BRADLEY ARANT BOULT CUMMINGS LLP **Second Quarter 2014**

CONSTRUCTION AND PROCUREMENT LAW NEWS

Recent federal, state, and local developments of interest, prepared by the firm's Construction and Procurement Group:

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The Unrecognized Sole-Source Requirement: A Lesson in Failing to Understand the Specifications

In the recent decision of *CMEC/ARC Electric JV v. Dep't of Veterans Affairs*, the Civilian Board of Contract Appeals (CBCA) denied a contractor's claims for defective specifications when the performance specification at issue created a sole-source requirement.

The appeal involved a contract to replace and upgrade generators at the Spokane VA Medical Center. The contract included a performance specification to install a digital HVAC control system. Importantly, the specification required that one database be used to operate the entire system. After the award of the contract, the contractor identified a solution that would utilize two separate databases. The VA rejected this solution, and the contractor submitted a request for equitable adjustment (REA) on the grounds that the requirement for a single database amounted to a sole-source requirement. In essence, the contractor argued that because only one control system would work under the specification, it was entitled to relief because of a defective specification, a constructive change, and/or because of the VA's failure to disclose its superior knowledge.

The contracting officer denied the REA, and the contractor appealed. The CBCA likewise denied the appeal based on a plain-language reading of the specification. Despite the contractor's argument that the procurement was to be open-source, the CBCA concluded that there was no ambiguity. One database was clearly required, and because the contractor did not comply, the VA was entitled to reject the contractor's claim for additional relief.

Generally speaking, performance specifications identify the outcome to be achieved and leave it to the contractor to determine the best method to accomplish the result. Here, the language of the specification was performance-based. However, the requirement to use only one database effectively turned the specification into a design or "cookbook" specification, as opposed to

Inside:

a performance specification. In other words, the nature of the one-database requirement meant that the contractor did not have the discretion it believed it had, which leads to the central lesson of the case: the contractor apparently was not aware that only one system would work for the database until *after* the bid had been awarded. Had the contractor objected to the sole-source requirement during the bid process or better understood the specification requirements, perhaps its loss could have been prevented. Instead, the contractor was left to argue about the sole-source nature of the specification after the award was made, and as the CBCA noted, such protests "come too late."

By J. Wilson Nash

Alabama Joins Recent Trend of States Finding Defective Work May Be Covered Under a Commercial General Liability Policy

The Supreme Court of Alabama recently held in *Owners Ins. Co. v. Jim Carr Homebuilder, LLC* that a contractor's commercial general liability ("CGL") policy provided coverage for property damage caused by the defective work of subcontractors. The *Jim Carr* Court decided that although faulty workmanship by itself may not constitute an "occurrence" (which is required to trigger coverage) under a CGL policy; faulty workmanship that results in property damage will be considered an "occurrence". Through this decision, the Alabama Supreme Court joined the recent (but not uniform) trend in other jurisdictions that recognize that defective work may be covered under a CGL.

Approximately one year after the purchase of a $1.2 million home, Pat and Thomas Johnson began to experience water leaks through the roof, walls, and floors. The Johnsons sued the general contractor, Jim Carr Homebuilder ("Jim Carr"), who had employed subcontractors to perform all of the actual construction work on the project. The case was sent to arbitration, and a $600,000 arbitration award entered against Jim Carr. In support of the damages award, the arbitrator found, among other things: (1) flashing was either not installed or improperly installed by subcontractors; (2) brick was improperly prepared for installation by subcontractors resulting in excessive absorption of water from the mortar; (3) sufficient weep holes were not installed in the brick or were covered by mortar by subcontractors; (4) windows and doors were not properly installed by subcontractors; and (5) part of the roofing was not properly installed by a subcontractor.

Jim Carr filed a claim with its CGL insurance carrier, Owner's Insurance Company ("OIC") and sought coverage from OIC to pay the arbitration award. OIC filed a declaratory judgment action – a lawsuit where a court is asked to determine the rights and obligations between the parties without ordering that anything be done or damages be paid - asking the Court to determine whether OIC had an obligation to pay the arbitration award. OIC argued that it had no obligation to pay because property damage covered under the CGL can only be damage to something other than the work being performed by the contractor. Since Jim Carr constructed the entire home, OIC argued that the CGL did not provide coverage for any damage to the home.

The Court rejected OIC's argument, pointing out that under OIC's interpretation of the CGL there would "be no portion of the project that, if damaged as a result of exposure to such a condition arising out of faulty workmanship of the insured, would be covered under the policy." The court instead held that faulty workmanship that leads to any property damage – including property damage to the project itself – will qualify as an "occurrence" under the standard CGL policy.

The Court also considered whether the "your work" exclusion precluded coverage even if the defective work qualified as an "occurrence." The standard form CGL policy excludes "'property damage' to 'your work' . . . and included in the 'products-completed operations hazard.'" The *Jim Carr* Court held that the "your work" exclusion does not apply at all if the policyholder purchases "completed operations" coverage. Because Jim Carr had purchased a completed operations coverage endorsement, the "your work" exclusion was not applicable. The Court held that the entire arbitration award should be covered by the insurance policy.

This is a significant holding for construction industry policyholders. In light of the *Jim Carr* decision, Alabama policyholders should consult their insurance agents to insure that the language of their CGL policy reflects the court's treatment of the "your work" exclusion and includes coverage for completed operations. Each reader should be aware that the state courts are varied in the application of this doctrine, and

it is not safe to assume that every state will hold the way the Alabama court did in this case.

By Heather Wright

California Law Restricting Non-Licensed Contractors' Right to Recover for Unpaid Services Does Not Apply to Miller Act Claims

In a recent decision, the federal appellate court encompassing nine western states and two Pacific island jurisdictions held that a California law restricting the right of non-licensed contractors to recover for unpaid services did not apply to actions brought under the Miller Act, federal legislation that requires prime contractors on certain government contracts to post payment and performance bonds.

In *Technica LLC ex rel. U.S. v. Carolina Casualty Insurance Co.*, Candelaria Corporation ("Candelaria") was the prime contractor on a federal project in California in which it purchased a payment bond provided by Carolina Casualty Insurance Company ("CCIC"). Candelaria entered into a subcontract with Otay Group, Inc. ("Otay"), which, in turn, subcontracted with Technica, Inc. ("Technica"). Technica received only partial payments from Otay for the labor, materials, and services it provided. Candelaria at some point terminated Otay's subcontract, prompting Technica to file a complaint invoking its Miller Act rights to recover outstanding amounts under the contract and payment bond.

The Miller Act provides that a person who has provided labor or materials in performing work on a federal project and who has not been paid within 90 days after the work was performed may bring an action on the payment bond for the amounts unpaid. The Miller Act extends this right to subcontractors as well as sub-subcontractors. The scope of the remedy and the substance of the rights under the Miller Act are, in general, considered matters of federal, not state, law.

Candelaria and CCIC argued that California Business and Professions Code § 7031(a) provided a defense to Technica's Miller Act claim in that it precludes contractors who are not licensed in California from maintaining an action for compensation for services under the contract. Candelaria and CCIC argued that because Technica did not hold a valid California contractor license, it could not assert a Miller Act claim. The lower court sided with Candelaria and CCIC, concluding that because Technica was not licensed, as required by a California law, it was precluded from pursuing its Miller Act claim.

Upon review, however, the federal appellate court reversed and held that the limitation in § 7031(a) did not apply to a Miller Act claim, and that, therefore, Technica's Miller Act claim was not barred. The appellate court reasoned that the application of a state statute as a defense to a Miller Act claim could result in the nullification of those rights. Additionally, as a practical effect, enforcing a state licensing requirement against Miller Act claims would cause inconsistent applications of the Miller Act, as federal subcontractors should not be required to comply with licensing requirements in every state in which they may perform work on a federal project.

Those performing work on government projects should take heed of the *Technica* decision in the event of future disputes regarding non-payment. State laws restricting non-licensed contractors from collecting for unpaid services may be poor defenses to Miller Act claims. As with any other law, however, it may be prudent to comply with licensing statutes in a given state before undertaking to perform work there. For example, had this suit been filed by a sub-subcontractor against Technica, Technica's lack of a license might have precluded Technica from asserting a counterclaim.

By Carlyn E. Miller

Talk is Cheap – Promises to Pay Are a Poor Substitute for Adherence to Contractual Notice Provisions

A recent Wyoming case – *JEM Contracting, Inc. v. Morrison – Maierle, Inc.* – serves as a reminder to contractors and subcontractors of the importance of following the contractual requirements for notice when differing site conditions are discovered. As the contractor in that case learned, failure to comply can serve as a waiver of such claims even when the upstream party makes subsequent promises of compensation for the cost and delays associated with the differing conditions.

JEM Contracting ("JEM") entered into contracts with two Wyoming counties to perform construction

services to improve 3.6 miles of a road which traveled through both counties. The counties hired Morrison-Maierle, Inc. ("MMI") to provide engineering services and serve as the owner's representative on the project. There was no direct contractual relationship between JEM and MMI.

JEM began work on June 21, 2010. That same day JEM verbally reported to MMI's on-site representative that it had discovered a differing site condition that would increase time and costs due to the additional work required to pulverize the existing road. JEM's contract included a provision regarding the procedure for asserting differing conditions claims:

> **Contractor shall notify the [counties] and [MMI] in writing about differing subsurface or physical conditions within 5 days of discovery** and before disturbing the subsurface as stated above. No claim for an adjustment in the contract price or contract times … will be valid for differing subsurface or physical conditions if procedures of this paragraph 4.03 are not followed.

(Emphasis added).

JEM did not provide written notice of the differing condition until 18 days later, on July 9. The two parties met that same day to discuss the issue. JEM alleged in court that at this meeting MMI told JEM that it would be paid for the increased costs if JEM could find savings on the remainder of the project so that it could complete the work within the contract price. When JEM later submitted its claim formally, however, both MMI and the counties rejected it. JEM brought suit against both shortly thereafter.

JEM alleged that it had relied on MMI's statements to its detriment and that it was induced to continue working due to these statements. The trial court rejected JEM's arguments due to JEM's inability to show harm from MMI's representations because JEM's contract required it to continue performance during a dispute. JEM appealed and eventually the matter arrived before the Wyoming Supreme Court. Wyoming's highest court initially noted that the lower court had failed to fully consider the types of harms that could have resulted from MMI's representations – namely the reduced profit JEM suffering in cutting other areas of work in order to stay within the contract price. Even still, the court said, JEM had clearly failed to assert its claim in writing within the five days required by Paragraph 4.03. The Wyoming Supreme Court found that JEM's inability to prove that MMI's representations on July 9 caused JEM any harm was irrelevant, as JEM had already waived its right to such claims when the five day time limit expired.

Differing conditions are common on projects, as are exchanges like the one that occurred between JEM and MMI on June 21, 2010. JEM likely had good intentions for not following up its verbal notice with a letter, perhaps because it did not want to 'rock the boat' early on in its performance of work. However, as this case showed, once a dispute arises good intentions are a poor substitute for compliance with the requirements of the contract.

By Charlie G. Baxley

Summary of Mississippi's New Construction Lien Law

Mississippi recently enacted a new construction lien law. This article addresses certain key provisions of the new law - codified at Mississippi Code Annotated § 85-7-401 (Rev. 2014) - that apply to commercial projects.

Under Mississippi's prior law only prime contractors held rights to a construction lien. The new law extends lien rights to subcontractors and material suppliers who have a direct contract with the prime contractor.

Further, sub-subcontractors and material suppliers who have a contract with a subcontractor who has a direct contract with the prime contractor may also have a lien. However, in order to establish this lien they must within 30 days of their first work or material delivery give notice to the prime contractor. The notice must state their contact information, who they are working for, the project they are working on, and what they are providing.

The new law sets various deadlines. The lien claimant must file a claim of lien in the office of the chancery clerk for the county where the project is located and do so within 90 days of the date that the lien claimant last worked or supplied materials. Within two business days of that filing the lien claimant must send that notice to the owner of the property. If the lien claimant is not the prime contractor, then notice must

also go to the prime contractor. The lien claimant must file a lawsuit to enforce the lien within 180 days of the date the above-referenced claim of lien is filed. However, the owner or the prime contractor may shorten this time period by filing a notice of contest of the lien. Once a notice of contest is filed, the lien claimant must file its lawsuit within the earlier of 90 days from the notice of contest or 180 days from the claim of lien filing.

The new law establishes measures to help upstream parties manage their risk by learning the identity of those downstream parties who potentially might claim a lien. The owner has the right to obtain from the prime contractor a list identifying all subcontractors and material suppliers. The prime contractor has the same right against its subcontractors. A willful failure to identify subcontractors and suppliers can result in forfeiture of lien rights.

The new law includes provisions to penalize improper conduct. Failure by a prime contractor or a subcontractor to pay those working for it can result in forfeiture of that prime contractor's or subcontractor's lien rights. Further, not having a contractor's license (when one is required) causes a forfeiture of lien rights. Also, if a prime contractor obtains a release from a subcontractor or supplier in order to induce payment from the owner, and then without "good cause" fails to pay the subcontractor or supplier, the prime contractor is liable to the subcontractor or supplier for three times the amount contained on the face of the release. The same rules apply against subcontractors in connection with releases and payments as to their sub-subcontractors and suppliers. "Good cause" includes, but is not limited to, any defense available pursuant to the terms of the applicable subcontract or purchase order. A person who falsely and knowingly files a lien without just cause is liable to every party injured by the filing for a penalty equal to three times the amount of the lien claimed.

The new law expressly provides for the bonding-off of liens to remove them after they are filed. Another key bond-related provision in the new law is that subcontractors, sub-subcontractors and material suppliers will not have lien rights when the prime contractor gives a payment bond providing coverage which matches that required by Mississippi's Little Miller Act.

Under the new law advance lien waivers are unenforceable. Statutory forms are prescribed for interim payment and final payment lien waivers. If a potential lien claimant is not paid the amount called for under a conditional waiver it has executed, then in order for the unpaid party to preserve its lien claim it must within 60 days from the date of the waiver file a notice advising that it was not paid and send the notice to the owner.

As stated above, this summary addresses commercial projects. The new law makes separate provisions for residential projects. Also, since this is a summary, there are additional details that are important to any final analysis. Contractors performing work in Mississippi should contact their attorney for additional information regarding their rights and obligations under the new statutory scheme. BABC's several construction attorneys in its Jackson, MS office are knowledgeable and available to assist as needed.

By Ralph Germany

Bradley Arant Lawyer Activities

U.S. News recently released its "Best Law Firms" rankings for 2014. **BABC's Construction and Procurement Practice Group** received a Tier One National ranking, the highest awarded, in both Construction Law and Construction Litigation. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

Jim Archibald, Axel Bolvig, Rick Humbracht, Russ Morgan, David Pugh, and **Mabry Rogers** were recognized by *Best Lawyers in America* in the category of Litigation - Construction for 2014. **Axel Bolvig**, **Ralph Germany**, **David Owen**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers, Wally Sears, Bob Symon**, and **David Taylor** were recognized by *Best Lawyers in America* in the area of Construction Law for 2014.

Mabry Rogers and **David Taylor** were recognized by *Best Lawyers in America* in the area of Arbitration and Mediation for 2014. **Keith Covington** and **John Hargrove** were recognized in the area of Employment Law – Management. **Frederic Smith** was recognized in the area of Corporate Law.

Jim Archibald, Ryan Beaver, Ralph Germany, Bill Purdy, Mabry Rogers, Wally Sears, Bob Symon, David Taylor, and **Darrell Tucker** were named *Super Lawyers* in the area of Construction Litigation. **Arlan Lewis** and **Doug Patin** were similarly recognized in the area of Construction/Surety. **Frederic Smith** was also recognized in the area of Securities & Corporate. In addition, **Monica Wilson** and **Tom Lynch** were listed as "Rising Stars" in Construction Litigation and **Aron Beezley** was listed as a "Rising Star" in Government Contracts.

Mabry Rogers was recently recognized as a 2014 BTI Client Service All-Star.

David Taylor and **Bryan Thomas** recently spoke at the Tennessee Bar Association's Construction Section annual seminar on "The Great Debate: Do you Arbitrate?"

Brian Rowlson was appointed 2014 Secretary of ABC Carolinas' Education Committee in Charlotte.

Monica Wilson was appointed 2014 co-chair of ABC Carolinas' Excellence in Construction Committee for a second term. Monica also serves on ABC Carolinas' Charlotte Council.

David Taylor recently co-authored an article for the March/April edition of the ABA's *Probate and Property* magazine entitled "Arbitration and Other Forms of ADR in Real Estate Deals: The Process, Drafting Considerations, and Making ADR Provisions Work."

Keith Covington taught a client seminar on December 3 on "Modern Communications: Perils and Pitfalls of Email Communications."

Jim Archibald and **Eric Frechtel** led a panel discussion at the Construction SuperConference in San Francisco in December 2013 entitled "The Government's Duty of Good Faith and Fair Dealing: The Bell Tolls for Thee?"

David Taylor was named the Chair of the Nashville Bar Association's newly formed Construction Law Section.

Eric Frechtel recently authored published an article that was selected as the cover story in the June 2014 edition of Contract Management entitled "The Government Must Administer Its Contracts Fairly and Reasonably". The article details the recent U.S. Court of Appeals for the Federal Circuit's decision in Metcalf Construction Co. v United States, a case in which Eric, along with **Bob Symon,** served as counsel for Metcalf Construction Company, Inc. To access the article online, click here.

David Taylor and **Brian Rowlson** spoke on December 5, 2013 to an in-house legal department in Michigan on "Pros and Cons of Binding Arbitration."

Ryan Beaver, **Brian Rowlson**, and **Monica Wilson** attended the ABC of the Carolinas Excellence in Construction Awards Banquet on November 21 in Charlotte. Monica presented awards at the ceremony as co-chair of the Excellence in Construction Committee.

Monica Wilson recently co-authored an article published in the December 2013 edition of Solar Business Focus entitled "Management of a Utility-Scale Solar Project: Contract by Communication."

Mabry Rogers, **Bill Purdy**, and **Doug Patin** were recently named to *The International Who's Who of Business Lawyers 2013*. The list identifies the top legal practitioners in the world in 32 areas of business and commercial law. All three were recognized in the area of Construction Law.

David Taylor was named to the 2014 AGC of Middle Tennessee Legal Advisory Council

Monica Wilson, **David Owen**, and **Ryan Beaver** attended the 2014 Energy Summit hosted by the Charlotte Chamber of Commerce, focusing on the roles that clean and safe energy, technology, and the government play in the future of the industry.

Keith Covington spoke at an Entrepreneurs Organization roundtable on hiring and employment best practices on February 20, 2014.

David Taylor recently spoke in Phoenix, Arizona to the National Meeting of the Construction Specifications Institute (CSI) on "Allowances and Owner Contingencies."

David Taylor and **Bryan Thomas** spoke at the Firm's 13th annual Commercial Real Estate seminar in Nashville on Arbitration.

On February 27, 2014, **Ryan Beaver** served as a panelist at ABC Carolinas' February monthly meeting,

speaking on North Carolina's new public-private partnership legislation as part of a 2013 Legislative Year in Review: Successes, Failures, and Continuing Efforts.

David Taylor spoke in San Diego to the ICSC Legal Conference on "Using Arbitration in Commercial Real Estate disputes."

Axel Bolvig, **Stanley Bynum**, **Keith Covington**, and **Arlan Lewis** were recently recognized by *Birmingham's Legal Leaders* as "Top Rated Lawyers." This list, a partnership between Martindale-Hubbell® and ALM, recognizes attorneys based on their AV-Preeminent® Ratings.

David Taylor's article in the March, 2014 ABA Probate and Property magazine was published—"Using Arbitration and Mediation in real estate disputes.

David Taylor and **Bryan Thomas** spoke at the Tennessee Municipal Attorneys Annual meeting in Chattanooga on June 4th on "Construction Bond and Avoiding Disputes."

In April 2014, **Aron Beezley** authored for Law360's Government Contracts Expert Analysis section an article on the limited remedies that are available to concession-contract bid protesters that bring suit at the U.S. Court of Federal Claims.

On April 23, 2014, **Steve Pozefsky**, **Jerry Regan**, **Tom Lynch**, and **Aron Beezley** gave a presentation to the Associated General Contractors of America's Young Constructors Forum on Understanding the Fundamentals of Joint Ventures in Construction.

David Taylor's article in the "Student Housing" Magazine on "Change Orders" was published in April of 2014.

Arlan Lewis was a Co-Chair of the 2014 Annual Meeting of the ABA Forum on the Construction Industry which was recently held in New Orleans, Louisiana on April 10-12, 2014. The program theme was "Beat the Blues: Counseling the Client during the Course of the Ongoing Construction Project" and focused on the interplay of the legal, business, and relationship issues at stake when trouble arises in the middle of a construction project. Arlan is also currently serving a two-year term as the Chair of the Project Delivery Systems Division (Div. 4) of the Forum. The Forum on the Construction Industry is the largest organization of Construction lawyers in the United States.

Michael Knapp, **Arlan Lewis**, and **Wally Sears** recently attended the Midwinter Meeting of the ABA Forum on the Construction Industry in Nassau, Bahamas.

On January 3, 2014, **David Bashford** and **Monica Wilson** published an article in Law360 entitled "Future Innovations Light the Way for Solar Power."

David Taylor and **Bryan Thomas** spoke at the National Meeting of the Construction Specification's Institute held in Nashville on "The Nuclear Option: Terminating a Contractor for Cause."

Luke Martin spoke to construction project managers for a client's project management group on documentation on the construction project in December 2013.

Ryan Beaver and **Monica Wilson** recently co-authored an article in the Charlotte Business Journal entitled "Meeting Our Road Needs," addressing the challenges and opportunities for the construction industry to meet North Carolina's growing infrastructure needs.

Chambers annually ranks lawyers in bands from 1-6, with 1 being best, in specific areas of law, based on in-depth client interviews. **Bill Purdy** and **Mabry Rogers** are in Band One in *Litigation: Construction*. **Doug Patin** was ranked in Band Two and **Bob Symon** in Band Three, both in the area of *Construction*.

David Bashford has been given a tremendous opportunity to go in-house with a solar energy client. We are sad to lose David's expertise and leadership in the Charlotte office but wish him the best in this endeavor and look forward to working with him in the future.

The lawyers of Bradley Arant recently completed a complimentary legal seminar on "Managing Risk on a Construction Project" at various locations in May and June. Thanks to all those who attended – we hope that the presentations were informative and helpful.

For more information on any of these activities or speaking engagements, please contact Terri Lawson at 521-8210.

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The lawyers at Bradley Arant Boult Cummings LLP, including those who practice in the construction and procurement fields of law, monitor the law and regulations and note new developments as part of their practice. This newsletter is part of their attempt to inform their readers about significant current events, recent developments in the law and their implications. *Receipt of this newsletter is not intended to, and does not, create an attorney-client, or any other, relationship, duty or obligation.*

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