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Bradley Arant Boult Cummings LLP

CONSTRUCTION AND PROCUREMENT LAW NEWSLETTER

INSIDE THIS ISSUE

MISSISSIPPI PASSES NEW RETAINAGE LAW GOVERNING PRIVATE CONSTRUCTION JOBS

Slates C. Veazey & R. Sumner Fortenberry

Construction contracts for private projects will soon be subject to a new retainage law in Mississippi. On April 19, 2024, Gov. Tate Reeves approved SB 2762 into law, and after July 1, 2024, most construction contracts on projects in Mississippi will comply with a set of retainage laws similar to those that have governed public projects for decades in the Magnolia State.

Specifically, this new law allows an owner, contractor, or subcontractor to retain contract proceeds from installment payments pending final completion. However, the retained funds cannot exceed 5% "of the estimated amount of work properly done and the value of materials stored on the site or suitably stored and insured off-site."

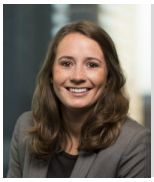
The law punishes its violators through interest assessments. An owner, contractor, or subcontractor that withholds more than the 5% amount will be liable to the contractor, subcontractor, sub-subcontractor, or material supplier, as applicable, for interest accruing on the excess amount withheld at the rate of 1% per month. The law clarifies that the 5% retainage applies to all items of work required to meet final completion and that all amounts withheld above that amount are subject to the 1% per month interest penalty.

An owner must release all retainage to a contractor for completed work no later than 60 days after final completion of the work if all necessary certificates of occupancy have been issued. Contractors

Safety Moment for the Construction Industry

The U.S. Department of Labor recently published a final rule clarifying the rights of employees to authorize a representative to accompany an OSHA compliance officer during an inspection of their workplace. OSHA provides that both the employer and employees have the right to authorize a representative to accompany OSHA officials during a workplace inspection. The final rule clarifies that workers may authorize another employee to serve as their representative or select a non-employee. For a non-employee representative to accompany the inspector into a workplace, they must be reasonably necessary to the conduct of an effective and thorough inspection.

The rule clarifies that a non-employee representative may be reasonably necessary to the conduct of an effective and thorough inspection based upon skills, knowledge, or experience such as knowledge or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills. These revisions will enable the agency to conduct more thorough inspections. OSHA regulations require no specific qualifications for employer representatives or for employee representatives who are employees of the employer.



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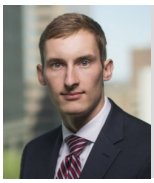

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and subcontractors must release retained funds to lower tiered subcontractors and/or suppliers in accordance with Mississippi's prompt payment statute, Miss. Code § 87-7-5.

The law defines the phrase "final completion" to mean "the stage of the project at which all work has been completed in accordance with the contract requirements, including, but not limited to, the completion of punch list items, the submission of contractual close-out documents, equipment manuals, warranty documents or other like required deliverables."

The law also defines the term "retainage" to mean "money, or other security as agreed to by the parties to a construction contract, earned by the contractor, subcontractor or lower-tier sub-subcontractor or supplier, as the case may be, for work properly performed or materials suitably stored if payment for stored materials is provided for in the contract, which has been retained by the owner conditioned on final completion and acceptance of all work in connection with a project or projects by the contractor, subcontractor or lower-tier sub-subcontractor or supplier."

The law does not limit or alter a party's right to withhold payments or not approve payment in accordance with the governing contract(s) for work not properly performed or for payment not earned. Similarly, this law expressly provides that pay-if-paid provisions can still be enforced and that lien releases can serve as conditions to payment.

A prevailing party in an action to enforce this law is entitled to recover attorneys' fees, court costs, and expenses.

Contracts excluded from this new law are:

1. Residential homebuilding contracts;
2. Contracts for improvements to real property intended for residential purposes consisting of 16 or fewer residential units;
3. Contracts in the amount of $10,000 or less; or
4. Public contracts (see Miss. Code Ann. § 31-5-33 for public project retainage law).

How and to what extent this new retainage law will impact Mississippi's construction industry remains to be seen, although some possibilities come to mind:

- Owners and upper tiered contractors, because they can no longer withhold more than 5% of payments for additional security, may be more selective in choosing contractors, subcontractors, or suppliers.
- Careful contract drafting will become even more critical given the law's express recognition of the payor's right to withhold payments for inadequate work, payments not earned, pursuant to pay-if-paid provisions, and conditioned on the execution of lien releases.
- The new definition of "final completion" could impact how courts interpret construction contracts and industry statutes and regulations beyond just this new law, as this term was previously undefined (see, e.g., Miss. Code Ann. §§ 31-5-33 (public retainage law); 85-7-189 (timing of suits on performance bond claims); 65-9-11 (State Aid Engineer final inspection obligations)).

SAM REGISTRATION LAPSE CAN NOW COST YOU A CONTRACT AWARD

Aron C. Beezley & Gabrielle A. Spiro

The Government Accountability Office (GAO), in *TLS Joint Venture, LLC*, B-422275, recently sustained a bid protest alleging that the contract awardee's System for Award Management (SAM) registration lapsed between the submission of the offer and award of the contract. The key facts, holdings, and takeaways from this noteworthy case are discussed below.

BRADLEY LAWYER ACTIVITIES AND NEWS

34 Bradley attorneys are named 2025 *Best Lawyers* "Lawyer of the Year" across 42 practice areas. The **"Lawyer of the Year"** honors are awarded annually to only one lawyer per practice area in each region. Bradley received three of these honors in the Construction field.

- **Jim Archibald** (Birmingham: Litigation – Construction)
- **Mabry Rogers** (Birmingham: Construction Law)
- **D. Bryan Thomas** (Nashville: Construction Law)

296 attorneys are recognized in the 2025 edition of *The Best Lawyers in America*, including the following construction attorneys.

- **Debbie Cazan**
- **Jim Archibald**
- **Axel Bolvig III**
- **John Mark Goodman**
- **Amandeep S. Kahlon**
- **David W. Owen**
- **J. David Pugh**
- **E. Mabry Rogers**
- **J. Christopher Selman**
- **Ryan L. Beaver**
- **Monica Dozier**
- **Jared B. Caplan**
- **James A. Collura**
- **Jeffrey Davis**
- **Ian P. Faria**
- **Jon Paul Hoelscher**
- **Ralph B. Germany, Jr.**
- **D. Bryan Thomas**
- **Ben Dachepalli**
- **Timothy C. Ford**
- **Eric A. Frechtel**
- **Michael S. Koplan**
- **Douglas L. Patin**
- **Robert J. Symon**

The Facts

The protester argued that the agency's contract award was unreasonable because the awardee's SAM registration had lapsed between the submission of the offer and the date of contract award. In support of this argument, the protester noted that FAR provision 52.204-7 requires an offeror to be continuously registered from submission of the offer, through contract award, and until final payment on any contract.

In response, the agency argued that FAR 52.204-7 does not impose a requirement that an offeror continuously maintain its SAM registration and, further, that the awardee's SAM registration never lapsed in any event because the awardee submitted its renewal information before expiration of the registration.

The Holdings

The GAO agreed with the protester that FAR 52.204-7 — in relevant part — "plainly and unambiguously requires offerors to maintain their SAM registrations during the evaluation period":

An Offeror is required to be registered in SAM when submitting an offer or quotation and *shall continue to be registered until time of award*, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation. FAR 52.204-7(b)(1) (emphasis added)

Accordingly, and because the awardee's SAM renewal information did not actually cure the lapse, the GAO sustained the protest and recommended that the agency terminate the contract award and make a new award decision.

The Takeaways

The GAO's holding in this regard comes less than a year after the U.S. Court of Federal Claims found in favor of a protester under similar facts in the case of *Myriddian, LLC v. United States*, 165 Fed. Cl. 650 (2023). As such, both the GAO and the court have now made clear that the failure to be registered in SAM at the time of submission of the offer and/or a SAM registration lapse while a proposal is being evaluated can be a sufficient basis to sustain a protest.

While some have questioned the fairness of these holdings given the well-documented issues with the SAM registration process, this is a reality that contractors will have to deal with. Thus, unless and until the FAR Council changes the rule, contractors must be particularly vigilant about ensuring not only that they are properly registered in SAM at the time of submission of their offer but also that they do not experience a lapse in their SAM registration after submission of their offer.

INFLATION REDUCTION ACT PREVAILING WAGE AND APPRENTICESHIP COMPLIANCE: TREASURY AND IRS ISSUE FINAL RULE

Monica Wilson Dozier & Jennifer M. Trulock.

On June 18, 2024, Treasury and the IRS released the final rule for compliance with the prevailing wage and apprenticeship requirements (PWA requirements) pursuant to the Inflation Reduction Act of 2022 (IRA). This final rule is scheduled to be formally published on June 25, 2024.

The final rule includes important affirmations and clarifications of the prior Notice of Proposed Rulemaking, issued August 30, 2023. Below is a high-level summary of these clarifications:

- The PWA requirements are in harmony with, and borrow certain definitions from, the Davis-Bacon Act (40 U.S.C. § 3141 et. seq.); however, the PWA requirements are distinct from Davis-Bacon requirements and do not require certified payroll.
- Original equipment manufacturers and suppliers may be largely exempt from compliance with PWA requirements, unless they are performing construction,

The Best Lawyers: Ones to Watch in America list recognizes attorneys who have been in practice for less than 10 years and exhibit outstanding professional excellence in private practice in the United States

- **Abigail B. Harris**
- **Mason Rollins**
- **Alex Thrasher**
- **Andrew W. Bell**
- **Kyle M. Doiron**
- **Ronald Espinal**
- **Christopher A. Odgers**
- **Lee-Ann C. Brown**
- **Erik M. Coon**
- **Nathaniel J. Greeson**
- **Sabah Petrov**

John I. Spangler III has been elected a Fellow of the American College of Construction Lawyers (ACCL). He will be among the 12 new Fellows inducted at the 2025 ACCL Annual Meeting.

Owen Salyers was recently appointed as co-chair of the American Bar Association (ABA) Section of Public Contract Law's Young Lawyer's Committee and vice chair of the Section's Contract Claims and Disputes Resolution Committee for the 2024-2025 ABA year.

Doug Patin and **Mabry Rogers** have been named to the 2024 edition of *Who's Who Legal (WWL) Thought Leaders - USA: Construction.*

Bradley attorneys **Jim Archibald**, **Ian Faria**, **Abba Harris** and **Jon Paul Hoelscher** co-authored a chapter in *Design-Build and EPC Contracting: A Practical Legal Guide*, which was recently published by the American Bar Association (ABA).

On December 3, 2024, **Jim Archibald**, **Carly Miller**, and **Alex Thrasher** will present at the 11th Annual Construction Industry Summit, hosted by Beacon Programs, the Alabama State Bar, and the Alabama AGC. Their presentation will discuss the issues, options, and pitfalls of default terminations.

alteration or repair on the project site or a secondary location where a significant portion of the facility is constructed.

- The prevailing wage applicable to a construction contract is the wage listed in the general wage determination active at the time the construction contract is executed.
- Supplemental wage determinations may be requested as needed from the Department of Labor's Wage and Hour Division, which will respond within 30 days of submission (or advise whether a longer period is needed).
- Supplemental wage determinations should be requested no earlier than 90 days prior to the expected execution date of the construction contract and remain valid for 180 days after issuance.
- A list of specific records may help taxpayers substantiate compliance with PWA requirements in the event of an IRS notice of examination.
- In the event a registered apprenticeship program fails to respond or denies a request for apprentices, a party may rely on that request to satisfy the Good Faith Effort Exception for a full calendar year before resubmitting requests.
- Employer-sponsored registered apprenticeship programs alone are not sufficient to substantiate compliance with the Good Faith Effort Exception, but requests must be submitted to unrelated registered apprenticeship programs.
- Taxpayers may take specific actions to avoid findings of intentional disregard for compliance with PWA requirements, including maintaining records and paying any required correction and penalty payments prior to receiving an IRS notice of examination.

The final rule is the final step in rulemaking for the IRA's PWA requirements. It provides reassurance and certainty in many respects to renewable energy developers and contractors seeking to ensure their compliance with PWA requirements.

However, the final rule declines to provide industry-specific guidance, and indeed removes a solar industry-specific example used in the Notice of Proposed Rulemaking. It emphasizes that compliance with PWA requirements will be determined after review of specific facts and circumstances, and therefore leaves many of the detailed questions raised in comments to the Notice of Proposed Rulemaking unanswered.

BRADLEY LAWYER ACTIVITIES AND NEWS CONTINUED:

Bradley recently hosted its annual Construction 101 series at its Birmingham, Charlotte, Nashville, and Tampa offices. Construction 101 is a free seminar designed to inform industry leaders about legal considerations that can lead to better construction management. This year's seminar focused on best practices for recognizing, preserving, and developing construction claims, along with strategies for avoiding and resolving them.

David Taylor presented *Top Ten Mistakes Made by Construction Lawyers* for National CLE on August 8th and *Top Ten Mistakes Lawyers Make in Mediations and Arbitrations* to the Tennessee Bar Association on September 10th.

MECHANICS LIEN UPHELD DESPITE LACK OF NOTICE TO SENIOR CONSTRUCTION LENDER

John Mark Goodman

In an unpublished opinion, a California appeals court has upheld a subcontractor's mechanics lien claim despite the subcontractor's failure to strictly follow the procedural requirements set forth in the mechanics lien statute (see Ram Concrete v. Montecito, 2024 WL 1879352 (Cal. Ct. Appeal)). In Ram Concrete, the trial court entered judgment for the subcontractor on its breach of contract and mechanics lien claim. On appeal, the owner contended that the mechanics lien was invalid under the California lien statute because the subcontractor failed to give preliminary notice of its lien claim to the owner's construction lender. The owner also contended that the senior secured interest of the construction lender prevented the subcontractor from foreclosing on the lien.

The appeals court rejected both arguments. As to the notice argument, the court recognized that the mechanics lien statute is remedial legislation and as such should be liberally construed for the protection of laborers and materialman. It reasoned that "[t]o construe the preliminary notice statute strictly would require us to invalidate a lien against an owner who received notice because someone else did not receive notice. That strict statutory construction would allow a party who received the required notice to be insulated from liability because another party did not receive notice. We do not believe that the statute's purpose should, or does, lead to this aridly formalistic result."

The court also rejected the owner's argument that the senior secured interest of the construction lender defeated the contractor's lien foreclosure claim. The owner could not point to any provision of the mechanic's lien statute requiring a mechanics lien holder to hold the senior lien interest on a property in order to foreclose. To the contrary, California law provides that a junior lienholder may enforce its lien by foreclosure, however its purchase of the property would remain subject to any senior liens. The court therefore found no merit in the owner's contention that the mechanics lien could not be enforced by foreclosure because there was allegedly a senior security interest on that property.

INFLATION REDUCTION ACT DOMESTIC CONTENT BONUS UPDATE: IRS ISSUES UPDATED GUIDANCE WITH NEW ELECTIVE SAFE HARBOR

Monica Wilson Dozier, Christopher A. Bowles & Amandeep S. Kahlon

On May 16, 2024, the IRS released Notice 2024-41 (the "Notice"), modifying its preliminary guidance issued last May in Notice 2023-38 addressing the application of potential future rules that taxpayers must satisfy to qualify for the domestic content bonus tax credit amounts under the Inflation Reduction Act (IRA). The IRA amended §§ 45 and 48 of the Internal Revenue Code to provide domestic content bonus tax credits for certain qualified energy facilities or projects placed in service after December 2022.

The revisions and new rules introduced by Notice 2024-41 are intended to clarify the prior notice, and importantly, introduce a New Elective Safe Harbor that allows taxpayers the option to elect an objective calculation of the domestic cost formula required to qualify for the bonus. A summary of the changes introduced by the Notice are provided below.

Summary of Notice 2024-41:

- Hydropower and pumped hydropower storage facilities were added to the list of Applicable Projects ("Applicable Project" is more fully defined in Notice 2023-38, but generally refers to a qualified facility or energy project or qualified investment in a qualified facility or energy technology under the IRA).
- The "utility scale photovoltaic system" Applicable Project is redesignated as the "Ground-mount and rooftop photovoltaic system."
- The Notice provides additional Manufactured Product Components (any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an Applicable Project Component that is a Manufactured Product) that may be included with previously listed Applicable Projects.
- The Notice provides a new safe harbor that taxpayers may elect to use to classify Applicable Project Components (any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an Applicable Project) and to calculate the Domestic Cost Percentage[1] in an Applicable Project to qualify for domestic content bonus credits. Taxpayers may elect to use the classifications and costs percentages in the New Elective Safe Harbor in lieu of the method specified in Section 3.03(2)(b) and (c) of Notice 2023-38. Taxpayers who utilize the New Elective Safe Harbor must use the classifications and cost percentages provided under the Notice. The New Elective Safe Harbor is intended to address the challenges of substantiation and verification in obtaining manufacturer's direct costs.

Should a taxpayer elect to utilize the New Elective Safe Harbor, the Notice also provides more detailed guidance regarding appropriate calculations of combined solar energy and energy storage projects. The formulas provided by the Notice with respect to the New Elective Safe Harbor offer the advantage of an objective, pre-formulated calculation of the Domestic Cost Percentage needed to satisfy the Adjusted Percentage Rule. However, this New Elective Safe Harbor merely provides an additional option for taxpayers seeking to qualify for the domestic content bonus; taxpayers still have the option to elect to proceed pursuant to the Direct Cost formula provided in Notice 2023-38, although they must elect either the original option or the New Elective Safe Harbor option.

Notice 2024-41 is not a notice of proposed regulations, which remains still to be issued. Additional uncertainties remain to be resolved in continued rulemaking. Notably, Notice 2024-41 appears to contain an incomplete description of steel or iron products in its Solar PV Table (Table 1). The IRS has requested written comments on Notice 2024-41 on or before June 15, 2024. Taxpayers may rely on Notice 2023-38, as modified by the Notice, for the domestic content bonus credit requirements for any Applicable Project the construction of which begins before the date that is 90 days after the date of publication of the forthcoming proposed regulations on the domestic content bonus credit requirements in the Federal Register.

Overall, the New Elective Safe Harbor established by Notice 2024-41 is likely to provide greater certainty to the renewable energy industry of how and whether taxpayers may obtain the domestic content bonus tax credit pursuant to the IRA.

BID PROTESTS IN ILLINOIS

Aron C. Beezley & Nathaniel J. Greeson

What Rules Apply?

- There are four separate chief procurement officers established by the Illinois Administrative Code, one chief procurement officer (CPO) for each of the following: General Services, Public Institutions of Higher Education, the Department of Transportation, and the Capital Development Board. 44 Ill. Adm. Code §§ 1.1-30.205.
- Although each CPO has a separately codified protest procedure, the majority of general contracting actions flow through the CPO for General Services (CPO-GS), the protest procedure on which we will focus our summary. If your procurement is managed by one of the other three CPOs, the general protest procedures apply, but will require analysis and reliance on separate Illinois Administrative Code cites. *Id*. at § 4.5500-4.5550; § 6.390-6.440; and § 8.2075-8.2076.

Who May Protest and When?

- "Any person may submit a protest related to the notice of the procurement, the solicitation document, any pre-submission conference, and any decision to reject a late bid, proposal or response." *Id*., § 1.5550(a)(1).
- "Any person who has submitted a bid, proposal or response may protest a decision to reject that person's bid, proposal, or response or the decision to award to another bidder, offeror or respondent." *Id*., § 1.5550(a)(2).
- A protester must submit a protest in writing to the Protest Review Officer (PRO) identified in the solicitation document. *Id*., § 1.5550(c)(1).
- "The protest must be physically received by the PRO at the location specified. A postmark or other carrier mark prior to the due date and time is not sufficient to show physical receipt." *Id*., § 1.5550(c)(2).
- "In regard to the solicitation notice or solicitation document including specifications, a protest must be received within 14 days after the date the solicitation was posted to the Bulletin and must be received by the PRO at the designated address before the date for opening bids, proposals or responses." *Id*., § 1.5550(c)(2)(A).
- "In regard to rejection of individual bids, proposals or responses or awards, the protest must be received by close of business no later than 14 days after the protesting party knows or should have known of the facts giving rise to the protest to ensure consideration, and, in any event, must be received before execution of the applicable contract." *Id*., § 1.5550(c)(2)(B).
- "The PRO, for good cause shown, or when he or she determines that a protest raises issues significant to the procurement system, may consider an untimely protest. Good cause may include, but is not limited to, instances in which the procurement file is not available in a timely manner to interested parties or when a FOIA request has not been responded to by a State agency in full or in part." *Id*., § 1.5550(c)(2)(C).

What Must a Protest Contain?

- No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise and logically arranged, and they should clearly state legally sufficient grounds of protest.
- The written protest shall include as a minimum the following:
- The name and address of the protesting party;

- Identification of the procurement, and, if a contract has been awarded, its number or other identifier;
- A statement of reasons for the protest specifically identifying any alleged violation of a procurement statute, a procurement rule or the solicitation itself, including the evaluation and award (conclusions with supporting facts and arguments may not be sufficient);
- Supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time, in which case the expected availability date shall be indicated.

Id., § 1.5550(c)(5).

What Happens After the Protest is Filed?

- The state agency must supply a response to the protest within the time period set forth by the PRO. *Id*., § 1.5550(d). If a state agency fails to comply with this request, the PRO may consider the protest on the basis of available information or may recommend to the CPO-GS that the relief requested in the protest be granted. *Id*.
- The protester must supply any additional information requested by the PRO within the time periods set in the request. *Id*. If the protesting party fails to comply with this request, the PRO shall consider the protest on the basis of available information or may deny the protest. *Id*.
- The PRO may request that an interested party supply additional information within the time period set in the request. *Id*. An "interested party" means an actual or prospective bidder, offeror or respondent whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. *Id*.

Is There a Stay While the Protest is Pending?

- Unless the CPO-GS determines the needs of the state require an immediate execution of a contract, the following rules apply:
- When a protest has been timely filed and before an award has been made, the procuring officer shall make no award of the contract until the protest has been resolved. *Id*., § 1.5550(e).
    - If timely received but after award, the award shall be stayed without penalty to the state. *Id*.

Who Reviews Protest Filings?

- The CPO-GS appoints one or more PROs to consider the procurement-related protests and to make a recommendation to the CPO-GS for resolution of the protest. *Id*., § 1.5550(b).
- The PRO will make a recommendation to the CPO-GS as expeditiously as possible after receiving all relevant, requested information. *Id*., § 1.5550(f).
- In determining the appropriate recommendation, the PRO shall consider the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the urgency of the procurement, and the impact of the recommendation on the state agency's mission. The recommendation may include, but is not limited to:
- Affirming the state agency's initial decision, in whole or part;
    - Directing the state agency to issue a new solicitation;
    - Directing the state agency to award a contract consistent with the statute and rule; or
    - Directing such other action as is necessary to promote compliance with the statute or rule. *Id*.
- The CPO-GS may adopt the recommendation of the PRO or take other action. *Id*.
- The CPO-GS will resolve the protest with a written determination. *Id*.
- "If an action concerning the protest has commenced in a court or administrative body, the CPO-GS may defer resolution of the protest pending the judicial or administrative determination." *Id*., § 1.5550(g).

What Are the Appeal Procedures?

- There are no formal administrative appeals processes provided. The CPO's determinations are considered "final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law." 30 ILCS 500/20-70.
- Review of a CPO's bid protest decision following exhaustion of the administrative process is available through circuit court review. (See *Chester Bross Construction Co. v. Dep't of Transpo.*, 2014 IL App (4th) 130164, ¶ 23, 8 N.E.3d 527).