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First Quarter 2021

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

COVID-19 in the Workspace: Is Enough Enuf?

You've been to the webinars about COVID-19 and its impacts. You've read the trade publication tips. You've implemented measures to protect your workers. You've been vaccinated. You're ahead of the game, right?

Employers generally have an obligation to provide a reasonably safe place for employees to work and for invited guests. In today's COVID-19 environment, this may involve daily temperature checks of employees and visitors, daily certifications by each employee that she or he has no COVID-19 symptoms or exposure, and a requirement that prudent distancing be maintained when possible. Visitors, too, should likely be required to make a similar certification.

Each of these safety steps is expensive, both in additional check-in time for employees and in work efficiency. That expense should be measured first against the well-being of the workforce. If the employer has the duty to provide a reasonably safe place to work, then that duty is perhaps satisfied by these safety steps.

It May Make Sense to Document the Company's COVID-19 Best Practices

So, you're ahead of the curve. You have gate monitoring in place; toolbox meetings to discuss COVID-19 issues each morning; your home office employees are reminded about COVID-19 issues weekly, infected employees are sent home, and you require certifications from each employee that she or he is symptom-free every day. Many of our readers have attended seminars emphasizing the importance of implementing good contractual and safety practices and of documenting them. Clearly, with the coronavirus, an employer should consider whether it can put simple, effective documentation of its proactive COVID-19 prevention into place. Can the company computerize the morning representation by its employees? Can the temperature log be automated? How can the company confirm that it held daily or weekly meetings with groups of employees at the site or home office to stress practicable COVID-19 preventive measures?

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Good recordkeeping will not "vaccinate" your workforce. But it can serve at least three salutary purposes: 1) encouraging your management to consider how to implement a COVID-19 plan; 2) lowering the risk of infections at your project; and 3) allowing you to show third parties that your company was safety conscious during this "new normal."

Now that three approved vaccines are being distributed, there is a new question for employers: Do I mandate COVID-19 vaccinations? And if I do, do I select the priority for who gets the vaccination or for exempting employees or classes of employees? Objections are likely from some employees, and thus, the employer should consider how those might be handled.

To Mandate or Not to Mandate?

Assuming vaccinations are not already being required by federal or state authorities (something that is potentially likely in certain industries, such as healthcare), in most cases, the decision on whether to mandate COVID-19 vaccinations will generally be left to an employer's discretion. Exceptions to the policy may be necessary, but unless your employees are represented by a union, an employer may require vaccination. If a union is involved, unilaterally implementing such a program may lead to a meritorious unfair labor practice charge if the collective bargaining agreement does not already address such an issue. When in doubt, bargain. At the very least, provide notice and an opportunity for the union to request bargaining. However, in an "at-will" employment scenario, an employer can make vaccination a condition of employment.

In deciding whether to mandate a COVID-19 vaccination for employees, an employer must balance the liberty interests of employees against the health and public safety benefits associated with the vaccination requirement. An employer should, of course, consider anything of relevance to the issue. One such factor is the workers' environment. Some jobs may be considered at higher risk for getting and transmitting COVID-19 than others. For example, those working more closely together, such as in a meatpacking or manufacturing facility, or in the accounting office, or at a construction site where distancing may not be feasible for all crews, may be considered more at risk than those working in an office where social distancing is more easily managed. Similarly, a job requiring frequent interaction with customers, such as workers in the site trailer, may also be considered at higher risk for contracting or transmitting the virus than are workers without that interaction requirement.

The risk that an employee will contract or transmit the disease must also be weighed against the risks associated with requiring the vaccination, such as the risk of potential liability for an employee that is harmed by the vaccine. In most states, such an injury would likely be covered by the applicable workers' compensation program, thereby limiting an employer's liability to the remedy provided by the workers' compensation statute. However, as has been seen with mandated COVID-19 testing programs, many enterprising plaintiffs' attorneys have brought challenges to such limitations. Similar challenges may be expected in the "required vaccination" arena.

Other factors for consideration include the potential for claims from customers and perhaps even your employees that they contracted the coronavirus from an unvaccinated employee. This potential risk increases in cases where other similar employers have already decided to mandate vaccines. Expectations on what a reasonable business should do can change over time, depending on changes in the industry.

Beyond the legal issues raised by a compulsory vaccination program, an employer should also consider that such a program can sometimes negatively impact employee morale. These morale issues may be outweighed by other factors, but should not be dismissed out of hand. As more is learned about COVID-19, the calculations as to what is reasonable and how to address the risks associated with this awful virus may also change.

Some Considerations for a Mandated COVID-19 Vaccination Program

If an employer decides that compulsory vaccinations are the way to go, the employer must also account for the typical anti-discrimination protections that can impact its compulsory vaccination program. Assuming an employer is covered by either Title VII or a similar state anti-discrimination statute, the employer should administer the program in a nondiscriminatory manner, consistently requiring all employees with similar jobs under similar

circumstances to be vaccinated. If an employer is going to require only certain employees to be vaccinated, there must be a legitimate, nondiscriminatory reason justifying the differing treatment between positions.

Similarly, assuming that an employer is covered by Title VII, the Americans with Disabilities Act (ADA) or similar federal or state accommodation requirements, an employer must include in its compulsory vaccination program a mechanism to carefully consider and decide religious or disability-related objections to the program's application to a specific employee.

In either a religious-objection scenario or a disability-related accommodation request scenario, an employer should engage in the "interactive process" with an employee to determine what accommodations, if any, are necessary and available. Do not pre-judge the result when a request is made. Rather, engage in the interactive process through communication with the employee. If the predicate for requiring a reasonable accommodation exists and a reasonable accommodation is feasible, the reasonable accommodation must be made unless providing the accommodation would create an "undue hardship" for the employer. The potential accommodations could include considering anything from the use of personal protective equipment to permitting the employee to work remotely, if feasible.

Under the ADA, an accommodation poses an "undue hardship" if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business. If a particular accommodation would result in an undue hardship, an employer is not required to provide it but still must consider other accommodations that do not pose an undue hardship. Note, however, that the EEOC has recognized that the undue hardship threshold under Title VII is a lower standard than that existing under the ADA. This may make it easier to meet, but an employer should not summarily dismiss religious objections to a COVID-19 vaccine requirement.

In sum, employers are in for a challenging time even as potentially lifesaving COVID-19 vaccines are rolling out to the public. The temptation to require all employees to take the vaccine will be great. Nonetheless, in considering whether to implement a compulsory vaccine program, an employer should compare the risks associated with implementing such a program with one that only recommends that employees take the vaccine. The answer will not be the same for every employer. If a compulsory program is implemented, it should include recognition and appreciation for objections based on religious or medical/disability-related grounds. Failure to allow for such, or to handle these in a manner consistent with both Title VII and ADA obligations, may come back to haunt an employer even as the world begins to recover from the horrible effects of COVID-19.

By: Mabry Rogers, John Hargrove, Keith Covington, Chris Selman, Chuck Mataya

Hasta La Vista, Baby! Contracting Officer Erroneously Terminates Contractor for Default

In a December 2020 opinion, the United States Civilian Board of Contract Appeals (the "Board") reviewed and reversed a Federal Highway Administration ("FHWA") Contracting Officer's ("CO") decision to terminate for default Eagle Peak Rock & Paving, Inc.'s thirty-six million dollar contract (the "Contract") for work on a project in Yellowstone National Park (the "Project"). Its decision underscored the fact that government "Terminators" should think twice before terminating a contractor for default.

In May of 2016, FHWA awarded Eagle Peak the Contract for the Project. The Contract anticipated a three-year Project duration, and it was governed by both the Federal Acquisition Regulations and FHWA Special Contract Requirements. Pursuant to a provision in those documents, Eagle Peak had to submit an initial construction schedule within twenty days of receiving its notice to proceed. The construction schedule had to reflect completion of the work within the Contract time and include both a Critical Path Method schedule and a written narrative. Eagle Peak had to prosecute its work with sufficient diligence to complete the Contract within the Contract time.

Shortly after FHWA issued the NTP, Eagle Creek successively submitted three baseline schedules, each of which the CO rejected for, among other things,

missing items of work and/or flawed logic. The CO stated in an October 3, 2016 cure letter that Eagle Peak was four months past the NTP date and still had not submitted an approved schedule. The CO gave Eagle Peak an ultimatum: provide an approvable schedule within ten days or face termination of the Contract for default.

Eagle Peak submitted revised baseline schedules on October 13, 2016, November 23, 2016, and January 23, 2017, respectively. Eagle Peak's submissions were accompanied by narratives that described its plan for mobilizing additional crew members, overcoming delays, and sourcing materials. Eagle Peak assured the CO there was sufficient time to accommodate any changes to the schedule. The CO rejected the October 13, 2016 schedule due to missing items, flawed durations and production rates, and logic flaws. The CO never responded to the November 23, 2016 schedule submission. The CO also rejected Eagle Peak's January 23, 2017 schedule over Eagle Peak's objections that the CO's demands exceeded Contract requirements and industry standards. Eagle Peak argued that the CO demanded flawless logic ties and did not account for additional resources described in Eagle Peak's narratives. On January 25, 2017, Eagle Peak submitted its final "recovery schedule," in an attempt to respond to the CO's demands.

On February 1, 2017, the CO rejected the recovery schedule and default terminated Eagle Peak's right to proceed , based on its failure to prosecute its work with the diligence required to ensure completion within the Contract time. The termination letter stated that Eagle Peak had only completed 10% of its work on the Project despite 30% of the Contract time having passed. Eagle Peak appealed the termination for default to the Board.

The Board began its review of the CO's decision to terminate for default by noting that such a measure "is a drastic sanction which should be imposed . . . only for good cause grounds and on solid evidence." Terminations for default usually occur when it is reasonable for a CO to determine there is "no reasonable likelihood" of timely completion by the contractor. In looking at the reasonableness of a CO's decision, the Board considers factors like the urgency of the need for the services described in the contract and the time it would take for another contractor to complete the scope.

In this case, with nearly two years still remaining on the Project duration, the CO failed to consider the time Eagle Peak had remaining to complete the work and its repeated assurances of additional resources. Per the Contract, the narratives were just as much a part of the schedule submissions as the CPM schedule itself, and the CO had not carefully examined the narratives. Further, the CO's estimate of Eagle Peak's percentage complete overlooked Eagle Peak's mobilization efforts. Expert testimony revealed that at least two of Eagle Peak's schedules met Contract requirements, and the outstanding value of the missing activities on the rejected schedules was minimal in comparison to the total Contract value.

Most importantly, the Board noted that the actual "intent and value" of a CPM schedule is to provide an efficient way of organizing and scheduling a complex project. Inevitably, changes will happen so a contractor's initial network analysis "is not cast in bronze." While a contractor may be in technical default based on minor errors in its schedule, this is not determinative of grounds for termination for default. The government must be fair and reasonable in exercising its discretion. The Board determined that the CO's decision here was arbitrary and capricious and should be converted to a termination for convenience. The Board's decision allowed Eagle Peak to pursue damages against FHWA.

This case serves as a reminder that government contractors can challenge a CO's decisions related to schedule submissions that are largely in compliance with the FAR, applicable regulations, and industry standard. Minor errors in logic ties or missing items in a schedule are not necessarily fatal flaws. Schedule narratives can provide the essential information to move a schedule toward approval. Equally important, note that Eagle Peak was timely in its repeated efforts to address the government's concerns. From the owner side, the owner's project leadershould think twice before saying "Hasta La Vista!" to a contractor for default.

By: Anna-Bryce Hobson and Ryan Beaver

Contract Language Matters, Even to Uncle Sam

No one can escape the basic rules of contracting, even the federal government. If the contract is clear and unambiguous, then the four corners of the agreement set the rules for the project and the parties – and there's not much room for interpretation. The government was recently reminded of this cold, hard truth after it refused to grant a contractor an equitable adjustment of the contract price for purchasing wetland mitigation credits.

In *Kiewit Infrastructure W. Co. v. United States*, the government issued a solicitation for bids for the design and construction of roadways through the heart of the Tongass National Forest in Prince of Wales Island, Alaska. Part of the solicitation included a Waste Disposal Sites Investigation Report, which specified where waste could be disposed of during construction. In referring to the Report, the government's solicitation clarified that "no further analysis of the environmental impacts of using government-designated waste sites would be needed unless an expansion of a site were proposed." The solicitation was clear, however, that the chosen contractor would maintain responsibility for all permits and clearances, including the need for any potential wetland mitigation credits and ensuring compliance with the Clean Water Act.

Considering this directive, Kiewit dispatched a team to the remote national forest and performed a two-day investigation to consider the environmental impacts of the project. Kiewit's investigation did not include a consideration of the Waste Disposal Sites due to the solicitation's assurance that no further analysis was needed. Upon completion of its investigation, Kiewit submitted a bid that included $1 million for wetland mitigation credits.

Kiewit was awarded the contract and got to work. Several months into the project, Kiewit discovered the potential for environmental wetland impacts at the government's Waste Disposal Sites. It informed the government of this fact and requested an equitable adjustment for the costs of additional wetland mitigation credits.

The government denied the contractor's request, asserting that Kiewit had an obligation to investigate the environmental impacts under the Clean Water Act prior to submitting its proposal. Kiewit appealed to the Federal Claims Court. The court agreed with the government that despite Kiewit's two-day investigation, it should have done more to determine the environmental impacts at the Waste Disposal Sites under the Clean Water Act.

The Court of Appeals for the Federal Circuit disagreed and drew the parties back to the terms of their agreement. The Federal Circuit declined to spend much time parsing through the facts and circumstances of Kiewit's initial investigation and bid. Instead, the court found all that it needed to make its ruling was in the four corners of the contract.

The court explained that Kiewit reasonably relied on the parties' agreement that "no further environmental impacts analysis" was necessary regarding the government-designated waste sites. In explaining its decision, the court reminded the parties, "contract language matters." At the end of the day, it didn't matter that the government intended the contractor's obligations to comply with the Clean Water Act to apply to all aspects of the project. The parties' agreement unambiguously carved out an exception for the waste sites, and the contract, as always, ruled the day.

This case is reminder that parties should always carefully and explicitly draft their agreements to make sure their intentions are on paper, in black and white. If there is any confusion or ambiguity, the best practice is to clarify in writing and make any necessary modifications in the contract itself before signing. Clarity and confirmation in writing is always the safest strategy, because everyone is subject to the terms of the agreement – no matter the job, no matter the party.

By: Katie Blankenship

Government's Failure to Grant REA Can Constitute Breach of Contract

The U.S. Court of Appeals for the Federal Circuit, in *BGT Holdings LLC v. United States*, recently held that the government does not have the discretion to deny a contractor's request for equitable adjustment (REA) under Federal Acquisition Regulation (FAR) 52.245-1 (Government Property) where the conditions specified in that clause are present and the contractor is able to show financial loss. As discussed below, the

Federal Circuit's decision in this regard is a welcome development for government contractors because the court's basic reasoning extends to all FAR clauses that direct that the government "shall" or "must" consider or make an equitable adjustment if the conditions set forth in the applicable FAR clause are present.

BGT Holding LLC filed a complaint with the U.S. Court of Federal Claims alleging, among other things, that the U.S. Navy breached its contractual duty to provide BGT an equitable adjustment after failing to deliver government-furnished equipment (GFE) that the Navy had agreed to deliver to BGT. The Court of Federal Claims dismissed BGT's complaint, finding that BGT's claim in this regard was precluded by the terms of the contract. BGT then filed an appeal with the U.S. Court of Appeals for the Federal Circuit.

On appeal, the Federal Circuit specifically addressed BGT's claim that the Navy breached FAR 52.245-1 by failing to provide an equitable adjustment for the Navy's non-delivery of GFE. The Federal Circuit noted that two subsections of FAR 52.245-1 govern GFE non-delivery by the government. First, under subsection (d)(3)(i), the contracting officer "may, by written notice, at any time — (A) Increase or decrease the amount of government-furnished property under this contract." In such a case, subsection (d)(3)(ii) directs that the contracting officer "shall consider an equitable adjustment." Second, under subsection (d)(2)(i), if the GFE "is not delivered to the Contractor by the dates stated in the contract, the Contracting Officer shall … consider an equitable adjustment."

The government argued on appeal that BGT's claim under subsection (d)(2)(i) is untenable because the contracting officer was required only to "consider BGT's request for an equitable adjustment — not to grant the adjustment to BGT." Under the government's theory, the phrase "shall consider" gave the contracting officer discretion to grant or deny an equitable adjustment and imposed no duty to grant an adjustment, even if BGT could prove financial loss due to the government's non-delivery of the GFE.

The Federal Circuit, however, rejected the government's argument, rejecting the government's interpretation of the term "shall consider" because it would produce absurd results under the government property clause. To illustrate, the Court told the reader to assume that the committed GFE in this case had a total value nearing $5 million, well over half of the contract price of $8.25 million. If the Navy had withdrawn all GFE, as the contract allows, it would be implausible to posit that the Navy's only obligation would be merely to "think over" BGT's request for an equitable adjustment before denying it.

The correct interpretation of "shall consider" did not give the government absolute discretion; rather, it held the government to a duty of good faith and reasonableness. Moreover, the FAR demands that the contracting officer exercise impartiality, fairness, and equitable treatment when considering requests for equitable adjustments. *See* 48 C.F.R. § 1.602-2 ("Contracting officers shall … (b) Ensure that contractors receive impartial, fair, and equitable treatment"). The Court noted that the government's interpretation of "shall consider" would invite subversion of that responsibility.

Accordingly, the Federal Circuit vacated the dismissal of BGT's claim. The Federal Circuit directed that, on remand, the Court of Federal Claims "must determine whether BGT is entitled to an equitable adjustment as fair compensation for the failure to deliver those GFE items."

The Federal Circuit's decision in this case highlights the government's duty of good faith and reasonableness in addressing government contractors' REAs. Where the FAR makes equitable adjustment available as relief to a contractor facing certain conditions, the government does not have the discretion to ignore a contractor's request for adjustment and, instead, has a duty of good faith and reasonableness not only to consider but grant such relief where due.

This is a welcome development for contractors because the Federal Circuit's reasoning extends to all FAR clauses that direct that the government "shall" or "must" consider or make an equitable adjustment if the conditions set forth in the applicable clause are present. Accordingly, we will likely see contractors rely on the Federal Circuit's holding in *BGT Holdings LLC* to argue that the government committed a breach of contract by failing to grant the contractor an equitable adjustment under a variety of clauses.

We will continue to monitor this noteworthy development. If you have any questions about the topics discussed in this article, please feel free to contact us or your lawyer.

By: Aron Beezley and Sarah Sutton Osborne

If You Want to Arbitrate, Better Ask for It (Sooner Rather Than Later)

In our last issue of the newsletter, we told you of a decision of the United States Circuit Court for the Sixth Circuit, in which the Sixth Circuit considered the issue of whether a party waived its arbitration right through its pre-litigation conduct. In *Borror Property Management, LLC v. Oro Karric North, LLC*, the Sixth Circuit upheld a party's contractual right to arbitration and concluded that a party's pre-litigation conduct (writing pre-lawsuit, informal letters suggesting that the parties litigate in court) did not constitute a waiver of the right to arbitrate.

The Alabama Supreme Court recently issued a decision cutting the other way (albeit on very different facts). Contractors, subcontractors, owners, and engineers who litigate (or arbitrate) in Alabama should take note.

In *The Health Care Authority for Baptist Health et al. v. Dickson*, the Alabama Supreme Court determined that a party to an arbitration provision substantially invoked the litigation process to the prejudice of its counterparty, thus waiving its right to compel arbitration. Dickson, an individual who sustained injuries as a result of an automobile accident, was taken to Prattville Baptist Hospital ("PBH"), was treated in the emergency department, and was discharged. Dickson was partially covered by health insurance issued by Blue Cross Blue Shield of Alabama ("BCBS"). PBH was a party to a provider agreement with BCBS under which the medical care rendered to Dickson was reimbursable.

Dickson filed a complaint in the trial court challenging a reimbursement that PBH had received in exchange for Dickson's medical treatment. He also sought to certify a class of people who were insured by BCBS and who had received care at any hospital operated by Baptist Health (collectively, the hospital defendants are the "HCA Entities"). The trial court entered an order transferring the case to the trial court in a different county. The second court then ruled on various pending discovery motions and denied the HCA Entities' motion to dismiss. The HCA Entities then took a number of actions, including filing an answer (which did not raise arbitration as a defense) and filing a motion seeking to stay discovery, for a protective order, and to quash subpoenas. The parties then participated in class-related discovery

After all of these actions, the HCA Entities then filed a motion to compel arbitration on the grounds that Dickson's health-insurance policy with BCBS required all claims related to the policy to be arbitrated and that the provider agreement also provided for arbitration, contingent upon the arbitration requirement of the BCBS policy. The trial court denied that motion and the HCA Entities appealed. The HCA Entities asserted that (i) Dickson's claims were subject to the arbitration provisions of the BCBS policy and the provider agreement, (ii) the arbitrability of the claims must be determined by an arbitrator, and (iii) Dickson is equitably estopped from disavowing that arbitration of his claims is appropriate. They also contend that they did not waive the right to compel arbitration by failing to raise arbitration as an affirmative defense or by participating in litigation and engaging in class-related discovery. Dickson argued that arbitration is an affirmative defense and that the HCA Entities waived that defense by failing to assert it in their answer. He also argued that the HCA Entities waived their right to compel arbitration by substantially invoking the litigation process.

Waiver is a defense to arbitration. The test for determining whether a party has waived its right to arbitration has two prongs: (i) whether the party's actions as a whole have substantially invoked the litigation process and, (ii) whether the party opposing arbitration would be prejudiced if forced to submit its claims to arbitration subsequent to the other party's actions invoking the litigation process. This decision is made based on the particular facts of each case.

The Court considered the facts that were relevant to this issue, including (i) the fact that Dickson commenced the lawsuit more than two years before the HCA Entities filed their motion to compel arbitration, and (ii) the various actions in the litigation taken by the HCA Entities prior to moving to compel arbitration (they filed a motion to dismiss, supported the attempt

by another party to be dismissed from the action, filed motions to stay discovery, opposed Dickson's nonparty subpoenas, submitted briefs to and participated in hearings in the first court, had the case transferred, participated in motion practice and hearings in the second court, answered Dickson's complaint on the merits, and conducted and participated in class-related discovery).

The Court reasoned that these actions were inconsistent with any desire that the HCA Entities may have had to resolve the case by arbitration. Accordingly, the HCA Entities substantially invoked the litigation process before seeking to compel arbitration. Further, the Court found it noteworthy that the HCA Entities delayed filing their motion to compel arbitration until after they received an adverse ruling on their motion to dismiss.

Having determined that the HCA entities substantially invoked the litigation process, the Court then considered the issue of prejudice. Dickson asserted that he had suffered unnecessary expense and wasted time that could have been avoided if the dispute had been sent to arbitration, because his BCBS policy required BCBS to bear the costs of arbitration and the policy provides for a short timeframe for arbitration. He argued that his attorneys had spent countless hours and resources responding to numerous letters, objections, motions, and other documents filed by the HCA Entities in the trial court.

The Alabama Supreme Court recognized that there is prejudice where the party seeking arbitration allows the opposing party to endure the types of litigation expenses that arbitration was designed to alleviate. Dickson incurred substantial time and expense in opposing the HCA Entities' various filings, resulting in expenses he would have been spared had the HCA Entities sought to invoke their right to arbitration earlier. The Court, therefore, held that the HCA Entities substantially invoked the litigation process, to the prejudice of Dickson, and that they waived any right to compel arbitration.

The lesson here is a simple, but important one: if you believe you have the contractual right to arbitrate your dispute – and if you *want* to arbitrate your dispute – it is prudent to request that the dispute be sent to arbitration sooner rather than later. The longer you participate in litigation or in court (and the more expense your counterparty incurs), the more likely it is that you will be deemed to have waived your arbitration right. If you are uncertain whether you have the right to arbitrate, or are unfamiliar with the mechanics for doing so, you should contact a lawyer who can advise as to your available rights and remedies before they slip away.

By: Carly Miller

Safety Moment for the Construction Industry

Almost every job at one time or another needs traffic control. This often involves the use of a flagman and signs. In short duration situations, flagmen may be preferable to signs since they can react to any changes in site situations. Signs are, however, a suitable solution to an extended traffic control problem.

It should be remembered that the intent of traffic control procedures is first, safety, and then to prevent a tie-up in the operation of the construction project and to allow the general public to move as safely and efficiently as feasible around the construction site. Some items to keep in mind when performing traffic control:

- Be sure the traffic can see you.
- Wear an Orange safety vest.
- Use a flag.
- Wear suitable shoes.
- Be dressed neatly.
- Wear a hard hat.
- Never turn your back on the traffic.
- Always be courteous but firm.

Coronavirus/COVID-19

Our firm has endeavored to compile a number of helpful resources to assist our clients to navigate the uncertainties of COVID-19, with a heavy emphasis on issues affecting the construction industry. If you have questions related to the coronavirus and how it may impact you or your business, please visit: https://www.bradley.com/practices-and-industries/practices/coronavirus-disease-2019-covid-19. This site contains various resources across different areas, including employment, insurance, healthcare, as well as the construction industry.

Additionally, our Practice Group maintains its **BuildSmart Blog** and has published a number of

coronavirus-related blog posts to help our clients in the construction industry navigate these issues: https://www.buildsmartbradley.com/. If you would like to get the blogs routinely, we invite you to subscribe to the blog at the above web address.

If you have additional questions that are not answered by these resources or you would like to discuss further, please contact an attorney in our practice group to help you find an answer to your question.

Bradley Arant Lawyer Activities

The pandemic may have changed the way we gather, but it has not changed our desire to provide relevant content and important guidance to our friends in the construction industry.

In lieu of our annual in-person seminar, we are working to create short video snippets that cover a wide range of educational topics that answer common questions or informational points of concern that need to be addressed. The content will be easily digestible and readily available at your convenience. We are still working through the library of topics, but if you have a question you would like to see addressed, please email Chrissy Ruth at cruth@bradley.com. We look forward to seeing everyone in-person soon!

In U.S. News' 2021 "Best Law Firms" rankings, **Bradley's Construction and Procurement Practice Group** received a Tier One National ranking, the highest awarded, in Construction Law and Construction Litigation.

Bradley's Construction Practice was ranked No. 3 in the nation by *Construction Executive* for 2020.

Chambers USA ranked Bradley as one of the top firms in the nation for construction for 2020. The firm's Washington D.C., Mississippi, and North Carolina offices were also recognized as a top firm for those locales for Construction Law.

Chambers USA also ranks lawyers in specific areas of law based on direct feedback received from clients. **Ryan Beaver, Ian Faria, Doug Patin, Bill Purdy, Mabry Rogers, Bob Symon,** and **Ralph Germany** are ranked in Construction. **Aron Beezley** is ranked in the area of Government Contracts.

In *Best Lawyers in America* for 2021, **David Taylor** was named Lawyer of the Year in Construction for Nashville, TN, **Mabry Rogers** was named Lawyer of the Year in Construction for Birmingham, AL, and **Ralph Germany** was named Lawyer of the Year in Construction for Jackson, MS.

Axel Bolvig, David Taylor, David Owen, Doug Patin, Mabry Rogers, Eric Frechtel, Ian Faria, David Pugh, Jim Collura, Jim Archibald, Jared Caplan, Jon Paul Hoelscher, Monica Wilson Dozier, Mike Koplan, Ralph Germany, Bob Symon, Ryan Beaver, Wally Sears, and Bill Purdy have been recognized by *Best Lawyers in America* in the area of Construction Law for 2021.

Axel Bolvig, David Owen, Mabry Rogers, Fred Humbracht, Ian Faria, David Pugh, Jim Archibald, Michael Bentley, Bob Symon, and **Russell Morgan** were also recognized by *Best Lawyers in America* for Litigation - Construction for 2021.

David Taylor, Doug Patin, and **Mabry Rogers** were recognized by *Best Lawyers in America* for Arbitration in 2021.

Keith Covington and **John Hargrove** were recognized by *Best Lawyers in America* in the areas of Employment Law - Management, Labor Law - Management, and Litigation - Labor and Employment.

Andrew Bell, **Katie Blankenship**, **Amy Garber**, **Matt Lilly**, **Carly Miller**, and **Chris Selman** have been recognized as *Best Lawyers: Ones to Watch* in the areas of Construction Law and Construction Litigation for 2021.

Jim Archibald, Axel Bolvig, Bill Purdy, Mabry Rogers, Wally Sears, Bob Symon, Ian Faria, Doug Patin, Ralph Germany, David Taylor, and **David Owen** were named *Super Lawyers* in the area of Construction Litigation. **Jeff Davis** was named *Super Lawyer* for Civil Litigation. **Aron Beezley** was named *Super Lawyers* "Rising Star" in the area of Government Contracts. **Luke Martin**, **Bryan Thomas**, **Andrew Stubblefield**, **Aman Kahlon, Amy Garber, Carly Miller,** and **Chris Selman** were listed as "Rising Stars" in Construction Litigation. **Ryan Kinder**, **Justin Scott**, and **Mary Frazier** were recognized as "Rising Stars" in Business Litigation. **Monica Dozier Wilson** and **Matt Lilly** were named North Carolina *Super Lawyers* "Rising Stars" in Construction Litigation. **Ian Faria** and **Jeff Davis** were ranked as Top 100 in Texas *Super Lawyers*.

Bob Symon was recently accepted as a Fellow in the American College of Construction Lawyers, joining other Bradley Fellows **Jim Archibald**, **Bill Purdy**, **Mabry Rogers**, and **Wally Sears**.

Jim Archibald, **Axel Bolvig**, **Jim Collura**, **Keith Covington**, **Ian Faria**, **Doug Patin**, **David Pugh**, **Bill Purdy**, **Mabry Rogers**, **Wally Sears**, **Bob Symon**,

and **David Taylor** have been rated AV Preeminent attorneys in Martindale-Hubbell.

Jim Archibald, Axel Bolvig, Ian Faria, Eric Frechtel, Mabry Rogers, Bob Symon, David Taylor, **Bryan Thomas** and **Michael Knapp**, have been selected as Fellows of the Construction Lawyers Society of America (CLSA), and **Carly Miller** and **Aman Kahlon** were selected as Associate Fellows of the CLSA.

Monica Wilson Dozier was selected to The Mecklenburg Times' list of the "50 Most Influential Women" for 2020, whose honorees represent the most influential women in business, government, law, education and not-for-profit fields in the Charlotte region. The annual list is selected by a panel of independent business leaders and is based on professional accomplishment and community involvement.

Bradley recently served as the Charlotte Regional Presenting Sponsor of the 2020 ABC Carolinas Excellence in Construction Awards, celebrating the quality, innovation and service of the best contractors and projects in the Carolinas. **Monica Wilson Dozier** and **Brian Rowlson** presented the EIC awards to winners in socially-distant celebrations, and Bradley honored each winner in a special presentation of the Charlotte Business Journal.

David Pugh has been re-selected to be the Chairman of the Hospital/Healthcare Construction Track at the ABC's annual User's Summit, which is sponsored by Bradley, to be held May 12-14, 2021 at the Ritz-Carlton in Dallas, TX.

On February 25, 2021, **David Pugh** moderated a webinar "Trends in Healthcare Construction" as a part of the ABC's User's Summit.

Aron Beezley and **Sarah Osborne** presented on bid protests at the North Alabama FBA Acquisition Law Symposium on December 4, 2020.

On December 3, 2020, Bradley sponsored the Energy Technology Series webinar hosted by E4 Carolinas. **Chris Selman** presented the keynote speaker, Scott Tew, Vice President, Sustainability & Managing Director at Trane Technologies.

On November 11, 2020, **Abba Harris** moderated a panel regarding the importance of diversity and inclusion in the workforce for the Birmingham Chapter of the National Association of Women in Construction.

Aron Beezley and **Sarah Osborne** hosted a webinar on bid protests on October 15, 2020.

Alex Thrasher recently wrote a feature length article entitled "The Importance and Effect of Statutes of Repose on Construction Claims," which was published in the most recent edition of *Alabama Construction News*. That edition also included an article entitled "Construction, Contracts, and COVID: The New Normal" authored by **David Pugh** and **Chris Selman**.

Amy Garber, together with a client, recently presented to a class at Morgan State University on risk allocation in construction contracts as a part of the construction claims management course.

Anna-Bryce Hobson was recently selected to serve on the Wake Forest Law School Rose Council, a leadership council for graduates who have graduated within the last ten years. The Rose Council builds community by encouraging recent grads to increase their involvement by volunteering, attending law school events, staying informed, and giving back.

David Taylor was named to the Board of Directors of the Nashville Conflict Resolution Center.

Abba Harris is currently serving as the President of the Greater Birmingham Chapter of the National Association of Women in Construction (NAWIC). Abba was also recently awarded the first-ever Jo-Ann Golden Humanitarian Award from the Southeast Region of NAWIC.

Michael Knapp was appointed to the Board of Trustees for the Patriot Military Family Foundation, a group that raises money and awareness to benefit wounded veterans and their families.

David Taylor was reappointed to the Executive Committee of the Tennessee Bar Association's Construction Law Committee. He was also recently reappointed to the Legal Advisory Counsel of the Associated General Contractors of Middle Tennessee.

Ian Faria, **Jon Paul Hoelscher** and **Andrew Stubblefield** became board certified by the Texas Board of Legal Specialization in Construction Law. Only about 100 or so attorneys out of more than 100,000 licensed Texas attorneys hold the certification.

Abba Harris recently received the firm's Cam Miller award, an award which recognizes an associate within the firm who exemplifies excellence in his or her legal work coupled with a high degree of involvement in community service. In addition to her pro bono work, Abba works extensively with the YWCA in Birmingham and has recently started a workforce program to help women who live in their shelters get into the skilled trades, and she has donated her financial award as a kickstart for that program.

Anna-Bryce Hobson recently joined the Commercial Real Estate Women of Charlotte Sponsorship Committee.

Lee-Ann Brown recently joined the Legislative Committee of the Associated Builders & Contractors of Washington, DC.

Kyle Doiron was named as a member of the Associated General Contractors' Construction Leadership Council for Nashville.

Monica Wilson Dozier served as mentor to Ashipa Electric in the TechStars Alabama EnergyTech accelerator, supporting entrepreneurship in the evolving energy industry as Ashipa Electric develops microgrid projects and microgrid controller software.

Rebecca Muff was appointed to the Board of Directors for the Junior League of Houston, Inc., an organization of women committed to promoting voluntarism, developing the potential of women, and improving communities through effective action and leadership of trained volunteers.

Jay Bender and **James Bailey** recently authored a book entitled "Construction Issues in Bankruptcy: Executory Contracts, Mechanic's Liens and Other Issues that Arise in Construction-Related Bankruptcies," which is written for the people who run construction companies, construction lawyers, and bankruptcy professionals representing parties in distressed construction matters.

NOTES

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An electronic version of this newsletter, and of past editions, is available on our website. The electronic version contains hyperlinks to the case, statute, or administrative provision discussed.

READER RESPONSES

If you have any comments or suggestions, please complete the appropriate part of this section of the *Construction & Procurement Law News* and return it to us by folding and stapling this page which is preaddressed.

Your Name:

☐ I would like to see articles on the following topics covered in future issues of the Bradley *Construction & Procurement Law News*:

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We are in the process of developing new seminar topics and would like to get input from you. What seminar topics would you be interested in?

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If the seminars were available on-line, would you be interested in participating? ☐ Yes ☐ No

If you did not participate on-line would you want to receive the seminar in another format? ☐ Video Tape ☐ CD ROM

Comments:

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