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First Quarter 2018

CONSTRUCTION AND PROCUREMENT LAW NEWS

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

Multi-Jurisdictional Licensing in the Expanding Solar Industry

As the solar industry expands into new jurisdictions, developers and contractors seeking to break into a new market should carefully evaluate their risks and opportunities. Contractor licensing, in particular, presents challenges to developers and contractors seeking to comply with widely varied state statutes and local regulations. When considering a project in a new jurisdiction, it is important to consider the following licensing questions:

Is there a state or local licensing requirement? If so, does it apply?

If the new jurisdiction has a licensing requirement, the first issue to confirm is whether it applies to the parties on a potential project. Although developers often assume contractor licensing regulations do not apply to developers, this question is not settled law in every state, and depends on highly varied situations and regulations.

As one example, a recently-issued (but as yet unpublished) opinion from California's Second District Court of Appeal provides useful guidance to developers or any energy provider. In *Reed v. Sunrun, Inc.*, a homeowner brought a class action alleging Sunrun (an energy provider who entered into a PPA and then contracted with homeowners to "arrange for the design, permitting, construction, installation and testing" of a solar energy system from which the homeowner purchased energy) was an unlicensed contractor. The court found that Sunrun was not a contractor under California's Business and Professions Code, because Sunrun did not perform, supervise, or oversee, or agree to be solely responsible for construction – Sunrun instead merely coordinated construction services performed by licensed contractors.

In other jurisdictions, or in a different situation, developers may need to obtain a contractor's license. A developer who takes an active (for example, on-

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site, or supervisory) role in managing a contractor may be deemed a construction manager under some state contractor licensing statutes. The Commonwealth of Virginia requires construction managers to comply with all licensing standards that apply to general contractors. VA. CODE ANN. § 54.1-1100 (contractors "perform or manage construction"). The Washington, D.C. Code of Municipal Regulations also requires construction managers to obtain a contractor's license. D.C. Municipal Regulation § 17-390.1 (license requirement expressly covers persons engaged in "general contracting or construction management"). Tennessee also includes a "construction manager of any kind" in its broad statutory definition of contracting. TENN. CODE ANN. § 62-6-102(4)(a)(iii).

When is the license required?

If a state or municipality requires a contractor license, the second issue to confirm is when the license is required. Many if not most U.S. states require contractors to obtain a license prior to offering to perform construction work (in other words, before submitting a bid). Unlike corporate registration requirements, contractor licensing is not usually an obligation that may be cured retroactively. Penalties for violation of contractor licensing statutes are often harsh and unforgiving. These penalties are also often both civil and criminal.

For example, Florida will not allow an unlicensed contractor to enforce contract, lien, or bond rights in court. FLA. STAT. §489.128. And, California is a widely-known "disgorgement" jurisdiction, in which an unlicensed contractor may be forced to pay back all amounts received for work performed. Cal. Bus. & Prof. Code § 7031.

What is the correct classification of required license?

An increasing number of states have contractor license classifications specific to the solar industry: Utah, for example, has a Solar Photovoltaic Contractors classification, which requires certification from the North American Board of Certified Energy Practitioners. Virginia has an Alternative Energy Systems (AES) classification.

Other states – such as Alabama, South Carolina, and Louisiana – cite the significant portion of electrical work required for a solar project to require even general contractors (not self-performing electrical scopes of work) in the solar industry to employ licensed master electricians to supervise projects as license qualifiers.

As the solar industry evolves, licensing laws and regulations are constantly changing. States that see increasing volumes of solar projects have begun to issue guidance specific to solar installations. Developers and contractors considering expansion should always consider contractor-licensing issues in each new jurisdiction, and should consult state licensing boards and qualified counsel to ensure compliance with licensing laws.

By: Monica Wilson Dozier

Be Aware of Sovereign Immunity

Sovereign immunity is the legal doctrine, dating back to the days of the British monarchy, that a sovereign or state cannot commit a legal wrong and is immune from suit: in essence, "the king can do no wrong." *Fulton County v. SOCO Contracting Co.*, a recent decision by the Georgia state appeals court, reminds contractors on government projects that sovereign immunity, although sometimes disclaimed or waived by contract, may still limit a contractor's ability to recover.

SOCO Contracting Co. ("SOCO") entered into a contract with Fulton County (the "County") for the construction of a local cultural center. The contract specified completion within 287 days from the issuance of the notice to proceed or the day the work began, whichever came first. Additionally, changes in the scope of work, or delays, or events not the fault of the contractor would increase the period of performance if authorized in a change order. The contract also provided that the County could order changes to the scope of the contract, and the County's policy and procedure for such changes required that they be effected through a written, bilateral agreement.

SOCO did not achieve substantial completion within the scheduled period of performance and asserted that the delays were due to adverse weather

conditions, delays caused by the County's design, the County's unwillingness to make timely design changes, and the impact that the federal government shutdown had on obtaining certain permits. Because of these delays, the County ordered changes to SOCO's scope of work, with the program manager listing more than thirty change orders in the change order evaluation log. However, there was nothing in the record to indicate that the parties had executed bilateral, written agreements, as required by the change order procedure. SOCO admitted that the County never issued a written change order extending the contract time or altering the scope.

SOCO ultimately brought an action against the County for breach of contract and bad faith performance of the contract. SOCO and the County filed cross motions for summary judgment on all claims. The County asserted that the doctrine of sovereign immunity barred any claims arising from unwritten change orders. The trial court denied the County's motion and granted summary judgment in favor of SOCO, and the County appealed.

In Georgia, only an act of the General Assembly or the Constution itself may waive the doctrine of sovereign immunity. Sovereign immunity is a threshold issue that must be addressed before the court may reach the merits of a case, and the party seeking the benefit of the waiver of sovereign immunity bears the burden of proving such waiver. Further, whether sovereign immunity has been waived, if the facts are undisputed, is a question of law.

The County argued before the appellate court that although it waived sovereign immunity for breach of the written contract, it did not waive sovereign immunity for claims arising from modifications to the written contract that failed to follow the written change order policy outlined in the contract. The appellate court concluded that SOCO provided no evidence that it complied with the change order procedure, and that the County could not waive sovereign immunity by actions outside of the written contract. The court was unable to create an exception to the rules regarding waiver of sovereign immunity based on any reliance that SOCO may have placed on the County's request for changes, upon the parties' course of conduct, or upon facts that were deemed admitted.

In this case, the appellate court determined that there was a question of fact, however, as to whether the County waived sovereign immunity. The court remanded the case for further consideration regarding whether the parties strictly complied with the contract's procedure regarding written change orders.

This case serves as a stark reminder that contractors must follow the terms of a state or municipal contract to ensure the validity of an argument that the government waived sovereign immunity for breach of contract. Each state differs significantly regarding the waiver of sovereign immunity, as to how it is waived and what levels of government enjoy the immunity, and whether any legislative process affects payment by a governmental entity. We urge each general contractor to check this legal issue when it is contracting with a public body in any particular state.

By: Carly Miller

Lien on Me (When Your Priority's Gone)

Imagine this scenario. You are the developer for a new mixed-used facility as part of a city's revitalization effort. Months went into clearing all of the zoning and financing hurdles. But now, everything is in place. All that remains is for the lender to finish the loan paperwork and get a security deed recorded. In the interim, you decide to visit the future project site to check on things. You notice that materials and equipment are already there. Some clearing has been completed and grading work begun. There appears to have been a miscommunication with the contractor, which directed its subcontractors to commence with project preparation. Is this merely a harmless scheduling hiccup, or have everyone's lien rights been suddenly inverted?

This example illustrates what is known as "broken priority." This occurs where construction work begins before a construction loan is finalized and recorded. Depending on what side of the table you are on, this can be potentially problematic or advantageous.

If you are an owner or developer, broken priority can make it difficult to actually close the construction loan. A bank may no longer wish to lend the funds,

and a title company may not want to insure the loan. There is no longer certainty that the construction loan will be the senior lien on the property. Why? A materialman or mechanic's lien may have just cut in front of the lender in the priority line.

Many jurisdictions enforce a "relation back" approach to materialman/mechanic's liens. California's lien priority statute is a good example of how these jurisdictions handle broken priority. Under California Civil Code §8450, "A lien under this chapter . . . has priority over a lien, mortgage, deed of trust, or other encumbrance on the work of improvement or the real property on which the work of improvement is situated, that (1) attaches after commencement of the work of improvement or (2) was unrecorded at the commencement of the work of improvement and of which the claimant had no notice." This means that although a contractor or materialman may not have actually recorded a lien, its lien rights could still trump a security deed that the lender recorded after construction work began. That's what makes the relation back doctrine a deep concern to banks and title insurers—even though there is no lien or encumbrance recorded on the public land records, a contractor or materialman could come back months later, record its lien, and have superior rights to the already-recorded security deed.

This broken priority situation can create headaches for owners and lenders. Project financing may be cancelled or delayed until lien waivers are obtained from each subcontractor and contractor on the job.

Assuming that you are a contractor, subcontractor, or material supplier, the relation-back doctrine potentially could be significant. If you are considering recording a lien, check the land records to see when the security deed for the construction loan was actually recorded. If you began work before that date, the construction loan could potentially be subject to your lien, allowing you to foreclose and be paid first from the proceeds, giving the contractor substantial bargaining power. Further, some jurisdictions, such as Missouri, employ a "first spade" rule. This rule is unique in that "a deed of trust recorded after the commencement of work on a project is inferior to <u>any</u> mechanic's liens arising on the land from that work." *See Bob DeGeorge Assocs., Inc. v. Hawthorn Bank.* This means that even if you are a contractor or material supplier who got involved later in the project, you could still take advantage of the first spade rule if any work commenced before the recordation of the construction loan security deed. Thus, under this rule, all mechanic's lien claimants are on equal footing.

In short, the timing of a loan closing and the beginning of construction work is important. If you are a construction lender or title underwriter, make sure that no work has commenced before you lend the funds or issue a policy, or obtain a lien subordination agreement from the contractor that has already begun work. If you are a contractor, subcontractor, or material supplier, never assume that a security deed for a construction loan automatically has priority over your lien, except in those projects where the lender in fact obtained a subordination agreement from your company.

By: Jackson Hill

Unstable Foundations: Following Industry Standards During Design Not Enough to Absolve Design/ Build Contractor of Liability

MT Højgaard A/S (Respondent) v E.ON Climate & Renewables UK Robin Rigg East Limited, involved the construction of foundation structures for an offshore wind farm. The Supreme Court of the United Kingdom analyzed whether a design/build contractor had liability when the turbine platforms began to fail despite the design/build contractor following industry standards as part of the design process.

In 2006, the E.ON Group sent tender documents to a number of parties related to the design and construction of offshore wind turbines at Robin Rigg in Solway Firth off the western coast of England and Scotland. The tender documents included E.ON's key functional requirements for the project, including provisions stating that the elements covered by the tender should have a minimum "design life" of twenty (20) years without major retrofits or refurbishments. The tender documents repeatedly emphasized that this design life was a minimum standard, and standards that are more rigorous should be adhered to where necessary. The tender documents

also required the design of the foundations for the wind farm installations to conform to a document known as J101, an international standard for the design of offshore wind turbines published by a Norwegian entity. A portion of J101 focused on the design and construction of the grouted connections of the turbine foundations and contained a specific equation for assessing the shear strength of the grouted connections under friction in circumstances where the designer elected not to use "shear keys."

MT Højgaard A/S ("MTH") won the tender for the design/construction of the offshore wind turbines. Shortly after MTH completed its work, defects were discovered in the turbine platforms, which resulted from an inaccuracy of the equation in J101 related to shear strength. E.ON sought to hold MTH liable for the defect arguing that MTH breached a fitness of purpose obligation under the design/build contract. MTH refused liability for the defect asserting that it complied with J101 and exercised reasonable skill and care under the contract.

The Supreme Court of the United Kingdom found persuasive E.ON's argument that the design/build contract imposed a fitness for purpose obligation on MTH to provide turbine platforms that would have a minimum life of 20 years. Specifically, the Supreme Court held that the design/build contract obligated MTH to comply with particular specifications and standards, such as J101, but also to achieve a specific result, a service life of 20 years. Even though MTH's design work complied with an industry standard such as J101, that compliance was not enough to achieve the required goal under the contract of providing a turbine platform that could last 20 years without major retrofits or refurbishments. The Supreme Court also rejected MTH's argument that the 20-year service life warranty was non-contractual because it was "tucked away" in the technical requirements portion of the bid documents. The Supreme Court noted that even a "badly drafted contract" would not negate the Court's duty to interpret the language of the contract using well-established principles of contractual interpretation.

This decision serves as a reminder to design/build contractors to be cognizant of the interplay between industry standards and specifications present in bid and contract documents, and to consider how compliance with those industry standards might not be enough to meet specific fitness or performance warranties made elsewhere in the contract documents.

By: Justin Scott

Pay IF Paid: It Means What it Says

Pay <u>when</u> paid clauses are common in the construction industry. A typical pay when paid clause sounds something like this: "Prime Contractor will not pay Subcontractor until Prime Contractor receives payment from Owner." A lay person might read that and interpret it to mean that if the Prime Contractor is never paid by the Owner, then at no point will the Prime Contractor be liable to pay the Subcontractor for the Subcontractor's work. But courts generally disfavor conditions precedent (an event that must occur before another party's performance is due) and will not observe their existence unless they are unambiguously laid out in the contract. Therefore, most courts interpret the above clause as dealing only with the timing of payments rather than shifting the risk of the Owner's non-payment from the Prime Contractor to the Subcontractor. In other words, a court would likely hold that if the Owner defaulted and was unable to pay the Prime Contractor, then the Prime Contractor would still be contractually obligated to pay the Subcontractor for the work it completed; the clause above would only function to postpone payment by the Prime Contractor for a "reasonable time" after demanded by the Subcontractor.

However, subcontractors and general contractors should be aware that if language in a contract clearly establishes that the prime contractor is only obligated to pay the subcontractor if the owner pays the prime contractor for that work, and the contract states that the subcontractor is taking the risk of the owner's potential insolvency, then courts are likely to enforce the contract as written—condition precedent and all. This language establishes what is known as a pay **<u>if</u>** paid clause.

For example, in *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, a Kentucky Supreme Court case, a subcontractor brought suit for non-payment by the general contractor for additional work it completed. The contract between the general contractor and subcontractor stated:

> No additional compensation shall be paid by the Contractor to the Subcontractor for any claim arising out of the performance of this Subcontract, unless the Contractor has collected corresponding additional compensation from the owner, or other party involved, or unless by written agreement from the Contractor to the Subcontractor prior to the execution of the Work performed under said claim, which agreement and work order must be signed by an officer of the Contractor.

The contract further stated in a section labeled "Time of Payment" that:

> Receipt of payment by the Contractor from the Owner for the Subcontract Work is a condition precedent to payment by the Contractor to the Subcontractor. The subcontractor hereby acknowledges that it relies on the credit of the Owner, not the Contractor for payment of Subcontract Work."

The court in *Superior Steel* found the above clauses unambiguous and held that the pay if paid language coupled with the express use of the term "condition precedent" "unequivocally allocate[ed] the risk of nonpayment by the Project owner to [the subcontractor] ..." The court was unpersuaded by the subcontractor's argument that pay if paid clauses are void as against public policy, reasoning that the right to contract is valued in Kentucky (as it is in all states), and if the court held pay if paid clauses void for public policy purposes, it would not only upset the respected right to contract but would be usurping the role of the legislature. Accordingly, because the general contractor had not been paid by the owner for the work, the court joined the majority of other jurisdictions holding that the general contractor was not liable to the subcontractor for the additional work completed.

It is important to be aware, however, that while the above is the majority position, there are states where pay if paid clauses are unenforceable. For example, the Supreme Court of California has deemed pay if paid clauses unenforceable as contrary to public policy. Similarly, South Carolina has statutorily deemed unenforceable any agreement conditioning a subcontractor's payment on an owner's payment to a prime contractor. S.C. Code Ann. § 29-6-230.

Therefore, the take-away for general contractors looking to minimize liability and decrease the risk associated with an owner's default is to consult with counsel about whether it makes sense to add a pay if paid clause to your subcontracts. If you are a subcontractor, lookout for language establishing payment from the owner as a condition precedent for payment and anything discussing shifting the risk of an owner's non-payment from the general contractor to you. Because if the language is clear and the owner goes bust, chances are you may be left holding the bag.

By: Kyle Doiron

Safety Moments for the Construction Industry

According to the Electrical Safety Foundation International, between 2003 and 2016 there were 2,652 fatalities in the United States due to contact with electricity. In that same time period, there were a total of 31,930 injuries that required days away from work due to electricity. The majority of such injuries occur in the construction industry. Thus, it is important to understand electrical safety and respect the dangers electricity poses. Eliminate electrical hazards in your work area to avoid an injury to yourself or another coworker, and always be aware of the presence of electrical hazards.

Bradley Arant Lawyer Activities

Our firm is extremely honored and grateful to our clients to have been recognized as the "**Law Firm of the Year**" in **Construction Law** for 2018 by the *U.S. News & World Report* in its "Best Law Firms" rankings. Bradley has held a National Tier 1 ranking in Construction Law every year since the rankings began and has also earned Tier 1 metropolitan rankings in Construction Law for its offices in Birmingham, Alabama; Houston, Texas; Jackson, Miss.; Nashville, Tenn.; and Washington, D.C. We are very proud of this honor and even prouder to have the opportunity to

advise our clients on projects near our offices, as well as throughout the country and around the world.

In U.S. News' 2018 "Best Law Firms" rankings, **Bradley's Construction and Procurement Practice Group** received a Tier One National ranking, the highest awarded, in Construction Law, and a Tier Two ranking in Construction Litigation. The Birmingham, Nashville, Jackson, and Washington, D.C. offices received similar recognition in the metropolitan rankings.

Chambers USA ranks lawyers in specific areas of law based on direct feedback received from clients. **Bill Purdy, Mabry Rogers** and **Ralph Germany** are ranked in *Litigation: Construction*. **Doug Patin, Bob Symon** and **Ian Faria** are ranked in *Construction*. The firm's Washington D.C. office is recognized as a "Leading Firm" for Construction Law.

Jim Archibald, Axel Bolvig, David Owen, David Pugh, Mabry Rogers, Walter Sears, Monica Wilson Dozier, Jim Collura, Ian Faria, Ralph Germany, Bill Purdy, David Taylor, Eric Frechtel, Douglas Patin, and Bob Symon are recognized by *Best Lawyers in America* in the area of Construction Law for 2018.

Jim Archibald, **Axel Bolvig**, **David Pugh** and **Mabry Rogers** were recognized by *Best Lawyers in America* for Litigation - Construction in 2018

Mabry Rogers, Doug Patin and **David Taylor** were also recognized by *Best Lawyers in America* for Arbitration for 2018. **David Taylor** was named 2018 Lawyer of the Year in the area of Mediation. **Keith Covington** and **John Hargrove** were recognized in the area of Litigation - Labor and Employment. **Frederic Smith** was recognized in the area of Corporate Law.

Jim Archibald, Bill Purdy, Mabry Rogers, Wally Sears, Bob Symon, Ian Faria, Doug Patin and **David Taylor** were named *Super Lawyers* in the area of Construction Litigation. **Aron Beezley** was named a *Super Lawyers* "Rising Star" in the area of Government Contracts. **Bryan Thomas, Daniel Murdock, Aman Kahlon, Amy Garber, Tom Lynch, Lisa Markman, and Jackson Hill** were listed as "Rising Stars" in Construction Litigation. Additionally, **Brian Rowlson** and **Monica Dozier** were named 2017 North Carolina *Super Lawyers* "Rising Stars" in Construction Litigation, and **Matt Lilly** was named a "Rising Star" in Civil Litigation: Defense.

In Texas, **Jon Paul Hoelscher**, **Ryan Kinder**, and **Justin Scott** were named 2017 Texas *Super Lawyers* "Rising Stars."

Jim Archibald, **Axel Bolvig**, **Jim Collura**, **Keith Covington**, **Arlan Lewis**, **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, Ian Faria, Mabry Rogers and **David Taylor** have been selected as Fellows of the Construction Lawyers Society of America (CLSA).

Aron Beezley was recently named by *Law360* as one of the top 168 attorneys under the age of 40 nationwide.

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.

Arlan Lewis was appointed to lead the Division Chairs Standing Committee of the American Bar Association Forum on Construction Law. This committee manages the operations of the Forum's 14 substantive divisions.

Chris Selman serves on the Board of the Young Professionals of the Alabama Chapter of the Associated Builders & Contractors. **Carly Miller** and **Aman Kahlon** are currently serving as Members of the Young Professionals of the Alabama Chapter of the Associated Builders & Contractors.

Arlan Lewis was selected to participate in the Associated Builders & Contractors of Alabama's 2017 *"Future Business Leaders: Advanced Organizational Leadership – The Masters Course."*

Daniel Murdock was selected to participate in the 2018 class of Future Leaders in Construction with the Alabama Chapter of the Associated Builders & Contractors.

Jim Archibald spoke on a panel with Shannon Briglia, Eileen Diepenbrock, and Leslie O'Neal at the American College of Construction Lawyers Annual Meeting at Dana Point, California, on February 23, 2018, about Emergency Procurements under Federal and State Procurement Laws. Jim is the Vice Chair of the Public Contracts Committee of the American College of Construction Lawyers. **Mabry Rogers** and **Wally Sears** also attended this Annual Meeting.

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

David Taylor was recently 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.

Kyle Doiron was recently admitted to the Associated General Contractors' Construction Leadership Program for the Middle Tennessee Branch.

Monica Wilson Dozier was recently selected to join the 2018 class of E4 Carolinas' Emerging Leaders Program, designed to guide participants in mastering personal energy industry leadership skills for future executive-level positions.

On March 21, 2018, **David Taylor** led a seminar on "Avoiding Construction Lawyers" at the Associated Builders & Contractors monthly luncheon in Knoxville, Tennessee.

On February 22, 2018, **Keith Covington** presented a seminar on "Employment Visa Options" in Huntsville, Alabama.

Eric Frechtel gave a presentation on February 6, 2018 on "Killer Contract Clauses" to the Service Bureau of the Mechanical Contractors Associated of Metro Washington.

In January 2018, **Lee-Ann Brown** published an article pertaining to the Civilian Board of Contract Appeals' award of a contractor's *quantum meruit* claim in the Division 13 of the ABA Forum on Construction Law Newsletter.

On November 30, 2017, **David Taylor** spoke at a meeting of the Construction Lawyers Society of America in New York on "Retainage."

On November 10, 2017, **David Taylor** was on a Panel at the Tennessee Association of Construction Counsel annual meeting discussing Advice for Young Construction Lawyers.

Bryan Thomas presented two sessions on the "Art of Negotiations" at the Total Solutions Plus Conference in Washington D.C. on November 6, 2017.

Carly Miller and **Bryan Thomas** presented a training session on October 24-25, 2017 in Santo Domingo, Dominican Republic to a client group on various issues regarding Engineering, Procurement, and Construction Contracts.

On October 12, 2017, **Jim Collura** spoke on "Hot Contracting Issues – What You Need to Know about Master Service Agreements and New Contracting Approaches in this Continued Low-Price Environment" at the 7th Annual Oilfield Services Law Conference for the Institute of Energy Law.

Michael Knapp was recently 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.

Doug Patin, Bill Purdy, Mabry Rogers, David Pugh, Bob Symon, and **Arlan Lewis** were recently listed in the *Who's Who Legal: Construction 2017* legal referral guide. **Mabry Rogers** has been listed in *Who's Who* for 21 consecutive years.

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