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Bradley Arant Boult Cummings LLP

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CONSTRUCTION AND PROCUREMENT LAW NEWS

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

The Modified Total Cost Method to Calculating Construction Damages

A Colorado federal court will allow a contractor to prove up more than $250 million in damages using the modified total cost method (see *AECOM Technical Services v. Flatiron AECOM, LLC*, Case No. 19-CV-2811, 2024 WL 22640 (D. Co. Jan. 2, 2024)). The *AECOM v. Flatiron* case involves a Colorado DOT project to add express lanes to Highway C-470 just south of Denver. The contractor, Flatiron, agreed to complete the project for $204 million. While change orders increased the contract price to $237 million, Flatiron's expenditures were over $502 million, more than double the contract amount. Flatiron sued the designer AECOM to recover $263 million in cost overruns. In support of its damage claim, Flatiron plans to present expert testimony that uses the modified total cost method to calculate damages.

As the name implies, the *modified* total cost method is a variant of the total cost method. Under the total cost method, a contractor's damages are assumed to be the difference between the total costs incurred by the contractor to complete a project and its bid amount. Many courts disfavor the total cost method because it assumes that all cost increases above the bid amount were caused by the defendant. The *modified* total cost method attempts to address this concern by subtracting such things as bid errors, unreasonable costs, and others costs that are not the defendant's responsibility from the damages indicated by the total cost method, as explained by a leading treatise on construction law:

> The modified total cost measure, a compromise between the total cost and segregated damage measures, deducts from the contractor's total cost any losses incurred on segregated work activities for which the contractor, not the owner, was responsible. The modification of the contractor's total cost claim thus enhances assurance that the necessary "safeguards" of the total cost measure are adhered to and that the contractor has taken into account its own failings in bidding or performing the contract. Use of the modified total cost measure, like the total cost measure itself, requires the contractor to prove that costs incurred in performing the original work and the extra work had become so co-mingled and "inextricably intertwined" that use of the segregated damage measure is impracticable. 6 Bruner & O'Connor Construction Law § 19:118 ("Modified total cost")

In *AECOM v. Flatiron*, AECOM moved to exclude testimony from Flatiron's damages expert because the expert allegedly used the total cost method, which AECOM argued is so disfavored by Colorado courts that it must be rejected entirely. The federal district court acknowledged that the total cost method is disfavored by Colorado courts and may someday be rejected, however it refused to exclude Flatiron's expert because it found that he did not in fact use the total cost method. Rather, he used the *modified* total cost method, which did not wholesale attribute damages to AECOM but factored in costs that were other parties' responsibility. The court further noted that the modified

total cost method had been accepted by several other courts and found that any challenges to the expert's methodology are best suited to cross-examination during trial. A jury trial is set to commence later this month.

By: John Mark Goodman

Subcontractors' COVID-19-Related Claims Survive Motion to Dismiss

In the Armed Services Board of Contract Appeals (ASBCA) appeal of *McCarthy HITT – Next NGA West JV*, ASBCA No. 63571, 2023 WL 9179193 (Dec. 20, 2023), a contractor brought suit for a collection of COVID-19-related claims on behalf of three of its subcontractors. The government moved to dismiss, arguing the subcontractors' appeal failed to state claims upon which relief could be granted. The Board denied the government's motion to dismiss, leaving open the door for pleading COVID-19-related claims. The key facts and takeaways from this noteworthy case are discussed below.

The Facts
In March 2019, McCarthy HITT – Next NGA West JV contracted with the U.S. Army Corps of Engineers (USACE) to design and build a new building housing the National Geospatial Intelligence Agency (NGA) in St. Louis, Missouri, and it subcontracted part of the work. Those subcontractors contemplated certain price ranges and availability for materials and normal, customary means and methods and workplace safety protocols in agreeing to perform their work.

COVID-19, the economic shockwaves it caused, and related government health and safety actions all caused substantial impacts to the job — higher priced or unavailable materials, delayed and impacted workflows through changed means and methods of construction, and onerous workplace safety protocols. Despite those impacts, USACE did not change its contractual expectations for the project. USACE did not timely grant the contractor a reasonable time extension or contract price adjustment.

McCarty-HITT filed certified claims on behalf of three of its subcontractors to address USACE's inadequate response. The claims alleged constructive changes, constructive suspensions of work, and breaches of the government's implied contractual duty of good faith and fair dealing. USACE denied the claims, relying in part on the Sovereign Acts Doctrine, which protects the government when it acts in a governmental capacity rather than a contractual capacity. McCarthy-HITT appealed to the ASBCA, and USACE moved to dismiss.

The ASBCA denied the government's motion to dismiss, holding that, as pleaded, the contractor sufficiently alleged constructive change, constructive suspension of work, and breach of the duty of good faith and fair dealing. Notably, the ASBCA rejected USACE's argument that the Sovereign Acts Doctrine barred all the subcontractors' claims at the pleading stage. The board noted that while there likely was merit to many of the government's arguments around its actions as a sovereign, the Board could not conclusively say USACE's arguments all were so meritorious as to bar the entire appeal without a more thorough factual examination.

The Takeaway
It is important to note the procedural posture of this decision. Because this was a motion to dismiss, the ASBCA did not conclusively rule on the merits of any of the subcontractors' COVID-19-related arguments. In fact, the Board even suggested it found some of the government's arguments persuasive, but the Board also indicated these arguments were better saved for later in the litigation process when the facts could be more developed.

That said, the ASBCA also demonstrated that it would not allow the government to use the Sovereign Acts defense as a trump card without delving into the facts of a particular matter. This is noteworthy because the claims raised by the subcontractors echo familiar complaints of many government contractors working during COVID-19: new safety procedures, contact tracing, testing and quarantine programs, additional PPE, air filtration systems, changes in crew sizes and makeups, and lack of cooperation around schedule changes and materials delays, to name a few. In allowing McCarthy-HITT's claims to survive dismissal, the ASBCA implicitly acknowledged that contractors may have the opportunity to litigate COVID-19-related impact claims where they adequately plead the circumstances that led to those delays.

By: Aron Beezley & Charlie Blanchard

Louisiana District Court Denies Motion to Compel Arbitration Pursuant to DIFC-LCIA

A U.S. federal district court refused to compel arbitration in a contractual dispute concerning the supply of materials, products, and services for an oil and gas project being performed by defendants in Saudi Arabia. The parties' agreement provided for arbitration under the now-defunct

Dubai International Financial Center London Court of International Arbitration Rules (DIFC- LCIA).

The DIFC-LCIA was an arbitration center located in Dubai that applied international rules for arbitration based on those used in the London Court of Arbitration. However, in 2021, the government of Dubai issued a decree abolishing the DIFC-LCIA and replacing it with the Dubai International Arbitration Center (DIAC).

The plaintiff argued that the contract's arbitration provision was unenforceable because the selected forum, the DIFC-LCIA, no longer existed. The crux of the defendants' argument was that the Dubai government's decree dissolving the DIFC-LCIA also "transferred the assets, rights and obligations" of the DIFC-LCIA to the DIAC and "expressly state[ed] that DIFC-LCIA arbitration agreements entered into before the effective date of [the decree] [we]re deemed valid[.]"

The district court, siding with the plaintiff, held that it "[could not] rewrite the agreement of the parties and order the [arbitration] proceeding to be held" in a forum to which the parties did not contractually agree. The court further held that whatever similarity the DIAC may have with the DIFC-LCIA, it is not the same forum in which the parties agreed to arbitrate and, therefore, the court could not compel the plaintiff to arbitrate.

The key takeaway is that despite the liberal federal policy favoring arbitration, arbitration is ultimately a matter of contract. Therefore, if the tribunal that was selected by the parties in the agreement is no longer in existence, courts may refuse to compel arbitration.

By: Petar Angelov & Jennifer Ersin

Court Sends Wind Farm Developer Spinning by Ordering Removal of Wind Turbines in Significant Mineral Rights Holding

Recently, in *United States v. Osage Wind, LLC*, the Northern District of Oklahoma awarded permanent injunctive relief in favor of the Osage Nation and the United States against wind turbine farm developers in the form of ejectment of the wind farm for continuing trespass. A trial to assess the amount of monetary damages due for trespass and conversion will follow.

The case arose from the development of a wind farm in Osage County, Oklahoma in a portion of the county designated as a reservation for the Osage Nation. In 2010, the developers of the project leased 8,400 acres of surface rights in Osage County to construct the wind farm. In 2011, the Osage Nation sued to block the construction of the wind farm but lost. Construction of the farm began in 2013. The district court described excavation and construction on the turbine foundations as follows:

> Defendants excavated holes to accommodate cement foundations measuring 10 feet by 60 feet for each tower. Smaller excavated rocks were crushed and used as backfill for the cement foundations. Larger rocks were positioned near the holes from which they were removed.

In 2014, the United States initiated the present lawsuit seeking declaratory judgment that the developers' excavation and construction activities constituted unauthorized mining of the mineral estate on the land where the project was constructed. Congress severed the surface estate from the mineral estate in 1906 with the surface estate allotted to members of the Osage Nation. The mineral estate was reserved for the benefit of the Osage Nation who was authorized to issue leases for all oil, gas, and other minerals. 25 C.F.R. Part 214 regulates the leasing of resources other than oil and gas and provides that no mining or work of any nature will be permitted upon any tract of land until a lease is granted.

In a related appeal, the 10th Circuit previously concluded that "altering the natural size and shape of rocks in order to use the rocks for structural purposes in the construction of wind turbines constituted mineral development and mining" under pertinent federal regulations, thus, requiring the issuance of a lease. However, the developers of the project failed to acquire a mining lease during or after construction. The district court took up the question of whether the wind farm developers' lack of a lease and continued presence of the wind farm on the land constituted a continuing trespass. The United States moved for summary judgment on its claims, and the district court found partially in its favor concluding that the developers violated federal law and "committed trespass, conversion, and continuing trespass."

To decide what relief to grant, the district court evaluated, in part, whether the trespass was temporary or continuing: "The relevant distinction between a temporary and continuing trespass is that the ongoing nature of a continuing trespass necessitates the need for equitable relief." In its motion, the United States asserted that the entire wind farm — not just the turbine foundations — constituted a continuing trespass and presented the court three separate theories of continuing trespass: (1) The

continued presence of the wind towers and ancillary structures constituted a continuing trespass, (2) the presence of the wind towers creates a mining setback and inhibits the development of the mineral estate within a certain radius around the structures, and (3) the support provided for each wind tower by the surrounding mineral estate and the backfill created from extracted rocks is a continuing trespass.

The court rejected each of these theories except for the last one, finding that the use of the backfill created from extracted rocks did constitute a continuing trespass. The court relied substantially on the 10th Circuit's earlier holding that the alteration of the excavated rocks and re-use of the crushed rocks to support the foundation constituted unauthorized mining. The court further noted that its broad interpretation of "mineral development" was supported by the "Indian canon of interpretation that requires the Court to liberally construe ambiguity in laws intended to benefit Indians in favor of Indians." In granting the harsh relief of ejectment of the wind farm, the court seemed particularly persuaded by the developers' continuing refusal to obtain a mineral rights lease even after the 2019 10th Circuit ruling that the developers' practices constituted unauthorized mining of the land. To protect the sovereignty of the Osage Nation, the court ordered the removal of the wind towers.

The harsh result in *Osage Wind* demonstrates the importance of understanding use restrictions on land early in development of any project. Renewable projects are often built on land that is subject to varying state and federal regulatory regimes or include protected habitats or wildlife. The significant scale of civil site development work like excavation, grading, and erosion control on renewable projects likely increases the risk of unauthorized use or damage to protected environments versus more typical construction projects. This decision also underscores the importance of community engagement and support on any renewable project. Absent the opposition of the Osage Nation to the project, the need for a mineral rights lease for the project may never have been litigated.

By: Bart Kempf & Tom Warburton

The Risk of Fighting on Two Fronts: Court Admits Evidence of General Contractor's Claims Against Other Parties

The court in *AECOM v. Flatiron* is back at it issuing additional evidentiary rulings as the parties head to trial later this month. These latest rulings highlight the risk of seeking the same damages from multiple parties, sometimes referred to as "fighting on two fronts." As you may recall, *AECOM v. Flatiron* involves claims by the general contractor, FlatIron, against the designer, AECOM, for cost overruns totaling $263 million on a Colorado DOT project. At trial, AECOM intends to introduce evidence that Flatiron sought to recover from other parties for at least some of those same cost overruns. This includes a "Special Request for Equitable Adjustment" that Flatiron submitted to CDOT, as well as claims made by Flatiron against various subcontractors. In connection with those other claims, Flatiron purportedly blamed parties other than AECOM for causing project delays and sought amounts that are inconsistent with Flatiron's damage claim against AECOM.

Flatiron moved to exclude evidence of these other claims on various grounds, including Rules 401 (relevance), 403 (unfair prejudice), 404 (character evidence), and 408 (settlement discussions). The court rejected each of those arguments, reasoning that such evidence is both relevant and persuasive. For example, with respect to the claims against other subcontractors, the court concluded that such evidence "is relevant to show that although Flatiron has alleged that AECOM is responsible for nearly all of the Project's cost overruns, Flatiron has also had disputes with several subcontractors who worked on the Project. AECOM's argument that Flatiron sued the other subcontractors for far more than the $1.5 million difference in overruns it otherwise wholly attributes to AECOM is persuasive [and] relevant to AECOM's defense that Flatiron has overreached in its causation and subsequent damages analysis." The court's decision highlights an issue that contractors often face when dealing with disputes from upstream and downstream parties on the same project. If you choose to fight on multiple fronts by pursuing claims against multiple parties, you run the risk that someone will argue and be allowed to introduce evidence of the related disputes, which may be inconsistent with or damaging to your position in the current litigation. This has obvious implications to a trial, whether to a judge, a jury, or arbitration panel. It also should serve as a reminder to a project participant that it should choose its targets carefully in project correspondence and should be careful in how it words a letter, whether a claim notice or a response to a routine job change order request.

By: John Mark Goodman & Mabry Rogers

Safety Moment for the Construction Industry

OSHA released its 2023 injury and illness data collected under the agency's new Improve Tracking of Workplace Injuries and Illnesses regulation published in July of 2023:

Establishment Specific Injury and Illness Data (Injury Tracking Application) | Occupational Safety and Health Administration (osha.gov). OSHA posits access to this new data will help identify unsafe conditions and workplace hazards leading to prevention of those conditions and reduced injuries and illnesses.

Bradley Lawyer Activities and News

Six Bradley Partners Named To 2023 Who's Who Legal: Construction

Bradley is pleased to announce that six of the firm's partners have been named to the 2023 edition of *Who's Who Legal (WWL): Construction* as among the world's leading construction lawyers.

Jim Archibald, Jon Paul Hoelscher, Doug Patin, Bill Purdy, Mabry Rogers and **Bob Symon** are all recognized in the 2023 edition as "Recommended," a designation for international leaders in their field. Mr. Hoelscher is also recognized in the "Future Leaders – Partners" category, which highlights practitioners aged 45 and under.

350 Bradley Attorneys Listed in 2024 *The Best Lawyers In America*® and *Best Lawyers: Ones To Watch In America*

Bradley is pleased to announce that 350 of the firm's attorneys are recognized in the 2024 *Best Lawyers* lists. The following individuals have been recognized by *Best Lawyers in America* in the area of Construction Law for 2024: **Jim Archibald (Lawyer of the Year), Ryan Beaver, Axel Bolvig, Jared Caplan, Debbie Cazan, Jim Collura, Ben Dachepalli, Monica Wilson Dozier, Ian Faria, Tim Ford, Eric Frechtel, Ralph Germany, John Mark Goodman, Jon Paul Hoelscher, Mike Koplan, David Owen, Doug Patin, David Pugh, Bill Purdy, Mabry Rogers, Wally Sears, Avery Simmons, Bob Symon, David Taylor,** and **Bryan Thomas.**

The following individuals have been recognized by *Best Lawyers in America* in the area of Litigation - Construction for 2024: **Jim Archibald, Ryan Beaver, Michael Bentley, Axel Bolvig, Debbie Cazan, Jim Collura, Ben Dachepalli, Hallman Eady, Ian Faria, Tim Ford, Jon Paul Hoelscher, Bailey King, Russell Morgan, David Owen, Doug Patin, David Pugh, Mabry Rogers,** and **Bob Symon**.

Andy Bell, Kyle Doiron, **Abba Harris**, **Anna-Bryce Hobson, Carly Miller, Sarah Osborne, Sabah Petrov, Mason Rollins** and **Chris Selman** have been recognized as *Best Lawyers: Ones to Watch* in the areas of Construction Law and Construction Litigation for 2024.

Lee-Ann Brown, Ron Espinal, and **Marc Nardone** have been recognized as *Best Lawyers: Ones to Watch* in the areas of Construction Law and **Matt Lilly** has been recognized as *Best Lawyers: Ones to Watch* in the area of Litigation – Construction.

Jim Collura, Jeff Davis, Ian Faria, Steve Fernelius, Jon Paul Hoelscher, and **Peter Scaff** have been named to the 2023 edition of *Texas Super Lawyers*.

Bradley is pleased to announce that associate **Anna-Bryce Hobson** has been selected to the 2023 list of *North Carolina Lawyers Weekly* "Icons and Phenoms of Law." The "Icons and Phenoms of Law" awards celebrate the achievements and contributions of the region's most accomplished and promising legal professionals. The Phenoms category is dedicated to rising stars who have already established themselves as standouts in their first 10 years of practice, demonstrating their promise as future leaders through their ambition and accomplishments, as well as their dedication to the practice of law.

Charley Sharman was recently appointed as the in-coming co-chair of the Houston Bar Association Historical Committee.

On May 22, 2024, **Kevin Mattingly** will be presenting "Recent Updates in Construction Law – Cases and Legislation" for the Maryland State Bar Association's Construction Law Section.

David Taylor and **Kyle Doiron** will be presenting on "Owner Disputes with their Contractors" at the 22nd Annual Commercial Real Estate Seminar at the Nashville School of Law on May 8, 2024.

On April 11-13, 2024, **Tim Ford, John Mark Goodman, Mason Rollins,** and **Alex Thrasher** attended the ABA Forum on Construction Law's meeting on "The Art & Science of Construction Litigation" in New Orleans, LA.

David Taylor's article "The Top Ten Worst Mistakes Lawyers Make in Commercial Mediations" was published by the American Bar Association in its *Tort Trial and Insurance Practice Sections Winter 2024 Newsletter*.

Dan Lawrence presented at the Tennessee Association of Construct Counsel's Spring Meeting on April 5, 2024 on the "AAA Construction Industry Arbitration Rules and Mediation Procedures."

Carly Miller attended the Associated General Contractors of American Annual Conference on March 20-22, 2024 in San Diego, CA.

Charley Sharman co-authored an article titled "J. Vance Lewis House Serves as a symbol of Progress, Culture, History, and Hope" in the March issue of *The Houston Lawyer*.

On February 3, 2024, **Charley Sharman** moderated a panel for the Houston Bar Association and Society of Professional Journalist's 36th Annual Law & The Media Seminar.

On December 5, 2023, **Monica Dozier** moderated the "Emerging Opportunities in MISO South" panel at the Southeast Renewable Energy Summit in Charlotte, NC.

Jim Archibald and **Carly Miller** presented at the Construction Super Conference on December 1, 2023 in Hollywood, FL on the topic "Gaining the Upper Hand in Proposal-Related Disputes between Designers and Contractors in Design-Build Contracts."

On November 3, 2023, **Carly Miller** and **Aman Kahlon** presented at the annual meeting of the Construction Lawyers Society of America in Palmetto Bluff, SC on the topic "Trends in Renewable Energy: Industry Developments and Our Observations from Recent Renewable Energy Disputes."

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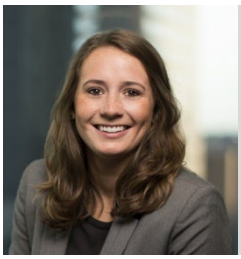

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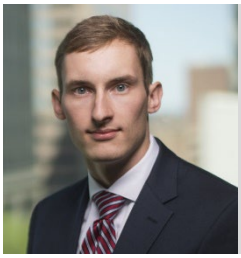

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