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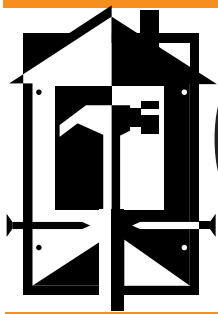
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### ***SB800 AND THE IMPORTANCE OF SELECTING AN ARBITRATOR WITH CONSTRUCTION EXPERTISE***

**By Calvin R. Stead**

Members of the construction industry, perhaps because construction annually generates more litigation than any other segment of industry, have long recognized the usefulness of alternative dispute resolution (ADR) for its efficiency, speed and cost-effectiveness in managing conflict and settling disputes. With the new SB800 arbitration provisions being added to more and more construction contracts, arbitrations have become more important than ever to builders and developers, and to the courts. Notwithstanding the recent case in San Diego where the court found that SB800 ADR did not apply to a subsequent purchaser, selecting the right arbitrator(s) is the key to an optimized outcome.

In addition to the often touted benefits of reduced costs and delays, one particular advantage of ADR that is often overlooked is the ability of parties to select an arbitrator who has extensive expertise in the construction industry.

In court, one cannot "shop around" to find the most qualified judge to hear a case. Yet in arbitration, the parties have the final say on the selection of the "judge and jury" and should take full advantage of this opportunity. Furthermore, the arbitration process allows parties to select arbitrators with specific expertise, thereby avoiding the necessity of educating the judge and/or jury on a complex matter in a highly technical trade. This helps streamline the process so that a better

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Calvin R. Stead is a partner in the Bakersfield office of Borton Petrini LLP. Cal's areas of legal expertise include construction defects, realtor errors and omissions, commercial and environmental litigation, land use planning, oil field litigation and toxic tort litigation. Cal has represented builders, developers and sub-contractors on a wide variety of construction issues, including grading, soils, foundation, asphalt, concrete, flat work, tile, framing, floor coverings, roofing, masonry and stucco. Within the area of toxic torts, he has handled a vast array of cases, including toxic molds, vaccine reactions, asbestosis, cancer phobia, chemically induced asthma, pesticide and herbicide contamination, EMF, and AIDS contamination and phobia claims.

## ***WATCH OUT FOR SELF-SERVING APPEAL BOARDS IN FEDERAL CONTRACTS***

**By Calvin R. Stead**

Recent rulings regarding interpretation of the typical quality control provisions found in a federal contract could have some expensive consequences for builders who are not diligent in clarifying contract details.

Take, for example, the contract involving the construction of a \$120 million hospital project for the USAF and the Department of Veterans Affairs. The contract was awarded and administered by the Corps of Engineers. The quality control specifications required the builder to name an individual within its organization who was responsible for the overall management of the contractor's quality control program. That person was to be on site at all times. The specification used by the government also expressly required that the quality control manager had to be employed by the contractor.

The quality control staffing specifications also required that a registered mechanical engineer and a registered electrical engineer be on site on a full-time basis from the date that the respective discipline's submittals were available for review until the respective discipline's work was completed. However, unlike the specification applicable to the quality control manager, there was no express requirement that either the mechanical or electrical engineer be employed by the "contractor." After performance began, the contractor introduced one of the mechanical subcontractor's employees as its mechanical engineer representative on the quality control staff.

The government's contracting officer required that both the mechanical engineer and the electrical engineer be employees of the contractor, not of its subcontractors. Following an exchange of letters, which addressed the contractor's opinion that the government's interpretation was a change to the contract, the contracting officer agreed that the contract did not specifically require the mechanical and electrical quality control personnel to be directly employed by the prime contractor. Consequently, he also agreed that the requirement that the electrical and mechanical quality control staff be employed by the

contractor and not its subcontractors was a change to the contract requirements.

The parties could not agree that any compensation was actually due for this "change." Ultimately, the government issued a unilateral modification which altered the quality control specification to expressly require that both engineers be "employed directly by the contractor." In an appeal, the contractor sought in excess of \$750,000 on behalf of itself and the two affected subcontractors due to this requirement, however, the claim was denied.

The government appeal board rejected the argument that the statement of agreement by a government contracting officer that the directives to the contractor that it employ the mechanical and electrical engineers were changes. The appeal board simply ignored the principle that some weight should be afforded to the parties' mutual or pre-dispute interpretation. The board stated that what the contract officer admitted was "inconsequential" and that the board found no value in the "admissions" regarding how it should interpret the contract.

The appeal board gave no weight to the unilateral modification finding that a unilateral modification by the contracting officer does not bind the government on appeal. Similarly, the board gave no evidentiary weight to the opinion of the contract officer.

The appeal board then addressed the merits of the contractor's interpretation of the alleged change, finding that the requirement that either the mechanical or electrical engineers be employees of the prime contractor was not a material change. The contract required the contractor to ensure that the work of the subcontractors complied with the contract documents. Allowing the subcontractors to "police themselves" when the contract placed that responsibility on the contractor frustrated the purpose of requiring the contractor to establish an effective quality control staff. Actually the contractor has to "police itself," but this was not addressed by the appeal board. The appeal board offered no explanation for requiring that the quality control manager be employed by the contractor.

***“. . .builders cannot anticipate that the traditional principles of contract interpretation will be followed if an “over-riding” purpose for a particular requirement exists.”***

## **Conclusion**

In federal contracts, unilateral modifications may have little value or weight upon appeal to a federal board or to the Court of Federal Claims. This is a change from the customary expectation that the government will not ignore unilateral modifications.

As a result of this apparent new policy, builders cannot anticipate that the traditional principles of contract interpretation will be followed if an “overriding” purpose for a particular requirement exists. In the government’s view, the common law interpretation of the changed contract produced “a weird and whimsical result” and it has been rejected on that basis. Of course, this is, in itself, an abomination of contract law.

If you are about to bid or submit a proposal on a federal government contract, carefully review the quality control staffing specifications in the proposed contract documents to verify who has the obligation to employ quality control inspectors. We might suggest, in those circumstances, where the terms are vague, as in the example described above, your subcontractors could be required to employ an independent inspector that answers to the prime contractor. This could pass along the cost and avoid the “bias” concerns. Certainly, your bid should include the extra costs if indicated.

The same principle described above regarding quality control is routinely applied to field overhead disputes, as well.



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### ***SB800 AND THE IMPORTANCE OF SELECTING AN ARBITRATOR WITH CONSTRUCTION EXPERTISE***

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decision can be reached sooner, because the arbitrator will be able to efficiently assist the parties in narrowing the issues to quickly get to the heart of the matter at dispute.

Realizing that at least minor disputes may be inevitable on a large, complex project, parties should, whenever possible, place the preferred arbitrator qualifications in the ADR provision contained in the contract. In addition to specifying the type of professional you would like, parties may also specify someone with specific job experience (e.g., an attorney who primarily represents builders and developers).

Selecting the right arbitrator largely depends on the facts of the case. If one’s case were based on a legal issue, one would be well advised to select a lawyer that has experience with construction contracts. On the other hand, if one’s case rests on whether the architect’s design was defective, a lawyer with experience in representing (or suing) architects may be more appropriate. Often, cases are complex and have issues where both an attorney and an industry professional would provide better results to the parties. Of course, your contract should permit this flexibility

In addition, a party can specify the geographical area where the arbitrator will come from. For example, if the project in dispute is highly publicized and politically charged, parties may want an arbitrator from a completely different part of the state. Normally, you want someone who is “local” and is familiar with the jurisdiction the project is in and understands local variations in industry standards.

The parties can also specify fee ranges, so they can control the cost of the process. Arbitrator fees are determined by the individual arbitrator; but are often based on going industry rates, experience and geographical territory.

In court, the parties do not pay the judge. Some builders feel that payment of fees is a disadvantage of arbitration, however, you are paying to have a specialist to be available to fit your schedule. When in court, the parties have to work around a judge’s overloaded docket when scheduling hearings, trials, etc. In contrast, in an arbitration proceeding, the parties can determine when and where they would like to hold hearings and select from a list of arbitrators available at those times and places. This is especially beneficial when a dispute arises that affects an ongoing project.

Selecting the right arbitrator is a very important stage in any arbitration – especially one involving a construction dispute – and it is a task that should not be overlooked or taken lightly. Spending the time with your lawyer to determine what you need in an arbitrator, and in drafting appropriate contract provisions is worth the time and effort to get the most out of the process – and it is the best way to ensure the desired result.



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