

CONSTRUCTION CLAIMS MONTHLY

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of construction contracting.*

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SPELL OUT THE SCOPE OF YOUR INTENT TO ARBITRATE

A U.S. circuit court recently highlighted a common contract error: ambiguous and conflicting arbitration agreement language. Even a seemingly straightforward, blanket statement that “any dispute be settled by arbitration” can be undercut by other provisions in the agreement.

Choice-of-law clause introduces ambiguity

In *Bechtel Do Brasil Construções LTDA. v. UEG Araucária LTDA*, 2011 U.S. App. Lexis 5840 (2nd Cir. March 22, 2011), the court considered the timeliness of the project owner’s arbitration request (on a contract breach and negligence claim) filed six years after project completion. The parties could not agree on what law governed the statute of limitations on the owner’s claim. The contract provisions on the topic were in conflict. On the one hand, a blanket statement provided that “any dispute, controversy, or claim arising out of or relating to the Contract, or the breach, termination or validity thereof ... shall be finally settled by arbitration.” But another provision stated that “the validity, effect, and interpretation of this agreement to arbitrate shall be governed by the laws of the State of New York.”

So, the blanket arbitration provision required that *any* disagreement—including disputes about whether a relevant statute of limitations barred arbitration—be decided by arbitration. And the second provision contradicted that. Because under New York law a party can assert a statute of limitations in court as a bar to arbitration, the second provision suggested a court could decide timeliness issues.

Exception doesn’t negate blanket statement

The defendant contractor in *Bechtel* argued that the tension between the clauses could be resolved by looking at the exception clause in the first provision. That provision stated that any dispute should be decided by arbitration in accor-

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dance with the rules of the International Chamber of Commerce (ICC), “except as these rules may be modified herein.” The contractor interpreted the choice-of-law clause naming New York state law as such a modification. The court disagreed. A close reading of the provisions didn’t support a conclusion that the second provision modified “the parties’ fundamental and broad commitment to arbitrate any dispute relating to their agreement.” Instead, the

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CONTRACTOR RETAINS RIGHT TO FULL PAY EVEN IF IT WAIVES RIGHT TO PROGRESS PAYMENTS

Payment - Miller Act

U.S. f/u/b/o Roach Concrete, Inc. v. Veteran Pacific, JV, 2011 U.S. Dist. Lexis 38229 (D. Wis. April 7, 2011)

A one-year statute of limitations on payment claims did not thwart a subcontractor's attempts to recover an outstanding balance for its concrete work.

Prime contractor Veteran Pacific, JV (Veteran Pacific) hired Roach Concrete, Inc. (Roach) to perform concrete work on a U.S. Army Corps of Engineers construction project in Menasha, Wisconsin. Roach sued Veteran Pacific for contract breach, claiming nonpayment of \$586,000, and sought recovery under the contractor's Miller Act payment bond. Veteran Pacific argued that a one-year statute of limitations in both the subcontract and the Miller Act barred the sub's suit. A Wisconsin district court disagreed.

The subcontract gave Roach one year "after the cause of action has accrued" to file a claim. Roach filed suit on September 22, 2010. Veteran Pacific contended the suit was barred because the cause of action accrued two years earlier, on September 23, 2008, when the sub submitted an Affidavit of Claim to Veteran Pacific's surety for \$586,000. Veteran Pacific reasoned that because Roach sought the same exact amount (\$586,000) in the Affidavit as it did in the present lawsuit, the sub must have believed it was owed that amount as a result of a breach on or before the date of the Affidavit (September 23, 2008). On the other hand, Roach contended that the contract breach claim was timely since it didn't accrue until September 27, 2009 when Roach completed the project work.

Statute of limitations hangs on 'accrual' of cause of action

In Wisconsin, a cause of action accrues when "there exists a claim capable of present enforcement." *Lajsic v. Perkins*, 109 Wis. 2d 688, 688, 325 N.W.2d 738, 738 (Wis. Ct. App. 1982). The court first rejected the notion that Roach's Affidavit was evidence that Roach's breach claim accrued on September 23, 2008. Importantly, at that time, the project was still ongoing and Roach continued to furnish labor and materials. The court explained that a breach occurs when a party fails to perform a contractual promise. "Generally, there can be no breach of a promise until all the conditions qualifying it have happened or been performed." *Williston on Contracts* § 63:6 (4th ed.).

Indeed, the Veteran Pacific-Roach subcontract contained conditions. It called for periodic payments as the

work was completed, but Roach's right to receive monthly payments was subject to a retainage and conditioned on approval by Veteran Pacific, the project architect/engineer, or the project owner. The payments were also conditioned upon Roach furnishing the proper waivers of lien, affidavits and sworn statements. There was no allegation that the work Roach had performed by the September 23, 2008 Affidavit date had been approved, nor was there any allegation that Roach had provided the documents required as a condition of payment. Therefore, the court was unable to determine whether Roach's breach claim was readily enforceable when the sub filed its Affidavit in 2008. Thus Veteran Pacific was not entitled to dismissal.

The court also explained that even if the one-year statute of limitations barred Roach's claim for one of the periodic payments to which it was entitled, Roach could still sue for breach of Veteran Pacific's more general promise to pay the full amount promised: \$1.325 million. Nothing in the subcontract suggested that a failure by Roach to apply for/receive periodic payment barred it from seeking payment in full. A contractor doesn't lose its right to recover for its work by waiving its right to receive periodic payments. See *Hubble v. Lone Star Contracting Corp.*, 883 S.W.2d 379, 381-82 (Tex. App. 1994).

Miller Act statute of limitations hangs on job completion

Veteran Pacific also tried to bar Roach's recovery by pointing out that a Miller Act claim must be brought within one year from the last day that the claimant furnished material or labor. 40 U.S.C. § 3133(b)(4).

Roach alleged that it "completed the furnishing of ... concrete materials and labor" on September 27, 2009. Again, Veteran Pacific reasoned that because Roach claimed the same amount (\$586,000) in 2008 and in 2009, Roach must not have performed any work or provided any materials between those two dates. The court refused to draw the factual inferences necessary to swallow this argument and could not conclude that Roach's Miller Act claim was barred by the Act's one-year statute of limitations.

Miller Act trumps contract provision

Finally, the court also addressed the surety's assumption that liability between a surety and its principal is always defined and limited by the principal's contractual liability. That's not automatically the case in Miller Act claims, it stated. See *U.S. f/u/b/o Walton Technology, Inc. v. Weststar*, 290 F.3d 1199, 1206 (9th Cir. 2002). The rights conferred by the Act are federal, not state, law. So, "[w]here subcontract terms [affect] the timing of recovery or the right of recovery under the Miller Act, enforcement of such terms to

preclude Miller Act liability contradict the express terms of the Miller Act.” *Id.* 290 F.3d at 1207. In other words, even if Veteran Pacific could have properly relied on the subcontract’s one-year statute of limitations as a defensive shield from Roach’s breach claim, the surety could not use that same shield against potential Miller Act liability.

Editor’s Note: The amounts in dispute here were based solely on unpaid pay requisitions. By its analysis, the court may have created problems with defining when a cause of action “accrues” under Wisconsin law. Specifically, the court ruled, on a motion to dismiss, that there were no allegations in the complaint that conditions precedent to the monthly pay requisitions had been satisfied, including the submittal of partial lien releases and the obtaining of architect approvals. Does the ruling hold that, had these conditions been made, the accrual of a cause of action occurs each month a requisition is not paid? A more straightforward approach, followed by other courts, is that a payment dispute can be resolved at any time while the contract is being performed. Accordingly, any limitation of action time period would begin to run only at substantial completion of the project as a whole. ❖

SUB RELIED ON CONTRACTOR PROMISES, STATUTORY TIME PERIOD RAN OUT

Delay Damages

Cleveland Construction, Inc. v. Ellis-Don Construction, Inc., 2011 N.C. App. Lexis 641 (April 5, 2011)

A general contractor led an unpaid sub to believe payment would be forthcoming from the owner. While the sub was waiting, the statute of limitations on claims against the contractor expired—but a court stepped in to allow the sub to pursue recovery.

Ellis-Don Construction, Inc. (EDCI) was the prime contractor on a University of North Carolina Hospitals (UNCH) project to construct two hospitals in Chapel Hill, North Carolina. After a lengthy and contentious project, EDCI found itself in dispute with its subcontractor, Cleveland Construction, Inc. (Cleveland), which had filed claims of extra/changed work, delay/disruption and inefficiency.

EDCI argued against an earlier ruling that concluded Cleveland had timely filed suit within the three-year statute of limitations provided by N.C. Gen. Stat. § 1-52(1) (2009). Cleveland countered that EDCI should be equitably estopped from hiding behind the statute of limitations defense. The court agreed and overruled EDCI’s argument. The contractor was not entitled to this defense since it acknowledged that through its own settlement

agreements with the project’s designers, it “received ... settlement monies” on Cleveland’s claims (which it did not pass on to Cleveland). (See *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 325, 663 S.E.2d 1, 4 (2008) where an attorney was “equitably estopped from asserting the statute of limitations for conversion” where [the] attorney used clients’ funds for personal expenses without clients’ consent and could “not unjustly benefit from the [clients]’ delayed discovery” of the conversion.)

Moreover, EDCI was the reason Cleveland had delayed its filing. EDCI had invited Cleveland to submit a claim to be passed through (along with other subs’ claims) to UNCH for settlement. After EDCI submitted Cleveland’s claim, it urged the sub not to file suit against EDCI in order to present a “united front” and avoid jeopardizing the success of recovery from UNCH. Cleveland reasonably believed that EDCI would pass through to Cleveland any proceeds attributable to its claim. Thus, the sub was “lulled into a false sense of security.” See *Turning Point Indus.*, 183 N.C. App. at 125, 643 S.E.2d at 668 and *Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987).

Right to recovery doesn’t confer right to double recovery

EDCI also argued that an earlier ruling incorrectly applied the theory of “concurrent delay” and deprived EDCI from collecting damages from Cleveland based on the delays the sub caused concurrent with those caused by UNCH and the project designers. Cleveland’s work relating to fire-rated walls and vapor barrier installation delayed the project by 12.5 weeks. EDCI asserted that it would have recovered from UNCH/designers *but for* Cleveland’s defective construction of the fire-rated walls, which delayed the project during the same time.

The principle of “concurrent delay” bars the parties contributing to the delay from recovering damages from one another. Because EDCI was not responsible for the delay, its delay claim against Cleveland was not barred. However, Cleveland pointed out, and EDCI acknowledged, that EDCI had recovered in its settlements with the designers some amounts attributable to its delay claim. EDCI failed to provide any evidence as to how much it recovered from the designers, and without such evidence, the court found it impossible to determine how much money, if any, EDCI was entitled to recoup from Cleveland without obtaining a double recovery. See *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 455, 481 S.E.2d 349, 357 (1997).

The court refused to buy into EDCI’s argument that Cleveland was fully liable for EDCI’s delay damages even though it was only partially responsible for the delay.

“EDCI mischaracterizes its injury as being the ‘concurrency’ of the delay rather than as the net effect of the delay itself,” the court stated.

Editor’s Note: This decision should not induce reliance for future strategies on the timing for submission of claims and the filing of an action in court. It is not uncommon for a sub to await a decision on a claim while statutory time periods are lapsing, such as the filing date for a mechanic’s lien or a Miller Act suit on a bond. A normal procedure is to have the sub obtain a written extension of the time limitation from the general contractor and its surety.

Here, Cleveland made a separate mistake. It signed partial releases during the job, apparently without reading them. Documents labeled “partial releases of lien” often contain language, as here, that purports to release any potential or actual claims, as well as liens, and those signed documents are enforceable as a waiver. ❖

SUB AGREED TO PERFORM \$8M WORK WITHOUT PAY, BUT ITS SURETY DIDN’T

Contract Modification

Federal Insurance Co. v. Turner Construction Co., 2011 U.S. Dist. Lexis 33353 (S.D.N.Y. March 29, 2011)

A surety wasn’t liable under the performance bond it supplied since a subcontract modification undertaken without its knowledge significantly expanded the surety’s risk in insuring that subcontract.

Federal Insurance Company (Federal) issued payment and performance bonds for Pile Foundation Construction Company, Inc.’s (Pile) work to provide marine structures for a New York City Cruise Terminal project. Construction manager Turner Construction Company (Turner) eventually terminated Pile for default, hired a replacement subcontractor to complete the work, and then sought recovery of those completion costs from Federal under the performance bond. Federal refused to pay, contending that Turner wrongfully terminated Pile and that a memorandum of understanding (MOU) the project parties issued in August 2007 constituted a material alteration of the subcontract.

That MOU essentially required Pile to perform \$8 million of work—completion of work on Pier 88—with no guarantee of payment. Federal argued that this contract modification made Pile’s eventual default (for failure to timely complete deck and pile work on Pier 88) inevitable. Federal further reasoned it wasn’t liable on the performance bond because it was unaware of the MOU prior to its execution and had no opportunity to object to it before execution.

Thus, the court had to determine whether the August 2007 MOU fundamentally changed the bonded Turner-Pile subcontract such that Federal was released under the performance bond. The MOU required that Pile work without payment unless or until the New York City Economic Development Corporation (EDC), which acted as the project owner, registered the subcontract with and received approval from the City Comptroller. (This registry is a payment condition for projects funded by the City of New York.) EDC should have registered the subcontract at the start of the project, but it did not because it was able to pay Pile out of \$25 million in blanket registration funds. When EDC considered belatedly registering the subcontract to facilitate payment going forward, it uncovered a problem.

The City requires vendors to submit a sworn vendor information questionnaire (VENDEX), which the City uses to select “responsible” vendors. During the project, Pile’s VENDEX form expired and it submitted an updated one. EDC discovered that the updated form contained an inaccuracy—it claimed Pile had not been investigated by any government agency in the past five years, when, in fact, its principal, had been subpoenaed in connection with an investigation into corrupt practices in the marine supply industry. EDC felt it could not register a subcontract entered into with a potentially irresponsible vendor and therefore couldn’t secure funds to pay Pile. Instead, it insisted Pile continue to work on the project. The parties then executed the MOU, which stated that registry of the subcontract with the Comptroller was contingent on Pile resolving any issues considered to be an impediment to registration.

New, third-party requirement is a fundamental change

In court, EDC argued that because the subcontract obliged Pile to clear its VENDEX status, the MOU’s requirements did not make it a contract modification. But the court distinguished between the two key tasks of VENDEX submission and contract registration by the Comptroller. Though filing an accurate VENDEX form was a precursor to EDC’s submission of the subcontract for registration, nothing in the subcontract required EDC to submit the subcontract. In fact, at the time EDC approved the subcontract, it didn’t inform Turner, Pile or Federal about the necessity of Comptroller registration. Neither the contract terms nor the any other communication led Turner, Pile or Federal to contemplate Comptroller registration as a precondition to payment under the subcontract. Thus, by adding the Comptroller registration condition, the MOU added a new contractual provision.

Importantly, the MOU gave a third party to the subcontract (EDC), “unfettered discretion” to decide whether to

register the subcontract, while requiring Pile to continue work without pay. Even if Pile cleared up the VENDEX issues, Turner would have no obligation to pay Pile unless EDC decided to register the subcontract and the Comptroller accepted it. The court reasoned that the MOU actually “incentivizes EDC not to submit the contract for registration because Pile would nonetheless be obligated to complete the job for free.” The court concluded that the MOU fundamentally changed the nature of Pile’s obligation under the subcontract from that which Federal undertook to insure in the performance bond. Therefore, the MOU was a material modification and Federal was not liable.

Editor’s Note: Although the facts are somewhat convoluted, at the heart of the decision was a contingent change order. Contingencies are hardly new to construction contracts. In this case, the difference was that payment to the sub was fully contingent on actions of a third party. There are instances where payment is contingent on merely satisfying administrative procedures (architect approval, submission of lien waivers, etc.). In other cases, the contingent payment may hinge on events such as an early completion (a bonus) or meeting an accelerated completion date.

Looking at this case from a general view of contingent change orders, it does not appear that the court adequately explained why “as a matter of law [the contingent payment] constituted a material modification of the Turner/Pile subcontract” to the extent that the bonding company would have no liability. ❖

CONDITIONS DON’T BAR RECOVERY FOR PRE-TERMINATION COMPLETED WORK

Payment - Contract Termination

U.S., et al v. Alacran Contracting, LLC, et al, 2011 U.S. Dist. Lexis 32110 (N.D. Ohio March 25, 2011)

A contractor sought summary judgment on its claim that it didn’t have to pay a subcontractor who failed to comply with several payment conditions. But those conditions failed to support the contractor’s creative arguments.

A payment dispute regarding plumbing work arose during a U.S. government remodeling project at the Bachelor Officer’s Quarters at Fort McCoy, Wisconsin. General contractor Alacran Contracting, LLC (Alacran) hired subcontractor Weatherproofing Technologies, Inc. (Weatherproofing), and Weatherproofing in turn executed two subcontracts with Alliance Mechanical, Inc. (Alliance) for \$150,000’s worth of plumbing work (the total cost increased by \$250,000 after several change orders). Weatherproofing never paid Alliance under the

two subcontracts, and the subcontracts were eventually terminated. In court, Weatherproofing advanced four arguments as to why it was not obligated to pay Alliance and was entitled to summary judgment. None worked.

Payment conditions apply only during contract pendency

First, Weatherproofing claimed Alliance failed to comply with Article 15 of the subcontract, which stated that furnishing affidavits/lien waivers was “a condition to payment.” However, Article 15 only governed payment during the pendency of the contract. So Alliance’s noncompliance with Article 15 might excuse Weatherproofing’s nonpayment, but it didn’t bar Alliance from recovering for the work allegedly performed prior to subcontract termination, the court explained. Instead, the court relied on Article 20 of the subcontract, which provided a formula for calculating payment in the event of termination prior to completion. There, the subcontract held that Alliance was entitled to payment for “Work properly completed and stored” as of the date of termination notification.

Contract change didn’t negate subcontractual duty

Second, Weatherproofing claimed Alliance’s entitlement to payment was expressly contingent and conditioned on Weatherproofing receiving payment from the project owner for the sub’s work. The court called this argument disingenuous.

Weatherproofing wasn’t paid for the plumbing work because a month after the Alliance subcontracts were terminated, Weatherproofing specifically requested that its contract with Alacran be changed to remove the plumbing work. “Weatherproofing may not escape its contractual duty to provide payment for the plumbing work by unilaterally changing the terms of its own contract with Alacran,” and removing its entitlement to payment, the court ruled.

Weatherproofing also claimed that Alliance failed to properly notify Weatherproofing of its payment claims on the subcontract or change orders and thus waived any claims related to them. The record was unclear whether Alliance complied here. But Alliance did submit evidence that payroll certificates and change orders were submitted to Weatherproofing and Alacran prior to termination. Thus, the court found there was evidence that Alliance had made some timely claim for payment and recommended the matter be resolved by a jury.

No payment if you can’t prove you performed

Finally, Weatherproofing sought summary judgment based on the fact that Alliance failed to prove it provided the services and materials on the project. What might have

been a straightforward payment dispute was convoluted by the existence of another subcontractor, Sunlee Development, LLC (Sunlee). Sunlee and Alliance were “somewhat interrelated” and involved in a “cooperative agreement” to perform on the project, according to Ryan Cole, former manager of Sunlee and subsequent representative of Alliance. Cole made conflicting statements about which company completed the plumbing work, although he ended up by claiming that Alliance purchased all of the materials used and performed all the plumbing work. The court concluded that there was sufficient evidence to create an issue of material fact as to who actually completed the plumbing work and was entitled to payment, and thus prescribed jury resolution.

Editor’s Note: A typical method for calculating periodic payments is the use of a schedule of values. Whatever dollar value is placed on each line item, payment will be made on a percent complete of each. Contractors can manipulate this schedule of values so that earlier completion items are unbalanced in dollar amount, thereby giving the contractor a better cash flow. Termination clauses, on the other hand, typically provide for payment of work in place (and sometimes for stored materials). The calculation method is more like a time and materials (T & M) contract and is not made in reference to the schedule of values. Depending on when in construction the termination occurs, there can be a price differential between the schedule of values and a T & M evaluation. The termination clause bypassed the payment clause of the contract. It is likely that termination would also bypass a pay-if-paid clause. ❖

**DECISIONS OF
THE BOARDS OF CONTRACT APPEAL
& THE COMPTROLLER GENERAL**

GOVT. MUST GRANT OPPORTUNITY TO MEET SPECS BEFORE BUTTING IN

Specifications

Singleton Enterprises-GMT Mechanical v. Dept. of Veterans Affairs, 2011 CIVBCA Lexis 81 (March 17, 2011)

A contractor won an appeal in the amount of \$56,000 after the government interfered with and changed the contractor’s method of performance.

Singleton Enterprises-GMT Mechanical (Singleton) was the prime contractor on a Department of Veterans Affairs (VA) project to replace a polyisobutylene (PIB) roof at the VA Medical Center in Wade Park, Ohio. The contract required Singleton to attach layers of insulation to the new PIB roofing membrane but left it up to the contractor to

choose what adhesive material to use. Singleton chose to use asphalt and included that in its bid. During the project, the VA rejected Singleton’s request to use asphalt and later issued a “design bulletin” requiring Singleton to use a specific manufacturer’s adhesive product instead. Singleton sought \$56,000 for the change to a more expensive product. The VA rejected the claim as overstated and alleged that the contractor knew at bid time that adhesive was required but did not seek proper clarification. Singleton appealed to the Civilian Board of Contract Appeals.

The contract section on roof/deck insulation specified that asphalt could be used to adhere the insulation (asphalt was the only material mentioned; the section detailed the type/grade of asphalt to be used). But another section describing PIB roofing replacement stated that the new insulation should be attached by adhesives manufactured by Republic Powdered Metals, Inc. (RPM). The Board found no patent ambiguity in the contract given that it described two performance methods. Rather, it reasoned that the roofing specs permitted two means of performance and in no way negated Singleton’s right to set its insulation in asphalt.

Specs’ words speak louder than govt. intentions

The hitch here was that the contract also required Singleton to provide a 20-year manufacturer warranty on the installed PIB roof. But RPM, the roofing manufacturer, wouldn’t issue a warranty unless adhesive (not asphalt) was used to secure the insulation. It didn’t appear that the VA knew when it was preparing the specs that RPM would impose such a condition on its warranty. Still, the record did show that RPM had already supplied several roofs at the facility and that the VA was familiar with and wanted an RPM roof. Indeed, the VA testified that it wrote the roofing specs specifically around RPM’s PIB adhesive product. The Board reasoned that it was highly likely RPM’s roofing product was the only one the VA would have accepted for the project and that the VA did not want nor would ever have allowed asphalt to be used. And yet the VA included—nay, highlighted—asphalt in the specs as an acceptable means of attaching insulation.

Govt. should have let contractor solve the problem

When Singleton learned of the problem warranting a roof adhered with asphalt, it notified the VA. When the VA finally responded, it was to declare Singleton could not use asphalt and must instead use a specific RPM adhesive product. This was a mistake, according to the Board.

The VA could have discussed possible solutions with Singleton or simply directed the contractor to resolve the issue. In other words, the government was obligated to

give its contractor a chance to meet the contract specs. Instead, it issued its design bulletin and “took matters out of [Singleton’s] hands.” Even after Singleton voiced its disagreement with the directive, the VA refused to change its position. Thus, in denying the contractor an opportunity to control its performance and seek its own way to contract compliance, the VA’s action constituted a change.

Contractors may seek best path to contract compliance

Key to the Board’s decision here was the fact that there were other options open to Singleton—it could have found a way out of its quandary.

The VA claimed that Singleton had a duty to seek clarification on the roofing specs since it received a clue to the asphalt problem pre-bid. Indeed, a potential roofing subcontractor’s bid contained a note that read: “Asphalt is specified as the insulation adhesive but is not compatible with warranty requirements.” This statement, however, introduced a possible conflict with only one potential supplier: RPM. The government testimony showed that there were likely other manufacturers who could have provided a conforming PIB roof and warranty, even with the choice of asphalt as adhesive.

Even though Singleton’s bid contemplated using an RPM roof, a contractor is permitted to change a bid intention if it learns that, due to an error or changed condition, it needs to move to an alternate means of performance that can satisfy the contract. The bottom line is that a contractor has “the right to proceed as it finds best, even where that varies from how it bid,” the Board explained.

Editor’s Note: The problem the contractor had was with a 20-year warranty. Although there was questionable testimony about the possibility that a 20-year warranty could have been obtained, that specification requirement was not satisfied by Singleton in its shop drawing submittal which then was properly rejected. The error on the part of the VA was in dictating to Singleton the method for resolving Singleton’s quandary. If, in fact, there was only one supplier capable of meeting the specifications, Singleton may have had a “superior knowledge” claim. ❖

ASSUMPTION BASED ON ELECTRICAL STANDARDS PULLS THE PLUG ON BID

Denied: Evaluation

Matter of: Andritz Hydro Corp., 2011 U.S. Comp. Gen. B-404642 Lexis 62 (March 21, 2011)

Once again, here’s a reminder that seeking clarification is your best bet to a successful bid, since what you

might consider a safe assumption based on common industry practice can still come back to bite you.

Andritz Hydro Copr. (Andritz) protested the evaluation of its bid for a U.S. Army Corps of Engineers (Corps) project at the Fort Randall Dam Power Plant in South Dakota. According to the Corps, Andritz received a marginal rating on its experience/personnel/scheduling factor due to lack of experienced personnel and a risky proposed schedule for replacement of excitation units.

First, Andritz challenged the conclusion that its employees’ experience was limited. Andritz contended that its installation supervisor and commissioning engineer had years of general electrical experience that the Corps should have found relevant. However, the record showed that the bid provided only general assertions of past electrical work and didn’t specifically implicate the more specialized exciter system installation and commission work required by the project. The Corps had found that Andritz’s installation supervisor had experience with only two relevant exciter installation projects and the engineer with only one. Thus, the Corps reasonably determined that the bid didn’t justify a higher rating on this point.

The Corps also properly found a serious weakness with Andritz’s proposed schedule to replace old analog excitation units with new digital ones. Andritz planned to allow a new digital unit to interface with an old unit for four months before the old unit was also replaced. Importantly, Andritz’s bid didn’t address any issues of potential system instability from reactive power sharing between two incompatible units over the four-month period between replacement installations.

Andritz explained that the two different units could work together without reactive power sharing problems because the old units were Institute of Electrical and Electronic Engineers (IEEE) 421.5 compliant. The Corps’ report, however, stated that the old units were not in fact IEEE compliant. Andritz had assumed they were because compliance with IEEE standards is generally recommended by the electrical engineering industry.

Andritz argued that its assumption was reasonable given this standard practice and the fact that the project solicitation improperly failed to specify that the old unit were not IEEE compliant. However, the solicitation advised that IEEE-recommended standards were applicable where specifically referenced, and no IEEE reference was made as to the old analog units. Further, the solicitation required bidders to inquire about the condition of equipment to be replaced before making assumptions that could affect performance. ❖

continued from cover page

court found that the exception could be fairly read as permitting modification of the ICC rules only insofar as they govern the actual arbitration. Ultimately, the court concluded that the contract was ambiguous as to whether a court could decide timeliness disputes, and such ambiguities must be resolved in favor of arbitration.

'Elastic' wording supports intent to arbitrate all

The arbitration agreement at issue in *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996) also contained a choice-of-law clause under which the plaintiffs sought to avoid a blanket arbitration statement. That blanket statement provided that "any and all controversies which may arise ... concerning, transaction, dispute or the construction, performance, or breach of this or any other agreement ... shall be determined by arbitration." The court charged itself with finding "clear and unmistakable evidence from the arbitration agreement ... that the parties intended that the question of arbitrability shall be decided by an arbitrator." It did find several provisions that pointed to intent to arbitrate *all* issues. For instance, the wording of the general arbitration clause was "inclusive, categorical, unconditional and unlimited" and used the "elastic" words "any" and "all." Thus, the court found that the contract as a whole provided evidence that the parties intended that their dispute be decided by arbitration.

Conditions precedent don't create arbitration ambiguity

In *Progressive Pipeline Management, LLC V. N. Abbonizio Contractors, Inc.*, et al, 2011 U.S. Dist. Lexis 38513 (D. Pa. April 7, 2011), a subcontractor argued that the subcontract's arbitration clause, which relied on provisions in the prime contract, did not demonstrate a mutual agreement to arbitrate. The arbitration clause stated that if the prime contract provided for arbitration—and it did—then all claims arising out of the subcontract would, at the contractor's "sole election," also be decided by arbitration. The subcontract first argued that the agreement wasn't "clear and unmistakable" because it provided that arbitration might or might not apply, depending on the prime contract. Second, it argued that the "sole election" clause introduced an ambiguity since that language meant that arbitration only applied if the contractor said so. The court found these arguments unconvincing. Looked at properly, the subcontract contained two conditions precedent to subjecting disputes to arbitration: (1) the presence of an arbitration agreement in the prime contract and (2) the contractor's election to arbitrate. Neither condition created an ambiguity. And the fact that the subcontract claimed it never received a copy of the prime contract was a non-issue. A party can't avoid its contractual obligations

because it didn't read or understand the contract terms—or seek out documents relevant to its obligations. (There was no evidence that the sub requested a copy of the prime contract or that the contractor prevented the sub from obtaining one.) The subcontract unambiguously identified the prime contract, which provided that all disputes "shall be decided by mutual agreement to arbitration." Thus, the parties' payment dispute was subject to arbitration.

Editor's Note: Since the passage of the Federal Arbitration Act (FAA) in 1925, the courts have regularly involved themselves with what should be the exclusive jurisdiction of arbitrators. There are literally hundreds of cases in which the courts have decided, improperly, that certain types of questions were not arbitrable, or that conditions precedent to arbitration had not been met. Section 3 of the FAA is written in mandatory terms: Where there is an issue referable to arbitration "the court . . . shall . . . stay the trial of the action." This language is a broad net, capturing the entire case if any issue in the case must be arbitrated. The cases reported above support the simple approach designed into the FAA, particularly where a broad arbitration clause is used ("all claims arising out of or concerning the contract or the breach thereof"). The conclusion to be drawn is that the "issues" referred to in the FAA, which are not framed in the procedural language of "causes of action," include torts (negligence, fraud) and demands for punitive damages and attorney fees, and these issues are also solely for the arbitrator. ♦

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