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New Year Message

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Onward and Upward!

[Brian Perlberg](#)

Senior Council for Construction Law and Contracts

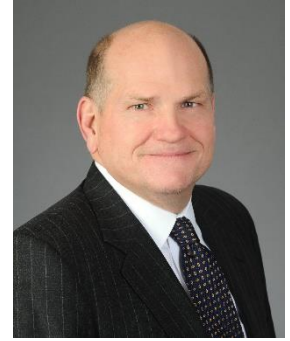
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The Government Can Require a Contractor to Make Snowmen in August, But Cannot Get Credit for Unperformed Work

[Neal J. Sweeney, Esq.](#), Partner, [Jones Walker LLP](#)

Despite noting that the Corps “can engage a contractor to make snowmen in August, if it spells it out,” the Armed Services Board of Contracts Appeals ruled that the Corps of Engineers waived its right to a \$40,000 credit for specified work the contractor failed to perform. The board found that the Corps’ failure to object to the contractor’s plan that eliminated the work, and failure to make the credit a condition of the Corps’ acquiescence waived the Corps’ right to strict enforcement. In this case, it was the Corps’ claim not the contractor’s claim that suffered due to lack of proper project documentation. (American West Construction LLC, ASBCA No. 61094 (December 19, 2017).



The board, after quoting several principles of strict enforcement of government contracts, was fairly lenient on the contractor. In that regard, the case illustrates the adage that “the five most important things in any construction dispute are the law, the facts, the facts, the facts and the facts.” The legal principles of strict enforcement yielded to the specific facts of the parties’ interaction during performance. Those facts prevailed for the contractor.

The case involved a contract to design and build bridges over irrigation canals in Texas. Although it was design-build, the specified scope unquestionably included two temporary bridges that had to be installed during construction and then disassembled and removed when the permanent work was complete. The costs of the temporary bridges was part of the contract price, and the contractor’s original schedule included the temporary bridges.

The board recognized that, if a contractor fails to perform work required by the contract, the contracting officer has the right to deduct from the contract payment the cost that the contractor would have incurred if it had complied with the contract. The board also observed that “it has long been held that the Corps ‘can engage a contractor to make snowmen in August,’ if [it spells] it out clearly.” But then the board turned its focus to the timeline of the contractor’s plan to eliminate the temporary bridges and the contractor’s interactions with the Corps. Based on that timeline, the board concluded that the Corps waived its rights to a credit.

Early in the project, the contractor determined it would be “quicker, safer, and more efficient” to access the construction site via a levee owned by a local water district and eliminate the use of the specified temporary bridges.

The contractor’s September 2015 construction site/traffic plan implicitly made the Corps aware of the contractor’s plan to eliminate the temporary bridges as it showed access using the levee and did not show any temporary bridges. However, the contractor never explicitly requested approval to eliminate the bridges. The Corps responded to the plan by noting the need for permits and the water district’s approval to use the levee, but made no objection to the lack of temporary bridges. The permits and approval were secured.

The contracting officer testified that in October 2015 he told the contractor the Corps did not object to the plan as long as it was “equitable to the government,” meaning the cost would be about the same. The contracting officer testified that he brought up the issue of the credit again in December 2015. The contractor also testified and he denied any recollection of these discussions about a credit. It was a swearing contest between the two witnesses.

Despite their directly conflicting testimony, the board found that both the contracting officer and contractor “testified truthfully regarding their recollections.” The board then looked to the project documentation to reconcile the conflicting testimony, and found no reference in meeting notes and daily reports to the earlier discussions alleged by the contracting officer. “We reconcile the disparity in testimony by consideration of the daily reports, which did not reflect the discussions” The board concluded that if the contracting officer did raise the

credit issue at the time, it was done in such an offhand manner that it did not register with the contractor or with the Corps' representative, who was taking notes.

Later in December 2015, the contractor submitted a pay request that still referenced "Install Temporary Crossings," and showed the work was complete. The pay application was paid by the Corps. In January 2016, the Corps' representative responsible for the payment said the payment was a mistake, but did not immediately seek repayment from the contractor. While someone might argue that such a pay request was false or otherwise misleading, the board completely dismissed any such possibility stating:

We do not believe the progress payment request was meant to be misleading since the Corps plainly knew that the bridges were not built. The most reasonable understanding of the submission is that the 'bridges' task was being seen as being subsumed by obtaining of the easement [to use the levee] for the same purpose, [site access.]

The board found that the contractor "not only believed that it had the government's consent, but also relied upon the government's acquiescence to the levee plan." Consequently, for the board, the contract requirement for the temporary bridges was "dead." To the board, the conclusion was clear – the Corps waived any credit:

[A]lthough the government was entitled to strict compliance with [the] specifications, including the installation and removal of temporary bridges, it lost its entitlement to any credit under the Changes clause by waiving its right to such work prior to insisting on such compensation.

Further underscoring the importance of how the outcome of disputes can flip if "the facts, the facts, the facts and the facts" are tweaked just a bit, the board warned: "The outcome of this appeal may well have been different if the Corps clearly and explicitly conditioned its waiver of the contractual requirements at an earlier date, but that circumstance is not for us."

This case is an illustration of how, despite the need to "turn square corners" when doing business with the government, the boards of contractor appeals are often contractor-claim friendly, compared to the treatment contractors may experience in state and federal courts with disputes against state and local governments. The case also underscores the importance of contemporaneous written documentation – documentation as an aid to avoid misunderstanding as well as compelling evidence in a legal proceeding. In this case it was the lack of documentation that cost the Corps its claim, but the entire misunderstanding and dispute may have been avoided if the contractor had better documented its understanding that the elimination of the temporary bridges would not require a credit.

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Protecting Contractors Subject to Chief Engineer Decision Clauses



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Most contractors have encountered a prime contract provision with a governmental agency or public authority owner where the contract states that all claims for extra costs, delay damages or the like must be presented to the owner's Chief Engineer for a decision, and that the Chief Engineer's decision shall be

conclusive, final and binding on the parties. This is a much different animal than a clause that merely requires presentation of all claims to the Chief Engineer as a prerequisite to filing a lawsuit. Under the first type of clause, the Chief Engineer becomes the sole judge and jury for the claim, and his or her decision can only be modified or reversed by the courts if the decision was based on fraud, bad faith or mistake about a fact over which no rational person could possibly disagree (such as a mathematical calculation). The right to appeal from a Chief Engineer's decision under one of these clauses is therefore very limited.

The authors have encountered circumstances when contractors have felt that being bound by such a "Chief Engineer decision" clause is not a bad thing. The Chief Engineer for a particular agency or authority may have a well-earned reputation for dealing with contractors and their claims in an open-minded, fair and neutral manner. Other contractors are skeptical about the chances of getting a fair decision from a person who is the head of the very same organization that is being "sued" for a large amount of money, especially when the claim may involve criticism of project personnel who interact with the Chief Engineer at the office every day. This article will briefly explore key points to keep in mind for the contractor who may have doubts about having its claim decided by the Chief Engineer in the unwelcome event that a claim has to be made.

The first point to keep in mind is that the enforceability of Chief Engineer decision clauses varies from state to state. The courts of some states hold that these clauses are enforceable, and that their judges should not interfere with dispute resolution clauses that are voluntarily signed.¹ The courts of other states disfavor these clauses as contracts of adhesion, and prohibit them on the assumption that the relationship between a Chief Engineer and his or her agency is just "too close" to ensure an impartial decision on a claim against the agency.²

Sometimes, Chief Engineer decision clauses will appear in contracts with bi-state agencies that are, by nature, congressional "compacts" between the governments of two states. It is quite possible that the courts of one of those states would enforce such clauses, while the courts of the other state would prohibit them. In such a situation, the contractor's attorney should evaluate which state's law should govern the contract, an evaluation that takes into account factors such as the location of the project, where the contract was signed, and where the important witnesses are likely to live.

Assuming that the Chief Engineer decision clause in a given contract is enforceable in the state whose law controls the contract, and that the Chief Engineer will therefore have the final, binding and conclusive say over how a claim gets decided, the contractor and its attorney should be proactive in suggesting — or demanding — that appropriate procedures are in

¹ See, e.g., *Laquila Constr., Inc. v. New York City Transit Auth.*, 282 A.D.2d 331, 331 (N.Y. App. Div. 2001) (holding that a dispute resolution provision making the Chief Engineer the decision maker was enforceable).

² See, e.g., *Gauntt Constr. Co. v. Del. River & Bay Auth.*, 575 A.2d 13 (N.J. App. Div. 1990) ("Relationship between Director and DRBA . . . is obviously too close to assure the dispassionate and impartial resolution of disputes" between the DRBA and its contractors).

place to ensure as fair a hearing as possible. Counsel should work cooperatively with the “claim officer” or other agency representative responsible for the administration of the hearings to ensure that there will be a right to inspect the agency’s project records and possibly take the depositions of key witnesses as a means of discovery before the hearings start. The hearings themselves should give the contractor a full and fair opportunity to cross-examine the owner’s witnesses and present rebuttal testimony after the owner has presented its defenses. Counsel should also request that the claim officer implement appropriate procedures to ensure that the Chief Engineer does not have any “off the record” communications about the claim with the agency employees or consultants involved in defending it.

Ultimately, and as the U.S. Supreme Court made clear in a case decided a half century ago, the hearing procedures must be “conducted in such a way as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal.”³ Hearing procedures that do not meet this minimum standard of fairness and due process may expose the Chief Engineer’s decision to reversal by a reviewing court, even in states where Chief Engineer decision clauses are enforceable. Most agency claim officers are keenly aware of these standards and understand that it would be in the best interests of all parties to have a hearing process that incorporates procedural safeguards like those discussed above. Counsel for the contractor should proactively work with the claims officer to ensure such a process is formally established in writing before any hearings begin.

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Key Considerations for Developing Compliance Programs that Work

[Karla Pascarella](#), Partner, [Peckar & Abramson](#)

Compliance programs are a necessity across most industries due to the current, increasingly complex regulatory environment. The construction industry is no exception.

Any construction company that wants to conduct its business in compliance with the host of laws and regulations that apply to the industry and business in general (Federal and state prevailing wage laws, false claims with both civil and criminal implications, occupational safety and health laws (OSHA), environmental regulations, building codes, set aside programs) and thus avoid costly mistakes and damage to its reputation, has little choice but to put a compliance program into place. Any



³ *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963).

construction company that does not recognize the value of this approach must consider that the costs of non-compliant conduct can reach levels that, in some instances, may result in dire consequences. Those costs can include the loss of business opportunities, the inability to work for government entities, civil lawsuits, and perhaps individual criminal prosecution. Companies whose names appear in the media for the wrong reasons, or those that do not appear to do business in an honest and compliant way, pay a high price for their failure to avoid non-compliance. Further, contractors who hope to compete for contracts with any federal agency *must* have a compliance program that satisfies the rigorous and specific requirements of the Federal Acquisition Regulation (FAR), among others.

The reasons for developing and implementing a program may stem from two different but not unrelated approaches. The first relates to a company's decision to define itself as a responsible corporate citizen that is rooted in the leadership's belief that that is the appropriate way to conduct business. The other is self-protective and relates to a company's understanding and realization that it benefits if its employees are aware of the risk of non-compliance and committed to avoiding the consequences of that risk.

Companies that actively train their employees to comply with specific policies; obtain those employees' written acknowledgment that they have read and understood the policies; and record their attendance at training sessions can have an advantage when an employee uses bad judgment and causes the company to undergo regulatory scrutiny or criminal investigation. Such a compliance program may enable the company to persuade a regulator or prosecutor (or in some cases, even a judge) that the company should not be penalized for the improper action of a properly trained rogue employee who committed a non-compliant act despite the extensive efforts of the company to ensure none of its employees did so. The protection of the company is directly linked to the protection of all its employees.

A culture of compliance

Compliance programs that are championed by management, professionally executed, and regularly updated provide a high level of protection from legal risk to a company and its employees. Through clarity of policy, company education, and active involvement in key regulatory issues, companies can save money and time, and protect their reputation. When each member of the company knows and understands the applicable rules, there is a significantly greater likelihood that the company will act in a compliant manner.

A culture of compliance is one that unconditionally recognizes that compliance is as much a part of the business of the company as is any other routine aspect of its operations. Without both, the company will not survive in a competitive and highly regulated construction market. Executive management must ensure that all levels of the company's management "buy in" to the program and take ownership of it, along with the employees. That means pushing down the expectation of a culture of compliance to everyone from the top level of the company to the bottom. Any disparagement of the policy among management will be quickly detected by the employees and the program will almost certainly be doomed to failure.

Any genuine compliance program and policy must be properly tailored to the individual company and the business it conducts. So called "off the shelf" programs are rarely effective and are quickly seen by employees for what they are—a haphazard and insincere solution that solely addresses appearances and has little to do with the actual business of the construction company. Such programs will not be taken seriously by the employees.

An effective compliance program should begin with a risk assessment by the company, working with competent counsel, to determine potential legal risk based upon the company's line of business. A risk assessment is best performed by interviewing management at all levels to gain a complete understanding of the company's business and where its business intersects with compliance issues.

Following the assessment, the company should adopt a written compliance policy that summarizes the company's compliance goals. In broad terms, the policy should meet the following criteria:

- 1) Clearly state that meeting the expectations in the compliance policy is an obligation of every employee at every level.
- 2) Be concisely written in plain English, without excessive legalese.
- 3) Set forth succinct policy rules and cross-reference other policy rules as necessary.
- 4) Include the expectation that business will be done honestly, carefully, transparently, and in full compliance with all applicable laws and regulations.
- 5) Specifically state that all employees are representatives of the company and expected to act accordingly and to be compliant.

Additionally, the policy should require maintenance of honest records; accurate recording and allocation of costs; transparency in dealing with clients and potential clients; definitions of a conflict of interest and an expectation of undivided loyalty to the company by all employees; special care on any publicly funded project with detailed guidance, as necessary; precise rules on the giving and receiving of gifts and other things of value to or from all categories of persons; policies on dealing with public officials and public employees including public clients, their representatives, and law enforcement; a detailed description of who employees should approach with compliance questions; and a requirement that any and all misconduct, violation of law, or violation of the compliance policy by anyone in the company or anyone doing business with the company be reported to the company immediately.

Of course, specific additional policies and guidance will be necessary, depending upon the needs and business of the company.

Managers and employees must also understand *why* a compliance program is necessary. Simply imposing a set of rules is not an effective way to encourage support for a policy and is less likely to result in a company that accepts a genuine culture of

compliance. The reasons for the program and the underlying culture of compliance should be explained in a training program specifically designed for the company.

Training programs should be carefully thought out. The training materials should be closely related to the compliance concerns applicable to the company and address actual risks facing the company and the employees. At the outset, training should be provided in person by competent trainers in the presence of respected members of management, who in turn show their support with their attendance and participation, as appropriate.

Once training is completed, the sessions should be well documented, and all employees should be required to "sign off" on the compliance policy in writing or electronically, stating that they understand and agree to follow the policy and that they understand there is zero tolerance for violations, emphasizing accountability.

Addressing compliance questions

Once a compliance program is in effect, employees must be encouraged to ask questions. There should be a designated venue for employees to seek guidance or advice when they have a compliance question. The answers can be supplied by a well-trained compliance officer or an attorney, who should always be the one answering legal questions.

The process may be as simple as walking into the designated person's office and having a conversation or by phone or by email. Regardless, it must be easy to get a timely answer; the question and answer should be documented so it is clear the inquiry was addressed; and there should be no recriminations for asking a question. All questions should be taken seriously and answered appropriately, without exception. It is critical that the company encourage all employees to feel comfortable asking all questions so employees may be less likely to make mistakes that could prove costly to the company.

Questions that are asked *before* action that might constitute a violation is taken must be encouraged. Delivery of clear, concise, and prompt responses from those responsible for compliance is equally important.

An employee who asks, "May I take this government employee out for dinner this week?" and receives an answer three weeks later saying, "No, you may not" will not be in a position to avoid violating policies, perhaps violating the law, and will be unable to undo the harm. The lack of prompt responses will inevitably result in little respect for the value of the compliance program.

Discipline and corrective actions

Once the compliance program is in place, there must be a system by which employees of the company will be held accountable for compliance policy violations and where prompt corrective action will be taken. In addition, this prompt corrective action must apply to all employees at all levels.

Disciplinary action may involve retraining, an oral or written reprimand, or, at worst, termination of employment for serious violations. Disciplinary action should be

imposed by a respected, higher level manager so as to convey a strong message that the company takes violations seriously and will hold everyone accountable. The lack of credible discipline could haunt the company someday, in the event of a violation that becomes the subject of a regulatory investigation or criminal prosecution. One of the first questions posed about the efficacy of the company's compliance program is "And what did you do to the employees who violated your policy?" Lack of discipline among lower-tier employees gains little respect from regulators and prosecutors.

Finally, while management is wise to listen to concerns from employees about the compliance program and perhaps make changes based upon reasonable concerns, comments that elements of the policy "don't make sense" or "are completely unrealistic" should never be tolerated. It should be made clear that this is the company's policy and it must be followed – like it or not. Similarly, complaints about compliance at "water cooler meetings" should be strongly discouraged.

When compliance programs do not work

A P&A partner and former public prosecutor observed many occasions when compliance programs ultimately failed and offers the following circumstances to look out for:

The most obvious policy failures were those in which the compliance program was itself a fraud as in the cases of boiler room "pump and dump" operations designed to separate unsophisticated, would-be investors from their money by unlawful manipulation of penny stocks and thinly capitalized companies. Those compliance programs were merely a front to fool regulators. Proof that the compliance program was a fraud was used to persuade a jury of the guilt of the company and its employees.

Cases in which employees do not perceive management's strong support for a company's compliance programs are similarly problematic. For example, managers will often sympathize with their employees' complaints that the program is a nuisance and makes it more difficult to do business. However, these kinds of complaints should be rejected immediately and firmly.

Managers should explain to employees that the compliance program is an important part of doing business and is no less important than the other parts of the company's overall approach to running a successful business. Additionally, managers should explain that the compliance program will also save the company money in the form of reduced legal fees for dealing with compliance violations.

Compliance programs also fail when the executive managers responsible for implementation and enforcement of the rules fail to recognize the perception among employees that compliance rules are counterintuitive, unfair, and inappropriately limit an employee's freedom to apply their own set of personal "ethical standards" to situations.

In the construction industry some companies have recognized that employees who accept meals, gifts, and other items of value create legal risk for themselves and the company. For example, if a mistaken or fraudulent change order proposed by a subcontractor is recommended by the construction manager (CM) or general

contractor (GC) to the owner, the owner will be very suspicious of the motivations for the CM/GC's recommendation if the owner learns that the subcontractor has given things of value to the employees of the CM/GC. When the compliance policy says that employees cannot accept such things, it naturally creates some resentment at the concept that otherwise ethical employees would allow themselves to be "bought off" with a meal. Accordingly, there should be a detailed explanation of the legal risks to both the company *and the employees* when such gifts are accepted. This explanation should be provided anytime there is a chance that employees perceive that something is being taken away by a compliance rule.

Some companies also denigrate the effectiveness of their compliance programs by treating compliance training as a chore and appointing lower-level employees to conduct the training. Ideally, the trainers should be people well-respected within the company who know and understand the company's business. When time, money, or resources are a concern, such that a senior person cannot perform the training, a respected manager should attend the training session as a participant and lead by example.

Perhaps one of the most important factors that cause a compliance program to fail is the lack of consequences and accountability for employees who violate the compliance policy. Failure to exercise prompt corrective action in response to a compliance violation will send an implicit message to its employees that the program and the policy are mere window dressing, and they will not be held accountable for violations, thus ensuring the policy's failure.

The failure to maintain a zero-tolerance policy for compliance violations, combined with a failure to have *documented* reasonable disciplinary action for those violations, also guarantees that the program will be of little use as a defensive mechanism and will be viewed by regulators, prosecutors, and judges as being in bad faith.

Disciplinary action must be *fairly* imposed upon *all* employees, management and non-management, for violations of the compliance policy. Enforcement of the compliance policy upon the lower-level employees without holding *all* employees (including managers) at all levels accountable for their compliance violations will breed cynicism, and a regulator or prosecutor will spot such unfairness immediately. That unfairness will be held against the company, especially if the person whose actions are in question is a manager who has a track record of not following the rules and not being held accountable. In such situations, regulators, prosecutors, and judges will view the compliance program as ineffective.

Final thoughts

Compliance programs, by necessity, have to consider that every employee has a unique set of values that may allow innocent enough actions that still constitute a violation of regulations and law, placing the company at legal risk. A genuine culture of compliance recognizes the employees' prior life experience and the existence of personal ethical codes, and emphasizes that the company's compliance rules, and not individual standards of ethics, must guide employee actions in conducting the business of the company.

Compliance programs are far more likely to be effective if the basic approaches suggested here are adopted by a company that is serious about its compliance program and creating a culture of compliance.

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Arbitrate or Litigate? The Four C's May Help You Choose

[Parker A. Lewton](#), Associate, [Smith, Currie & Hancock, LLP](#)

Given a choice, which is the better way to resolve a construction dispute: arbitration or litigation? For many years, arbitration was the default choice of owners and contractors. During the last fifteen to twenty years, however, arbitration has begun to fall out of favor. The ConsensusDocs standard-form

contracts first published during 2007 encourage informal negotiations and mediation, but have always required their users to make a choice between arbitration and litigation as the final means of dispute resolution. How are owners and contractors to choose between arbitration and litigation at the outset of a project? Four key factors to consider are cost, competency/complexity, and conclusiveness—the four C's.

Cost—Arbitration can save money with cooperation or proper planning.

Arbitration is based on a contractual agreement to resolve disputes outside the public court system. Because arbitration is consensual, the parties have more ability to control cost than may be available in either state or federal court. But this requires cooperation. Frequently, by the time a dispute arises, the parties are less inclined to cooperate. While virtually all construction arbitration agreements are enforceable under the Federal Arbitration Act, this does not prevent a party from seeking to avoid arbitration by filing a preemptive lawsuit or by seeking to enjoin a demand for arbitration. A party resisting arbitration is entitled to raise contractual defenses such as fraud, duress, or unconscionability to demonstrate that no such agreement was made. If an agreement is found to exist, there may still be debate over its scope. An ambiguous agreement may be subject to judicial interpretation, which could require an evidentiary hearing. Following any order compelling or denying arbitration, federal courts and certain states will provide for an appeal as of right. If one party is truly obstinate, an agreement to arbitrate in lieu of litigation can result in months or years of just that: costly litigation.

If both parties, or the party controlling the choice, want to select arbitration to reduce and control cost, there are a number of things that can be done at the time of contracting before a dispute arises. First, select the arbitration option in one of the ConsensusDocs standard-form contracts. This should eliminate, or significantly reduce, arguments about whether there is a binding agreement to arbitrate. Beyond that, consider limiting or eliminating motion practice and discovery other than exchange of documents, features of litigation that have crept more and more into the arbitration process. Even if such limitations are not included in an arbitration

clause, the parties to an arbitration always have the ability to reduce cost by agreement to forego costly procedure.

Competency/Complexity—Arbitration may work better for complex cases requiring construction expertise.

The competency of the fact-finder is of particular import. Juries and even judges may lack the requisite expertise to adjudicate a complex construction dispute whereas a panel of lawyers, engineers, and/or consultants selected as arbitrators is likely to possess a much higher level of expertise. In the words of Chief Justice Warren Burger, “to find precisely the judge whose talents and experience fit a particular case of great complexity is a fortuitous circumstance. This can be made more likely if two intelligent litigants agree to pick their own private triers of the issues.” Burger, Chief Justice of the U.S. Supreme Court, Remarks Before the American Arbitration Association and the Minnesota State Bar Association: Using Arbitration to Achieve Justice (August 21, 1985), in 40 Arb. J. 3, 6 (1985).

While contract law is not particularly complex, construction disputes on large projects can be factually complex. Resolution of such complex disputes can require knowledge of disciplines ranging from architecture and material sciences to construction management and mechanical engineering. Arbitration allows the parties to select a panel of peers who understand these inherent complexities. As one federal judge observed:

Being trained in this field, you are in a far better position to adjust your differences than those untrained in these related fields. As an illustration, I, who have no training whatsoever in engineering, had to determine whether or not the emergency generator system proposed to be furnished . . . met the specifications, when experts couldn't agree. This is a strange bit of logic. . . . [The parties] should realize that, in most situations, they are by their particular training better able to accomplish this among themselves.

E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 387 F. Supp. 1001, 1006 (S.D. Ala. 1974). Since arbitration is a consensual process, the parties can even specify in advance the types of arbitrators who will be eligible to serve in the event of a dispute.

Conversely, arbitration may not be the best choice for simpler projects. The American Arbitration Association and other private administrative bodies charge case administration fees that are significantly higher than the filing fee for a court case. On top of that, arbitrators, unlike judges and juries, must be paid by the parties. If complexity/competency is not a major consideration, then the choice of arbitration versus litigation may default back to cost. The courts can be cheaper for a relatively simple dispute. The tradeoff for this reduced cost is lost time. A simple arbitration will likely be concluded in less time than a lawsuit.

Conclusiveness—Consider litigation for the preservation of meaningful review.

To arbitrate is to virtually forgo judicial review, and exceptions to this generality are rare: “Because arbitration is an alternative to litigation, judicial review of arbitration decisions is ‘among the narrowest known to the law.’” *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007) (quoting *Del Casal v. E. Airlines, Inc.*, 634 F.2d 295, 298 (5th Cir. Unit B Jan. 1981)). Consequently, the desirability of an appeals process can be a deciding factor when choosing between arbitration and litigation.

Most grounds permitting judicial review of an arbitration award do not allow for a review of the award's accuracy or merits but instead only the nature of the proceedings. Even reduced to proceedings alone, review can be exceptionally narrow. For example, in *Oxford Health Plans v. Sutter*, the Supreme Court of the United States was forced to uphold an arbitrator's interpretation of the parties' contract, “however good, bad, or ugly,” because the Court's

review of the arbitrator's venue determination was limited to "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Indeed, to overturn or vacate an arbitration award, the Federal Arbitration Act requires that the award be obtained through fraud or corruption or that the arbitrator act corruptly or exceed his allocated power.

To some, the finality of arbitration may be troubling. Others may see value in a process that provides closure and does not ordinarily result in protracted appeals. Most contractors can make more money from new projects than they can from protracted litigation.

Seeking to overturn an arbitration award is an expensive bet with poor odds. Depending on the jurisdiction, an aggrieved party will have to demonstrate that the award was arbitrary and capricious, irrational, or made with a manifest disregard of law. With the bar set so high, prejudicial or even egregious errors may be left undisturbed following costly and prolonged post-award litigation. The Eleventh Circuit—which has appellate jurisdiction over Alabama, Florida, and Georgia—summarized this dilemma aptly, noting in one case that the process "deprived [the appellee] and the judicial system itself of the principal benefits of arbitration. Instead of costing less, the resolution of this dispute has cost more than it would have had there been no arbitration agreement." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006).

Arbitration's lack of formality, evidentiary rules, and binding precedent can produce unexpected and effectively conclusive results. If a party is worried about being stuck with an unexpected result, it can opt for court litigation or the mandatory use of a three-arbitrator panel, with of course the latter option increasing costs. A party faced with this choice at the time of contracting must weigh the finality and closure normally offered by arbitration against the more thoroughly vetted and explained resolution from a trial and subsequent appeals.

In deciding which dispute resolution option to choose, a party should consider the four C's of dispute resolution: cost, complexity, competency, and conclusiveness. These four concepts are not mutually exclusive; instead, they are inseparably intertwined, and their consideration lends itself on occasion to conflicting direction. Making this decision requires careful, strategic thinking and the understanding that no process will guarantee a successful result.

Smith, Currie & Hancock LLP is a national boutique law firm that has provided sophisticated legal advice and strategic counsel to our construction industry and government contractor clients for fifty years. We pride ourselves on staying current with the most recent trends in the law, whether it be recent court opinions, board decisions, agency regulations, current legislation, or other topics of interest. Smith Currie publishes a newsletter for the industry "Common Sense Contract Law" that is available on our website: www.SmithCurrie.com.

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AGC Convention Sessions

This year's annual AGC Convention will feature three sessions devoted to the most relevant topics surrounding construction contract documents including, but not limited to, the most recent provisions made to the AIA A201 and ConsensusDocs contract documents, including:

- ***Insurance Requirements are A Chang'in: New Insurance Requirements in the New AIA A201***



and Updates to the ConsensusDocs Insurance Provisions –

Monday 02/26 (11 a.m. – Noon)

Description: The AIA A201 2017 General Conditions Document has been rewritten and restructured its insurance requirements in the new edition and created a new Insurance Exhibit A. This will impact how insurance requirements required by Owners and insurance products Contractors must procure (and avoid exclusions). The AGC-endorsed ConsensusDocs also made significant changes in its updated standard documents that among other things now defaults to the Constructor procuring the Builder's Risk Policy, instead of the Owner. Find out what you need to do to comply or alternatively contract negotiation strategies.

Presenters:

[Bob Majerus](#), General Counsel, Hensel Phelps

[James O'Connor](#), Partner, Maslon Law

[David Suchar](#), Partner, Maslon Law

• Your Defective Design is Stuck in my Non-Negligent Means & Methods –

Monday, 02/26 (1:30 p.m. – 2:30 p.m.)

Description: Design liability exposure has become one of the most important risks facing builders today. General Contractors are often faced with correcting defective design; performing delegated design (sometimes without clear delegation). This is often mandated without adequate compensation or liability protection. Moreover, previous protections under the *Spearin Doctrine* for change orders to correct defective design plans and specifications is under assault in contracts and in the courts. The line between assessing blame for defective design or negligent means & methods has blurred and this panel will explore how design-assist and more collaborative delivery methods provide solutions to this growing riddle.

Presenters:

[Kristen Brown](#), President, Brown Builders

[Bryan Kelley](#), VP Legal, Howard S. Wright

[Joseph Leone](#), Partner, Drewry Simmons Vornehm, LLP

[Ryan Lamb](#), General Counsel, Weitz

• Why the New AIA A201 Gets a Failing Grade and How the Updated

ConsensusDocs Provide an Alternative – Tuesday, 02/27 (9 a.m. – 10 a.m.)

Description: The AIA A201 is the most litigated contract document in construction. Find out the most troubling changes made to the 2017 AIA A201 and contrast this with the AGC-endorsed ConsensusDocs provisions. This session will dissect what the AGC membership absolutely needs to know when forced to use AIA contract documents. As well as, contrast these changes with the alternative provisions from ConsensusDocs to make your contract negotiation better.

Presenters:

[Ron Ciotti](#), Partner, Hinckley, Allen & Snyder LLP

[Brian Perlberg](#), Executive Director & Senior Counsel, AGC of America and ConsensusDocs

Click [here](#) to find out more about these sessions!

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