

STATEMENT FROM STUART S. ZISHOLTZ

Over the years, I have written many articles about how egregious arbitration is in the construction community. Every contract which contains an arbitration clause should have the clause stricken before the contract is executed. The reasons for that, from a legal point of view, are that you are subject to the whims and idiosyncrasies of the arbitrator.

For instance, the ordinary rules of evidence do not apply in an arbitration proceeding. If a contractor writes you a letter telling you the Project was delayed, work was inferior and that he is the best contractor on the face of the planet, the letter is admissible in an arbitration proceeding for “whatever it’s worth”. What that means and how it is applied by the arbitrator is unknown to everyone.

Moreover, an arbitrator does not have to explain his decision and award while a judge in the Supreme Court has to set forth findings of fact and conclusions of law. A judge has to breakdown the various aspects of the claim and explain how he arrived at his determination. Moreover, the judge’s decision is appealable. An arbitrator’s award is not. In the most unusual and limited circumstances, an arbitration award will be modified or reversed. Usually, however, it is set in stone and you are bound by the award.

Finally, the cost for arbitration far exceeds the cost for a lawsuit instituted in the Supreme Court. They are not even close to being similar. The costs for an index number in the courthouse is \$210 and having a judge assigned is \$95. In an arbitration proceeding, the filing fees vary from \$800 to \$12,500 depending on the size of the claim. The cost for an arbitrator can vary from \$2,500 to \$5,000 a day! Recently, a client was hit with a bill for arbitration where his initial one-third estimated share of expenses to be reimbursed to the

Arbitrator was \$11,716.66. His neutral one-third share of the compensation covering 145 pre-hearing hours was \$30,166.66. Finally, his one-third share of the compensation covering 180 hearing hours and 130 post hearing hours was a whopping \$140,999.99. Altogether, this amounts to an estimated sum \$182,883.31. This sum only represents the fees incurred for the arbitrator and the association and does not include his own legal fees.

Many contractors believe that pursuing arbitration is expeditious and will save money. However, that is not always the case. A complex arbitration may result in discovery being exchanged between the parties, possible depositions, motions and multiple days of hearings. Thus, to expect your case to be completed quickly because you decided to pursue arbitration, your decision may not be accurate.

The reality of the situation is that the arbitration process could be horrific and costly. If you win, you obviously believe that the arbitration process was worthwhile, albeit costly. If you lose, however, the result could be catastrophic since the determination is not appealable. No matter how you slice it, the costs associated with arbitration is gut wrenching.

Never let your lien time run out!

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