

## **PWCA Meeting Minutes February 14, 2005**

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### **PUBLIC WORKS CONTRACT ARBITRATION COMMITTEE MEETING MINUTES**

#### **FEBRUARY 14, 2005**

The meeting was called to order at 10:06 a.m. by Co-chairperson Mr. Robert Pieplow, representing the Department of Transportation. Other voting members present were David McCosker and Tim McGowan, representing the construction industry; William McDonald, representing the Department of Water Resources. Mr. Cecil Mark was in attendance as was Michael Doughton representing the Department of Corrections. Others present included Margaret Farrow, Arbitration Administrator for the Office of Administrative Hearings, Carol Rader, representing the Department of General Services and Randy Benning, Office of Administrative Hearings.

#### **Minutes of the October 18, 2004 Meeting**

The draft minutes of the October 18, 2004 Public Works Contract Arbitration Committee meeting were approved with the exception of one change. Ms. Farrow noted that a correction should be made. In the section entitled "Arbitrator News", forty (40) cases are shown as being before the PWCA committee. This number should be four (4). Minutes were approved as amended.

#### **Administrator's Report**

Ms. Farrow introduced Randy Benning as the Arbitration Assistant and explained that Phoenix Vigil had accepted appointment to the Department of Managed Health Care.

Current PWCA statutes and regulations as revised August 2004. This material was provided to all members. The administrator advised that hyperlinks were created as part of the regulations for viewing online. By clicking on a particular hyperlink, a person can now be taken directly to the statute. In addition, a booklet was printed which supplements the PWCA 1997 Procedures for the Office of Administrative Hearings. This supplement shall be considered current and all other versions should be discarded. PWCA statistical reports were provided, listing all years in which there are active cases. This information encompasses 1997 to present. It was noted that no cases had been filed for year 2005 as of February 14, 2005. Filing fees shall remain the same, no increases are anticipated. In response to a question from the panel, the arbitration administrator explained that without a statute change, filing fees will not increase.

#### **Discussion of Revisions to Arbitration Regulation 1395**

Ms. Farrow explained that she has drafted changes to this statute in an email to Mr. McCosker. Ms. Farrow provided 2 versions: underlined and struck-out sections and an example without alteration. Comments and questions were received. Mr. Doughton asked if subsection "c" should also apply to "d"...if ways to satisfy subsection "c" should also apply to "d". The arbitration administrator indicated her concern with proceeding in that manner. Specifically, if the listing in "c" applies to "b", then it dilutes the requirement of arbitration or adjudication experience. The administrator's discussion at the October 2004 PWCA committee meeting entailed the committee's desire to require arbitrator or adjudicator experience. If the committee allows that requirement to be satisfied by five (5) or more years' experience at managerial or supervisory level, it does not satisfy the requirement, neither does experience representing parties satisfy this requirement. Mr. Doughton offered that it seems a bit difficult to somehow create a

generic checklist listing specific qualifications that make a person qualified to do this kind of work. Mr. Doughton's concern that if this regulation is defined too rigidly, it may not be effective. Counsel for the Department of Corrections also felt that it is extremely difficult to judge an arbitrator's qualifications. Ms. Rader reminded the committee that all present arbitrator applications are now available at the OAH website under "PWCA Program." She stated that this is a very useful tool in determining what background arbitrators may have in regard to the specifics of a particular case. Ms. Rader also asked for clarification of the definition of "extensive" in relation to experience and training. Are there a specific number of cases or years experience that an arbitrator must possess before an arbitrator is considered experienced? Mr. McGowan offered that some arbitrator's can participate in a training program. After this period of training, an arbitrator may be considered experienced. Ms. Farrow interjected that the American Arbitrator Association also had a rather effective training program.

Mr. Jose Aguirre of the Department of Transportation submitted written comments and drafts of changes. These particulars were discussed. Mr. Aguirre posed the written comment, "If the regulation requires formal training, then the regulation should explain how this formal training is to be acquired. Will OAH maintain a listing of approved training programs? What is extensive training?" Ms. Farrow related that when she and Mr. Aguirre spoke via telephone the week prior to today's meeting, Mr. Aguirre asked Ms. Farrow if the PWCA program would accept training in lieu of experience. He suggests that instead of "arbitration and adjudication experience", the committee should consider having the statute subsection read "experience as an arbitrator or experience as an adjudicator. Should training be defined?" Several members felt that a number of active arbitrators participating in the program are not well qualified. It was also noted that these particular arbitrators are rarely selected by one or both parties involved in the selection process. Not only should an arbitrator have experience as an arbitrator or adjudicator but he/she should also have been trained in a public works arbitration process.

Ms. Farrow explained it as follows: subsection (a) specifies public works experience and (b) specifies arbitrator/adjudicator experience. Subsection (c) presents options for meeting (a).

The committee agreed that the regulation should read:

"Arbitrator shall have substantial experience in or directly related to public works construction projects, particularly large scale, complex projects with or on behalf of federal, state, or local government agencies **and** (b) experience as an arbitrator or adjudicator of disputes arising out of such projects is necessary as well as knowledge of California construction law. (c) Experience in subdivision (a) may be met by a combination of factors which shall include any one or more of the following:

1. Five or more years experience at the managerial or supervisory level in public works construction contracting with extensive experience in the resolution of disputes arising out of public works construction contract claims.
2. Five or more years experience as an attorney representing parties in litigating or arbitrating public works construction contract claims.
3. Five or more years experience as a judge or arbitrator. This shall include extensive experience in adjudicating or otherwise resolving public works construction contract claims or other large scale or complex construction litigation.

(d) An applicant is evaluated on an individual basis by the public works contract arbitration committee. The committee has the discretion to waive the experience **and** qualifications in (a) or (b) on an individual's demonstration of equivalent experience and qualifications.

Mr. McGowan moved to approve the draft subject to final review. Mr. Doughton seconded the motion to approve. All were in favor.

### **Arbitrator Applications**

Mr. Ron Kelly's application is presented for recertification. The committee decided that Mr. Kelly's application required more information. Mr. McGowan made a motion that the application be returned and heard at the next committee meeting. Mr. McCosker seconded the motion. The following specifics will need to be addressed in order to properly determine Mr. Kelly's experience and qualifications:

1. Information on cases that pertain to construction; particularly large public works cases.
2. Two additional professional references that will speak to his qualifications and experience.
3. Complete items H, I and J in the arbitrator application.
4. A current and professional resume.

All committee members were in favor of these specifics.

### **New Business/Public Comments**

None.

The next Public Works Contract Arbitration Committee Meeting is scheduled for June 20, 2005 at 10:00 a.m. the Department of General Services headquarters building, located at 707 West Third Street, West Sacramento, California.

The meeting was adjourned at 11:48 a.m.