

PUBLIC WORKS CONTRACT ARBITRATION (PWCA) COMMITTEE MINUTES

October 12, 2010

The meeting was called to order by co-chairperson Mark Leja, representing the Department of Transportation (Caltrans). Other voting members present were Diane Miller, John Messner, and Charles Fletcher, representing the construction industry; and Jim Peddy and Richard Sanchez (alternate), representing the Department of Water Resources (DWR). Others present included Bruce Kaminski, from the Department of Water Resources, Stephen Cameron, Caltrans; Nik Karlsson, Department of General Services (DGS), Dan Rios, DGS; Phoenix Vigil, Program Administrator, Office of Administrative Hearings (OAH), Cara Padilla and Rene Dimech, (OAH).

1. MINUTES OF THE FEBRUARY 9, 2010 MEETING

The draft minutes of the February 9, 2010 meeting were adopted with minor changes.

2. ADMINISTRATOR'S REPORT

The Administrator reported on the status of the program.

Program Summary

There are currently 53 active cases. OAH was about 80-90 days behind in processing of the arbitration matters due to internal staffing and state budgetary issues.

3. PROGRAM BACKLOG

In prior meetings, the Committee expressed concern about the backlog of activities related to arbitration cases and requested that the topic of Program Backlog remain on the Committee's Agenda. The Administrator advised that there was currently a 90-day backlog for open cases.

The Administrator will update the Committee on the status of the backlog at the Committee's next meeting.

4. REGULATION REVISIONS

At the previous meeting, the Committee decided to establish a Sub-Committee to look at proposed revisions and report back to the Committee with recommendations.

Sub-Committee's report: Bruce Kaminski and Steve Cameron presented the work accomplished to date on the list of issues.

1305. Service and Filing -

The reason for the proposed revision was that the service of the initial process has due process ramifications and the Sub-committee wanted to ensure that respondent has notice of the matter against them. To ensure that respondents are aware of the pending matter against them, OAH sends an "acknowledgement of filing of new complaint" to both parties within a couple days of accepting the complaint for filing.

A committee member also suggested a form complaint for petitioners or pro per contractors to fill out and submit. The Sub-committee will work on this draft complaint form and present it at the next Committee meeting.

The Committee approved the proposed revision to Regulation 1305 as follows:

1305. Service and Filing

(a) Whenever a Party is required or permitted to file any document, it shall be filed in the Sacramento office of the Office of Administrative Hearings together with proof of service of a copy on all other Parties, unless filing prior to service is authorized for good cause by the Office of Administrative Hearings.

(b) Service of the complaint in Arbitration by the claimant shall be made either in a form of mailing providing for a return receipt which proves the date of delivery or by a method provided for service of a summons in a civil action (Code of Civil Procedure Sections 415.10, et seq.).

(c) Except for subpoenas which may be served by the same methods as in civil actions, service of documents between Parties may be made in the manner provided in Code of Civil Procedure Sections 1011 or 1013, except that a form of mailing providing for a return receipt which proves the date of the delivery or a method provided for service of a summons in a civil action must be used for delivery of the following:

- (1) Any pleading by which an interested Party is to be joined under Section 1352;
- (2) The Decision on the Merits provided for in Section 1390;
- (3) The Arbitration award provided for in Section 1393;
- (4) Any other order or decision which is a final disposition of the Arbitration;
- (5) Any Decision or Ruling on Objections provided for in Section 1390(b).

1332. Appointment of Special Arbitrator –

This regulation was originally established for the purpose of determining if a complaint was timely in the event that acceptance of the contract work was in dispute. The Sub-committee recommended that the special arbitrator also be allowed to decide jurisdictional issues, sufficiency of pleadings, discovery issues, default issues, and other motions in the event that an arbitrator had not yet been appointed. The Sub-committee proposed that the special arbitrator's services would be paid through filing fees or fees for motions filed.

After much discussion, the Sub-committee withdrew this proposed regulation and will look into it further..

1332.1. Qualifications of the Special Arbitrator-

After much discussion, the Sub-committee withdrew this proposed regulation and will look into it further

1350. Complaint, When Due; When Deemed Not Filed-

Only slight changes to Regulation 1350 were proposed and the Committee approved the proposed revisions as follows:

1350. Complaint, When Due; When Deemed Not Filed

(a) Pursuant to section 10240.1 of the Public Contract Code, an Arbitration is ~~commenced~~ initiated by filing with the Office of Administrative Hearings in Sacramento a complaint in Arbitration within 90 days from receipt of the final written decision by the Public Agency on the claim or, if no final written decision has been issued, at any time subsequent to 240 days after acceptance of the Contract work. The Petitioner shall serve copies of the complaint on the Respondent and any other named Party pursuant to Section 1305.

(b) Arbitration of a dispute with the Contractor may be ~~commenced~~ initiated by the Public Agency by filing with the Office of Administrative Hearings and serving on the Contractor the Public Agency's complaint in Arbitration. The time limit for filing such a complaint by the agency is as limited by the Contract or applicable law.

The Petitioner shall submit with the complaint in Arbitration a non-refundable filing fee established by, and payable to, the Office of Administrative Hearings and the proof of service required in Section 1305, or the complaint is deemed not to be filed.

1360. Discovery -

The changes that were proposed included permitting the parties to engage in discovery prior to the appointment of an arbitrator and omitting the Office of Administrative Hearings from receiving discovery documents from the parties.

The committee accepted the proposed revision to discovery.

The Committee approved the proposed revision to Regulation 1360 as follows:

1360. Discovery

~~Parties shall have the following obligations with respect to discovery in Arbitrations under this subchapter:~~

~~(a) Pursuant to the authority granted by Public Contract Code Section 10240.11, the procedures in Title 9, commencing with Section 1280 of Part 3 of the Code of Civil Procedure, is modified by these regulations to allow discovery prior to appointment of the Arbitrator.~~

~~(b) The Parties shall have the following obligations with respect to discovery in Arbitrations under this subchapter:~~

~~(a)(1) Discovery (including inspection and production of documents and records, depositions, interrogatories, admissions, etc.) by agreement of the Parties is encouraged. For this purpose it is the duty of the Parties or their counsel to communicate with each other before initiating discovery to determine whether a reasonable agreement for discovery can be made. This subsection does not limit or modify the rights and obligations of the Parties with respect to discovery set forth in Section 1283.05 of the Code of Civil Procedure, except subdivision (e) thereof, as specified in Section 10240.11 of the Public Contract Code.~~

~~(b)(2) Inspection and production of discoverable documents and records is the preferred initial means of discovery.~~

~~(c) Notwithstanding the provisions of Sections 2030 and 2033 of the Code of Civil Procedure, all original documents relating to interrogatories and requests for admissions and all notices of the taking of deposition and inspection and production of documents shall be filed with the Office of Administrative Hearings and copies shall be served on all Parties to the Arbitration. (d) On request of any Party made not less than 30 days prior to the hearing on the merits, each Party shall notify the other Parties in writing of the identity and current address of each expert witness to be presented as a witness at the hearing and a brief narrative statement of the qualifications of such witnesses and the general substance of the testimony which the witness is expected to give. At the same time, the Parties shall also exchange all written reports prepared by such witnesses and each Party shall have a reasonable opportunity to depose such witnesses. The Arbitrator may permit a Party to call an expert witness not included on the list upon a showing of good cause.~~

1361. Motions

As mentioned above, the Committee discussed the possibility of a filing fee for motions filed as a possible revenue source to pay for the services of the special arbitrator. The filing fees would also be intended to cover the costs of OAH's administrative fees.

After much discussion, the Sub-committee withdrew this proposed regulation and will look into it further.

5. REVIEW OF ARBITRATOR APPLICATIONS

James Wiezel, Adam Dawson, Michael Claessens, and James Sell were certified to the arbitrator panel.

6. NEW BUSINESS/PUBLIC COMMENT

The committee approved John Messner as the co-chair from the private industry. Mr. Messner will chair the next two meetings.

7. SCHEDULING OF NEXT MEETING

The next meeting is tentatively scheduled for February 8, 2011