It’s Time To Re-Examine Arbitration As The Process Of Choice To Resolve Construction Disputes

Historically, arbitration has been one of the most commonly used methods for the adjudication of construction-related disputes. Because of the perception that it provided a speedy, efficient and cost-effective means to have disagreements over complex construction issues resolved by experts in industry practice, arbitration has long been viewed by contractors and project owners alike as the best way to resolve claim issues. This fact was perhaps best reflected in the selection of arbitration as the dispute resolution method of choice in the widely used American Institute of Architects (AIA) contract documents.

But is arbitration all that it has been cracked up to be? Increasingly, people involved in the handling of construction disagreements are having second thoughts. Indeed, because of the frequent failure of arbitration to deliver swift, fair and economical resolution of construction claims and disputes, many parties are expressly avoiding arbitration and rather are opting to go to litigation when they have disputes that cannot readily be settled. This phenomenon is occurring in other areas as well, as reflected in a recent article in The Legal Intelligencer entitled “Litigators Losing Love of Arbitration Argue for Trials.”

There are various reasons for this trend. Contrary to traditional views, contractors and their attorneys often find that arbitration is slow-moving and expensive, not cost-effective and expeditious. Although the strict evidentiary and procedural rules governing court proceedings do not strictly apply, construction arbitrations can increasingly become bogged down with discovery demands that are time consuming and costly. Also, scheduling can become problematic when the individual calendars of multiple participants (lawyers, parties, witnesses, arbitrators and experts) have to be accommodated. Moreover, the need to pay substantial administrative fees and to compensate arbitrators for their service adds elements of expense which litigation typically does not involve, especially where a three member arbitration panel is utilized instead of a single arbitrator. Perhaps most significantly, opportunities to pursue an appeal from an unfavorable arbitration award are severely limited, so a party who is unhappy with the outcome of a construction arbitration has little recourse to seek review and reconsideration of a bad arbitration result.

For all these reasons, it is not surprising that the once-favored status of arbitration has changed. As one of the attorneys quoted in The Legal Intelligencer observed, “Arbitration has become very complex and as burdensome as trials are in many cases because arbitrators are getting paid by the day or by the hour. I think there are many people, and I’m included, who would prefer to try a case to [a judge or jury] and when the case is over you know the case is over. Arbitration can go on forever and ever.” As parties to construction arbitrations experience the all-too-common frustrations reflected in these comments, the use of that process will continue to lose its cachet as the dispute resolution method of choice among contractors and project owners. At the very least, it is time reconsider the assumptions which traditionally caused construction disputes to end up before a panel of arbitrators rather than in front of a judge and jury.