

ALABAMA

# CONSTRUCTION NEWS

A photograph of five men in suits standing in front of a large, multi-tiered fountain. Each man is holding a trophy featuring an eagle with spread wings. The trophies also have the ABC logo on them. The background shows green trees and a clear blue sky.

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# Arbitration vs. Litigation: The Great Debate

by DAVID K. TAYLOR

Many commercial construction contracts contain "dispute resolution" clauses requiring binding arbitration instead of courtroom litigation. However, the decision to include an arbitration clause in a contract is a serious decision and the many pros and cons should be examined.

Many in the construction industry prefer arbitration because of problems with the existing court system:

**COSTS.** Courtroom litigation is expensive and time consuming. Cases often settle, but not after parties have spent substantial amounts on attorney's fees and expenses. In most states, unless there is an attorneys' fees provision in the contract, fees are not recoverable even for the winning party. A company may win in court but realize, after subtracting the attorneys' fees and costs, there is a net zero recovery. Even if a company wins, is the judgment even collectible? There are also substantial soft costs of litigation, including the hours that key employees must devote to the dispute over a failed project.

**PUBLICITY.** Court filings are public records open to any competitor looking for confidential documents or information. A lawsuit may also make the front page of the local news or trade journal.

**TIME.** Lawsuits can take years to get to trial and a losing party has the right to appeal which may take up to three years. Any smart lawyer can delay a trial—which may be exactly what your adversary wants.

**UNPREDICTABLE RESULTS.** Will a judge or a jury understand industry issues, especially if the case involves complicated facts such as scheduling or delays? When a company

places a substantial legal dispute in the hands of a judge or jury, it is just a roll of the dice.

## BINDING ARBITRATION

**PREDICTABILITY.** Arbitrations are heard by individuals with substantial experience in commercial construction. Arbitrators can be lawyers but also engineers, contractors or developers. Properly selected arbitrators focus on the real issues and are not swayed by emotional arguments.

**TIME.** An arbitration can be scheduled in months, not years. It is also very difficult to appeal an arbitration award. Finality is the rule, but this can also be a "con" since, if there is a bad decision, a company is stuck with the ruling with little legal recourse.

**COSTS.** Arbitration can cost less than litigation. The most costly aspect of litigation – discovery – is limited. Limited depositions can reduce fees. Personal involvement by employees can be minimized.

**PRIVACY.** Unlike courtroom litigation, arbitration is private and confidential. The proceedings are not public records. Arbitrators maintain the privacy of the hearings unless some law provides to the contrary.



David Taylor

David Taylor chairs the firm's construction group in its Nashville office, and has for over 30 years been a commercial litigator, with an emphasis on construction and real estate dispute resolution.

No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.

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# Project Management “Best Practices” Requires Accurate and Consistent Recordkeeping

by ARON C. BEEZLEY

Sometimes, when it comes to Project Management “best practices,” attention given to the most mundane of a manager’s daily tasks can make a huge difference in the overall success of a project. This principle was dramatically illustrated in the Armed Services Board of Contract Appeals’ (ASBCA) recent decision in Dick Pacific Constr. Co., Ltd, which serves as an important reminder to contractors that keeping consistent and detailed daily logs is essential and can mean the difference between winning and losing a given case. This ASBCA decision is a useful reminder to contractors on all projects, public or private, of the importance of keeping accurate daily logs.

## BACKGROUND

The case before the ASBCA involved a series of consolidated appeals arising from a U.S. Army Corps of Engineers construction contract for the installation of additional concrete pavement for aircraft parking and construction of a clear water rinse facility at Hickam Air Force Base in Honolulu, Hawaii. The contractor filed the subject appeals after experiencing a series of delays that it alleged were caused by the government, and after the government had assessed liquidated damages against the contractor.

After considering the parties’ arguments, the ASBCA denied some of the contractor’s ancillary claims, but found in favor of the contractor on its claim that the government was responsible for certain critical path delays. Importantly, in finding in favor of the contractor on the delay claim, the ASBCA relied heavily on the contractor’s daily logs. Also noteworthy, at the outset of its analysis of the merits of the claims, the ASBCA explicitly

declared “We consider daily logs to be the most reliable evidence of what actually happened during construction.” Similarly, the ASBCA noted that “[d]aily inspection reports have been held to be prima facie evidence of the daily conditions as they existed at the time of performance.” In many federal government contracts (as well as state and local public contracts and some private construction contracts), the daily reports are provided to the owner by the contractor. Hence, in some cases, not only are they reliable evidence, but they may be deemed notice.

## THE TAKEAWAY

Although daily life for field personnel on a construction project can be unpredictable and downright hectic, such personnel nonetheless must be disciplined about keeping consistent, detailed and accurate daily logs. They must be factual and not slanted or claim-driven to be considered reliable. As the ASBCA’s recent decision in



Aron Beezley

Aron Beezley is an attorney with Bradley, focusing primarily on government contracts and construction law. His practice is particularly focused on the litigation of contract claims and bid protests.

Sometimes, when it comes to Project Management “best practices,” attention given to the most mundane of a manager’s daily tasks can make a huge difference in the overall success of a project.

Dick Pacific Constr. Co., Ltd underscores, daily logs can come back to haunt or help contractors in litigation and, frequently, detailed daily logs mean the difference between winning and losing a case.

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