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Construction Law - "Baseball Arbitration" Offers Creative Solution to Shorten Construction Contract Dispute

Not every dispute needs to be resolved through an extended arbitration or trial. That's not a very "deep thought", and shame on us as your attorneys if we didn't recognize that fact. But figuring out how and when to resolve a case short of a full blown trial often requires out of the box thinking. Here is an example of how we handled one such engagement.

Our client was the EPC (engineering, procurement and construction) contractor for the construction of a power plant in the northeast. At the end of the job, the client was owed a substantial amount of money. The problem was that the owner had lots of complaints about the quality of the work, and was claiming that he had spent \$5 million more than what was left to be paid to the client remedying supposed defects in the work. When it was obvious that discussions at the senior management level would not lead to a resolution, we were instructed to file an arbitration demand consistent with the contract between the parties. The contract also contemplated extensive discovery, as if we were in court not arbitration.

So what to do? First of all, this was a power plant, and so the technical issues were rather complex. Moreover, the other side's defect list and associated dollars claimed went on for pages and pages. We didn't need to be terribly insightful to realize that while our affirmative case largely revolved around collecting an agreed-to contract balance [albeit a large one], that our focus had to be on defusing the owner's claims. Initially, we made sure we understood the bases of these claims, and the relative strengths and weaknesses of those claims that had significant dollars associated with them.

Practically speaking, we understood that it would not be cost effective to go to battle on each and every claim, no matter the size. In order to try to keep costs under control, the parties agreed to exchange documents and a limited number of depositions, but with the understanding that the witnesses who were produced would be the people who would and could address the merits of the dispute. In other words, these were not "I don't recall" witnesses.

After documents had been exchanged and the targeted depositions were completed, each side had a pretty good understanding of what was good [and not so good] about its case. We headed to mediation, confident of settlement.

But something happened in mediation. After lengthy substantive presentations by the attorneys for both sides and protracted negotiations, the parties were nowhere near settlement. The scheduled 4 week arbitration and the massive preparation that would

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be required appeared to be a near certainty. And then we all agreed on something that gave us a fast track to the finish line: baseball arbitration.

Here is what we thought. The case was largely developed factually and legally. Both sides had put their best foot forward in mediation, and it was as likely that our experienced construction mediator--if asked to put on his arbitrator's hat--would get it right as would three arbitrators sitting through a four week hearing. So the parties agreed to each give the arbitrator a number and let him pick one or the other, but nothing in between. We told him to wait a week while we tried to settle on a number between what we each gave him (we didn't) before he had to pick one number or the other (he did).

Happily, he picked our number, but we think that as much as that, our client appreciated the creative approach to getting as smart as we could about the dispute, laying all the issues out on the table in the mediation, and then getting the dispute resolved in a manner that saved massive amounts of money as well as employee time that could better be spent elsewhere.

Some disputes resolve themselves early; others need to go to a full blown hearing or trial. This looked and felt like that latter situation. But by thinking out of the box, we reached a good resolution without having to go through trial.

