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UAA EXPANSION

University gets new look

Page 46

EAGLE RIVER ROAD OVERHAUL

Project reduces curves,
widens shoulders

Page 44

SUMMER ROAD PROJECTS

Parks Highway will get
bulk of work

Page 18





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Contract appeals: How to get an experienced construction law arbitrator or hearing officer

Resolution of complex construction disputes requires a good understanding of technical facts and terms unique to the industry. Fortunately, in Alaska such claim appeals involving the Department of Transportation have been historically adjudicated by an experienced construction lawyer appointed as a hearing officer directly by the Department of Transportation Public Facilities (DOT/PF) commissioner.

This is consistent with the Alaska Procurement Code (Code), which also allows an appeal of a construction contract claim to be decided by arbitration. In fact, to serve on such appeals, an arbitrator must have 10 years of legal experience including experience in construction law and public procurement law. This policy makes sense and confirms the concept that a construction claim should be decided by a person with construction law experience.

Accordingly, to get an experienced construction lawyer to decide your appeal, make sure that you:

- invoke a contractor's right to arbitration if the claim is under \$250,000;
- request arbitration with the commissioner's agreement if the claim is over \$250,000; and/or
- request adjudication by an experienced construction law hearing officer if arbitration is not granted for a claim over \$250,000.

Experienced construction law arbitrator

The Code's construction contract appeal provision, AS 36.30.627(a)(1), sets forth a preference for arbitration. The provision states:

- (a) An appeal from a decision of the procurement officer of a claim involving a construction contract **shall** be resolved by
 - (1) binding and final arbitration under AS 09.43.010 – 09.43.180 (Uniform Arbitration Act) if the claim is
 - (A) less than \$250,000 and the contractor requests arbitration of the claim; or
 - (B) \$250,000 or more and both the agency and the contractor agree to arbitration of the claim;
 - (2) a hearing under AS 36.30.630 if the claim is not handled by arbitration under (1) of this subsection. (*Emphasis added.*)

Therefore to assure your decision is reached by a professional expert in your subject matter, a construction contractor appealing a construction claim less than \$250,000 should elect binding arbitration at the same time it files an appeal. A contractor appealing a claim over \$250,000 should elect binding

arbitration and request agreement by the commissioner.

This is an option that should be requested; however, the author is generally unaware of any appeal in which the DOT/PF commissioner has agreed to binding arbitration of a construction claim appeal over \$250,000. Rather, these types of large-dollar appeals have been decided by experienced construction law attorneys appointed by the commissioner to serve as a hearing officer.

Independent hearing officer

Adjudication by an independent hearing officer appointed directly by the commissioner is the customary process for large dollar appeals. See *North Pacific Erectors, Inc., v. State of Alaska, Dept. of Administration*, 337 P.3d 495 (Alaska 2013), (hearing officer appointed directly by commissioner) and *Sw. Marine, Inc. v. State, Dep't of Transp. & Pub. Facilities, Div. of Alaska Marine Highway Sys.*, 941 P.2d 166 (Alaska 1997), (Commissioner of Transportation appointed hearing officer directly to hear M/V TUSTUMENA ship repair claim). In the above cited appeals, the DOT/PF commissioner as well as the commissioner of administration directly appointed a hearing officer from a list of highly qualified Alaska construction attorneys.

While appeal decisions by an experienced construction attorney serving as a hearing officer are not necessarily binding on the commissioner, a contractor is assured of an adjudicator with significant construction law experience.

Conclusion

The best course of action for a contractor to obtain an adjudicator experienced in construction law is for the contractor's attorney to advocate for an arbitrator under the Code or to promptly request appointment of a hearing officer experienced in construction law. 📄

This column provides information about the law designed to help users safely cope with their own legal needs. But legal information is not the same as legal advice — the application of law to an individual's specific circumstances. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a lawyer if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation.

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