

Caltrans Dispute Resolution Board Specification Flaws

By Bernard S. Kamine

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Effective January 1, 2017, Caltrans made significant changes to its specifications for dispute resolution boards (DRB) and dispute resolution advisors (DRA, essentially a one-person DRB). The revised specification (2015 Standard Specifications, Section 5-1.43E, Alternative Dispute Resolution), and the corresponding revised Dispute Resolution Board Agreement (both of which are on the Caltrans website), attempt to reduce the jurisdiction of DRBs and DRAs to just the four corners of the contract. Caltrans wants to preclude a DRB/DRA from considering otherwise applicable legal concepts that, in court, can be used to ameliorate unreasonably harsh effects arising from enforcing take-it-or-leave-it contract provisions, *e.g.*, waiver, estoppel, constructive notice and substantial compliance.

Caltrans also wants to bar a DRB/DRA from proposing legally applicable extra-contractual relief, *e.g.*, breach of the implied warranty of the accuracy of plans (*see Judicial Council of California Civil Jury Instructions*, CACI No. 4500, Breach of Implied Warranty of Correctness of Plans and Specifications--Essential Factual Elements) and non-disclosure of material facts (*see CACI No. 4501, Owner's Liability for Failing to Disclose Information Regarding a Construction Project--Essential Factual Elements*).

The reduction of DRB jurisdiction has been provoked by what Caltrans perceives to be jailhouse lawyering in DRB proceedings, and in the writing of DRB reports. (*N.B.*, Actual lawyers are barred from participating in the DRB process.) Caltrans believes the resulting application of legal theories outside the contract language has caused a precipitous decline in the parties' acceptance of DRB reports.

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DRB reports are not binding on the parties; they are only recommendations that must be accepted by the parties in order to resolve a dispute. For a DRB's recommendations to be accepted, the parties must have confidence that the DRB process is fair, and the DRB's conclusions are reasonable. However, a tension exists: If Caltrans engineers feel that the DRB process has been hijacked by legal mumbo-jumbo to avoid what they think is clear contract language, then the engineers are not likely to accept the result. On the other hand, if contractors feel that the process is unfair, because it sanctions agency misconduct, or produces results the contractors' lawyers say ignores the law, then the contractors are not likely to accept the result. Caltrans' vehicle for resolving this tension is its recent specification amendments, but Caltrans' approach appears to be misguided.

Since the DRB process succeeds in large part because it is informal, not legalistic, it is probably reasonable to resolve the tension by separating the resolution of purely technical and contractual compliance issues from the application of equitable and extra-contractual doctrines. Federal Boards of Contract Appeals have somewhat similar jurisdictional limitations. But that decision should be clearly presented to the parties, not back-doored into the contract. Unfortunately, not only has Caltrans elected a back door approach, it has adopted contract language which, under California law, is likely to defeat its goal altogether.

Although a DRB report is not binding on the parties, it is admissible in a subsequent arbitration, where the report has significant weight because it is an analysis by experts in the field. Therefore, the fact that the DRB was barred from considering legal defenses to contract provisions cannot be buried in obscure contract language. For example, Caltrans specification Section 5-1.43E(1)(a) should have a paragraph like this:

The ADR process shall proceed on the basis that all contract provisions are legal and enforceable as written. No legal principles shall be considered by the DRB or

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DRA that would avoid enforcement of contract terms as written. Such issues are reserved for arbitration.

However, that direct approach has not been taken. There is nothing in the Standard Specifications to alert the contractor, or an arbitrator, to the new limit on DRB/DRA jurisdiction. Instead, the relevant language is buried in the standard Dispute Resolution Board Agreement. Section 1 of that agreement is entitled Description of Work. Paragraph B of that section incorporates into the agreement the five Canons of the Dispute Resolution Board Foundation's Code of Ethics, which are then quoted. The second sentence of Canon 5 says:

Dispute Board recommendations and decision *should* be made expeditiously on the basis of the provisions of the contract, applicable *statutes* and regulations, the information provided to the Board, and the facts and circumstances as submitted by the contracting parties. [emphasis added]

Caltrans believes that this buried sentence prevents the board from applying equitable principles like waiver, estoppel, constructive notice, substantial compliance, or other legal concepts that avoid enforcement of contract provisions, like implied warranties and non-disclosure of material facts.

Caltrans is wrong. First, the quoted language does not bar the board from looking to equitable principles; "should" is not mandatory language, it is just a recommendation to the board. Second, in 1872 California deviated from the common law tradition by enacting a Civil Code. That entire code is a statute. It lays out the basic criteria for contract interpretation (*e.g.*, Civil Code §§ 1635, *et seq.*, and 3509, *et seq.*). It also makes equitable principles like waiver and estoppel applicable in contract disputes (*e.g.*, Civil Code § 1698, concerning modifications of written contracts, which specifically authorizes, "in an appropriate case the application of rules of law concerning estoppel, oral novation ... [and] waiver"). Therefore, under California law, unlike the law of most of the rest of the United States, the term "applicable statutes" includes waiver and estoppel and other legal doctrines that Caltrans is trying to take out of the

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DRB/DRA process through its back-door approach. For both the construction industry's and Caltrans' sake, Caltrans should do better.

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