

Don't Underestimate the Importance of Repair Estimates



By **Michele Ammendola, Esq.**
MAmmendola@becker-poliaoff.com

When Evaluating Your Construction Defect Claim

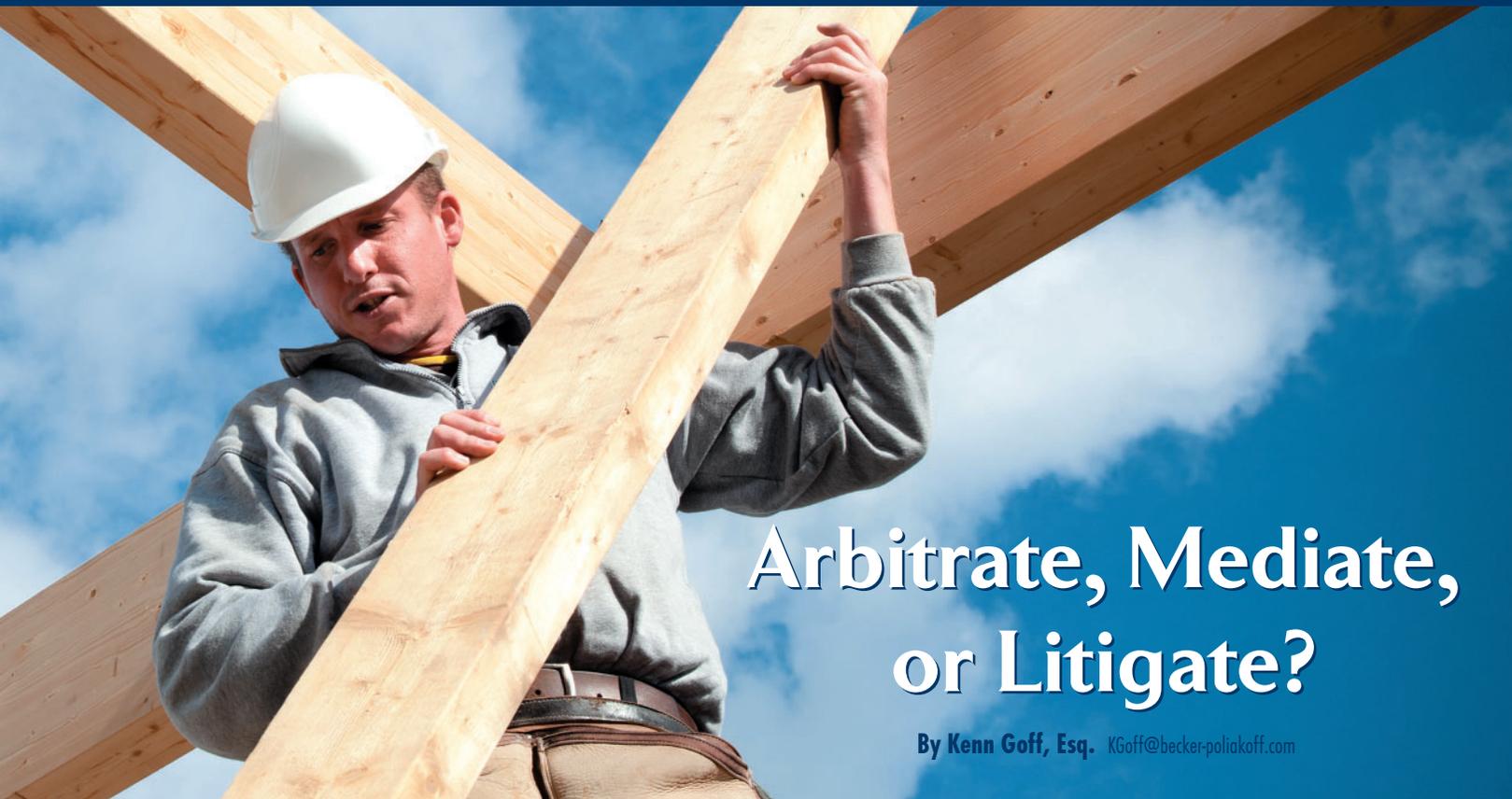
Investigating and placing potentially responsible parties on notice about the existence of construction or design defects against Developers, Contractors or Design Professionals in accordance with Chapter 558, Florida Statutes, is an important part of the claims process. As their defect claims progress, Individual Property Owners and Condominium Associations may need professional assistance from their attorneys and design consultants in calculating the potential costs to correct construction or design defects.

There are many other reasons why Owners or Associations would want to obtain repair proposals or estimates. For example, while repair estimates may help Owners and Associations budget for repairs, they may also help Owners and Associations to prioritize their claims for settlement purposes. Repair estimates enable Owners and Associations to identify any defects they may wish to withdraw from their Ch. 558 pre-litigation construction defects claims, or from litigation, during the course of settlement negotiations.

When negotiating a settlement, repair estimates are a valuable tool for attorneys to use in quantifying their clients' settlement demands better and evaluating the economic value of any settlement offers for money or repairs which they may receive.

Sometimes, repair estimates can be used to show how a party's monetary demands were calculated. Settlement

continued on page 3



Arbitrate, Mediate, or Litigate?

By **Kenn Goff, Esq.** KGoff@becker-poliakoff.com

You are about to embark on a new construction project, hoping for the best but preparing for the worst. The construction contract is almost done. At issue is what the contract should state about how disputes among the parties should be resolved; should they be arbitrated, mediated, or litigated? (If nothing is stated the default is generally litigation.) Each of these methods of dispute resolution has its own unique characteristics.

ARBITRATION: Arbitrations are typically not matters of public record. A contract calling for arbitration may provide that the arbitration proceedings are to be kept confidential. Although the American Arbitration Association has rules governing arbitration in construction disputes, the normal rules of evidence typically do not apply. There is no judge or jury. Rather, and depending upon the case or the parties' agreement, one to three arbitrators will decide the dispute. The arbitrator(s) will typically have experience in the construction field, unlike perhaps a judge or jury.

Some view arbitration as less expensive and providing for a relatively faster resolution of a dispute; not always so. Discovery is not typically allowed in an arbitration proceeding [if allowed it is typically limited], so any arbitration testimony might take longer than might otherwise be if pre-arbitration discovery were taken.

There is also a more limited right to challenge an arbitration proceeding. For example, in Florida the right to modify an arbitration award can exist where (a) there is an evident miscalculation of figures or an evident

mistake in the description of any person, thing or property referred to in the arbitration award, (b) the arbitrator(s) rendered an award upon a matter that was not submitted to them, or (c) the award is imperfect as a matter of law, not affecting the merits of the controversy. Fla. Stat. § 682.14.

MEDIATION: Mediation can also be a cost effective means to resolve a construction dispute. Some construction contracts provide that the parties shall consider mediation, whereas other contracts make mediation a condition precedent to filing a lawsuit. The mediator is usually someone who is well versed in construction. The actual mediation process may take a day or so, depending upon the complexity of the issues. Mediation is generally not binding unless the parties reach a settlement. At times, a party may, however, believe it needs certain information in order to effectively mediate a matter. Pre-suit mediations may not allow for a full opportunity to present one's case. Also, a party may be concerned about tipping its hand; wanting to lock in the other side to a position before exploring settlement through mediation. On the other hand, mediation may enlighten everyone as to the basis for the parties' positions in an expedited inexpensive manner without the need for tedious time consuming discovery.

LITIGATION: Finally, there is litigation. Under this approach the parties can have a judge or jury decide the case. The court is bound to follow the substantive law

that applies to the case. Rules of evidence apply. Those who testify are, of course, required to tell the truth. Discovery is allowed. The parties proceed through the structured judicial process, taking depositions, serving interrogatories and requests for production upon each other, conducting site inspections, retaining experts, and otherwise going through the formal court proceedings. The right to appeal, on a broader basis than in arbitration, exists as well. Litigation can be

expensive too, but you will have "your day in court." (In Florida, courts may also require the litigants to participate in arbitration or litigation as part of the pretrial process. Chapter 44, Florida Statutes)

CONCLUSION: There is not per se a "one size fits all" approach to the best method of dispute resolution. Instead, consideration should be given to what works best in your particular case.

continued from page 4 SCAMS

contract; to only then be followed by excessive change orders in an attempt to make up or increase the contractor's profit margin. On government projects, at least one state, Illinois, has enacted a Public Works Change Order Act in an effort to minimize the impact of potentially excessive change orders. This Act provides that on government projects, units of local government and school districts are to re-bid change orders when such change orders increase the overall cost of a project by 50% or more of the original contract price.



Proactively addressing potential construction scams - Although there are no guarantees, there are ways to minimize the chances of being exposed to a construction scam. Some examples of items to consider include verifying a contractor's license and credentials, checking the contractor's references, being wary of the high-pressure contractor that claims there is an extreme urgency in getting the work done, obtaining more than one bid for the work, determining if the bids are actually responsive to the work that needs to be done, avoiding cash payments, eliminating up-front payment for the entirety of the work and instead having a payment schedule that corresponds to the work done, having a qualified individual oversee the work, and having a written contract that protects your interests. Remember that "an ounce of prevention is worth a pound of cure."

continued from page 1 UNDERESTIMATE

meetings and mediations are usually more productive when all of the parties have a better understanding of an Owner's or Association's expectations as to what its construction or design defects claims may be worth, and how these amounts were derived.

Repair estimates may also identify portions of the claim that need further investigation or testing, such as when an Association has identified a few examples of a particular defect, but is not sure how widespread the problem actually is.

When obtaining repair estimates, Owners and Associations should consult with their attorneys. They should work together to obtain repair proposals from reputable, Florida licensed contractors or design professionals. Whenever possible, Owners or Associations should also try to procure multiple repair proposals for each defect. Doing so may illustrate whether there is a significant range in the Owners' or Associations' potential damages.

Ideally, repair estimates should include the scope of work, as well as costs for any permits, code upgrades, or design specifications which may be needed to effectuate the repairs. If the Owner or Association is working with a professional engineer or other design consultant, it should include the consultant in the bidding process. Among other things, a consultant can review the proposed repair methods, locations, materials and costs, and make recommendations for changes to protect the Owners' or Associations' interests.



3111 Stirling Road
Fort Lauderdale, FL 33312
www.becker-poliakoff.com

CAUTION

WATCH OUT for Construction Scams in 2013!



By Kenn Goff, Esq.
KGoff@becker-poliakoff.com

As the construction industry hopefully improves in 2013, one must always be mindful of construction scams. These scams can take many forms, including but not limited to the following:

The free test and need for a new system - An individual visited homeowners in Virginia and offered to test their water. Perhaps not surprisingly, the homeowners were then told they needed new water filtration systems. Yet, after paying for the systems the homeowners were unable to contact this individual. His so-called office address turned out to be a chiropractor's office. Charges for construction fraud were brought against this individual in Virginia.

Advance payments for work not done - A general contractor in Texas continually got advance payments from its clients while doing minimal work in relation to the monies paid. In appealing criminal convictions determined in the trial court, the general contractor

argued that it only quit the jobs after there were payment disputes. The appellate court disagreed. The evidence showed that the contractor did more than simply fail to perform the contracts and refund the money. The contractor engaged in a series of transactions with the same pattern-promising to complete the construction projects in a short time frame, demanding advance payments on a tight weekly schedule regardless of job progress, beginning a minimal amount of work and then stopping and walking off the job, leaving it unfinished after a "payment dispute" arose, while giving no refund of payments made. Although available beforehand, once the contractor got the money, he was unresponsive. The Texas appellate court affirmed the contractor's criminal convictions for misapplication of fiduciary property and theft by deception.

The low ball bid followed by a contract with excessive change orders - Various commentators have written about the practices of some [certainly not all] contractors low ball bidding a job to get awarded the

continued on page 3