

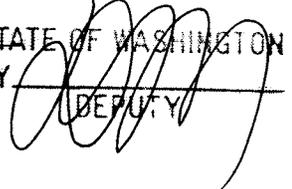
FILED
COURT OF APPEALS
DIVISION II

NO. 37092-1-II

08 MAY -5 AM 9:22

STATE OF WASHINGTON
BY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON



S&S CONSTRUCTION, INC., a Washington corporation,

Appellant,

v.

ADC PROPERTIES, LLC, a Washington limited liability company;
HIMANSHU NIGAM, an individual; CHAN HAN, an individual;
Community Property of HIMANSHU NIGAM and ZANQETTA
NIGAM; Community Property of CHAN HAN and KATHY HAN;
and DOES 1-10,

Respondent.

APPELLANT'S BRIEF

MARSTON ELISON, PLLC

Jami K. Elison WSBA # 31007

16880 N.E. 79th Street

Redmond, WA 98052-0902

Telephone: (425) 861.5700

Facsimile: (425) 861.6969

Attorneys for Appellant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY -2 PM 4:15

P. M. 5-2-2008

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION	1
II. VERITIES AND ASSIGNMENTS OF ERROR.....	3
A. Verities on Appeal	3
B. Assignments of Error	4
1. Assignment of Error #1	4
Issues Pertaining to Assignment of Error #1	4
2. Assignment of Error #2.....	4
Issues Pertaining to Assignment of Error #2	5
3. Assignment of Error #3.....	5
Issues Pertaining to Assignment of Error #3	6
III. STATEMENT OF THE CASE.....	7
The Parties and Undisputed Facts.....	7
The Construction Contract.....	7
Procedural History	8
The Lawsuit	8
The Arbitration.....	8
Objections and Belated Disclosures.....	12
Motion to Vacate and Motion to Confirm	13
IV. ARGUMENT AND AUTHORITY	15
A. The Court Has Jurisdiction Over This Appeal.....	15
B. An Arbitrator's Authority Is Purely Contractual.....	15
1. AAA Construction Industry Arbitration Rules. R-42 Time of Award.....	16
C. Contract Time Limitations Are Strictly Enforced.....	17
D. The Arbitrator Failed to Disclose Important Relationships.....	18
1. AAA Construction Industry Arbitration Rules. R-17 Disclosure.....	18
2. AAA Construction Industry Arbitration Rules. R-18 Disqualification of Arbitrator	19
E. The Untimely Award Contains Facial Errors.....	20
V. CONCLUSION.....	23

TABLE OF AUTHORITIES

TABLE OF CASES

WASHINGTON

<i>Beroth v. Apollo College, Inc.</i> , 135 Wash.App. 551, 145 P.3d 386 (2006)	15
<i>Clark County Public Utility Dist. No. 1 v. International Broth. Of Elec. Workers</i> , 150 Wash.2d 237, 248-49, 76 P.3d 248 (2003)	16
<i>Davidson v. Hensen</i> , 135 Wash.2d 112, 119 (1998).....	21
<i>Kitsap County Deputy Sheriff's Guild v. Kitsap County</i> , 165 P.3d 1266, 1270 (2007)	16
<i>Lindon Commodities, Inc. v. Bambino Bean Co.</i> , 57 Wash.App. 813, 816 (1990)	20
<i>Mike M. Johnson, Inc. v. County of Spokane</i> , 150 Wash.2d 375, 386, 78 P.3d 161 (2003)	18
<i>ML Park Place Corp. v. Hedreen</i> , 71 Wn. App. 727, 744, 862 P.2d 602 (1993)	16
<i>Munsey v. Walla Walla College</i> , 80 Wn. App. 92, 94, 906 P.2d 988 (1995)	16

STATUTES

Wash. Rev. Code 7.04A (2008)	21
Wash. Rev. Code 7.04A.230 (2008)	20
Wash. Rev. Code 7.04A.230(1)(c) (2008)	20
Wash. Rev. Code 7.04A.230(1)(d) (2008)	17, 18
Wash. Rev. Code 7.04A.280 (2008)	15
Wash. Rev. Code 7.04A.280(1)(c) (2008)	15

REGULATIONS AND RULES

Wash. R. Evid. 701	22
Wash. R. Evid. 703	22

OTHER AUTHORIES

AAA Const Indus. Arb Rules and Med R-1319
AAA Const Indus. Arb Rules and Med R-1718
AAA Const Indus. Arb Rules and Med R-1819
AAA Const Indus. Arb Rules and Med R-18(a)(iii).....21
AAA Const Indus. Arb Rules and Med R-429, 16

I. INTRODUCTION

This case has been appealed to this court seeking reversal of the trial court's refusal to vacate an arbitration award rendered (1) long after the contract deadline for doing so had expired and (2) by an arbitrator who failed to disclose the magnitude of his long-standing business relationship with the law firm representing the opposing party.

The parties' contract specified dispute resolution in accordance with the AAA Construction Arbitration Rules. Those rules require the arbitrator's award be made within 30 of the hearing. The arbitrator below did not render his award until 180 days after the hearing concluded. Not only was there by this time a likelihood that his recollection of the evidence had dimmed, but he actually admitted that this had occurred. He apologized for what he referred to as an "unconscionable" delay and rendered a grossly flawed award.

The point of making *conflicts* and past relationship disclosures is to give litigants a fair opportunity to evaluate the possibility of a biased decision. The presence or absence of a relationship or acquaintance with one or more of the parties is a cause for concern. The presence or absence of a relationship with a lawyer or that lawyer's firm is perhaps an even greater cause for concern because a continuing business relationship with a law firm presents the real possibility of bias due to financial self-interest.

The arbitrator below did not disclose to Respondent the fact of his prior employment by the law firm of the opposing party until the moment the hearing commenced. It was not until much later that the arbitrator disclosed that opposing counsel's law firm was a source of arbitration business for him. It was only months after the hearing that he finally disclosed that he had a previous business relationship with one of the owners of Respondent-Defendant.

The untimely award was rife with erroneous rulings and mistakes in applying the law. In the face of these serious failures and the expiration of contract authority, the trial court denied Appellant's motion to vacate and confirmed the award. The trial court fashioned two reasons to excuse the arbitrator's failures: (1) the trial court ruled that the contract's deadline to allow for a "reasoned decision" had been postponed, even though the parties had requested both a "reasoned decision" and 30-day deadline; and (2) the trial court ruled that Appellant was required to have filed an objection on the day the arbitrator's authority expired, even though there was no such requirement in the contract or in law.

While Washington policy favors arbitration, Washington policy also requires adherence to the contract terms defining and limiting the arbitration. With this appeal, this Court has the opportunity to confirm that an arbitrator derives authority only from the consent of the parties as

defined by the terms of the contract they entered into. When that contract limits an arbitrator's authority, such limitations must be enforced. Because the facts here are generally undisputed, this appeal presents an ideal opportunity to confirm this critical principle. By doing so, this Court of Appeals will prevent not only an injustice to this Appellant, but also enforce needed discipline to contractual arbitrations protecting the rights of Washington citizens and thereby encouraging utilization of the arbitration process.

Appellant requests that this Court of Appeals reverse the trial court's decision and vacate the arbitration award.

II. VERITIES AND ASSIGNMENTS OF ERROR

A. Verities on Appeal: For the purposes of this appeal and based on the hearings below and on the arbitrator's own admissions, the Court of Appeals must accept as a fact each of the following:

1. By contract, the arbitrator was required to issue an award within 30 days of the evidentiary hearing.
2. The arbitrator did not issue an award until 180 days after the hearing.
3. Prior to the commencement of the hearing, the arbitrator had not disclosed:
 - (a) That he previously was employed by the law firm that was representing the Respondent;
 - (b) That he previously served as an arbitrator in disputes argued by the attorney representing the owners;

- (c) The amount of services he provides to the law firm representing Respondent, which he refused to disclose when requested;
- (d) That he previously served as a mediator in a dispute involving one of the owners who was one of the parties in this arbitration.

B. Assignments of Error:

Assignment of Error #1: The trial court erred in not vacating the arbitration award because the contract provided that the arbitrator's authority to make a binding award expired 30 calendar days after the hearing.

Issues pertaining to Assignment of Error #1:

- Contracts containing the agreements reached by the parties are enforceable.
- Arbitrators have no authority beyond that granted by the contracting parties.
- Our courts strictly enforce agreements regarding time limitations.
- An agreed time limitation for arbitration awards serves multiple purposes including limiting the expense of arbitration, providing a prompt resolution, and ensuring that an award is made when evidence and testimony is most clearly recalled by the arbitrator.

Assignment of Error #2: The trial court erred in not vacating the arbitration award because the 30-day deadline for issuing an award could only be extended when "agreed by the parties" and no such agreement was requested or granted.

Issues pertaining to Assignment of Error #2:

- Courts enforce and do not rewrite agreements.
- The trial court may not excuse the arbitrator's failure to perform his duties as required by rewriting the parties' contract. (a) The trial court's decision to extend the deadline for an award to allow for a "reasoned decision" contradicts the parties' agreement to a reasoned decision within a 30-day deadline. (b) The trial court's decision to prolong the arbitrator's authority when a party does not file an objection on the day authority expires has no basis in the contract, no basis in law, and no basis in sound policy. It creates an unfair dilemma for litigants, fosters an environment where delay has no consequence, and excuses the arbitrator from failing even the simple task of asking the parties to extend his authority.
- The only method for extending the 30-day deadline for making an award was agreement of the parties. The parties did not agree to extend the deadline here, and the arbitrator did not seek or obtain such an agreement from the parties.
- Appellant expressly objected to the expiration of the Arbitrator's authority. Such an objection was not a requirement because the expiration of authority voided any binding effect of any subsequent decision.
- If an objection were necessary, Appellant's formal objection was lodged more than 90 days before the Arbitrator's Notice of Award. There is no rule or law requiring an objection earlier than that, no objective standards for creating such a rule, and only bad policy behind Respondent's assertion that such a rule should be imposed by the court. Instead, once authority has expired the burden should be on the Arbitrator to request an extension of his contractual authority.

Assignment of Error #3: The trial court erred in not vacating the arbitration award based on the arbitrator's admitted failure to make important disclosures.

Issues pertaining to Assignment of Error #3:

- The burden to make disclosures rests with the Arbitrator.
- The arbitrator failed to disclose relevant relationships and circumstances that evidence a financial incentive for partiality. He had a business relationship with Respondent's side and no prior relationships with Appellant's side.
- The arbitrator refused requests for further information regarding the extent of his relationship with Respondent's attorneys.
- The failure to disclose past relationships before the hearing creates a presumption of partiality.
- When factual disputes about the timing and extent of disclosures exist, the facts should be taken in the light most favorable to the aggrieved party because the Arbitrator has the ability and responsibility to eliminate ambiguity through disclosures at the outset of his engagement.
- Allowing an arbitrator to wait until a hearing to start making disclosures regarding past relationships fosters concealment and creates an unfair circumstance for a litigant who has already incurred substantial cost preparing for a hearing.
- The fact that the arbitrator knew a principal and witness for Respondent was not made until several months after the arbitration.
- The parties contracted to hold alternative dispute resolution proceedings pursuant to AAA Construction Industry Arbitration Rules that require an arbitrator to disclose "any circumstance" that likely will give rise to justifiable doubt to the arbitrator's impartiality or independence. Under the AAA rules, the arbitrator was subject to disqualification.

III. STATEMENT OF THE CASE

The Parties

Appellant-Plaintiff S&S Construction, Inc. was a licensed and registered construction contractor. Respondent-Defendant ADC Properties, LLC is a group of dentists that own a building in Puyallup built by Appellant. The parties entered a construction contract to build a dental office in Puyallup.¹ As a direct result of this project and the resulting non-payment from the owners, Appellant S&S Construction is insolvent and is not doing business.²

The Construction Contract

The construction contract required arbitration of disputes and included the Construction Industry Arbitration Rules of the American Arbitration Association.³ The project began in 2003. The owners postponed construction on several occasions. Construction work resumed in late 2005.⁴ Respondent-owners obtained a certificate of occupancy and Appellant completed work on the project in April 2006.⁵ The contractor incurred substantial additional costs as a result of unforeseen soil conditions and changes required by the property owners and City of

¹ CP at 224 and 226 (excerpts from contract)

² CP at 228

³ CP at 93-96 (excerpts)

⁴ CP at 222

⁵ CP at 227

Puyallup. The owners failed to pay for services provided and the contractor recorded a lien.

The Lawsuit

S&S filed a Complaint in May 2006 when Respondent-owner ADC Properties would not return phone calls or meet to resolve these disputes.⁶ By consent of the parties, the dispute was submitted to arbitration pursuant to an Order of the Court on October 20, 2006.⁷ The owners did not comply with the schedule set in that order. Subsequently, on January 5, 2007, the Court entered another Order for the completion of alternative dispute resolution by the end of March 2007.⁸

The Arbitration

Before the hearing, the arbitrator sent letters with limited disclosures.⁹ Nowhere in those letters did the arbitrator disclose his past relationships with the attorneys or principals.

The arbitrator made his first ruling in the arbitration on March 23, 2006.¹⁰ The arbitrator still had not made disclosures about his relationships with the parties, defense counsel, and defense firm.

⁶ CP at 228

⁷ CP at 1-2

⁸ CP at 3

⁹ CP at 98-100, 102-03, and 105-110

¹⁰ CP at 112

The evidentiary hearing commenced March 27, 2007. There were 3 days of testimony. Closing arguments were on April 5, 2007.¹¹

The arbitrator's authority to make an award derived entirely from the parties' construction contract. By contract, an award was due no later than 30 calendar days after the conclusion of arbitration:

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

R-42, American Arbitration Association.¹² Accordingly, the arbitrator's contractual authority to make a binding decision expired on May 5, 2007.

The arbitrator failed to issue an award when required by contract. He knew he was obligated to provide the reasoned decision award in 30-days, and stated:

I apologize for the unconscionable delay, take full responsibility for it due to a variety of factors.¹³

By that point in time, an award was already untimely and invalid. No agreement was sought or provided to extend the arbitrator's authority.

On June 25, 2007, the arbitrator transmitted a letter containing his thinking and decisions on many issues in dispute. He stated that the letter

¹¹ CP at 30

¹² CP at 96

¹³ CP at 88

did not constitute the award or any portion of the award: “This letter is not an award, nor does it form any portion of the award which will be entered in this matter.”¹⁴ He also stated that he would receive and consider letters challenging fundamental errors: “I am also available, albeit reluctantly, to entertain argument from you that I have made a fundamental error in the matters that I have addressed above.”¹⁵

Although there was no obligation to do so, Appellant objected that the Arbitrator’s contractual authority had already expired.¹⁶ Any subsequent award would be null and void. Under this protest, in July 2007 Appellant submitted letters assigning fundamental errors and requesting that the arbitrator recognize the expiration of his authority by withdrawing.¹⁷ On August 10, Defendant responded. Plaintiff replied on August 14.¹⁸

On August 24, the arbitrator sent a letter in which he declined to withdraw.¹⁹ In that letter he admitted that he has no memory of certain portions of the hearing, and specifically, whether he ever disclosed his past relationship with Dr. Han. “I did not specifically recall, whether S&S was aware that I had previously served in a mediation with Mr.

¹⁴ CP at 119

¹⁵ CP at 135

¹⁶ CP at 138-139

¹⁷ CP at 143-44 and 157

¹⁸ CP at 164

¹⁹ CP at 177

Farren in which Dr. Han was a participant.”²⁰ “Regretfully, contrary to my routine practice it became obvious to me that no written disclosures had been made to the parties.”²¹

The arbitrator issued a letter decision on September 28, 2007. In that letter, the arbitrator acknowledged one of the many errors that resulted from an unsworn post-hearing document he relied substantially upon, but he declined to otherwise address the merits.²² Instead, 180 days after the hearing, he incredulously relied on the supposed credibility of witnesses and weight of evidence: “With one minor exception, I find that Mr. Elison’s objections relate to matters involving the credibility of witnesses, the interpretation or balancing of evidence, or legal analysis.”²³ Once again: “By their terms, neither the memorandum decision nor the supplemental memorandum decision constitute awards, nor do they form any portion of this award.”²⁴

On October 2, 2007, plaintiff received a notice of award, subject to vacation or confirmation by the trial court, dated September 28, 2007.²⁵

²⁰ CP at 178; See also CP at 181

²¹ CP at 178

²² CP at 198

²³ Id.

²⁴ Id.

²⁵ CP at 203-205

Objections and Belated Disclosures

Over Appellant's repeated objections to the expiration of authority, and despite his admitted inability to recall portions of the hearing²⁶ and his own admitted commission of "unconscionable delay,"²⁷ the arbitrator made an award on October 2, 2007—180 days after the hearing.²⁸ This was almost five months after the expiration of his contract authority to make a binding decision. Having previously conferred with Respondent's counsel about the lapsing of the deadline for an award,²⁹ on June 29, 2007, Appellant had lodged with the Court formal objections.³⁰

Only during the evidentiary hearing did plaintiff learn that the arbitrator had previously been employed by the law firm representing Respondent. Only after the conclusion of the hearing did plaintiff further learn that the arbitrator had previously arbitrated for defense counsel.³¹ On July 31, 2007, long after the hearing, the arbitrator initiated a telephone conference for the purpose of disclosing that he had also previously mediated a dispute for principals of Respondent-Defendant who were parties in this arbitration.³² Appellant immediately objected.³³

²⁶ CP at 178 and 181

²⁷ CP at 88

²⁸ CP at 203-05

²⁹ CP at 88

³⁰ CP at 138-39

³¹ CP at 143

³² CP at 178

Appellant requested fair disclosure of the business relationship between the arbitrator's and defense counsel's firm.³⁴ The arbitrator refused further disclosure.³⁵

Motion to Vacate and Motion to Confirm

In November 2007, Appellant-Plaintiff moved to vacate the award and Respondent-Defendant moved to confirm it. The trial court fashioned two reasons for prolonging the arbitrator's authority and re-writing the contract's deadline:

My ruling is that the timing issue is not dispositive on whether I should confirm or vacate the arbitration award, and I find that for two reasons: One, both parties asked for a reasoned decision ... Secondly, S&S did not file a timely objection when the decision did not come out on the first calculation April 5th, so May 5th. So as to that, timing is not dispositive.³⁶

A record was immediately made establishing that the first ground was not tenable:

[Appellant's Counsel]: The parties asked for a reasoned decision in initial phone conferences with Mr. Cogan. So we are talking about January or February, and it was contemporaneous and after that that he recognized that he had a 30-day obligation. So asking for a reasoned decision had no effect on the period that that he would be allowed to write a decision.

³³ CP at 212

³⁴ CP at 188

³⁵ CP at 220

³⁶ RP p. 10-11.

[The Court]: Because it happened up front.

[Appellant's Counsel]: It happened up front.

[The Court]: Understood.

...

[Respondent's Counsel]: Yes, Your Honor. I do agree with Mr. Elison with respect to the first point, that we did ask for a reasoned decision early on, not at the trial, ...³⁷

Likewise, a record was also made showing why the second ground

was also untenable:

[Appellant's Counsel]: And on the second issue, not filing a timely objection, Mr. Farren did not state in his comments that the law is that you have to send a written notice. There is no law cited that says you have to send written notice on this issue, on an objection to a decision not being published on time. There is no reason for notice because everyone has the same calendar. ...

[The Court]: Do you want to address the obligation that it puts on the arbitrator, which is what is the point of the notice? Does the arbitrator stop work because no notice was received? Does the arbitrator stop work when it wasn't timely produced in 30 days, or because no notice was received continues to work, believing the parties wish the reasoned decision requested up front to be produced.

[Appellant's Counsel]: The easiest control is if the time has elapsed, the arbitrator, who can easily say, do you want to extend the time limit, and there is a rule allowing for additional time. That is the rule in AAA, is the parties can extend that period of time. They can consent to additional time. And the arbitrator has an easy opportunity to say, hey, I missed my time limit. Do you want to consent to additional time. That didn't happen here.³⁸

³⁷ RP at 11, ll.5-13 and p.13, ll. 15-17.

³⁸ RP p.11-12, ll. 14-20 and p.13 ll.16-25, 1-7.

The trial court confirmed the award on November 9, 2007.³⁹
Plaintiff timely appealed.⁴⁰

IV. ARGUMENT AND AUTHORITY

A. The Court Has Jurisdiction Over This Appeal.

There are statutory grounds for judicial review of an arbitration decision.⁴¹ RCW 7.04A.280 provides those grounds:

- (1) An appeal may be taken from:
 - (a) An order denying a motion to compel arbitration;
 - (b) An order granting a motion to stay arbitration;
 - (c) An order confirming or denying confirmation of an award;
 - (d) An order modifying or correcting an award;
 - (e) An order vacating an award without directing a rehearing; or
 - (f) A final judgment entered under this chapter.

Review is sought from the trial court's order confirming the arbitration award and denying the motion to vacate the award.⁴²

B. An Arbitrator's Authority Is Purely Contractual

An arbitrator's authority derives from contract.⁴³ The arbitrator's authority to issue a binding decision was subject to a 30-day deadline for issuing the award.

³⁹ CP at 340-43

⁴⁰ CP at 34-38

⁴¹ *Beroth v. Apollo College, Inc.*, 135 Wash.App. 551, 557, 145 P.3d 386 (2006).

⁴² RCW 7.04A.280(1)(c)

AAA Construction Industry Arbitration Rules

R-42. Time of Award

The Award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

Recognizing that an arbitration decision will be binding and is not subject to the same appeal rights as other decisions, the AAA's 30 day rule is critical to preserving the likelihood that a decision will be made when credibility and weight of evidence determinations are reasonably fresh in the arbitrator's mind.⁴⁴

When the arbitration and contract rules are followed, arbitrations can serve as an "efficient and economic alternative to litigation."⁴⁵ "There is a strong public policy in Washington state favoring arbitration of disputes."⁴⁶ But those presumptions in favor of arbitration are fully dependent on an arbitration being conducted pursuant to the contract.

The arbitrator's February 6, 2007 letter acknowledged that, per the parties' contract, he was bound by the Construction Industry Arbitration

⁴³ *Clark County Public Utility Dist. No. 1 v. International Broth. Of Elec. Workers*, 150 Wash.2d 237, 248-49, 76 P.3d 248 (2003); *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 165 P.3d 1266, 1270 (2007).

⁴⁴ In addition, the rule prevents arbitrator's from spending too much time and thereby adding too much expense to a dispute, which also defeats the purpose of alternative dispute resolution.

⁴⁵ *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 744, 862 P.2d 602 (1993).

⁴⁶ *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94, 906 P.2d 988 (1995).

Rules of the American Arbitration Association.⁴⁷ Closing arguments took place on April 5, 2007. On June 25, 2007, 81 days after closing argument, a letter was distributed. Further submissions were submitted under protest of the arbitrator's authority, partial modifications made, and a notice of award sent effective September 28, 2007. But the arbitrator's contractual authority had long since expired.

Here, the arbitrator's power to issue an award derived from a contract that required the award to be issued within 30 days.

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

...
(d) An arbitrator exceeded the arbitrator's powers.⁴⁸

The arbitrator had no power to issue an award after 30 days and no authority to spend time on the project after that date. The delay was in his own word, "unconscionable," and it prejudiced opportunities for a fair decision. And it was not issued under the mantle of the arbitrator's contractual authority.

C. Contract Time Limitations Are Strictly Enforced.

Washington courts strictly enforce the terms of construction contracts with regard to durations that are specified and required by the

⁴⁷ CP at 102-03

⁴⁸ RCW 7.04A.230(1)(d).

contracting parties.⁴⁹ Under these basic principles of contract law and also under RCW 7.04A.230(1)(d), the award should have been vacated because the arbitrator's contractual authority had expired.

D. The Arbitrator Failed to Disclose Important Relationships.

AAA Construction Industry Arbitration Rules.

R-17 Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

"Justifiable doubt" as to partiality exists when the arbitrator was formerly an attorney with the same law firm representing respondent-defendant, had served as arbitrator on multiple occasions for the same attorney representing respondent-defendant, and had served as mediator for one of the same principal members of respondent-defendant. The arbitrator should be presumed partial for having withheld this information.

The burden is squarely on the arbitrator to make disclosures about prior relationships. It is improper and inadequate for these disclosures to trickle in during and after an arbitration, well after the parties have

⁴⁹ See *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wash.2d 375, 386, 78 P.3d 161 (2003).

already incurred the significant expense of preparing for an arbitration, or while parties are engaged in the middle of evidentiary contests.

**AAA Construction Industry Arbitration Rules.
R-18 Disqualification of Arbitrator**

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

In this case, the arbitrator failed each of the three requirements. (i) partiality or lack of independence. The arbitrator failed to make an independent decision. After waiting too long to make a decision based on credibility and weighing of the evidence, the arbitrator relied instead on a post-hearing document submitted by defense counsel. He was partial in doing so especially after refusing a request by both parties to submit supplemental materials. Furthermore, the arbitrator gave no consideration to the critical first witness, Mr. William Chang, completely disregarded plaintiff's expert Mr. Mike Lembke without reason, and adopted whole-

cloth defendant's expert despite admitted lack of foundation for most of his opinions. (ii) inability to perform duties with diligence. The arbitrator called his delay "unconscionable." When he was already more than a month late, he stated: "I just can't, I just can't do it, I just am not going to be able to live up to that commitment." (iii) any grounds for disqualification provided by applicable law.

The award should be vacated under these binding AAA provisions and also under RCW 7.04A.230. The refusal to permit additional evidence while ultimately relying on defendant's post-hearing submission violates the portion of RCW 7.04A.230(1)(c) that identifies "refused to consider evidence material to the controversy" as a ground for vacating an award.

E. The Untimely Award Contains Facial Errors.

In order for a court to vacate an award, "the award, on its face, must show the adoption of an erroneous rule or mistake in applying the law."⁵⁰ In *Lindon*, the appellate court reversed the superior court's affirmation of an arbitration award because the arbitration award could not stand in light of the error of law on face of award.⁵¹ "A court may confirm, vacate, modify, or correct an arbitrator's award in accordance

⁵⁰ *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wash.App. 813, 816 (1990).

⁵¹ *Id.*

with the applicable provisions in RCW 7.04.”⁵² AAA R-18(a)(iii) adopts other grounds such as these as proper grounds for disqualification.

A portion of the contract specified: “This Second Addendum to Construction Agreement is not intended to define or alter the work scope for the project, which is otherwise established through other contract documents, agreements, and/or change orders that may have been or may be issued from time to time.”⁵³ However, in the face of this plain language the arbitrator erroneously concluded that the work scope was altered and that S&S was responsible for site work without compensation: [T]here was no contractual or other agreement to pay separately for site work under the Second Addendum.”⁵⁴

On the contrary, a portion of the contract specified: “The Contractor may request and/or the Owner may order changes in the Work or the timing or sequencing of the Work that impacts the Contract Price or the Contract Time.”⁵⁵ It was undisputed that the City of Puyallup required changes to the sewer system and Mr. William Chang’s testimony of additional site work was likewise undisputed.⁵⁶ However, having concluded that the contractor was responsible for site work with no

⁵² *Davidson v. Hensen*, 135 Wash.2d 112, 119 (1998).

⁵³ CP at 222

⁵⁴ CP at 125

⁵⁵ CP at 226

⁵⁶ CP at 148-49

additional compensation the arbitrator committed obvious legal error by failing to award compensation under the plain language of these clauses. Instead, the arbitrator put the contractor in a position to pay for the sewer system revisions, and other changes, required by the City of Puyallup during construction.

A portion of the contract specified: "If the Contractor is delayed at any time in the commencement of progress of the Work by any cause beyond the control of the Contractor, the Contractor shall be entitled to an equitable adjustment of the Contract Time."⁵⁷ However, again in the face of this plain language the arbitrator acknowledged numerous items of additional work justifying change orders to the contract but refused to provide a single extra day to the contractor.

Furthermore, it was obvious legal error to take counsel's non-sworn post-hearing submission as a factual basis for his decision.⁵⁸ ("Following the evidentiary hearing, ADC submitted a schedule of change orders, contract sums, and damages.")⁵⁹ The submission violated Rules of Evidence 701 because it was not submitted in testimony nor did it have sufficient foundation under Rule 703. By making this mistake, the Arbitrator ended up making absurd conclusions such as the one about all

⁵⁷ CP at 224

⁵⁸ CP at 128

⁵⁹ See discussion at CP at 144-46 and 192-93

walls being structural⁶⁰ and charging the Contractor for work that was never even within the Contractor's scope.⁶¹

The plainly mistaken rulings and forgotten factual underpinnings further demonstrate the partiality of the arbitrator. It is conceivable that the arbitrator had simply lost the independent recollection necessary to render a fair decision by the time he got around to writing one, but, given the significant failures regarding disclosures, it is also likely that the delay was not the only problem here. In either case, his award should be vacated. The arbitrator's contract authority to make a binding decision had long since expired.

V. CONCLUSION

Reversing the trial court and vacating the untimely, unauthorized, presumptively and demonstrably biased arbitration award places each party in exactly the same position. That is what justice requires here. Appellant-Plaintiff S&S Construction is entitled to a fair proceeding before final resolution. The arbitration proceeding was not a fair proceeding and the arbitrator exceeded the authority extended to him by contract. The contract provision requiring an award within 30 days must be enforced. Reversal will uphold the general policy in favor of

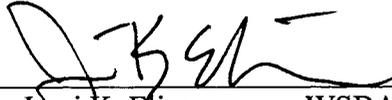
⁶⁰ CP at 127

⁶¹ CP at 196, 144-46, and 192-93

arbitrations because it will preserve the integrity of contractual arbitrations. Arbitrators can easily, and must, provide required disclosures. If arbitrators fail to comply with deadlines, they can request that the parties extend the contractual authority. Neither happened here. Appellant respectfully requests reversal and that this Court vacate the award and remand.

DATED this 2nd day of May, 2008.

MARSTON ELISON, PLLC

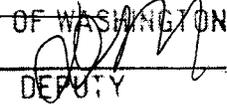
By 
Jami K. Elison WSBA # 31007
Attorneys for Appellant S&S Construction,
Inc.

FILED
COURT OF APPEALS
DIVISION II

NO. 37092-1-II

08 MAY -5 AM 9:22

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

S&S CONSTRUCTION, INC., a Washington corporation,

Appellant,

v.

ADC PROPERTIES, LLC, a Washington limited liability company;
HIMANSHU NIGAM, an individual; CHAN HAN, an individual;
Community Property of HIMANSHU NIGAM and ZANQETTA
NIGAM; Community Property of CHAN HAN and KATHY HAN;
and DOES 1-10,

Respondent.

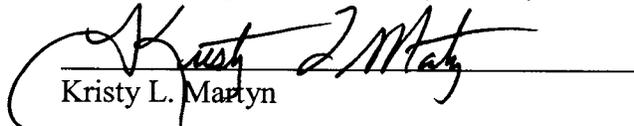
PROOF OF SERVICE

I certify under penalty of perjury that on the 2nd day of May, 2008,
I served a copy of Appellant's Brief via facsimile and U.S. Mail on the
following:

Attorneys for Respondents:

Rhys M. Farren
Davis Wright Tremaine LLP
777 108th Avenue NE, Suite 2300
Bellevue, WA 98004-5149
Phone 425.646.6100
Fax # 425.646.6199

Dated at Redmond, Washington this 2nd day of May, 2008.



Kristy L. Martyn

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY -2 PM 4:15