

LOS ANGELES

Daily Journal

THURSDAY,
AUGUST 13, 2009

COVER STORY

SINCE 1888

Caltrans Legal Strategy: Fight, Delay, Then Pay More

In Several Cases, Agency Wound Up Paying Out Far Higher Than It Could Have If It Settled Early On

By Don J. DeBenedictis
Daily Journal Staff Writer

The California Department of Transportation might have forestalled litigation over the construction of a \$30 million freeway project back in 2002 had it paid a major Orange County builder a little more than \$3 million to take care of cost overruns and delays, according to the company's attorneys.

Instead, under the gun from a judge, Caltrans finally cut the company a check for more than \$12 million early this year.

In 2000, Caltrans might have signed off on a Fresno landscaping company's roadside beautification work for \$340,000. Instead, this past October, the department paid close to \$2 million after abandoning an appeal of an arbitrator's award, the landscapers' attorney said.

According to the lawyers in those and many other cases, Caltrans regularly drags out litigation over construction disputes it could have resolved. As a result, it engorges the awards it finally pays with extra costs, years of interest and even attorney fees for opposing counsel, the lawyers contend.

"Their strategy is delay, delay, delay, stall, stall, stall," said Robert Marcereau, an associate at Rutan & Tucker in Costa Mesa, who along with partner Steven A. Nichols, has had a string of five victories against Caltrans in recent years.

"In my opinion, it's a clear defense strategy to financially wear down the contractors," charged Kerri Melucci, a contractor's attorney at Braun & Melucci in La Jolla.

Caltrans officials declined to discuss any of the allegations. In an e-mail, a spokesman offered only that "the men and women of Caltrans, which includes our legal team, strive to be good stewards of taxpayer dollars. We follow the highest standards of professionalism, in court and otherwise, and allegations to the contrary are off-base."

To be sure, other lawyers who represent contractors insist Caltrans' in-house legal department comprises good attorneys who handle overwhelming caseloads professionally while saddled with the state's fiscal problems. These days, Caltrans' 148 in-house lawyers "can't work on Fridays, can't make color copies," one sympathetic lawyer said.



ROBERT LEVINS / Daily Journal

Attorneys Steven A. Nichols, left, and Rob Marcereau, of Rutan & Tucker in Costa Mesa, have won a string of legal victories against Caltrans, representing builders in construction disputes. "Their strategy is delay, delay, delay, stall, stall, stall," Marcereau said.

Building a major highway project is a hugely complicated endeavor that usually takes years and costs millions. No matter how well a project is planned and orchestrated, "there are always change orders," said Edmundo A. Puchi, who was a Caltrans civil engineer for a dozen years before becoming a construction lawyer in 1977.

Sometimes, things go well. Puchi, the in-house lawyer for MCM Construction Inc. in North Highlands, said his company is working on a Bay Area bridge that is months ahead of schedule and for which he predicts final payment could arrive 90 days after Caltrans formally accepts the finished job.

On the other hand, Caltrans accepted MCM's \$65 million rebuilding of the I-5 freeway near the 91 freeway in northern Orange County back in April 2003. But dispute resolution stretched out till December 2008, when Caltrans ultimately sent off the final \$1.8 million payment, according to Puchi and the department's Web site.

Theoretically, the administrative process should wrap up within eight months of the time Caltrans accepts the work, and if it doesn't the contractor has the statutory right to demand arbitration before the state's Office

of Administrative Hearings, the only forum to hear construction claims against Caltrans.

But Puchi said the in-house process often can take three years. Disputes that need formal arbitration, according to calculations by Melucci, typically drag on seven years past the time final payment was originally due before contractors receive their money.

During this decade, Caltrans cases have taken an average of about 2½ years — 878 days — to go from filing of the arbitration complaint to final award, according to a Daily Journal analysis of Office of Administrative Hearings statistics.

That's not speedy, but it's not exceptionally long for what are essentially big-ticket construction-defect suits against a single defendant.

On the other hand, some cases take much longer. Following a lengthy administrative process, Rutan & Tucker's case for Orange County builder Sully-Miller Contracting Co. spent 1,164 days in the arbitration system, but it spent another 2½ years after that in court as Caltrans fought the arbitrator's award. *Sully-Miller Contracting Co. v. California Department of Transportation*, A-0018-2003 (OAH, May 19, 2003)

By the time Caltrans paid up in January, it had filed and dismissed an appeal and been threatened with sanctions and a writ of mandate by a Superior Court judge. The arbitrator's award of \$8.4 million plus \$1.5 million in attorneys fees — the second-largest in Caltrans history — had grown to more than \$12 million, according to Rutan & Tucker partner Nichols. *Sully-Miller Contracting Co. v. California Department of Transportation*, E044762 (Cal. App. 4th Dist., filed Dec. 14, 2007)

Caltrans' strategy is to "try to wait out the clients ... and offer pennies on the dollar" for their claims, Nichols said.

Much the same happened to the Fresno-area landscaping case. It lingered for 1,917 days at the OAH, from May 2001 to October 2006, when an arbitrator awarded J&M Land Management Inc. \$1.2 million. *J&M Land Restoration Inc. v. Department of Transportation*, A-0019-2001 (OAH, filed May, 29, 2001)

But then, Caltrans attorneys waited till the day before deadline to object to the arbitrator's award in Superior Court and to the day before deadline to appeal the court's ruling, according to the landscaper's attorney, Steven B. Copeland of Los Angeles. A few days before the opening brief was due, Caltrans dismissed the appeal, Copeland said.

It still took another nine months before Caltrans cut J&M a check on Oct. 6, 2008, he said.

"You're dealing with bureaucrats who represent the state ... so their philosophy is don't pay it and push it out as far as possible," said Amanda E. Manahan of the Rodarti Group in Irvine. Manahan is

handling a Caltrans arbitration for South Shores Residential & Development Corp. that has been pending since March 2004.

Caltrans' goal, Manahan speculated, is to force a favorable settlement as the contractors run out of money.

Kenneth W. Curtis, an Allen Matkins Leck Gamble Mallory & Natsis partner in Irvine and co-chair of the firm's construction law group, said he has a client who may have to go out of business because it has been carrying a couple of million dollars in receivables from Caltrans for years.

"It's very scary that they have that much control over the fate of the contractor," Curtis said.

Several lawyers also complained that naming an arbitrator can take a long time. "I've had cases where it's taken years even to pick an arbitrator," Puchi said.

The Office of Administrative Hearings process for selecting an arbitrator allows as much time as needed. Each side in a dispute

proposes five names from among the 41 lawyers and 12 contractors or engineers approved as public construction arbitrators.

If there's no match, the process repeats until there is. In one case Puchi filed in April 2008, "there's still no arbitrator selected," he said. "We've been through four iterations."

Either side can ask a Superior Court to step in to pick an arbitrator from the list, but either side also can reject the court's selection. At the least, according to Melucci, the process needs "some sort of end to the game."

Worse, she and many dissatisfied construction lawyers insist the process allows Caltrans to blackball arbitrators who have awarded big money against it.

"If Caltrans gets an adverse ruling, like 100 cents on the dollar, Caltrans never picks them again," Melucci contended. "All the arbitrators know it."

To Rutan's Nichols, that contention raises serious issues. "If Caltrans is using this procedure to blackball people, there's a fairness question, a due process question."

Nichols believes blackballing is why the arbitrator who awarded \$9.9 million to Sully-Miller, David W. Robison of Paradise, has not had a Caltrans arbitration since then. Robison, who had been a Caltrans in-house attorney for 24 years before switching to arbitration in 1996, declined to comment.

Melucci and Copeland suspect Caltrans went further with Robert B. Thum. Formerly with Thelen, Reid & Priest in San Francisco and now with Howrey in Los Angeles, he has

practiced in the field since 1974.

Melucci said a judge appointed Thum to handle a case in which she represents a big San Diego builder, Coffman Specialties Inc., only to discover that Caltrans was having Thum removed from the approved list.

"This was news to Mr. Thum," Melucci said.

Copeland said Thum was taken off the list after issuing the \$1.2 million award in the Fresno-area landscaping case in June 2006. Caltrans said it removed Thum for taking too long in that case, according to Copeland, but Copeland doesn't buy that explanation.

Thum would not comment on his removal. "I would hate to speculate," he said. "I have my personal views, but I don't have any facts."

Melucci has gone so far as to attack the Caltrans arbitration system at the Court of Appeal. In her case for Coffman Specialties, she contends arbitrators are economically beholden to Caltrans, which provides nearly

three-quarters of public works arbitrations. *Coffman Specialties Inc. v. Department of Transportation*, D053134 (Cal. App. 4th, filed June 2, 2008)

In oral arguments July 15, however, the San Diego appellate court wasn't sympathetic. The justices noted that contractor representatives also sit on the special panel that admits arbitrators to the list and that contractors have the same ability to reject arbitrators as Caltrans, according to Ross C. Moody, the deputy attorney general from San Francisco who defended the state's system.

For that matter, Allen Matkins' Curtis noted that any lawyer in any sort of litigation would reject a neutral who had given a big ruling to an opponent. "Blackballing" is normal, he said. And many lawyers do have confidence in Caltrans' and OAH's systems.

Thum, for one, insisted that the arbitrations are fair. "The people on that list are pretty experienced arbitrators," he said. "I would not say there's any intentional bias."

As an arbitrator, Thum said, "I never had the impression [Caltrans attorneys] were stalling for stalling's sake or taking unreasonable positions."

"I'm not complaining," said contractors attorney Bradley A. Raisin of Raisin & Kacvoglou in Encino. Raisin has one of the older cases pending in arbitration, filed May 27, 2004. The arbitration trial is going on now.

"The OAH is one of the fairer systems," he said. "I've had nothing but good experiences."

Matthew J. Liedle of Liedle Getty & Wilson in San Diego has the oldest pending case, filed July 24, 2003, with no hearing scheduled yet. He said the case has been stalled by agreement in order to handle a related matter first. The two sides stipulated to waive the statutory five-year deadline.

If there is a problem with Caltrans disputes, it's that Caltrans doesn't have enough lawyers, Liedle said. "They have horrendous caseloads. They get themselves painted into corners."

Liedle said Caltrans would spend less money on liability if it could spend more money on lawyers' salaries.

Curtis said some delays come from the fact that Caltrans lawyers' ability to make settlement offers is boxed in by contract language and government regulations. "They don't have sufficient authority," he said. "They should probably have bigger contingencies" set aside in each contract for problems.

But whatever the source of delays, the many delayed cases hurt Caltrans and the state, even on projects that have no problems and don't need arbitration, he said.

"They don't do themselves any great service" by letting cases drag on and on, Curtis said. "Contractors know they have to build that [delay] into their bids."

'The men and women of Caltrans, which includes our legal team, strive to be good stewards of taxpayer dollars.'

Caltrans spokesman