

Liquidated Damages Award Believed to be Largest Ever in U.S. Construction Industry History

According to experts, \$27 million award is industry's largest by a 'factor of at least 10,' serves as cautionary lesson for contractors

WASHINGTON (Nov. 2, 2009) – What is believed to be the U.S. construction industry's largest-ever liquidated damages award was entered against construction giant Bechtel and in favor of New Athens Generating Company, LLC, a merchant power company. The arbitration award – permanently finalized just two weeks ago – serves as an instructive lesson on the willingness of arbitration panels to uphold liquidated damages in contractual disputes.

“The liquidated damages award against Bechtel is the largest by far that I have ever seen in my 30 years of experience,” said lead trial attorney Judah Lifschitz of Shapiro, Lifschitz and Schram, which represented New Athens throughout the dispute. Industry experts echoed this sentiment.

“This is the largest award of liquidated damages – by a factor of at least 10 – that I have ever seen in this industry,” said Bill Schwartzkopf, CEO of Sage Consulting and a nationally recognized authority on construction damages. Schwartzkopf has written several books on construction claims and damages and served as an expert witness in the case.

Schwartzkopf noted that contractors often assume that liquidated damages will be renegotiated or that the parties will agree to concurrent delays. “Liquidated damages are an often-overlooked remedy, but they can – and will – be enforced,” he said. “This case clearly demonstrates that.”

Evans Barba, Chairman & CEO of Barba Consulting, an internationally recognized authority and specialist in the analysis and resolution of construction contract disputes, agreed with Schwartzkopf. “This is enormous – I’ve never heard of these kinds of liquidated damages being recovered by an owner,” Barba said. “This is the type of case that I believe everyone involved in construction disputes should take note of and learn from the outcome. Not only was Bechtel denied recovery on its multi-million-dollar claims, but it was found liable for millions of dollars in liquidated damages.”

In the construction industry, liquidated-damages clauses are often inserted into construction contracts, specifying specific amounts – or damages – that will be due to the

owner if the contractor does not meet its targets, such as a completion date.

The project began in 2001 when New Athens engaged Bechtel, one of the world's largest construction contractors, to design and build a \$533 million power plant in upstate New York. When Bechtel – which had revenues of \$31.4 billion in 2008 – completed the project eight months behind schedule in early 2004, it brought an arbitration proceeding against New Athens, seeking \$94 million in damages it said fell within New Athens' legal responsibility.

“It's important to note that New Athens did not back down in the face of such large claims from one of the world's largest contractors,” said Lifschitz. “In fact, New Athens' decision to vigorously defend itself and its refusal to be intimidated by Bechtel's large claims proved extremely wise.”

New Athens counterclaimed for \$33 million in liquidated damages. Following three extensive trials and testimony, not only did New Athens deliver a resounding defeat to Bechtel on its affirmative claims, New Athens obtained \$27 million in liquidated damages for Bechtel's inexcusably late completion of the project.

“Having tried these types of cases for 30 years, I see time and time again how important it is to assemble the right team to handle such a large and complicated undertaking,” Lifschitz said. “We were honored to be part of the team that New Athens created and are proud of what that team accomplished.”

About Shapiro, Lifschitz & Schram

Shapiro, Lifschitz & Schram is a boutique Washington, D.C.-based law firm that is renowned for its repeated success in “must-win” cases. In addition to its commercial litigation practice, the firm's main areas of focus are business/commercial transactions, construction, and real estate law. The firm's attorneys use their collective experience and passion for the law to deliver customized and successful solutions for their national roster of clients. For more information, visit www.slslaw.com.