

MINUTES

Advisory Committee on Model Civil Jury Instructions

January 12, 2009

4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, and David E. West. Also present: Kent B. Scott, chair of the construction contract subcommittee

Excused: Phillip S. Ferguson, Colin P. King

1. *Preliminary Instructions.* The committee considered Mr. Humpherys's proposed additions to the general instructions:

a. *CV137. Selection of jury foreperson and deliberation.* The committee approved the instruction.

b. *CV138. Do not speculate or resort to chance.* At Mr. Carney's suggestion, a reference to *Day v. Panos*, 676 P.2d 403 (Utah 1984), was added. At Mr. Simmons's suggestion, the last sentence was revised to read, "You must not agree in advance to average the estimates." The committee approved the instruction as modified.

c. *CV139. Agreement on special verdict.* The committee approved the instruction.

2. *Construction Contract Instructions.*

a. *CV2201A. Committee notes to construction contract instructions.* Mr. Young suggested adding an eighth area: defective construction. Mr. Simmons asked whether it was already covered by "(5) claims," and "(6) defenses." Mr. Humpherys asked why the subcommittee had "determined that it would be best" not to address certain areas--because they are legal issues and not proper subjects for jury instructions? because they do not arise often enough to warrant instructions? or because they are not easily dealt with in jury instructions? Mr. Scott noted that the subcommittee had drafted instructions but had decided against proposing them because they were very fact intensive and the status of the law in Utah was uncertain. For example, there is no Utah law on whether a "paid if paid" clause is enforceable. Mr. West thought such clauses presented legal issues that would not go to the jury in any event. The fourth paragraph was revised to read: "The Advisory Committee decided not to draft pattern instructions on certain areas of law . . ." Mr. Summerill noted that the third paragraph, which said that mechanic's lien and bond claims are "fact intensive," suggested that they should be covered by jury instructions. At Mr. Scott's suggestion, the committee struck the phrase "fact intensive and" from the

third paragraph. At Mr. Shea's suggestion, the committee struck the last paragraph. Mr. West suggested striking the third and fourth paragraphs as well. He thought there was no need to explain what subjects were not covered in the instructions. Mr. Scott thought it was necessary to explain why some areas were left out because attorneys will want to know where they can find instructions dealing with those areas. At Mr. Young's and Mr. Humpherys's suggestion, CV2201A was deleted. A general comment will be added to the introduction to the effect that if there is no Utah law on a subject, the subject has not been covered in the instructions.

b. *CV2201B. Compliance with public bidding instructions.* Mr. Scott noted that bidding on public contracts is governed by statute. Mr. Humpherys questioned the use of "responsive responsible bidder." Mr. Young noted that it was a statutorily defined term and thought it should be retained. The instruction deals with a claim by the lowest bidder; Mr. Young asked what happens to the bid the contractor accepted. It was thought that the contract was still enforceable, but the public entity would be liable in damages to the bidder whose bid was wrongly rejected. Mr. Young asked what the cause of action would be. Mr. Scott thought it would be akin to a breach of contract claim or a claim for damages for breach of the procurement code. Mr. Humpherys thought the instruction implied a form of strict liability. Mr. Scott noted that the instruction states the general rule for public construction contracts but noted that there are exceptions. The subcommittee decided not to include instructions on the exceptions because they are complicated and the law is not clear. Mr. Humpherys thought there should be a committee note to explain this. Mr. Shea added a committee note that says there are statutory exceptions to the general rule stated in the instruction. Mr. Scott will supply Mr. Shea with citations to the statutory exceptions. The committee revised the first and last paragraphs of the instruction to read:

[Name of contractor] claims that [name of governmental entity] was required by law to award [him] the construction contract. [Name of governmental entity] claims that [describe claim]. If [name of governmental entity] did accept a bid, it was required to accept the lowest "responsive responsible" bid. The contractor who submitted the lowest responsive responsible bid is one who:

...

If you find that [name of contractor] submitted the lowest responsive responsible bid and that [name of governmental entity]

accepted a different bid, you must find that [name of governmental entity] is liable to [name of contractor] for damages.

The committee approved the instruction as modified.

c. *CV2202. "Responsive bid" defined.* Mr. West asked whether the instruction was covered by CV2201B(2). Mr. Scott said the subcommittee tried to combine CV2202 through 2204 but thought they were too long and complex to be easily combined. Mr. Shea noted that the instructions could be written without using technical terms, but the committee thought the technical terms were necessary because they are so common in the industry. The committee approved the instruction.

d. *CV2203. "Responsible bid" defined.* The committee struck the last sentence of the instruction. Mr. Humpherys asked what the phrase "integrity and reliability that will support its good faith performance" meant. Mr. Summerill pulled the statute and noted that it requires "integrity and reliability." Mr. Fowler asked whether "good faith" needs to be defined. Mr. Scott thought the definition should be in the commercial contract instructions, not the construction contract instructions. Mr. Young suggested adding a committee note cross-referencing the commercial contract instruction. Mr. Humpherys suggested that the note simply say that good faith is not defined in the statute. The instruction was revised to read:

A "responsible bid" is a bid made by a party who has the capability, integrity, and reliability to fully perform the contract requirements in good faith.

e. *CV2204. Owner's duty to inform.* Mr. Humpherys noted that in the fraud jury instructions the committee had used "important" instead of "material." Others suggested that "material" simply be deleted from the first sentence. In keeping with its practice of not repeating the standard of proof in instructions (unless the standard is something other than a preponderance of the evidence), the committee deleted the phrase "by a preponderance of the evidence" in the first paragraph. Mr. Humpherys asked whether the instruction should use the term "breached the contract." He thought "breach" may not be commonly understood by jurors. Mr. Simmons thought it should be used because the verdict form will ask them to decide whether the defendant breached the contract. The committee revised the instruction to eliminate the phrase. The revised instruction reads:

[Name of contractor] claims that [name of owner] had a duty to disclose the following information before the bid was submitted: [Describe information.] You must decide whether [name of plaintiff] has proved that:

(1) [name of owner] did not disclose the above-described information to [name of contractor];

(2) the undisclosed information was important to [name of contractor]'s ability to perform the contract; and

(3) [name of owner] had knowledge about the undisclosed information that was not available to [name of contractor].

If you find that [name of contractor] has proved all of these facts, then [name of owner] is liable to [name of contractor] for damages.

The committee approved the instruction as modified.

f. *CV2205. Contractor's duty to investigate.* Ms. Blanch suggested that the instruction be stated in the active voice. Ms. Blanch was excused (for reasons totally unrelated to her comment). Mr. Humpherys asked what the consequence was if a contractor failed to investigate. Mr. Scott said that a failure to investigate relieves the owner from liability. Mr. Humpherys noted that the instruction will be awkward if there is a lot of information to describe. He also asked whether there is still a duty to investigate if the contractor has inquired and received reassuring answers to his inquiries. Mr. Young noted that the duty goes beyond just re-reading the contract. Mr. Humpherys asked whether the standard was subjective ("knew") or objective ("should have known"). Mr. Young proposed revising the instruction to read:

[Name of owner] claims that he is not liable for damages because [name of contractor] knew or should have known [describe facts] that created a duty to reasonably [inquire about/investigate] the accuracy and completeness of the information provided by [name of owner].

You must decide whether [name of owner] has proved that [name of contractor] knew of [describe facts] that required [name of contractor] to reasonably [inquire about/investigate] the

accuracy and completeness of the information provided by the owner.

If you find that [name of contractor] knew or should have known of these facts, then [name of contractor] had notice of all information that a reasonable [inquiry/investigation] would have revealed.

Mr. West was excused. Mr. Young suggested that a committee note be added to say that, depending on the circumstances, a contractor may have only a duty to inquire or also a duty to investigate. An inquiry may uncover facts that would require a reasonable contractor to do more investigating. At Mr. Summerill's suggestion, Mr. Scott will run the proposed changes and committee note by the subcommittee and will check the authority for the instruction. Mr. Humpherys was excused. Mr. Young asked Mr. Scott to ask the subcommittee (1) whether the contractor's duty is only to inquire, (2) under what circumstances it also has a duty to investigate, and (3) when does the contractor have a right to rely on what the owner says. Mr. Scott thought that perhaps there should be separate instructions on the duty to inquire and the duty to investigate.

3. The next meeting will be Monday, February 9, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m.