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Can a party be forced to arbitrate, where it did not sign the agreement requiring arbitration? The United States District Court for the District of Colorado recently decided yes, at least under some circumstances. In *Todd Habermann Construction, Inc. v. Epstein*, 70 F.Supp. 2d 1170 (D. Colo. 1999), the Court compelled an owner to arbitrate pursuant to the arbitration provision contained in AIA Document A201, General Conditions, even though neither the owner nor the contractor signed the underlying AIA form agreement. Holland& Hart LLP represented the contractor in the case.

Although it may sound somewhat novel to enforce an arbitration provision where the party resisting arbitration did not sign the agreement, the result is hardly surprising or even novel under the facts involved in *Habermann*. Despite the lack of a signed agreement, the Court held that an agreement to arbitrate was formed. Specifically, the owner solicited bids from Todd Habermann Construction, Inc. ("THC"). The "solicitation required that the bid be made on the basis of certain general conditions (including an arbitration provision) and that the contractor whose bid was accepted agreed to enter into an AIA contract (which also included an arbitration provision)." *Id.* at 1173.

THC submitted a bid based on those requirements, and the owner orally accepted the bid. *Id.* Once the bid was accepted, even though the acceptance was oral, the Court held that a contract was created. *Id.* at 1174. Perhaps significantly, the Court noted that THC began working on the owner's project based on the owner's acceptance of the bid (that acceptance came through the owner's architect, who the Court found to be authorized to solicit the bid and communicate the acceptance of the same). *Id.* It was undisputed that a written contract was never signed. There was, however, evidence that the owner, prodded by the contractor, gave repeated assurances that he would sign the contract.

The Court concluded that the course of conduct of the parties established an agreement on the terms of an AIA contract, including the arbitration provision. The Court held that neither the Uniform Arbitration Act nor the Federal Arbitration Act require that the arbitration agreement be signed. "While both acts require that the terms of an arbitration agreement be in writing, neither requires that the agreement be signed by either party." *Id.*

Thus, the Court "concluded the written arbitration agreement is enforceable notwithstanding that it was not signed by either party."

Why did the Court enforce the arbitration agreement, despite the fact that neither party signed the agreement? The answer lies in the parties' conduct:

- By soliciting a bid based on an AIA form which included an arbitration provision, the owner indicated in advance that it assented to arbitration. That assent was reinforced when the owner accepted the bid, which indeed was based on the AIA form.
- The owner permitted work to proceed in the absence of a written agreement. This course of conduct essentially became a substitute for a signed agreement, the terms of which already had been spelled out in the bid request, bid, and bid acceptance.
- There was evidence of repeated assurances by the owner that he would sign the contract. Again, this conduct, which induced the contractor to continue work in the absence of a signed agreement, essentially took the place of a signature on the agreement.

The lessons of the case are multiple. First, parties ought not to assume, simply because they have not signed an agreement, that an agreement has not been formed. Second, where the terms of an agreement have been discussed, but no agreement has yet been signed, any party wishing to avoid being bound by an agreement should not perform work or, in the case of the owner, permit work to be performed prior to execution of the written agreement. Third, a party giving assurances that an agreement will be signed may be held to those assurances (this is the essence of the legal doctrine of estoppel).

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