



March 13, 2008

Mr. Baruch Fellner
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1050 Connecticut Avenue N.W.
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Mr. Timothy R. Fisher, CSP, ARM, CPEA
Secretary, ASC A10
1800 E. Oakton Street
Des Plaines, Illinois 60018

Dated Notice

Re: ANSI Board of Standards Review (“BSR”) Decision Relating to the Appeal by the American Subcontractors Association, Inc., Associated Builders and Contractors, Inc., Associated General Contractors of America, the Mechanical Contractors Association of America, Inc., and the National Association of Home Builders (“the Coalition”) of the Approval of *A10.40 Reduction of Musculoskeletal Problems in Construction* as an American National Standard

Dear Appeals Participants:

On February 7, 2008 the ANSI Board of Standards Review (BSR) heard the above appeal. The decision of the ANSI BSR is attached.

Please be advised that **this transmission via E-mail constitutes your official notification of the decision of the BSR.**

Parties to the appeal who believe that they have been or will be adversely affected by the results of the subject hearing are hereby notified of their right of further appeal to the ANSI Appeals Board.

Should you choose to appeal this decision to the ANSI Appeals Board, written notice of appeal **and all appeals statements and supporting documentation** must be filed with the Secretary of the ANSI Appeals Board (the office of the undersigned) by **April 3, 2008**. The appeal shall be accompanied by a check in the amount of \$500.00 as a filing fee. If you require an extension for the filing of appeals materials, you must contact the Secretary of the ANSI Appeals Board on or before **April 3, 2008**, or you will forfeit your right to further appeal. The appeals statement must specify the decision from which the appeal is taken, the ANSI body that made the decision, a short statement of the matter in controversy and the reason(s) why the Appellant believes the decision is in error. The appeals statement must also list all other parties that appeared before the ANSI body with respect to the matter being appealed. A copy of the *ANSI Appeals Board Operating Procedures* is attached to the E-mail that transmitted this decision.

Thank you for your attention to this matter. If you have any questions, or if I may be of assistance to you, please contact me at (212) 642-4914 or send an E-mail to acaldas@ansi.org.

Sincerely,
Anne

Anne Caldas
Secretary
ANSI Board of Standards Review

cc: P. Griffin, ANSI VP & General Counsel
ANSI Board of Standards Review
Mr. King, via ASSE
Mr. Burg, via ASSE

ANSI BOARD OF STANDARDS REVIEW SUMMARY DECISION

Relating to the Appeal filed by the Coalition of the Approval of *A10.40 Reduction of Musculoskeletal Problems in Construction* as an American National Standard, the BSR denies the appeal.

Appellant: American Subcontractors Association, Inc., Associated Builders and Contractors, Inc., Associated General Contractors of America, the Mechanical Contractors Association of America, Inc., and the National Association of Home Builders (“the Coalition”)

Represented by:

Mr. Baruch A. Fellner, GIBSON, DUNN & CRUTCHER LLP,
Counsel of Record

Respondent: ASC A10 *Safety Requirements for Construction and Demolition Operations* with ASSE as Secretariat

Represented by:

Mr. Frank Burg, ASC A10.40 Subgroup Chair
Mr. Tim Fisher, ASSE
Mr. Richard King, ASC A10 Chair

Hearing Date: February 7, 2008

Hearing Location: Marriott Biscayne Bay, Miami, Florida

ANSI Board of Standards Review (“BSR”) Panel Members:

John Berninger
Steve Ferguson
Rita Harrold, Chair
Megan Hayes

Deborah Prince
David Ringle
John Sabelli
Michael Tierney

Observers:

Gaby Davis, IAPMO, ANSI BSR Member
Robert A. Hirsch, Associated Builders and Contractors, Inc.
Andrew Holliday, National Association of Home Builders
Dennis Hudson, ASSE Staff
Gary Lopez, Chair of the ASSE Standards Development Committee (SDC)
Jim Smith, ASSE Vice President of the Council on Practices and Standards

ANSI BOARD OF STANDARDS REVIEW DECISION

Introduction

This appeal is brought by the Construction Industry Employer Coalition (“Coalition”), a coalition of five trade associations of U.S. construction interests,¹ against ANSI-Accredited Standards Committee *A10 Safety Requirements for Construction and Demolition Operations* for which the American Society for Safety Engineers (“ASSE”) serves as the Secretariat (the “ASC A10 Committee”). ASSE assumed the role of Secretariat of the ASC 10 from the National Safety Council in March 2004 and in January 2006 ASC A10 was reaccredited under ASSE as Secretariat by the ANSI Executive Standards Council (“ExSC”).

The standard that is the subject of this appeal, *A10.40 Reduction of Musculoskeletal Problems in Construction* (the “A10.40 Standard”) was developed by the ASC 10 Committee and submitted to the ANSI Board of Standards Review (“BSR”) by ASSE. The standard was approved by the BSR as an American National Standard (“ANS”) on July 23, 2007. Soon thereafter, the Coalition noted its intent to appeal the BSR decision and did so on November 9, 2007. On December 7, 2007 ASSE filed its timely response.

Summary of Arguments

The Coalition argues that ASSE and the ASC A10 Committee failed to adopt and implement adequate procedures for the development of the A10.40 Standard. Specifically, the Coalition maintains that: (1) the A10.40 standard did not have substantial agreement among materially affected interests; (2) the ASC A10 committee lacked balance and as a result the standards development process was effectively dominated by pro-ergonomics factions in favor of the standard; (3) the Committee failed to give due consideration to comments submitted by the Coalition and did not put forth a concerted effort towards comment resolution; and (4) the Committee engaged in a myriad other procedural violations independently calling for withdrawal of the standard. In rebuttal, the ASSE, on behalf of ASC A10, denied these allegations.

For the reasons set forth below, the ANSI BSR finds that the Coalition’s arguments are without merit. Accordingly, the appeal is denied.²

¹ The “Coalition” represents: American Subcontractors Association, Inc., Associated Builders and Contractors, Inc., Associated General Contractors of America, the Mechanical Contractors Association of America, Inc., and the National Association of Home Builders.

² This decision summarizes the oral and written arguments presented to the ANSI BSR. While this decision may not reference every argument or point made in connection with the appeal, the BSR had full access to the complete written record. The BSR did not evaluate any technical data or make any assessment of the merits of the technical content of A10.40. The BSR relied on the written record and oral statements made by both parties regarding procedural matters only. Counsel for the Coalition objected at the hearing to the applicable hearing protocol on the grounds that it could result in the respondent (as opposed to the appellant) having the final opportunity to address the Panel. It was pointed out to the

Discussion

1. The BSR Rejects the Coalition’s Argument that the A10.40 Standard Should be Withdrawn Because Consensus was Not Achieved

The Coalition maintains that the A10.40 standard must be withdrawn because it does not reflect a true “consensus” of materially-affected interests as that term is used by the *Essential Requirements*. The Coalition argues that, under ANSI’s definition, “consensus” has “both a quantitative dimension and a qualitative dimension” and that the A10.40 standard does not meet the “qualitative” prong of the analysis because ASC A10: (1) relied solely on a quantitative definition of consensus; (2) “exaggerated” the extent to which numerical consensus was achieved; and (3) “ignored” the “vehement” opposition of the key interest category – the construction industry employers responsible for implementing the A10.40 Standard at their workplaces. The BSR disagrees with the Coalition and finds that, based on the evidence before it, consensus as defined in the *ANSI Essential Requirements* was achieved.

a. The Coalition’s Argument that the ASC Improperly Placed Sole Reliance on a “Quantitative” Dimension to Consensus is Unavailing

Under the *ANSI Essential Requirements*, “consensus” means that:

substantial agreement has been reached by directly and materially affected interests. This signifies the concurrence of more than a simple majority, but not necessarily unanimity. Consensus requires that all views and objections be considered and that an effort be made toward their resolution.

The *Essential Requirements* add that “consensus” is “demonstrated, *in part*, by a vote of the consensus body [and] that [s]uch a vote shall be conducted and reported in accordance with the rules set forth herein.” (Emphasis added.)

The BSR agrees that consensus requires more than a counting of votes. Indeed, a vote of the consensus body is, by definition, only a “part” of the calculus. The other “part” is the requirement that the vote be “conducted and reported” in accordance with the other provisions of the *Essential Requirements*, *e.g.*, that interested parties have the opportunity to make objections and comments, that efforts are made to resolve outstanding objections, and that the comments of committee members and public commenters are fairly considered. But, consensus, as defined in the *ANSI Essential Requirements*, does not distinguish between “qualitative” vs. “quantitative” consensus specifically; rather it defines consensus in a more holistic way, one that addresses numerical consensus as well as adherence to due process considerations.

Coalition, however that it could allocate its 30 minutes to allow sufficient time for rebuttal. This protocol is a long-standing implementation of ANSI’s appeals procedures as specified in the *Operating Procedures of the ANSI BSR* (and others).

The BSR finds that the A10.40 Standard met all aspects of the consensus requirements. The final vote in support of the A10.40 standard reflected 50 affirmatives, 15 negatives, 7 abstentions and 2 not returned based on a consensus body membership of 74. On its face, the numerical aspect of consensus was met here. As to other, due process requirements, the BSR finds nothing in the record to suggest that the Committee did not meet any of the other requirements contained in the *Essential Requirements*. Indeed, the record shows that the ASC A10 Committee gave interested parties the opportunity to make objections and comments, made efforts to resolve outstanding objections, and fairly considered the public and other comments. Many of these requirements are discussed in more detail below.

In sum, the record shows that “substantial agreement” was reached by directly and materially affected interests.

b. The Coalition’s Argument that the ASC A10 “Exaggerated” the Extent to Which Numerical Consensus was Achieved is also Unavailing

The Coalition next maintains that the ASC A10 Committee overstated the actual numbers of “yes” votes obtained in support of the A10.40 Standard and that, if such votes were properly reclassified, the numerical requirement of consensus would not have been obtained. In making this argument, the Coalition acknowledges that the A10.40 Standard received sufficient affirmative votes to meet the minimum needed for passage of a standard as set-forth in ASC A10’s ANSI-Accredited Procedures. Nevertheless, Appellant argues that several of these “yes” votes are “open to question” because in “some cases” the comments furnished by the voter seemed to the Coalition to “undercut” or “whittle away at” support for the standard.

The BSR disagrees with the Coalition’s argument concerning the ASC A10 Committee’s characterization of the votes and comments cited. The record shows that the “yes” votes in question were properly recorded. Any suggestion that the voters “would have” voted “no” had they been in possession of certain facts or had they not been under perceived misconceptions about other facts is based upon speculation. For example, the Coalition points to the vote of Barry Cole who voted “yes” and included that language should be added to the A10.40 Standard to prevent OSHA from adopting it into law. The Coalition maintains that, had Mr. Cole known that OSHA would not be restrained by any such language, he would have voted “no.” But this is based on the Coalition’s supposition, not on actual facts. The other examples cited by the Coalition are equally unavailing.

In short, the Coalition’s argument that the ASC A10 Committee “exaggerated” the number of “yes” votes in support of the A10.40 Standard is not supported by the record.

c. The Coalition's Argument that the ASC A10 "Ignored" the Opposition of the "Key" Construction Industry Interests is also Unavailing

The Coalition next argues that the Employer/User ("EU") group of employer contractor representatives overwhelmingly opposed the standard and that this interest category was effectively "ignored" by the ASC A10 Committee. According to the Coalition, of the 24 members of the EU category voting, 15 members – more than half -- voted "no". The Coalition maintains that, "on that basis" alone, the A10 Standard failed to achieve a consensus. The BSR rejects this argument as well.

ANSI's definition of consensus does not require consensus *within* each interest category. If such a requirement was in place, the result could be that any single interest group could unilaterally halt a standards project and conceivably pre-empt the standardization of innovative approaches that may not be supported by some - but not all - within a particular interest category. Such a process would not benefit the public interest or those who are materially affected by the issue. Moreover, to give greater deference to the votes of some members of a consensus body over others, as the Appellant's argument suggests, would undermine due process and the level playing field that results from the procedural requirements that govern the American National Standards (ANS) process.

2. The BSR Rejects the Coalition's Argument that the A10.40 Standard Should be Withdrawn Because the Committee Approving it Was Unbalanced and/or Dominated by One Interest Group Over Another

The Coalition next advances a number of related arguments concerning balance and dominance. Appellant argues that the ASC A10 was not balanced and that it was dominated by certain interests, specifically so-called "technical representatives" and "consultants," who the Coalition maintains were biased in favor of the content of the standard. Such interests, it is argued, acted to the detriment of employers whose "exclusive purpose" was construction. In making this argument, the Coalition distinguishes between these "exclusive-purpose" employers and those employers who voted for the Standard but for whom, the Appellant argues, construction work is ancillary and may be performed by contractors who are members of the Coalition. According to the Appellant, this lack of balance existed throughout the development of the Standard and was not remedied when ASC A10 implemented revised procedures and interest category classifications. The revised classifications placed the committee members into four (as opposed to the prior three) interest categories: Employers/Users ("EU"), Employees ("E"), Technical ("T") and Consultants/Related Interests ("Other"). Finally, the Appellant argues that ASC A10's procedures, which provide for a cap of 35% in any given interest category, are at odds with ANSI's requirements.

The BSR finds these arguments unpersuasive. First, the BSR-9³ submitted by ASSE on behalf of the ASC A10 Committee indicates that sufficient balance existed at the time of

³ BSR-9 is the checklist that accompanies the formal submittal of evidence of consensus in support of the approval of a standard as an American National Standard.

the final vote on the ASC 10.40 Standard by the consensus body. ASSE inherited a committee for which another standards developer served as Secretariat and the evidence demonstrates that ASSE took action to improve the balance on the committee soon after the transfer took place. ASSE also submitted revised procedures, which were approved.

The make-up of a consensus body may change over time and such changes, when they affect balance, must be addressed, as was the case here. Further, the interest categories defined in the *Essential Requirements* are not mandatory and indeed, standards developers have the right to develop and utilize other interest categories. Appellant does not refute the ASSE's assertion that Coalition members themselves participated in the development of the four interest category classifications or that the Committee roster was also presented to the ASC A10 membership at meetings and though Coalition members were able to do so, they did not raise any concerns as to balance or interest categories, prior to the present case. Moreover, the *ANSI Essential Requirements* does not prohibit the imposition of a cap on participation within an interest category, such as the cap that is part of ASC A10's ANSI-Accredited Procedures.

No evidence either was provided to indicate that dominance⁴ as defined within the *ANSI Essential Requirements* was exercised within the A10 Committee. Although claims of dominance by "general interest members" were made, the Appellant failed to provide documented evidence that demonstrates that the position of any voting member or public commenter was considered to the exclusion of fair and equitable consideration of other viewpoints.

3. The BSR Rejects the Coalition's Argument that the A10.40 Standard Should be Withdrawn Because the Committee Failed to Put Forth a "Concerted Effort" To Resolve Coalition Members' Objections

The Coalition next asserts that the ASC A10 Committee failed to adequately address its members' objections in that: (i.) it failed to give due consideration to opposing views; (ii.) its responses reflect a "fundamental misunderstanding" of the nature of the consensus process; (iii.) its responses were cursory and failed to address the points raised; and (iv.) its responses are not based on emerging science. In support of these allegations, Appellant points to a 150-page matrix document prepared by the ASC A10 Committee which compiled all final comments and responses circulated to the Committee in accordance with the A10 ASC procedures. Appellant argues that the matrix demonstrates that mere "boiler plate" language and/or otherwise "non-persuasive" or non-compelling responses were used by the Committee in its responses to comments.

The BSR finds, however, that the Committee's matrix demonstrates that it responded to comments in an acceptable way. Contrary to the Coalition's assertions, the ASC A10 Committee did not ignore comments or use only "boiler plate" language in response to other

⁴ In the *ANSI Essential Requirements* "dominance" means a position or exercise of dominant authority, leadership, or influence by reason of superior leverage, strength, or representation to the exclusion of fair and equitable consideration of other viewpoints.

comments. While there may have been some similarity in some of the responses there was also similarity in some of the comments. The *Essential Requirements* does not require that a developer *persuade* those offering negative votes or comments that they are wrong. On the contrary the requirements are that an effort to resolve all expressed objections shall be made; each such objector shall be advised in writing of the disposition of the objection and the reasons therefor; and each such objector shall be informed in writing that an appeals process exists within procedures used by the standards developer. The record demonstrates that these requirements were satisfied. Moreover, the record shows that the Coalition members were also provided with a final opportunity in December 2006, in addition to an appeals filing, to address the ASC A10, but chose not to do so.

The BSR declines to address the argument concerning the sufficiency of ASSE's responses relative to "emerging science" as the BSR is precluded from determining technical sufficiency of a Standard and limits its review to whether procedural requirements were met.

4. The BSR Rejects the Coalition's Argument that the Committee Engaged in Other Procedural Violations of the *ANSI Essential Requirements*

The Coalition also points to a number of alleged procedural violations by the ASC 10 Committee in the development of the A10.40 Standard, arguing that such violations individually and/or collectively require that the A10.40 standard be withdrawn as an American National Standard. Each is addressed, in turn, below.

a. *The Coalition's Argument Relating to the Duties of the Liaison Officer Is Not Compelling*

The Coalition maintains that the "Liaison Member," whose role is defined in the ASC A10 Committee's procedures as an individual who shall assist in resolving Committee negative ballots, did not serve this function and never contacted any of the Coalition members.

The BSR accepts, based on the record before it including ASSE's testimony, that the Liaison Member was, in fact, involved in the resolution of ballots, though not through personal contact with commenters. Nonetheless, comments were addressed and responded to, and ASC A10's procedures do not require that the Liaison Member make individual, personal contact with each commenter.

b. *The Coalition's Argument Related to the Activities of the Subgroup Is Not Compelling*

The Coalition further alleges that the ASC A10 Committee improperly delegated the development of the standard to the A10.40 subgroup that was not open or balanced. The Coalition argues that, despite the ASC A10 Committee's attestations to the contrary, the subgroup at issue exercised responsibility for the definitive content of the Standard and that no changes to the Standard were ever made or suggested at the ASC A10 Committee meetings. According to the Coalition, the subgroup should thus have been subject to the

same procedural requirements as the consensus body. Moreover, the Coalition claims that subgroup meetings were not announced appropriately.

The BSR disagrees with the Coalition. The ASC A10 Committee is the consensus body with respect to the A10.40 Standard and as explained by ASSE, it is the group responsible for the definitive content of the standard. ASSE acknowledges that a subgroup was formed under *6 Subgroups created by the Committee* of ASC A10's procedures to assist the Committee (e.g.: drafting all or a portion of a standard, drafting responses to comments, drafting positions on international standards, or other advisory functions.) ASSE confirmed that the full Committee remained the consensus body and that it was the ASC A10 Committee whose final vote was reported on the BSR-9. The record, meeting minutes and ASC A10's ANSI-Accredited procedures support the explanation that the ASC A10 Committee served as the *consensus body*.

In addition, the record includes multiple examples of meetings notices provided by ASSE, including meeting announcements in *Standards Action*. To this point, the BSR notes that ASC A10's procedures also do not specify minimum meeting notice requirements for subgroup meetings; for committee meetings, the procedures require *when possible, at least four weeks' notice of regularly scheduled meetings shall be given by the secretariat*.⁵

c. The Coalition's Arguments Relating to the Appeals Process are without Merit

The Coalition characterizes the developer level appeals panel ("Panel") decision as "fatally defective" and "not entitled to deference." Key to this concern is the perceived "disconnect" between the ASC A10's appeals procedures and the written decision. The Appellant refers to the decision as nearly entirely conclusory and not written to reflect the procedural requirements associated with a Panel decision. The Appellant states that the decision does not develop the underlying facts and is nearly devoid of persuasive reasoning that would logically support the Panel's conclusion. Finally, the Coalition alleges that the Panel members were unprepared and uninformed.

The BSR agrees with ASSE that there is no evidence in the record that supports the arguments that the appeals process or the resulting decision is not in compliance with ASSE's accredited procedures or ANSI's requirements. The Panel was duly constituted, documentation was submitted by each party, a hearing was held before an impartial Panel that undertook an analysis of the issues and rendered a timely written decision that reflected the Panel's view of the issues. There is no evidence of any prior objection to the Panel, whose role was to adjudicate procedural, not technical issues. Nor is there any basis on which the BSR may conclude that the Panel acted improperly or irresponsibly.

⁵ See clause 7.0 and 7.1. of ASC A10 procedures.

*d. The Coalition's Argument Relating to ASSE's
Service as a Voting Member of ASC A10 Is Not Compelling*

As a final argument, the Coalition maintains that ASSE -- the Secretariat of the ASC A10 -- improperly also held a voting position on the consensus body. The Appellant claims that to allow ASSE to serve as both leaves open the possibility that as Secretariat, ASSE will not fulfill its duties to its constituent members or that it will not be unbiased or fair in the exercise of those duties.

The BSR finds that the practice of serving in dual roles as both a Secretariat of a Committee and a voting member of such Committee is not precluded by the *ANSI Essential Requirements*. As ASSE explained at the hearing, an organizational member of ASSE served as the voting member on the ASC A10; the January 2007 roster lists Mr. Macenski of Bechtel National Inc. as the primary representative of ASSE on the ASC A10. ASSE also confirmed that the ASSE representative does not have a directed vote with respect to votes on the A10.40 Standard, i.e., Mr. Fisher's hearing testimony confirmed that ASSE, as an organization, does not specify how its representative on the ASC A10 shall vote.

Finally, there is nothing in the record that supports the accusation that ASSE has behaved improperly with respect to its Secretariat function.

Conclusion

In light of the written evidence and oral testimony presented by both sides, the ANSI BSR denies the appeal. The ANSI BSR finds that insufficient evidence was provided by the Coalition in support of its appeal to demonstrate that the ASC 10 Committee failed to obtain a consensus of materially-affected interests with respect to the A10.40 Standard, that the Committee was unbalanced or dominated by one interest group, that the Committee failed adequately to respond to comments or that any procedural requirements were violated or overlooked.

Pending the conclusion of any further appeals in this matter the BSR has determined that its original action to approve the A10.40 as an American National Standard stands.