RESOLUTION SOLUTION

Formal Mediation

a primer on mediating complex disputes

By Christopher S. Drewry

Mediation can be a successful tool in resolving many different types of cases, but in the context of construction disputes utilizing mediation can be particularly effective. Construction disputes often consist of a series of interrelated, complex issues and involve multiple parties. A single case may involve a dispute over payment, cost overruns, changes, defective work, and/or delays. The case may also have both construction and design claims asserted within the same action and can involve the owner, architect, design subconsultants, general contractor, subcontractors, and/or suppliers. Often the complexity of the issues and relationships between the parties in dispute require the engagement of third-party consultants to serve as expert witnesses. Frequently, parties may not want to try these cases in front of a judge or jury, and/or it may become very expensive to litigate or arbitrate through a trial or hearing. How then can construction parties resolve their disputes short of a protracted legal fight? The answer often lies with formal mediation.

MEDIATION PROCESS

For those who have not participated in a formal mediation, the process involves a neutral third-party mediator who brokers settlement negotiations between the parties. The mediation is typically hosted at the mediator's office, counsel's offices, or a neutral location. Parties each must have a representative attend who has authority to settle the case on that party's behalf. Parties attend with their counsel and any key project personnel needed in addition to the individual with settlement authority. In some cases, technical experts (such as a scheduling consultant) may attend the mediation to provide input and assessment of the claims and issues. Mediation is entirely confidential, and no statements or communications can be used as evidence in the subsequent proceedings with the goal being to facilitate open and frank discussions as to how (or why) the parties could/should settle the dispute.

Importantly, mediation is nonbinding—the parties commit to mediate a dispute, but they are not required to reach a settlement. The mediator leads the mediation but does not serve as judge or jury. The mediator typically gathers all parties and their counsel together for an opening session, discusses various claims and issues to gain understanding of the alleged damage, and breaks the parties up into separate rooms to begin the negotiation process.

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Mediation can be invaluable in helping the parties truly gain an understanding of the other parties' factual and legal position. Again, with a complex construction case there are often many issues and claims to address. Gaining this understanding is often the first step in reaching a resolution. This process is also effective because it "sequesters" and brings the parties together to commit to the negotiation process—this may be the last opportunity to resolve the case before further litigation or arbitration. Most construction disputes are resolved at mediation rather than at trial.

MEDIATION AS A REQUIREMENT?

Most state courts will require the parties to mediate a case at some point during the litigation. Federal courts will require a formal settlement conference administered by the judge or magistrate and/or mediation. The American Arbitration Association requires mandatory mediation for disputes over $100,000. Regardless of whether the court or arbitrator requires mediation, project participates should consider making mediation mandatory under the applicable construction contract. A typical construction contract will require mediation as a mandatory precondition

to initiating a lawsuit or arbitration. The contract may also dictate who the mediator is, how the mediator is selected, the location of the mediation and/or the time within which the mediation should be conducted. Another consideration is to require stair stepped settlement negotiations in addition to formal mediation. The contract could require that when a claim or issue arises, field level personnel must first discuss the issue and attempt resolution. If that process fails, the matter gets elevated to project managers and/or senior executives or principals to discuss and conduct settlement discussions. Only if that process fails does it elevate to formal mediation. Such a process is designed to facilitate an early resolution.

THE TIMING OF MEDIATION

There is no one-size-fits-all answer to this question. As mentioned above, the contract may dictate when mediation is to occur. Pre-suit mediation is designed to avoid litigation or arbitration all together, with the goal being to avoid the time and costs incurred with a lawsuit or arbitration proceeding. Pre-suit mediation presses the proverbial "pause" button on a dispute before a lawsuit or arbitration is filed. Once litigation or arbitration is initiated, the considerations may change. However, in certain cases, the parties need document or information exchanges to understand their respective positions and facilitate a more productive mediation—one which has a better chance of success. Mediation may be conducted before depositions are taken. In other cases, depositions (or at least a limited number) or other procedural motions are needed to position the case for a productive mediation. Most importantly, two rounds of mediation may be needed particularly with a complex construction dispute. Many times, it takes an initial first day of working through the various claims and issues before progress is made, and the parties commit to a second day of mediation to truly attempt to negotiate a settlement.

CLOSING THOUGHT

Understanding the mediation process and how it can be effective may resolve your next construction dispute. Consider how you want to address mediation in your construction contract, and work with your counsel to determine when mediation is right for you. Then, find the right mediator with the right personality fit for the parties and counsel, especially one that meets your specific needs. ■

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