

## CONTRACTS

# Tools of the Trade

## mediation and arbitration as alternative dispute resolution: part 1

By Dixie Wells and Chris Flurry



Success in any construction project requires having the right tools for the job. While most construction industry professionals know the tools of their own trades well, some of the most important tools in the event of a dispute are buried in the “legalese” toward the back of the contract in its dispute resolution provisions.

Many construction contracts contain dispute resolution provisions. Typically, the contract will state which jurisdiction’s law governs the contract and any disputes, and under what circumstances and where a lawsuit can be initiated. Often the contract may also provide alternative processes to court-based litigation. Two of the most common alternative processes are mediation and arbitration. While these two terms might sound similar, they are very different tools with different purposes, different processes, and yield different outcomes.

### TWO ALTERNATIVES

Both mediation and arbitration are forms of Alternative Dispute Resolution (ADR)—meaning they are forms of resolving disputes in

addition to, or often largely instead of, the traditional court system. For this reason, the “power” to resolve the dispute in both mediation and arbitration rests in the parties themselves, rather than in a judge or jury, though it is vested quite differently. Both also allow the parties more control over the dispute resolution process and ultimately how a dispute is resolved, which may lead to cost and time savings. Finally, confidentiality plays a heightened role in both mediation and arbitration, making these appealing alternatives in many construction industry disputes because of the prevalence of trade secrets, cost and profit data, and other sensitive business information contained in contracts and other key documents.

The principal difference between mediation and arbitration is who is the “decider.” In mediation, the parties virtually always retain the power to resolve the dispute on their own terms. In an arbitration, however, the parties empower an arbitrator or a panel of arbitrators as the decision-maker. Unlike a mediator, an arbitrator will adjudicate facts, will decide “right and wrong,” and will determine an outcome that is almost always binding.

## MEDIATION

Mediation is a form of ADR where the parties meet together with an impartial third party, the mediator, to attempt to negotiate a mutually agreeable resolution on their own respective terms. Mediations are typically non-binding, in the sense that if the parties fail to reach a resolution, they are not bound by any offers made and the mediator cannot force an outcome. The mediator does not decide facts or determine “right and wrong” in the dispute. However, as an impartial third party, mediators can be helpful in developing a better understanding of the strengths and weaknesses of the parties’ respective positions.

Mediation can be a powerful tool in a dispute resolution process because in most jurisdictions the parties are able to agree to resolutions a court could never award. As the ultimate outcome of a successful mediation is a settlement agreement—a form of contract—potential resolutions can run the gamut from cash payments, to an exchange of information, to an agreement to (or not to) perform further work or some other act. In short, if it can be agreed by contract, it can be part of a resolution at mediation.

Preparing for mediation is typically not an overly burdensome process. The process begins by selecting a mediator, usually by mutual agreement of the parties or by a court’s or arbitrator’s appointment. Sometimes, parties may choose to informally exchange information and provide the mediator detailed written memoranda in advance of the mediated settlement conference—the culminating event of the mediation—outlining facts and legal positions, and provide key documents like contracts, invoices, or copies of emails to help orient the mediator to the dispute. Other times, a short opening statement at the mediated settlement conference is sufficient.

The prototypical mediation takes place in a law firm or similar corporate office. Typically, the parties meet together with the mediator for an opening or “general” session where the mediator discusses the mediation process and allows the parties an opportunity to outline their respective positions. From there, the parties are placed into separate rooms. The mediator then hears separately from the parties and serves as a sort of information and deal-term broker to help the parties negotiate and navigate toward a resolution. The mediator can help the parties develop potential ideas for resolution, form offers or counter-offers, and understand how the other side views certain facts in the dispute. Some mediations take only a couple of hours, and others may last several days or require multiple sessions over weeks or months.

A mediation may end a few different ways. If the parties are able to reach a resolution, the mediator may assist the parties in developing a settlement agreement to document the terms of their resolution. Importantly, while mediation itself is non-binding, a settlement agreement reached at mediation will virtually always be binding, holding the force of contract. If the mediator believes that the parties are simply too far apart to reasonably reach resolution, he or she may determine an impasse has been reached, concluding the mediation without a result for litigation or arbitration if the dispute continues. Finally, if the parties appear close to a deal, and the mediator believes further exchange of information or just the passage of time might help to close it, the

mediator can choose to keep the mediation open to allow negotiations to continue.

One notable change for mediations in more recent years is the growing use of Zoom or other videoconferencing platforms. A mediation by videoconference works just like any other, with the caveat that the meeting place is now virtual. Often, when a dispute concerns sophisticated parties or geography is a major consideration, a remote mediation can prove a cost- and time-efficient alternative to an in-person mediation. ■

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The logo for ESSEX, featuring the word "ESSEX" in a bold, stylized, black font with a white outline and a slight shadow effect.