Evaluating Contractual Dispute Resolution Provisions: Mediation

The past two editions of this column addressed contractual claims and dispute resolution provisions. As that discussion continues, the next step in both the discussion and in most dispute provisions in construction contracts falls to mediation. In most contracts, even those that have abandoned the previously favored arbitration path for final dispute resolution, mediation of a dispute remains a contractual requirement.

Mediation, as a process, involves the use of a third-party facilitator to help negotiate a resolution to a claim. Because mediation is a legal process that generally occurs in connection with threatened or pending legal proceeding, most individuals who serve in the capacity of a mediator tend to be attorneys. However, a law license is not a prerequisite to serving as a mediator. There are many engineers and former construction project managers or construction consultants that frequently serve as mediators.

In a dispute resolution structure, mediation typically follows formal negotiations or contractually required executive level meetings because mediation shares more similarities to negotiation than to litigation. Unlike arbitration or litigation, mediation is a non-binding process. Any resolution to a dispute resolved through mediation requires the agreement of both parties. The mediator does not make any decisions in the way a judge would, nor does the mediator have any ability to force one party to accept a position that the party may not wish to accept.

With respect to the mediation process, most mediations take one full day. Typically, the day begins with the parties and the mediator convening in a group session where all in attendance have an opportunity to address each other directly. Following the opening session, the mediator typically sends each party to a separate room and alternates meeting with each party to facilitate negotiations. In the opening session and then throughout the day, the mediator may challenge each side on their position and may make suggestions on how to resolve the case.

In order to help the parties reach consensus and move towards a compromise for settlement, the mediator often asks questions of both sides independently in an attempt to encourage case and risk assessment. For example, if one party comes into the mediation steadfastly convinced of the infallibility of its position, the mediator may assume a devil's advocate role in that party's room. While never expressing an opinion as to the weight and value of that party's position, merely challenging the party to consider an outcome less than the party initially hoped for might facilitate some level of compromise. As this and similar discussions play out during the day, the mediation process tends to move parties closer together such that a settlement might be reached.

Ultimately, settlement of disputes and the avoidance of litigation or arbitration is the goal of most contractual dispute provisions. Some cynics may argue that certain dispute provisions are drafted in a way to provide leverage to one party and that dispute provisions in that situation are intended to be a deterrent to proceeding with a claim instead of assisting to resolve disputes. Generally speaking, however, most claim and mediation provisions are included in contracts to provide a framework to encourage resolution of disputes.

One example of a choice in drafting such a clause involves those provisions that make mediation mandatory prior to litigation or arbitration. Compulsory mediation provisions, in my experience, tend not to result in settlement. Often, a compulsory mediation provision becomes a box that one party must check on its way to the courthouse. In these situations, the parties tend not to have developed the claim or case beyond initial submission. Therefore, since nothing changes between the various preliminary steps of early dispute maturity and resolution, creating a different outcome merely because the process for presentment and discussion has changed often fails to occur.

Making mediation a condition precedent (meaning a required first step) to filing a suit or proceeding into arbitration is not necessarily dooming mediation to failure. There may be certain disputes that cannot be resolved through field or executive level negotiations where a mediator might be able to help bridge the gap between the parties. However, in those situations where a dispute is not ripe for settlement and where the legwork required to demonstrate to the opposing party that a claim or defense has merit has not been done, I find that mediation often fails to result in settlement.

Nevertheless, early mediations that do not result in settlement of a dispute may still advance the ball. In most every mediation, the parties and their lawyers learn valuable information about their case. Often, information about the other party can be gleaned from the mediation as well. The manner in which a party approaches a dispute, the characteristics of the personnel with decision making-authority and the way they react to certain tactics, and other items can be learned throughout the day based on interactions with the opposing party and even the mediator. In this regard, mediation can prove valuable even if it becomes a check-the-box exercise.

In conclusion, most construction contracts contain mediation provisions because parties recognize that proceeding directly from claim submission to litigation remains the costliest manner of dispute resolution possible. Using contractual tools to assist in the resolution of disputes can help parties save money and settle claims. Understanding the process, learning what to expect from mediation, preparing for certain reactions to the process, and gauging one's expectations going in are some of the underlying considerations that I hope this article has brought to mind.

Also, I hope that providing an understanding that mediation has costs associated with payment for the mediator's services and attorney's fees, in addition to lost productivity, may also be of some use. Bear in mind, a mediation that successfully resolves a dispute, will always be cheaper (sometimes exponentially) than litigation. Furthermore, when costs of litigation are factored in, I have found that mediated settlements often result in resolution of a case fairly aligned the possible or even expected result of litigation.

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