Mediating Construction Disputes: How and Why It Can Work for You

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Over the years, alternative dispute resolution procedures such as mediation have gained headway as a means to resolve construction disputes and avoid costly litigation. While many if not most contractors are familiar with the term "mediation" or have participated in a mediation session, not all may be familiar with the process or understand what to expect from it. When the parties to a dispute are exploring the possibility of mediation (or when a construction contract contains a clause requiring the parties to mediate a dispute), it is important for each party to fully understand the process and goals of mediation in order to derive a benefit and avoid wasting time or money. This article will explore the process and goals of mediation, and instances when mediation may not be advisable.

What is "mediation", and how does it differ from litigation (or arbitration)? Litigation involves the submission of a dispute to a judge or jury whose decision can be appealed. Parties who agree to arbitration can select an arbitrator whose decision is binding but reviewable in very limited circumstances. By contrast, mediation is not a "legal" process resulting in a determination of a winner or loser. Mediators do not make rulings of fact or law binding on any party but can facilitate or assist the parties to settle their dispute.

Neither party "wins" or "loses" in mediation (some say a successful mediation occurs when both parties are equally unhappy with the result). If the process does not result in settlement, the parties can try another session or litigate. An often overlooked benefit of mediation is the opportunity to "face off" in a non-adversarial manner without fear that a party's unfavorable statements can be used against them at trial. Adding the mediator's influence and skill, mediation can be more creative, meaningful and satisfying than a result achieved after a trial or arbitration.

Parties and their attorneys should prepare for mediation by developing persuasive evidence to support their case and respond to their opponent's claims or defenses. Parties must be willing to compromise; if you let your opponent know that you are willing to accept less than you think you deserve, he or she is more likely to do the same. A party's stubborn refusal to consider an opponent's position wastes everyone's time and money. When parties are openly hostile, mediation provides a mechanism known as a "caucus" whereby parties meet in separate rooms to avoid confrontation. The mediator moves between "caucus" rooms to present evidence, deliver responses to questions, convey offers and negotiate a settlement. In rare circumstances, mediation can be conducted entirely online.

A successful mediation strategy is to focus on each party's needs rather than their demands. Sometimes, a simple apology or recognition of a person's emotional needs can "turn the tide" towards resolving a dispute and avoiding significant litigation costs. Mediators can assist the parties to identify and evaluate non-monetary issues that create conflict and interfere with or prevent resolution of the dispute.

Litigation and arbitration can resolve disputes entirely in favor of one party or provide an unsatisfying "mixed bag" result. A "win" following trial or arbitration can actually be a loss if your opponent cannot pay the judgment or you do not recover attorney's fees and litigation costs. Mediation provides flexibility and creativity not found in court or arbitration proceedings that could achieve a better and more satisfying result. Because mediation discussions are confidential, the parties are encouraged to discuss their positions openly and honestly to reach an agreeable solution.

One factor to consider before agreeing to mediate a dispute (or deciding whether to include a mediation provision in a construction contract) is an actual or perceived power imbalance negatively impacting one party's ability to negotiate effectively and successfully. A power imbalance may exist if one party has greater financial resources or stronger negotiation skills than the other party. Ideally, the parties should have equal bargaining power. If one party believes that it does not have the same bargaining power as his or her opponent, it will be difficult to resolve disputes at mediation without first resolving this perceived imbalance. A good mediator may be able to implement strategies to rebalance the parties' bargaining powers (though some mediators believe mediation is not an advisable option if a significant power imbalance exists). It is always advisable to explore this issue and all issues noted above with your attorney when considering mediation or deciding whether to include a mandatory mediation provision in your contract,

The overwhelming majority of civil cases settle before trial or arbitration. Mediation allows parties a meaningful opportunity to resolve their dispute more productively, efficiently, and for less money than litigation or arbitration. An experienced construction attorney can help you decide whether to mediate or litigate a dispute, or to include a mediation provision in your contracts.

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