LEGALLY SPEAKING

Know the Basics of Mediation, Arbitration and Litigation

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Dispute resolution provisions in subcontracts should not be overlooked. They are every bit as important as the payment terms, change order procedures and schedule provisions. All subcontractors must understand the important differences between the most common forms of dispute resolution—mediation, arbitration and litigation. If you sign a subcontract containing onerous dispute resolution provisions or procedures, it can be extremely difficult and expensive to enforce your rights.

Arbitration and litigation are both binding forms of dispute resolution. Decisions constitute final and enforceable rulings on the disputed issues. Mediation, on the other hand, is non-binding and is essentially a formalized settlement meeting.

Mediation

Mediation involves a third-party (the mediator) who acts as a facilitator between the parties. The mediator does not decide which side's position is correct. The mediator does not make a ruling or render a decision. The mediator's job is to evaluate each party's position, to point out the strengths and weaknesses in each party's position and to try to get the parties to a negotiated resolution or settlement agreement. There are no witnesses who give testimony at a mediation and no exhibits introduced. It is not a hearing. However, a party to a mediation is encouraged to back up its arguments with project records and other evidence. This is usually presented in a mediation statement submitted to the mediator before the mediation conference. It can also be presented at the mediation conference. The point is to try and demonstrate that your position has merit so that your opponent believes it is best to settle out of court. Since mediation is an attempt to reach a settlement, nothing said during the mediation is admissible in court.

Mediation is not binding. Either party can walk away from the mediation process at any time. Mediations are often administered by the American Arbitration Association. Such mediations are usually held 60 to 90 days after the demand is filed, although it can vary depending on the complexity of the issues, the number of parties to the mediation and the schedules of the participants and the mediator. Many subcontracts state that mediation is a *condition precedent* to the next step of the dispute resolution process. This means that the parties must try to resolve the dispute through mediation before moving on to the next step in the dispute resolution process, usually litigation in court or arbitration. If the subcontract requires you to mediate before you can get to court or to arbitration, you may want to invoke mediation sooner rather than later since it will take at least 60 to 90 days (and perhaps longer) to complete the mediation process. Mediation can be expensive because the mediator has to be paid (usually in advance) and you are well-advised to invest in an experienced construction attorney to assist you the mediation statement and selecting the backup to support your positions. If the mediation does not result in settlement of the dispute, you will have invested a lot of time and money only to come away disappointed. However, even an unsuccessful mediation enables you to learn a great deal about your opponent's position and the backup to support it. It is important to select a mediator that is experienced in construction and who has a solid track record of successfully bringing parties together. Without a good mediator who is willing to immerse himself or herself into the details of the disputed issues, the chances of reaching a settlement are diminished. Successful mediations often involve significant concessions or compromise by all parties.

Arbitration

Arbitration is an alternative to court in which the parties appoint a third party to decide their dispute. The arbitrator's ruling is binding and enforceable

by courts. Unlike a mediator, the arbitrator hears actual testimony from witnesses (which can include experts) and reviews exhibits. The arbitrator analyzes and weighs the impact of the evidence submitted and makes a binding ruling at the conclusion of the arbitration hearing. It is similar to presenting a case in court, but less formal. Arbitrators are not bound by the strict rules of evidence in the same way that judges in court are. There are very few grounds upon which to appeal an arbitrator's ruling, so if a party believes the arbitrator made a mistake in his or her reasoning or ruling, or did not follow the law, it is almost impossible to overturn the ruling. Arbitrators often decide the case based on what they believe is fair and are not as constrained by legal precedents as are judges.

Some companies prefer arbitration of disputes because arbitration is less formal, usually moves much faster than a lawsuit in court and can be less expensive. An arbitration hearing is often conducted much more quickly than a trial in court. Getting a case to trial in court can take years. Arbitration, on the other hand, is usually completed in a matter of months (although it can vary depending on complexity, schedules and the amount of pre-hearing discovery permitted by the arbitrator). Because arbitration moves quickly, it can provide leverage to subcontractors pursuing payment from the general contractor. The customer cannot hide behind the sometimes cumbersome procedures inherent in the court system which often delay the trial and drive up legal expenses.

In this author's experience, arbitration is almost always cheaper because it is less formal, expensive discovery processes are limited, and there is less paperwork that the lawyers have to prepare and file. In recent years, however, some participants have complained that arbitration hearings drag on as the arbitrator(s) sometimes bend over backwards to let each side present all evidence without limitation (which often results in duplication of evidence and unnecessary redundancy). Another knock on arbitration is that it can be expensive as the arbitrator is usually an experienced (but expensive) lawyer, architect or engineer, whose hourly fees, travel costs, etc., must be paid by the parties in advance. Exceptionally complex arbitration cases may even require multiple arbitrators. On the plus side, though, experienced arbitrators usually understand the complex construction issues that are at the center of most disputes. To many judges in the court system, the issues in complex construction disputes are completely foreign to them.

Litigation

Many subcontracts require all disputes to be resolved by litigation in court, rather than by arbitration. Litigation has been criticized because it can be expensive and lawsuits can drag on for years. Litigation often entails expensive pre-trial discovery, such as production of documents by the parties, subpoenas to third parties and depositions. Many subcontracts require litigation because the customer believes that it will be more costly and time-consuming for the subcontractor to pursue its claim. Many believe the subcontractor will eventually become frustrated with the time and expense of litigating a dispute through the slow-moving court system. Eventually, some subcontractors will either give up or settle the claim for pennies on the dollar. Also, judges and juries often have little or no expertise with complex construction issues. Few understand scheduling, scope issues, RFIs, shop drawings, payment applications, plans and specifications and other construction concepts that are often involved in construction disputes. On the other hand, if your position is not unduly complicated and will appeal to ordinary people (such as where you are not paid without any apparent justification), a jury of your peers may be more likely to award you a full recovery, plus attorney fees, interest and penalties (if permitted in your jurisdiction).

Juries like to pick winners and losers in construction disputes. Arbitrators, on the other hand, are less likely to be offended by the behavior of one side or the other, and do not usually award a full recovery to either side. Arbitrators have a reputation for "splitting the baby" (although that has not been this author's experience in several dozen arbitrations). Court decisions can be appealed on many more grounds than can arbitration awards, but the appeals can be costly and time-consuming. Finally, beware of subcontract provisions requiring disputes to be resolved in the courts of an inconvenient location. If you must travel to an inconvenient location to litigate a dispute, it can result in significant legal costs. (See also ASA's Anti-Forum-Selection Clauses in the 50 States)

In summary, every company should consider the types of disputes it is most likely to encounter (or has encountered in the past). If you are a company that is often fighting to be paid, immediate access to binding arbitration may be best because it eliminates the time and expense of mediation and allows you to apply immediate pressure on your customer. During contract negotiation, every subcontractor should carefully consider all aspects of the project, the contract and the key parties and decide what forms of dispute resolution makes the most sense. It is recommended that you consult with experienced construction counsel to decide what is best and to avoid agreeing to a process that will make it difficult to enforce your rights.

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11 — Webinar: "Electronic Takeoff Software Solutions" presented by Justin Hobby, Exactal

October 2018

9 — Webinar: "Group Captive Insurance for Construction Companies" presented by Ed Kushlis, Insurance Associates

November 2018

13 — Webinar: "The Soft Side of Scheduling: Improving Communications Between GCs and Subcontractors" presented by Steve Groth, Chiaramonte Construction

December 2018

11 — Webinar: "Improving the Change Order Process" presented by Ron Churchey, Shapiro & Duncan

January 2019

8 — Webinar: "Work-In-Progress Reporting" presented by Stephen Blankenship, Ennis Electric

February 2019

12 — Webinar: "The Best—and Worst—Construction Legal Decisions of 2018" presented by Adam Harrison, Harrison Law Group

March 2019

6–9 — SUBExcel 2019, Nashville, Tenn.

19 — "Lean Construction—What Subcontractors Need to Know" presented by Lean Construction Institute

April 2019

9 – Webinar: "Avoiding Predatory OCIPs, CCIPs and Builders Risk Insurance Flow-Downs" presented by Jonathan Mitz, Ennis Elecric

May 2019

14 — Webinar: Corporate and Individual Tax Planning Under the New Tax Law, by Thomas B. Bailey, CPA, CVA, Councilor, Buchanan & Mitchell, P.C.

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