

## **MEDIATION: A MORE EFFECTIVE WAY TO RESOLVE CONSTRUCTION DISPUTES**

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Mediation has proved itself to be an expeditious, economical and effective way to resolve construction disputes. In most mediations in which I have been involved, either as the mediator or an advocate for one of the parties, the parties and their counsel have come to the mediation fully prepared to participate in a frank "off the record" discussion of the issues involved in the dispute with a willingness to engage in good faith settlement negotiations. This is essential if the mediation is to be successful. For the mediation to be successful, the parties will be realistic in their respective positions and their expectations since any mediation will require a compromise by all parties. The procedures for any mediation are rather simple. After the mediation is initiated by either the request of a party pursuant to a contract provision requiring mediation, or by the agreement of the parties in the absence of a binding mediation provision, the mediator will normally hold a pre-mediation conference call with the parties or their counsel to pick a date, time and place for the mediation and to discuss such things as the submission of short position papers. At the mediation itself, the mediator will normally hold an initial meeting with both parties' representative and their counsel, during which each party or their counsel are given an opportunity to express their positions to the opposing party and its counsel. During this meeting and afterwards, in private confidential meetings with each party and its counsel, the mediator will seek to determine what results each party seeks to achieve in the mediation and what are the areas of agreement or disagreement between the parties. During the mediation process, the mediator will use his knowledge, experience and reputation to enhance the chances of a successful mediation. The mediator may use either what is known as the facilitative method, or, with the parties' consent, he may take a more proactive role and use the evaluative method. Because the evaluative approach has proved itself to be a more effective means of moving a case towards settlement, in cases where I am the mediator, I normally like to get the agreement of the parties to use this approach. Hearing the views of a neutral third party on the relative strengths and weaknesses of a party's position is, in my view, a very effective way of moving towards a negotiated settlement, especially in a case where the parties have reached an impasse. Simply using what is sometimes referred to, as a "shuttle diplomacy" is not, in my opinion, the best way to mediate a construction dispute. But it must be understood that in mediation, unlike arbitration where the arbitrator may make a binding award, it is the parties, not the mediator who decides whether to settle or not. Litigation, and even arbitration, of a large construction dispute is extremely expensive and the result is unpredictable. Mediation offers a way to avoid much of the time and expense entailed in litigation or arbitration. The fact that the parties, rather than a judge, jury or arbitrator, make their own decisions with the help of the mediator plays a major role in any mediation and for this reason the parties are usually very pleased with the result.

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