This article originally appeared in the Summer 2017 issue of
global construction solutions

The Advantages of Mediating Construction Disputes

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The construction process necessarily involves many parties, some of whom may not have contracts with each other. While the owner usually has contracts with the architect and the general contractor, the architect and the general contractor are not often related by contract, and the subcontractors and consultants of the general contractor and the architect rarely have contracts with the owner. When disputes arise, as they often do on construction projects, it is common for many parties to become involved, since it is often not clear whether a dispute is the result of improper design, faulty construction, defective materials or actions of the owner.

It has become standard practice for construction contracts to contain clauses requiring the parties to arbitrate any disputes that arise. Although these clauses may be stricken from the printed American Institute of Architects forms that are commonly used in the construction industry, lawyers and parties are more likely to amend the printed provisions than to eliminate them entirely. Thus, most construction contracts provide for some form of arbitration of disputes between the parties.

However, arbitration is solely a creature of contract. A party that has not contractually agreed to arbitrate a dispute cannot be forced to participate in an arbitration, although if all involved in a dispute consent, other parties can join an arbitration. This can lead to a situation where all parties involved in a dispute cannot be brought into one proceeding to resolve the dispute. A party can be forced to arbitrate against one or more parties at the same time as it is engaged in court litigation against other parties involved in the same dispute. Such a situation not only can be very expensive, but there is also the possibility of inconsistent results being reached in the multiple proceedings.

If the parties cannot negotiate a resolution, mediation is the best and least expensive way to resolve such disputes. In mediation, all the parties can agree to participate in the process, even if they have not agreed to join in one adjudicatory proceeding.

Parties facing this type of situation are well-advised to seek an early resolution of their dispute. If the parties cannot negotiate a resolution, mediation is the best and least expensive way to resolve such disputes. In mediation, all the parties can agree to participate in the process, even if they have not agreed to join in one adjudicatory proceeding. The cost of the mediation, when spread among all the parties, is minimal when compared to the cost of engaging in multiple adjudicatory proceedings.

Another advantage of mediation in these situations is that the dispute can be promptly resolved so that the parties can get back to productive activities. Construction arbitrations can be very complex, with many facts to examine, experts to testify and documents to review and explain. Hearings of these proceedings can take many days over many months. A related litigation regarding the same issues can take even longer. In addition, many judges do not like handling construction cases, and they may delay the resolution of these cases in the hope that they will settle before trial.

For these reasons, mediation—which is always a good option for resolving disputes—is an especially attractive tool in construction disputes. The advantages of speed, low cost and final resolution of the issues all support using mediation in an early attempt to resolve complicated construction disputes.

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