

CONFLICT

RESOLUTION

SOLVING CONSTRUCTION DISPUTES: A Practical Approach



BY GARRETT J. SULLIVAN

Construction has always been a risky business. With every passing year, the levels of risk and complexity climb, causing owners and contractors to shift the risk to those lower on the supply chain. “Risk transfer” creates all types of exclusions, additional provisions, and addendums being added to cost proposals—not all of which make it into the final contract.

Contract disputes permeate our industry today, and they can literally put an organization out of business. That’s why I’ve become such a big believer in the benefits of mediation.

Mediation is a dispute resolution method which takes the place of arbitration or litigation. The mediator is an impartial person who brings the contracting parties to a dispute resolution. It is not a win/lose proposition (neither party can say they’ve “won”), but rather a process where acceptable solutions are reached by both parties. In my view, it’s a great tool to resolve disputes with far less time and money.

Why Mediate?

Mediation is a means of reducing risk and saving money. Often, disagreements in construction involve many parties and large amounts of money, not to mention the huge emotional toll. When a contractor goes to court or binding arbitration, he is publicly placing the outcome into hands of people who are not in the construction industry. Inevitably, the losing side will say that, in some way, the arbitrator/judge did not truly understand the nature of the construction issue. When mediation is used, the contractor has a large say in the resolution. This permits

a higher probability of an agreed-upon solution. Mediation opens the door for creative solutions instead of the standard award of damages and attribution of blame.

Mediation is particularly useful in very complex, multi-party cases because it can resolve a portion of the dispute while allowing the most contentious facets of the case to proceed onward to arbitration. Additionally, mediation allows the parties to walk away at any time, creating a risk-free system to explore potential solutions.

When to Mediate

Prior to beginning mediation, consider the following questions with your team:

What is the key outcome you’re seeking?

In a perfect world, if the dispute were settled today, what would it look like to you?

What is the highest amount of money you are willing to pay or the lowest you are willing to accept in order to settle?

Conversely, what is the most important issue to the other side(s)? How much money do you think it will take for the other side(s) to settle?

If the other party offers an apology, will that make a difference in the settlement amount?

How to Prepare

First, carefully review the dispute resolution clause in your contract. This should include a written notification to the other party and a time period for its resolution. If you’re not already doing so, I recommend including language such

as that below to your future contracts:

If the dispute is not resolved within the agreed-upon time period, the parties agree to attempt to settle such claims or disputes by non-binding mediation first before moving to arbitration. Should mediation not be successful, the parties shall still have the right to proceed with binding arbitration.

Second, select a mediator. Usually each party will have their legal counsel assist them in selecting the names of three mediators. From the pool of mediators, all parties should agree upon one—ideally someone with construction knowledge and the ability to trim back emotion to reveal the real problem.

Your third step is to go into the mediation with an open mind. Allow for meaningful dialogue. Consider your options carefully and keep your eye on your desired outcome. This leads me to your final step: once the issue is resolved, learn from the experience. Things can and do go wrong on the jobsite. There are learning lessons all around. Be sure to hold a debriefing session with your key employees to glean as much as you can from the experience and to insulate yourself as much as possible in the future.

Recap

Overall, mediation is a valuable tool that should not be overlooked. Statistics show that it resolves disputes approximately 80% of the time. With odds like that, I recommend that you allow a skilled mediator to guide you through a creative solution in any future disputes. You have virtually no downside risk. **BI**

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