



Mediation

The Process of Assisted Negotiation

A Cost-Effective Way to Reach a Settlement

BY CHRISTOPHER HANVEY

“I’ll see you in court!” Those volatile words are not uncommon when conflicts arise on a construction project. Nobody really wants to go to court and an alternative exists—mediation.

Construction projects require contractual interdependence between many parties and frequently, the complexity and nature of those relationships leads to conflict. Construction disputes are usually intricate and when they are not resolved, they commonly escalate to legal action involving arbitration or litigation. Mediation has become one of the most cost-effective and widely used dispute resolution tactics used by those in the construction industry today.

By the mid-1980s, it became apparent that litigation costs were growing expo-

nentially. Many disputes reaching the legal arena could have been resolved earlier, had the parties communicated their issues to each other clearly, in a less combative setting. As with many trends, a few pioneers noted the phenomenon and developed an alternative approach to resolving a dispute—one that could be used with or without the follow-up of litigation. This alternative approach is the modern form of mediation.

While this concept of resolving disputes through mediation is not new, its formal use in legal matters was not widespread prior to the 1980s. Later in that decade, mediation evolved from an industry serving the legal community into a widely accepted and desired dispute reso-

lution technique. Now, mediation is sometimes used by construction and engineering companies to achieve a dispute resolution before taking the costlier, more time-consuming step into the legal arena.

WHAT IS MEDIATION?

Mediation is a structured negotiation in which a neutral person, the mediator, assists parties in a dispute with the objective of reaching a settlement. While mediators cannot impose a decision, they can influence the parties’ receptiveness to settlement by clarifying the issues and pointing out the strengths and weaknesses of each party’s positions. The mediator acts as an ally keeping the process alive and closer to reaching a potential settlement.

WHY IS MEDIATION FOR CONSTRUCTION DISPUTES?

During the construction process, unanticipated events or conditions frequently occur, requiring the parties to identify ways to deal with time, labor, equipment and material costs. The likelihood that the parties will develop disagreements over these issues is high. To compound this struggle, the construction process involves events and issues that can be highly technical and factually complex.

Mediation offers the parties a forum in which they can communicate their positions without having to fear an adverse result from decision makers (e.g., jury, judge, panel) who may not understand the true nature of the issues. The mediator maintains structure and order in the settlement negotiations, providing the parties an opportunity to express their position and opinions. In complex construction-related disputes, a skilled mediator with experience in construction litigation and mediation can be the key to the successful resolution of the parties' dispute.

THE MEDIATOR—A CRITICAL RESOURCE

Two types of mediators exist: facilitative and evaluative. Both can be effective in resolving a construction dispute, depending on the nature of the dispute and the individuals representing the parties.

The facilitative mediator usually takes a neutral stance, summarizing each side's positions with a view toward promoting an environment in which each party's voice can be heard. The mediator in this case does not typically express his views regarding the merits of the issues on either side. Here, the mediator assists the parties in communicating information that each party considers important to its positions. The facilitative mediator tries to achieve compromise and settlement through understanding and cooperation.

The evaluative mediator usually has a series of definitive opinions regarding each party's positions, which he discusses to some extent with both sides. After listening separately to each party's perception of the facts and their positions, the mediator evaluates the merit of certain issues. The mediator usually presents his deductions and conclusions in a non-threatening manner, hopefully facilitating each party's self-evaluation. However, an evaluative mediator can take an adversarial stance with

either or both parties to promote compromise or to neutralize a negative influence on the path toward settlement.

The purpose of both mediator roles is the same: to resolve the dispute. Both types of mediators do this by helping the parties better understand each other's issues, simplifying arguments and developing opinions regarding each side's positions. However, the evaluative mediator quickly and directly voices opinions on the possible outcome should a dispute escalate to arbitration or trial. By doing so, he gets the parties' attention, helping generate positive results in a construction dispute. The facilitative mediator will tend to focus on looking for opportunities to create harmony and agreement between the parties.

THE MEDIATION PROCESS— FOCUS ON SETTLEMENT

The process of mediation is relatively simple. However, most construction disputes involve complex technical issues and damages that are not well substantiated. Many times a construction-related mediation includes numerous fact witnesses as well as construction experts.

In construction mediation, guidelines such as the following can foster positive results:

- Select a mediator experienced in both construction litigation and mediation.
- Prepare an outline of the dispute's issues, so the mediator and all team members can understand each party's positions.
- Prepare for the mediation as you would for a very important negotiation by reviewing key correspondence and legal issues, as well as any expert reports.
- Arm your decision makers who will be present at the mediation with knowledge. If compromises are to be made—and that will be necessary to actually reach a settlement—they can be made with knowledge and understanding.
- Be prepared to make formal presentations outlining the positions and issues to both the mediator and the opposing party. A presentation should address all issues, relieving dependence on the opposing party to present the issues as hoped.
- Let the mediator guide the process and listen carefully to what he says.

Mediation can be crippled if either side holds on to unrealistic expectations. When one or both parties fail to clearly communicate issues, positions and interests, even with the help of the mediator, the process is undermined.

Mediation can help reestablish a negotiation process when the parties cannot reach a mutually agreeable solution. By introducing a neutral third party familiar with the construction process, the parties often restore a positive negotiating dialogue, which can lead to solutions. Mediation involving construction disputes is a viable, cost-effective, efficient alternative to arbitration or litigation. The process of mediation, when it results in a settlement, also results in both parties feeling that they have won.

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