

Mechanics of Construction: Mediation of Construction Disputes

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Mediation of Construction Disputes

Mediation can be a cost-effective process for resolving construction disputes, and in many contracts, it is prerequisite to binding dispute resolution, including the AIA Document A201 – General Conditions to the Contract For Construction. Because the final contract becomes the law between the parties, it is essential that each party become familiar with all terms, especially how disputes will be resolved, before a problem arises.

Mediation is simply a negotiation among parties. Contrary to arbitration and litigation, the third-party mediator does not make any decisions or rulings on the parties' claims, but instead is there to assist the parties with the exchange of information and to help guide the parties to common ground – even when it appears none exists. Unlike arbitration and litigation, the final decision, if one is reached, is based entirely upon what the parties can agree to and may sometimes include creative solutions. Importantly, mediation outcomes are nonbinding and information exchanged therein is considered confidential, with few exceptions.

Mediation details, including who is present, when and where the mediation takes place, division of costs, and how the mediator will handle the participants, are almost entirely dictated by the parties, which allows for more flexibility and a more informal setting than litigation or arbitration. Typically, the mediator asks each party to provide a confidential position paper in advance of the mediation, so that the parties have the opportunity to present their position on the background and merits of their case before the actual mediation. Depending on what the parties decide, the mediation may or may not begin with each party giving an opening statement to the mediator and other participant(s). While parties may bring documentation of their positions and claims, there is no formal evidence exchanged or maintained by the mediator. After the parties' first meeting together, they are housed in separate rooms. From there, the mediator meets separately with the parties in an attempt to carrying information, pros and cons of each case, and practical concerns back and forth in an effort to reach a compromise. The session ends when the mediator sees either that progress is no longer being made or a compromise is reached.

Mediation may be a productive use of the parties' time and less costly route to resolve disputes. As a practical matter, in disputes arising from construction contracts, a mediation requirement may allow the parties to avoid

unnecessary costs, potentially narrow the contested issues, and work through conflicts without the need for extensive discovery, retention of expert witnesses, testimony, etc.

Often confused with mediation, arbitration, on the other hand, is a binding dispute resolution process, similar to litigation, in which the arbitrator or panel of arbitrators hears evidence and issues a decision that is binding upon the parties. While there are some similarities between arbitration and litigation, there are many distinct differences which may be advantageous or provide significant drawbacks depending on the situation at hand.

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