Contracting to Resolve Construction Disputes

By Brian Babcock and Andrew Berne

Although there are many different types of construction, such as commercial, heavy-civil, industrial, residential, etc., one common unfortunate thread ties them all together; there will eventually be some type of a dispute. Some major. Some minor. Disputes are typically either about payment, timelines, or the quality of the work. Unlike a car crash, which occurs in an instant, construction disputes are the culmination of issues based on months or years of work performed. Throughout any project, it is more common than not that neither party is completely blameless. For this reason, resolving construction disputes can easily become a very timely and expensive endeavor. Contractors can attempt to limit their exposure to the inevitable dispute with a detailed dispute resolution clause in a written contract. Utah law, as with most other states, allows contracting parties to set forth how disputes will be resolved.

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Negotiation

The first suggested requirement for dispute resolution should be in-person, good faith negotiation. In this digital era of emails and text messages, the humanity of the industry can be lost and written words can be misunderstood. By forcing parties to meet in person, this allows the parties to physically interact and attempt to resolve the dispute. While some people enjoy the struggle of conflict, most individuals are more willing to try and resolve a dispute than to push further. These negotiations may start at the project management level with a potential escalation to the upper management. The best chance for success is if the parties put emotion aside, have candid discussions and make a reasonable business determination for the company.

Each additional step in the resolution process requires more time, and becomes exponentially more expensive. If resolution is reached at the negotiation stage, the cost may be minimal. Unfortunately negotiations are not always successful despite a party's willingness and best efforts. Sometimes parties are irrational, or unwilling to work towards a mutually beneficial result. In such a situation, the use of mediation can often assist the parties to overcome previous obstacles to resolution.

Mediation

Mediation is the use of a third-party neutral to help facilitate resolution. The mediator does not act as a judge and doesn't have the authority to determine liability or fault. The role of the mediator is to objectively and independently help each party evaluate the strengths and weaknesses of their position and facilitate a mutually agreed upon settlement. The typical process for mediation is that each party will draft position statements that are shared with the mediator. These statements provide the factual background of the dispute, and the legal basis or justification supporting the relief sought. Sometimes these statements are shared with the other parties, other times they remain confidential. The benefit of early mediation is that construction disputes can be very complex and technical and the most crucial information is typically fresh in the minds of the parties. While a more detailed technical analysis may be important for ultimately building a case to prove liability or to establish a defense, they may not be necessary for a mediated settlement. Additionally, by investing the time in putting together well-reasoned position statements, the parties will better understand the disputed facts and law which can allow the parties to focus on those specific issues going forward from a failed mediation.

Any settlement reached in mediation is completely under the control and up to the parties. Many mediations end successfully due to the parties being open-minded and having a willingness to listen to the independent mediator. A mediation will most likely fail if the parties enter with unreasonable expectations. Both parties typically compromise more than originally anticipated. The saying is "if both parties feel they gave too much, it is a good settlement." The parties should counsel with their attorney as to the likelihood of success in moving forward and the costs to obtain that success.

If the mediation does not result in a settlement, the last step would be formal adjudicative process such as litigation or arbitration.

Formal Resolution

There are two main types of formal resolution, litigation and arbitration. Litigation is the default most people think of when they talk about suing someone. It is administered by the court system, and the ultimate outcome is determined by a

judge or a jury. This process is governed by local rules and is subject to the knowledge and experience of the assigned judge or jury which may be very limited as it relates to construction. With construction being a technical and complex industry, vital trial time might be lost educating the judge or jury about the industry.

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Another option is to use arbitration. Arbitration is like litigation but instead of having a judge, the parties choose either a single arbitrator or a panel of three arbitrators. The arbitrators are agreed upon by the parties and can be individuals with specialized knowledge which can be an advantage over litigation. The parties may agree to directly select their own arbitrator(s) or use associations like the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Services ("JAMS") who qualify arbitrators within certain fields, such as construction. Of note, most decisions by a judge or jury are subject to appeal where an appeal from an arbitration award is very limited. As such, Arbitration awards are more likely to remain and bring finality to the dispute.

The benefits of arbitration do come at a cost. The arbitrator(s) charge an hourly rate that will be split between the parties and if the arbitration is administered through the AAA or JAMS, there are additional filing and administrative fees. When parties litigate within the court system, those fees can mostly be avoided.

Without a predetermined sequence of dispute resolution, contractors can be held to the whims of the opposing party and brought into litigation without the potential benefit of mandatory negotiation, mediation, or arbitration. While parties can still participate in these without a dispute resolution clause, it is much easier to get parties to agree to a process in the contracting stage than when a dispute has already arisen. ■

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