HEALD & LEBOEUF, LTD. Attorneys At Law
One Turks Head Place • 76 Westminster Street, Suite 600 • Providence, RI 02903 • 401.421.1500

CONSTRUCTION LAW BULLETIN®

Spring 2016 Newsletter

www.HealdandLeboeuf.com

## RESOLVING CONSTRUCTION DISPUTES THROUGH MEDIATION

A growing number of construction disputes are being resolved through mediation. The American Institute of Architects (AIA) contracts require parties to submit their disputes to mediation as a condition precedent to arbitration or litigation in court. This article will discuss the mediation process, the advantages and disadvantages of mediation, provide an overview of a typical mediation session, and tips for a successful mediation.

Mediation is the submission of a dispute to a disinterested person. The mediator is typically an attorney or a retired judge. Unlike arbitration, in which the disinterested person acts as a judge and makes a final decision, the mediator listens to the parties and tries to facilitate a resolution of the case through negotiation. Unlike arbitrators or judges who can issue orders and binding awards, mediators cannot force the parties to agree to settle a case.

The primary advantage of mediation is that it provides the parties with an opportunity to resolve their construction dispute at a small fraction of the litigation costs they would incur if they went the distance in arbitration or in court. Even when mediation is unsuccessful, the parties often learn the strengths and weaknesses of their cases during this process. Mediation can be unsuccessful initially, but the parties may narrow their differences to the point that they can eventually resolve their dispute.

Mediation may be less appropriate when a party is recalcitrant or unwilling to resolve the case under any terms. In such instances, mediation is only going to serve as an additional cost and delay to arbitration or litigation. Nevertheless, there are a number of skilled mediators who have managed to successfully mediate even seemingly unresolvable cases.

Mediation is typically commenced by the filing of a request for mediation. This is a short form identifiying the parties, their contact information, and a brief description of the dispute. After the request is made, the parties will attempt to agree on a mediator. In mediations administered by the American Arbitration Association (AAA), the AAA will appoint a mediator if the parties cannot agree on one of those listed by the AAA. The parties will then meet or conference with the mediator to schedule a mediation session and discuss logistical issues including any information and documentation either party needs in advance of the mediation. The parties generally file a memorandum setting forth their positions in advance of the mediation.

The mediation is typically in person and can last a few hours in a smaller simpler dispute to a day or two or longer in larger more complex disputes. The parties and their counsel will initially meet together with the mediator. Typically, counsel for each party will begin with a short presentation setting forth their version of the dispute. After the presentations are made, the mediator then meets separately with each party. The mediator

HEALD & LEBOEUF, LTD. Attorneys At Law
One Turks Head Place • 76 Westminster Street, Suite 600 • Providence, RI 02903 • 401.421.1500

CONSTRUCTION LAW BULLETIN®

Spring 2016 Newsletter

www.HealdandLeboeuf.com

will often provide his or her views on the dispute, discuss the strengths and weaknesses of each party's case, and advise each party why they should settle their dispute. The mediator will typically ask each party for settlement authority and for a confidential "bottom line" settlement number. The mediator will then spend the rest of the session going back and forth between the parties until he or she can facilitate a settlement between the parties, or it is apparent that the parties are at an impasse.

There are a few keys to mediation success. The parties need to pick the right mediator. In construction cases, the mediator should be a construction law attorney, architect, engineer or contractor with extensive construction experience.

The mediator also should have extensive experience mediating cases. Mediation is an art form. A good mediator knows how to push two seemingly recalcitrant parties to a resolution.

Finally, the parties should exchange sufficient documents and information in advance of mediation so that they have an accurate understanding of the strengths and weaknesses of their respective cases. In litigation, counsel and parties are used to "holding back" documents to the maximum extent possible in order to increase their advantage at trial. In mediation, parties may want to disclose information and documents that would show the opposing party why they should settle the case.

Mediation is the rare high-reward, low-risk opportunity. Parties who resolve their case in mediation can avoid the substantial attorneys' fees and considerable risk involved in litigating / arbitrating construction disputes. The only major disadvantage to mediation is the cost if the case does not settle – which is generally small given the potential reward. Mediation is an effective means of resolving a construction dispute. Contractors should consider inserting a provision in their contracts requiring mediation of construction disputes prior to arbitration or litigation in court.





Please contact Thomas W. Heald, Esq. with any Questions with respect to this newsletter.
Tel: (401) 421-1500 Fax: (401) 331-5886
E-Mail: twh@healdandleboeuf.com