



Mediation and Arbitration: Choosing the Right Process

By Blase Reardon

In last month's issue I mentioned various techniques for preventing, minimizing, managing, and resolving construction disputes. I am continually amazed at the confusion and apparent misunderstanding which surround the terms "Mediation" and "Arbitration." I have found that some individuals use these terms interchangeably. Others who profess to know the difference believe that the end result of either approach is identical. "The baby gets split" is a frequent expression we all have heard.

This expression becomes more reinforced as the "baby splitting" syndrome continues or is promulgated, primarily by owners, constructors, and the legal communities. Ask yourself, what happens in life when I do not understand a method or technique?

Unless we educate ourselves about the unknown we tend to avoid the new approach in favor of the tried and true, whether we like it or not. Specifically in construction, differences which grow into disputes are either (1) ignored with the hope that one party will walk away (giving in or just surrendering) or (2) the parties agree to resort to litigation or the active threat thereof. In the latter case, usually no one wins except the lawyers.

Apart from these "surrender" or "litigation" approaches to construction disputes, the use of Mediation and Arbitration represent two better methods for resolving complex issues. However these methods are as different as day and night. When asked recently by the head of a large, well-respected Boston construction manager (CM) to explain the difference, I used my own dispute resolution experiences on two Boston projects as illustrations. Whereupon the CM principal allowed that "in the mediation you (the

neutral) work with each disputant to achieve a resolution between the parties whereas in an arbitration the disputants agree in advance to accept the decision of the third party neutral."

Let's get more specific about the differences between these two alternative dispute resolution (ADR) processes which can and should be used in lieu of litigation in the courts.

Remember that mediation and arbitration are just two of the methods available. Both processes allow the parties, including their attorneys if requested, to tailor the process to the particular circumstances involved in the dispute.

Arbitration is the more formal process, but less restrictive than litigation in the courts. The parties usually pick an experienced decision-maker, called the arbitrator. (In some instances a panel of two or three arbitrators are used.) The arbitrator will hear the case, including any evidence and/or witnesses, allowing each side to present its position, usually followed by any questions the parties might have of the other side. After the hearing is concluded, the arbitrator, within the stipulated period of time, will render a written decision. (In many cases, the decision does not have to be supported by any findings of fact or law.) Both sides must accept the decision of the arbitrator unless the parties have previously decided upon an advisory opinion in which case the decision is not binding. In those cases where the parties want a final decision and are willing to allow that decision to be made by a third party neutral, arbitration is the appropriate process to use. The arbitration process is private and confidential.

Mediation is a voluntary process in which a neutral third party assists the disputants in crafting a written resolution

to their dispute/disagreement. The mediator does not impose a settlement and the disputants are under no obligation to reach an agreement. And rarely does the mediator assess the fairness of the agreement. Thereby any settlement or resolution reached by the parties is truly voluntary and will in most cases result in immediate compliance.

The mediation session(s) does require that each party have someone with final decision making authority participating. The process is private and confidential and the substance of the discussions and negotiations is generally privileged. As someone who has settled and resolved many cases using both processes, I prefer the use of mediation instead of arbitration for construction disputes for these reasons:

- Most construction disputes involve numerous subissues which, with the guidance of a well-trained mediator, the disputants can identify and discard those matters on which there really was only a misunderstanding, not a conflict. Seen another way, this is called “finding common interests.”
- Most construction disputes will require the input/testimony of those closest to the problem on both sides. So why not use these same persons to assist in a timely resolution rather than giving the problem a life of its own by handing it to their superiors or legal counsel for resolution much later?
- When an agreement is concluded and documented, all parties to the dispute understand how and why a particular settlement resulted. This does not infer that all disputants are pleased, but at least they have an under-

standing of the end product since they participated in the crafting of the resolution.

- If one disputant is attempting to use the mediation as a delaying or fact-finding mission prior to commencing litigation, a skilled mediator will identify such a tactic and suspend the mediation immediately. The mediator, through his or her questioning skills, can test the validity of the parties’ positions and the reality of each disputant to fulfill its commitment to a mediated settlement.
- In most states (Massachusetts included), a properly educated mediator may not be called to testify in any other proceeding on this same matter, if mediation is unsuccessful and litigation follows.
- If a settlement is concluded, generally there is a far better and less adverse relationship between the disputants, who may need to work together again on some future project.
- Faced with the foregoing scenario, mediation of construction disputes usually results in a much faster, less expensive solution.

It is my hope that next month’s issue will discuss another ADR process called Partnering. BostonSolv is currently involved in several Partnering engagements for both private and public projects. We will go back to the beginning of a construction project and discuss this valued tool.

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