The Mediation and/or Management Meeting Condition Precedent

By Aman Kahlon

Contract provisions geared to save you legal expenses

Most modern construction contracts include some kind of dispute resolution provision. Because many in the construction industry favor arbitration in lieu of litigation, arbitration clauses are commonly included as the primary dispute resolution in construction contracts. However, many companies continue to prefer traditional litigation to resolve their disputes. The debate between litigation and arbitration is ongoing and there are benefits and disadvantages to both approaches, but this article will focus on some of the secondary procedures for dispute resolution contained in many construction contracts. Specifically, the article will address the use of mandatory mediation and/or executive meetings as a requirement prior to any further legal proceedings.

The use of mandatory mediation or executive meeting requirements in contracts is one way contractors and owners have tried to mitigate the costs to resolve disputes. When the relationship between the parties at the project level becomes toxic, it can become difficult to resolve change orders, payment disputes, and other issues. A mandatory mediation or meeting of the executive team from each party is an effective way to get some distance from that toxic relationship and resolve disputes without more expensive litigation or arbitration proceedings.

MEDIATION

The benefit of mediating a dispute is that you bring a neutral third party into the discussion who can dissociate parties from the more extreme positions they have staked out. A mediator can help parties view their claims more objectively and provide insight on the difficulty of recovery in any resulting arbitration or litigation. Mediation is most effective when parties come prepared to discuss their claims and related backup, participate in good faith, and have representatives present with the authority to settle the dispute.

Typical mediation provisions in construction contracts require the mediation to be administered through the American Arbitration Association or some other alternative dispute resolution provider. These providers offer a framework to govern the mediation and an objective process for selecting a mediator. There are usually fees associated with these services; so many parties elect to decide on a mutually agreeable arbitrator and other logistics without resorting to these services. Companies should consider their preferences when negotiating for the inclusion of mediation in their contracts.

ABOUT THE AUTHOR

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EXECUTIVE MEETING

Unfortunately, mediation still has some expense attached to it because it usually requires both parties to share in the cost of the mediator and administrative fees, prepare some kind of mediation statement, and have lawyers present at the mediation. As a result, many companies will, instead, pursue a management or executive meeting as the condition precedent to further dispute resolution proceedings in their contract.

This approach usually requires a C-suite level representative from each party to meet to discuss the dispute at some set time before an arbitration demand or lawsuit may be filed. Parties may negotiate over whether the meeting must be in person, whether position statements or backup for claims should be exchanged prior to the meeting, and where the meeting should take place. More detailed requirements may ensure that the meeting is treated seriously by both parties.

The problem with executive meetings is that there is often not enough distance between the project teams and the management teams to create favorable conditions for settlement. If the toxicity from the project seeps into the management discussions, a sound business resolution becomes less likely. For management meetings to be successful, the management representative needs to be well-informed of his or her project team's complaints or claims. This includes having substantive knowledge of any costs or damages incurred by his or her company and knowledge of the claims alleged by the other party.

Because outside counsel is often not heavily involved at this stage of dispute resolution, it is critical for the project team to educate the executive representative about the relevant issues and to synthesize these issues into a digestible format. A brief consultation with an outside or in-house lawyer to get a better sense of the legal exposure and risk for the company may also be beneficial for the party representative before engaging with his or her counterpart.

CONCLUSION

Experience suggests that mandatory mediation and/or executive meeting requirements are often overlooked or not appropriately utilized by members of the construction industry. Companies who view these requirements as merely a minor hurdle or obstacle to escalating the dispute into a more complex arbitration or litigation proceeding are ignoring a valuable tool for dispute resolution. If utilized properly, mandatory mediation or an executive meeting can be an effective and extremely affordable means to resolve a contract controversy. This estimation is especially true for smaller claims where the cost of arbitration or litigation relative to the dollars in dispute may be substantial. ■