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LARGE, COMPLEX CONSTRUCTION DISPUTES: THE DYNAMICS OF MULTI-PARTY MEDIATION

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Mediating the large, complex construction dispute from the vantage point of counsel and the mediator. Special attention is paid to organizing and dealing with negotiating groups.

At the American Arbitration Association's (AAA) recent Construction Mediation Conference in Miami, entitled "What You Can't Not Know," we facilitated a discussion of the complexity of mediating large, complex construction disputes, focusing particularly on the dynamics associated with multi-party mediation. Mr. Holt focused on the role of the mediator, while Mr. Bates focused on the role of lead outside counsel. The purpose of this article is to share the highlights of the Miami discussion.

Hypothetical Problem

Complex construction projects involve many stakeholders. The fact pattern that we used at the conference involved a public-private partnership as the owner of a project that involved a multi-modal (train/bus/light rail) transportation station, a 400-room luxury hotel and a three-story parking garage. The owner retained an architect, who in turn retained a number of consultants, many of whom retained subconsultants. The owner also engaged a construction manager with full-time site supervision responsibilities. The project was bid on a "design, negotiate and build" basis, funded in large part through the issuance of municipal bonds. The construction contract was awarded to a general contractor, who retained a number of subcontractors to perform significant portions of the work. Materials were purchased from a number of vendors and suppliers by the contractor and subcontractors. Each of the participants had various types and amounts of insurance coverage.

The general contractor asserted claims against the owner for significant delay and disruption, as well as labor and equipment inefficiency claims. These claims implicated the owner, architect, various consultants and the construction manager. The subcontractors had similar delay and insufficiency claims against the general contractor. The owner asserted claims for liquidated damages on certain phases of the work, alleged various deficiencies in the work, and was pushing the general contractor to develop a recovery schedule. The owner was also preparing an error and omission claim against the architect and derivatively some of the architect's consultants, as well as a claim against the construction manager for scheduling and supervision deficiencies. The architect and several of its consultants had significant unpaid invoices and they were developing a claim for additional services as a result of acts and omissions by the owner, the construction manager and the general contractor.

Identifying the Negotiating Groups

This fact pattern is not atypical and it illustrates the complexity of the issues before a mediator on a large, complex construction project. The first challenge for the mediator is determining the relationships between the various parties to the dispute and the issues on which certain parties may be aligned. In Miami, we called this determining the number of "packs" (i.e., negotiating teams) participating in the mediation process. A general consensus must be reached among the negotiating teams before a facilitated resolution of the dispute can be achieved by the various stakeholders and their teams. Consequently, identifying these teams

is an important task for the successful mediator.

It is obvious that the claimant and respondent have divergent interests and views on the merits of the underlying controversy. They often disagree about facts, the causes of delay and disruption, the completeness and accuracy of the drawings, the amount of damages actually resulting from the alleged causes, and a myriad of other issues. Other than an overriding goal of "minimizing exposure" or "maximizing recovery," the stakeholders on each side of the table may have disparate interests, which could be economic or non-economic in nature. However, the interests among the stakeholders on the "owner's side of the table" or the "contractor's side of the table" may also be quite divergent.

A general consensus must be reached among the negotiating teams before a facilitated resolution of the dispute can be achieved.

Further, the members of each negotiation team often have divergent interests. To take a simple example, the goals and objectives of the attorney, the architect of record and the architect's insurer may differ significantly. The dynamics may be more difficult when the owner is a public-private partnership or a joint venture or other consortium created for the project. The same is true if the contractor is an entity created for the project. The dynamics may also be difficult on publicly bid projects, particularly in states that require public bidding of multiple-prime contracts.

Initial Considerations

In spite of their divergent interests, the stakeholders must open up the lines of communication and strive to reach consensus on important process issues. Initially, they must agree on a mediator and explore the nature and extent of information to be exchanged in advance of the mediation. If the process is to be successful, all stakeholders must be fully engaged in the mediation process. Other important initial considerations that must be addressed include:

- Who comprises the negotiating team for each entity? Who should participate in the mediation? To what extent should experts be involved in the negotiating team? Who within the company must attend the mediation for it to be successful?
- How should the negotiating team approach the mediation session? What role will each participant play? Who will be the spokesperson? To what extent should the business principals directly interface with each other prior to or during the mediation?
- How many negotiating teams are there? Should everyone on the owner's side of the table meet collectively to prepare for the mediation, or will the

owner, design professionals and construction manager approach the mediation independently? Is there a “joint defense agreement”? How does the presence or absence of such an agreement affect the interests of the parties at the mediation?

- Have the insurers made coverage determinations? How do the coverage issues, if any, affect the mediation process? Is there a dispute between the insured and the insurer that is relevant to the mediation?
- How can the carriers be forced to become engaged in the process?

There could be other special considerations in a public project and in one that is publicly bid.

Mediator Selection Process

As Mr. Holt said in Miami, the first objective in mediator selection is “Do No Wrong.” In other words, selecting the right mediator is important, but retaining the wrong one can be fatal to an early and cost effective resolution of the disputes. Factors to be considered in the mediator selection process include the mediator’s qualifications and experience, specifically:

- How many times has the mediator been involved with this type of dispute, either as a mediator, as counsel for a party to mediation or in some other capacity? There are lots of construction mediators in the United States, but only a small subset of those mediators have the experience and skill set to handle large, complex, multi-party construction matters.
- Is public-sector mediation experience important? What about specialized construction knowledge or specialized insurance claims experience?
- A large percentage of construction mediators are attorneys. Is the likelihood of success in resolving this dispute maximized by selecting an attorney, or is this a matter best addressed by an industry professional?
- Is the mediator’s mediation philosophy important? What style would maximize the likelihood of resolving the dispute?

The consensus at the Miami conference was that technical expertise and prior experience with large, complex construction projects is essential. To be successful, the mediator must structure the mediation conference to facilitate the meaningful exchange of information among the parties. Each stakeholder must buy into the process, and must be prepared, motivated and ready to address the matters in dispute. Achieving these preliminary objectives requires a skilled and knowledgeable mediator.

Preparation for the Mediation Conference

The initial contact between the mediator and the

parties is very important to the success of the process. The process begins with the initial contact. The mediator needs to lead the discussion to maximize the utility of the mediation process and to begin to understand the obstacles that may present impediments to resolving the dispute. In doing so, the mediator needs to recognize the divergent personalities within each negotiating team. Most teams contain both “stabilizers”—members who are committed to the mediation process and want to achieve a negotiated resolution—and “destabilizers”—members who want to fight to the end and attempt to present roadblocks to a negotiated resolution.

An important early goal of the mediator is to identify the leader within each negotiating team. (That leader may or may not be the ultimate decision maker.) Another early goal is to identify any “destabilizers” and take affirmative steps to minimize their disruptive impact. This can be a difficult to achieve, particularly if the destabilizer is the decision maker, or if there are several destabilizers on each side of the table.

Some of the issues to be discussed between the mediator and the parties in advance of the mediation conference, including the following:

- What submissions will be necessary?
- Will all submissions be exchanged or would only provided to the mediator?
- Who will attend the mediation conference? Will experts attend? If so, what is their role?
- Who *must* attend? What level of authority must be in the room before proceeding to mediation?
- What will be required of the insurers? What level of insurance authority must be in the room before proceeding to mediation? Is telephone availability acceptable under any circumstances?
- What work needs to be completed by the participants for the mediation conference to be meaningful?
- Should “small group” and “negotiation group” *ex parte* calls be conducted in advance of the mediation?

From the perspective of the mediator, these issues are best addressed in a pre-mediation conference or conference call. In Miami, Mr. Holt, commenting from the perspective of the mediator, made the following points with respect to planning for the mediation:

1. In large and complex cases, you must hold a pre-mediation conference call; thereafter, act on what you learn.
2. Appreciate before the mediation conference that you have a large and/or complex dispute, and prepare, plan and structure the mediation accordingly.
3. Set the property expectations for the parties, beginning with the initial conference call.
4. Make sure that there is “grist for the mill.”

All of the key participants must be presents for a large, complex mediation. The scheduling and structure of the mediation conference *must* address and include all necessary parties, insurance representatives, consultants or experts as appropriate to the case and consistent with the wishes of the parties and their counsel.

It is also important that the mediator address any fundamental problems or issues in advance of the mediation conference. Fundamental issues include the following:

- the need for public-sector approval and ratification. These issues need to be addressed in advance of the mediation.
- the need to have insurance representatives physically present.
- the presence of key decision-makers at the mediation.
- the status of the expert and damage reports. If these have not yet been exchanged, the mediator needs to address how can this information can be effectively communicated among the parties to allow meaningful dialogue during the mediation.

If left unaddressed, such issues can create irreconcilable conflict that creates a barrier to early, cost effective resolution of the case.

Counsel's Perspective

In Miami, Mr. Bates offered comments from the perspective of outside counsel on preparation for the mediation conference. He described his role in the following terms:

As outside counsel, I view my role as leading the consensus-building process on behalf of my client, trying to draw out and fully understand the views of the members of my negotiating team, including my client, and to aligning divergent interests that may exist. From a broader perspective, I try to understand where the money is and the extent to which the responsibility for the losses follows the ability to pay.

In general, Mr. Bates's approach to the mediation process contains four basic themes:

1. Needs v. Wants: Participants often come to the mediation process telling their counsel, "This is what I want." The lead counsel must open the lines of communication to understand what each of the participants "need," not what each wants.

Needs include the financial ability to meaningfully contribute to the solution. Needs must be the focus of the dynamic within the negotiating team. Clients who use binding dispute resolution processes, such as litigation or arbitration, are motivated by the desire to get what they want. In mediation, no one gets everything he wants. Clients choose mediation to have the dispute quickly and efficiently resolved, eliminate business risk and minimize disruptive effect on business operations

on financial terms that are acceptable.

2. Objective Case Assessment: An objective case assessment is a critical element of preparing for the mediation process. Clients want and need an objective assessment of the reasonable range of outcomes from a litigation or arbitration process. Clients must understand the risks to their business if a negotiated solution is not achieved in mediation. These risks include, but are not limited to, the following:

- an adverse ruling in litigation or arbitration,
- the legal and expert costs associated with adversary proceedings,
- transaction costs (filing fees, arbitrator compensation),
- the cost of personnel used in the adversary proceeding,
- the effect that litigation can have on reputation, and
- lost opportunity costs while being involved in an adversary proceeding.

It is often useful to develop a potential exposure range. Mr. Bates says the illustration of a statistical bell-shaped curve is useful. The curve will demonstrate the reasonable range of likely financial outcomes. The parties must deduct from any recovery the costs of achieving those outcomes.

Once there is some agreement within a negotiating team on the reasonable range of net recovery, it becomes significantly easier to obtain consensus within the negotiating team.

3. Identify Impediments to Resolution: It is important to understand the impediments to resolution. They include:

- vast differences of opinion as to the reasonable range of outcomes,
- differences in the party's aversion to risk,
- "destabilizers" or other personality conflicts
- disproportionate case knowledge or information,
- the absence of an important participant,
- a dispositive legal issue,
- a dispositive technical or engineering issue,
- financial constraints with one or more participants, and
- insurance coverage issues.

Counsel needs to assess these issues and take steps to reduce or minimize the disruptive effect on the mediation process. This often includes meeting with the stakeholders in advance of the mediation and opening lines of communication with the mediator.

4. Prepare the Client for the Process: Even sophisticated clients sometimes have a misconception of the mediation process. They need to be reminded that the process

is often slow and tedious. The client may not see the mediator for several hours. Clients may be offended by remarks made in the parties' opening statements. Nevertheless, if the process is to be successful, the client needs to be committed to it, allow it the time necessary to work, and remain positive and proactive. Counsel may need to remind the client to help the mediator find a solution. Mediation is an unpredictable process. Sometimes, one or more parties may need to vent. However, counsel must remain focused on the client's objectives and assist the client in managing its emotions.

The Mediation Conference

At the Miami Conference, Mr. Holt outlined the initial considerations for the mediation conference, including logistics and presentations.

Logistics involve when, where, and how long the mediation will be. (He stresses the need to make sure that enough time is committed.) Also involved are the availability of support facilities, personnel and equipment, and the commitment of people not to run out "early to catch a plane."

As to presentations, the question is will there be any or might they be divisive? If there will be presentations, who will make them and how long will they be? The mediator needs to get everyone's input on these issues.

While the specifics of the mediation conference varies in every mediation, the process can generally be broken down into the beginning, the middle and the end.

Mr. Holt described the beginning as the "engagement" process. Each team member must become engaged in the mediation for the process to be successful. This may involve venting and drawing out the feelings and thoughts of each member of the team. The listening skills of the mediator are of critical important at this stage.

The middle game inherently involves challenges to the positions articulated by the parties. The style of the mediator varies greatly, as do the mediation philosophies of different mediators. Some mediators are evaluative, while others are facilitative. Some are aggressive while others gently challenge a party's stated position. The mediator's goal is to have each party fully appreci-

ate and evaluate the risks of not resolving the matter through mediation. A good mediator has many tools at his disposal to challenge the parties.

The mediation then moves to the "end game," the meaningful engagement between the various negotiating teams. Mr. Holt offered the following comments from the perspective of the mediator on the "end game."

- Do not be too quick to declare impasse.
- Do not confuse bluffing and negotiating tactics with true impasse.
- Let the parties decide what they need to proceed further with the process.
- Additional sessions are not uncommon in early and/or complicated, multi-party mediations.
- Everything is subject to mediation, including the terms and conditions of the next session.
- In order for complicated deals to survive, some form of settlement memorandum must be documented and signed before mediation conference ends.
- Partial or "half a loaf" settlements can sometimes facilitate or encourage complete resolutions.
- Do not let the progress that has been achieved get lost.

Conclusion

Successfully mediating a large, complex construction case requires a commitment from each participant in the process. Open communication and understanding the needs of each person involved in the process is critical to achieving a negotiated solution. Counsel and the mediator each have very difficult jobs in finding commonality within the negotiating teams, building consensus within the teams, and fully engaging all necessary stakeholders. Effective mediation, particularly with the myriad of participants in large construction projects, takes hard work by all involved. The mediation process is highly successful because it meets the needs of the parties to achieve an acceptable resolution of difficult issues while minimizing the cost, time and disruptive effect of resolving the underlying dispute. ■

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