This article originally appeared in the Spring 2019 issue of
JAMS Global Construction Solutions

Mediation of Complex Construction Disputes: Breaking an Impasse

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In the context of mediation, if there is one word that counsel and mediators dread the most, it is "impasse." Consider the following scenario: In one room, there is a contractor making allegations of delay, disruption and/or acceleration based on differing site conditions, changed character of a project or constructive changes. In separate rooms, there are a public entity owner and an insurance carrier for a design professional earnestly contending that while the contractor experienced increased costs, such costs were due to an underbid or self-inflicted inefficiencies. Moreover, the carrier for the design professional is asserting that there is no breach of the standard of care. The parties are millions of dollars apart and are convinced of the righteousness of their respective positions.

Often in this scenario, counsel for the public entity and/or the insurance carrier are put in a position of having to report to a third-party government agency, legislative body or internal "chain of command." Counsel typically arrive at mediation with a range of settlement authority, based on an initial review of the case.

As the mediation progresses, counsel for the public entity or insurer may recognize that the contractor's arguments have more merit than they originally calculated and that there are greater litigation risks than they previously evaluated. Conversely, counsel and principals for the contractor may get a "wake-up call" at the mediation that certain of their positions have less merit than they thought. However, without more solid evidence or support, counsel may be hesitant or unable to effectuate a change in the settlement position of the parties that they represent.

Engineering and construction disputes handled by GEC neutrals commonly have complex factual and legal issues that often require experts in scheduling, estimating and financial analysis to resolve them. As a result, these cases usually require in-depth and extensive discovery to prepare for arbitration or trial. At the mediation stage, which hopefully occurs before substantial cost is incurred, the evidence may not be fully developed or presented in a way that allows counsel for the public entity or insurance carrier to persuade decision-makers that increased settlement authority is warranted. Therefore, even if there is a recognition that settlement talks should continue, in practicality, without a further assessment of the merits of the case, the mediation often fails and can be resumed only after expensive discovery has taken place.

This need not always be the outcome. We have developed a method of alternative dispute resolution that allows parties to vet their cases and assists in the ability to alter settlement authority *during* the mediation process. We call this technique mediation-evaluation.

Mediation-evaluation is not early neutral evaluation as you may recognize it from

federal court. The goal is not to identify and clarify the central issues for trial or to assist with discovery and motion planning or with an informal exchange of key information. Nor is it similar to a dispute review board, which is a panel appointed to recommend resolution of disputes while the project is still ongoing. Additionally, it is not a neutral analysis, which provides one side with an advisory opinion on strategy, answering the question of whether it should proceed to trial or consider settlement. Finally, it is not a mediator's proposal, in which a mediator makes a settlement recommendation based only upon the limited facts discussed during the mediation and the offers that have been made.

Instead, mediation-evaluation is a hybrid technique that combines the concepts of neutral analysis and a mediator's proposal. It is specifically designed to break an impasse during the course of a mediation. In other words, the mediator-evaluator will at once mediate, hear and analyze the facts of the case, and provide an informed nonbinding evaluation and settlement recommendation.

We use the process when the parties have reached an impasse in a traditional mediation. We, together with counsel, determine what issues must be opined on in an attempt to reach a resolution. We then assume the role of an evaluator, to become more familiar with the issues that are acting as impediments to settlement. In order to do so, we invite the parties to make presentations, a "mini-trial" of sorts. However, this mini-trial is informal. The rules of evidence are not followed, and the proceeding can be designed by counsel. Counsel may wish to make PowerPoint presentations and demonstrative exhibits, have lay witnesses discuss what they experienced at the project or have expert witnesses give narratives—whatever is necessary for each side to fully express the essence of their case in one day. Following the one-day presentations, we usually reserve a day for rebuttal presentations. At any point, we may choose to "hot-tub" the experts or pose specific questions to counsel or lay witnesses.

Mediation-evaluation can take many forms, depending on the protocols set by the parties. The authors have used mediation-evaluation as follows: (1) Both sides made presentations of the evidence and requested that the mediator-evaluator provide a written analysis and settlement recommendation; (2) both sides made presentations of the evidence and requested an oral confidential settlement recommendation be made separately to the parties; 3) both sides made presentations of the evidence, immediately resumed mediation, negotiated a settlement based on the settlement recommendation and then used the mediator-evaluator's written analysis to obtain approval for the negotiated settlement; and 4) both sides used the process to resolve particular issues that caused a divide in the settlement valuation, allowing the parties to come together and resolve the case. Like mediation itself, "one size does not fit all," and there is no one way to perform mediation-evaluations. The process should be flexible and adaptable to the parties' settlement goals and needs.

In short, mediation-evaluation is a tool that allows the parties to obtain a nonbinding independent assessment of the case in a mediation setting. The neutral's evaluation and ultimate settlement recommendation are more informed than a mediator's proposal because the neutral has heard a robust presentation of the evidence. A written analysis of this evidence, coupled with a settlement recommendation, can be extremely effective in cases where the parties are far apart in monetary and/or ideological terms, because the parties can rely on a quasi-judicial opinion. Further, mediation-evaluation is helpful in situations involving public entities or insurers, where third-party or upper management approval of a settlement is needed and must be based upon strong evidentiary support.

We believe using mediation-evaluation provides the parties with cost-effective dispute resolution. By using this technique, the parties can plan one single presentation of the evidence as opposed to participating in multiple mediation sessions or engaging a separate neutral to perform a neutral analysis. Mediation-evaluation can also be used early in the litigation process, saving the parties both time and money.

In the context of the complex world of GEC disputes, where so much information is required to make an informed settlement recommendation, mediation-evaluation provides parties with a way to find independent and well-versed support for that recommendation. Most important, the mediation-evaluation process helps the parties to break an impasse and reach a resolution.

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