

Evaluating Contractual Dispute Resolution Provisions: Prescribed Discussions and Negotiations

Last month, this column introduced the idea of claims and certain contractual and statutory elements that may affect a contractor's ability to bring claims for contract time and contract sum adjustments under contract. This month, the discussion will focus on contractual terms concerning claim resolution.

Construction contracts typically contain language that prescribes and directs parties through a dispute resolution process. Theoretically, parties hope and believe that these provisions will enable claims to be resolved by project-level personnel. Ultimately, enabling this type of resolution will reduce costs associated with claims and allows projects to flow more smoothly towards completion.

The language utilized by the EJCDC for Claims resolution is as follows:

Review and Resolution: The party receiving a Claim shall review it thoroughly, giving full consideration to its merits. The two parties shall seek to resolve the Claim through the exchange of information and direct negotiations. The parties may extend the time for resolving the Claim by mutual agreement. All actions taken on a Claim shall be stated in writing and submitted to the other party, with a copy to Engineer.

This language is found in the article within the general conditions of the contract that addresses claims. This language seeks to maintain the Engineer's involvement in the claims process, but the Engineer does not have an active role in the anticipated and encouraged direct negotiations pertaining to the claim.

In contrast to the fairly skeletal process contained in the EJCDC documents, the dispute resolution provisions in the Consensus Docs contain a second level of prescribed dispute resolution that endeavors to provide additional tools for the parties to resolve their differences. Consensus Docs is a body of form contracts that has been drafted and promoted by the AGC of America as a more collaborative body of contracts.

The standard general conditions from Consensus Docs contains language that first requires parties at the project level to engage in good faith direct discussions, with all necessary authority, to resolve a claim. Then, if that effort fails, the language in the contract requires the project representatives to provide written notice to each party's senior executives that a resolution could not be reached. Following that notice, the senior executives must meet to discuss and attempt to resolve the claim within five days. Finally, if the claim remains unresolved, Consensus Docs prescribes an intermediate layer of dispute resolution prior to moving into more formal and traditional alternative dispute resolution.

The additional layer of dispute resolution in Consensus Docs is called Mitigation. The term Mitigation, as used by Consensus Docs is proprietary and describes the AGC's version of claim submission to a designated project neutral or a dispute review board. The dispute review board concept arose in the construction industry in the last decade as a means to avoid litigation and control dispute costs. In the Consensus Docs standard general condi-

tions, the decision to make Mitigation a contractual obligation is elective. In order to invoke that provision, the parties must check a box. In checking the box, the parties can decide on a single project neutral or a dispute review board consisting of multiple neutrals.

If a dispute or claim cannot be resolved through project level or executive level negotiations and discussions, then it would be referred to the Mitigation procedure. There, the claim would be referred to the selected neutral for review. The costs for the neutral party would be split evenly by the parties and either party can choose to invoke Mitigation and refer a claim to the neutral for decision. While the general conditions do not expressly state that the neutral shall receive submissions from the parties about a claim, it seems generally understood that this submission must occur to allow the neutral to make an informed decision.

The neutral is expected to visit the project and generally remain aware of its progress. In reviewing a claim, the neutral is to issue a decision regarding a claim relatively quickly so as not to delay the project. Then, if either party disagrees with the neutral's recommendation, a review of the decision is available through formal mediation, arbitration, or litigation. One interesting thing to note about the Mitigation procedure is that the neutral's decision can be introduced as evidence in a later proceeding as a presumption of how the claim should be decided. This introduction of the neutral's decision is markedly different from a mediation where all information and evaluations of the case by a neutral is strictly protected and cannot be introduced in an arbitration or trial.

The general idea behind the creation, conceptually, of dispute resolution boards was to foster cooperation and partnering on projects. The use of dispute resolution boards or project neutrals was also intended to provide a pre-mediation procedure that fell somewhere between mediation and arbitration. Keep in mind that mediators do not make decisions or recommendations about how a claim will be decided or who might win in a dispute. Arbitrators sit in judgment of a claim and the decisions they make are binding and generally not subject to review or appeal.

The dispute review board does render a decision on a claim, much like the Engineer in EJCDC contracts. But unlike an arbitrator's decision, the recommendation is reviewable and subject to reversal by a court or an arbitrator. In some ways, the use of dispute review boards has the effect



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of providing parties with a preview of how a dispute might be decided. This preview allows the parties to evaluate how deeply to dig in and, in turn, what the value of resolution is for any particular claim.

In general, the use of a dispute review board does add significant costs to a project, especially if the project generates a lot of claims. However, the board can be an effective tool in resolving disputes and keeping parties out of the courthouse.

