Arbitration and Mediation

Presented by
American Arbitration Association
Dispute Resolution Services Worldwide

Materials for
Home Builders Association
of Greater St. Louis
10104 Old Olive Street Road
St. Louis, MO 63141-1509

Tuesday, August 28, 2001
3:00 p.m. to 5:00 p.m.

I. Introduction
– James R. Keller
Partner - Herzog, Crebs & McGhee, LLP

II. The Agreement to Mediate and Arbitrate
– James R. Keller

III. American Arbitration Association
- Daniel C. Moore
Assistant Vice President - American Arbitration Association
St. Louis, MO

IV. Mediation
- Michael L. Lyons
Attorney at Law

V. Arbitration
- James R. Keller

TODAY'S SPEAKERS

James R. Keller

Jim is a partner at Herzog, Crebs & McGhee, LLP where he focuses his practice on business litigation, including construction. He has tried nearly forty jury and bench trials ranging from one week to nine months, representing both plaintiffs and defendants in state and federal courts in Missouri, Illinois, New York and Iowa, and argued more than twelve appeals. His construction trial experience includes a five-month bench and a one-month jury trial in state court in Benton, Illinois, and a nine-month $40 million construction jury trial in federal court in Buffalo, NY representing Black & Veatch in the remaking of the sewage treatment plant for the City of Rochester. Jim is on the panel of neutrals for the construction and commercial sections of the American Arbitration Association, where he has served as an arbitrator on thirteen construction/commercial disputes during the last eighteen months in Missouri, Illinois and Iowa. He has authored thirteen published articles in the last two years on construction, alternative dispute resolution, and consumer fraud, including several in the ST. LOUIS CONSTRUCTION NEWS & REVIEW, where he serves as its legal writer.

Daniel C. Moore

Daniel is the Missouri & Iowa Asst. Vice President for the American Arbitration Association. The American Arbitration Association is the world's largest not-for-profit provider of alternative dispute resolution services. He has been with the Association for one year. His primary responsibilities include business development, neutrals relations and ADR education. Daniel has an MBA from Benedictine College in Kansas and a BA in psychology and biology from Benedictine. Prior to joining the Association, he worked for St. Francis Academy, a national not-for-profit behavioral health care company. Daniel served three years as the Director of Marketing & Admission for St. Francis Academy after having served two years as Client Services Coordinator.

Michael L. Lyons

Mike practices law in Clayton. He has been a practicing attorney for 30 years and has been involved in alternative dispute resolution, both as a mediator and arbitrator, for more than 10 years with such dispute resolution providers as the American Arbitration Association and the National Association of Securities Dealers, among others. Mike is an approved mediator/arbitrator for the commercial, securities and mass claims panels of AAA. Mike has experience mediating and arbitrating more than 500 disputes in the areas of securities, insurance, personal injury, employment and commercial law, and has written articles which have been published in the area of securities arbitration.

I.

Introduction

James R. Keller

II.

The Agreement to Mediate and Arbitrate

James R. Keller

The American Institute of Architects has produced the contract recognized nationwide as the industry standard. It is AIA Document A201-1997, General Conditions of the Contract for Construction. This contract, 40 single-spaced pages long, requires mandatory mediation and arbitration with the American Arbitration Association. Virtually every major construction contract starts with this form as the legal foundation for what the parties agree to do, especially in how to resolve disputes through alternative dispute resolution instead of traditional litigation. In the area of resolution of claims and disputes, its basic provisions are:

Standard Provisions *

4.4 RESOLUTION OF CLAIMS AND DISPUTES

4.4.1 Decision of Architect. Claims, including those alleging an error or omission by the Architect but excluding those arising under

---

*These materials are the property of the American Institute of Architects and are protected by copyright from unauthorized use. The Sections referenced in this Presentation are reproduced with permission from the American Institute of Architects, 1735 New York Ave. N.W., Washington, DC 20006.

Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

4.4.2 The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

4.4.3 In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

4.4.4 If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

4.4.5 The Architect will approve or reject Claims by written decision, which shall state the reasons therefore and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

4.4.6 When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and

binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceeding sunless the decision is acceptable to all parties concerned.

4.4.7 Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

4.4.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or arbitration.

4.5 MEDIATION

4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

4.6 ARBITRATION

4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.3 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Modifications to the Standard Agreement

- Location for dispute
- Type of arbitration
- Type of award
- Rules to apply
- Timeliness of hearing
- By agreement, the sky's the limit

III.

American Arbitration Association

Daniel C. Moore

See Handout on *Construction Industry Dispute Resolution Procedures* including Mediation and Arbitration Rules, effective September 1, 2000.

IV.

Mediation Materials

Michael L. Lyons

Mediation is "the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute." *Blacks Law Dictionary*. The Mediator is the peacemaker whose goal is to resolve conflict through compromised agreement.

See separate handout article entitled *Recipe for Success in Construction Mediation* by John P. Madden, appearing on page 16 of the May-July 2001 edition of Dispute Resolution Journal, published by the American Arbitration Association.

V.

Arbitration Materials

James R. Keller

Arbitration is the "submission for determination of disputed matter to private unofficial persons selected in a manner provided by law or agreement." *Black's Law Dictionary.* This makes the Arbitrator the decision maker who must, without bias or compromise, reach a "just and equitable" result.

Advantages of Arbitration

- Speed (for claims of $75,000 and less, trial in 30 days)
- "Trial by your Peers"
- Confidential Proceedings
- Expense: "I can't afford to go to trial" (Discovery more limited)

- Finality: Rarely do you hear, "The trial is over; the appeal begins"
- "Picking your Arbitrator"
- Attorney fees (it can be a win, win)
- More flexible awards (get creative)
- "You call this a fair result; yes, because it's "just and equitable"

Arbitration can make a difference

Do these advantages really yield a viable difference to traditional litigation? Yes, they do. Let's consider two recent Missouri construction lawsuits tried in traditional courts and see if arbitration might have produced a different result; in other words, "what if."

1. *Environmental Protection, Inspection and Consulting, Inc. v. City of Kansas City, MO,* WD 56182 (W.D. Mo. 12/26/2000).

A "Just and Equitable" Result

EPIC agreed with the Kansas City Zoo to build a spillway for $400,000. An existing spillway had channeled water to Swope Park Lagoon. The new spillway was to divert water to the Blue River. The specifications called for building the new spillway without draining a lake that comprised part of the work site for the new spillway. The specifications required building a cofferdam, a temporary structure, to claim water and thus allow excavations for the spillway.

During construction, several problems developed, including a rainstorm flood of the new spillway, caused by a porous rock road submerged in the lake near the cofferdam. Engineers for the Kansas City Zoo knew of this submerged road, but neither the bid documents nor the contract referenced it.

EPIC sued the Kansas City Zoo alleging that non-disclosure of this rock road was a breach of contract; the jury agreed and awarded EPIC $561,200. It added $454,570 under Missouri's Prompt Payment Act for late payment of interest. The trial court took away the jury's award of interest and the appellate court upheld this decision. Apparently, EPIC did not provide the documents required under the Act, including certificates of completion and contractor affidavits. Because of this, EPIC

lost $454,570. (An article is attached discussing this case in greater detail.) Would arbitration yield a different result? Quite possibly yes, given the standard of "just and equitable."

2. *Massman Construction Co. v. Missouri Highways & Transportation,* 32 S.W.3d 109 (WD Mo. 2000)

Finality and Expense

The attached article, titled *Missouri River Spawns Big Judgment for Massman Construction*, chronicles a construction dispute in a Missouri court that required three trials, four appeals and took twelve years to resolve. Ultimately, the contractor "won" $850,000 for substructure work it did on the Highway 40 Bridge across the Missouri River near St. Charles and Chesterfield. Would arbitration yield a different result? Maybe not, but arbitration would never take this long, cost this much, or require four appeals.