FCIA Boston
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Preventing, Minimizing and Resolving
Disputes in the FS/SS industry

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Why waste?

- Time?
- Money?
- Emotional Energy?
Wake up!

Recent TV Commercial:
- “Buy a truck”
- “Payment: only $16.67 per $1,000 financed”

Is this a good deal?
Stay out of trouble
Get out of trouble

• Don’t let matters fester
• Document, document, document

vs.

customary business ethos
Avoiding and minimizing disputes

– Who in the audience has been in any form of construction dispute resolution?
– What kind?
– What was it like?
– Results?
– FS/SS disputes?
Purpose

• How to avoid/minimize disputes (ADR)
• How to prepare better for dispute resolution
• Focus on “self solution”
• MEDIATION vs. other forms of construction dispute resolution
• Emerging trends in ADR
My personal experience with FS/SS and ADR

- Engineering/Construction: 29 years
- FS/SS: 11 years
- ADR: 8 years
Where do disputes come from?

**Substantive factors:**
- Drawing errors/deficiencies
- Specification inconsistency
- Codes
- Labor
- Scope of work
- Interference/damage
Where do disputes come from?

**Substantive factors:**
- Accounting mistakes
- Schedule changes: acceleration/deceleration
- Costs/Back charges
- Quality/Performance
- Registration/Taxes
- Contract language/Ambiguity
Where do disputes come from?

**Behavioral factors:**
- Stubbornness
- Ego
- Pride
- Anger
- Failure to document *in writing*
- Leaving the job
- Secrecy
Where do disputes come from?

**Behavioral factors:**
- Asking the wrong question
- Procrastination vs. promptness
- Fear of delivering bad news
- Dealing with wrong person
- Cultural/demographic differences
- Taking things personally (you vs. me, us vs. them)
Where do disputes come from?

**Behavioral factors:**

- Failure to respect privity of contract
- Not reading the contract
- Not knowing with whom I am doing business
- Misrepresentation
- Misunderstanding
- Over-expectations/overselling
Alternatives for Settlement

Litigation:
- Miniscule chance of court hearing
- Expensive—lawyers and depositions
- Who’s in charge?
- Time-consuming
- Frustrating and painful
- Ruins relationships
- Appealable
Alternatives for Settlement

**Arbitration:**

- Fast
- Who’s in charge?
- Less expensive than litigation, but depositions
- Ruins relationships
- No reasoned decision
- Binding, NOT appealable
Alternatives for Settlement

Structured Negotiation:
– Usually involves facilitator or devil’s advocate
– Focus on facts and findings and discussions
– Parties conclude agreement mutually
– Usually precedes formal mediation
Alternatives for Settlement

Mediation:
- Voluntary?
- Directed by a trained Mediator
- No COI mandatory
- Formal procedure
- What is it? How does it work? How is it different from arbitration?
- Who’s in charge? Are there seldom depositions?
Alternatives for Settlement

**Mediation:**
- Cannot be used as “source” for litigation or arbitration
- Parties do the resolving
- No oath
- Distinguishes interests from positions
- Agreement is binding
- Process is confidential
Alternatives for Settlement

Mediation:
- No “fishing”
- Either party or mediator may end mediation at any time
- Both (all) parties less unhappy at conclusion
Advice during Structured Negotiation or Mediation

- Big decisions: Lien? Lawsuit? Against whom?
- When to leave/abandon the job?
- Keep calm (temper, shouting, verbosity, and vulgarity do not help your cause)
- Be logical
- Be factual: keep BS and phony numbers to a minimum
- Proposing mediation or structured negotiation is NOT a weakness
Advice during Structured Negotiation or Mediation

- Insist upon a facilitator or mediator with construction knowledge — preferably FS/SS experience too
- Keep asking “what are my weak points?” and “where am I vulnerable in the other party’s mind?”
- ALL decision makers must be “at the table”, involved, and knowledgeable
- Try to understand other party’s strong points. Denial is deadly.
More Advice for Settlement

- Admissibility vs. client privilege
- My experience with “chronologies”
- Advice of counsel
Advice during Structured Negotiation or Mediation

– Understand differences between positions and interests
  – Positions = $
  – Interests = what else do I want or not want from other party?
– Have lawyers at formal mediation, but in the background
– Constructors are more believable
– Lawyers draft/approve agreement
Advice during Structured Negotiation or Mediation

As soon as a deal is made, document it NOW!

- Signed mediation agreement /MOU at conclusion
- Mediation is confidential
- Final agreement/MOU is binding
Emerging Trends in Construction ADR

- Dispute Review Boards
- More “team building”
- New project delivery methods (D/B, IPD, P3, LPD, etc.)
- New technologies (BIM, Revit, Green, LEED, etc.)
- More complex designs
- Tougher code enforcement
- Increased need for self-documentation
Thank you!

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