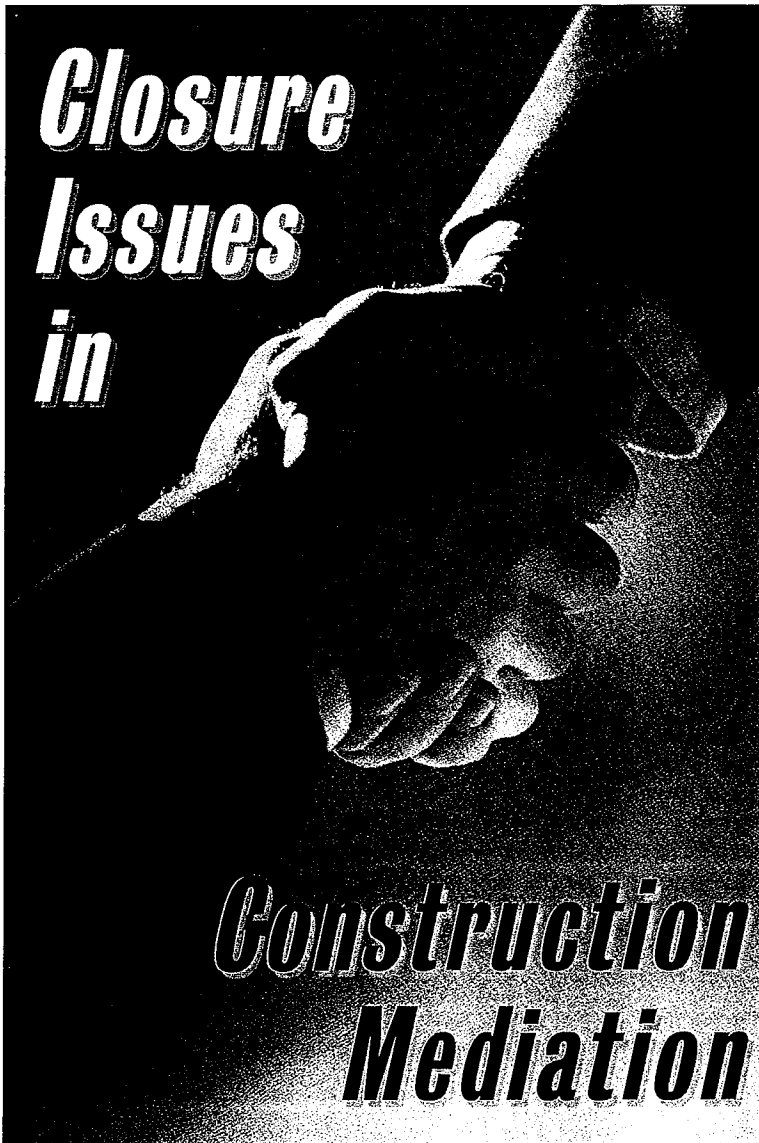


Yogi Berra's prophetic statement—"It ain't over till it's over"—contains a lesson that is particularly pertinent to "closing" a negotiated settlement in mediation. Only at the point where all parties sign the settlement agreement is the mediation really over. The failure to resolve overlooked or inadequately addressed issues can undermine closure of a settlement just at the point when everyone thinks that complete agreement has been reached.

The importance of identifying and resolving all the closure issues is even more critical in construction mediation because of the many parties that are typically involved, the multiplicity of contractual obligations, and the technical complexity of the issues. Construction disputes often involve a mix of money, delay, performance and construction defect issues, each of which raise a series of closure issues.

Setting the stage to deal with the closure issues in an effective way begins much earlier than the eve of the parties' "handshake deal." It requires good preparation coming into the mediation, which means, among other things, knowing the facts, the issues in dispute, and the strengths and weaknesses of your case and that of the other parties. (See Venzie, "Some Guidelines for Effective Advocacy in Mediation," *Punch List*, Fall 1997.) It is also essential for all the parties with a financial or other significant interest in the outcome to willingly participate in the mediation process.

This article will identify some of the key closure issues that parties should address when mediating construction disputes involving work completion claims, time-related claims, and



Closure Issues in

Construction Mediation

BY HOWARD D. VENZIE JR.

The author is a partner in Venzie, Phillips & Warshawer in Philadelphia. He serves on the board of directors of the American Arbitration Association and is a mediator and arbitrator on the Association's roster of neutrals.

allegations of defective workmanship, and when negotiating financial settlements. It also suggests an effective approach to drafting the settlement documents.

Work-Completion Claims

Many construction disputes involve claims that a contractor or subcontractor failed to perform work required by the construction agreements. Claims of this type raise numerous closure issues.

Future contract work and punch list items. If the mediation occurs at or near substantial completion of the project, the parties should focus on the nature and scope of the contract work and punch list items that remain to be performed by the contractor. Their determination might involve changes to the scope of work specified in the original contract documents.

Schedules. The parties should also address the schedule for completion of the remaining work and the timing of progress payments to be made.

Site access. To carry out its obligations under the settlement, the contractor will require access to the site. To prevent this issue from becoming the source of a later dispute, the parties should agree during the mediation on when access to the premises will be allowed so that the work can proceed without disruption or delay. This is

often an issue in renovation projects where use and occupancy of the premises has been a cause of the dispute.

Retainage, guarantees and warranties. Because work completion claims involve future performance they raise several closure issues of significance to the owner, including retainage and contract guarantees and warranties.

Retainage is a sum withheld from progress or other payments as "security" to ensure performance of the remaining work. If the owner raises the issue of retainage, the parties should focus on the extent of retainage and when the sums withheld will be paid.

The owner probably will be concerned about the contract guarantees and warranties, raising the issue of how long they will run and the extent to

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which the original construction agreements will govern future performance.

Surety consent. Owners typically require the contractor to obtain a performance bond protecting against the contractor's default and a payment bond protecting against the contractor's failure to pay subcontractors and suppliers. If a bond or the contract documents require the surety's consent to the settlement, that issue should be addressed in the mediation.

ADR. Since disputes could arise out of the settlement agreement, the parties should address the subject of dispute resolution. For example, will settlement-related disputes call for further mediation proceedings or another ADR procedure?

Time-Related Claims

Time-related claims may allege damages for delay on the part of the contractor, owner or design professional, acceleration of performance under the contract, or lost productivity. They may also involve claims for the cost and expense of additional administration.

Global v. individual settlements. A key issue in such cases is whether disputes between fewer than all parties must be resolved in a global settlement or can be resolved separately by the affected parties. For example, can the contractor separately settle a delay issue with its subcontractor, or must resolution of that issue be part of a global settlement? Can the owner resolve with the design professional a claim for extended administration service costs and expenses, or must this claim also be included in a global settlement? If so, what will be the outcome of delay claims of other contractors whose contracts have not yet been closed out? These issues are fundamental to reaching closure of the dispute.

Work-Defect Disputes

A key issue in work-defect disputes is determining who bears responsibility for the defective condition, and how that responsibility will be shared. Any settlement will determine how much of a financial contribution each party (or its insurer) will make toward the settle-

ment and/or toward the costs of repair or remediation.

Responsibility for design and performance. The parties should focus on who will be responsible for the design, specifications and performance of the repair. It is usually more effective to separate the design aspects of the repair from the performance of the repair work itself. For example in the case of a defective roof, it is preferable for the scope of the repair to be designed and specified by a technically qualified person, working in conjunction with the roofing system manufacturer.

Schedule. The parties should agree on a schedule for completion of the remedial work and the conditions for its performance.

Site access. Access to the site must be arranged so that the repair work can be

warranty of performance from the manufacturer of the roofing system.

In addition, there should be an agreement on who will be responsible for the defective condition should it fail to be cured.

Insurance. In a work-defect case, the owner may want the contractor to purchase "extended completed operations coverage" to protect the owner in the event the repair or remedial work causes property damage. This issue should be resolved in the mediation negotiations.

Surety consent. If a performance bond has been issued, the owner will probably wish the surety to extend the time for the owner to bring suit on the bond. This is also a factor in bringing closure to the settlement.

Inspection and certification. A negotiated settlement of a defective work claim can fall apart if there is a disagreement later about the individual who will inspect the remedial work and determine whether it has been performed according to specifications. To avert this possibility, the parties should agree on the person who will serve as the owner's representative for this purpose. Will it be the architect or another design professional retained as a consul-

tant? A related issue to be determined is who shall pay the fees for such services.

ADR. The parties should not ignore the possibility of a dispute arising out of the remediation work. Accordingly, they should address the method of dispute resolution to be used.

Monetary Settlements

Other issues must be addressed whenever a mediation settlement involves a monetary payment.

Treatment of payment. The parties should determine in the mediation how the settlement payment should be treated. Will it be a final payment under the contract, which has no further consequences? Or will it be a liquidated settlement, which has the effect of releasing all claims and extinguishing all further obligations under the contract, except to the extent reserved by the parties?

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A negotiated settlement of a defective work claim can fall apart if there is a later disagreement about the individual who will inspect the remedial work and determine whether it has been performed according to specifications.

done. If the facility is occupied, the remedial work may have to be performed outside normal business hours. This issue should surface during the negotiations in order to lay the groundwork for a lasting settlement. Other similar issues that could be addressed are whether the owner will provide staging and storage areas for construction materials during the repair.

Withheld payments. Where construction defects are to be cured by future remediation work, the owner may wish to withhold some contract money which otherwise would be paid until the repairs are completed. This issue should be raised during the mediation, not after.

Additional guarantees and warranties. Another concern of the owner should be to obtain additional or extended guarantees and warranties with respect to the repair. For example, in the roof defect example, the owner may require the contractor to obtain a

Disbursements. Another issue is the manner in which the settlement sum and any contract funds required to be paid will be disbursed. Will they be disbursed in a lump sum or in installments? Will disbursements be tied to completion of all or a portion of the work?

Collateral. If payments are to be made over time, the parties should determine whether any property will be provided as collateral to ensure that those payments will be made. They should also determine what waivers and releases will be given and how "payment act" obligations will be met. In addition, they should consider whether the settlement should include indemnification for future claims against the project.

Insurance. An issue that may need to be addressed when insurance coverage applies after payment of a deductible is whether the insured can afford to pay the deductible. If not, the parties may wish to deal in the mediation with the possibility that the insured will have to finance the deductible payment.

Default

Since default under a contract is always a possibility, the parties should address the consequences of default under the settlement agreement. Here are some questions to be resolved: Will the non-defaulting party have the right to be restored to its pre-settlement position at its election? Or will it be limited to the remedies under the settlement agreement? Will the non-defaulting party have the right to recover its costs and expenses, interest and attorneys' fees if it has to seek enforcement of the settlement agreement?

The Proactive Mediator

The mediator always hopes that the parties and their counsel will identify all of the closure issues that must be addressed in order to fully resolve the dispute. In a simple case, that usually

occurs. But if the case is at all complex, and the parties have not focused on all the key issues, the mediator should assist the parties in the identification and resolution of these issues, always being careful not to compromise mediator neutrality. Offering suggestions for the resolution of an issue that will clear the path for final and complete settlement does not put the mediator in the position of being an advocate for a party. The parties usually will adopt the suggestion as their own if they like it, and will be thankful for the mediator's help in reaching a settlement.

Once a closure issue is raised, the mediator should push for its resolution, all the while expecting that new, related issues will emerge in the process.

The failure to anticipate and resolve closure issues as the mediation progresses may lead to unexpected complications later on, including impasse.

It is often necessary for the parties to focus on construction issues (such as determining who will design and "spec" repair of a defectively installed roof, and the scope and specifications of a roof repair) at the same time that financial issues are moving toward closure, so that the potential costs of future work can be factored into the negotiations, enabling the parties to adjust their financial expectations.

Settlement Documents

The devil is in the details when it comes to closing the settlement of a construction dispute. Thus, implementing the settlement through comprehensive settlement documents will involve further negotiations. This raises the risk that a settlement reached "in principal" might unravel because the parties (or their counsel) find that they disagree on one or more closure issues.

A sound approach is to draft the settlement documents immediately after the agreement in principal has been reached. With today's word-processing

technology, immediate preparation and turnaround of comprehensive settlement documents can be easily accomplished as long as time is built into the mediation process for this purpose. Allotting this drafting time can eliminate many headaches later on.

At a minimum, a written Mediation Memorandum of Understanding should be prepared on the spot, before anyone leaves the mediation. It should be executed by the parties and the mediator. The MOU should set forth all of the principal terms of the settlement since it serves as a master checklist of the points and concepts the parties' attorneys are to include when they draft the final comprehensive settlement documents.

To ensure that the final settlement documents are prepared and signed, the mediator should hold the mediation open to monitor the closing of the settlement documents and intervene in the process the moment it looks like the parties may be going backwards.

Conclusion

Successful closure of construction mediation proceedings requires the mediator to think globally and take a proactive role in ferreting out the issues that, if ignored, can thwart the proceedings. Resolution of these issues is vital to achieving a lasting, final settlement. By implementing a strategy that allows the negotiations to incorporate these important issues, the mediator will put the parties on a path to a complete "contract close-out," which is the surest way to achieve a lasting settlement. ■

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