



National Association of Construction Auditors



# 2020 NACA VIRTUAL CONFERENCE

September 21 – 30

Session # 5

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## Mock Mediation

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Kitch Attorneys & Counselors

# Mock Mediation

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JUST A TASTE



## Housekeeping items:

- 1) There will be Polling Questions asked during this session- you **MUST** answer the questions if you seek CPE per NASBA rules.
- 2) Attendees will be muted during the session unless they raise their hand and ask to offer a question of the presenter. It is the presenter's option to field the question at that time.
- 3) You should ask questions via the chat option.
- 4) There will be time at the end of the session for attendees to ask questions live, but typing them out first gives the presenter time to answer all questions.
- 5) If you experience audio issues when using the computer it may work better to call in on the phone.



# Overview

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- Introduction to program and outline of logistics
- Plenary session with parties to review ground rules of mediation and summary of positions/interests
- Breakout session
  - attendees randomly assigned to one of 2 groups
  - caucus with each separately
- Return to Plenary Session to discuss outline of interests
- Wrap-Up & Questions

# Mediation process

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Understand Facilitative v Evaluative style

Plenary session

- Introduction and ground rules by mediator
- Optional presentations by parties [occasionally by experts]

Caucus sessions

- Review interests
- Communicate offers and counters

Concluding session

- Confirm settlement
- Acknowledge lack of settlement and plan for next steps
  - Exchange additional information
  - Further investigations
  - Avoid declaring “the end” – keep the lines of communication open

# Mediator Opening Statement

Thank you for allowing me to assist

Voluntary, nonbinding process

Engaged, authorized, empowered decision makers from both sides

Confidential – entire proceeding

- Separate caucus confidential unless authorized to disclose [varies by mediator]

Mediator not fact-finder

- but may express opinions ask pointed questions, offer suggestions

Parties maintain control over dispute and possible resolution

- Resolution may not be what could be achieved in court

Reduce uncertainty

- We are unrealistically confident of our ability to predict uncertain outcomes

Candid discussions of liability and damages

Candid discussions of interests –

- Common
- Competing

Do not try to guess or project what is occurring in the other caucus

- It's not productive
- It's probably wrong

# Factual Scenario

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Construction Manager has requested final payment under the contract [AIA A133-2019 and A201-2017]

Owner invoked audit provision of A133, 11.2.2

Owner's audits identified discrepancies and unwritten subcontracts that were not on lump sum basis

Owner's audit report recommended reduction of amount requested by CM.

CM timely requested mediation [initial decision on dispute not required]



§ 11.2.2 Within 30 days of the Owner's receipt of the Construction Manager's final accounting for the Cost of the Work, the Owner shall conduct an audit of the Cost of the Work or notify the Architect that it will not conduct an audit.

§ 11.2.2.1 If the Owner conducts an audit of the Cost of the Work, the Owner shall, within 10 days after completion of the audit, submit a written report based upon the auditors' findings to the Architect.

§ 11.2.2.2 Within seven days after receipt of the written report described in Section 11.2.2.1, or receipt of notice that the Owner will not conduct an audit, and provided that the other conditions of Section 11.2.1 have been met, the Architect will either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Article 9 of AIA Document A201–2017. The time periods stated in this Section 11.2.2 supersede those stated in Article 9 of AIA Document A201–2017. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

§ 11.2.2.3 If the Owner's auditors' report concludes that the Cost of the Work, as substantiated by the Construction Manager's final accounting, is less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount without seeking an initial decision pursuant to Article 15 of AIA Document A201–2017. A request for mediation shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to request mediation within this 30-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

# CM Issues

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Particular subcontractor without written subcontract was DBE

Original Owner's Representative aware of the subcontractor

CM attempting to "mentor" subcontractor, but was lax in oversight

CM did not use lump sum subcontract

No warranty or workmanship issues

Some questions about labor productivity with larger crew sizes than expected

Total costs within GMP, but the line item for this subcontractor was higher than originally budgeted

# Owner Issues

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Project is within budget and on schedule

Lender is a stickler for documentation

Reviewed prior Applications for Payment, but did not review subcontracts

Audit of final payment mandatory for lender

Audit first discovered unwritten subcontract

Owner has no DBE requirement or mandate

No warranty or workmanship issues

A question of documentation and value

# Outline of Resolution/Next Steps

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## Settlement reached:

- Joint session to develop specifics of resolution
- Finalize terms of agreement
- Confirm that all issues resolved by enforceable settlement

## No settlement, but progress:

- Describe additional actions and information to be developed or exchanged
- Establish timeline for activities
- Schedule follow-up date to resume or check-in

# Topics used in each caucus session

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## Owner session

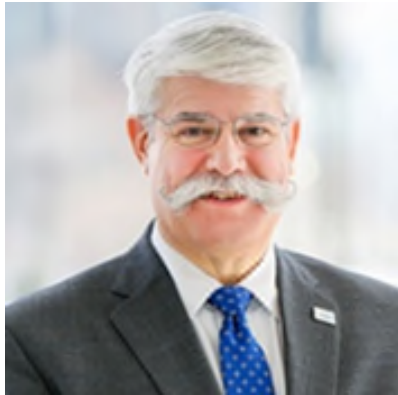
- Best Alternative to Negotiated Agreement – “Best day” – compared to “Worst day”
- Burden of proof and elements of claim
- Current uncertainty and cost to improve uncertainty
- Relative return on investment time and resources
- Common interest in positive outcome and future relationship

## CM session

- Exposure analysis and assessment
- Cost of defense/prosecution
- Information available and needed – effort to compile currently unknown data
- Common long term interest

# Questions and Comments

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