

BULLETIN 14

ALTERNATE DISPUTE RESOLUTION (ADR) PROCESSES

November 1998

The issuance of the 1994 edition of CCDC 2 introduced ADR to the owner/contractor stipulated sum contract. (This initiative has since become reflected also in 'cost plus' contracts; 'design-build' contracts; and the standard national client/consultant agreements, etc.). This inclusion responds to moves in the construction industry to resolve disputes by methods other than by the traditional process, i.e., if the endeavours by the Consultant did not effect conclusive resolution, subsequent litigation was usually the most probable alternative.

These ADR processes, i.e. negotiation, mediation and arbitration, do not negate or absolve the consultant from any of the responsibilities and obligations traditionally associated with the administration, interpretation and findings with respect to owner/contractor agreements. In the event of a dispute arising from the Consultant's finding, the parties will initially attempt to resolve the matter by negotiation. Should these negotiations fail, mediation and possibly arbitration processes are implemented.

Mediation – Both parties should mutually attempt to select a mediator within the time limits specified in the contract. If the two parties cannot agree on the choice, a mediator may be named by the Arbitration and Mediation Institute of Canada, or one of its regional affiliates e.g. the Québec Institute of Mediation and Arbitration, the British Columbia International Commercial Arbitration Centre, or other similar organizations. If these nomination processes are not acceptable, the parties may make application for a court to nominate a mediator. Usually, the Arbitration and Mediation Institute of Canada will endeavour to negotiate with the parties to provide a nominee acceptable to both. The parties jointly agree to a schedule for the mediation hearing, and both share equally the procedural costs involved.

There are certain standard procedures used in the mediation process, e.g. the mediator meeting with both sides individually and on a "without prejudice" basis prior to joint discussions; and following the process, he/she might be able to suggest a settlement, and consequently assist the parties to resolve the dispute amicably. If one or both parties do not accept the mediation, either party may withdraw and elect to invoke binding arbitration. It should be noted that if the dispute goes to a subsequent proceeding, the mediator can neither represent nor testify on behalf of either party.

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Arbitration – As with selection of the mediator, the choice of an arbitrator or an arbitration panel can be mutually agreed between the parties, or assisted by the Arbitration and Mediation Institute of Canada or one of its regional affiliates. The costs are established by the arbitrator. The procedures now become more formal than mediation. Statements of claim and defence are exchanged via the arbitrator and a date is established for the formal hearing. Information exchange takes place based on the receipt and consideration of the other parties' position, and this also occurs prior to the hearing. Unlike the less formal process of mediation, the arbitrator does not discuss the case individually with either of the parties prior to the hearing. During the arbitration hearing, both parties have the right to present evidence, and to introduce witnesses for substantiation in support of their positions.

Following the hearing, the arbitration award is announced, and the award is binding upon both parties. There are some limited circumstances in which the decision rendered or the process undertaken could be questioned by one or both parties, and which would be accepted by the courts as grounds for an appeal. If such a circumstance occurs, an appeal may be made by either party to litigation, but it should be noted that the same principle of non-representation in the legal proceedings applies to the arbitrator, as previously applied to the mediator.

For additional information, refer to CCDC 40 'Rules for Mediation and Arbitration of Construction Disputes'.

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