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**THREE ESSENTIALS FOR DISPUTE RESOLUTION IN CONSTRUCTION
CONTRACTS**

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Construction starts and spending have remained strong this year for the residential and industrial sectors despite increasing concerns that the economy is slowing. Although the industry remains strong, construction disputes are expected to increase due to financial difficulties facing some of the players in construction projects. Yet, even in a good economic climate, as Murphy's Law would have it, things can and do go wrong. When problems arise, the problems can be complicated by the parties' failure to properly address how disputes should be resolved at the outset of the project.

In the construction industry, one of the most important goals of any project is to stay on schedule. By addressing dispute resolution in the construction contract, disputes can be resolved quickly and less expensively while keeping the construction project on time. When negotiating a construction contract, whether you are an owner, a general contractor, or a subcontractor, there are three essential dispute resolution items that you should have in your contract.

ALTERNATIVE DISPUTE RESOLUTION

Construction disputes are uniquely suited to alternative dispute resolution (ADR) because of the critical need to complete construction on time. Mediation and arbitration, the two forms of ADR, generally provide quicker (and less expensive) solutions than the traditional process of litigation. First, the primary difference between litigation and ADR is that ADR involves a private "judge" in the form of a mediator or arbitrator. The opposing parties jointly pay the private "judge" to resolve their dispute. This allows the parties to have their claims heard within a matter of months rather than the year or more that most court dockets require.

Second, ADR saves money. The lengthy pre-trial procedures in litigation generate high attorney costs as well as the delay cost discussed above. Often, these costs force parties with the upperhand to accept a less than satisfactory settlement because it is cheaper to pay the wrongdoer than to continue to incur the litigation costs.

Standard, form contracts sometimes do provide for ADR when a dispute arises. For example, the American Institute of Architects' (AIA) forms - a mainstay of construction industry contracts - do include ADR clauses. Nonetheless, other form contracts may ignore ADR and thus leave parties to resolve issues in court. Therefore, you need to be aware of the form of dispute resolution provided in the contract. If your contract is an AIA, there are two major issues that should be amended.

JOINDER OF PARTIES

First, the AIA contracts uniformly provide limitations on joinder of parties in arbitration. This means that even if you have an ADR provision in your construction contract, you may have to mediate and arbitrate several times with different parties to reach the same goal. The AIA includes this non-joinder clause so that the architect will only have to be involved in one ADR process with the owner - the only party with whom the architect has a contract.

For instance, if a dispute arises about the length of structural steel beams for a project because the beams delivered are too short, the owner will have to initiate ADR with the general contractor as well as a separate ADR with the architect in order to find out whether the architect provided wrong steel beam specifications or whether the general contractor ordered the wrong length beams. The downside to non-joinder includes doubling or tripling the cost of ADR fees and increasing the time until the dispute is resolved.

A modification of the AIA non-joinder clause to include joinder allows every party that might be responsible for a mistake - or that might have suffered a loss because of a mistake - to take part in the same mediation and arbitration. This brings all the parties together to resolve problems and avoids duplication of fees.

ATTORNEY FEES

Second, even though your contract clearly provides for ADR, occasionally a party will file suit in court to challenge the validity of the ADR clause in an attempt to avoid mediation and arbitration. Most construction contracts, including the AIA forms, do not provide for the recovery of attorney fees to the party that was wrongly hauled into court. Failing to provide for this can be costly and extremely frustrating. On the other hand, if the construction contract provides that the successful party in a suit challenging the validity of an ADR clause shall have its attorney fees paid for by the loser, it is highly unlikely that a party will file suit as a threat or delay tactic.

CONCLUSION

The AIA contracts state that they are intended to be modified to fit individual projects. The substance of this provision applies to any contract. Never wholly accept a contract provided to you regardless of how professional it looks. Keep in mind that it was drafted with someone's interests in mind other than your own. If you have any questions regarding a construction contract that you might be using, or that someone has asked you to sign, give the attorneys at KDDK a call.