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WINNING IN MEDIATION

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A dispute has arisen on your construction project. A claim has been initiated and the owner and the contractor dig out their copy of the contract that was long ago filed. They look through the American Institute of Architects (AIA) General Conditions of their contract (AIA Document A201-1997) to see how the claim must be handled. It is then that they realize that section 4.5.1 of the General Conditions requires them to mediate the claim as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

For many years, attorneys and their clients in the construction industry viewed construction mediation as a "throwaway" exercise in the march to the resolution of a dispute. They viewed it merely as a way to get a peek at their opponents' strategy in the matter. Recently, however, that view has been changing. The trend is under way to try to win in mediation and no longer waste the opportunity that it presents.

There are numerous elements to be considered by the owner or contractor to better utilize the time and expense which will be incurred in a mandatory mediation, and maximize the opportunity to win a settlement in the mediation. That's right -- try to win in mediation!

Here are three elements to consider in formulating your strategy:

1. Your attorney:

Your choice of an attorney to present your position on the claim is important to the success of your strategy. The attorney should have an extensive background in construction law, with considerable experience in construction mediations. The attorney should also have easy access to the resources necessary for a visually appealing electronic presentation to achieve maximum impact at the beginning of the mediation process.

2. The mediation forum:

Section 4.5.2 of the AIA General Conditions directs that the mediation shall be conducted by the American Arbitration Association unless the parties mutually agree otherwise. The italicized words are important because they allow the parties to agree, if they wish, to have the mediation conducted in another forum. Owners and contractors in Southern California are fortunate to also have numerous private mediation services available with a roster of mediators who are extremely knowledgeable on construction issues and construction contracts. Your construction attorney has the knowledge and experience to

recommend the appropriate mediation forum for the type of claim, parties and personalities involved in your mediation.

3. The mediator:

The mediator is like the conductor of a symphony orchestra. It is the conductor's job to bring all of the sections and players together to achieve a result and "make music." The construction mediator, chosen with the assistance of your construction attorney, has to bring all of the parties together to achieve an end result in the mediation. The greater the preparation by your mediation team, the better your chances are of convincing the mediator of the merits of your side. You can gain a valuable ally who can consciously or subconsciously assist you with your winning strategy.

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