

IS THERE A BETTER WAY TO RESOLVE SMALLER DISPUTES?

By Anthony D. Whitley (as seen in *Texas Construction* January 2010)

Construction businesses today do not have the margins to write-off cost overruns or unpaid contract balances as they could have in the past when there were more projects and higher profits. More parties are willing to fight for the last dollar. These disputes can add up, and the attorney's fees can be disproportionately large. Without a compromise or other alternative, construction businesses must proceed with litigation and hope to manage attorney's fees so that they do not approach — or exceed — the amount in dispute. But there are other options. The American Arbitration Association (AAA) and JAMS, the Resolution Experts (JAMS) each offer an economical and efficient option to resolve smaller disputes under their “fast track” or “expedited” rules. Contracting parties might want to consider these options in their construction contracts.

Filing a Case Under JAMS or the AAA

It is important to remember that the parties' agreement must allow for arbitration for either service to be involved. The fast track arbitration rules of the AAA govern cases involving two parties where no party's claim exceeds \$75,000. Once a party files a demand for arbitration, the case is set for the fast track resolution. The expedited rules of JAMS govern cases in which the parties agree that such rules apply.

Administrative Costs

AAA and JAMS charge less to administer fast track or expedited arbitrations than other arbitrations. These fees can range from \$400 to over a \$1,000, but are still relatively small compared to the cost to administer more complex arbitrations. The fees charged by the arbitrator are in addition to the administrative fees.

Responding to a Claim and Amending Claims

In litigation or arbitration, parties have the right to file and then amend their claims and defenses, with a few restrictions. To ensure disputes are resolved efficiently, the AAA and JAMS place short deadlines on these rights. Both services require a responding party to file its answer (if necessary) or counterclaim within 7 days after receiving notice of the claim. A party can amend its claim anytime prior to the appointment of an arbitrator, after which it must have the arbitrator's permission.

Appointment of Arbitrator and Schedule of Case

The expedited nature of these arbitrations is evident in how quickly the arbitration is conducted. The AAA provides a list of candidates to serve as arbitrators within a week after the responding party's deadline to answer. After the AAA appoints the arbitrator,

the arbitrator holds a preliminary conference and sets the arbitration hearing no later than 45 days after the conference. JAMS follows a similar procedure, but the JAMS arbitrator sets the arbitration hearing date no later than 4 months after the preliminary conference.

Discovery and Preparing for Arbitration

Though the arbitrator can allow additional discovery, JAMS' expedited rules require the parties to informally exchange documents and other relative information at a mutually agreeable time. JAMS requires the parties to exchange summaries of witness and expert testimony, along with expert reports, at least 14 days before the arbitration hearing. The only discovery allowed by the AAA is the mutual exchange of exhibits, affidavits and witness lists the parties intend to use at the hearing. This exchange must occur at least five days before the hearing. Neither set of rules allow for depositions unless the arbitrator makes an exception.

Risks accompany the economy of streamlined discovery. The opportunity to miss evidence in preparing for the hearing, or the risk of ambush, is greater. If the case is too complex legally, or if the parties do not have necessary information, the parties should ask the arbitrator at the preliminary conference to modify the discovery rules, or the party should opt for an arbitration under the traditional rules of the AAA or JAMS.

Arbitration Hearing and Decision

Hearings are also expedited. The arbitration hearing under the AAA fast track rules only lasts 1 day (or up to 2 days if the arbitrator permits). The arbitrator must render a decision no later than 14 days after the hearing closes. JAMS allows up to 3 days for the arbitration hearing, and the arbitrator must render a decision within 20 days after the hearing closes. JAMS and the AAA allow the parties to waive a hearing, even in large cases, and have the arbitrator decide the case based on submission of documentary evidence. A party should carefully consider its decision to waive a hearing. A few factors to consider include: the availability, authenticity and clarity of the evidence; necessity for witnesses to explain the evidence; necessity to cross-examine the opponent's witnesses; and, the cost of the hearing compared to the claimed damages.

A fast track or expedited arbitration is not for every case but can be effective for smaller disputes with few legal issues. If parties want finality to a dispute that cannot otherwise be resolved by the parties themselves, an expedited or fast track arbitration may offer the original promise of arbitration: an efficient resolution.