

Appendix H

RULES IMPLEMENTING MEDIATED
SETTLEMENT CONFERENCES IN
NORTH CAROLINA PUBLIC CONSTRUCTION PROJECTS

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SAMPLE

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RULE 1. INITIATING MEDIATED SETTLEMENT CONFERENCES

A. Purpose of Mandatory Settlement Conferences.

Pursuant to N.C.G.S. 143-128(g) 143-135.26(11), these Rules are promulgated to implement a system of settlement events which are designated to focus the parties' attention on settlement rather than on claim preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time prior to or during commencement of the dispute resolution process.

B. Initiating the Dispute Resolution Process

- 1) Any party to a public construction contract governed by Article 8. Ch. 143 of the North Carolina General Statutes and identified in N.C.G.S. 143-128(g) and who is a party to a dispute arising out of the construction process in which the amount in controversy is at least \$15,000 may submit a written request to the public owner for mediation of the dispute.
- 2) Prior to submission of a written request for mediation to the public owner, the parties requesting mediation,
 - a) If a prime contractor, must have first submitted its claim to the Project Designer for review as set forth in Exhibit A. If the dispute is not resolved through the Project Designer's instructions, then the dispute becomes ripe for mediation in the Formal Dispute Resolution Process, and the party may submit his written request for mediation to the public owner.
 - b) If the party requesting mediation is a subcontractor, it must first have submitted its claim for mediation to the prime contractor with whom it has a contract. If the dispute is not resolved through the Prime Contractor's involvement, then the dispute becomes ripe for mediation in the Formal Dispute Resolution Process, and the party may submit its written request for mediation to the public owner.
 - c) If the party requesting mediation is the Project Designer, then it must first submit its claim to the public owner to resolve. If the dispute is not resolved with the public owner's involvement, then the Project Designers' dispute is ripe for mediation in the Formal Dispute Resolution Process, and the Project Designer may submit its written request to the public owner for mediation.

RULE 2. SELECTION OF MEDIATOR

- A. Selection of Certified Mediator by Agreement of the Parties.** The parties may select a mediator certified pursuant to the Rules by agreement within 21 days of requesting mediation. The requesting party shall file with the State Construction

Office (hereinafter collectively referred to as the "SCO") or public owner if a non-State project a Notice of Selection of Mediator by Agreement within 10 days of the request; however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

- B. Nomination and Public Owner Approval of a Non-Certified Mediator.** The parties may select a mediator who does not meet the certification requirements of these rules but who, in the opinion of the parties and the SCO or public owner, is otherwise qualified by training or experience to mediate the action.

If the parties select a non-certified mediator, the requesting party shall file with the SCO a Nomination of Non-Certified Mediator within 10 days of the request. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The SCO or public owner shall rule on said nomination, shall approve or disapprove of the parties' nomination and shall notify the parties of its decision.

- C. Appointment of Mediator by the SCO.** If the parties cannot agree upon the selection of a mediator, the party or party's attorney shall so notify the SCO or public owner and request, on behalf of the parties, that the SCO or public owner appoint a mediator. The request for appointment must be filed within 10 days after request to mediate and shall state that the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The request shall state whether any party prefers a certified attorney mediator, and if so, the SCO or public owner shall appoint a certified attorney mediator. If no preference is expressed, the SCO or public owner may appoint a certified attorney mediator or a certified non-attorney mediator.
- D. Mediator Information Directory.** To assist the parties in the selection of a mediator by agreement, the parties are free to utilize the list of certified mediators maintained in any county participating in the Superior Court Mediation Settlement Conference Program.
- E. Disqualification of Mediator.** Any party may request replacement of the mediator by the SCO or public owner for good cause. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

- A. Where Conference is to be Held.** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the county where the project is located. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

- B. **When Conference is to be Held.** The deadline for completion of the mediation shall be not less than 30 days nor more than 60 days after the naming of the mediator.
- C. **Request to Extend Deadline for Completion.** A party, or the mediator, may request the SCO or public owner to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the SCO or public owner.

The SCO or public owner may grant the request by setting a new deadline for completion of the conference.

- D. **Recesses.** The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.
- E. **The mediated settlement conference shall not be cause for the delay of the construction project which is the focus of the dispute.**

RULE 4. DUTIES OF PARTIES AND OTHER PARTICIPANTS IN FORMAL DISPUTE RESOLUTION PROCESS

A. Attendance.

- 1) All parties to the dispute originally presented to the Designer or Prime Contractor for initial resolution must attend the mediation. Failure of a party to a construction contract to attend the mediation will result in the public owner's withholding of monthly payment to that party until such party attends the mediation.
- 2) Attendance shall constitute physical attendance, not by telephone or other electronic means. Any attendee on behalf of a party must have authority from that party to bind it to any agreement reached as a result of the mediation.
- 3) Attorneys on behalf of parties may attend the mediation but are not required to do so.
- 4) Sureties or insurance company representatives are not required to attend the mediation unless any monies paid or to be paid as a result of any agreement reached as a result of mediation require their presence or acquiescence. If such agreement or presence is required, then authorized representatives of the surety or insurance company must attend the mediation.

B. **Finalizing Agreement.** If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel.

C. **The mediation fee shall be paid in accordance with N.C.G.S. 143-128(g).**

- D. **Failure to compensate mediator.** Any party's failure to compensate the mediators in accordance with N.C.G.S. 143-128(g) shall subject that party to a withholding of said amount of money from the party's monthly payment by the public owner.

Should the public owner fail to compensate the mediator, it shall hereby be subject to a civil cause of action from the mediator for the 1/3 portion of the mediator's total fee as required by N.C.G.S. 143-128(g).

RULE 5. AUTHORITY AND DUTIES OF MEDIATORS

A. Authority of Mediator.

- 1) *Control of Conference.* The mediator shall at all times be in control of the conference and the procedures to be followed.
- 2) *Private Consultation.* The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.
- 3) *Scheduling the Conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of Mediator.

- 1) The mediator shall define and describe the following at the beginning of the conference:
 - a) The process of mediation;
 - b) The difference between mediation and other forms of conflict resolution;
 - c) The costs of the mediated settlement conference;
 - d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their legal rights if they do not reach settlement;
 - e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
 - f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - g) The inadmissibility of conduct and statements as provided by N.C.G.S 7A-38.1(1);
 - h) The duties and responsibilities of the mediator and the participants;
and
 - i) That any agreement reached will be reached by mutual consent.
- 2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or

partiality.

- 3) *Declaring Impasse.* It is the duty of the mediator timely to determine that an impasse exists and that the conference should end.
- 4) *Reporting Results of Conference.* The mediator shall report to the SCO or public owner within 10 days of the conference whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state the nature of said agreement. The mediator's report shall inform the SCO or public owner of the absence of any party known to the mediator to have been absent from the mediated settlement conference without permission. The SCO or public owner may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.
- 5) *Scheduling and Holding the Conference.* It is the duty of the mediator to schedule the conference and conduct it prior to the deadline of completion set by the rules. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the SCO or public owner.

RULE 6. COMPENSATION OF THE MEDIATOR

- A. **By Agreement.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator provided that the provisions of N.C.G.S 143-128(g) are observed.
- B. **By Appointment.** When the mediator is appointed by the SCO or public owner, the parties shall compensate the mediator for mediation services at the rate in accordance with the rate charged for Superior Court mediation. The parties shall also pay to the mediator a one-time per case administrative rate in accordance with the rate charged for Superior Court mediation, which is due upon appointment.

RULE 7. MEDIATOR CERTIFICATION

All mediators certified in the Formal Dispute Resolution Program shall be properly certified in accordance with the rules certifying mediators in Superior Court in North Carolina. * When selecting mediators, the parties may designate a preference for mediators with a background in construction law or public construction contracting. Such requirements, while preferred, are not mandatory under these rules.

All mediators chosen must either demonstrate they are certified in accordance with the Rules Implementing Scheduled Mediated Settlement Conference in Superior Court or must gain the consent of the SCO or public owner to mediate any dispute in accordance with these rules.

* Except when otherwise allowed by the SCO or public owner upon the request of the parties to the mediation.

RULE 8. RULE MAKING

These Rules are subject to amendment by rule making by the State Building Commission.

These Rules are mandated for State projects when the contracting state entity has not otherwise adopted its own dispute resolution provision. These rules are optional for all other projects subject to Article 8, Ch. 143 of the General Statutes.

RULE 9. DEFINITIONS

When the phrase "SCO or public owner" is used in these rules, "SCO" shall apply to state projects, "public owner" shall apply to non-state public projects.

RULE 10. TIME LIMITS

On state contracts, any time limit provided for by these Rules may be waived or extended by the SCO for good cause shown.

On non-state contracts, any time limit provided for by these Rules may be waived or extended by the mediator it appoints for good cause shown. If the mediator has not yet been appointed, the designer of record shall decide all waivers or extensions of time for good cause shown.