



Large, Complex Construction Disputes:
The Dynamics of Multi-Member Mediation Teams

11th Annual
ABA Section of Dispute Resolution
Spring Conference
April 16, 2009
Sheraton New York Hotel & Towers
New York, New York

Facilitators: L. Tyrone Holt & Mark J. Heley



L. Tyrone Holt, Esquire

The Holt Group LLC

1675 Broadway, Suite 2100

Denver, Colorado 80202

P: (303) 225-8500 F: (303) 225-4585

Email: ty.holt@holtllc.com

www.holtllc.com



Mark J. Heley, Esquire

**Coleman, Hull & van Vliet, P.L.L.P.
8500 Normandale Lake Boulevard, Suite 2110
Minneapolis, Minnesota 55437
P: (952) 841-0219 F: (952) 841-0041
Email: mheley@chvv.com
www.chvv.com**



Program Agenda

- What makes construction cases “Large & Complex”?
- Hypothetical Fact Pattern
- Problem & Issue Identification
- Mediator Selection Process
- Preparation for the Mediation
- The Mediation Conference



Large, Complex Construction Disputes

- **Use your background, experience and training to assist the parties in structuring the mediation process.**
- **As a part of structuring the process, you need to consider whether the dispute at issue is a “large, complex, construction dispute”.**
- **Not all construction disputes are large and/or complex.**
- **A mediation may be large, complex or both.**



WHAT FACTORS QUALIFY A MEDIATION AS LARGE AND/OR COMPLEX?

- “Large” may be defined by a combination of one or more of the following factors:
 - Number of parties
 - Amount in dispute
 - Number of claims
 - Types of issues
 - Number of factual issues
 - Dispositive legal issues
 - Third-party claims



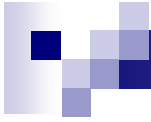
WHAT FACTORS QUALIFY A MEDIATION AS LARGE AND/OR COMPLEX?

- “Complex” may be defined by a combination of one or more of the following factors:
 - o Difficulty, complexity and/or technical nature of claims, issues or defenses
 - o Insurance coverage issues [limits, excess, primary layers, competing claims, “CGL” vs. professional liability policies]
 - o Insurance company attitudes, reservation of rights, declination of rights, conflict within natural or structured bargaining groups of claims
 - o Complexity of legal issues
 - o Financial Circumstances of the parties



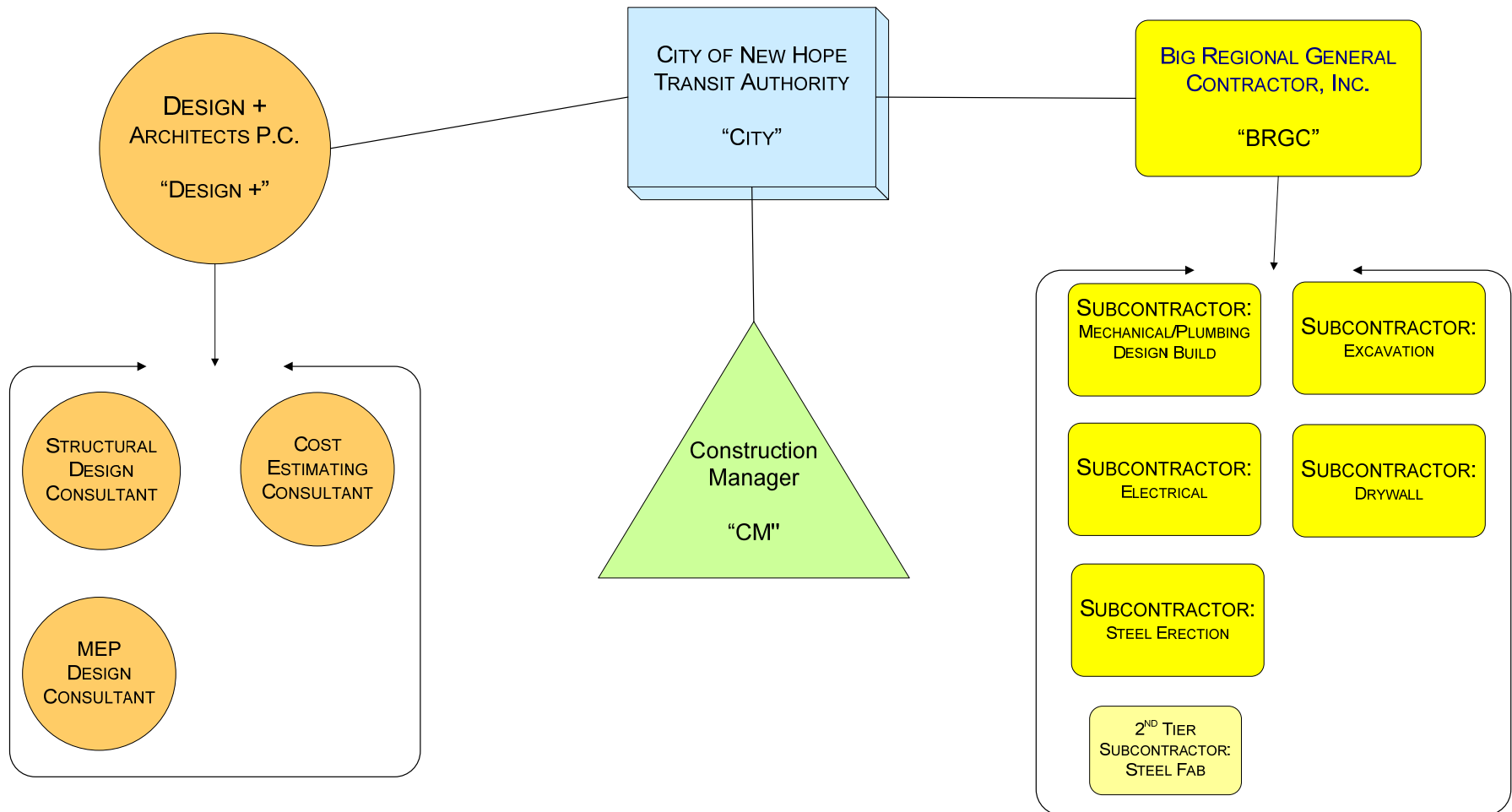
“Complex” [continued]:

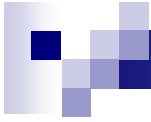
- o Different or conflicting interests**
- o Different or conflicting “agendas”**
- o Presence of governmental entities, with attendant political issues and/or pressures**
- o Emotional charges or personality conflicts**
- o Procedural posture and related procedural issues, e.g., claims subject to arbitration and some not**
- o Other factors unique to the particular dispute**



Hypothetical Fact Pattern

CITY OF NEW HOPE TRANSIT AUTHORITY MULTI-MODAL TRANSPORTATION CENTER PROJECT

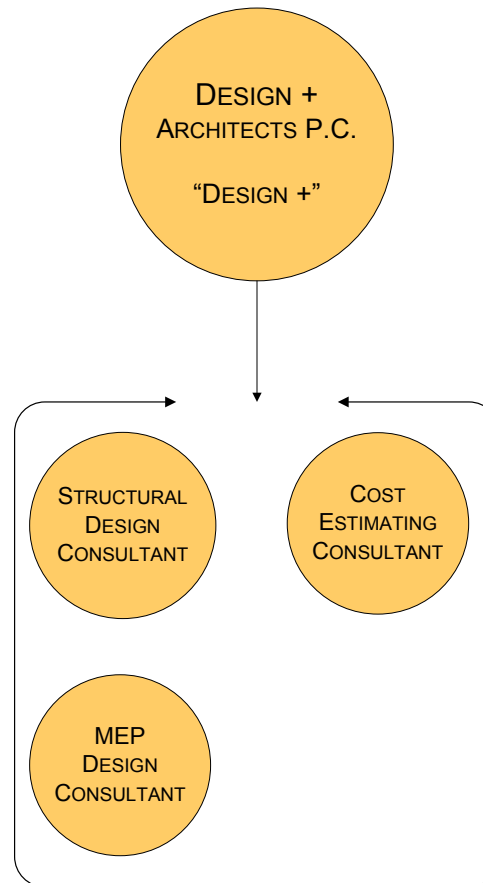




**CITY OF NEW HOPE TRANSIT AUTHORITY
MULTI-MODAL TRANSPORTATION CENTER PROJECT**

Negotiation Groupings

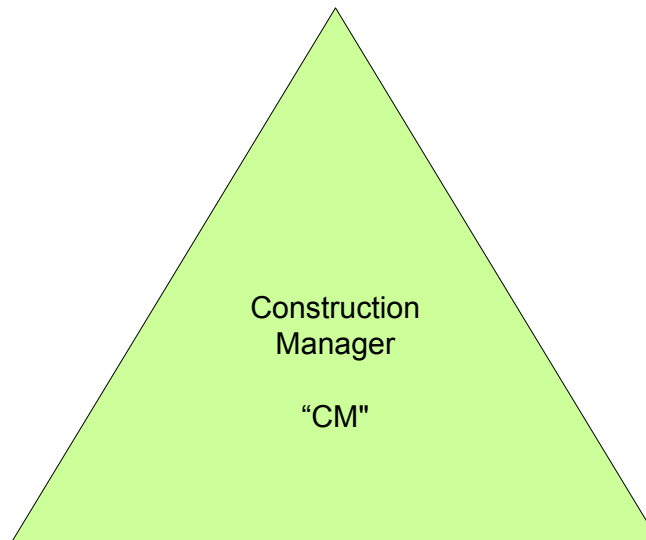
CITY OF NEW HOPE TRANSIT AUTHORITY MULTI-MODAL TRANSPORTATION CENTER PROJECT





CITY OF NEW HOPE TRANSIT AUTHORITY MULTI-MODAL TRANSPORTATION CENTER PROJECT

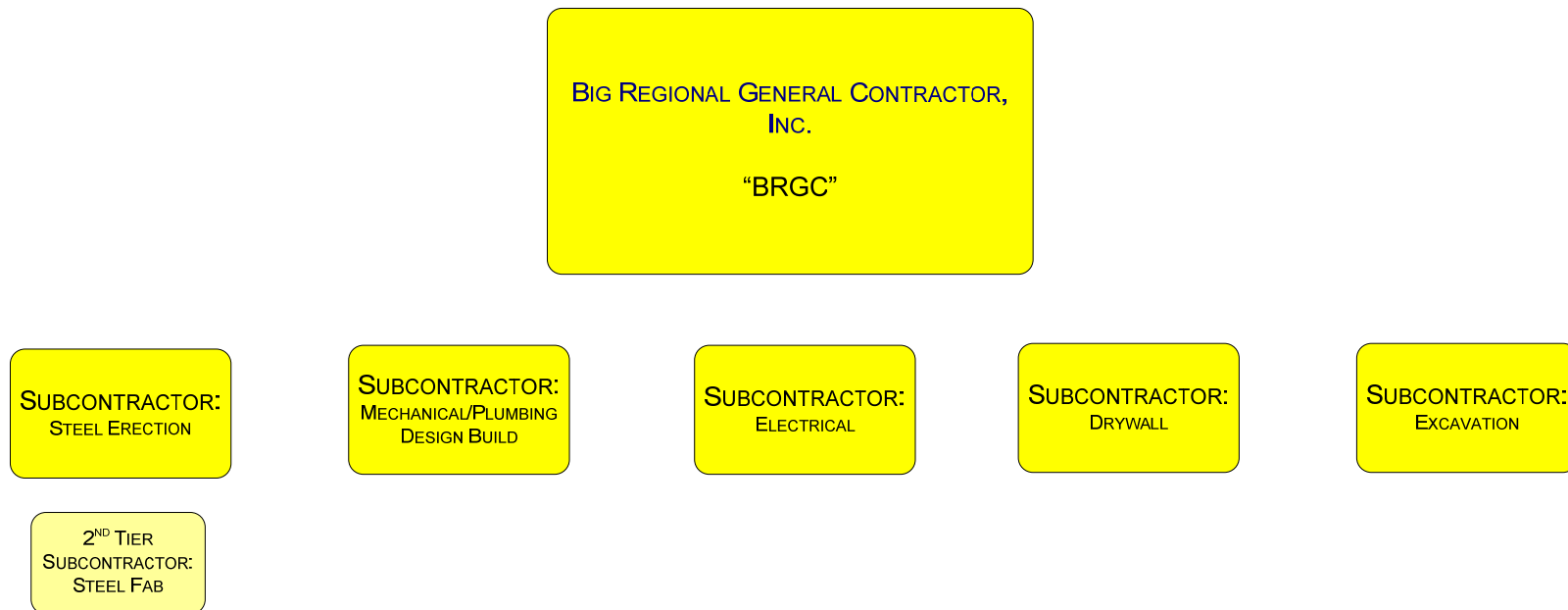
Negotiation Groupings





CITY OF NEW HOPE TRANSIT AUTHORITY MULTI-MODAL TRANSPORTATION CENTER PROJECT

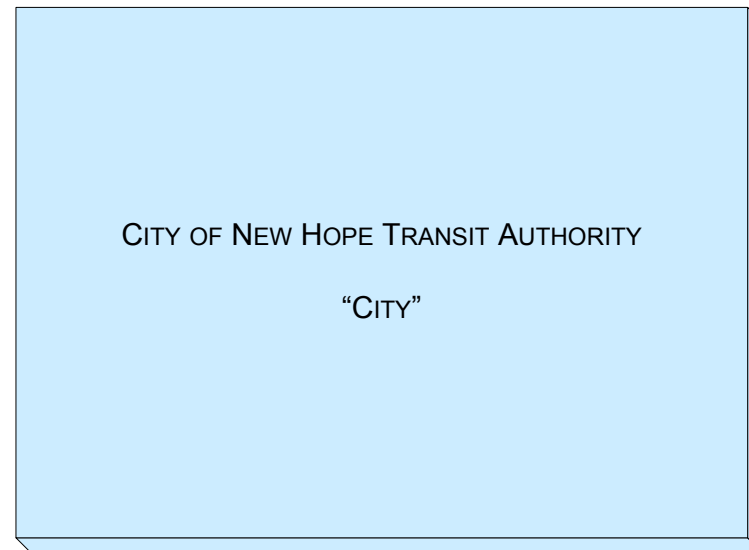
Negotiation Groupings





CITY OF NEW HOPE TRANSIT AUTHORITY MULTI-MODAL TRANSPORTATION CENTER PROJECT

Negotiation Groupings





Mediator Selection

**FIRST, AND FOREMOST,
“DO NO HARM”**



Getting Started

- **The Mediator Selection Process**

- **Qualifications**

- **The mediator's "personality": evaluative, facilitative, or flexible? Does one style fit every case? What does this mediation need? What do the parties and counsel want?**

- **Is public sector mediation experience important?**

- **Is specialized construction knowledge necessary?**

- **Is specialized insurance claims experience necessary?**

- **Other factors in mediator selection that are unique to or desirable for this particular dispute.**

- **Delaying tactics manifested in the mediator selection process.**



Getting Started - Continued

- **The Mediation Engagement Agreement**
 - **Set the tone and agenda for the mediation in your agreement – help counsel prepare and identify the appropriate issues**
- **Use of the pre-mediation conference is essential**
 - **Typically by telephone conference call**
 - **Who attends the pre-mediation conference call**
 - **Setting the Agenda for the call – purposes and goals for the pre-mediation conference**
 - **Scheduling the Mediation Conference**
 - **Structure the Conference and the Submissions**



Getting Started - Continued

■ “Before” Mediation Conference Issues

- o What is necessary for the parties to be ready to mediate – discuss this issue.
- o Have the parties exchanged all necessary documents, reports, insurance policies, damages specifications, and issue specifications that are necessary for a meaningful mediation conference?
- o Who will attend the mediation conference?
- o Who must attend or be available for the mediation conference to succeed? The mediator must provide guidance on this issue.



Getting Started - Continued

■ “Before” Mediation Conference Issues

○ Mediation Conference Submissions

○ Some form of submission is always needed.

▪ Will they be exchanged?

▪ Confidential vs. non-confidential

■ Discuss the concept of any necessary or appropriate “small group” or “negotiating group” and the need for ex parte communications before the mediation conference.



Counsel's Role in Preparing for Mediation

- **“Wants” vs. “Needs”: Identify Client's Objectives & Develop Plan to Meet its “Needs”**
- **Objective & Realistic Case Assessment: Explain Risks, Costs, & Reasonable Range of Potential Outcomes**
- **Identify Impediments to Resolution**
- **Prepare Client for the Process**



The Mediation Submissions & Preparation for Conference

Identify and Address anticipated problems, obstacles and potential troublesome issues

For example:

- **Public Sector approval and ratification issues need to be addressed in advance of the mediation conference**
- **Insurance representatives need to be physically present**
- **Key decision-makers must be present**
- **The role of experts**



The Mediation Conference

■ Logistics

- When?
- Where?
- How long? [Make sure that enough time is committed]
- Support facilities, personnel and equipment?
- No one leaves “early to catch a plane”?

■ Presentations

- Will you have them – discuss and get everyone’s input?
- By whom?
- What?
- How Long?
- No surprises?



The Mediation Conference

- **Confidentiality**
 - In the mediation conference
 - In private caucus

- **The Mediation “Chess Game”**
 - Beginning Game
 - Middle Game
 - End Game

- **The dynamics of internal negotiation**
- **The dynamics of vertical negotiation**
- **Negotiation with insurance carriers**



“End Game” Issues

- **Do not be too quick to declare impasse**
- **Do not confuse bluffing and negotiating tactics with impasse**
- **Let the Parties decide what they need to proceed**
- **Additional sessions are not uncommon in early and/or complicated, multi-party mediations**
- **Everything is subject to mediation, including the terms and conditions of the next session.**
 - **What do you need to proceed?**



Breaking “Impasse”

- The Mediator Proposal
- Ask “what if” questions
- Moving the bookends
- Partial settlements – “half a loaf”
- Confidential numbers
- Adjourning with instructions
- Review BATNA and WATNA
- What do you need to proceed
 - Make a determination in your mind of what you need to do to keep the parties talking

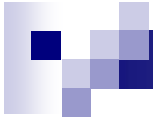
The Mediator Can Never give up



“End Game” Issues

– Settlement Agreement/Memorandum, etc.

- **In order for complicated deals to survive, some form of a settlement memorandum must be documented and signed before mediation conference ends**
- **Partial or “Half a Loaf” settlements can sometimes facilitate or encourage complete resolutions**
- **Do not let the progress that has been achieved get lost**
- **Mediator should document terms and conditions of next session, including interim steps**
 - **This is not a settlement memorandum**



Questions?