

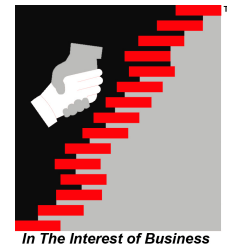
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EPC Disputes- An Opportunity for Mediation

Engineering Procurement and Construction (EPC) contracts are the contracts with full of complexity and long contractual life cycles, may be 3-5 yrs., primarily involving team work, co-ordination and interfacing with multiple agencies and stake holders i.e., client, contractor/s, govt agencies (local and central), sub-contractors, vendors, suppliers, service providers etc.

Successful, seamless and timebound execution of the EPC contract is a herculean task. It *interalia* requires a peculiar skill of man management and also the management of the relationships between the stakeholders mentioned above, which is not an easy task. In fact, seamless execution of the EPC contract is one of the critical aspects of the profitable EPC contract.

Any EPC contract has different activities as elaborated below.

1. Negotiation of contract between client and the main contractor,
2. Execution of the contract after negotiation,
3. Appointment of the sub-contractors,
4. Negotiations of contracts between main contractor and subcontractor,
5. In case the scope involves land acquisition, co-ordination with the land owners,
6. Appointment of suppliers, vendors and service providers and negotiation of contracts with them,
7. Interfacing between client, main contractor during various stages of execution of the contract,
8. Interfacing and co-ordination between main contractor and subcontractor, vendors, service providers etc.,
9. Issues between client and main contractor, main contractor and sub-contractor pertaining to the change in scope, extra work, price variation, delays etc.,
10. Issues between the main/ subcontractor with the contract labour,
11. Issues between the consortium or joint venture partners in case the main contractor is a consortium or a joint venture.
12. Issues between client and main contractor and main contractor and sub-contractor pertaining to the closure of contract.

The list goes on.....

All the above activities are prone to the differences and disputes between the stakeholders under the contract.

All the stakeholders in the EPC contract are focused on performing their obligations in a cost-effective manner to maximize their profits out of the contract.

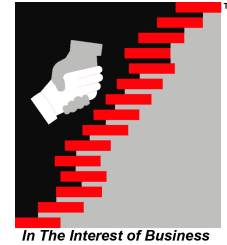
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During the performance of the contractual obligations, the differences are generally developed between the stakeholders in respect of contractual issues like delaying or defaulting the performance of the contract or its obligations. These differences between the stakeholders unless addressed in a timely manner, gradually convert into disputes between the parties. It is said that India is set to become the third largest construction dispute market.

The EPC disputes are generally high-stake disputes and are subject to the arbitration to begin with, followed by appeals in the courts. The average time period to resolve these disputes is around 7-8 yrs. It takes lot of time, energy, manhours and also the cost to file / defend those disputes. These disputes ultimately erode the profit margin of the stakeholder in an EPC contract they are part of. As per the Ministry of Law & Justice, the cost of litigation in India is around 37% of the claim amount involved in dispute.

In the entire EPC contract, hierarchy wise, client stand first in the ladder enjoying the dominant position followed by main contractor, subcontractor, vendors, suppliers and service providers respectively. Generally, client has a dominant approach towards the main contractor during the execution of the contract. The same approach is cascaded by the main contractor towards the other stakeholders down the line. This approach many times results into an element of distrust, mis-communication or communication gap during the execution of contract. Further, this hierarchy gives birth to the ego too.

The EPC contracts are the capital-intensive projects as lot of capital, material, time and human resources are involved in the contract. Differences and disputes between the stakeholders, as mentioned above, results into the delay in completion of contract and in turn resultant cost over-run.

Need and role of Mediator in EPC contract

Taking into consideration the gamut of EPC contract mentioned above, the appointment of a trained neutral Mediator by the parties (preferably who understands the EPC business) at the beginning of the contract, will facilitate the timely resolution of the possible differences and /or issues arising out of contract between the parties before conversion of those differences/issues into the disputes. The Mediator being a neutral person will be in a better position to look at the issues independently, listen to the parties, engage with the parties, understand the issues, talk to the stakeholder/s about the strength and weaknesses of the issues in hand and facilitate the resolution of the differences without hampering the progress of the contract.

This helps in saving huge cost of litigation, time spent for the litigation and most important preservation of the business relationship between the stakeholders, which in turn, ultimately result into adding to the profit margins of the stakeholders in the contract.

What is Mediation?

It is a process in which through a trained professional i.e., Mediator, parties themselves negotiate and arrive at a mutually acceptable resolution to their differences or disputes.

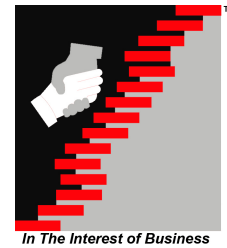
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Role of Mediator in this process is to facilitate the negotiation between the parties and lead parties towards the amicable resolution of the differences or disputes between them.

In Mediation, the disputing parties are in control of the Mediation proceedings and negotiation with the other side. Appointment of a lawyer is not mandatory. The disputing parties themselves arrive at an amicable resolution of differences/ disputes. The decision is not imposed upon the parties unlike in Arbitration awards and Courts judgements. As a result, the settlement arrived at between the parties is honoured by the parties and possibilities of dishonouring the terms of settlement is rare.

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