

**MEDIATION** is a process in which the parties are assisted by a neutral mediator who helps them to negotiate resolution of their dispute. Mediation is a non-binding procedure, but once an agreement has been reached and documented, that agreement is binding on the parties and can be enforced. Mediation has proven to be an effective procedure for resolving disputes that cannot be resolved through direct, unassisted negotiations. Intervention by a highly skilled mediator results in resolution of contractual disputes approximately 80-90% of the time.

#### **Clause Providing for Compulsory Mediation Prior to Litigation:**

Any dispute or claim in law or equity arising out of this agreement or any resulting transaction, including disputes or claims involving the parties to this agreement, their officers, agents, or employees, shall be submitted to neutral, non-binding mediation prior to the commencement of arbitration, litigation or any other proceeding before a tier of fact. The parties to the dispute or claim agree to act in good faith to participate in the mediation, and to identify a mutually acceptable mediator. If a mediator cannot be agreed upon by the parties, each party shall designate a mediator and those mediators shall select a third mediator who shall act as the neutral mediator, assisting the parties in attempting to reach a resolution. All parties to the mediation shall share equally in its cost. If the dispute or claim is successfully resolved in the mediation, its resolution will be documented by a written agreement to be executed by all parties. If the mediation does not successfully resolve the dispute or claim, the mediator shall provide written notice to the parties reflecting the same, and the parties may then proceed to seek an alternate form of resolution of the dispute or claim, in accordance with the remaining terms of this agreement and other rights and remedies afforded to them by law.

#### **Clauses Providing for Compulsory Mediation Followed by Arbitration (Step Clauses):**

A “step clause” provides for a mediation or other Alternative Dispute Resolution process to precede an arbitration proceeding. The first Step Clause below assures the parties that a preliminary remedy in aid of arbitration will be available during the pendency of any mediation proceeding. The second Step Clause below provides no such assurance (although a preliminary remedy might otherwise be available depending upon the facts and the jurisdiction in which the application is brought), and simply provides for mediation to precede an arbitration.

#### **Step Clause 1 (this Clause follows the contract’s arbitration clause):**

Prior to the appointment of the arbitrator(s), and within 10 days from the date of commencement of the arbitration, the parties shall submit the dispute for mediation. The parties will cooperate with one another in selecting a mediator, and in promptly scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. If the dispute is not resolved within 30 days from the date of the submission of the dispute to mediation (or such later date as the parties may mutually agree in writing), the administration of the arbitration shall proceed forthwith. The mediation may continue, if the parties so agree, after the appointment of the arbitrators. Unless otherwise agreed by the parties, the mediator shall be disqualified from serving as arbitrator in the case. The pendency of a mediation shall not preclude a party from seeking provisional remedies in aid of the arbitration from a court of appropriate jurisdiction, and the parties agree not to defend against any application for provisional relief on the ground that a mediation is pending.

**Step Clause 2 (this Clause follows the contract's arbitration clause):**

The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to its successor, for mediation, and if the matter is not resolved through mediation, then it shall be submitted to its successor, for final and binding arbitration pursuant to the arbitration clause set forth above. Either party may commence mediation by providing to mediator and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with a mediator fl of neutrals, and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration at any time following the initial mediation session or 45 days after the date of filing the written request for mediation, whichever occurs first. The mediation may continue after the commencement of arbitration if the parties so desire. Unless otherwise agreed by the parties, the mediator shall be disqualified from serving as arbitrator in the case. The provisions of this Clause may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys' fees, to be paid by the party against whom enforcement is ordered.

Although we have drafted the above clause in a manner we feel is comprehensive, it should be reviewed by legal counsel, as we do not make any representations as to its completeness, utility, or its binding nature. By providing this language for your use, we do not purport to be providing a legal advice or a legal opinion of any kind.