Choosing the Right Tool for the Job:

Resolving Disputes on Complex Construction Projects

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In this issue

Anyone who has ever been involved in a complex, multi-party construction project will know that conflict is virtually inevitable. Whether it is the cost of work performed under an owner-requested change order, the need for revised engineering to correct design deficiencies, or the insolvency of a major player in the midst of construction, disagreements can arise in an almost limitless number of circumstances and involve sums ranging from hundreds to millions of dollars. Left unaddressed, disputes can severely disrupt the project and quickly eat into the parties' profits. A fair, efficient and effective process for resolving them is therefore vital.

DISPUTE PREVENTION

Ideally most disputes can be resolved at site or between senior managers of the respective players. The objective should always be to resolve disputes without the involvement of a third party. To meet this objective, parties on complex projects are increasingly engaging in "partnering". Partnering is not a legal framework but rather an approach to project management based on open communication, collaboration and a commitment by the parties to work together toward common goals.

Partnering is a process which must start in the very early stages of the project, often well before construction even begins. Generally speaking, the parties will agree on a common set of values, objectives and processes, all with a view to keeping lines of communication open and the project moving forward. Importantly, partnering does not override or extinguish the parties' legal and contractual rights. Instead, partnering encourages the parties to discuss resolutions to problems before they turn into "disputes".

Unfortunately the reality is that some problems cannot be easily resolved. In these cases, a well-planned and executed process for dispute resolution becomes critical. Without it, the parties may find themselves mired in minutiae which delays resolution and potentially jeopardizes the project.

MEDIATED DISPUTE RESOLUTION

Most will agree that a negotiated resolution is almost always better than a binding ruling. To avoid the latter, parties who are unable to resolve a dispute among themselves will often attempt mediation. A more formal means of negotiation, mediation involves a neutral third party who assists the parties with canvassing the nuances of the dispute and bridging the gap between their respective positions. Mediation can take many forms, but is always without prejudice – that is, nothing said or conceded by a party during mediation can be used against that party in the future should mediation not produce a negotiated resolution.

Mediation need not be lengthy, costly or unduly burdensome. Provided the parties approach mediation in good faith and with a sincere desire to resolve their dispute, mediation can be and often is successful. However, when all attempts to resolve a dispute through negotiation fail, parties are left with only one option: a decision by a neutral third party, either through private arbitration or litigation in the Courts.

BINDING DISPUTE RESOLUTION

In reality, every formal dispute resolution process begins with the terms of the construction contract itself. Yet too often parties fail to give their contracts sufficient consideration and agree to standard Alternative Dispute Resolution (ADR) clauses and the associated risk of costly, time-consuming and often unnecessary proceedings.

The standard CCDC Rules for Mediation and Arbitration (CCDC 40) may in some cases suffice. So too may the governing Commercial Arbitration Act. But when parties agree to apply these regimes to all project-related disputes, the parties risk spending more time and energy on expansive disclosure, lengthy discoveries, and costly motions than they do on resolving the disputes themselves. The parties can always rely on such procedures if and when it is to their benefit, but why should they lock themselves into these obligations before knowing if that benefit exists?

A different and almost always preferable approach is to simply leave the process to the arbitrator. To avoid unnecessary delay, strict timelines should be set for the arbitrator's appointment and an initial conference call or meeting to discuss the parties' needs and the means to move the process forward. Provided the parties have selected a willing arbitrator prepared to be flexible on the procedures to be followed, everything else can be agreed upon based on the nature of the dispute, the status of the project, and the constraints on the parties. The extensive discovery process contemplated by many ADR regimes can be substantially reduced, the number of required witnesses pared down, and the length of a formal hearing limited if not eliminated altogether.

When properly employed, the arbitral process becomes what the parties need, when they need it, and arguably the best process available when all else fails.

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