

ALTERNATIVE DISPUTE RESOLUTION

Complex construction disputes can be hammered out

By Robert Silver
and Gary Furlong

Anybody in the construction industry who has ever filed or fought a lawsuit in the court system can understand the frustration, expense and time involved in trying to get a dispute resolved. In most cases there are many parties involved in this type of litigation.

The main reason for multi-party disputes when problems arise is the complex set of dependencies and interrelationships within a construction project. Any problems, changes or delays that occur tend to cause a domino effect that costs everyone downstream time and money, costs that everyone wants someone else to pay for. The two main types of problems are delays and payment schedule problems.

Delays

Schedule delays and timing is the number one reason that multi-party disputes arise in the construction industry. The general contractor is responsible for the progress made in any project. Deadlines must be adhered to and delays caused by any party that affect this progress are not taken lightly. Every party involved in the construction project has agreed to the guidelines or the scope of work to be done prior to being awarded the contract. This contract defines not only the nature of the work, the materials to be used and standard of quality to be met; it also clearly defines when the work must be completed. Based on this, contractors and subcontractors plan their own work schedule on many different projects.

Tenders initially go out from the general contractor to the subcontractors requesting bids. The subcontractors will get quotes and schedules from their

suppliers, which will allow them to submit a bid to the general contractor with exact costing and timing for their part of the project. Most parties involved in the bid process usually depend on some outside



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resources to establish this pricing and availability.

When the general contractor has received all the quotes back, an analysis will be done to determine who will win the bid for each piece of work. Since the lowest bidder is often chosen, this creates a situation in which profit margins are thin for everyone on the project. The general contractor will now submit his project tender to his customer, based on the bids he has received from the subcontractors. If the general contractor is awarded the job, he will expect that all of the subcontractor bids will be honoured. The performance and reputation of the general contractor is now on the line with his client, and there can be significant financial implications if things don't go according to the contract that has been executed.

Imagine that once the schedule has been set, the first subcontractor on the site realizes that it ordered the wrong

materials, and that its supplier will take two weeks to provide the correct materials. This delay will now affect every single trade downstream, possibly affecting six, seven, eight parties, causing delays and damages. All of them will be looking for compensation from the party causing the delay.

Payment schedule

Payment to the individual parties for work completed is the next reason that disputes in the construction industry are often multi-party. Most funding for construction projects is provided by financial institutions. The funds are advanced as the work progresses. This is called a draw or "cost to complete."

When a party issues an invoice, it should be paid as stipulated in the executed contract. The party requesting payment needs to provide a statutory declaration which states that everything provided to the project by the party has been paid for; in other words, it doesn't owe its suppliers or subtrades any money.

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The owner or general contractor is allowed to hold back up to 10 per cent of the payment for 45 days under the *Construction Lien Act*. In many cases, however, the parties submitting their invoices ignore the con-

tract payment schedule and expect payment sooner. This causes hostility within the working relationship and the project. Sometimes a work slowdown occurs until payments are



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made. This delays the general contractor and interferes with his ability to request payments in order to pay the other trades. This will affect numerous other parties.

For every project, the general contractor will be required to communicate and co-ordinate the project with a large number of parties. It is not unusual for a larger construction project to have at least 50 individual companies involved. Each company may have two or three parties involved in order to complete their part of the work. Payment problems causing delays on the project can affect many parties, all looking to the source of the problem for compensation.

ADR as an option

Now that you understand why disputes in the construction industry are usually multi-party, let's look at how these multi-party disputes can be resolved using ADR.

ADR methods can be used in multi-party disputes to reach an agreement that is fair to all parties in an atmosphere of co-operation and mutual respect. More importantly, it can help to restore the relationship through co-operation while advancing the interests of the parties. It is important to use a construction specialist who is trained in ADR and has hands-on construction expertise to help facilitate reaching an agreement.

Because most civil lawsuits settle before trial, the statistics are in favour of a settlement; the problem is that many settlements take place years after the problem arose. ADR can help parties settle significantly earlier in the process, leading to agreements that are more cost-efficient and time-efficient than litigation.

It is important to understand the positions and concessions

made in the course of the ADR process cannot be used against any party in subsequent legal proceedings should the process fail to produce a settlement.

In ADR processes such as mediation or facilitation, the parties are encouraged to move away from taking positions based on their legal rights, to a discussion of their interests. This requires everyone to avoid trashing and bashing.

By avoiding positional behaviour, both sides are able to examine and discuss their real interests. Parties can now discuss the details of the construction project and examine the work done and the costs incurred. Through skillful questioning, at times with the parties facing each other and other times with the parties apart, the ADR facilitator will begin to understand what actually precipitated the dispute.

Once all of the parties understand each other's needs and perspectives, the discussion can shift to a consideration of the options that will help everyone. Different issues for each of the parties will be voiced at the table.

These differences in perspective are normal and should be expected. Recognizing them is key for construction dispute settlement, and the process allows the parties to tailor solutions, which meet the needs and have value for the parties.

Even if complete agreement is not reached during this process, you can still aim for a partial resolution in order to keep the project moving forward, especially when confronted by construction loans and scheduling pressure.

It is important to understand that the ADR facilitator must be neutral and impartial and able to help the parties reach a settlement. It is up to the parties to work out the terms of any settlement by examining the available options and choosing those that work best.

While this process takes both commitment and work from all of the parties involved, the process has the potential for a positive outcome, minimizing expensive delays and costs.

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