

PARTNERING

New Dimensions in Dispute Prevention and Resolution

By Mark E. Appel

The author is the vice president of the AAA's Denver regional office. He is a past-president of the Colorado Council of Mediators and Mediation Organizations and is an adjunct professor at the University of Denver College of Law and at University College, University of Denver.

Partnering is a collaborative contracting process. It could be argued that partnering is not alternative dispute resolution (ADR), but rather an effective management process using ADR methodology. Indeed, the primary focus of partnering is *dispute prevention*, as opposed to dispute resolution. Since no relationship is without some conflict, however, the process also focuses on the adoption of efficient and effective dispute resolution techniques.

Partnering was created in response to a perception that, too often, the contracting process is designed and implemented in an adversarial atmosphere where collective needs and interests are either subordinated to individual needs, or ignored entirely. This leads to mistrust, a lack of open communication, and ultimately, conflict. The partnering process responds by creating a framework for team building, where open communications and commitments to common goals, mutual respect and trust can be developed.

Construction contracting exists in a largely adversarial atmosphere where "collective needs and interests are either subordinated to individual needs, or ignored entirely." The result? Closed lines of communication, mistrust and escalating disputes. A growing need to counter this divisiveness has led to the evolution of partnering, a team-building process based upon mutual trust and respect that nips conflict in the bud and fosters harmonious relationships among owners and contractors.

A Brief History

The partnering process was created in the private sector construction industry. In his article, "Partnering in Government Contracts, The Ultimate in Dispute Resolution?" (*World Arbitration and Mediation Report*, October 1990), David P. Johnson, Senior Counsel, U.S. Army Corps of Engineers, traces partnering to contracts involving DuPont Engineering and Flour Daniel in the mid-1980s.

Reasons given by corporations and their contractors for using partnering are many, and include the following:

- focus on quality products and services;
- reduce costs ("value engineering");
- fewer field changes and/or re-work;
- flexible resource utilization;
- create competitive advantage;
- increase project safety;
- maximize profits for *all* parties; and
- encourage innovation.

Positive Expectations

In 1989, the construction industry created a task force to study the partnering process. In the report which ensued, 91% of the contractors and 86% of the owners surveyed agreed that with partnering, projects schedules will be more dependable. Survey respondents were less optimistic regarding expectations of improvement in project safety (contractors 73%; owners 43%). But, in perhaps the most compelling statistical endorsement, contractors and owners agreed that with partnering project costs are reduced by 5% and owner's costs by at least 10%.

Recent significant growth in the use of the partnering process has occurred in government contracting. Owners include

Readings in Partnering

F. Carr, "Partnering: Dispute Avoidance the Army Corps of Engineers Way," *The Punchlist*, American Arbitration Association, Vol. 14, No. 33 (1991).

"Drafting Dispute Resolution Clauses: A Practical Guide," American Arbitration Association (1992).

L. Edelman, *et al.*, "Partnering in the U.S. Army Corps of Engineers," IWR Pamphlet 91-ADR.-P-4 (December 1991).

R. Fisher and W. Ury, *Getting to Yes*, Houghton Mifflin Co. (1981).

"In Partnering a Creative New ADR Concept, Talk and Team Spirit Are the Fundamentals," 38 *ALTERNATIVES*, Vol. 9, No. 3 (March 1991).

"In Search of Partnering Excellence," Construction Industry Institute, special publication, 17.1 (July 1991).

"Partnering, A Concept for Success," The Associated General Contractors of America (September 1991).

P. Scholtes, *The Team Handbook, How to Use Teams and Improve Quality*, Joiner Associates Inc. (1988).

state and municipal public works and transportation departments, as well as the U.S. government. One of the earliest historical proponents of partnering was the U.S. Army Corp of Engineers. According to Lester Edelman of the Corps, there are currently about 150 separate partnering programs in effect in government construction and supply contracts.

Partnering is well-suited to government contracting. Historically, relationships between government owners and contractors consisted of equal parts fear and loathing. For example, exhibits from an arbitration hearing showing that both the public owner and general contractor hired claims experts within one month of the project start date were an acute indication of the level of each party's mistrust, lack of communication and ultimate need for dispute resolution services. From the public owner's perspective, vigilance may be based upon a legitimate concern for the public's interest. However, where mistrust is substituted for vigilance, disputes inevitably result.

Part of the problem is the sealed bid, fixed price contracts that have become the industry standard. Prior to the bid being let, precious little communication takes place between the owner and prospective contractors. After the project begins, communications are often stilted, with each side seeking to protect its own perceived interests. Getting contracting partners to think and act as a team is a central tenet to the Corp of Engineers' adoption of the partnering process.

Another factor is the sheer weight of bureaucracy which often slows the decision-making process. This is particularly problematic in an industry where timing is critical in terms of cost efficiency, profit and loss. It is ironic that purposeful, deliberate decision-making aimed at cost effectiveness may instead be fueling the contention process.

How Partnering Works

The decision to partner should be made prior to creation of the contract. Having evaluated the status quo in terms of quality, cost containment and facility

of communication, and having made a decision to pursue partnering, the process can be committed to in the bidding process (*e.g.*, government contracting), or negotiated after careful selection of a suitable partner. An agreement to partner should include at least the following elements:

- Goals of the partnering relationship: project performance; project quality; project relations.
- Necessary organizational involvement: commitment to project "team"; time frame for selection of partnering retreat facilitator; time frame for participation in the partnering retreat; commitment to good faith participation in the partnering process.
- Necessary individual involvement: principals of contracting parties; key project decision-makers; key line decision-makers.

To better illustrate the elements of a successful partnering agreement, a sample provided by the American Arbitration Association is reproduced on page 50. A partnering agreement provided by the U.S. Army Corps of Engineers appears on page 51.

Keep in mind a critical distinction that the partnering process *does not* serve as a substitute for the parties' contract. The contract creates expectations, legal rights and obligations. The element which is missing, and what partnering *does* seek to create, is a sound working relationship.

Is there any interplay between partnering and contractual liabilities? While typically seen as two distinct aspects of the contracting parties' relationship, it would seem that some effect on contractual relations is likely, perhaps even desirable. Purported aims of partnering include open communication, innovation, and risk and reward sharing. These become problematic where the underlying contract engages in one-sided risk shifting. For example, a contract which indemnifies the owner, at the expense of the contractor, for mistakes in value engineering reached through joint communications might serve as a disincentive to meaningful partnering.

Elements Of Partnering

The core element of partnering is the partnering retreat. Before the job gets underway, key decision-makers from each of the contracting parties participate

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in a several-day workshop away from their places of business. There, they can get to know each other, listen to each other's priorities, and come to understand the needs and interests of their project partners. In an effective partnering retreat, the participants will also develop the hallmarks of a successful working relationship: open communications, trust, a willingness to work through problems, explore options and create solutions.

To get off on the right foot, the retreat should be scheduled as soon as practicable after the contract is let. One important early decision is the selection of participants for the partnering retreat.

Who attends the retreat is in some respects a measure of the contract's complexity. A general rule of thumb is that all persons whose decisions will have significant impact upon a project's quality, timeliness or cost should be invited.

Retreat Facilitator

The use of a neutral facilitator greatly enhances prospects for a successful retreat. Having no vested interest in the project allows the neutral facilitator to explore contract concerns, as well as the respective partners' needs and interests,

in a non-threatening manner. A skilled facilitator can also be of assistance by:

- building camaraderie, a sense of "we";
- creating an atmosphere where creative, innovative thinking is encouraged;
- keeping the focus on problems and off of people; and
- securing a broad set of project aims (charter or compact).

Where relationships have historically been adversarial, moving contracting parties out of their traditional competitive mind-sets and into a shared decision-making environment is quite a challenge. Early in the partnering retreat, the parties should engage in exercises that focus them on reaching consensus and exploring interests. These skill-building sessions will come in handy when the project gets underway and the first problems arise.

Focus On Project Concerns

After some initial team and skill-building exercises, the parties should, with the assistance of the facilitator, spend some time surfacing any concerns they may have with the project, and exploring potential solutions.

Partnering has led to completed projects without any formal disputes. Above, workers constructing a New York City hospital.

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The AAA's Sample Clause

The partnering process "creates a framework for team building, where open communications and commitments to common goals, mutual respect and trust can be developed." The partnering clause below reproduces the elements that should be incorporated into a successful partnering agreement:

In order to complete this contract most beneficially for all parties, the parties to this contract agree to form a partnering relationship. This partnering relationship will draw on the strengths of each party in achieving a quality project. Within ___ days of the date of execution of this contract, the parties will request from the American Arbitration Association the appointment of a neutral facilitator for the partnering retreat. The partnering retreat will take place as soon as is practicable, but in any case within ___ days of the date of execution of this contract. The parties to this contract agree to good faith participation in such partnering retreat. Individual participation in such partnering retreat shall be agreed upon by the parties, but shall include at least the following project personnel:

[list personnel names here]

The cost of administering the partnering retreat and the fees and expenses of the partnering facilitator shall be borne equally by the contracting parties.

All parties to the contract should commit themselves to creating and sustaining a quality project. Precepts of total quality management (TQM) provide models for product expectations and contract performance. For example, barriers may need to be broken down between strictly defined roles within project management. In construction partnering, contractors need to be able to address concerns regarding design choices as well as construction materials and management. If defects are to be prevented, *all* members of the project team need to feel comfortable during the partnering retreat to comment on every aspect of the project performance.

Quality consciousness, as opposed to fear, must become a driving force for project personnel. By creating an atmosphere in which product and project quality comes first, management time often otherwise wasted on constant inspections and evaluations can be better utilized for anticipating problems and improving product quality. Where quality becomes a focus, project re-work, inefficiency and delays can be minimized, if not eliminated altogether.

Value Engineering

Money is a powerful motivator. Whether the parties actually take part in exercises during the partnering retreat geared at accomplishing cost savings for the project, or whether the time-frame limits participants to only setting goals

regarding such value engineering, this is one topic that should be touched upon during the course of the retreat. One sure way to create incentives is for project management to establish a policy and methodology for sharing cost savings realized through value engineering.

A negotiation strategy currently finding favor in government contracting is "issue escalation." Contracting parties agree that when disputes occur, the involved parties will negotiate a solution, or carry the problem up to their superiors *quickly*. Issue escalation recognizes that inertia in decision-making is counterproductive. Additionally, encouraging parties to explain their rationale to superiors may create a joint desire to solve problems rather than simply ignore them or pass them off.

Third-Party ADR

The partnering retreat provides a unique opportunity to do something that contracting parties rarely do, which is to acknowledge that disputes *do* occur, and think about appropriate methods to resolve those disputes. For instance, the parties might start by looking at the dispute resolution provisions, if any, in their contract.

Standard form contracts in the construction industry routinely reference at least the arbitration process, and frequently incorporate the opportunity for mediation as well as arbitration. Parties should consider whether such provisions are adequate, or whether they should be "tailored" to meet the needs of the particular contract. Instead of the classic use of arbitration (work now, grieve later), the parties might agree to establish a dispute review board (DRB) or instant arbitration process, to resolve disputes as they arise on site.

In a substantial contract, the price paid to have neutrals available for hearing and resolution during the course of the contract may be well worth the dollars saved in delay damages, should their services be needed. Parties might also at this time establish qualifications for potential neutrals, and set the timeframe and parameters for the information sharing necessary to make such processes effective.

Project Charter (Compact)

The last act of participants in the partnering retreat is drafting and signing-off on a project charter. Charters typically

look more like compacts than contracts, committing the parties to broad project goals. Some of these goals can be easily measured. Others, while less tangible, are arguably every bit as essential to the ultimate success of the process. Conceptually, it might be preferable to organize the charter into separate sections which address partnering relations, dispute resolution design and performance objectives. Agreements commit the parties to broad project goals such as:

Partnering Relations

- surface project concerns as soon as possible;
- communicate openly and honestly;
- treat all partners with respect;
- commitment to joint problem solving;
- make decisions quickly at lowest possible level.

Dispute Resolution Design

- commitment to avoid litigation;
- commitment to resolve conflicts at lowest possible level;
- commitment to ADR.

Project Performance

- finish on time;
- finish on budget;
- focus on project safety;
- commitment to project quality;
- commitment to maximize cost savings/value engineering.

In order to ensure that the goals identified in the project are met, the parties, as part of the partnering retreat, should develop an implementation plan including objective criteria to measure against performance, and evaluation forms to be used at monthly meetings to measure success in reaching performance standards.

For example, if project quality is one of the performance objectives, a standard for the number of field changes or amount of re-work might be the appropriate measure of performance. Likewise, if project safety is important, the severity or number of injuries on the project can be a measure of success. Successful partnering relationships can be neither developed nor sustained absent the support of top executives, as well as continuing follow-up to monitor partnering success and get the project back on track when problems occur. Any party to the partnering relationship should be able to convene meetings quickly, and whenever necessary. Additionally, ongoing meetings to evaluate both successes and problems should be scheduled.

Prospects for Partnering

What types of projects are ripe for the use of partnering? Major corporations and the government have extended their use of the process to non-construction related functions. For example, Proctor and Gamble has successfully incorporated the process into its diaper business purchasing services. The U.S. Army Corps of Engineers has used partnering in its long-term supply contracts.

Several common themes such as enhanced communication, shared risks and rewards, increased quality and cost containment run through the various rationales offered by proponents of the process.

Because the partnering process takes time, money, and commitment, its use to date has been limited to large, long-term contracts and projects. Given its recognized benefits, partnering should work well in any long-term commercial venture involving subcontracting, partnerships, or joint ventures. Partnering might work well between subsidiaries of the same corporation.

Partnering should prove especially useful in international ventures, where the contracting parties' already divergent interests are often further confused by cultural and communication barriers. Pioneered by the construction industry, the promise of partnering far exceeds its use to date. ■

The Army's Clause

The U.S. Army Corps of Engineers helped to pave the way for the use of partnering as a means of dispute prevention and early resolution. The following sample partnering clauses appear in the Army Corps of Engineers IWR Pamphlet 91-ADR-P-4 (Dec. 1991):

In order to complete this contract most beneficially for both parties, the Government proposes to form a Partnering relationship with the Contractor. This Partnering relationship will draw on the strengths of each party in an effort to achieve a quality project done right the first time, within budget and on schedule. The Partnering relationship will be bilateral and participation will be totally voluntary. Any costs associated with Partnering will be shared equally with no change in contract price.

In order to most effectively accomplish this contract, the Government is encouraging the formation of a cohesive partnership with the contractor and its subcontractors. This partnership will strive to draw on the strengths of each organization in an effort to achieve a quality project done right the first time, within budget, and on schedule. This partnership will be bilateral in make-up, and participation will be totally voluntary. Any costs associated with effecting this partnership will be agreed to by both parties, and will be shared equally with no change in contract price.

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