

Alternative Contract Delivery Systems

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Introduction:

The construction industry has been dramatically affected by numerous changes to the laws and regulations controlling it over the past three decades. While these changes have been much more drastic in some parts of the world than others, few areas have escaped change totally. Environmental considerations alone have impacted not only individual projects, but entire construction-related industries, such as logging, transportation and marine use projects, to name a few...

While we see tremendous progress in quality and volume output of work on projects that involve many computer terminals tied together to link disciplines in design and review, from a legal perspective, the question of ultimate responsibility for failures, should they occur, will be more challenging than it has been in the past, and may require the development of new processes for adjudication of issues.

Many are convinced that ADR processes will have to be further developed, modified, combined and strengthened in order to bring experienced and expert neutrals into play. These experts will need to be educated and experienced as much on the overall construction process as on the judicial process. Panels of mediators, arbitrators and facilitators must be strengthened worldwide, and we must work to convince "owners" of their need to invest in supporting the improvement of these processes. Further, attorneys for the owners must be willing to support the need for "soft" conflict resolution processes in addition to litigation and other third party resolution methods.

Support for ADR within contracts will come from early discussions regarding the need for such provisions. ADR is rarely a "stand-alone" method of dispute management and resolution, but, rather, most often works in concert with litigation. Considering the number of civil and criminal cases that settle before being heard in court, ADR seeks to speed up the process of settlement that occurs this way and to find methods to bring it to fruition earlier in the process.

One ADR process that is already in use and continues to be refined and improved is called "partnering." Partnering is a form of risk management, in which participants are encouraged to develop an interdisciplinary vision of the project, then to use that vision to more clearly identify, and thus, manage the risks.

As an example of the way partnering can become part of an overall system of dispute resolution management, consider the case study of the Tren Urbano Project in San Juan, Puerto Rico:

Tren Urbano is a regional rail transit system now under development in San Juan. The initial 11-mile line will run along one of the most densely populated corridors in the United States,

serving an estimated 115,000 travelers per day. The PRDTPW (Puerto Rican Department of Transportation and Public Works) received approval of the Environmental Impact Statement and the Record of Decision for of the project in 1996.

Recognizing the difficulties associated with bringing the necessary expertise together to build such a large and complex project, the PRDTPW determined to invest significantly in building a dispute resolution system into the project from the earliest stages. Not only did they have to face the usual communications problems of the construction industry, but this project attracted international joint ventures, which then introduced a significant management concern over cultural difference among the players.

Contract documents included provisions for the establishment of Dispute Review Boards as a means to have swift justice readily at hand when issues cannot be resolved by the parties. Dispute Review Boards are standing boards of industry professionals with specific process knowledge related to each contract. The boards meet quarterly to keep pace with its assigned contract. Should an issue warrant a third party decision, the board stands ready to hear evidence and render a decision while work progresses. . .

American Arbitration Association was specified in the contract documents as the provider of partnering facilitation services for all of the contracts in Tren Urbano Phase One. American Arbitration Association collaborated with Adaptive Consulting Team to design and implement all partnering sessions for all contract segments, and the author serves as program designer and lead facilitator.

There are over 150 professionals representing myriad disciplines and specialties working for the project's General Management and Architectural and Engineering Consultant (GMAEC), which was established to provide oversight of the project in San Juan. American Arbitration Association and Adaptive Consulting Team closely coordinated invitation lists and agenda development with GMAEC personnel.

The total budget for of Tren Urbano is more than \$1 billion, and partnering sessions were held on five major contract segments totaling that amount during 1996. . .

All of the partnering sessions were geared to accomplish the following minimum objectives:

- Identify project risks from all perspectives
- Improve inter-disciplinary communication and vision
- Promote teamwork among participants
- Minimize cultural differences and the negative impacts they can have on projects
- Develop a common vision of the "big picture"
- Provide dynamic feed-back loops to monitor project progress
- Guide participants in making their own process adjustments where needed
- Provide increased management of project risks by all participants
- Establish uniform project goals for each contract segment
- Anticipate and avoid costly disputes by discussing alternatives early, and agreeing to attempt informal mediation before proceeding with any other legal process of resolution

Although it is still too early to completely assess the value of partnering to the Tren Urbano project, comments received from senior management of all participants are extremely

positive and express hope that the gains exhibited can be maintained over the balance of the work. Follow-up sessions are underway currently, and a number of issues have been successfully dealt with through informal mediation. . .

Project participants, including Secretary Carlos Pesquera, who kicked off every facilitated session personally, are unanimous in their initial appraisals that partnering has been very beneficial. They look forward to follow-up sessions as work progresses further. The new line is scheduled to begin revenue operations in 2001.

A typical partnering scenario begins with an initial strategic management session with the principals involved in the three project elements common to all projects: specifically, design, constructor, and owner (through a contracting authority).

The principals themselves are encouraged to take an active role in the development of partnering agendas, project management goals, and the preparation of the invitation lists. This meeting usually takes place toward the end of a workday several weeks ahead of the initial partnering session. All partnering sessions, including the strategic management session are retreats, held away from offices, telephones, and daily business interruptions. Cellphones, and radios are put aside for the duration of the sessions, and adequate breaks are provided for management of messages. This undivided concentration on the project is crucial to partnering success, as is the positive attitude of senior managers toward the process. In fact, partnering cannot be successful without the latter.

Many of these management strategy sessions involve significant discussion on who should be invited as "stakeholders" to the process. The author leans toward inclusiveness rather than exclusiveness, although no one should be invited to participate without accountability. It is not enough just to have an opinion. Participants must be willing to hear other arguments and work to find the best "engineering solution" to problems identified. . .

Once the initial agenda is agreed upon, and the invitation list is determined, the principals establish a partnering oversight body (of its own design) that is representational of the three project elements. This informal oversight body provides an opportunity for the establishment of loop-back performance links that will stay with the project for the duration.

Should important goals not be reached in a timely fashion, or agreements reached in partnering sessions not be adhered to, these loop-back performance links keep the partnering oversight body informed, and provide them with an opportunity to take action. Actions taken may include, but are not limited to, additional partnering sessions, mediation sessions on specific issues, arbitration on specific issues, or anything else the body determines to be productive.

All partnering sessions and/or strategic management sessions have some similarities in that they are, first and foremost, informal, outside the legal confines of the contracts involved, and are intended to offer opportunities for questions and answers to questions in a group setting. Expectations for internal processes are formulated by the group itself.

Opportunities for questions across disciplines have been limited, rather than increased, in the typical construction scenario that has developed over the past three decades or so. Pre-construction meetings rarely consist of more than the "owner" making a statement to the contractor and his subs, often quoting verbatim sections of the contract, most likely having to

do with liquidated damages.

Opportunities for questions are limited, and, more importantly, such meetings are not conducive to open communication. Contractors, and, especially subs, are often very intimidated. Partnering, on the other hand, for the first time in years, provides an opportunity to shift that momentum in the other direction.

Conclusion:

Through partnering risks are better identified, understood more clearly, and can thus be managed, rather than reacted to. Through a series of partnering sessions and follow-up sessions throughout the pre-design, design, final design, and construction phases of a project, quality, safety, and on-time delivery can be improved.

While nothing is perfect, a managed process is possible through partnering, and a common vision of the project can be developed by all the participants. This common vision of the project is particularly important on complex, inner city projects, where the real story of the project is not told at neat presentations with computer-generated audio visual graphics, but, rather, is told in the post office, drug store or supermarket, where project participants run into their neighbors.

If they have not worked to develop a common vision for the project, which includes milestones for certain major events, it becomes evident quickly, and the seeds have been sown for community distrust, which can lead to unforeseen work interruptions, unsafe conditions, or other kinds of problems.

