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A New Approach to Construction Disputes

With private construction at its slowest pace in years, development deals stalled or stopped, more bidders chasing fewer jobs, and money flow from lenders to owners to contractors slower than normal, the last thing the construction industry needs is more claims and disputes. Unfortunately, as profit margins get smaller (various public owners report that bids are being received that are 35 percent less than the engineer's estimate) and cash flow is constricted it seems that seeds of discord have been planted leading inevitably to more disputes and claims. In this atmosphere, what can be done to avoid expensive and protracted litigation and arbitration proceedings?

The construction industry has always been at the "cutting-edge" of innovation in terms of alternative dispute resolution. Arbitration was pioneered by the industry more than 100 years ago as an alternative to litigation. Mediation, dispute review boards and partnering are all dispute resolution innovations that the construction industry has embraced, and which it continues to employ in an effort to resolve or prevent disputes.

There is a new and better way to resolve construction disputes so as to prevent them from festering, becoming major claims and disrupting the successful completion of a project. This method is called "real-time dispute resolution."

There are two approaches to real-time resolution. One is to have the parties, at the time of entering into the contract, designate a project neutral. The project neutral is a trained dispute resolution specialist who joins the project at its inception and follows the building process from groundbreaking to completion. He or she, unlike any other player on the construction



team, has only one client: the project itself. The project neutral is used to mediate and facilitate the resolution of disputes that cannot be resolved at the project management level and, if the parties agree, to actually rule on matters so that disputes can be resolved on an ongoing basis. Using a proactive approach, the neutral can also work with the project team to look ahead and avoid many disputes altogether by identifying and addressing potential problems before they happen.

But what if the parties have not designated a neutral at the time of contracting? How can the parties design an effective process after a dispute arises and when their contract is silent or calls only for traditional mediation, arbitration or litigation? This is where a second approach, called "rapid resolution," can be used. Rapid resolution consists of real-time dispute resolution by "rapid responders" who are experienced and trained construction industry dispute resolution experts. They include mediators with legal backgrounds but also include engineers and construction management experts who are prepared to meet with the parties within a period of a few days of being called to gather information and give a recommendation of a specifically tailored process to resolve the issues confronting the project participants.

While most alternative dispute resolution providers offer panels of neutrals who are prepared to mediate or arbitrate construction disputes, these traditional techniques usually take

months to put into place. In contrast, the rapid resolution team is prepared, on an immediate basis, to make an assessment of the dispute and recommend creative resolution methods. For instance, if a dispute involved a structural engineering issue, a structural engineer member of the rapid resolution team might be brought in to make a neutral evaluation and recommendation (which could either be binding or non-binding). Similar approaches can be used for accounting, scheduling and legal issues.

This team can also facilitate and moderate structured negotiations between the parties; offer evaluative mediation; conduct binding or non-binding arbitrations on a "fast-track" basis using technical neutral experts as appropriate and as agreed upon by the parties; and conduct pro-active sessions with the parties to avoid future disputes.

Neither owners, contractors or design professionals can afford protracted and expensive litigation or arbitration, particularly in the current economic environment. As it always has, the construction industry and the lawyers serving the industry need to adopt new and innovative ways of preventing, mitigating and quickly resolving disputes. Positive change is available now. By making sure your clients are familiar with project neutrals and rapid resolution and incorporating these methods into your arsenal of dispute resolution tools, construction lawyers can help their clients resolve disputes efficiently, economically and fairly.



Kenneth C. Gibbs

is a full-time mediator, arbitrator and project neutral with JAMS based in Santa Monica. He is an Advisory Board Member of the JAMS Global Engineering and Construction Group. He may be reached at kgibbs@jamsadr.com.