

# **DISPUTE MANAGEMENT PROGRAMS**

**PARTNERING, CLAIMS MANAGEMENT**

**AND DISPUTE RESOLUTION**

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# **DISPUTE MANAGEMENT PROGRAMS: PARTNERING, CLAIMS MANAGEMENT AND DISPUTE RESOLUTION**

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## **The Problem**

Construction disputes are costly, disruptive, and too frequently lead to litigation. This can threaten the profitability of construction contractors and the fiscal integrity of project owners, both public and private.

For contractors, inadequate or delayed compensation for disputed extra work, delays, acceleration and impact can result in significant bottom line losses. In some cases, it can result in business failure. Owners, too, are subject to unexpected and uncontrolled additional project costs that wreak havoc with budgets, require additional financing, and threaten the profitability of privately financed projects. Architects and engineers are also affected by the additional efforts to resolve disputes or to defend themselves against charges of errors and omissions.

Furthermore, disputes over the responsibility (entitlement) for additional costs and the amount (damages) can disrupt working relationships between the owner, designer and the contractor. The result often is further delay, strained relationships and unnecessary costs. In the United States, and to a lesser degree in other countries, the costs of litigating or arbitrating disputes can be enormous.

For example, a recent \$300,000 arbitration award on a \$600,000 sewer contract cost over \$200,000 in legal fees, \$7,000 in arbitration administrative costs, and \$50,000 for a three-person arbitration panel meeting for two weeks of hearings and innumerable legal maneuvers. The legal and arbitration costs could have been cut by half, had the parties and their attorneys not been so contentious. Litigation, however, would have been even more expensive and taken years to conclude. The contractor, who had been shut down due to denied compensation, was at least able to resume business as a result of early settlement.

This paper describes a philosophy for managing disputes and offers a concise overview of techniques for avoiding conflict, resolving disputes, and winning in court if necessary. While this information is based primarily on experience in the U.S. construction industry, many of the techniques are applicable world-wide and translate well to other industries.

## **The Solution -- A Dispute Management Program**

A Dispute Management Program (DMP), tailored to the specific needs of each contractor and owner, can prevent the majority of disputes and contain the impact of those that do occur. The DMP consists of a reasoned approach to construction disputes integrated with the following concepts into one consistent program:

- ◆ Better Project Management
- ◆ Dispute Avoidance Through Partnering
- ◆ Effective Claims Management Procedures
- ◆ Alternative Dispute Resolution (ADR)
- ◆ Firm But Fair Legal Strategy and Tactics

The DMP is not a new body of knowledge, nor are the individual elements of a DMP that much different from what some organizations already practice. What is unique is how a DMP marries the relatively

new (but old-fashioned) concept of partnering with modern techniques for dispute avoidance and resolution, all within an integrated philosophy and set of procedures.

## **Description of a Dispute Management Program**

The elements of a DMP include both a philosophy and some <sup>1</sup> or all of the following techniques:

- ◆ Project management policies and procedures that ensure projects are better managed, minimizing errors and other sources of conflict.
- ◆ Training in interpersonal skills for all members of the design and construction team, so that interpersonal dynamics are more productive, with less tension and conflict.
- ◆ Partnering to promote a more successful project environment, where all parties work together and claims are avoided or readily resolved.
- ◆ Dispute avoidance and collaborative problem-solving techniques to reduce costs, increase quality, and improve the process.
- ◆ Win/win negotiation techniques to foster prompt resolution of conflicts.

- ◆ Improved claims management procedures designed to support dispute resolution and winning in court if necessary, without adversely affecting the partnering attitude. This includes thorough documentation with prompt notice of potential problems, without posturing or blame, ensuring the facts are known and that everyone can participate in problem solving.
- ◆ Alternative Dispute Resolution (ADR) to resolve or adjudicate disputes not resolved by the project team in order to avoid the delay, cost and negative impact of litigation.
- ◆ Legal strategies that are firm but fair, with an emphasis on winning without the legal gamesmanship that delays or increases the cost of resolution.

The DMP includes a sequence of alternative techniques, progressing from pro-active to re-active. It starts with a collaborative or partnering philosophy, transitions to a cooperative approach, and then to an adversarial relationship only if disputes cannot be resolved. Figure 1 charts the elements of a DMP and is followed by a brief discussion of each technique.

### More Effective (Total Quality) Project Management

One of the most important techniques for avoiding disputes is better project management by all parties:

- ◆ The owner's planning, decision-making, and oversight -- so that projects are not delayed until the last minute nor started with ambiguous objectives or incomplete criteria, but are managed effectively and efficiently.
- ◆ The designer's pre-design to ensure the project scope, cost and budget are clearly defined; design management to eliminate errors, ambiguities and incomplete documents; and contract administration to facilitate rather than hinder construction. This requires slightly higher design fees, but will pay enormous dividends.
- ◆ The contractor's jobsite management so that the work is carefully planned, diligently pursued, correctly constructed, and safely managed.

Good project management is relatively inexpensive and pays dividends far above the cost of implementation. It requires documented procedures and training.

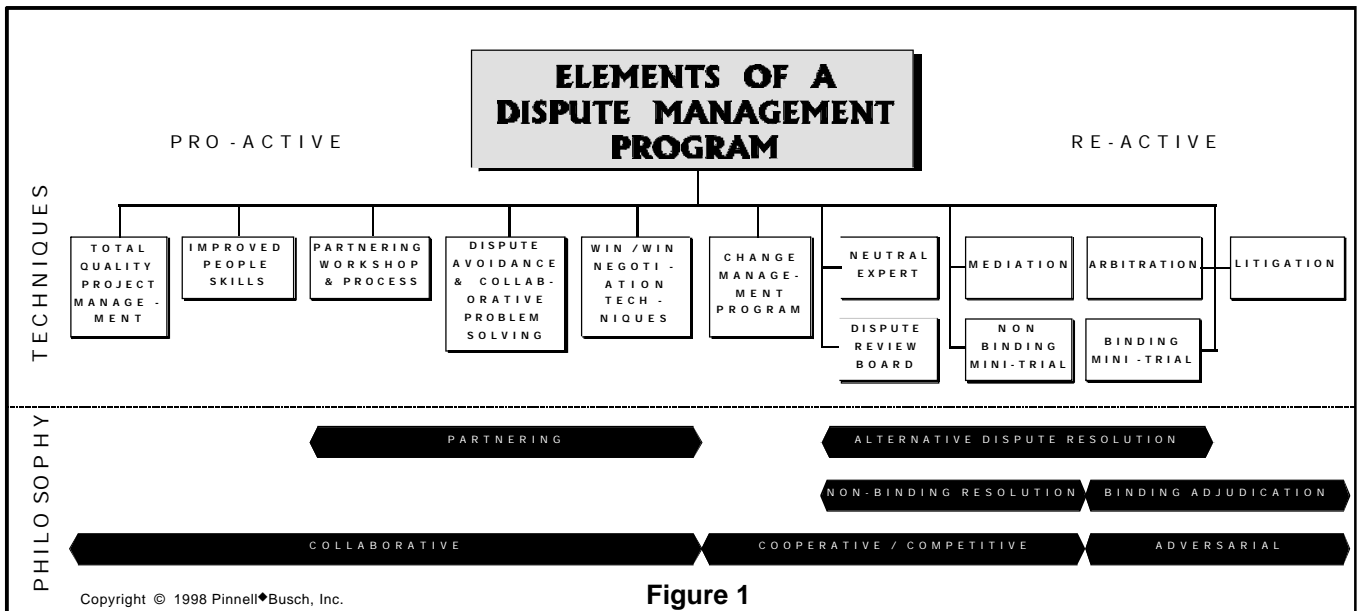


Figure 1

## Interpersonal Skills

The next recommended step for implementing a DMP is to improve everyone's people skills. One approach to improving interpersonal skills is through: (1) training in recognizing behavior styles based on some reasonably easy-to-understand model, (2) guiding each individual through a self-administered test to determine their own behavioral style, (3) explaining how each individual's style affects their success in dealing with others, and (4) teaching how to recognize the behavior style of others and to work more cooperatively with them. A two day seminar is generally sufficient to train personnel in a workable behavior model and how to use that model to understand their own and others' styles and needs.

Other interpersonal skills that often need to be improved include communication, negotiation, and collaborative problem solving. Reading material for self-study and seminars are available from a number of sources.

## Partnering<sup>2, 3, 4, 5, 6, 7, 8</sup>

The most important element in the success of a DMP is the concept and process of partnering. Partnering is simply a change in attitude, from an adversarial relationship to a partnership in which there is mutual trust and respect. It requires a change in the "culture" of the project team. All parties -- owner, designer, contractor, subcontractors, suppliers, and affected members of the public -- join together in an informal partnership to ensure a more successful project for all. It isn't easy to change attitudes, however. Formal procedures with considerable, continuing efforts are necessary to make it work.

Partnering is not a contractual agreement, nor does it create legally enforceable rights or duties.<sup>7</sup> Although described in the contract documents, its execution is outside the contract.

Partnering usually includes the following steps, which vary depending upon the size of the project and the participants' past experience with partnering:

- ◆ Include a partnering clause in all contracts.
- ◆ Secure top management commitment. If the parties are not familiar with partnering, a pre-workshop partnership development seminar for top management and key project personnel, a "strategic partnering session", is advised.
- ◆ Identify a strong partnering "champion" on the project team. This person is essential to partnering success.
- ◆ Invite all "stakeholders" having a significant stake in the process of the project to participate in the partnering workshop. This should include the executive level, until an organization has participated in several partnering efforts.
- ◆ Select the best available partnering facilitator. He or she must be neutral and a "people" person with considerable skills in personnel relations, communication, conflict resolution, teambuilding and goal setting. Knowledge of the industry and prior experience as a partnering facilitator are necessary.
- ◆ Conduct pre-workshop analysis and planning so that the facilitator understands the basic elements of the project, critical dates and tasks, the personalities and past history of the parties in dealing with each other, the basic expectations and concerns of each stakeholder, and other critical issues that may need to be resolved during the workshop. Customize the workshop for the project and participants, and provide background material before the workshop.
- ◆ Conduct the partnering workshop at a neutral facility away from the jobsite. Workshops are normally of one or two days duration. On small projects where the participants have all partnered before, this may be only an informal half-day session.
- ◆ Accomplish the following tasks at the workshop:
  - Introduce everyone and establish a relaxed atmosphere.
  - Set communication guidelines and workshop ground rules.
  - Explain general partnering concepts.
  - Briefly examine personality characteristics and behavioral style assessments.
  - Discuss principles of communication, problem solving, and conflict resolution.
  - Discuss mutual interests, expressed positions, possible hidden agendas, and project needs.
  - Work on team communications and establish reporting procedures.
  - Determine each party's expectations and needs.
  - Develop a mission statement or project charter.
  - Identify, briefly analyze, and plan for avoidance of potential problems.
  - Develop quality indicators.
  - Develop responsibility matrix for partnering action.
  - Define an issue/conflict resolution process.
  - Set stages of team evolution (e.g., when additional subcontractors come on board).
  - Develop follow-up tasks for the partnership.

- ◆ Establish new relationships through personal contact, teambuilding, and moving beyond strictly business issues to a discussion of personal interests.
- ◆ Include common goals and measurable objectives in the joint project mission statement. Each party's objectives, once accepted, are shared by all. The project quality, safety, schedule and budget are the highest priority. After that, the contractor's profit and other objectives can also be part of the team's goals.
- ◆ Document workshop achievements with framed mission statements, team photographs and other symbols for distribution to workshop participants at an occasion such as the ground-breaking ceremony.
- ◆ Schedule a follow-up workshop when additional subcontractors come on board, or one to two months after the initial workshop. This should review the champion's roles and responsibilities and team progress in meeting the mission statement objectives. This is also a good time for the facilitator to coach the champion in leading a partnering session.
- ◆ Conduct random site visits and periodic telephone checkups to identify slackening of the partnering efforts or a return to adversarial relationships -- before conflicts progress too far for easy resolution. A follow-up workshop can re-vitalize the partnering effort and resolve lingering disputes.
- ◆ Use symbols and team identification. A joint/project logo, teamwork coffee cups, and other seemingly naive promotions can have a significant positive effect.
- ◆ Celebrate your success when you achieve major milestones, accomplish the objectives in the charter/mission statement, and complete the project.

The benefits of partnering are immense. One industrial contractor in a long-term, strategic partnership with an owner found productivity savings of 16% to 17% on 18 projects surveyed. A government agency experienced better cost control, reduced paperwork, attainment of value engineering objectives, and no litigation on the projects partnered.<sup>5</sup>

Partnering should not be considered an extra cost, but an investment in a successful project. Fees for a one-day workshop vary from \$1,800 to \$7,000 or more, depending upon the preparation required and the facilitator's fee structure. Follow-up cost can vary from zero to a few thousand dollars, depending upon the team's success in maintaining the partnering effort without outside help.

### **Dispute Avoidance and Collaborative Problem-Solving<sup>3,4,6</sup>**

Dispute avoidance and collaborative problem-solving are an adjunct to the partnering process and provide additional benefits beyond reducing and resolving disputes. They include the following policies and procedures:

- ◆ Immediate response to identified problems, which reassures the parties that partnering is working.
- ◆ A conscious effort by each party to honestly evaluate their position and the position of the other party.
- ◆ Cooperative joint review of the initial project schedule and monthly updates to jointly identify potential problems and solutions. Scheduling specialists help in this effort as they can identify potential problems and solutions that the generalists on a project team might miss. The specialist can be either an employee of one of the parties or a neutral expert.
- ◆ Innovative analysis of problems using techniques such as brainstorming, value engineering, and functional analysis. This needs to be a collaborative effort by all members of the project team. In addition to bringing a wider array of talent and experience to bear on a problem, this also builds a sense of teamwork.
- ◆ Open discussion of problems at weekly progress meetings, with the focus on finding solutions, not assigning blame.
- ◆ A commitment by all parties to give timely and un-exaggerated notice of potential extra costs, and reasoned responses to these notices.
- ◆ Agreeing that efforts to resolve immediate, critical problems at minimal overall costs will not be used as evidence of responsibility.
- ◆ Retaining a neutral expert, with all parties sharing the cost.
- ◆ Empowering field personnel to settle issues at the jobsite. Some organizations are reluctant to do this, but it is necessary to the success of the partnering concept. The risks can be reduced by adequate training, documentation of policies and procedures, and verification of performance.
- ◆ An escalation process that transfers unresolved disputes up to the next level of management when not settled promptly in the field will encourage prompt dispute resolution at the lowest possible level. Jobsite personnel do not like to admit they cannot resolve problems and will almost always reach a settlement among themselves to avoid transferring problems to their management. This transfer can go up the chain of command of all involved organizations to the chief executive officers if necessary. Inaction is not an option.

The costs of dispute avoidance and collaborative problem solving can be nominal, as expert involvement is limited and the cost is shared by all parties. In many cases (e.g., value engineering), the benefits are immediate, measurable, and greatly exceed the costs.

### **Win/Win Negotiation Techniques<sup>9</sup>**

The use of win/win negotiation techniques will help resolve conflicts that may arise and will maintain the partnering attitude. These techniques are based on the partnering concept and are quite different from the win/lose tactics used by many negotiators.<sup>10</sup>

There are numerous books, articles, and seminars on negotiation techniques and tactics. All personnel involved in negotiations should

be encouraged to improve their negotiation skills through self-study and formal training.

**Claims Management Program** <sup>1, 24, 25, 26</sup>

An effective claims management program will ensure that the contractor is paid an equitable compensation for extra work and impacts, but no more. The elements include:

- ◆ Compatibility with Partnering. A claims management program by both the contractor and project owner is needed for a successful DMP, but must be accomplished within the partnering approach. This requires a change in outlook from normal practice, but the same basic procedures are needed.
- ◆ A Different Approach To Risk Management by the owner and designer, who must forego the onerous contract clauses that appear in some contracts. Total Quality Project Management of the design process eliminates hastily prepared, ambiguous and conflicting contract documents and reduces the need for such clauses, which in any case often fail to protect against justified claims. Further, these clauses are not recommended even when the design is inadequate, due to their negative impact on relationships.
- ◆ Training of an organization's personnel to: (1) understand contract rights and obligations, (2) give timely notice of potential claims or respond promptly to requests for information or decisions, and (3) thoroughly document issues in dispute.
- ◆ Thorough Documentation and Timely Notice, which are essential for dispute resolution and achieving an equitable settlement based on the facts. If that isn't possible, the additional documentation provides a greater probability of winning in litigation or arbitration. Partnering does not eliminate the need for adequate documentation and timely notice.
- ◆ Data Organization and Analysis. Whenever a potential dispute is identified, the parties need to gather data from their recordkeeping systems. This should be done jointly whenever possible, possibly by a neutral expert in order to preserve the confidentiality of each party's records. The analysis and presentation of the information should then focus on identifying alternative solutions and collaborative problem-solving so as to reduce the costs of extra work and changes.
- ◆ Negotiation and Exchange of Information based on win/win principles. Contractors should assemble all available information as soon as possible, and owners should advise the contractor on the best method of presenting the information so as to facilitate settlement. Whenever possible, entitlement should be resolved before substantial efforts are expended on determining damages, as the parties will find it difficult to drop an issue in which they have invested time and money to investigate.
- ◆ Documented Procedures that serve as a checklist to guide the project team, in order to avoid overlooking important issues. Procedures need to be customized to match an organization's existing policies and procedures, the type of construction, and the contracts used. The procedures also need to be expandable with more detail as the organization grows or if a larger project is undertaken that requires more rigorous procedures. Customization of standardized, widely-tested procedures is therefore recommended, with variation in the level of detail to match the organization's needs and flexibility for varying conditions. After implementation, management must verify that the procedures are being followed.

- ◆ Escrow Bid Documents, which is a new technique for claims management. <sup>13</sup> It requires the contractor to place the bid documents in escrow, accessible jointly by the parties only to resolve disputes. Escrow preserves essential information for use in dispute resolution without compromising the confidentiality of the contractor's business records.

It is the authors' opinion that, after partnering, a good claims management program is the best investment an owner or contractor can make. Lack of adequate documentation is the biggest hindrance to contractors recovery of adequate compensation. Over the past twenty years we have seen millions of dollars of legitimate claims abandoned or lost and several contractors go out of business for this reason alone.

### **Alternative Dispute Resolution (ADR) Techniques** <sup>11,16,22</sup>

If disputes are not resolved through the efforts of the parties directly involved, the alternative has historically been to put off resolution until the project is over and then to litigate. Alternative Dispute Resolution (ADR) evolved in response to the drawbacks of that approach. ADR techniques reviewed in this paper include:

- ◆ Dispute Review Boards
- ◆ Neutral Experts
- ◆ Mediation
- ◆ Mini-Trials and Rent-A-Judge
- ◆ Arbitration

ADR relies on a neutral third party to help resolve or to adjudicate disputes. Dispute Review Boards, Neutral Expert findings and Mediation are normally non-binding. Arbitration is usually binding and Mini-Trials or Rent-A-Judge can be either binding or non-binding.

The advantages of the non-binding techniques are that the parties are in control of the process, can terminate the process at any time, and must agree to the final settlement. They also permit the parties to maintain on-going business relationships.

Traditionally, owners have selected one ADR technique to the exclusion of others. The DMP includes all as possible options, with a progression from non-binding third-party resolution to binding adjudication.

### **Dispute Review Boards (DRBs)** <sup>12, 13, 14, 15</sup>

DRBs are usually panels of three individuals experienced in the type of construction being accomplished. The contractor and owner each select one board member and these two pick the third. All three must be acceptable to both parties. The board meets regularly to keep abreast of progress and, whenever there is an unresolved dispute, to hear presentations and render a non-binding written recommendation for settling a dispute.

On 100 underground construction projects with a value of \$6.4 billion using DRBs, only 98 disputes were referred to the boards and none of these were arbitrated or litigated.<sup>11</sup> DRBs have also been very successful on other types of construction, although there have been a few cases of litigation.<sup>14</sup> Often, just the existence of a DRB has enabled disputes to be settled without claims being filed.

DRBs are suitable only on large contracts as board meetings typically cost around \$5,000.<sup>14</sup> The total cost of DRB programs have ranged from 0.04% to 0.51% of final project costs.<sup>12</sup>

### **Neutral Experts** <sup>17</sup>

The use of Neutral Experts is new in the U.S. but has been used elsewhere for years. Neutral Experts are retained jointly by both the contractor and owner to determine the facts, develop a recommended solution, and present them without bias.

Normally, the parties need not accept the findings and recommendations of the neutral expert, nor of independent legal counsel if retained to address legal issues. However, it is unlikely that

one party will seriously contest the Neutral Expert's judgment in arbitration or litigation -- which encourages resolution.

The advantages of using a Neutral Expert over in-house staff or separate claims consultants for each side include:

- ◆ A higher level of confidence in the data used for decision making.
- ◆ Elimination of exaggerated claims and unfounded counterclaims.
- ◆ Reduced costs due to having one expert instead of two, eliminating the analysis of counter-arguments.
- ◆ More accurate data due to the expert having access to both parties' records without resorting to discovery. This also protects the confidentiality of the files.
- ◆ Compatibility with partnering.

The use of Neutral Experts is similar to the use of DRBs, but can be applied to smaller projects due to the substantially reduced costs. In addition, the Neutral Expert is more pro-active than DRBs and can help mediate disputes. A Neutral Expert can also be retained by a DRB to investigate and report on disputed technical issues outside the expertise of the DRB members.

Dispute Review Boards and early designation of a Neutral Expert are pro-active and more compatible with the partnering concept. One or the other is recommended for all projects, with the Neutral Expert being preferred, except for very large projects, due to the reduced cost and more pro-active approach.

## **Mediation** <sup>16,18,23</sup>

As with Dispute Review Boards and Neutral Experts, mediation is entirely voluntary. However, unlike DRBs and Neutral Experts, all information received by the mediator is confidential and cannot be used in court.

Besides partnering, mediation has probably had the greatest effect on reducing construction litigation. Some attorneys are now writing mandatory but non-binding mediation into all their contracts and some courts require mediation before proceeding with litigation. <sup>16,18</sup>

If not mandated by the courts or by contract, mediation requires only an agreement by the parties to jointly engage an independent mediator. If experienced construction attorneys are involved, they may know several qualified construction mediators. If not, the American Arbitration Association (AAA) or the Dispute Avoidance and Resolution Task Force (DART) can recommend an experienced mediator who has been trained at one of their seminars.

Mediation starts with both parties submitting a confidential letter or written brief to the mediator for review before the hearings. This is an extremely important part of successful mediations; it should clearly and concisely present the facts and a suggested method of resolution.

Mediation continues with a joint hearing where each side briefly presents their case, which allows "venting" and statement of positions. The parties then caucus and the mediator shuttles from one party to the other with offers and counteroffers until settlement is reached. This is a rather complex process requiring considerable skill, patience, and training, and it is extremely effective.

Mediation is normally completed in one day, although some cases may take two. Adequate preparation by each party will take far longer, and is essential to success. It is at this time that an attorney who is familiar with the process and has developed a "winning" strategy that focuses on the client's primary objectives should be retained.

A Mediation clause is recommended for all contracts. If the parties are unable to resolve an issue through partnering and the Dispute Review Board/Neutral Expert efforts, mediation is the best way to resolve a dispute.

Mediation is successful in over 90% of the cases. <sup>18</sup> The costs can vary from \$150 an hour for a qualified mediator to as much as \$7,500 a day for the better known mediators. The authors' experience is that the cost is well warranted. Recently, what was believed to be an intractable dispute was settled in five hours for \$7,500 instead of the two years and \$500,000 that litigation would have cost.

## **Mini-Trials** <sup>11, 21, 22</sup>

Mini-Trials can be either binding or non-binding. The process is similar to litigation, except that the parties hire a private judge or appoint a panel. This gives the parties more control over the process. Another advantage is avoiding the delays of crowded court calendars, which in some jurisdictions can run for one or two years.

Non-binding Mini-Trials are generally presented to either a neutral third party or to principals of the contending parties who have the authority to settle disputes. This is an alternative to mediation, but is more adversarial, more expensive and less successful.

Binding Mini-Trials (also called Rent-A-Judge) are generally adjudicated by a retired judge or attorney. <sup>22</sup> These adjudicators tend to rely more on legal issues than on equity. They also often lack the

industry knowledge represented on typical arbitration panels, which is the preferred method of adjudication.

## **Arbitration** <sup>11,22</sup>

In arbitration, the parties present their case to a one or three-person panel of arbitrators who are selected for their knowledge of construction and pertinent contract law. Most parties use the AAA to provide the names of qualified arbitrators and AAA rules for controlling the procedures. <sup>16</sup>

In recent years arbitration has suffered from an image of being nearly as expensive and time-consuming as litigation. In the authors' opinion, this is in large part due to the contentiousness of the parties and the legal gamesmanship of those attorneys who use legal strategies for delay, to gain an advantage, or to increase the opposing party's costs.

One possible method to cut down on legal gamesmanship is in the award of legal fees and panel costs based on the parties' reasonableness in pre-hearing offers of settlement and in avoidance of delaying tactics. The settlement information would be provided after award of damages to avoid influencing that decision.

Another innovative award policy sometimes suggested for construction arbitration is the baseball arbitration model, where each party makes an offer and the arbitrators' choice is limited to one of the offers. This tends to make the parties more reasonable in their demands.



A partial solution to the problem of excessive time and cost is the use of one-person panels. This works for the smaller cases, but may be considered too risky for large disputes. In addition, there is the difficulty of finding a single individual with both the legal and technical knowledge needed to rule on legal issues while also understanding the technical details.

To avoid a continuance of hearings if the presentations take longer than expected, arbitrators can:

- ◆ Schedule more time than the parties say they need.
- ◆ Encourage some sense of urgency by notifying the parties when an issue has been adequately explained so that they can move on to the next. Arbitrators must not, however, limit testimony as that is one of the few grounds for courts to overturn an arbitration award.
- ◆ Bifurcate the hearing to first rule on entitlement before proceeding to damages.
- ◆ Extend the working day until enough time is made available or the parties become so tired as to voluntarily compress their presentations.

Another concern about arbitration is the lack of a written opinion. In response to the concern that one of the parties may appeal the arbitration panel's award, the normal procedure is to not issue a written opinion, but to state only the damages.

The lack of written opinions may contribute to the notion that arbitrators tend to "split the baby". It is the authors' experience that arbitrators often feel that both parties are at fault to some greater or lesser degree. The decision may appear to be a compromise when in fact it is a carefully considered attempt at apportioning responsibility.

In addition, written opinions may reduce the feelings that arbitration is often a "crap shoot". A written opinion will tell the parties why things came out as they did and alleviate any possible feelings that the results were unfair. In the authors' opinion, arbitrators should issue a written opinion if the parties request it, but should word it carefully and limit the scope of discussion.

Arbitration is the oldest and still most widely used form of ADR. It has its drawbacks, however, and can sometimes be nearly as costly and slow as litigation. It is also adversarial, which isn't compatible with partnering. It should be the last resort, in lieu of litigation, after all other efforts have failed. Alternative rules can be adopted to overcome the disadvantages of conventional procedures.

## **Firm But Fair Legal Strategies**

The final, and hopefully unnecessary, element in a DMP is a firm but fair legal strategy and tactics that focus on winning a dispute without legal gamesmanship. This is implemented only if the other efforts are unsuccessful.

The first step is selection of the best attorney for your organization and the specific dispute. Construction contractors and owners with an ongoing construction program should have an experienced construction attorney available for advice and guidance long before a specific dispute arises. An attorney should also be included as part of the DMP implementation team.

Selection of a construction attorney should be similar to any other selection process for professional services. In addition to prior construction arbitration experience, they should be advocates of (and experienced in) partnering, mediation and other ADR techniques. The selection criteria should include an aversion to legal gamesmanship, willingness to cooperate with opposing counsel to minimize costs and delays, thorough preparation, good presentation skills, and a determination to win. Fee schedules are not the primary factor, but should be considered relative to the importance of getting the most qualified expertise. Management of the attorney's efforts should be the same as any other professional service, i.e., the client is in control, but relies on the expert's judgment.<sup>19, 20</sup>

## **Implementation**

A DMP is not just knowledge of the concepts and techniques. It is also the process and product of a well planned and executed effort to develop and implement a customized program for each organization.

Implementation of a DMP should be treated like any other project, and is an excellent vehicle for starting the TQM (Total Quality Management) process. Organizations already involved in TQM might consider the DMP as a continuous improvement project. Others may incorporate it into their yearly Operations Plan, which is tied to their overall Strategic Plan.

### **Phase One - Needs Assessment and Project Definition**

Implementation should start with an analysis of the cost and impacts of disputes on the organization's operations, and how the DMP will fit into other policy and procedures. The analysis should include not only the organization's past history, but a review of what has happened to others. A DMP is somewhat analogous to an insurance policy and may require a risk assessment to determine how extensive it should be. For example, one disastrous dispute for a contractor with several million dollars of unpaid extra work, protracted litigation, and appeals can destroy a lifetime of building a company and the livelihood of all those working there. That should be weighed against the \$5,000 to \$15,000 cost for a DMP at a medium-sized construction company.

### **Phase Two - Commitment and Goal Setting**

Full commitment from top management is essential. The necessary money and resources must be allocated and management must monitor and guide the outcome. Commitment also includes setting goals and measurable objectives.

Next, a corporate leader or management steering committee, plus a staff advisory committee, to guide and assist the implementation team and to communicate the program goals to the rest of the organization must be designated.

### **Phase Three - Development**

Most successful programs are implemented in phases, with the success of one phase leading to acceptance of the next. For a contractor, this may be improved claims management procedures on a firm-wide basis and partnering on a project-by-project basis. Owners may want to start with a specific element such as changing their contracts to specify partnering, mandatory (but non-binding) mediation, and arbitration (with alternative rules). Or, they may start with training in interpersonal skills and work their way through each element of the DMP.

Concurrent with the decision on phasing is the identification of the implementation team, as the composition of the team will vary depending upon the tasks to be accomplished. Team members should be involved in the initial decision-making and goal-setting. In all cases, the team leader must be from the organization to ensure an internal "champion" and long-term, continuing improvement. In most organizations, consultants will also be needed as in-house personnel seldom have all the skills or time necessary to set up a new program.

The program must be based on the organization's operations, current procedures and policies. This must be blended with well-established industry procedures that have proven effective for other organizations. If the team members are not experienced with each element of the DMP, outside consultants experienced in those techniques should be involved.

Development must involve the management steering committee, the staff advisory committee, and others as necessary to obtain their input and commitment to the program. In many cases, implementation will overlap development. For example, background training should be conducted early on, in order for the staff to fully understand and participate in development.

#### **Phase Four - Implementation**

Implementation starts with a series of seminars to explain the new policies and procedures. Since the "why" and "what" has already been discussed and accepted by everyone during the development phase, this will focus on the "how".

#### **Phase Five - Verification and Continued Improvement**

Several months after implementation, someone needs to review the extent of implementation, successes, problems and desired changes. After appropriate discussion, the results should be incorporated into the program. Annually thereafter, additional reviews should be conducted to ensure continued improvement.

#### **Benefits**

Better project management and the partnering approach will improve communication and attitude, will avoid many problems, and will help resolve those that do occur. The dispute avoidance and resolution efforts will encourage settlement of changes by the project team without resorting to ADR techniques. The documentation and compliance with notice requirements of the claims management portion of the DMP will facilitate reaching a fair and equitable settlement for additional work. The use of ADR techniques in lieu of litigation will save time and money, in addition to preserving on-going business relationships.

The substantial reduction in disputes, claims and litigation from a DMP offers probably the greatest opportunity for productivity improvements in the industry -- far greater than the potential benefits from the "relatively" well-funded research on robotics and other hardware/systems developments. Of even greater potential is the improved effectiveness and efficiency generated by a synergistic partnering attitude that promotes a collaborative approach to problem solving and innovation.

#### **Current Practice, Trends and Needs**

Partnering and mediation have been enthusiastically adopted in certain sectors of the industry, and have greatly benefitted those organizations and industry sectors. The spread of both practices is more than just a trend; it is like a tidal wave that is still gathering speed.

Training in people skills, adaption of collaborative problem solving techniques, the use of ADR to resolve disputes, and other elements of the DMP are also increasing in use although not at the same speed as partnering and mediation. What was lacking was a comprehensive philosophy that integrates the separate elements into an effective program and facilitates their adoption by the industry. This is the Dispute Management Program.

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