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By Steve Revay

Although Alternate Dispute Resolution (ADR) started as a buzzword, today it is a generally accepted – almost a "household" – concept. ADR, however, is "reactive" because the resolution of the dispute usually occurs after the completion of the project. With respect to short duration jobs or contractors with strong financial backing, an after the fact resolution may be acceptable, but today the same cannot be said for the majority of contractors/subcontractors.

The lead article of this issue describes the advantages and disadvantages of various proactive solutions. We have discussed two of these processes in past issues; we believe nevertheless, that an analysis, such as offered in this article, is very timely. As many of our readers may know, the CCDC-2-1982 form of contract (expected to be ratified soon) proposes on-site mediation, and as such it is a proactive remedy. Unfortunately, not all Canadian construction projects are governed by this form of contract. There is no reason, however, why the same or a similar procedure could not be introduced on all projects.

Also in this issue, we are introducing three senior additions to the company: Michael Primiani; Dan Seenundun; and last but not least, Tom Martin. We have had a presence in the U.S.A. in one way or another for a long time now. With Tom's appointment we are formalizing this presence and at the same time we are stating that we are committed to maintaining and in fact expanding our involvement in the U.S. construction market.

ON SITE DISPUTE RESOLUTION

by S.O. Revay

Efforts to minimize the cost of resolving claims have in the past been focused on post construction activities, i.e., alternate dispute resolution mechanisms. Of late, more attention has been paid to minimizing the cost of claims by improving the on site dispute resolution process and, to some extent, through preconstruction activities.

Although this paper touches on these preconstruction activities, the focus is on avoidance and an appreciation of risk directed to on site dispute resolution mechanisms. This focus is not meant to suggest that on site processes are more important than preconstruction activities but rather that both approaches cannot be dealt with effectively in a paper of this length.

Historically the on site process of resolving disputes was one of give and take. For a variety of reasons, that mechanism became unworkable. As more and more disputes remained unresolved, the construction industry turned to the courts as a means of settling them. Suffice it to say, this approach did not work. The industry then turned to arbitration with mixed results. Now, with justifiable caution, it is exploring the concept of mediation.

The costs and time involved in dealing with disputes after substantial completion of a project have caused the construction industry to review its preconstruction activities and the mechanisms used to resolve disputes on site. The cost of post-completion dispute resolution and the time included has been estimated by the American Society of Civil Engineers to have increased construction costs by 2%. In Canadian dollars this is equivalent to about $2 billion. Perhaps that is why, in Canada, construction disputes are the second most common form of litigation and why contractors have the second highest incidence of bankruptcies, after restaurants.

Preconstruction activities have focused on such concepts as Risk Management, Partnering and Total Quality Management. The early results from T.Q.M. would suggest that our industry should be reintroducing a complete design at bid stage; thinking which is foreign to those who advocated the concept of fast tracking. There is no truth to the rumour that these advocates were secretly claims consultants. Although there are many who became claims consultants because of the proliferation of claims stemming from fast track projects.

Recent studies by the Construction Industry Institute (CII) indicate a relationship between increased engineering costs (i.e., a more complete design) and decreased construction costs and project time. As such, the benefits of fast tracking are largely myth and the pitfalls are quite real. The CII studies should certainly decrease the frequency of fast track projects and claims. Further information on these studies is available from the various RAL offices.

Nevertheless, there will always be claims regardless of the contracting approach or preconstruction activities. There is therefore a need to examine

the process of resolving disputes on-site, that is, during the currency of the project.

Traditionally, the process of resolving disputes during construction has been the responsibility of the design consultant (architect/engineer) or the Owner's agent (construction manager). This process has one fundamental drawback; construction disputes are frequently rooted in the non-performance of these same individuals. Hence the accused is often mandated by the contract to be the arbiter or "judge". Keeping in mind that this accused, now judge, is also being asked to tell his client that costs will increase on account of his actions. Is it any wonder why this process has experienced considerable difficulty?

Currently, there exists three alternate means to the above traditional method of resolving disputes during construction. They are:

- Project Management Overview (PMO);
- Dispute Review Boards (DRB);
- Project Mediator/Neutrals.

The first two concepts originated in the United States and have essentially only been used on large public works projects. Notwithstanding the potential benefits of these concepts they have seen little use in Canada. It is nevertheless useful to examine these concepts as they help to appreciate the difficulties and benefits of improving on site dispute resolution mechanisms.

Comments on the advantages and disadvantages of each follow.

PROJECT MANAGEMENT OVERVIEW

PMO was conceived with a view to overcoming the common failings of project management arrangements that result in time and cost overruns.

In the United States, generally on large public works projects, these problems have been addressed by having outside personnel, with no inherent financial or organizational ties to the project or its progress, report directly to senior management on the status of the project and the effectiveness of the project team.

These individuals were consultants, independent of the firms associated with or responsible for the management, engineering, procurement or construction of the project. Their mandate was to offer an unbiased assessment of the performance of team members (those responsible for the aforementioned functions) and of the tools and processes being utilized to meet project objectives.

There is, of course, nothing new about owners engaging independent consultants to perform such assessments. In the past, this exercise has been called "management audit". What is innovative and different about PMO, however, is that this assessment is continuous throughout the life of the project and is intended to forestall problems – as opposed to being the consequence of a recognized problem. PMO is, as such, a preemptive, proactive approach to project management.

Typically, PMO has not been considered or used as a mechanism for resolving disputes. That, however, should not prevent it from happening. This could simply occur by broadening the mandate of the independent consultant so that it includes a review of outstanding contract disputes. Outstanding could simply mean an acknowledged dispute which remains unresolved for more than 30 days.

The difficulty with this concept is, however, the marketability of PMO itself. Notwithstanding the success and benefits achieved with this process, Owners frequently perceive PMO as a duplication of effort and an additional cost without commensurate benefit.

Project managers and project teams view this concept with fear as there is an immediate "Big Brother" syndrome attached to this concept by project teams. The question of reporting is a major issue with these individuals. This problem, with understanding, can be overcome. It nevertheless increases the difficulty of implementing the concept.

Consequently this process has seen little use in Canada. Perhaps if our economy improves people will be prepared to embrace a process which can provide a win-win scenario for all participants if understood and implemented properly. Further data on this concept is available from RAL's offices.

DISPUTE REVIEW BOARDS

Pursuant to Contract terms, the Board is organized shortly after the contract award. The owner and contractor each select and approve a member of the Board, who in turn selects a third member, approved by both parties, who acts as board chairman. The party-appointed board members are not intended to function as advocates. Their purpose is, as described, to review disputes.

The Board should be an objective, impartial and independent body. The agreement establishing the board should specifically prohibit the board or individual members from providing consulting services to either party during construction.

DRBs have been established on some one hundred projects in the United States, totalling approximately $6.5 billion in construction cost. On these projects, a total of 98 disputes have been heard by DRBs; all of them have been settled either by the parties or by recommendations from DRBs. None of these disputes were later arbitrated or litigated.

If a dispute arises, a DRB provides an expeditious on-site consideration of the matter by a panel of experts and thus the possibility of a quick resolution of the dispute. Per Paul Sandori's article, "American Experience in Avoiding and Resolving Disputes During Construction," in the Construction Law Letter, Volume 8 Number 2, additional benefits of DRB are as follows:

- it is effective in preventing and resolving disputes before they grow into larger problems;
- construction can continue, with the owner's and contractor's efforts focused on the work;
- it takes the dispute out of the hands of those on the job who are "too close" to the problem;
- recommendations for settlement are made quickly so the animosities that would otherwise entrench and fester throughout the remainder of the contract are avoided;
- last but not least, its cost is minimal compared to litigation or even arbitration.

In contrast to litigation, board members actually observe construction problems when they occur, thus eliminating the need to reconstruct events. Furthermore, they understand the technical aspects and contractual ramifications of the problems without lengthy, detailed explanation.

The knowledge that trustworthy experts are familiar with the project and will recommend a fair resolution

reduces the posturing and gamesmanship that occurs in conventional dispute resolution processes. Should a dispute develop, the task of preparing for a hearing before the DRB encourages the parties to properly document their positions, and this, in itself, can facilitate resolution. The existence of a DRB alone reduces the number of disputes. Since the contracting parties know that the DRB will review a dispute, contractors are reluctant to submit a frivolous claim and owners are more willing to recognize claims earlier. With the parties focused on job completion rather than arguments, project delays and extra costs are minimized. The results are lower costs, fewer time overruns and fewer claims submitted to litigation.

Unfortunately, as with PMO, the concept of DRB is perceived as being too costly for this economy. Its frequency in Canada is almost nonexistent.

PROJECT NEUTRAL/MEDIATOR

Of the three alternate approaches discussed in this paper, the concept discussed below has the least cost. It is therefore the most marketable and thus might experience the greatest frequency.

The concept is simply to have one individual available to the project for independent, impartial opinion (i.e., project neutral) who can, if necessary, provide mediation services (i.e., project mediator). In simplistic terms, this concept is, with one important distinction, a one person version of the Dispute Review Board concept. That distinction is the mediation aspect of the concept.

For those not familiar with mediation, the Alberta Arbitration and Mediation Society define it as a process of dispute resolution in which a neutral third party assists the parties involved in a dispute to negotiate their own settlement.

The benefits of mediation include the following items:

- It leaves control of the outcome in the hands of the disputing parties.
- It is flexible, allowing disputants to explore a wide range of options open to them.
- It is fast, enabling disputants to save substantial time and money.
- It is confidential and avoids public disclosure of the conflict, confidential business and personal information.
- It preserves or improves business and personal relationships by improving communication and understanding through nonconfrontational problem solving.

A better understanding of the concept can be understood by reviewing the implementation contemplated by:

- CCDC-2 Stipulated Price Contract; and
- New Canadian Contracting Method.

The CCDC is a committee comprised of five construction associations: The Association of Consulting Engineers of Canada, The Canadian Construction Association, The Canadian Council of Professional Engineers, The Committee of Canadian Architectural Councils and Construction Specifications Canada.

According to CCDC suggested amendments of CCDC-2, the procedure for initiation of mediation includes these steps:

- dispute occurs;
- consultant's findings, with no prescribed time limit (Per CCDC, the owner's design consultant or architect/engineer is referred to as a consultant);
- within 10 working days of receiving the consultant's findings, if a disagreement exists, a notice of dispute that identifies particulars, any additional time or cost and relevant provisions is required;
- within 10 working days a response to the notice of dispute that sets out the particulars and any relevant contract provision is required;
- if resolution of the dispute has still not occurred after 10 working days, the mediator is contacted;
- unless otherwise specified, the mediation should be concluded within 10 working days;
- within 10 working days after the date of termination of the mediation, either party may refer the dispute to binding arbitration.

In terms of the marketability of this concept it is interesting to note that whereas the document is still not formally approved by all five associations the author has nevertheless acted as a project mediator. In that case the parties based their General Conditions on a draft of the proposed CCDC-2 which shall soon be ratified by all five constituent associations.

That use of the concept before formal approval would suggest that the recognized need for a better approach might just give rise to considerable acceptance of it. It should also be recognized that there is potential for further innovation. Over time and with use it is conceivable that the role of the project neutral could be expanded. Should the construction industry enjoy the same success with mediation that has been experienced by the insurance industry (i.e., 85% success rate) it is more than likely that mediation might become the rule and not the exception.

The only stumbling block is the extremely conservative nature of the construction industry. We are usually the last industry to embrace new concepts.

The New Canadian Contracting Method is a contracting strategy developed by Dr. Francis Hartman, Director of Project Management Specialization at the University of Calgary.

An aspect of that strategy is proactive mediation. Dr. Hartman states in the paper "Reducing or Eliminating Construction Claims by Changing the Contracting Process":

"Proactive Mediation

Once construction begins, on-going management of problems and disputes or potential disputes is vital if their impacts are to be minimized. To do this a mediator, acceptable to both the owner and the contractor (and if appropriate, acceptable to the consultant) is appointed. This mediator must be independent of the owner, contractor and consultant in order to be effective. The concept is similar to the use of a non-binding dispute resolution board, except that, in effect, the board is made up of a representative of the owner and the contractor, plus the mediator who will have the casting vote in the event that there is no agreement.

It is expected that the mediators would be experienced construction professionals who have been trained as mediators, based on a specific mediation model. That model is one developed from the negotiation principles described by Fischer and Ury.

The mediator is involved in and informed about the project throughout the life of the contract. Proactive mediation involves early identification of potential problems, so that solutions may be found before the problem

becomes more complex or the principals become polarised and entrenched in their positions. Achieving this will take special skills and training, as well as support in familiarization with the process. As part of the on-going development of the New Contracting Model, detailed procedures, checklists and other tools are being prepared to help all participants in the process to work efficiently with it."

In large part, the concepts described above originated with the work of Bonita J. Thompson, Q.C., a partner at Singleton Urquhart MacDonald and the B.C. Hydro Contracts Committee that introduced the concept of a referee in 1989. The Nov./Dec. '93 issue of Construction Law Letter has an article dealing with that concept. Ms. Thompson also served as a consultant to the CCDC committee that is introducing the above amendments to CCDC-2.

The enhancement from referee to mediator serves to move from judgements/decisions to potentially win-win scenarios for both parties.

Unquestionably the concepts contained within the new CCDC-2 document and Dr. Hartman's new contracting strategy will require some fine tuning. Certainly one can criticize various aspects of either process. They are nevertheless significantly better than the current process. That is if one accepts time and cost as relevant measures.

History has certainly provided enough experience to clearly indicate that an integral member of the construction process should not sit or be asked to sit as an independent arbiter.

There is a need for the availability of true independent opinion. As seen from the foregoing discussion, the mandate of the person(s) providing that opinion can be quite varied. The benefits are limitless. The only hurdle to overcome is the frequent tendency of buyers of construction services to take short cuts and avoid what might superficially appear as extra cost.

Too often in our current construction environment lawyers are paid more in defending a claim than the designers who provided the engineering for the project. The problem is not the lawyers but rather the processes being used to resolve and avoid disputes.

THOMAS L. MARTIN, P.E.

Thomas L. Martin has been appointed as President of Revay & Associates Ltd., the U.S. subsidiary of RAL Canada, effective January 15, 1994.

Tom graduated from the University of Maryland in 1974 and obtained his Masters in Structural Engineering in 1976. He began his engineering career as an estimator working for a large construction company, subsequently being promoted to senior estimator and eventually to project engineer on complex projects.

Tom became an independent engineering consultant in 1984 and was involved in scheduling and claims analysis for numerous projects requiring CPM analysis. He has managed the development and implementation of scheduling and cost accounting systems for a number of companies. Besides developing programs for particular claims applications, he has also been accepted as an expert witness on both estimating and/or scheduling and claim matters before the Armed Services Board of Contract Appeals on two separate occasions; Federal District Court; Maryland Circuit Court; as well as during arbitration proceedings and ADR proceedings.

Tom is a member of both the National Society of Professional Engineers and the American Society of Civil Engineers.

This appointment significantly expands RAL's capacity to serve clients in the U.S. as claim consultants and in the provision of project management services.

Michael J. Primiani has been appointed Director of Planning and Development of Revay and Associates Limited, Montreal.

Michael graduated from McGill University in 1970 in Civil Engineering, is a part-time professor at Concordia University's Centre for Building Studies and has lectured extensively in Canada and overseas.

He has been Project Manager for a variety of projects including the tallest office complex in Montreal and a telecommunications network for the Group of Seven Economic Summit. Michael has also been involved in structuring and directing project management departments, as well as developing training programs in project management and authoring policy and procedures documents for various private and government organizations. His mandates have brought him to the Canadian high Arctic, Trinidad and Tobago, Malaysia and Sweden.

He is a member of the Order of Engineers of Quebec, the Association of Cost Engineers, the Project Management Institute and the McGill Alma Mater Fund, in addition to several community associations.

In his capacity as Director of Planning and Development, he assists clients in risk management, planning and scheduling, cost control and dispute resolution.

MICHAEL J. PRIMIANI, P.ENG.

DAN SEENUNDUN, ARICS

Dan Seenundun has been appointed Chief Quantity Surveyor of Revay and Associates Limited, Montreal.

Dan graduated from Bristol University, England in 1980. As a chartered quantity surveyor he has been associated with numerous large building projects in Canada, U.S., Russia, England, Mauritius, Libya and Tunisia, including the residential/commercial Pushkin Square project in Moscow and a large luxury residential/commercial/medical complex in Montreal.

Dan has also been involved in value engineering, teaching of estimating and building economics, mortgage monitoring, preparation of tender documents and Bill of Quantities. He has also served as an arbitrator.

Dan holds memberships in the Canadian Institute of Quantity Surveyors (Canada), the American Association of Cost Engineers, the Project Management Institute, the Royal Institution of Chartered Surveyors, UK, and the Institute of Bankers, England.

In his capacity as Chief Quantity Surveyor, he assists clients in estimating, cost planning and control, value engineering, contract administration and dispute resolution.

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