



RHarper Consulting Update

Embedded Neutrals Adult Supervision

I recently had the opportunity to chat with a very seasoned and retired construction attorney. We were discussing recent disputes in which we had been involved as neutrals; he mentioned that he particularly enjoyed serving on dispute review boards (DRBs) and had been serving on them since 1996. He offered, somewhat incredulously, that not once in all that time had a dispute risen to the DRB for resolution. In the projects the parties had always been able to resolve their disputes without escalation. In his words, "we simply provide adult supervision."

The parties – owner, architect, and contractor - have a natural aversion to exposing themselves with an overzealous or poorly constructed claim if an unbiased third party will be providing immediate feedback in a formalized manner. In effect, everyone "steps up their game" and the issues get resolved without protracted, time consuming, and expensive litigation.

When I think about the disputes where I have been involved as a party or neutral, I feel certain that had a neutral third party been available, more cost effective solutions would have been achieved much earlier.

With the AIA 2007 A201 provisions allowing establishment of a third party initial decision maker (IDM), perhaps more owners, architects, and contractors will avail themselves of this provision.

The costs and time spent resolving disputes are often outstripping the original amounts in dispute. Aside from the direct costs of attorneys and experts, the indirect costs and opportunity costs are becoming increasingly large. One of my contractor acquaintances shared how, during a recent arbitration, his company had to forego preparing a bid he was quite certain they would have won because they were too busy preparing and assembling exhibits and preparing for testimony. As he said, "no one ever warned me how expensive it is to be right."

As the public and construction markets become more active, it's worth considering adding some form of embedded neutral into your projects to resolve disputes before they grow into expensive problems. Here are some thoughts to consider:

- Scope of Services – Most service proposals, whether for an individual IDM or several person DRB, include an initial project orientation where the neutral(s) familiarize themselves with the project scope, contract documents, and team members, followed by quarterly site visits to observe construction progress and address any potential disputes that may be evolving. If a dispute arises and elevates to the level of involvement by the neutral(s), then a resolution is undertaken on a pre-determined hourly basis.
- Binding or non-binding – The involved parties make this decision as part of the initial project organization. The IDM language in the A201 provides for a determination by the IDM that is subject to further dispute resolution procedures (mediation and/or arbitration).
- Qualifications – Generally, a DRB is comprised of a group of industry professionals and attorneys with expertise in the specific area of the project. The A201 allows the IDM to suggest alternative solutions as well as making an initial determination on the resolution of the claim, so the IDM might be someone with extensive field experience and experience as a neutral.

So, as the planning for your next construction project proceeds, add some adult supervision and see how much better everyone on the playground gets along.

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RHarper Consulting Group provides development consulting, program management, and owner representation services focused on the senior living and mixed use sectors. In addition, Mr. Harper is also a listed mediator and arbitrator providing dispute resolution services for the construction and real estate industries.