



RHarper Consulting Update

A Few Ounces of Prevention – Preventing Construction Disputes



Over the past several years, we have seen quite a few construction disputes drag on with no resolution yet in sight. As these disputes slowly work their way toward possible conclusion, the principal issues in question are often lost in process and procedure. Contract documents sometimes fail to define well, or at all, each side's obligations in case of a dispute – and providing some focus on dispute resolution during contract drafting and negotiations pays real dividends later if a disagreement arises. The involved parties may not be so quick to pick a fight once they understand what is involved in settling it, and just exploring resolution options during negotiations can provide valuable perspective if and when a dispute arises.

Roger Harper, Principal of [RHarper Consulting Group](http://RHarperConsultingGroup.com), provides development consulting services to the senior housing industry.

Dispute resolution is never a budgeted cost. The longer a dispute drags on without resolution, the more costly it becomes, cutting into or eliminating both parties' margin. Providing dispute resolution procedures early in the process can allow both parties to resolve claims before costs get too high; if a claim matures to the point of requiring resolution, a pre-determined process with defined discovery limits and scheduling guidelines is much more efficient and cost effective.

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Below are some thoughts on reducing dispute resolution costs:

Initial Decision Maker (IDM), Dispute Review Board or Embedded Neutral – the 2007 AIA A201 provides for a neutral third party to provide a non-binding initial decision on claims. Other forms such as Dispute Review Boards and Embedded Neutrals accomplish the same goal – resolve the dispute quickly after it arises. The IDM may also offer or evaluate suggestions for alternatives to mitigate cost impacts of the conditions precipitating the claim. While these decisions may be subject to further dispute resolution, the process of forcing the parties to prepare a claim for early review and carefully consider how it will be evaluated often leads to resolution before it is even presented to the IDM or other embedded neutral.

Mediation – The use of mediation has become a readily accepted practice for effectively resolving disputes. However, mediation can be more effectively employed where the parties acknowledge and agree that a dispute may be broken up into several issues and resolved separately. Resolving satellite issues without fully addressing the whole dispute may achieve a great deal and make resolution of the other issues easier and less complicated.

Another ADR process gaining wider acceptance is “med/arb,” where the neutral first attempts to resolve the dispute via mediation. Once the parties agree that no further progress is expected from mediation, then the neutral is empowered to resolve the matter or any unresolved portions of the matter via arbitration.

Fast Track Arbitration – This is an often overlooked alternative for binding resolution. The American Arbitration Association has defined a procedure for disputes up to \$75,000 where time frames for discovery, hearing, and award are specifically defined, and allow for a resolution approximately 75 days after filing a demand for arbitration. Specifying this procedure for claims of this size makes quick work of resolving smaller disputes. Allowing for use of the fast track procedure for larger claims is also an option upon which the parties can agree if they so choose.

The prospect of addressing dispute resolution when drafting contracts is often overlooked because the parties have a long working relationship, or because an unresolved dispute seems so unlikely as to be impossible. However, providing that “ounce of prevention” provides significant cost and time savings for all parties involved.

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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.

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