

DESIGN/BUILD

BUSINESS

Resolving Disputes Through Partnering

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Arbitration and mediation have dramatically helped resolve countless disputes involving construction projects and by doing so have reduced cost and time overruns. A relatively new dispute-preventive concept, “partnering,” goes even further to reduce the risks associated with disputes.

Partnering is an approach that creates an atmosphere in which all parties in a large construction project can communicate effectively with each other and uses flexible dispute resolution techniques should a dispute occur.

How does partnering work? All participants in a major construction project—owners, architects, contractors and subcontractors—begin the project as a team, without the “covering your backside” relationships that contractors traditionally maintain with owners and architects and the “pointing fingers” relationships subcontractors have with general contractors and other subcontractors.

Coordinating the partnering effort is typically a facilitator well-versed in alternative dispute resolution (ADR) and construction law. Once the contractor and subcontractors have been identified, the coordinating facilitator calls for team meetings between the developer, architect, contractor and subcontractors to set the goals of the project, including timing sequences and quality expectations. Potential roadblocks are discussed and decisions are made addressing how to resolve them. Each party in the project signs an agreement establishing the ground rules for dispute resolution and each commits to the goals of the project.

From these meetings comes a mission statement developed with the help of the facilitator. This team concept brings unity to the project and creates lines of communication between the parties involved. Developers give the architects and contractors a clear vision of how they see the finished project. Some developers may want a finely detailed building; others may want a building that is structurally sound but not much more. Architects and contractors will have an opportunity to express their concerns about payment issues, deadlines, and elements of the project they feel could be improved. Just as in mediation, the facilitator

can conduct private caucuses in which the architect, contractor and subcontractor can speak candidly about problems or issues they foresee with the project. The facilitator can then help resolve these matters before the project begins.

During these initial meetings, it may become clear that one or more of the contractors or subcontractors cannot work within the project mission’s criteria or is otherwise seen as divisive. An attempt can be made to resolve the situation, but if this fails, the contractor or subcontractor can be replaced before the project is affected.

Of course, partnering is not a guarantee for a trouble-free project. All job sites experience problems. Partnering can eliminate many but not all. Creating an ADR plan that the developer, architect, contractor and subcontractors agree to up front makes dispute resolution much easier. Disputes most often arise during construction when a mistake or error is made and the subcontractor is afraid to tell the contractor, who is then hesitant to tell the architect or developer. The error grows until what was once an easily solvable problem has mushroomed. In the partnering discussions, systems are put in place to resolve problems early—in an atmosphere where contractors and subcontractors are not fearful they will lose their jobs by being forthcoming.

The facilitator is usually designated in the partnering agreement to resolve disputes that arise during construction. Unlike arbitrators, facilitators in partnering projects do not need to worry about conflict of interest issues. They are waived in the partnering agreement. In fact, the facilitator has typically won the parties trust during the pre-construction phase and this trust factor goes a long way in resolving disputes later on. Even when unforeseen conditions occur, provisions in the partnering agreement can dictate how they should be resolved.

These agreements often contain unconventional dispute-resolving methods thereby bypassing traditional ADR practices. For example, when a dispute arises, the facilitator can be called to the construction site, review the aspects of the problem and make a decision on the spot. The partnering agreement can dictate that the parties in the dispute will be bound by the facilitator’s oral decision with

later confirmation in writing. Work can then resume immediately. Compare this process with that of traditional ADR. With arbitration, an arbitrator must be selected, a meeting location secured, the date calendared, with both sides usually hiring attorneys who must prepare for the proceedings. Each side then presents its case to the arbitrator and only then does the arbitrator make a decision. The process is expensive and could take weeks if not months before a decision is made. Mediation can take just a long without a resolution to the conflict. In the meantime, the project could come to a standstill until the dispute is resolved. With building projects, every delay is critical—it is time the owner has to pay on the construction loan or another hour a tenant cannot occupy the space. The delay caused by arbitration or mediation (not to mention the even longer delay if the case winds up in court) can cost a large project tens of thousands to millions of dollars in added loan costs, lost tenant income, lawyers fees and idle construction time, plus open the project up to future litigation. At worst it can kill or destroy the project. While the decisions made by the facilitator may not make everyone happy, at least the project can continue.

Partnering requires upfront costs and time commitments so that the process is usually reserved for large projects. This upfront cost, however, can be more than made up for by the elimination of higher costs down the line when disputes or lack of communication issues occur.

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