

## *Rapid Resolution and the Project Neutral*

### A New Way and Better Way to Resolve Construction Disputes

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With the construction industry still in recession, the last thing the industry needs is more claims and disputes. Unfortunately, as profit margins get smaller (various public owners report that bids are being received which are 25%-35% less than the Engineer's Estimate) and as cash flow is constricted it seems that seeds have planted that will inevitably lead to more disputes and claims. In this atmosphere, what can be done to avoid expensive litigation and arbitration proceedings?

The construction industry has always been at the "cutting-edge" of innovation in terms of alternative dispute resolution ("ADR"). Arbitration was pioneered by the industry more than 100 years ago as an alternative to litigation. Mediation, Dispute Review Boards and Partnering are all dispute resolution innovations which the construction industry has embraced and which it continues to employ in an effort to resolve or prevent disputes.

There is a new and innovative way to resolve construction disputes so as to prevent them from festering, becoming major claims and disrupting the successful completion of a project. This method is known as "real-time dispute resolution."

There are several approaches to real-time resolution. One is to have the parties, at the time of entering into the contract, designate a Project Neutral. The Project Neutral is a trained dispute resolution specialist who joins the project at its inception and follows the building process from groundbreaking to completion. The Project Neutral, unlike any other player on the construction team, has only one client: the project itself. The Project Neutral is used to mediate and facilitate the resolution of disputes that cannot be resolved at the project management level and, if the parties agree, to actually rule on matters so that disputes can be resolved on an ongoing basis. Using a proactive approach, the neutral can also work with the project team to look ahead and avoid many disputes altogether by identifying and addressing potential problems before they happen.



The Project Neutral approach works best if it is set forth in the contract documents between the owner and contractor. The contract clause should provide at a minimum: (1) That the Parties shall agree on a Project Neutral; (2) That the Project Neutral shall be experienced in resolution of disputes on comparable projects; (3) That the Project Neutral shall assist in dispute resolution and shall essentially act as a mediator; (4) That the Project Neutral may attend job meets as requested by the parties; (5) That expenses of the Project Neutral shall be borne equally; and (6) That all discussions are

confidential. To download a good Project Neutral Clause go to <http://www.jamsadr.com/construction-practice>.

Another method to facilitate real-time dispute resolution is to have the contract documents remove the architect as the initial arbitrator of disputes and substitute in his place an independent "Initial Decision Maker." Traditionally the architect, as the "master-builder" has been the initial arbiter of disputes between contractors and owners. But over the years architects have been increasingly asked to rule on their own potential liability regarding alleged errors and omission in the plans and specifications. This has led to an inherent conflict of interest for the architect and to his being ineffectual as an arbiter whose advice will be listened to and trusted. The 2007 American Institute of Architects ("AIA") contract forms recognize this issue and allow the contractor and owner to designate, in their agreement, an independent third party to act as the Initial Decision Maker ("IDM"). The IDM can act very much like the Project Neutral discussed above to review and deal with issues on a real-time basis. Moreover, the AIA documents provide that even if an IDM is selected, the architect remains arbiter of any aesthetic considerations or disputes. The AIA documents further provide that if the IDM is not specified in the contract the architect remains the initial arbitrator of disputes. Accordingly, both owners and contractors should carefully consider who they want as the initial arbiter of disputes when preparing and agreeing to the contract documents for a project.

But what if the parties have not designated a neutral or an IDM at the time of contracting? How can the parties design an effective process--after a dispute arises--and when their contract is silent or calls only for traditional mediation, arbitration or litigation? This is where another approach, called "Rapid Resolution," can be used. Rapid Resolution consists of real-time dispute resolution by "rapid responders" who are experienced and trained construction industry dispute resolution experts. They include mediators with legal backgrounds and also include engineers, construction management and scheduling experts who are prepared to meet with the parties within a period of a few days of being called, gather information and give a recommendation of a specifically tailored process to resolve the issues confronting the project participants. While most Alternative Dispute Resolution providers offer panels of mediators and arbitrators who are only prepared to follow traditional methods, usually requiring months to put a process into place and to bring the dispute to a conclusion, the Rapid Resolution Team is prepared, on an immediate basis, to:

- Make an assessment of the dispute and recommend creative methods to resolve it. For instance, if a dispute involved a structural engineering issue, a structural engineer member of the Rapid Resolution Team might be brought in to make a neutral evaluation and recommendation (which could either be binding or non-binding). Another example of the use of a Rapid Resolution Team is to combine a skilled mediator with the services of a neutral forensic scheduling expert to deal with delay, liquidated damages and extended overhead claims mid-stream on a project. I have personally been a part of this approach on major hospital and hotel projects and we have been successful in "defusing" issues which could truly derail successful completion of the project. Similar approaches can be used for accounting and legal issues.

- Facilitate and moderate structured negotiations between the parties

- Offer evaluative mediation

- Conduct binding or non-binding arbitrations on a "fast-track" basis using technical neutral experts as appropriate and as agreed upon by the parties

- Conduct pro-active sessions with the parties to avoid future disputes

Neither owners, contractors or design professionals can afford protracted and expensive litigation or arbitration, particularly in the current economic environment. As it always has, the construction industry needs to adopt new and innovative ways of preventing, mitigating and quickly resolving disputes. Positive change is available now. By making sure your teams are familiar with Project Neutrals, Initial Decision Makers and Rapid Resolution and incorporating them into your arsenal of dispute resolution tools, construction executives can help their organizations resolve disputes efficiently, economically and fairly.

### **About the Author**

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## The Advocate for Resolution

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The concept of the Project Neutral is not new to the industry. The idea is premised on the approach that a representative or team representing a broad-based background consisting of design and construction assist all parties to deliver the project on-time and on budget. The Project Neutral could be appointed at the beginning of the project or be brought in as challenges and issues arise to actively manage and mitigate its impacts on the project. It would be best if the key project participants were to agree to both the concept and the Project Neutral, but it is not mandatory. What is mandatory is that the Project Neutral continually reinforces the concept of representing the collective goals of the key project participants; owner, contractor and designer; in its efforts to seek issue resolution.

Unlike the role of a Disputes Resolution Board (DRB) the Project Neutral works more like a preemptive mediator working with the parties to achieve compromise and facilitate their resolution of issues rather than attempting to adjudicate and render a decision, whether binding or non-binding.

Below is an example of a project in which I was not specifically identified as a project neutral, with consent by the key parties, however in acting in the best interest of the goals of the project, and not representing the parochial interest of any of the individual parties, major issues were averted and resolved by the project participants and all achieved their individual goals as well as the overall project goals.

### The Hotel Casino

An American-Indian community embarked on a construction program to expand and create a destination resort for their casino operations. The key components of this expansion were the construction of a new 350,000 square foot casino and an adjoining 400 room hotel. Midway in construction the tribal council began

receiving reports that the project could finish more than \$20 million over budget and two to three months late. The opening date was critical as it coincided with their peak season as well as the playing of the Super Bowl, which happened to be played locally that year.

A project management review team was initially brought into the project by the Owner to conduct an audit of both of the status of the project and the adequacy of the stakeholders' management personnel. Upon completion of the audit and the presentation of findings, the team was asked by the owner to implement the suggested project recommendations. The implementation of those recommendations included both the changing of the management structure and personnel on the respective management teams, as well as the separation of legacy project issues from the ongoing management of the project.

The successful implementation of the plan was contingent upon the owner, contractor and designer collectively developing and recommitting to an understanding of how all could achieve individual success while at the same time achieving the overall project goals. The first step in this process was to get all to see that they were using their expertise to work against each other, instead of all leveraging their collective expertise. The details of this process are described below.



The initial assessment of the project included a review the management control systems, schedule, budgeting and cost reporting, document control, design issues and changes, occupancy planning, testing and startup planning, existing claims and claims of avoidance procedures, project forecasting, and the overall level of cooperation between all project participants. The audit included interviews with key staff from the key project participants; the owner, the design team, the general contractor, and key subcontractors. Each was invited to identify key areas of concern and what quickly emerge was the fact that communication was breaking down,

questions by the contractor were taking too long to be resolved by the owner and designer, and changes being issued by the owner were beginning to disrupt the orderly flow of work and were not being expeditiously resolved financially.

Some of the key issues discovered were the lack of experience in key positions; the lack and consistent application of management procedures; no personnel in key positions on the owner's team; the lack of cost and schedule impact determinations of change orders prior to the issuance of the changes; and that the communication channels on all levels were beginning to break down.

The bottom line was that the project was at a point where uncertainty was beginning to loom larger than any other issue on the project. With that uncertainty came distrust of other's intentions, and with that distrust came the inability to resolve issues and push forward with construction at a pace to achieve timely completion. My primary role was to enable the personnel from all parties to recognize this evolution, stop the process and then establish positive steps to move forward with my oversight and checking.

In order to complete the project on-time, the key recommendations of the audit suggested that the general contractor needed to maintain higher staffing levels through the completion of the project; agreement needed to be reached with the general contractor on an accelerated completion date with the understanding that the costs for this acceleration would be resolved quickly; no additional design changes would be made except those which were found to be absolutely necessary and after conferring with the general contractor on the potential impacts in advance of their issuance; and that the cost and time effective the changes would be resolved and implemented timely.

The turning point of the project was when the general contractor's president and the chairman of the Tribal Council shook hands in an open session and committed to each other that they would both work to achieve success for the project and for each other on the project. That simple handshake was then carried over to an all-day meeting with key management personnel from all parties during which the issues were discussed and potential resolutions were determined.

The morning of that daylong session involved opening statements by the tribal chairman and the president and then pandemonium ensued or the next few hours. Each side complained about the issues that were being caused by the other. The key was to get the staff that

needed to work together to identify issues created by others actions/inaction and then I facilitated their identification of solutions to implement and metrics to monitor success.

When the teams reconvened after lunch, everyone realized that they were all complaining about the same issues, and denying it was their problem. That simple recognition was enough to allow everyone to begin talking about what could be done on a collective basis to resolve the problems focusing on what they could do to help resolve the problem.

Many solutions were forthcoming, not the least of which was implementing daily 7 AM standup meetings to review and resolve RFIs from the day before, most of which could be resolved quickly with pencil sketches and formal follow-up. Additionally, expedited change order review and implementation was addressed. Pending future changes were agreed to be discussed collectively for potential impact, how to mitigate that impact, and the potential for canceling the change if it did not help all parties achieve a successful completion of the project. Monthly executive meetings were established to monitor the resolution of these issues within the project team.



One of the key actions was the replacement of the owner's and contractor's project managers. This step was not taken because of alleged incompetency or personality differences, but rather the long list of unresolved legacy issues. Those issues were keeping them from being able to work together, and that atmosphere filtered down to everyone else on both management teams. The new project managers had no reason to distrust each other their sole agenda was how to implement successful project procedures and project management and the legacy issues were resolved by upper management. These legacy issues as well as the cost to accelerate the project to meet an earlier completion date were resolved within a few weeks. This resolution cost the owner little more than one percent of the total construction budget, but without it, had the potential of causing a 20% cost overrun.

As Team Leader and defacto Project Neutral, I became the on-site mediator between all the parties to

compromise, resolve issues, and expedite construction. The bottom line was a project that was projected to complete in 10 months, completed in seven; and a project that was projected to cost an additional \$20 million was completed for an additional expenditure of a little more than \$2.5 million. The simplest explanation for this success was that everyone on the project, worked together to achieve common goals of the project, and thereby also achieved their company's individual goals. The other significant factor that changed the outcome of the project was the expeditious resolution of the legacy issues by the off-site management team and the development of a level of trust at other issues encountered on the completion would be resolved amicably and expeditiously.

In the project related above, the primary driving force behind the overall success was that the project needed assistance in identifying and implementing methodologies to achieve the overall common project goals, which worked to the benefit of the project, the contractors and themselves. As Project Neutral, I was able to become that driving force.

### **About the Author**

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