

Planning for DISPUTE MANAGEMENT

Illustration by **Mitch Blunt**

‘Plan your work, work your plan’ is an old adage, drilled into many professionals in the construction industry. Owners and contractors routinely apply this approach to projects from planning through close out. However, rarely do owners plan how to manage disputes, relying instead on whatever process was used in past contracts. Accordingly, owners who frequently use standard form contracts later suffer the pitfalls of the disputes clause therein. Some owners may be surprised to learn that the contract sends the contractor straight from negotiations to the courtroom.

Owners must include a plan for dispute management in contracts that mandates a process for elevating unresolved issues promptly before they adversely impact the project. What sort of plan should an owner include in a contract?

RARELY DO OWNERS PLAN HOW TO MANAGE DISPUTES, RELYING ON WHATEVER PROCESS WAS IN PAST CONTRACTS

- Include requirements to identify disputes early by including reasonable, but not impossible, timeframes for providing written notice to the owner.
- Dispute avoidance necessitates submittal of claims soon after a disputed event is complete. Impose

a deadline for submittal of fully documented claim submittals of 30 to 60 days after the event is completed.

- Specify what must be included in a properly documented claim and state that the contractor, as claimant, bears the burden of proving entitlement, causation, and damages.
- Require prompt claim review by mandating responses to claims submittals within a specified timeframe by the owner’s representative.
- Require that once entitlement is agreed upon, settlement negotiations shall commence within 30 days. The longer it takes to get to the negotiation table, the larger the claim is likely to be.
- Mandate prompt elevation of unresolved issues to management by requiring project-level negotiations to be completed within 45 days after a finding of entitlement or the issue will be elevated to senior management.
- Include a Dispute Resolution Board (DRB) in the contract and make the DRB hearing and receipt of the DRB’s

recommendation a condition precedent to any formal legal action. (As of 2007, more than 2,000 projects worth US\$100bn have used DRBs – 58% never held a dispute hearing and 98.7% were completed without any follow on legal action.)

- Require mediation should a DRB recommendation be turned down. This imposes a cooling off period and analysis of the recommendation by an experienced neutral, which should help resolve the dispute.
- Weigh the pros and cons of arbitration versus litigation in the jurisdiction where the project is to be built and make a rational business decision on which way to go. Should the decision name arbitration, specify the rules governing the process and the qualifications of the arbitrators.

Owners need to plan the dispute management process prior to bidding and embody such decisions in contracts. Proper prior planning and rational decision-making concerning the disputes process should provide for resolution of issues in a business-like manner by the project stakeholders, not by others.

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