

TRY PARTNERING BEFORE LITIGATION

INTRODUCTION

In a conference in year 1994, a paper was presented on Alternative Disputes Resolution. The paper dealt with different ADR methods then being tried out in countries, which were frustrated by long drawn and queer results of litigation through Court as also with Arbitration.

The ADR then discussed included Mini-Trial, Expert Adjudication, Project on-going adjudication, Mediation, Negotiations, Dispute Review Boards and Dispute Avoidance and Resolution Task Force. Varieties of dispute prevention, control and resolution techniques have been developed but not one by itself can effectively respond to specific needs of a project. It has to be a hybrid one – Partnering.

Partnering and Management in disputes is the latest trend in Resolution of Construction Disputes. Its essence is applicable and valid for all types of Contract and Business related disputes.

Partnering is a combination of several forms of ADR in an informal process. It aims at eliminating or minimising issues having potentials of becoming disputes for litigation. Partnering provides platform for various opposing interests to reduce project risks.

Partnering changes attitude towards differences and disputes. It reduces conflict and accelerates settlement. It is an outcome of common goal of

Project team to reduce conflicts and achieve early completion. Any conflict results in financial, emotional and efficiency costs. Partnering basically is disputes management programme. It is a programme that provides benefit for all parties, Contractors, Owners, Consultants, and Vendors.... It is a win-win situation. It helps all project players to focus on efficient completion rather than scheming for strategies to avoid liability. Parties intuitively hate litigation. This natural aversion to conflict is the very foundation of this Partnering Programme.

Professionals involved in a construction project contribute two commodities. Time & Talent. Both mean costs. Their interest is to get maximum output at minimum inputs. They are, therefore, most amenable to 'Partnering'.

Contractor invests value resources. Shorter the time of resource engagement, better the profit. They are most keen to develop partnership. Owners' interest too is early completion, lower cost, and quality assurance. While all the three are natural partners, the concept of 'Partnering' remains unidentified, unappreciated under inertia of tradition to view it as a triangle instead of being collinear.

Mediated Contract is a hybrid worth trying out. It is perhaps not possible to have this done in a public tendering system.

Construction industry needs Co-operation, Co-ordination and Cordial relationship while it is the one which produces most confrontation amongst its players. It is most adversarial industry – having antagonistic relations and win-lose attitude. How long you could think of litigation? Serious

Construction executives have started to study causes of Construction “Cost Influence Curve”, source and cause of disputes, efficient construction techniques, Realistic Risk allocation and Partnering Philosophy.

The entire programme of Dispute Management has to follow a particular sequence and evolving different methods, at times hybrids in different phases. This programme is related to different management philosophies .

The pro-active phase is where partners develop certain basics of rules of programme.

STEPS IN PROACTIVE PHASE –Partnering/ Collaboration Philosophy

1: Total Quality Management

Parties should appreciate Total Quality Management in terms of policies, procedure, skills and teamwork.

Project Owners must do their homework well. Designers should put their best professional skill to minimize design errors and drawing co-ordination. Contractors should manage procurements –materials & skills, minimize Bid errors, Realistic scheduling, and Resources based schedules are necessary instead of activity-based schedules.

2: Improved Personal Relations

Team should have more objective interpersonal relations, less tensions, less formalities and better communication at personal level rather than at paper level.

3: **Encourage Partnering**

Partnering is a direct result of the above two rules. However to monitor resolution of a dispute for a win/win situation, Neutral Expert, Dispute Review Board, Mediation are suggested provisions.

4: **Collaboration for value Engineering**

Parties put their heads together for dispute avoidance in case of Change Orders which trigger disputes to reduce impact of extra cost.

5: **Win/Win Negotiation**

Parties look for mutual interest in each situation that could trigger differences. They work for interest instead of issues. Claims are direct outcome of mishandled Change Orders. Good documentation, timely notice and fair computation contribute to successful partnering.

STEPS IN REACTIVE PHASE (Competitive Philosophy)

6: **Standing Neutrals/ Dispute Review Board**

These are Construction experts who watch project coming up and are available for Consultancy for resolving differences for on-going project. It has definite advantages

1. Confidence level in neutrals is high

2. Inflated claims/ Counter claims can be avoided with on-spot evidence available.
3. Low cost resolution technique
4. Compatibility with partnering

7: **Mediation/ Conciliation**

Just a step short of litigation but still it is a type of partnering one must exhaust before resorting to Arbitration which is just another form of litigation.

Parties to contract are often in business of repetitive commercial relations. It is only “Partnering” which leaves no scar.

8: **Arbitration/ Litigation (Adversarial Philosophy)**

This is done by legal channels having no flexibilities or scope for convenience of parties. It is a non-partnering technique.

WHEN TO START “PARTNERING”

For intelligent management and control of Project the concept as to timing of Partnering is based on Cost-influence Curve i.e. *“Earlier one studies project planning, greater will be savings of Time & Money”*.

This principle can be applied to potential disputes. *Earlier the identification and application of resolution technique better is pay off in cost and timesaving.* ‘Partnering’ should begin with first Agreement or MOU with an

agency and new members as they come in are inducted in the process of partnering.

Salient features of Partnering vs. Adversarial process

Partnering Provides

- Parties Control and interests maintained
- Informal & flexible proceedings
- Confidentiality
- No prejudice is caused
- No appeals

Arbitration/ Litigation

- No control by parties
- Formal legal procedures
- No confidentiality
- No mutual interest settlement
- Third party's decision binding
- Appeals may lead to multiple litigation

Conclusion:

Lord Donaldson, Former Master of Rolls wrote in May 92 issue of Arbitration.

“..... all other avenues to settlement... have a better chance of success if the parties are acutely aware that the alternative is an imposed solution. For this reason I do

not regard conciliation, mediation or any like process as an alternative which, in the absence of agreement, will lead to an imposed solution.'

'If that is right, as I am sure it is, we should not be looking at alternative dispute resolution.'

'I want to see consensual settlement at the earliest possible moment. I do, however, want the threat of an imposed settlement to be ever present in the background as an aid and stimulus to such settlements'.

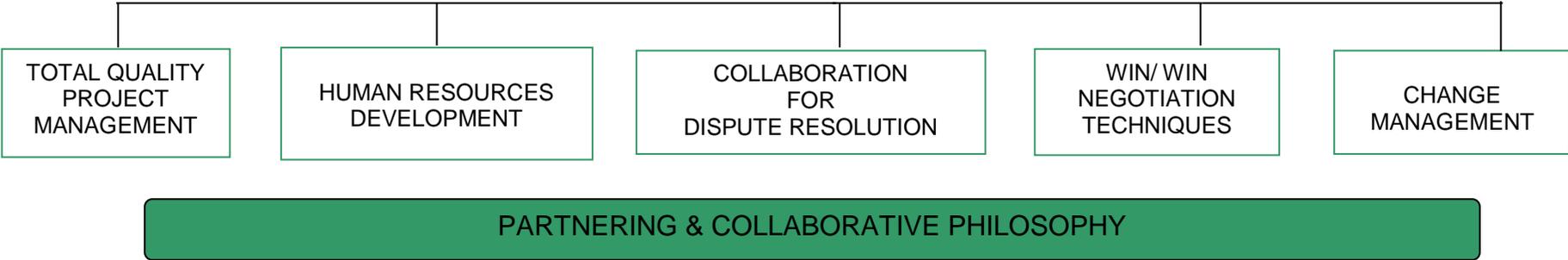
It is in the amendments to CPC could effectively be used to encourage Partnering. The provision in contract for 'Partnering' should be encouraged as a condition precedent to litigation. After all settlement of disputes should be the business as its technicalities & complexibilities are better understood by us. An U.S. Judge said:

"Gentleman, this is a case which should be settled between the parties...Being trained in the field, you are in a far better position to adjust your differences than those untrained in the related fields...the parties litigant should realise that, in most situations, they are by their particular training better able to accomplish this among themselves."

(E.C. Ernst. Inc. vs. Manhattan Construction Co. of Texas)

CONSTRUCTION DISPUTE MANAGEMENT PROGRAMME

PROACTIVE STAGES



REACTIVE STAGES (ADR)

