

DISPUTE RESOLUTION — IS THERE A RIGHT WAY?

BY LEE SCHUMACHER, P.E., P.S.P.

Many years back, a lawyer I knew made an observation that went something like this:

“All construction disputes have one thing in common—they are ultimately resolved either by surrender, compromise or litigation. Anyone familiar with litigation will tell you that litigation is generally the second least-preferable way.”

Disputes and claims are something that we all must live with despite our best efforts to avoid them. How we choose to resolve our differences, however, is often something within our control. Since this decision can have a significant effect on what your project will ultimately cost, it requires careful deliberation. Before making the final decision to jump into litigation, pause for a moment and consider what that option holds for your future.

Why? I am reminded of this other oft-quoted definition of litigation attributed to Ambrose Bierce and others:

“Litigation is a machine which you go into as a pig and come out of as a sausage.”

Imagine this: A contractor suffers significant cost overruns on a long, difficult and delayed project. There is finger pointing from start to finish, and by the end of construction, the owner and contractor distrust and resent each other. Both have been severely wounded by the job and blame each other for their respective pain. The contractor quantifies the pain and submits a global impact claim at the end of the job.

The owner is outraged. From the owner’s perspective, the contractor’s claim grossly mischaracterizes the facts of the job, ignores the contractor’s problems, and fails to comply with the contract provisions or establish a cause-and-effect relationship between the contractor’s allegations and cost claims. The owner summarily rejects the contractor’s claim.

The contractor decides to commence litigation, believing it the only way to have his concerns heard by someone other than the biased owner with whom he dealt throughout construction. When the litigation starts, communication between the two stops and everything is filtered through their attorneys. As a result, both sides start forgetting their vulnerabilities and begin to fall in love with their positions. In addition, the checks they write to their attorneys and consultants get larger, more frequent, and begin to add up to

significant amounts of money with no end in sight.

The owner and contractor finally start realizing that litigation is very expensive and slow. Worse yet, they learn that they cannot control it nor guarantee the outcome. It is then—only after a requisite amount of “blood letting” has taken place—that the owner and the contractor cut a deal that is driven more by the desire to stop the bleeding than by the merits of their position. Or, after years of more legal expenses, the claim ultimately settles on the courthouse steps or in the courtroom itself by people who had nothing to do with the project and for an amount that leaves both sides unsatisfied.

What is wrong with this picture? Just about everything. Unfortunately, in our business we see it happen all too often. Here are three suggestions that we have found help contractors and owners avoid this ugly scenario.

1. Contractors, spend the time to make your claim convincing from the start. Avoid, if possible, the strategy of presenting a general global impact claim that is not founded on the contract or a detailed analysis of the project events, and that blames others for all of your cost overruns without considering your self-inflicted problems.

Yes, perhaps you can create a “fog of war” situation that camouflages your losses as owner problems, and you may avoid getting into the trenches and fighting out every issue. Using this approach, you may even be able to get your claim resolved quickly without additional cost by luring an unwary owner into mediation unprepared, and having the mediator browbeat the owner convincing him to pay you most of the claim.

However, do not get your hopes up that this strategy will work. It frequently backfires, and as a result, you can end up in the quagmire of litigation. As budgets become tighter, many owners are less and less willing to jump into an early mediation and cut a deal. Be aware that owners and their attorneys are increasingly more skilled in dispute resolution, less easily intimidated by contractor claims, and well aware that they have a distinct advantage when it comes to time and money.

2. Owners, if the claim has merit, recognize it will probably be proven some day. Despite what many owners believe, most contractors are not claims-driven, nor are they skilled at litigation. Fortunately, they are usually much better at building things than constructing claims. Moreover, it is

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often easier for them to compromise when issues are unclear. As a result, they sometimes do not understand the owner's need for substantiation and prepare their claim accordingly. As owners, it is easy to summarily reject contractor claims that are unclear, confusing and unconvincing even when the owner knows there may be some merit; the contractor just hasn't proven it to the owner's satisfaction. I call this the "prove-it trap."

Be aware that the prove-it trap can significantly increase the owner's cost of resolving the contractor's claim. Why? If the claim has merit and involves a significant amount of money, the contractor and his attorneys will usually be able to someday show it with sufficient certainty to convince a judge, jury or arbitrator. Moreover, many owners do not realize that a court may require a lower standard of proof by the contractor than they do. Often, by the time owners come to these realizations, the ability to negotiate a settlement may not be possible due to the amount of time that has elapsed and the money the contractor has spent on their attorneys and consultants.

If possible, avoid the prove-it trap. As contrary as it seems, your best strategy is usually to be clear with the contractor regarding the substantiation needed for you to consider the claim. Consider helping the contractor get it right the first time. Generally, owners put themselves in the best position when they do their own independent analysis—either internally or using outside consultants—to determine the time and cost impact of their actions or inaction for which the contractor may have legitimate claims.

3. If possible, agree to structured negotiations or, if necessary, mediate. We have found on a number of occasions that, if properly structured, negotiations can settle even the most difficult disputes for amounts that all parties can accept and for amounts far less than what the parties would have spent in litigation.

This starts when the principals within the owner's and contractor's organizations understand that each has the resources and intent to aggressively pursue and vigorously defend their relative positions in court if necessary. Only then will they agree on the benefit of seeking an alternative to litigation, even though it will take time and a dedicated good faith effort by both parties to make it work.

For the negotiations to work, the contractors must be convinced that their claims will receive a fair evaluation. Owners can generally accomplish this by putting into place a senior negotiation team composed of individuals that were not involved in the project either from within their organization or an outside consultant.

Similarly, contractors must demonstrate that they have considered the contract and will bear the costs of their mistakes. The best way for contractors to do this is come to meetings prepared, take consistent positions that make contract- and fact-based arguments, and recognize legitimate owner arguments by reducing the claim when appropriate.

A reasonable and fairly negotiated settlement is only possible if the contractor senses that the owner's negotiation team is on top of the details, understands the issues, and has enough flexibility to reach a settlement. Thus, it is also very important that they have the authority to compromise with confidence that they will not be second-guessed later on. We do not live in a perfect world, and if the negotiation team cannot compromise and is forced to take too strong of positions, negotiations will not be successful.

In closing, do not forget that the alternatives to a negotiated settlement are either surrender or litigation. Neither contractor nor owner will have to surrender if their positions are based on the contract and they have properly documented the project. The only other way to resolve the claim is to litigate it. The consequences of that are what? "Pigs usually become sausage."

About the author

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