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Engineering News-Record

Mediation By Kenneth C. Gibbs

Viewpoint

Project Neutrals Prevent Disputes

The concepts of mediation and alternative dispute resolution have become almost universally accepted in the construction industry, and many construction contracts now require non-binding mediation before litigation or

arbitration can be initiated. Traditionally, mediation occurs at the conclusion of a project. But recognizing the huge advantages of preventing and resolving disputes at the earliest possible time, the industry increasingly has been using tools like partnering and non-binding dispute review boards to render advisory opinions during the course of a project.

Now, a new concept, the “project neutral,” is gaining widespread acceptance, as project owners, designers and contractors push dispute resolution and mediation into the earliest stages of large projects. Project neutrals are trained ADR specialists who are designated in contract documents to join construction project teams and follow the building process from groundbreaking to completion.

The project neutral is used as

needed to mediate disputes that cannot be resolved at the project level and, if the parties agree, actually rule on matters so that disputes can be resolved on an ongoing basis. Using a proactive approach, the neutral also can work with the project team to look ahead and avoid many disputes altogether by identifying and addressing potential problems before they happen.

So what is new and different about this? Many in the industry would say, “We always try to resolve disputes and we always try to look

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ahead and prevent problems.” The key point is that unlike any other player on the construction team, the project neutral only has one client: the project.

By demonstrating true impartiality and gaining the trust of all members of the construction team, the project neutral can have private, confidential meetings with each member (much like the traditional mediation process) and determine their concerns and the threats to the project being completed on-time and within budget. The project neutral then can carefully use that information to facilitate group meetings to address and prevent disputes.

The construction industry is recognizing the importance of having a neutral involved during the construction process. Traditionally, the architect/engineer, as the “master-builder,” has been the initial arbiter of disputes between the owner and contractor. But as more of those disputes have centered on plans, specifications and design aspects of projects, decisions by architects have been questioned by various parties, and architects have been put in the difficult situation of rendering opinions that could affect their own liability.

The new “American Institute of Architects General Conditions” (AIA 201), to be published this fall, recognizes this problem and introduces the concept of a third-party “initial decision-maker.” While the initial decision-maker under AIA



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201 does not exactly equate to the project-neutral role, the principal concept is the same: Someone involved in the project is a neutral party who represents only the project's interests and is not a participant in the project itself.

I have had the opportunity to serve as the project neutral on major projects involving hospital construction, heavy construction and hotel construction. With all of the parties working together, we have been able to avoid litigation and solve problems in a very proac-

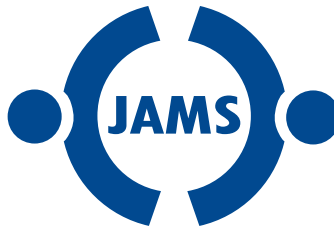
tive manner for the benefit of all.

Use of a project neutral was required by the construction contract for the Adventist Health-White Memorial Medical Center in Los Angeles. Tom Verti, president of Charles Pankow Builders Ltd., the general contractor on the project, says the project neutral approach "is much faster and less costly than mediation due to its informal and common-sense approach: It forces business principles to take precedent over the legalities."

The project-neutral concept takes the benefits of mediation and applies them in a cost-effective manner to construction management. It should be seriously considered by owners, contractors and design professionals planning to construct any major project. ■

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