

APC/PENNDOT FALL SEMINAR 2017

Dispute Avoidance and Resolution for all Industry Stakeholders

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OVERVIEW

- **Introduction**
- **Identification of issues causing disputes – all stakeholders**
 - Risks Associated with Identified Issues
- **Limiting risk**
 - Understanding the “other side”/mitigating that party’s risk
 - Limiting your own risk
- **Smart issue resolution**
 - The Psychology of Dispute Resolution
 - Dispute resolution myths
 - Best Practices for Smart Dispute Resolution



DISPUTES HAPPEN

- Billions spent annually on design/construction
- Nature of Construction: projects unique/built over long time
- Limited construction season
- Work done adjacent to traffic
- Public/political pressures
- Tight budget/bids
- Tight schedules
- Heavily regulated
- Many moving parts/contractual relationships



HAVE FORMAL CLAIMS INCREASED?

- Experience of seminar attendees?
- Fewer PennDOT claims attorneys
- Very limited number of Board of Claims trials over last 15 years



OVERALL GOALS FOR ALL INVOLVED

- **Identify and understand the issues that create the most risk**
- **Limit the issues that could result in dispute**
- **Smartly resolve disputes by utilizing informal dispute resolution mechanisms prior to full blown claim/litigation**



HOW DO YOU ACCOMPLISH THE OVERALL GOALS?

■ Three Step Process:

- Study existing data and prior experiences to Identify the problem areas, including both “issues” and risk factors
- Implement procedures within your respective organizations to Limit the number of disputes
- Resolve disputes “smartly” when they occur

■ Alternatives:

- Use a formal partnering process?
- Make claims a bid item (kidding!)



THE HELPFUL ACRONYM

- “ILS” Method
 - 1) Identification
 - 2) Limit
 - 3) Smart Resolution



STEP I – IDENTIFICATION OF ISSUES AND RISKS

ISSUES THAT RESULT IN DISPUTES – OWNER

- **Utility relocation is slow**
- **Utilities not in identified locations**
- **Differing site conditions**
- **Permit delays for Permits Owners must obtain**
- **Extraordinary weather events**
- **Errors in drawings**



- **Slow turnaround of submittals**
- **Let project without: (1) right-of-way, (2) permits, (3) pre-bid utility relocation**
- **Imposition of schedules with no room for error**
- **Slow decision making**
- **Use of design versus performance specifications**
- **Imposition of extra work without acknowledging impact on other work items or schedule**



- **Dispute over design/build allocation of risk**
- **Direct a recovery schedule when contractor not responsible for delay**
- **Payment delays, particularly on Local Let jobs**
- **Imposing contract with inequitable distribution of risk**
- **Failure to deal with changes properly**
- **Over-inspection**



ISSUES RESULTING IN DISPUTES – **CONTRACTORS**

- **Delayed finish due to own productivity issues, etc.**
- **Did not staff the project with enough crews/prioritize other projects**
- **Not coordinate designer's work on design/build projects**
- **Not fully examine project site or bid documents**
- **Failure to coordinate subcontractors**



- **Failure to perform utility coordination**
- **Failure to have adequate quality assurance**
- **Work does not meet specifications**
- **Latent defects**
- **Failure to provide documentation owner requests**
- **Failure to schedule the job/update the schedule properly**
- **Suspending work on project**



- **Subcontractor delays/financial problems**
- **Material supply delays**
- **Designer delays on D/B projects**
- **Weather issues**
- **Work stoppages**
- **Third party delays for which you have contractual responsibility**



ISSUES RESULTING IN DISPUTES DESIGN PROFESSIONALS

Design for DOT

- Insufficient scope/time allowed for design
- Fail to take proper SUE steps
- Fail to follow DM
- Mistakes in design/Subconsultant errors
- Slow review of shop drawings
- Untimely redesign during construction
- Third party delays to design process
- Improper survey/site information



Design for Contractor on D/B Job

- Dispute over designer obligations – no Teaming Agreement in place
- Quantities provided on lump sum items overrun
- Slow design delays construction
- District preferences increase cost of design/time
- No formal D/B Agreement in place



ISSUES RESULTING IN DISPUTES

Construction Managers/Project Management Consultants

- Slow review of schedules/submittals/change orders
- Assert too much control over schedule process/construction activity
- Direct acceleration through actions
- Adherence to one-size fits all schedule spec.
- Utilize a “bully” approach to run the job
- Providing poor advice to your Owner client
- Utilizing staff unfamiliar with Owner processes
- Requesting too much documentation/unrealistic
- Holding approval of pay estimates punitively



ISSUES RESULTING IN DISPUTES

Inspectors

- Overzealous inspection
- Requiring ongoing/multiple punch lists
- Not timely inspect finished work
- Use of staff unfamiliar with PennDOT/PTC Processes
- Inconsistency of inspection/staff turnover issues
- Attempts to dictate means and methods
- Not understanding “reasonable close conformity”



ISSUES RESULTING IN DISPUTES

Subcontractor/Supplier

- Delay prime contractor's work
- Your work is impacted by Owner actions/prime contractor actions
- Significant payment delays
- Errors in supplier's shop drawings
- Defects in product provided
- Stretched too thin, especially late in construction season



SITUATIONS WITH INCREASED RISK

- **Design/build projects**
- **Local Let projects**
- **Projects with high RULDs**
- **Projects with Complex Utility Relocation Requirements**



DESIGN/BUILD PROJECTS

- **Risks to contractor: designer delays and poor quantity estimates for lump sum items**
- **Risks to owner: (1) imposition of District preferences when contractor's design meets the DM; (2) owner still responsible for differing site conditions, utility delays and failure of governmental agencies to timely act; and (3) owner not completely relieved of design responsibility**



RISKS ASSOCIATED WITH LOCAL LET JOBS

- **Contractor risks: (1) significant risk of payment delay; (2) risk of differing directives from municipalities/PennDOT District**
- **Risk to PennDOT: (1) increased responsibility for payment delays due to applicability of Prompt Pay Law; (2) risk of dispute with municipality**



RISKS TO ALL STAKEHOLDERS IF ISSUES ARE UNRESOLVED

■ Owner

- Can be in disputes on both sides of contractual chain
- Costs of litigation
- Significant financial exposure
- Overall program delayed/impacted
- Public/Political pressures
- Can impact ongoing relationships
- Can result in intergovernmental disputes
- Higher bids



RISKS TO ALL STAKEHOLDERS IF ISSUES ARE UNRESOLVED

■ Contractor

- Can also be in disputes on both sides of contractual chain
- Can also face significant financial exposure/harm to business
- Disputes may not be able to be resolved in one forum
- Costs of litigation/experts
- Increased bonding costs/issues with bonding company, etc.
- Internal resources tied up/lost opportunity costs



RISKS TO ALL STAKEHOLDERS IF ISSUES ARE UNRESOLVED

- **Designers** – Can be sued by Owner and subconsultants; potential Bilt-Rite direct liability to contractor; can be brought in as third party defendant; disputes with contractors on D/B job; impact on PennDOT bid rights, added liability insurance costs; financial exposure.
- **CMs/Inspectors** – Can subject client to liability/incur risk of subsequent claim for reimbursement; can be liable for maladministration/over inspection, or at least expose client to claims; can lose future PennDOT work; can tie up company resources in claims, perhaps without reimbursement.
- **Subcontractors/Suppliers** – Often the party with most financial exposure; may need to rely on a pass through claim to recover; may be forced to act quickly to protect payment bond rights; may be in dispute with best customers.



LIMITING RISK

- **Recognizing the challenges the other party to the contract faces and helping them avoid disputes**
- **Taking all necessary appropriate steps to minimize the risk of disputes that you may cause**



FIVE THINGS OWNERS SHOULD KNOW ABOUT CONTRACTORS

- **The three days leading up to the bid are much worse than you think**
- **Full blown pre-bid CPMs are unrealistic**
- **Margins are slim and company overhead is real**
- **Contractors cannot afford to finance the job**
- **Contractors would strongly prefer not to bring claims**



FIVE THINGS CONTRACTORS SHOULD KNOW **ABOUT PUBLIC OWNERS**

- **The “approvals” that must be obtained for every change order, etc. are real, and the process is much worse than you think**
- **The government is simply not set up to be as flexible in negotiating change orders, etc. as private industry**
- **There are often political/funding reasons behind decisions**
- **The owner is often not the source of the issue ... it may be another agency, utility firm, consultant, etc.**
- **The utility firms will not listen to them either**



FIVE THINGS TO KNOW ABOUT OTHER INDUSTRY STAKEHOLDERS

- **Designers are not insured for everything**
- **Designers are often given unrealistic design schedules or are otherwise limited by their contract with the Owner**
- **CMs and Inspectors may simply be doing what the Owner directs them to do, and may be told to “follow the book” without exception**
- **Holding a prime contractor’s payment can have harsh results to subcontractors and suppliers**
- **The utility firms will not move very quickly for other industry stakeholders either**



HELPING THE “OTHER SIDE” MITIGATE RISK

- **Allow for a slightly longer bid period and provide less aggressive schedules**
- **Owners must recognize ripple effect/psychological impact of slow payment**
- **Contractors and subcontractors should be proactive in providing backup/requested documentation**
- **Owners and Designers on D/B job must realize that the design stage is compressed and the time frames for preparation and reviews must be adjusted accordingly**
- **Contractors and Owners should work together to obtain cooperation of utilities**
- **Routinely ask yourself – how can I help them so it helps us?**



LIMITING RISK – OWNER

■ Control what you can control

- Never let a project without securing all right-of-way and permits; relocate utilities pre-bid to extent possible
- Spend much more time and money on pre-bid SUE
- Build more flexibility into schedules
- Consider use of local acceptance testing
- Stress prompt decision making ... set up internal matrix, etc.
- Pay timely, particularly on Local Let jobs ... use estimated force account process
- Change Specs to more accurately reflect what a Court would impose anyhow



LIMITING RISK – OWNER

- Use best efforts regarding what you cannot fully control
 - Leverage whatever you need to make utilities relocate facilities more quickly
 - Do not let another public agency delay your project
 - Acknowledge that you get lower bids by including a DSC clause in contract, and proactively resolve DSC disputes
 - Find better solution to weather delays
 - If there is a design error, do not hold contractor accountable



LIMITING RISK – CONTRACTORS

■ Control what you can control

- Staff the job properly
- Do not bid the job anticipating to incur liquidated damages
- Do a pre-bid physical site inspection ... don't just rely on Google Earth, etc.
- On design/build projects take all steps to make sure design does not delay construction
- Timely provide schedule updates, submittals, etc.
- Manage your subcontractors and suppliers



LIMITING RISK - CONTRACTORS

- **Use best efforts regarding what you cannot fully control**
 - Have one person on each job assigned to aggressively pursue the utility firms and PennDOT to force utilities to relocate quickly
 - Stay on top of any permit issues for which you have responsibility
 - Inquire about supplier/material availability at bid stage
 - Consider a subcontractor insurance product
 - Have a well drafted Teaming Agreement and D/B contract on D/B job, and include a firm schedule with milestones
 - If an Owner delay now makes harsh weather more of an issue, alert Owner quickly and discuss schedule/acceleration options



LIMITING RISK - INDUSTRY

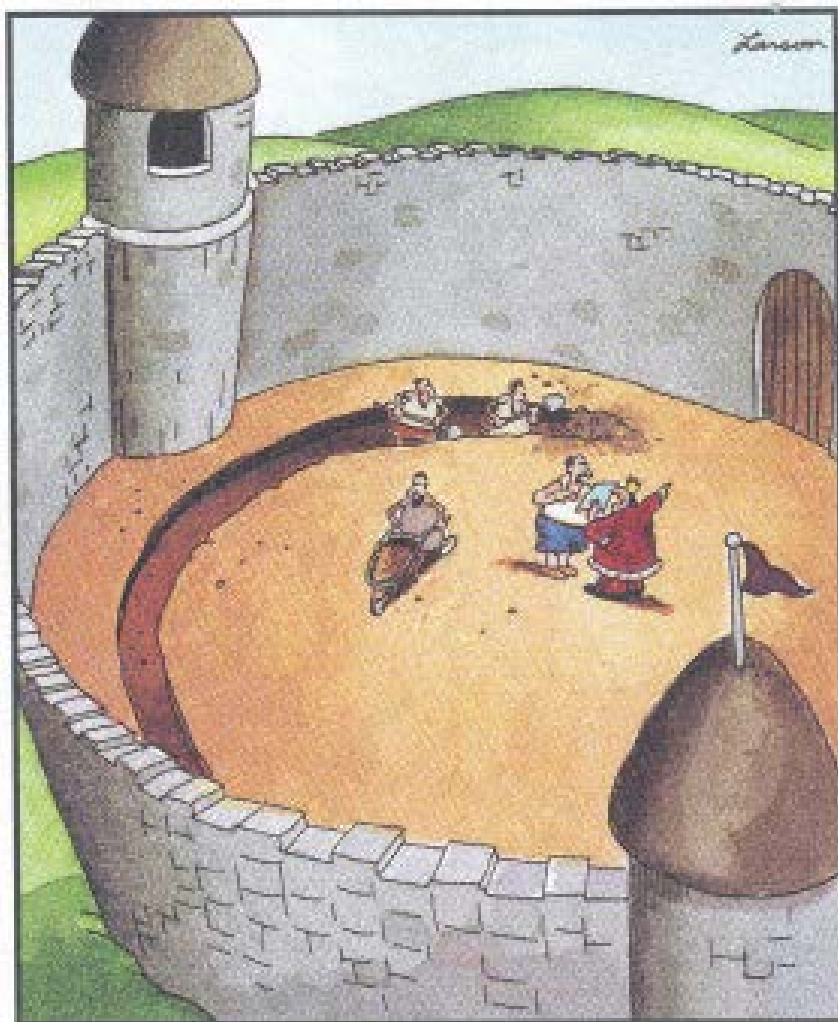
- **Develop defined Rules for design/build**
- **Develop a better informal process to resolve disputes, particularly larger disputes**
- **Provide your staff with more flexibility and empower them to make prompt decisions**
- **Make specification changes**
- **Urge General Assembly to address utility delay/mismarked utility issues**



“SMART” DISPUTE RESOLUTION

- **Smart Claim Resolution is:**
 - Cost effective
 - Timely
 - Flexible
- **Exhaust collaborative processes to avoid judicial processes**
- **Find least invasive procedure and work from there**
- **Don't pursue a weak position**





Suddenly, a heated exchange took place between the king and the moat contractor.

THE PSYCHOLOGY OF DISPUTE RESOLUTION

- **The typical mind set of the individuals involved**
 - Human nature contributes to the number of disputes on construction projects
 - Conflict is the natural result of human interaction in a challenging environment
 - Most people take conflict personally – see outcome of any negotiation as reflection of who they are
 - People are naturally psychologically invested in particular issues on projects



THE PSYCHOLOGY OF DISPUTE RESOLUTION

- **The typical mind set of the Parties to the Contract**
 - Each party tends to view self as all good and other as all bad
 - The perceived balance of power can contribute to a dispute heavy environment – parties view balance of power differently
 - Loss of control creates natural anxiety
 - Nobody wants to be bullied/taken advantage of
 - Understanding the psychology of a dispute can help solve the disputes



THE PSYCHOLOGY OF DISPUTE RESOLUTION

- **Using awareness of Dispute Psychology to help resolve disputes**
 - If taking conflict personally limits the ability to resolve disputes, parties must be able to release the psychological investment in the outcome
 - Parties must understand themselves both in isolation and within context of human interaction
 - Parties must recognize that mutual resolution is better than imposed resolution
 - Those who function with adequate objectivity or can be encouraged to do so get best results



THE PSYCHOLOGY OF DISPUTE RESOLUTION

- Parties removed from the project's day-to-day operations can help provide a level of objectivity
- During mediation/negotiation, parties are generally overconfident and have high expectations – overconfidence can be catastrophic to negotiated solution
- Prior to negotiations/mediations, parties often experience anxiety and are naturally defensive
- Understanding the psychology of a dispute can lead to better practices to resolve them



DISPUTE RESOLUTION MYTHS

Owner

- Exculpatory clauses fully protect the owner
- The owners have an absolute right to assess liquidated damages
- The contractor can always recover lost time
- On D/B contracts, the contractor bears all the risk
- The owner is never liable for interest
- The contractor's duty to review construction drawings absolves the owner of design liability



DISPUTE RESOLUTION MYTHS

Contractor

- **Inspection and acceptance by the owner relieves the contractor of responsibility for the work**
- **Under a differing site conditions clause, the owner is always responsible for what is discovered under ground**
- **The owner's review and approval of shop drawings removes all liability from the contractor**
- **Placing a supplier on Bulletin 15 guarantees that the product being provided meets specifications**
- **The contractor will be made whole in a claim**



BEST PRACTICES FOR DISPUTE RESOLUTION

Maximizing use of the Current System

- **Current system: (1) job level/change order resolution, (2) ACE/Project Manager, (3) ADE/Senior Manager, (4) Contracting Officer/Optional Claim Review Meeting, (5) Board of Claims**
- **Best resolution is a job level/through work order – Negotiated prices are less combative than force account**
- **Quickly “elevate” what must be elevated**
- **Always consider both the “business case” and the risk of allowing an issue to remain unresolved**
- **Don’t let dispute turn into a “Pay me now or pay me later” situation**
- **Remember the psychology of disputes at all levels**



BEST PRACTICES FOR DISPUTE RESOLUTION

If a “Claim Meeting” is Necessary

- **Consider a meeting with DE/Senior Management outside of Claim Review process**
- **Perform a “360 degree” review prior to any meeting**
- **Have discussion whether to include legal counsel**
- **Consider unique solutions**
- **Agree on an agenda/content**



BEST PRACTICES FOR DISPUTE RESOLUTION

If Formal Claim Review Meeting is Scheduled

- **Mutual advance exchange of written positions is critical**
- **Allow enough time for full discussion**
- **Limit the number of attendees**
- **Avoid the who wins/loses Claim Meeting thought process**
- **Limit overconfidence**
- **Consider a two meeting process**
- **Make decisions based on business case**



BEST PRACTICES FOR DISPUTE RESOLUTION

Consider Utilizing Other Non-binding Dispute Resolution Methods

■ **Mediation**

- Helps parties view objectively
- Helps parties “have their say”
- Helps parties evaluate risks
- Can assist Owner with internal/external overseers
- Easier to bring multiple parties to the table
- Costs should be shared; include a Special Provision?

■ **Other ADR Methods**



BEST PRACTICES FOR DISPUTE RESOLUTION

Summary

- **Identify the problem areas**
- **Limit the potential for disputes by controlling what you can control and using best efforts on what you cannot**
- **Smart Resolution – time and money spent now saves both in the future**

