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# Mediating a powerful dispute effectively

Joe Grynbaum

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# The ADR Bulletin

The monthly newsletter on dispute resolution



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### General Editor



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### An American case study

# Mediating a powerful dispute effectively

*Joe Grynbaum*

### Overview

More and more dispute resolution mechanisms are being factored into construction contracts between power project participants to avoid costly and often acrimonious litigation following project execution. Alternative dispute resolution (ADR), a disciplined non-binding approach that is successful 80 to 85 per cent of the time, is being adopted by informed management in the power industry. Mediation is the least expensive and most painless ADR method adversaries can choose.

The successful resolution of construction contract disputes by mediation is not attributable merely to the mediator's neutral demeanour, but also to his or her empirical knowledge of the circumstances under which such contracts are made. Moreover, the mediator's construction expertise, powers of persuasion and comprehension of the reasonable expectations of all parties served by the project are essential for effective, efficient resolution.

This is no small task: mediators must master the disciplines practised by all the affected parties, including the engineering, planning, and construction teams, as well as the ultimate user of the service. In some cases, mediators must even understand the intricacies of the financing and insurance implications entailed in the project.

This article explores how a neutral mediator developed an informal approach tailored to the circumstances in a dispute

that compromised the development of a power plant. The goal, as in all project ADR, was to provide the developer and contractor with a non-binding mechanism for reaching a solution that would:

- (1) not adversely affect the ongoing project work;
- (2) not alienate the parties from each other; and
- (3) keep both parties away from the courts, with their lengthy and costly litigation process and uncertain outcomes.

### Project background

For several years, a well established co-generation project developer had sought to develop a private power generating facility in the Caribbean region. After an opportunity to sell power to an island utility became available, the developer located a candidate commercial processing facility situated adjacent to a suitable distribution line. The host facility management was interested in paying for cost effective and reliable thermal energy in the form of steam and hot and chilled water, and reducing the cost of its electric power.

After a thorough engineering analysis of the thermal host's existing and future potential energy needs, the developer selected an optimum size of co-generation plant and determined the economic advantage of using heavy fuel oil as its primary fuel. The developer selected low

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emission medium speed diesels, capable of generating 16.25 MW for power production, and waste heat equipment to produce thermal energy as an economic by-product. The co-generation plant both satisfied the utility's condition for entering into negotiation for power purchase and allowed the developer to enter negotiations with the thermal host to purchase thermal energy services.

After successful completion of these concurrent negotiations, the developer signed a power purchase agreement with the utility and an energy services agreement with the processing facility, and received a commitment for financing from a lender. All he needed was the co-generation plant itself. For this task he went to an internationally renowned diesel engine manufacturer willing to supply all equipment and build the facility under a turnkey lump sum contract agreement. From the developer's perspective, this arrangement represented the best overall approach to the project in terms of pricing, schedule for completion and project risk mitigation.

### Contract

Based on these understandings, the developer and contractor negotiated an engineering, procurement and construction (EPC) agreement to cover the supply of the diesels and co-generation equipment, and the design and construction of the facility under a fast track schedule for completion of the facility 320 days after notice to proceed.

An EPC contract agreement typically describes what the contractor will supply for engineering, purchasing and construction of the project, usually for a lump sum cost and fixed schedule of completion. The critical aspects of the agreement are what it covers, how it will be interpreted, how well each party communicates what the developer was seeking to accomplish, and the stated specifics of how the contractor is going to satisfy these objectives. In the event of an unresolved dispute during its implementation, it is this agreement that will later be interpreted by a court.

### Dispute develops

Although the project started off well, it did not meet its 320 day deadline. The parties were mired in frustrating progress meetings that failed to address the problem of delay and its accompanying costs. The additional costs and delays bred particularly adversarial and unproductive discussions. Although the contract documents contained the usual requirement to continue the work in good faith when the contractually mandated mechanisms for amendments and resolution of disputes were triggered, communication became strained and the predicted completion date of the project was further endangered.

The dispute centered on scope of work related issues specific to how the contractor had undertaken the design of the facility. The owner based his position on his interpretation of the contract documents and the general requirement that the co-generation facility be designed in accordance with 'good engineering practice' and automated sufficiently for operation by a shift crew of three operators.

About 12 months into the co-generation project, when construction was approximately 85 per cent completed, the debate over scope of work issues reached an impasse that could only be broken by some outside influence such as binding arbitration or a judgment of a court in a lawsuit. These alternatives, however, entailed a large time commitment that would be likely to further threaten timely completion of the project. Moreover, this delay could cause both parties to incur monetary damages under the time sensitive agreements in place with the utility, the thermal host and the project lender.

The issues obviously arose out of each party's unique interpretation of the contract provisions and the subsequent promises made by the contractor in winning the job. Accordingly, a judicial interpretation of the contract seemed in order. That process alone, however, could take long enough to doom completion, as well as expose the parties to the myriad risks inherent in judicially rigid contractual interpretations. Binding arbitration appeared no better a prospect, because arbitrators are primarily governed by the same rule of law as judges.

### Resolving the dispute

The parties were stuck in a holding pattern. Fortunately, my engineering management consulting firm was already participating on the project as the independent engineer. Recognising the need for quick and efficient intervention by a qualified neutral party, I volunteered to expand my technical responsibilities and offered my services as mediator to resolve the dispute.

I had worked with and earned the respect of both disputants, and had a proven record of absolute objectivity. I also had design and construction expertise on projects of this nature. This enabled me to understand fully the reasonable expectations each party held in terms of completing the project. From my vantage as an independent engineer, it was apparent that the problem was one that needed to be confronted and resolved quickly, while still maintaining project momentum and strong lines of communication between each party.

A cottage industry in construction mediation has undeniably been created by dispute resolution 'professionals' or neutrals who profess skills in conflict resolution. It is, however, often characterised by a distinct deficiency: the absence of expertise in the subject of the dispute. Only a mediator who possesses a degree of knowledge in an area as technical as diesel co-generation would have been able to fully understand the conflict and the nature of the project priorities in this case — a rare talent among professionals in dispute resolution.

### Why ADR?

I believe mediation is particularly effective with EPC construction projects, because it is based on voluntary participation, can be budgeted into the project, and does not involve the delays and constraints inherent in the court or the binding arbitration alternatives. In mediation of these cases, a neutral party, preferably experienced in the EPC contract method of project execution and hopefully also familiar with the design and construction aspects of the project, helps each disputant frame the issues in dispute and enables them to enter into a constructive ➤



➤ dialogue designed to resolve the issues between them.

### Resolution workshop

With input and encouragement from both parties, I offered to organise an informal resolution process designed to tackle the major issues without risk of disruption to the project flow. I counselled both parties that if these disputed issues remained unresolved until the end of the project they could lead to costly litigation, because outstanding plant design items would be more complicated and therefore difficult to correct after the plant was completed. More importantly, not doing anything was beginning to produce an atmosphere of distrust and antagonism between the contracting parties, particularly as the critical commissioning and testing phases of the project were fast approaching.

When the suggestion to try ADR was received favourably, I set about organising a one day informal session to give each party the opportunity to resolve the major outstanding issues. The session was designated a 'dispute resolution workshop' where the parties could embark on a facilitated exchange of positions on an expedited basis.

### Rules

In order to prepare for the workshop, I proposed a number of ground rules that both parties accepted. The rules were as follows:

- (1) attendees had to be authorised to make decisions involving financial and schedule commitments that were binding on their companies;
- (2) the workshop would be held in a neutral location outside the offices of either company;
- (3) a maximum of three persons from each organisation could attend;
- (4) outside interruptions would be kept to an essential minimum;
- (5) both parties would concur on a list of disputed issues prior to the workshop; and
- (6) the fee for the services of the neutral workshop facilitator would be shared by both parties.

Over the next few weeks, the parties finalised a list of eight contractual items that

had eluded resolution. During this informal exchange of information, which I managed as the mediator, the parties were able to resolve another four previously disputed items before the workshop even began.

The finalised list of issues was provided to me and each party at the outset of the workshop. The list included a brief description of each item, its estimated cost impact, schedule impact and position (priority), based upon each party's interpretation of the contract documents. With this information in hand, we began the real work of reaching a mutual agreement on each of these items.

Each company chose to have two managers attend the mediation: the project manager, who had fiduciary responsibility under the contract agreements, and the site manager, who was responsible for the site activities and had detailed knowledge of the circumstances affecting construction and operation of the facility upon completion.

Prior to beginning the workshop, I announced several additional workshop rules. Using visual aids to introduce the participants to a brief overview of the informal mediation process, I reminded everyone of the workshop's greater goals of identifying and meeting the legitimate interests of all participants and continuing to have a successful project. I also suggested that the workshop conclude at the end of three hours.

The workshop rule that proved most effective, despite the different cultural backgrounds of the European based EPC contractor and the US based owner/developer, focused on the importance of communication. This rule was described as the 'no buts' rule. Simply stated, each person was asked to minimise the use of the qualifier 'but' in expressing a position or an opinion on a disputed item, as in 'I agree with what you have described *but* it is ...'. Both parties also agreed to watch their language in order to maintain a positive and constructive working atmosphere that emphasised mutual respect and common ground on the important project considerations at hand.

### Process

With the rules established, the ➤

'The workshop rule that proved most effective, despite the different cultural backgrounds of the European based EPC contractor and the US based owner/developer, focused on the importance of communication.'



➤ workshop proper got under way. In order to avoid making a value judgment on the importance of each issue in dispute, I had written a number from one to eight on slips of paper and placed them in a baseball cap. Each party alternated and picked a slip of paper with a number for the issue to be discussed.

The first two issues concerned a covered access way and maintenance blanking plates. These matters were quickly resolved in a co-operative dialogue. It looked like the workshop would prove successful — until item three emerged, and took the meeting beyond the three hour time limit previously established.

Item three involved the need to improve the project's existing computer based acquisition and monitoring system, and its determination was more far-reaching in terms of cost and schedule impacts than the first two items. When I alerted everyone to the previously agreed time restraint rule and suggested that the group accept defeat on this item, both parties insisted that they were not ready to give up and wanted to explore more options to reach an agreement, despite the difficulties encountered thus far.

Buoyed by this feedback, the group broke for an informal lunch together and then returned to the task at hand. The troublesome item three was quickly eliminated in a 'horse trading' exercise I suggested, and from that time forward all remaining items were resolved in a give and take approach during the extended afternoon and early evening session.

At that point, both project managers signed off on a formal list of agreed items with their associated costs and schedule impacts, which I witnessed. The workshop's success was celebrated with a group dinner.

### Feedback

In order to obtain constructive feedback, I sent a questionnaire to all attendees to elicit their impressions and suggestions. The attendees raised several significant points.

1. They had not previously been exposed to mediated resolution as a management technique to exchange views

and resolve issues that were hampering project progress.

2. The consensus was that the people skills and thorough understanding of the project's design and contractual dynamics that I brought to the workshop were important in establishing the trusting relationship that pulled the participants through the rough spots that could have aborted the workshop.

3. The limited timeframe proposed for the workshop was inadequate for the task at hand and more flexibility in time is required.

4. Each party would come to future mediations better prepared, with more alternative acceptable solutions for discussion.

5. Both parties left the workshop 'with a good feeling'.

6. Both parties as individuals to this day try to minimise the use of the 'but' qualifier in their professional dealings as well as their personal lives.

### Conclusions and recommendations

The construction industry is discovering that there is a cost effective alternative to resolving disputes without turning to the courts or even binding arbitration. Mediated dispute resolution is a process that is rapidly gaining favour among industry associations and industry insurers in the US, and it has the endorsement of the American Bar Association. After a 20 year incubation period ADR has been mandated for construction disputes by State courts such as the New York State Supreme Court, by public agencies such as New York City School Construction Authority, and by private organisations such as Associated General Contractors. The American Institute of Architects has recently revised its standard contract to include mediation before arbitration.

Mediation has a number of obvious advantages over the court system. It is co-operative and consensual rather than adversarial. It is relatively quick, inexpensive, and can be confidential and flexible. It also often has the satisfying characteristic of keeping control and power in the hands of the parties involved.

The application of the power of persuasion in a voluntary fashion has a high probability of resolving disputed project issues at a fraction of the cost of litigation and subsequent lawyer-brokered settlements. It also offers the fringe benefit of mending the strained business relationships that can persist between parties in dispute and negatively influence future business opportunities.

When construction contracts are drawn up, they should include provisions for non-binding alternative dispute resolution as a first step to resolving the inevitable conflicts that persist after the parties under contract have attempted to overcome them in day to day administration of the project. Furthermore, an early effort should be made to select experienced individuals and/or firms as potential neutral mediator parties.

Mediators should be selected on the basis of their empirical skills to understand the nature of the business at hand, be it lump sum design and construction, or design build, or build operate transfer contracts, as well as their people skills. The fee for the mediator's services should be shared between both parties to ensure that neutrality and absolute objectivity is maintained beyond question. ●

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