

Focus ALTERNATIVE DISPUTE RESOLUTION

Anticipating project disputes



Corey Sandquist

Construction and infrastructure projects involve intertwined moving parts, parties and competing and complementary interests. As such, projects become a hearty breeding ground for changes, disputes, claims and litigation.

However, addressing claims and changes is often an afterthought, only to come to the forefront of the project team's minds during the heat of construction or toward the end of the project.

Project counsel and project dispute counsel offer a proactive solution. We will focus on project dispute counsel for this article and demonstrate an example of how the parties could have saved approximately 60 per cent of their costs on a \$200,000 issue, minimized schedule impacts and preserved relationships.

Project dispute counsel (PDC) are legal counsel who are "engaged" by the project and do not represent only one party. PDC act for two or more parties (such as an owner and general contractor or owner, general and one or more subcontractors) on issues that arise over the project lifecycle.

In a claim or disputed change order situation, PDC will make a legal assessment and quantification of the claim, then point out the issues that each side faces. They will review both sides' relevant documents, but also further investigate both sides' version of events.

PDC will engage, in a meaningful way, each party on their strengths and weaknesses and make a recommendation as to settlement based on their application of the contract, the law and the evidence that exists. This will eliminate months of back-and-forth letters and strategic game-playing and payment issues, as well as the usual duplication of costs associated with the traditional approach of both parties hiring legal counsel.

This traditional approach has severe communication restraints and takes months to a year (or more) before both sides start to get a picture of the evidence and version of events from the other party, with their respective counsel having to regularly update their analysis based on this trickling and costly information flow. The traditional approach is inefficient, very costly for both sides and unnecessary when the ultimate result is that each party receives the same information (through the fact discovery process of litigation) and has the same law and contract with which



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to apply to that information.

Consider the common example of a general contractor that has engaged a subcontractor for, say, steel work on a fixed price contract. During early construction, the contractor is drilling a piling and strikes an underground boulder that requires the piling to be moved, necessitating design changes. The subcontractor has to wait eight weeks beyond its expected mobilization date and requires it to use more material than the original scope of work. The subcontractor submits a change order to the general contractor for \$200,000. The general contractor has a fixed price agreement with the owner and the owner refuses to pay any more for the project. The general contractor argues that the subcontractor does not have a claim for the delay.

Neither party agrees with one another, but their legal entitlements are determined in contract law, the *Builder's Lien Act* and evidence. PDC will make a legal assessment and quantification of the claim, then point out the issues that each side faces, all of which would be done by their own legal counsel anyway, but at double (or

more) the cost and time. In this example, the amount of work that goes into the traditional approach to get to the same fact sharing and discussion point would likely be around \$25,000 to \$35,000 each and take six to nine months. With PDC, the general contractor and subcontractor only have one collective cost and no time, formal litigation rules or communication constraints. The cost of PDC would likely be around \$20,000. More importantly, the parties can maintain focus on the project itself and keep an active and open dialogue to address project impacts and get the project to completion.

The above example applies more to a situation where the claim has escalated to some formal degree. PDC offer even greater value if they are engaged at earlier stages of the claim or even at the time the events giving rise to the potential change occur. If PDC are engaged at these early stages, they could be involved in developing the scope of work for the change and preparing a clearer and more comprehensive change order document that will, at the least, give the parties a better understanding of what has occurred, what each has to do and how it will be addressed, cutting down a majority of the costs associated with the after-the-fact investigation stage (likely another \$10,000 to \$15,000 savings in the above example).

The PDC concept does require a perspective shift at the start of the project to recognize that the project will not go precisely as planned and all of the moving parts will need adjustment over the course of the project. In doing so, the PDC will facilitate a substantial cost savings in addressing these adjustments and minimizing the negative impacts on project completion.

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Corey Sandquist is the founder of Sandquist Law & Construction Project Consulting.



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