

THE PROJECT MANAGER AS MEDIATOR

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Project Managers know it: Hong Kong's construction industry is blighted by scandal, delay, in-fighting, litigation and wasted resources. Construction sites always have more than their fair share of hard-headed people. Why is it then, that some project managers have very few, or no disputes at all? How do these professionals deal with inevitable frictions and differences of opinion BEFORE they explode into disputes?

The successful ones have not only the technical abilities for the job at hand; they also have the people skills to solve problems before they spiral out of control. Many of those skills are the same ones that we use today in the mediation process.

Pilot mediation projects sprang up in the early eighties in a number of North American jurisdictions. Most originated in Family Courts - which encouraged warring spouses to negotiate a more dignified termination to their marriages, a solution that took into account not only legal rights, but also the needs of the parties and their children. Court officials and judges, presiding over crowded courtrooms and inundated with litigants, were delighted to see shrinking case lists and reduced waiting time. Realizing that these facilitated settlement negotiations could also save time, money and stress in commercial cases, they began exploring its uses in other types of dispute. Today, mediation is widely used in all kinds of civil cases America, the UK and Australia. In some jurisdictions, it is a necessary first step before the parties can get to a judge.

In Hong Kong delay in the courts is not a serious problem, but the cost of legal proceedings is prohibitive to all but the wealthy or the publicly aided. Hong Kong's judiciary is studying the use of mediation¹ as a way to improve access to justice.

In the construction industry no one will deny that improvement is long overdue. Competition is fierce and tenders usually go to the low bidder. Contracts are for substantial sums of money and for lengthy terms. Nothing is certain but the unexpected, and surprise begets friction. Claims are a way of life in this business. Mistrust and adversarial attitudes don't help solve problems. Litigation and arbitration divert resources belonging to the business and waste them on second guesses, recrimination, hand-wringing and blame. Often the disputes linger and fester for years after the construction is finished. Aside from the negative impact on morale in the industry, the bottom line shows lower profits for contractors; high cost and poor quality for owners.

¹ The Honourable Mr. Justice Michael Hartmann discussed this trend to the use of ADR in addresses in two international dispute resolution conferences in Hong Kong, in May 2001 and again in January of 2002. Since 2000, the Hong Kong Family Courts have had a mediation pilot project in place, with heartening results. See also the Construction Industry Review Report (Tang Report) of 2000, in which Henry Tang's committee recommended increased use of ADR.

What about trying to resolve some of these disputes *before* friction becomes discord? As the “neutral” on a construction site, the project manager is in an ideal position to make use of some classic mediation techniques in resolving issues as they occur and in maintaining a cooperative spirit among the members of the construction team.

What is Mediation?

Mediation is by no means a novelty. It is a voluntary, non-binding and confidential procedure where a neutral assists disputing parties to negotiate a settlement of their differences. Simply, it is facilitated negotiation. It's then up to the parties to follow through to implement their agreed solution.

Mediation Techniques

So, just what does a mediator do? In the classic facilitative² negotiation, the neutral does not make a decision or even a recommendation. It is up to the parties to negotiate. However, the mediator does have a number of techniques at hand to help the parties agree. As we look at some of these we will see how these techniques also help *prevent* major disputes during the life of the contract. Consciously or not, a good project manager will be using these techniques on a daily basis.

The Mediator Convenes

The mediator may have a role in actually bringing the parties to the table, usually in explaining the process to a reluctant party, and in assuring that everyone understands the process and is comfortable with it.

On a tunnel project some years back, Gerry Tucker, the engineer assisting with the method statements, discovered that the digging equipment on site was simply too large for the dimensions of the tunnel it was supposed to excavate. The party responsible for the error was advised, but since the plant budget had by then been completely exhausted, was simply refusing to admit or discuss the problem. Time passed as the contractor first tried unsuccessfully to use the equipment, and then simply ceased working. Tucker was finally able to persuade the partners' leaders and the construction team to come to a facilitated meeting where he posted marked-up cross-sections on the wall. Faced with graphic reality, the parties consented to change equipment within three hours and located second-hand machines to be flown in from the other side of the globe. A refocused and reinvigorated team brought the project in on time.

² Contrast Evaluative Mediation, where during the process, the neutral will suggest one or more solutions to the parties, or Med-Arb, in which if the parties fail to agree, the neutral will decide the dispute.

Les Leslie recalls the challenge that met him when he arrived as General Manager for Shui On in the late 1980's. The first stage of refurbishment for the Happy Valley Racecourse got finished in the nick of time for the first race of the season -- but at the expense of a defects list 15,000 items long. His task was to do the remainder of the job better. Leslie sought out an American, Arnie Riebe, who had no experience on racetracks, but was a "people person". While Leslie reassured the client, Riebe was able to cajole the various subcontractors into talking and planning together for the first time. The job was done on time with minimum defects, and instead of the feared loss, produced a profit for the contractor.

The Mediator Listens Actively

Initially a key role of the mediator is to take the parties through the "understanding phase". When the parties first sit down with the mediator, each will be invited to make an opening statement. The mediator, by asking questions, body language, and minimal comment encourages each side to tell their version of the story. This is an opportunity -- perhaps the first -- for each side to present his or her side of the issue without interruption. While the mediator is listening to identify and understand issues and concerns, the parties also have a chance to "let off steam." One of Arnie Riebe's innovations was a regular morning briefing session. Subcontractors, aggressive and frustrated from their previous negative experience, were amazed as he asked each of them where they were having difficulties and what they needed to resolve them. He listened without threats or badgering, and they were able to work out solutions without delay. This time the project came in on time, and with very few defects, all of which were corrected within three months.

The Mediator Clarifies

The mediator, by asking questions, body language, and minimal comment encourages each side to tell their version of the story. The mediator then will summarize the positions as expressed by each of the parties. This reduces the chances for misunderstanding. Reframing the parties' inflammatory comments in emotionally neutral language is also a way for the mediator to diffuse the anger and frustration that so often characterise disputes.

For the Macau Refuse Incineration Project, there were two parts to the project -- the civil work, being done by a Portuguese contractor and the design and building were the responsibility of a Japanese firm. The consultant was German, the electrical work was being done by a Chinese firm working for the first time outside Mainland, and the client of course was the Macau government. In this potpourri of cultures there were serious communications barriers. Tempers flared, and at one point the engineer walked off the site. Things looked bad for the Japanese contractor. The consultant they brought in started by looking closely at the way the Japanese team worked. Their compartmental approach mystified and frustrated the

Germans. The professional rivalry that existed between the two firms did nothing to improve matters.

The consultant instituted regular progress meetings with pre-meeting briefings with the Project Manager. Once they got talking, the consultant was able to get the Japanese to modify their approach to include the others. The result was a much more positive environment. The ensuing education process and schedule included all subcontractors. The consultant made sure they kept talking by identifying individuals with “people skills” who could then take over the meetings and keep the process moving. The project was completed on time and with minimal defects. The contractor, pulled back from the brink of disaster, made a substantial profit and subsequently used the same approach successfully on projects in Taiwan and Singapore.

The Mediator Identifies Issues and Sets an Agenda

As each party speaks, the mediator’s questions, notes and encouragement bring out the points that are really relevant to each side. The mediator will continually check to see if all the points important to each party have been put on the table, and if they have been correctly understood. At this point in the process, there will probably be a list on a flip chart or whiteboard. By writing out this list, the mediator externalises the conflict, so that physically both parties are looking in the direction of the board or flipchart, rather than glaring across the table at each other.

Construction professionals are accustomed to working from drawings. The Project Manager will use these to good effect to ensure everyone understands the goals and what they need to do to achieve them. Gerry Tucker’s tunnel cross-sections on the wall reduced a “people problem” to a simple matter of geometry.

An important task is prioritising work and setting out the schedule of works. The good project manager, like the mediator, needs to think past the immediate results of today’s decision, to the ramifications for the project as a whole.

The Mediator Explores the Issues

Einstein discovered that in physics, the shortest distance between two points may not necessarily be a straight line. In mediation, the quickest way to a lasting solution may be by going slowly. The mediator spends a great deal of time probing behind the parties’ initial statements to discover their hidden concerns and needs – and to address them. Only when a party is satisfied that its critical needs are met will an agreement be possible.

On a construction site, where “time is money,” it’s tempting to get the job done as quickly as possible. The insightful manager will recognise however, that the extra few minutes spent

with a subcontractor to get to the bottom of a problem is a wise investment that will probably save time in the long run.

Sometimes a party is unwilling to express these underlying concerns. He may fear that the other side will use the information against him later. Some disclosures may bring about embarrassment or loss of face. The mediator can often persuade a party to “open up” in the safety of a *caucus* – a private confidential session. With the underlying concerns out in the open, new possible solutions may spring to mind. In some cases the mediator (or the project manager) is a messenger – scurrying between the parties’ offices to carry messages and test assumptions that the various subcontractors may not be ready to discuss face to face.

The Mediator Encourages Option Generation

At the beginning of the process, each party is likely to go in with an idea of the solution it wants. As part of the bargaining process, the mediator will help the parties formulate offers. One of the mediator’s main jobs is to encourage the parties to consider other options, either by compromising on less important points in order to get satisfaction on the crucial ones, or by finding new ways of looking at the problem to accommodate the needs and priorities of both parties. Flexibility and ingenuity can play an important role in what Harvard Negotiation Project’s Roger Fisher calls “making the pie bigger” to produce a win-win result.

The mediator can also to some extent redress power imbalances between disputants. By identifying certain structural or emotional dynamics, the mediator can allow a vulnerable party the best possible opportunity of getting its needs addressed.

Stonecutter’s Island is the site of Hong Kong’s long-awaited sewage treatment plant. Unfortunately, some of the protective domes covering the outfall diffusion pipes suffered damage from the impact of anchors. The employer and contractor could not agree on responsibility for replacing them. It was an expensive task - requiring divers to do the repair work in 12 to 14 meters of water - and one that was subject to close political scrutiny, since the project was already delayed and over budget. The consultant had the challenge of finding a solution. He then had to persuade the engineer that arbitration would be a lose-lose situation and that amended specifications could be used without danger to his professional reputation. After more than a year of meetings, option generation, cajoling and reassuring, the parties agreed on the solution and the facility opened in December 2001.

The Mediator Checks the Options

Reality testing is an important part of the mediation process. Our legal system and lawyers tend to emphasise parties’ *rights*. Each party may arrive at the mediation convinced that they are absolutely in the right; they have a great case that they just can’t lose if they wind up in court or arbitration. They engage in “positional bargaining.” The mediator needs to get parties “off” their positions, and may point out that no solicitor ever guarantees a result until

the decision has been published. The possibility of just *perhaps* losing in court, and the spectre of the other side's legal costs, can sometimes introduce a little flexibility into the discourse of even the most recalcitrant litigant.

In a construction scenario this holds particularly true. A tough contractor may win in arbitration if the subcontractor is found legally responsible for a costly repair. The downside of positional bargaining in this context is that the expense will all too often result in bankruptcy. Not only does it destroy the subcontractor's company, but it leaves the owner with an uncorrected defect. The intelligent project manager will recognise this as a lose-lose situation and look for a commercially viable option.

The Mediator Breaks Impasse

At some stage the parties may stop short. Certain situations are likely to produce impasse. Multi-party disputes, high emotional content, one party's abuse of the process, or negotiating "teams" who are not working properly together – these all may stall the mediation procedure. The neutral may remind the parties of their common concerns, congratulate them on their progress to date, and use a variety of techniques to separate the people from the problems. Sometimes it helps to break up an issue into a series of smaller points that can be resolved piecemeal. If parties become discouraged by apparent stalemates, the mediator may use hypotheticals to try to open up new avenues for discussion, to keep the dynamics of the negotiation moving in a positive direction.

Assuring the parties that "plateaux" are a normal part of the process may also give them the confidence to proceed. Sometimes an adjournment may be necessary to allow parties to "cool off" and assimilate what they have accomplished thus far. A trip to the local watering hole may provide the change of scene that will produce an agreement. By focusing on the interests rather than the rights, the neutral leaves the way open for a creative solution. Perhaps a recognition or apology is the key to an enduring solution.

The Mediator Coaches the Parties

Perhaps the most inspiring aspect of the construction industry is the end product. Whether it is one of the spectacular structures that grace Hong Kong's skyline, a first-class hospital, or a public housing estate to accommodate our citizens, everyone working on the project wants to feel proud of the result. Like the mediator, the wise project manager will constantly encourage each member of the team to take pride in the project, to give it their best effort, and resolve their differences so as to produce the best possible product.

The Mediator Helps the Parties Wrap Up Their Agreement

When it appears that the parties have arrived at a solution that both can accept, the project manager, like the mediator, must not let them go too quickly. At that point it is advisable to

draft a mediation agreement, not only to cement the accord, but also to forestall any argument about what was agreed in case one party decides to renege.

Mediation Techniques in Partnering

In the past few years, many professionals in the construction industry have embraced the concept of partnering. In Hong Kong, partnering has been used on MTR and Hospital Authority projects. The partnering coach, who coordinates the activities of the partnering team, will frequently make use of mediation techniques in encouraging the construction team members to see the project as the “adversary” and to attack it together with a view to maximising the benefits to all parties.

Minimise disputes, encourage win-win solutions, save resources

As we have seen, project managers aware of the benefits of using positive, creative negotiated solutions will deal with friction as it arises, thus resolving many disputes before they actually happen. Although not strictly a neutral, the project manager as the man in the middle can appreciate the different approaches of each party, and recognise areas of mutual concern and benefit. By using basic mediation techniques the project manager is well-placed to save the owner and the contractor millions of dollars in wasted cash and employee time – and to complete the project on schedule.

By learning to step back, to ask the right questions and to address the parties’ interests, the project manager can see where all the parties are coming from. It’s simple to describe, but the reality requires a good measure of self-control, logic, ingenuity and patience. Using these techniques makes the difference between a smoothly operating site and the bumpy road to arbitration. In fact, you could say our modern mediation process is in many ways a formalisation of the same skills that have always been used by successful project managers. If you’re not using them, chances are you have lots of disputes on your hands. If you’re already using them, perhaps you’ll want to consider a retirement career as a professional mediator!