



PROJECT MEDIATION: IT'S LIKE PARTNERING WITH TEETH

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Thursday 7 December 2006 saw the launch of the Model Project Mediation Protocol and Agreement which has been prepared by Fenwick Elliott and the Centre for Effective Dispute Resolution (better known as "CEDR").

What is Project Mediation?

Project Mediation is one of the new methods of managing the risk of disputes during the delivery stage of a project. In short, the project participants contract from the outset to use mediation as the primary means of dispute resolution. Project Mediation attempts to fuse team building, dispute avoidance and dispute resolution in one procedure.

The aim of project mediation is to assist in the successful delivery of a project by identifying and addressing problems before they turn into disputes about payment and delay. A project mediation panel is appointed at the outset of the project; it is impartial and normally consists of one lawyer and one commercial expert, who are both trained mediators. The panel assists in organising, and attends, an initial meeting at the start of the project and may conduct one or more workshops at the outset or during the course of the project as necessary, to explain what project mediation is about and how it works. They may also visit the project periodically in order to have a working knowledge of the project and more importantly the individuals working on it.

That knowledge allows the panel to resolve differences before they escalate, because the panel provides an immediate forum for the confidential discussion and potential mediation of differences or disputes. Therefore the panel members will not be coming to the project cold each time there is a dispute, but rather will build up their knowledge of the project as it progresses. In addition, the parties have the right to contact the mediators informally and consult with them privately at any time.

The Model Project Mediation Protocol sets out the ground rules, including the powers of the project mediators. It includes, as you would expect, a confidentiality agreement to ensure that all information emanating from the mediation process is not to be used for any other purpose, unless the parties agree otherwise.

In project mediation, the parties to the construction contract recognise that there is a risk that they might have disputes during the course of the work but also recognise that a

standing mediation panel could help to avoid those disputes. This is because the parties to the construction contract will get to know the individual mediators, and those mediators will not only have an understanding of the project, but will also know the individuals concerned. There is, therefore, the potential for the project mediation panel to become involved not just in disputes, but also in the avoidance of disputes before the parties become entrenched and turn to adjudication, arbitration or litigation. By anticipating potential differences, managing unexpected risks and seeking to prevent disputes, the mediators help to control project delivery.

There are of course some similarities with the structured ADR procedures such as Dispute Review or Adjudication Boards. However typically these are only economically viable because they are used on substantial projects; this is because of the costs associated with establishing and running a three person board. However project mediation is viable for projects with a much lower contract sum, and has the potential for very widespread use; it is intended to be cheaper, less formulaic, more flexible and more informal than a Dispute Board.

In terms of cost, it is much cheaper than a Dispute Board. If a dispute arises, a Dispute Board requires detailed statements of case, evidence, experts' reports and a hearing. If a dispute arises on a project with project mediation (and remember that the idea behind Project Mediation is that it is there to prevent disputes arising), the parties exchange position statements and supporting documents. There would then usually be a one-day mediation with a high chance of resolving the dispute. The mediators already have valuable knowledge of the project and of the individuals working on the project.

The Model Project Mediation Protocol sets up a mediation framework which is then put in place for the entire lifecycle of a project. A key difference with mediation in its traditional sense is that currently ADR is often only explored once a dispute has arisen, positions been taken and relationships soured. Here the parties agree at inception to manage and resolve any differences that may arise with the assistance of the Project Mediation Panel that follows the project through. This knowledge allows the panel to resolve contractual differences before they escalate, and provides an immediate medium for the confidential, mediated resolution of disputes. With Project Mediation, a dispute can be nipped in the bud and where a dispute is resolved during the course of a project, the Panel will of course still in place afterwards to help facilitate implementation of the agreement, as well as to help avoid, manage or resolve other disputes.

Project mediation provides a better response to project finance and risk management. Banks and funders are increasingly having to look at operational risk and having effective measures available to deal with conflicts. Project Mediation is one such option.

Some of the advantages of Project Mediation are that:

- (i) By its nature mediation is voluntary but quasi contractual;
- (ii) The process encourages communication and information flow and enhances collaborative working between the parties;
- (iii) It focuses on dispute prevention;
- (iv) It shows that parties are taking collaborative working seriously;
- (v) It is flexible, cost effective and can be budgeted for in advance;
- (vi) It is without prejudice to the parties' contractual rights and remedies;
- (vii) The process focuses on the parties' needs rather than contractual rights;
- (viii) Imaginative solutions are generated and become available to the parties; and
- (ix) It is relatively inexpensive, quick and effective.

Project mediation enables conflict management and dispute resolution to be integrated into the contract as part of a collaborative contracting approach. As project mediation is integrated into the contract, it will be included as part of the contract procurement documentation.

Project Mediation does, of course, build on what has gone on before, but is tailored to the needs of the industry. It is more about dispute avoidance and only then resolution. The mediators are there to assist with problem-solving during the project. Therefore the parties can focus on the project not the fight. Although they cannot make decisions, so the power to deal with issues remains with the parties, the project mediators can inject some reality that might otherwise be overlooked. It's like partnering with teeth.

The benefit of project mediation lies with encouragement of collaborative working and the use of an effective early warning system. The aim of such a process is to encourage parties to look ahead together and eliminate financial and programme risks. It focuses on the people and getting the job done. The project mediators can test whether the participants are really collaborating or just going through the motions.

For further details about Project Mediation please contact Simon Tolson or Nicholas Gould at Fenwick Elliott or visit the Fenwick Elliott website at www.fenwickelliott.co.uk or the CEDR website at www.cedr.co.uk.

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