

Resolving Construction Disputes in the Change Order Spec

Construction controversies are as much a part of a construction project as a skip loader or a jack hammer. Differences of interpretation in plans, specs, means and methods abound amongst contractors, owners and design professionals. It is no wonder--the act of construction is the practice of solving problems. But when a “claim” or “dispute” arises on a construction site, the parties’ pre-agreed methods for problem solving are rarely very efficient in resolving the underlying problems.

Large construction projects almost always use construction documents derived from base AIA agreements. These agreements are largely “rights” driven, rather than interest driven. The claims section of AIA 201 is instructive.

Although the title of Section 4.3 is “Claims and Disputes,” the term “disputes” appears only once in the following 11 paragraphs. The same is true of Section 4.4, entitled “Resolution of Claims and Disputes”—only “Claims” get resolved in the following 8 paragraphs. This same construction continues in Sections 4.5 “Mediation” and Section 4.6 “Arbitration.”

Webster’s defines a “dispute” as “an assertion of opposing views or claims: a disagreement as to rights.”¹ It defines a “claim” as a demand for something due or believed to be due.² Although Webster’s makes reference to a claim within the definition of dispute, it seems clear that a “dispute” is both broader and less formal than a “claim.” Yet the AIA pre-selected process available for “resolution” of claims is formal and blame-assessing with one party winning the argument every time. Is this the most efficient “dispute” resolution process for all “claims”?

¹ Merriam-Webster’s Dictionary of Law©1996

² Ibid.

Efficiency requires analysis of the cost effectiveness of any resolution process. Expenses can derail the path of a very promising case and force a “nuisance value” or undesirable settlement. Expenses are like the pebble in a pond; the effect of each expense multiplies and expands outward affecting the value, size and effect of later expenses. If the pebble is large enough, the “waves” cause derailment. Thus, the ultimate goal of any dispute resolution process is to cut the direct expenses of resolving a “claim.”

Direct expenses have two components: the battle costs and the settlement costs. The whole point of the “battle” is to minimize or eliminate “settlement” costs. That means that battles need to be fought wisely in order to have the desired settlement effect. Choosing the battle site is especially important in strategic warfare; choosing the battle site is what pre-selected resolution clauses are all about.

Because of dissatisfaction with court resolutions, the AIA long ago adopted the American Arbitration Association arbitration paradigm as the chosen forum for the battle. The reasons for this choice included the perception that arbitration was less expensive and less protracted (thus, “more efficient”) than traditional litigation. In addition, construction professionals and experts could act as arbitrators, thus giving the parties the comfort that they were arguing before peers and not juries. A recent AAA study indicated that parties are most concerned with expense, predictability and time in choosing “battle” forums.³ However, the experience of the arbitration bar is very instructive. While 56% of trial attorneys find arbitration less expensive than lawsuits, **44% find it equally or more expensive than a lawsuit.**⁴

In addition, many who choose arbitration either fail to understand or down-play that the arbitrators are the unassailable judges of the law and the facts and thus, an arbitration

³ *Dispute-Wise™ Business Management*, American Arbitration Association, 2003

⁴ ABA Section of Litigation Task Force on ADR Effectiveness, *American Bar Association*, August, 2003.

award based on a flat out wrong legal conclusion, cannot be overturned in court. As the Illinois Court of Appeals pointed out recently in *Sloan Elec. v. Professional Realty and Development Corp.* 353 Ill.App.3d 614, at 620, 819 N.E.2d 37, at43 (2004):

The purpose of arbitration is to resolve a dispute in less time and with less expense than litigating in court. *Edward Electric Co. v. Automation, Inc.*, 229 Ill.App.3d 89, 96, 171 Ill.Dec. 13, 593 N.E.2d 833 (1992). Parties who agree to arbitration have chosen the means to resolve their dispute, and judicial modification of an arbitrator's decision deprives the parties of that choice. *Hawrelak*, 316 Ill.App.3d at 179, 249 Ill.Dec. 241, 735 N.E.2d 1066. As such, an appellate court's review of an arbitrator's award is much more limited than review of a trial court's decision, and, whenever possible, a court must construe an award so as to uphold its validity. *Hawrelak*, 316 Ill.App.3d at 178-79, 249 Ill.Dec. 241, 735 N.E.2d 1066. A court has no power to determine the merits of the award simply because it strongly disagrees with the arbitrator's contract interpretation. *Canteen Corp. v. Former Foods, Inc.*, 238 Ill.App.3d 167, 179, 179 Ill.Dec. 342, 606 N.E.2d 174 (1992). Also, a court cannot overturn an award on the ground that it is illogical or inconsistent. *Perkins Restaurants Operating Co., L.P. v. Van Den Bergh Foods Co.*, 276 Ill.App.3d 305, 309, 212 Ill.Dec. 740, 657 N.E.2d 1085 (1995). In fact, an arbitrator's award will not be set aside even for errors in judgment or mistakes of law or fact. *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 181 Ill.2d 373, 381, 230 Ill.Dec. 1, 692 N.E.2d 1167 (1998).

In 1992, the California Supreme Court held that an arbitrator's decision is not generally reviewable for errors of fact or law, even when errors appear on the face of the award and cause substantial injustice.⁵ Thus, despite carefully choosing your arbitrator, an arbitration is often much less "predictable" than a court of law.⁶

The concerns with the battlefield have given rise to many more options than just litigation or arbitration including Dispute Resolution Board, mini-trials, med-arb (mediation that if unsuccessful is immediately followed by arbitration), mediation, etc.⁷ Interestingly, almost all of the forums, with the exception of mediation, are processes that are designed to assign

⁵ *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 6, 10 Cal.Rptr. 2d 183 (1992)

⁶ Federal courts have judicially created an exception where an arbitration award exhibits a manifest disregard of the law but the courts have shown great reluctance to disturb an arbitration award: "Our review under the doctrine of manifest disregard is 'severely limited' ... It is highly deferential to the arbitral award and obtaining judicial relief for the arbitrator's manifest disregard of the law is rare." *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 49 (2d Cir.2003).

⁷ For a good summary and definition of the choices, see Steve Nelson, Esq., EVP & General Counsel, Suretec Insurance Company, *Glossary of Alternative Dispute Avoidance and Resolution Terms* at www.suretec.com/glossaries-dispute.htm

blame or responsibility dealing with rights over interests. A significant problem with these processes is that each is pre-selected before the dispute arises. Although these processes will eventually end the “dispute,” they are not designed to avoid further disputes by solving the underlying problems.

A pre-selected battlefield allows no option for deciding how or where or when or what will be decided on the battlefield. In fact, when the issue is given over to the lawyers, the preconceived notion of the lawyer (based on solid training in res judicata and collateral estoppel concepts) is that all disputes must be raised in the resolution process or risk being barred in future proceedings. If all claims are brought in one action, limited disputes almost always grow into nuclear controversies. Efficient battlefield design to avoid nuclear conflagration should be one goal of alternative dispute resolution.

How can one select a process that allows for battlefield design? Because no square peg can ever fit snugly in a round hole, efficient design of the hole requires knowledge of the shape of the peg. The CEO of a major construction company would never purchase a health care plan where the only solution to every diagnosis is penicillin. Why should that same executive sign a contract where the only solution to every problem is arbitration?

The emerging concepts of Intervention Partnering™ and Project Realignment™ in fact respond to this conundrum. Because no specific construction problem can be anticipated, no specific system can be designed in advance that adequately addresses the specific problem. Consequently, the best approach is to **define the problem** (with the assistance of the participants), then **design a system** to resolve **that problem**. In order to define the problem, the parties should have a mechanism to recognize a problem before it completely stalls the project.

There are several “usual suspects” that indicate a problem project, including:

- Poor or unapproved CPM schedules
- Change Requests are not processed
- RFI turn-around times are slow
- Major unforeseen conditions
- Stops and starts
- Nitpicking contract provisions
- Answer shopping
- Written-vs.-Verbal communication
- A party has claims consultant
- Bonding Company is notified or involved
- Attitudes shift to adversarial or cover your _____
- Time extensions are not processed
- Submittal approvals are behind
- Submittals are late or incomplete
- Out of Sequence Work
- Mobilisation or démobilisation
- Posturing & unreasonableness
- Finger-pointing or blame shifting
- Party wants indemnity
- Party has attorney involved
- Subs have cash flow problems

When direct negotiation on some or all of these issues has failed, the parties normally call in the lawyers and the claims experts. The project grinds to a halt as the parties arm themselves for battle as outlined in Sections 4.3, 4.4 and 4.5 of the AIA contract.

A cursory review of the claims specification of not only the AIA contract but most standard construction contracts discloses that the dispute resolution processes chosen are “rights” based—analyzing the strength of a party’s position based on contractual provisions that have little to do with building the project and everything to do with defining rights and assessing blame, ultimately, leading to increased litigation and arbitration.

To halt this blame-assessing nuclear conflagration, the parties have to step outside the “claims” specification in the contract and move back to the “change order” specification because something on the project must change in order to move the project forward. The change order specification is designed to recognize all the usual suspects of a troubled project and to treat them appropriately.

In the change order specification, parties routinely **define** the problem and negotiate directly over a solution. Merely because the problem is large and complicated does not mean it is necessarily less susceptible to resolution. The larger the problem, the more important its resolution is to the very companies fighting over it because appropriate resolution can preserve the parties' individual integrity and their working relationships (often lost or severely damaged in an imposed, fault-based resolution). As addressing the problem becomes a higher priority (and thus grabs the attention of the highest levels of all companies), executives often take the wrong turn—turning to the lawyers, rather than turning to their project partners.⁸

Turning to one's project partners is not easy because the relationship has often soured over the very problem that begs for resolution. What is necessary is a reality check amongst these project partners—a time out to review and analyze the problem and what tomorrow looks like without this problem resolved. What is also necessary is a way to preserve the **rights** of the parties under the contract so they can address the **interests** of the parties (get the project moving again). A contractual time out, allowing the executives and the various companies involved to get their arms around the problem and design a system to resolve it, makes ultimate sense at this stage.

Here, processes like Project Realignment™ (“PR”) can assist.⁹ PR assembles the companies, at all important levels, for a facilitated discussion of the extent of the problem and what processes may be available to assist in its resolution.¹⁰ The ultimate length of the process is dependent upon the depth and breadth of the issues, but, it is designed to be a

⁸ “Turning to the lawyers” is not meant in a pejorative sense. Skilled counsel, knowing the variety of options that can be used to assist his or her client in resolving the controversy, will look to the panoply of options available. These options are preternaturally cut short if the first reference is to the claim specification of the contract and that spec requires a certain resolution process.

⁹ For more information, see www.projectrealign.com.

¹⁰ “Companies” includes all the parties necessary to resolve the dispute: the owner, the general contractor, the design professionals and any important subcontractors.

short-term affair, 10-90 days, and it recognizes that a slow, cumbersome process will never meet the needs of a project.

This is not a traditional mediation session where the mediator explores ways to settle the case. This is a facilitated discussion designed to allow the parties to understand the extent of the problem and internalize the effects on their various companies of a protracted battle on the issues. However, it is a mediative process in the sense that it provides a confidential setting for such a discussion.¹¹

The concept of “realignment” means realigning the parties’ conceptions of the issues and breaking the parties into the most effective working groups for resolution. Once the companies define the nature and extent of the problem through breakout sessions (e.g. if things do not change, the project will be delayed 18 months and will cost all parties (with battle costs), over \$20 million), the parties are “realigned”. The realignment results in project executives, project managers, subcontractors, etc., being grouped together (even to the level that they sit together during various parts of the process). This allows people with similar problems and concerns to interact, to concentrate and focus. It removes the burden of **company protective thinking** from the project managers so that they can focus on **project level thinking** that can lead to issue resolution.

The task of the parties, once the extent and nature of the problem is defined, is to devise a recovery plan. The recovery plan is designed by the Project Managers, the people with the most experience on this specific job and with the greatest knowledge of the strengths and obstacles available. This plan is then proposed to the Executive Team in a follow-up session for their comment, concurrence, amendment or rejection. In proposing the plan, the PM

¹¹ Almost all state and federal courts recognize the confidentiality of mediations, either through statute or common law rule.

Team is responsible to **all** the executives, not just their own superiors. Consequently, the plan must be candid, articulate, defensible and do-able.

Part of the realignment process involves assessing barriers to recovery: what could keep the group from getting the project back on track. One typical barrier is the cluster of unresolved disputes between the parties. The laundry list or “slate” of delays, cash flow interruptions and general bad feelings that have accumulated during the festering of the disputes must be corrected quickly and efficiently. Here, the parties have available to them all the tools of traditional alternative dispute resolution—not just arbitration or mediation. Available tools include independent experts (scheduling, quantification, legal) employed by **the project** to facilitate and collaborate on the extent of the problem and the possible remedies. This gives the parties independent and neutral verification of entitlement and quantification.

The costs for these services are split among the warring parties: typically the owner, the general contractor, and possibly several subcontractors. Questions involving confidentiality are addressed in the PR agreement by adopting both statutory and contractual mediation confidentiality. This allows broad and deep data gathering without fear that party input will be used against them in a subsequent court action or arbitration.

In the PR experience, the experts meet with the Executive Team and PM Team for a preliminary assessment (“PA”), usually within a week or two of the PR team’s retention. The PA is a quick look at the facts of the case and the likely outcome. The experts provide independent analysis to allow the team to move away from entrenched positions. The parties still have their own legal counsel and often have their own forensic or scheduling experts, but the parties work from the factually neutral report and analysis by the project’s neutral expert team.

Because the parties are working under the change order process, this “Preliminary Analysis” becomes industrial strength change order backup. Through it, parties approach settlement with greater confidence in the neutrality of both the data and, more importantly, the interpretations (two things that tend to keep parties at bay in any dispute). The “industrial strength” back-up also supports the parties’ decisions upon review by third parties.

Contemporaneously with negotiations on the slate of past issues, the parties have directly negotiated or, through the facilitation group, hired an independent neutral to assist the parties with scheduling and getting the project back on track. This begins to get the project going again. The scheduling person is not a retired judge or professional arbitrator who holds “hearings” on schedules, but is a skilled, CPM scheduler that has the respect, and thus the buy-in, of the parties.

The Project Realignment™ method has worked on very large projects with strongly adversarial parties deeply entrenched in their positions. The process has historically generated a number of benefits:

- Realigning the parties into separate teams avoids ties to past positions and allows a fresh look at the issues from the perspective proper to each team.
- PM Team reports provide all executives unfiltered data regarding the job, rather than relying strictly on information secured from their own employees
- The ReAlignment structure allows the executives to immediately discuss important issues rather than engaging in circuitous exchanges of partial information
- Providing resources, such as neutral experts, allows completion of an analysis within a short time period and prevents unrealistic legal posturing by informing the parties about the 'facts of life' in construction law.

- The team building effort with the executives from each of the organizations is the key to success. It reduces the influence of any single obstructive party, so that the Executive Team can move forward together. It brings the decision-makers to the decision-making table.
- If new problems are encountered during later phases, the Executive Team has the skill set to maintain the project momentum by preventing the project managers or field supervisors from derailing the process.
- The contractor and subcontractors are paid as the process goes forward, eliminating financial pressure on the subcontractors and preventing further delay or poisoning of relationships.
- The process allows the parties to quickly resolve the historical issues that have stymied progress and resume working together as a team to complete the project without the animosity of unresolved conflict.
- Coaching is available to assist those parties with dysfunctional attitudes or work habits in correcting their behavior and improving their performance and contribution to the team effort.
- The cost to the parties is a fraction of the cost to carry the claims through to final adjudication.
- Only one set of experts is retained, eliminating the disorder caused by the hiring of individual experts for each party. In addition, the cost of experts is shared by multiple parties.
- The most important savings are clear-cut: a troubled project is back on track within 45 to 60 days with continuing delays and cost impacts replaced by timely, economical progress.

- Using the Change Order process instead of the Claims procedure simplifies contract administration and reduces the possibility of unfavorable publicity. This point cannot be over-emphasized because the Change Order process allows the complete flexibility that the pre-selected or default legal process hinders. And this may be especially important in Public Owner jobs where political pressure from elected or appointed officials makes any public process like a trial an exercise in sausage making.

Since the process is non-binding and is protected by available statutory and contractual mediation confidentiality, there is very little downside to active participation by all parties and their counsel. A resolution is **always** an upside. Ultimately, we suggest that any process that reduces a principal's costs, resolves current disputes/claims and avoids future claims (and the resultant reserves, loss and costs) offers the parties and their insurance carriers (first-party, third-party and sureties) a much needed option.

As all of us "stumble towards the light" of effective construction problem resolution, we should use all of the tools at our disposal. A process like Project Realignment™ that incorporates all of the tools in the ADR tool-box, while reducing fault based issues, gets us closer to that objective and ensures that the light at the end of the tunnel is not an oncoming train wreck.

Contract Provisions

Construction contracts are difficult documents, especially for large public projects. So many different agenda are served in the contract that it is little wonder that public owners are reluctant to change their tried and true version. In our experience, many public owners' representatives do not know what is in the construction contract, what dispute resolution method has been chosen, whether that method is effective and who administers that process. Owner's representatives tend to concentrate on the plans and specifications and leave the contracts to the "lawyers." Thus, the "lawyers" have a particularly important job in making sure that the contractual provisions their clients agree to match the expectations of the parties on the project. Certainly a judge or arbitrator later reviewing the contract will infer that the parties' intentions are expressed in the contract.

To allow flexibility in the dispute resolution process, lawyers should consider mandating a "dispute time-out," a period of time after a dispute has arisen that the parties may consider all the resolution options available before they must choose the nuclear option. We believe the following is appropriate to provide this kind of "time-out:"

1. Dispute Resolution:

- a. **Notice of Dispute:** If a dispute between the parties to this Agreement arises, any Party may initiate the dispute resolution provisions of this paragraph by drafting a Notice of Dispute and serving same by electronic mail or fax to all other parties, with a copy to the Realignment Group, LLC ("TRG") c/o rbayer@projectrealign.com or 858-454-1021. The Notice of Dispute shall contain at least all of the following: (1) the name of the Party issuing the Notice of Dispute; (2) a brief description of the dispute; and (3) the position of the Party issuing the Notice of Dispute. Upon delivery of the Notice of Dispute, no Party can file a claim under this Agreement for a period of thirty (30) days, unless all parties to this Agreement waive that date. All other parties may, but are not required to, respond to the Notice of Dispute with additional disputes or their position on the dispute(s) contained in the Notice.

- b. **Executive Session:** Upon receipt of the Notice of Dispute, TRG shall confer an executive session for purposes of assessing the dispute(s) pending on the job and their relative impact on the work to be completed. This session shall take place no later than ten (10) days after receipt of the Notice of Dispute and shall be at place within ten (10) miles of the jobsite or other location agreeable to all parties. TRG shall notify all parties of the time and place for the meeting and the amount of the required deposit from each party for conducting the meeting. Each party shall send to the Executive Session the most senior executive from the party available for said meeting, the Project Manager from the Company on the project, and any other necessary senior personnel involved in any of the disputes noticed. If the Architect or design professional on the Project is not a party to this Agreement, the Owner will require that the most senior executive from the design firm and its Project Manager also attend the Executive Session. All parties shall participate in the Executive Session in good faith. All discussions held in the Executive Session shall be confidential and covered by the mediation privilege.

- c. **System Design and Implementation:** With the assistance of the various teams attending the Executive Session, TRG shall design and schedule for implementation a dispute resolution process tailored to resolve the pending disputes, resolve any scheduling conflicts or disputes, anticipate future disputes and get the Project back on track. The Parties shall, at the conclusion of the Executive Session or some short period of time thereafter that is agreeable to all parties. Implement the dispute resolution system designed with the assistance of TRG. The costs of TRG services and any necessary experts, legal representatives or other third-party services will be borne equally by the parties.

- d. **Election to Proceed with Claim:** Any Party to this Agreement may determine that the resolution system designed and recommended by TRG is not acceptable to that Party and may, upon the expiration of twenty (20) days following the conclusion of the Executive Session, file a claim under this Agreement. The other Parties may choose to proceed with the TRG system without the declining Party or may themselves file claims hereunder upon the expiration of twenty (20) days following the conclusion of the Executive Session. Any discussions held subsequent to the Executive Session with TRG regarding the design or implementation of the dispute resolution system shall be confidential and privileged under the mediation privilege applicable in the state where the Project is located or the discussions had, whichever state offers more protection. No party shall subpoena or demand testimony, documents or other evidence from TRG or any third-party retained by TRG to assist in the design or implementation of the resolution system.

Another approach is to provide for different methods of resolution for different sized problems or different degrees of animosity. This allows pre-selected dispute resolution options but more of them, based on the size, complexity or animosity of the dispute. Bryan

Jackson, a prominent real estate lawyer with Allen, Matkins in Los Angeles,¹² has allowed us to share the following language he incorporates in some contracts to provide for a stepped method of dispute escalation:

1. Design and Construction Phase:

a. Project Neutral

The Owner, Architect and Contractor may agree to select a Project Neutral for the Project. The Project Neutral shall be experienced both in the design and **construction** of major real estate developments as well as the mediation of design and **construction** disputes. The parties shall select the Project Neutral from among the panel mutually agreed to by the parties. The Project Neutral, in close consultation with all involved parties, shall assist in resolving any disputes, claims, or other controversies that might arise from the commencement of design through issuance of the final certificate of occupancy and acceptance of the Project by the Owner. The Project Neutral shall have no adjudicatory authority and, therefore, shall act solely as a mediator in working with the parties.

If requested in writing by the parties, the Project Neutral shall attend the regular job meetings at the site of the Project. Also, the Project Neutral shall attempt to be available to attend any specific job-related meeting if so requested by the Owner, Architect and Contractor in writing. The Project Neutral also shall be available to confer or meet with any party or parties if so requested by the Owner, Architect and Contractor.

If the services of the Project Neutral are retained, they shall be provided on an hourly basis and the cost will be borne in equal parts by the Owner, Architect, Contractor, and any other necessary parties, including, but not limited to, consultants, subcontractors, sub-subcontractors, and suppliers (collectively "Subcontractors") except as agreed to in writing between any Subcontractor and the parties.

The confidentiality of any discussion involving the Project Neutral shall be protected by all applicable statutes and case law with respect to mediation.

The term of service by the Project Neutral shall end on the same date as the Architect's services for the Construction Phase as detailed in Subparagraph 2.6.1 of the Agreement. The Project Neutral may be involved in subsequent dispute resolution negotiations or proceedings under the terms and conditions set forth herein.

b. Executive Negotiations

If there is any unresolved dispute(s), such dispute(s) may be resolved at any time by designated executives of the involved parties through direct negotiations before, in lieu of, or after engaging the Project Neutral. These direct negotiations shall be between or among executives with authority to resolve the dispute(s). To this effect, the executives shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable resolution

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satisfactory to the involved parties. These discussions are intended to be informal and must be conducted face-to-face.

The executives taking the lead in such negotiations may involve any other individuals or entities in the discussions that the lead executives deem appropriate. Unless required by statute, no arbitration, court or other legal proceeding (except mechanic's lien rights) shall be initiated prior to **[sixty (60)]** days after issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner.

The confidentiality of the executive negotiations shall be protected by all applicable statutes and case law with respect to settlement negotiations.

If, at the end of the **[sixty (60)]** day period following issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner there are any dispute(s) remaining unresolved, such dispute(s) shall then be the subject of facilitated negotiation (i.e., with a professional **construction** mediator) (herein "mediation") between or among the involved parties.

c. Mediation

If, at the end of the **[sixty (60)]** day period following issuance of the temporary certificate of occupancy and acceptance of the Project by the Owner there are any disputes remaining unresolved, such remaining dispute(s) may next be attempted to be resolved by mediation. During mediation, the involved parties shall endeavor in good faith to resolve any and all remaining disputes which they have on the Project. Unless required by statute, no arbitration or other proceeding shall be initiated prior to **[thirty (30)]** days after any party serves a written demand for mediation.

The confidentiality of the mediation shall be protected by all applicable statutes and case law with respect to mediated settlement negotiations.

If, after the passage of **[thirty (30)]** days from service of any written demand for mediation, the mediation does not result in settlement of all disputes, then any unresolved claim or controversy arising from or relating to this **contract** shall be settled by arbitration or judicial reference to an arbitrator as described in the following Subsections. The parties may agree to extend this thirty (30) day period.

2. Post-Completion Dispute Resolution

a. Disputes with Less than [\$10,000.00] in Controversy – Arbitration

Within **[thirty (30)]** days from when a mediator declares the parties are at an impasse on one or more of their claims and/or controversies, or if no mediation occurs within the sixty **[(60)]** day period for Executive negotiations, the parties shall exchange letters which shall state in summary form those claims and/or controversies which each party contends are unresolved and the party's asserted value of those claims and/or controversies.

If after exchange the parties agree the total amount in controversy (i.e., taking into account both claims and counter-claims) is less than **[\$10,000.00]**, then such remaining disputes shall be settled by arbitration using a single arbitrator, and

judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

b. Disputes with [\$10,000.00] or More in Dispute – Judicial Reference

If after exchange of the letters the parties (1) cannot agree whether or not there is more or less than [\$10,000.00] in dispute regarding Architect's claims or the threshold amount asserted by the Contractor, as specified in the Contractor's Agreement ("Contractor's Threshold"), or (2) agree that more than [\$10,000.00] (or the Contractor's Threshold amount) is in dispute, the parties stipulate that trial by jury and judge is waived as to all unresolved claims or controversies. The party or parties seeking affirmative relief then will file a court action (or cross-complaint in an existing court action). The parties, however, expressly stipulate that all such court-filed claims or controversies shall be referred by the court to a referee who is agreed to by all parties.

The arbitrator selected shall be named in an order of the court as the referee, in accordance with the applicable law as to judicial references.

Within [thirty (30)] days of when the hearings in the case are closed, the referee shall report its statement of decision to the court. Such statement of decision by the referee shall include a detailed, written opinion explaining the decision, including the referee's findings of fact and conclusions of laws. Judgment on the referee's decision may be entered by the court as if the action had been tried in court.

The cost of the referee and/or the provider organization proceedings shall be borne by the participating parties as determined by the arbitrator or the court after the referee's decision is provided to the court. An order so providing can be entered by the court without further notice. The intent of this Section is that the parties settle remaining claims valued together at [\$10,000.00] (or the Contractor's Threshold amount) by way of judicial reference. The parties agree to take such actions as to enable a judicial reference whereby (1) the dispute is heard and determined under the state and federal law, (2) the statement of decision by the referee is provided to the court which then may enter the statement of decision as a judgment as if the case had been tried by the court, and (3) the normal rules with respect to appeals would apply as to the judgment thereby entered by the court.

3. Incorporation by Reference

The parties agree to incorporate this Dispute Resolution provision into any contracts, subcontracts and any other agreements with Subcontractors which they may enter with respect to the Project. The expectation of the parties is that any entity or individual working on the Project will be bound to resolve their disputes which involve the Owner, Architect, Contractor and/or any of their Subcontractors in one proceeding in which all parties will participate and be bound.

The Construction Industry Institute has formed an ADR/Disputes Potential Index Implementation Feedback Team consisting of Maitland Horner of U. S. Generating Co., Socorro Jones of M. W. Kellogg Co., Peter Marshall of Bayer Corporation, Michael C. Searver of NASA Lewis Research Center, Timothy A. Watt of H. B. Zachry Co., and Brian Thomas of UT Austin. The mission of this committee appears to be to develop a stepped process to dispute resolution as represented by the following graphic:



All of these procedures recognize the dissatisfaction of lawyers and litigants alike with a single approach to construction dispute resolution. An interest based analysis of the parties concerns is the only way to effectively put in place an effective process that actually resolves the pending disputes and leaves in place a structure that can deal with future issues.

--Richard Bayer, Esq.
La Jolla, California

WIPE THE SLATE CLEAN

WSC

CONTRACT SCOPE - TIME - COST - CHANGE ORDER ISSUES

How To Use 3rd PARTY EXPERT SERVICES

When teams become locked up on an issue at the PM Team Level, there are other alternatives and options available to assist the team in resolving their differences constructively. The PM Team needs additional change order tools to keep their issues moving towards a resolution. ***Design a method to deliver professionally prepared “Change Order Back-Up” and support documentation for large, complex, contentious situations.***

The intent is to keep decision making at the level closest to where the work is performed, as well as gain the support for the solution from the executive level. People make better decisions if they have reliable information on which to base them. The **WSC™** (Wipe the Slate Clean) process provides the project team alternative methods to generating change order back-up that is objective, timely and cost effective.

The GOAL of the WSC™ process is to:

- ***Resolve all issues through the “Change Order” specification and avoid implementing the claim or dispute resolution clause of the contract.***
- ***Fully utilize the change order process. Collaboratively generate reasonable contract and legal interpretations & accurate change order quantification that can be RELIED UPON.***
- ***Provide accurate, objective and reliable Change Order Back Up to support the PM Team on the project. Adjust these services based upon:***
 1. ***The size and/or the complexity of issues and circumstances***
 2. ***The complexity of the analysis/calculation method required to estimate quantity and costs***
 3. ***The lack of objectivity and/or trust in the other parties’ reasonableness of interpretations or generation of quantification and support back-up (data).***
- ***Maintain and build working relationships between the owner, architect, engineer, CM, general contractor and subcontractor organizations’ PM personnel on the project.***
- ***Provide assistance in generating change order backup collaboratively for entitlement and quantification requirements, especially when the project team is overloaded.***

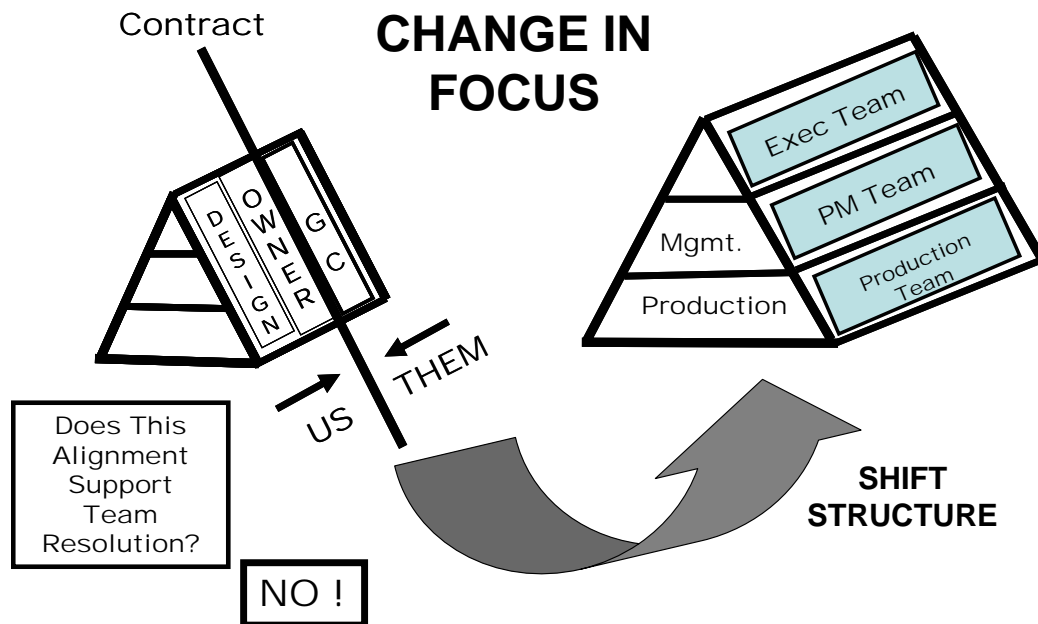
The PM Team can buy objective third-party interpretations and/or quantification through The ReAlignment Group, Ltd. (**TRG**) to provide independent expert information and evaluation: legal, engineering, architectural, management and/or forensic. These experts generate the change order back-up and analysis needed to resolve opposing positions on interpretations and differences in the calculation of quantum and apportionment of changed condition risk dollars.

The **WSC™** process uses the services of an IPA (Independent Project Advisor) for interpretations, and a TAS (Technical Analysis Support) consultant to generate quantification of cost, delay, impact and/or schedule analysis.

*If you don't Trust the Interpretation
buy an Interpretation you can Trust,
if you don't Trust the quantification,
buy quantification you can Trust.*

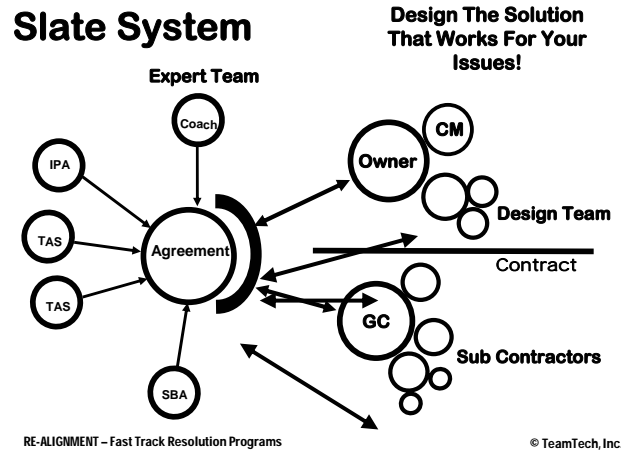
The Project Management Team (including Owner/Designer/CM/Contractor) must “confront” project issues timely and fairly:

Confrontation Team Alignment Form Cross Organizational Teams



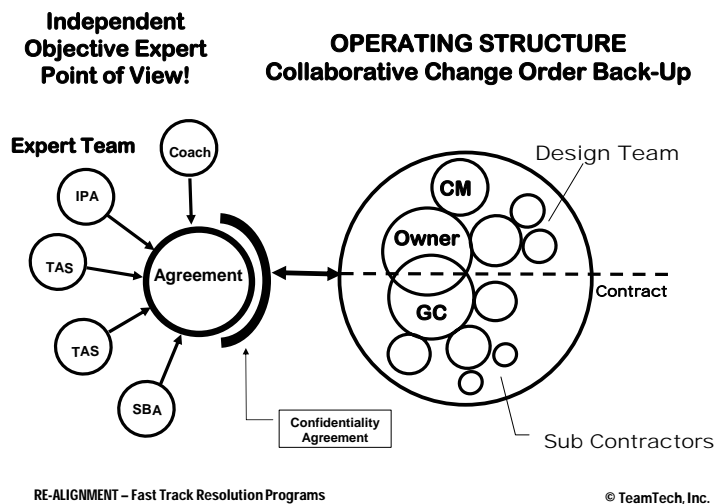
Wipe The Slate Clean - CONTRACT LINES

To initiate services for the **WSC - Change Order Back-Up process**, TRG is retained by all of the parties, who, on behalf of the project team, enter into a Project Agreement that provides access to the **WSC Tools**. The Project Agreement can be activated at anytime: at the beginning of a project, at mid-project as needed, or at the end of a project to help close out unresolved issues.



OPERATING STRUCTURE

The experts represent the Project Team, not any one party. Once services begin, the experts work with everyone involved and directly with the information that is related to the problem being resolved.



Below are a few **Wipe The Slate Clean** Tools open for discussion by the project team when issues become overly complex, large in size or the accumulative effect of unresolved change orders negatively impact the project schedule and/or cash flow (especially to the

subcontractors or sub-consultants). Each **WSC™ Tool** is a stand-alone process, which can also be combined with other tools to provide a pathway to a resolution. Choose any one or a combination of the **WSC™ Tools** listed below to analyze issues and design the final resolution to the problem.

TRG COACH:

The coach works with the parties to manage the process to evaluate the application of the confrontation tools. The resolution tools are custom designed to reduce or eliminate the cost and risk growth factors for delay and extended overhead costs associated with construction claims and disputes. The Coach becomes the “project advocate” in maintaining the process as the “process conductor” who provides the leadership, guidance and integrity for the process. The TRG Coach draws together other people from industry firms as the independent voice, but does not perform the analysis. The TRG Coach stays independent in order to **MONITOR RESOLUTIONS**.

TAS: Technical Analysis Service – Fact & Data

Buy quantum analysis that can be trusted and relied upon to **GENERATE RESOLUTIONS**. The TAS consultants are industry forensic experts who provide Technical Analysis Services to define the issue’s scope, quantify the impacts, calculate the estimated cost of damages, and develop the apportionment of damages between the parties. The most common types of expert forensic services needed are:

CPM Schedule Analysis	Delay Impact Analysis – Scope & Costs
Extended Overhead Cost Analysis	Changed Scope Cost Analysis
Audit/Accounting/Financial Analysis	Constructability
Standard of Care Analysis	Cost Estimate reconciliation

IPA: Independent Project Advisor Services

Buy interpretations that can be trusted and relied upon to **DEVELOP RESOLUTIONS**. The IPA provides interpretations and advice regarding disputed contract provisions: i.e. Is the disputed scope of work in or out of the contract and who owns the risk? The IPA defines in Black, White and Gray how the risk should be apportioned between the parties. The IPA (a respected construction attorney) issues a confidential assessment, a recommendation as to how to resolve the issues and an apportionment of risk guideline. The IPA often relies upon facts generated by the TAS.

Resolution Coach: RC

Professional coaching services to facilitate communications, administrative process improvements, generate resolution options, determine consequences, assist in decision-making, and design solutions for disputed issues. The coach applies leverage to implement and follow through with actions to expedite turn-around results.