Conflicts between Owner and Contractors: Proposed Intervention Process

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Abstract: The parties of a construction contract, the owner and contractor, are a society with a complex set of interrelated relationships requiring cooperation and collaboration to coordinate time, resources, and communication. The main goal of the parties involved in a project's construction is to have a successful project constructed in accordance with the plans and specifications, within the time and cost originally anticipated. The success of a project depends on a number of variables, not the least of which is how the organizations approach problems and conflicts. However, the adversarial atmosphere that infects the industry can prevent the parties from reaching their goal. This paper proposes an intervention process, a combination of partnership and mediation, to prevent and resolve dispute prior to contract close-out.

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Introduction

The parties of a construction contract, the owner and contractor, are a society with a complex set of interrelated relationships requiring cooperation and collaboration to coordinate time, resources, and communication. The main goal of the parties involved in a project's construction is to have a successful project. This is defined as a project that has been constructed in accordance with the plans and specifications, within the time and cost originally anticipated. The success of a project depends on a number of variables, not the least of which is how the organizations approach problems and conflicts (Diekmann et al. 1994).

Conflicts

Conflicts are present on all construction projects (Bramble and Cipollini 1995; Zack 1995; Fenn et al. 1997; Carsmen 2000; Pinnell 1999) and, if left unresolved, can have detrimental effects on the progress of the project as well as the relationships between the contractual parties. Conflicts are caused by the size and duration of the project, the complexity of the contract documents, changed conditions, poor communication, limited resources, financial issues, inadequate design, labor issues, and force majeure events. Because of these conflicts, the construction industry is plagued by an increasingly adversarial atmosphere existing between the owner and the contractor (Rhys Jones 1994; Conlin et al. 1996; Mix 1997; Arditi et al. 1998; Steen and MacPherson 2000). The adversarial attitude prevalent on many projects undermines the cooperation environment necessary for a successful project and goes against the very nature of the collaborative nature of the construction process (Harmon 2001). Efforts to reduce either the number or magnitude of these conflicts have not been successful (ASCE Technical Committee 1991). The current adversarial environment fosters distrust and a breakdown of the cohesive bonds of the society.

A society as diverse and complex as the construction industry is fraught with both constructive and destructive conflict. It is the destructive conflict that is of concern. Destructive conflicts develop as a result of limited resources, e.g., not enough time, money, labor, materials, and/or equipment. Randall Collins (Ritzer 2000) argues that the groups controlling resources will attempt to exploit those with limited resources. In construction, the entity with the most resources and control over finances and time is the owner. Therefore, the entity that controls the most resources can coerce the ''weaker'' party to perform in the manner in which it desires. This is prevalent in construction and is manifested by the owner's actions and the contract which the contractor must sign prior to commencing work. Because of the oppressiveness of some contracts (e.g., New York City construction contracts that seek to shift all risk to the party who has the least control over these risks, namely, the contractor) and the coercive power owners use to attempt to dominate the contractor, the adversarial relationship between the owner and the contractor is understandable. Each views the other with suspicion and distrust. It is hypothesized that this intervention process would seek to reduce or eliminate that initial distrust and suspicion.

Though the contractor and owner are interdependent upon one another, since the objective of having a project successfully constructed is a mutual objective, the owner—who controls the most resources—has the power and can effectuate change to increase the satisfaction of both parties.

Construction Process

Construction is a collaborative teamwork process with successful projects dependent upon ''a strong weave of owner, architect, engineer, contractor, and supplier'' (Lightening Up Litigiousness 1999) into a collaborative team, a working society. When indi-

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viduals within that society do not work together toward a common goal, then conflicts, which are a part of every construction process, evolve into unresolved and emotion-laden disputes (Harmon 2001), preventing the successful and timely completion of the project.

The resolution of conflicts on construction projects can be accomplished under certain conditions. These conditions are based on shared relationships and past experiences the parties have had with each other. Failed attempts to resolve a dispute often strengthen the party's adversarial positions and are always counterproductive. If conflicts continue to be unresolved, they will affect the progress of the project. The timely resolution of disputes will provide more satisfaction to both parties and will therefore not adversely affect job progress.

Individuals base their actions upon the sense they develop from any given situation, which Charles Cooley defines as the ''looking-glass self'' (Ritzer 2000, p. 361). Individuals try to imagine themselves as they appear to others and as other persons are thinking of them. Their perception of self is then largely defined by other's evaluations. Herein lies the road upon which the parties to a conflict travel. It is just another twist of the saying of the Greek philosopher Epictetus: ''people are disturbed not by events but by their view of them.'' Thus, an individual's actions are guided, or at least influenced, by how their actions are perceived by others in society as well as from past experience, and the resolution of conflicts is a result of experience and perception as well as a function of resources.

Given that construction conflicts and disputes are a significant phenomenon in the U.S. construction industry, the next logical question is how to resolve these disputes in the most economical manner, with the highest satisfaction for both parties.

Conflict Resolution

Conflicts can escalate as a result of the faulty assumption that the individuals have accurately communicated their position, when they have not (Gillie 1991; Mayer 2000). Inasmuch as faulty and poor communication and understanding is at the heart of construction conflicts, how can a conflict resolution system be designed to prevent these conflicts from starting in the first place or from escalating into a full-scale dispute? People reason not only from experience but also from shared knowledge, which is a collection of experiences that he/she actually had, heard about from colleagues, or read about (Arditi and Totdemir 1999); therefore, ignoring or delaying the resolution of conflicts can have serious implications to the parties present and to future relationships.

As competition and adversarial attitudes escalate, once-flexible thinking becomes more concrete, positions are polarized, and communicative styles are more hardened into either-or attitudes with unilateral actions closely following (Augsburger 1992). Addressing conflicts and facing issues as they occur can be an important key to reducing conflict within the construction industry (Groton 1997; Stipanowich 1997; Carsman 2000). Clearly, disputes are never reduced with time, but grow larger the longer they are left unresolved (DiDonato 1993; Harmon 2001). The sooner the conflict can be identified and addressed, the higher the percentage of resolution success and the lower the cost.

Conflict Intervention

If conflicts are caused by poor communication and the lack of a collaborative approach to constructing the project, then the prevention of conflicts should entail open communication and a teamwork atmosphere. Cooperation requires common connections and conflict-limiting processes with open, honest communication at the forefront of the process (Augsburger 1992). To prevent or resolve a conflict, the first step is to create an atmosphere that will be effective for the resolution process (Weeks 1992). There are two processes already being used in the construction industry which can be modified to bring about a conflict intervention system that should work to reduce and prevent conflicts. Both processes involve storytelling. One is mediation; the other is partnering. Both are currently used as two separate dispute resolution mechanisms. What I propose is the interlocking of these two techniques to prevent and resolve the conflicts that exist between the owner and contractor on each project.

Inasmuch as the construction industry is a conservation one and not necessarily open to new ideas, an intervention process using two familiar and currently practiced alternative dispute resolution methodologies would not be suspect.

Mediation

Mediation has been used in construction disputes since 1985 (Phillips 1997) and involves the assistance of a third party neutral who facilitates negotiations (stories and their interpretation) between the parties (Loulakis and Smith 1992; DiDonato 1993; Jones 1995). Mediation and storytelling provide a forum by which and through which individuals can be empowered and recognized (Bush and Folger 1994; Kandel 1994; Senehi 2001). According to surveys sponsored by the American Arbitration Association, mediation is currently the most popular of the different alternature dispute resolution methodologies (Gillie 1991; Macneil et al. 1994; Reuben 1996).

However, traditionally, mediation takes place after a conflict has escalated into a dispute and relationships between the contractual parties are strained. At this stage, positions are hardened and resulting either/or attitudes prevent the successful and timely resolution of a dispute. Nevertheless, mediation, when used at the appropriate time before the hardening of positions, can ''strengthen relationships of trust'' (Moore 1996) and create a win/win outcome, satisfying both parties to the dispute. Moreover, mediation can minimize future disputes by maintaining open communication between the parties (Macneil et al. 1994). There are two types of mediators, facilitative and evaluative. The facilitative mediator does not offer an opinion, believing that to do so might harden the position of the parties, thereby preventing settlement. The evaluative mediator will give the parties his/her opinion on the merits of their case. This can enhance the discussions and chances of settlement (Goodman 1999). The proposed intervention uses a facilitative type individual.

Partnering

Partnering is a project and risk management tool that seeks to change the attitudes concerning the relationships between the owner and contractor to promote mutual rather than bifurcated goals (Appel 1993; DiDonato 1993; Augustine 1994; Zack 1995; Groton 1997; Keil 1999). The primary objective of partnering is the prevention of disputes (Appel 1993). However, inasmuch as all disputes cannot be prevented, partnering is one piece of the conflict prevention, and resolution puzzle and mediation is the other. Both would provide a workable intervention process to prevent and contemporaneously resolve conflicts.

Partnering is a nonadversarial process that seeks to build cooperation, trust, commitment, and open communication (Appel 1993; Penna 1993). The partnering process encourages the contracting parties to take deliberate voluntary steps to keep the channels of communication open, identify mutual goals, and discuss methods of handling conflict prior to communicating work on a project.

The Process

Groups identify themselves through shared stories that promote identity development (Kitchell et al. 2000). The two parties to the contract, the owner and contractor, are a part of one society, that of the construction industry, but they have evolved from a traditionally cooperative team to a currently adversarial one. Each group within the main society has a horror story about a job that went bad. Correspondingly, each group, in retrospect, can tell you the point at which things on that project started turning sour.

The intervention process would start similarly to a partnering conference, where a neutral third party facilitator (with both partnering and mediation knowledge and experience), who is an expert in team building skills with knowledge of the construction industry, assists the parties in telling their ''horror'' stories. Horror stories are stories of projects where disputes were so prevalent that the projects were not completed within the time or costs originally anticipated, the parties' relationship deteriorated to all-out war, and the emotional and financial cost of performing the work under such conditions was far beyond the expectations of either party. A partnering conference or retreat is usually held prior to the actual start of construction (Appel 1993; Penna 1993; Augustine 1994; Macneil et al. 1994). The initial phase of mediation is for the mediator to build a rapport with the disputants (Moore 1996). In this process, both the contract and owner must build rapport with each other to allow a foundation of trust to be constructed.

In mediation, the mediator will begin telling about himself, the mediation process, past mediation successes, or the issue at hand. The mediator, by telling stories of past experiences, encourages the parties to separate issues that may be discussed in terms of the current project from other past issues (Kandel 1994). Past experiences are an important part of the process. The facilitator, by recounting past horror stories, allows the parties to freely tell their stories. The facilitator/mediator's interest is not necessarily in past history, but in the present occurrences and the future (Cobb and Rifkin 1991); however, the telling of past stories may bring an understanding of the interests and complexities of the construction process from both points of view, i.e., the owner and the contractor, to the forefront of the discussions. Moreover, when told or retold, the stories can help the parties gain insight into past problems, difficulties, or disputes each group had and what ''baggage'' from these past difficulties is being brought to the current project. Weeks (1992, p. 89) notes that perceptions ''hold enormous influence'' over the parties' behavior. By bringing these perceptions out in the open to be freely discussed, both the owner and the contractor can gain a better understanding of what situations in the past created conflicts that resulted in unsuccessful projects. These insights can be used as the tools to prevent the same type of conflicts or to prevent conflicts from escalating into disputes.

In addition, conflict and resulting resolutions are more amenable when told through stories, because ''stories touch the intellect, spirituality, and compassion in the listener'' (Duryea and Potts 1993). The act of actively listening and reacting to the story ''makes the listeners as well as the tellers participants in the story, not merely observers to the story'' [Simms, as quoted by Sobol (1999, p. 37)].

In mediation, storytelling is a sequential process wherein each party tells his perception of the conflict (Fuller et al. 1992). This process will also entail sequential storytelling of first the horror stories, then the stories of goals and desires of both the owner and contractor for this project. Stories are more than an exchange of information; most importantly, they are a ''tool to mediate identity change and to motivate members to action'' (Kitchell et al. 2000). By the telling of past horror stories, the parties can seek to avoid repeating these stories on their current project. By telling stories of future hopes for a successful project, the parties can lay the groundwork for a shared relationship built on mutual goals.

Shared Goals

At the initial mediation session, the mediator attempts to understand the issues and desires of each side. According to Weeks (1992), an important step in the conflict resolution process is to focus on individual and shared needs. Weeks (1992, p. 143) points out that ''shared needs are the connecting points'' that hold the relationship together. Likewise, the storytelling in this process can clarify the issues and desires each group sees at the outset of the start of construction. This proposed intervention process seeks to determine individual and shared needs prior to the construction and before conflicts start. Stories told by the owner and contractor are the ''escort'' (Yashinsky 1993) that allows the facilitator to guide the parties toward an understanding of each other's position and issues. By the telling of goals, needs, desires, and hopes for the project, the parties can understand each other's interests and avoid the pitfalls they encountered on other projects due to poor communication and a lack of understanding as to the importance of certain issues.

Group Identity

In addition, narrative storytelling is how relationships and identities are established (Rifkin et al. 1991) and personal stories are central to the maintenance of groups (Kitchell et al. 2000). Inasmuch as conflicts are prevalent on all construction projects, the horror stories each group tells of the adversity they overcame or succumbed to on past projects will build the relationship and establish the new identity of this project's participants as ''smarter'' than they were in the past, because they are working to prevent conflicts from developing. As Tannen (1990, p. 113) notes, ''dialog makes story into drama and listeners into an interpreting audience to drama. This active participation in sense-making contributes to the creation of involvement.'' Moreover, if storytelling is an inclusive process that ''facilitates people's perception of social knowledge'' (Senehi 2001, p. 144) then the telling of past horror stories and the hopes for this project may shift the owner and the contractor's view of each other to that of teammates rather than adversaries.

Results

Mediation provides a forum by which and through which individuals can be empowered and recognized (Bush and Folger

1994). Using this proposed intervention process, parties can work toward developing authentic trust. According to Solomon and Flores (2001), authentic trust is a positive attitude towards the future. This is generally called hope, but this hope, because of the shared stories, is aware of the dangers and obstacles in the way of successful completion of the project. By shifting the paradigm from adversarial to cooperative, both parties become empowered. The parties are alert to the potential of a conflict- and dispute-riddled project but have a foundation of mutual respect and open communication that was absent from past projects.

The result of the partnering retreat is a ''charter'' or agreement that is signed by all members of the project team (Appel 1993). It commits the project team to pursuit of specific goals, e.g., the project's completion within the planned cost and duration. This process would include a charter wherein parties agree on goals to be achieved and the process under which those goals can be achieved.

However, like partnering (DiDonato 1993; Augustine 1994; Groton 1997), this intervention process must include seminars throughout the course of the project, because old patterns and habits could easily be resumed once problems or difficulties arise.

By engaging in this process, time and energy can be focused on constructing the project and keeping communication open rather than maintaining an adversarial position. There is little downside to this process, but it does require commitment on the part of the contractual parties to implement the steps necessary for its success.

Evaluation

It would be difficult to determine whether this proposed intervention process would succeed, because each construction project is unique. Each project has a different set of ''players'' on both the owner and the contractor's side, even if both owner and contractor are the same entity. However, it can be evaluated based on the satisfaction the parties had with the process, whether or not they believed the intervention process contributed to satisfaction with the parties' relationship, whether or not conflicts were prevented or contemporaneously resolved due to the process, and whether or not they perceived the intervention process was a key element in having the project completed successfully.

Conclusion

As previously noted, the construction industry is an adversarial society, with its product, the construction of a project, a major contributing factor to the economic health and well being of the U.S. economy. Therefore, any intervention process that can divert money away from those whose business is conflict, e.g., attorneys and consultants, to the main function of the industry, capital projects, can be considered a benefit to the industry as well as the public as a whole. Moreover, this intervention process can break the cycle of conflict in the construction industry. Because relationships are built on a project-by-project basis, this process, if deemed a contributing factor to the successful completion of a project, can be utilized on future projects. If individuals value what has been proven useful to them, and if this intervention has been useful, then it can logically be useful for others on other projects. The greater the success of contractors and owners in using this intervention process, the greater the likelihood that the process will spread to other contractors and owners.

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