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Innovative Construction Contracting Formats – Will They Succeed?

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As we move further into the 21st century, we continue to see new trends develop in project delivery for the construction industry. The industry is experimenting with different project delivery formats and combining them with the incorporation of Building Information Modeling (BIM) into the design and construction process. Today's contract trends are moving beyond the traditional Design – Bid/Price – Build delivery format into a more collaborative approach. The developer of a project, whether public or private, now has multiple format choices including Design-Build, Integrated Project Delivery (IPD), Construction Manager At Risk (CMAR), Public Private Partnership (PPP) and variations of lean delivery philosophy incorporated into design and construction delivery methodologies.

Documented productivity gains and reduction of disputes anticipated with these formats have yet to materialize. The amount of data is not yet significant enough to determine what is best. The promise of productivity advancements and avoidance of costly dispute resolution remains unfulfilled. Some would argue these new contract format trends open a new frontier to greater complexity with unanticipated and nontraditional risk.

If progress is to be made utilizing newer formats, there needs to be more focus to better manage the risk and complexity these formats bring to the process. Success with these formats is largely dependent on collaboration which cannot be underestimated in terms of making these alternate formats reach their productivity potential. There is also a greater need to simplify the payment process which has grown unnecessarily complex in terms of procedural requirements to get paid. There has been great focus on Alternate Dispute Resolution (ADR) to resolve disputes over the past decade, but not enough commitment has gone into dispute avoidance which is a function of collaboration.

The key component to the success of the nontraditional delivery methods is a collaborative working environment where responsibility, risk and reward are proportionally shared and collectively owned in a better way to deliver client requirements. It is disappointing to see that the number of disputes remains at comparable historical levels, and that as a whole, the industry is more likely to see the number of disputes increased rather than decreased. Research has shown that disputes remain constant regardless of economic conditions.

Without relationships, achieving collaboration is made more difficult. Collaboration can take many forms; some forms are structured and more prescribed than others. Contracts need to include an ethos of "mutual trust and cooperation" including affirmative obligations stated in the contract to accomplish the collaborative purpose. The least structured approach is affirmation of mutual trust and cooperation to a more structured approach such as partnering and even more formally by the use of contractual alliancing agreements.

Implementation of collaboration starts with a collaborative culture and commitment to procedures to implement that commitment. It is essential to define what is collaborative and to establish the techniques used for collaboration to be successful. Integrated contract agreements are best able to support collaborative working. It is not enough to have a single collaborative agreement between two parties, all project agreements with team members need to be collaborative. All contracts need to be integrated on the concept of collaboration. Collaboration will only come with more transparency in information systems, where all involved have the opportunity to see their role and their obligations more or less in real time. A good tool to accomplish this is BIM. Serious consideration should be given to have BIM requirements included in the contract suite of documents.

Payment issues undermine trust and collaboration. Payment procedures have grown too complex. Payment disputes remain too commonplace in the construction industry and too often arise from or are exacerbated by the relatively complex payment provisions in the contract. Layers of procedure are becoming the norm further complicated by convoluted timing mechanisms triggering payment and the requirements to be paid. The key objective is to ensure that the contract contains clear mechanisms that enable both parties to be aware clear contractual deadlines for payment.

Contradictory or unclear wording inserted into other relevant provisions of the contract concerning progress payment applications, milestone payment dates, substantial completion date, final completion date, final acceptance date and other similar "target" dates serve to confuse when and what amount is due to be paid. The problem is made worse when payment obligations are not integrated

throughout the various construction agreements.

Layered on top of the payment timing are the "paperwork" requirements. Use of "paperwork" as a sword instead of a shield undermines the collaborative process. It is essential that contract language sets forth a clear and precise statement of the due date and final date for payment and the steps surrounding them from initial applications for payment to interim certificates certifying completion. Timing is everything in payment practice.

Collaboration is a tool to be used for dispute avoidance. When properly deployed, there will be fewer disputes and less need to engage in dispute resolution processes. Most existing construction contracts focus on alternate dispute resolution technique as opposed to dispute avoidance. The alternate dispute resolution process has become a process that too often delays resolution of issues.

Generally, most construction contracts are written to enable the dispute resolution process to be engaged in during the course of the work. However, in the practical world, this rarely happens. Too many contracts have too many steps to the dispute resolution process. By the time the parties get around to the final steps, the work is near or at completion. This delay leads to damaged relationships, a hardening of positions and financial hardship, all of which undermines the collaborative process. The dispute resolution procedures serve to avoid resolving the problem by engaging in procedure. Lawyers like procedure and process, owners and construction professionals prefer dispute avoidance.

Additionally, with the advent of BIM, such modeling represents a single source of information which the parties can use to avoid disputes. BIM means that data from several places has already been brought together in the same place. This data comes from architects, engineers, constructors, planners, and surveyors, and it will all have been coordinated, clash checked, organized and integrated before being included in the model itself. The subsequent "architectural" plans, "engineering" layouts, drawings, elevations, schedules and data sheets will be complete from and can be used to resolve or avoid disputes. The advantage of BIM is that it allows visualization of the issue and a means to identify and correct the problem in real time. If one accepts that uncertainty is one of the major causes of disputes, then BIM should reduce that aspect. Lack of understanding of BIM, and lack of a BIM specification in the contract can be a great obstacle to collaboration.

If the future of productivity gain and dispute avoidance does lie in a collaborative approach then contracts need to incorporate and reinforce the culture of collaboration. For these innovative delivery methods to succeed it is essential to define what is collaborative. The construction sector is viewed as fundamentally adversarial rather than collaborative, where narrow margins are expanded through dispute procedure. Contracts that provide a framework for collaboration may just be the catalyst to a better way.

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