CHAPTER 10

Claims, Changes, and Disputes

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Introduction

Often parties do not pay adequate attention to the inevitability of disputes and claims arising on megaprojects. The parties' primary focus is on getting the project planned, funded, permitted, designed, and sent out for bid. And the beginning of the project is always the time of hope that the planned megaproject is going to be a success, combined with the early optimism of the project proponents and participants that "we're not going to have disputes and claims." However, one endemic characteristic of megaprojects is that there will be disputes and claims, and they often will be high in number and large in size. So, the prudent megaproject manager should assume that there will be a large volume of disputes and claims and plan accordingly.

The authors propose that addressing potential disputes and claims should be given just as high a priority as planning, permitting, design, and bidding, since disputes and claims can derail a project just as surely as other causes. Likewise, the authors recommend that this area be addressed at the beginning of the project when the parties are cooperative – it is much easier to address dispute avoidance and resolution processes when there are no disputes than to leave that issue until a dispute has arisen or a formal claim has been made.

The authors will first address ways to avoid or minimize disputes,[1] since a dispute that is either avoided or resolved before it becomes a claim obviously will save time, money, and resources. The authors then address systems of control to manage the inevitable changes and claims, with the goal that all issues be resolved at the project level and that the project close out without the traditional "litigation tail." The authors finish their review by exploring the use of alternative dispute resolution (ADR) mechanisms that can avoid the morass of lengthy and expensive post-project litigation.

Partnering on Megaprojects

At the most basic level of work, a construction project is accomplished through a complex network of commitments – individual promises from one person to another. These discrete promises include what will be done, by whom, when, at what cost, and

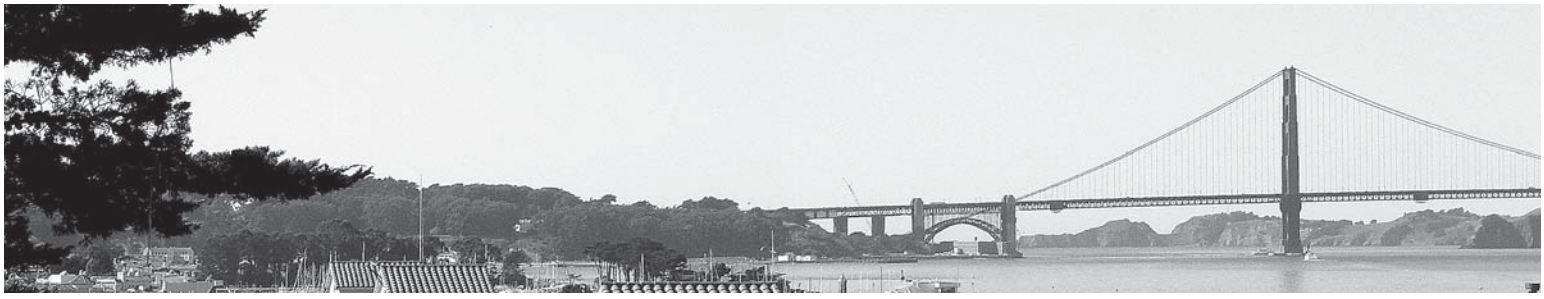
to what standard of quality. At this most basic level of work, megaprojects are different principally in the quantity of promises and the complexity of their interrelatedness.

Because the success of the megaproject relies on the fulfillment of these commitments as they are created or changed, the quality of human relationships on a job has a direct and material impact on the execution of the project. Humans engage with each other at several levels, and they telegraph the quality and nature of the relationship through communication. "Communication" can vary from relatively obscure gestures or body language to direct and understandable statements. We communicate conflict by a gesture as simple as a frown of annoyance or a feeling as profound as betrayal. Managing a megaproject requires managing conflict. The best way to manage conflict is through continuous, healthy, focused, direct human communication. The bridge between communication and conflict is often called "politics"; the space between communication and conflict is the "political space."

Not all conflicts can be resolved between project people, even people of extraordinary goodwill acting responsibly. But most can be resolved by effectively isolating positions from interests, with the ultimate interest of the participants being what is best for the project as a whole. For this reason, conflict management starts with the management of human relationships on a project. As projects increase in size and complexity, the impact of individual human relationships becomes magnified and such impact is often reflected both in the multitude of project inefficiencies (waste) and in the nature of project disputes (additional resources). This is especially the case on a megaproject, where the risks are so much greater and the distances between people can be substantial.

In the 1980s an approach to managing the "political space" on a project called "partnering" began to be used. Partnering became important and respected when the Army Corps of Engineers adopted it as its chosen method of project kickoff. Over the intervening years, partnering has been defined in a variety of ways. In 1991, the Construction Industry Institute published *In Search of Partnering Excellence* to underscore the importance of partnering as a means of reducing adversarial relationships. That study provided the following definition of partnering (Partnering Task Force 1991):

> . . . a long-term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources. This requires changing traditional relationships to a shared culture without regard to organizational boundaries. The relationship is based upon trust, dedication to common goals, and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost effectiveness, increased opportunity for innovation, and the continuous improvement of quality products and services.



Robert Cushman defines partnering as an important part of the commitments that are exchanged on projects. According to Cushman, partnering is

> . . . a more or less formal commitment by all concerned parties on a project to implement and use a forum that provides opportunities for open communications between the parties on a regular basis to achieve joint resolution of problems. . . . The goal of partnering is to obtain a genuine commitment from each member of the construction team to work toward the resolution of issues when they are identified.[2]

The commitment parties make in partnering is that they will establish and use healthy, resilient lines of communication between all project participants. This is meant to result in robust managerial and interpersonal relationships that can continuously resolve the day-to-day conflicts and disputes that arise. Partnering seeks to develop a "project culture" from the many company cultures that organizations bring to the job. Thoughtfully and responsibly done, partnering may actually avoid claims and litigation, improve morale, and enhance value to the customer – in other words, deliver a quality project on time and on budget.

Expectations of Partnering

When parties partner, they usually engage in social activities aimed at creating a feeling of shared community and shared humanity. This normally happens at the outset of the project and involves all the project participants – sometimes hundreds of people. The parties expect that the enhanced communication developed in this one-day session will lead to greater efficiency on the job. The parties also expect that the newly developed bonds among participants will result in a quicker resolution of conflicts as they arise at all levels of the job. Partnering attempts to foster the growth of relationships among the participants through regular facilitated activities, including conversations between project participants.

Traditional partnering often develops a charter, a list of common understandings and a commitment from job participants that they will value the project first. Partnering facilitators often encourage the parties to develop a mutually agreed upon mechanism for the identification of disputes and a process for clarifying who "owns" the issue and who is responsible for resolving it. Ironically, the concept of a shared responsibility for resolution of issues is thereby dropped in favor of a simplistic resolution mechanism: the creation of a "dispute resolution ladder." The resolution ladder provides a stair-stepped escalation of disputes up the chain of command, ostensibly resulting in no dispute lingering for more than a few days. However, there is no conscious attention given to resolving the dispute at the lowest level; rather resolutions await elevation to a higher level.

The Problem with Partnering

Although the results sought by partnering are essential to project success, the fact remains that roughly half the time partnering fails to put in place appropriate mechanisms to resolve disputes and prevent claims. When it fails, its failure is primarily related to the fact that partnering is a one-day event; the relationships crafted are not durable. Even with quarterly check-ins, the kinds of team-building events usually employed by partnering facilitators do not deal with the on-the-ground problems encountered on the project. The relationships so necessary to a common understanding of project interests, and thus the shared responsibility in the resolution of the problems, often breaks down in the attempt to allocate all the responsibility for a problem to one party. The parties rarely employ the partnering facilitator's skills in attempting to resolve the matter at the lowest level and in a manner that is best for the project.

By way of example, a June 2000 study of the Texas Department of Transportation's (TxDOT) partnering program, which found that it had generally been effective, also found that follow-on sessions were rarely employed:

- The survey revealed that 70 percent of TxDOT and contractor personnel did not know about follow-up and close-out workshops, did not know they were available, or did not know the purpose of these workshops.
- Only 20 percent of TxDOT and contractor personnel indicated they had attended a follow-up workshop, and only 5 percent indicated they had attended a close-out workshop.
- Of the 20 percent who had experienced follow-up and close-out workshops, all rated these workshops as from "beneficial" to "extremely beneficial."[3]

Another difficulty in making project relationships durable is the fact that project participants remain within their company organizations – within their "organizational silos" on the project. This means that they remain charged with protecting and enforcing their company's interest first, with the project's interests second. Such a scenario is not what the Construction Industry Institute envisioned in terms of partnering "changing traditional relationships to a shared culture without regard to organizational boundaries."[4] In order to make partnering effective as a project management tool, projects need to break down company barriers and develop a "project first" culture that is implemented throughout the life cycle of the project.

Partnering's mixed results have been documented by some of the most dynamic proponents of the process. As pointed out above, Grajek, Gibson and Tucker found that TxDOT partnering was generally beneficial but that the process used in Texas missed the opportunity to be truly transformative by failing to require follow-on sessions.

Other departments of transportation have encountered similar problems in implementing their partnering processes.

Caltrans (California Department of Transportation)

The 2007 Caltrans Construction Partnering Steering Committee (CCPSC), which included construction leaders from Caltrans and the construction industry, worked to provide recommendations to improve the Caltrans Partnering Program. The committee started work in October 2006 and has met quarterly since then. Indicative of the detail to which CCPSC delved into the process, five subcommittees were created to work on improvement efforts in concentrated areas. In September, 2008, CCPSC issued and approved the new Caltrans specification and *Field Guide to Partnering on Caltrans Construction Projects*.[5] At the heart of the new process are the following six key lessons, upon which their program is based:

1. Follow-up and Measurement
2. Training and Empowerment of Field Staff
3. Project Stakeholder Partnering
4. Strategic Level Partnering
5. Decision Making and Risk Management
6. Recognition and Awards

These key factors are implemented as follows:

1. To encourage the use of project partnering, a change to the Partnering Specification has been proposed. The new partnering specification provides that professionally facilitated project partnering is mandatory for all projects over $10 million and optional but encouraged on projects from $1 million to $10 million. In addition to requiring partnering, a separate and distinct session of project team training in partnering skills development is mandatory for all projects with a total bid of $25 million or greater and is encouraged on projects from $10 million to $25 million.
2. To encourage follow-through and dispute prevention, the project team will include a partnering maintenance and close-out plan in the partnering charter and be required to do monthly partnering evaluation surveys. The survey results will go to the project team, construction managers, and the partnering facilitator, providing feedback for course corrections as needed.
3. To encourage the use of project partnering in dispute resolution, the new specification allows up to a 20-day extension of the notice of potential claim (NOPC) timeline. The Dispute Resolution Ladder (DRL) process looks to resolve disputes

within six weeks prior to involvement of a Dispute Review Board (DRB). The DRB, however, will remain in place, as it serves a valued purpose.

4. Caltrans uses partnering facilitators to encourage quality and consistency in Project Partnering statewide. A statewide team will assemble and review the information in an annual quality review to capture best practices and areas of needed improvement.

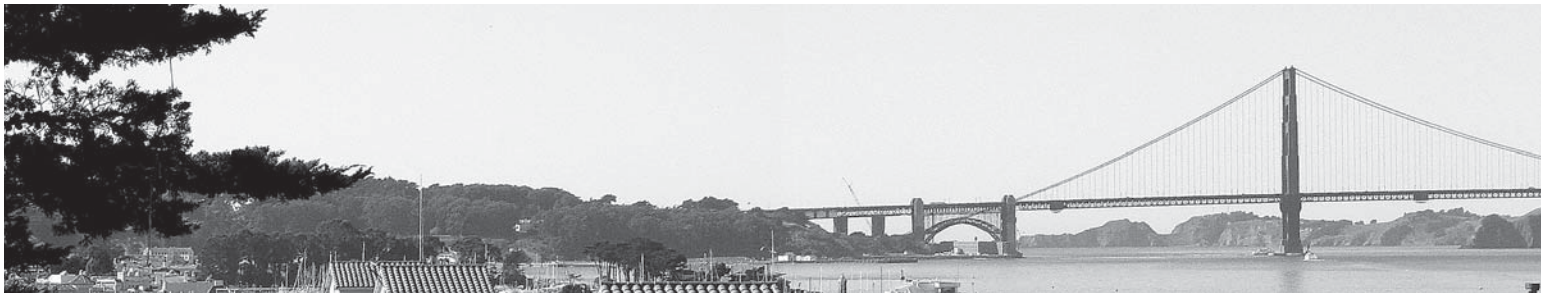
ODOT (Ohio Department of Transportation)

The Ohio Department of Transportation's 2001 strategic initiatives included the department's commitment to "embrace partnering with contractors to improve quality and to reduce disputes." In an as-yet unpublished 2006 proposed redraft of its *Manual for Partnering on Construction Projects*,[6] ODOT recommended the minimum threshold for use of formal partnering be set at $5 million (and/or three funding sources for more than a one-year project duration), and suggested a broad spectrum of persons be invited from executives to managers to inspectors, estimators, foremen and subcontractors (as appropriate).

There are common components of partnering workshops recommended in Ohio, including working from an agenda, keeping minutes of the meeting, developing partnership objectives (i.e., stakeholders' wants and needs), and defining an issue resolution process, as well as identifying obstacles and developing action plans. Ohio also recommends drawing up a "charter" with its mission statement and goals and advises that the team consider "[h]ow we work in terms of communication, sequencing, planning, coordinating, and general work flow."

Additional workshops are recommended "as necessary to facilitate the flow of the project . . . and ensure that the lines of communication are maintained and problems are addressed in a timely manner." On larger, multi-year, multi-phase projects or projects with critical items of work or milestone dates, the *Manual* calls for a project milestone meeting, at which the following items would be considered:

- Partnering Project Rating Form evaluations
- A review of the partnering charter
- Items that could be improved
- Items that could be deleted
- Items that should be included
- Items that should be continued
- Things that did not go well
- Thing that went very well
- Upcoming activities that could be challenging



- Roadblocks that are ongoing or anticipated
- Right of Way or utility conflicts
- Public issues
- Finalization
- Performance of all parties

In survey responses to partnering sessions over the past 15 years, the authors have collected anecdotal responses concerning the effectiveness of partnering. In general, participants were in favor of the philosophy but skeptical of the efficacy of the actual process. Their greatest skepticism concerned the ability of the participants to actually engage (e.g., ". . . success is directly dependent upon the integrity of the participants," "the parties lacked commitment," the "wrong people were involved"). Participants concluded that traditional partnering often fails due to the nature of the chosen process, not the underlying philosophy (e.g., "one-time opening session that is ineffectual," "failure to set up mechanisms for continuous issue review," and "failure to establish meaningful project teams at horizontal levels of competence").

Megaprojects Partnering

In megaprojects, this skepticism is further complicated by the clustering of projects and contractual relationships whose only real commonality is the owner. Megaprojects are often "partnered" only at the project level and not at the program level, resulting in a fragmentation of the effort to establish relationships that are focused on creating and nurturing an effective "whole project" – or even "whole program" – team throughout the megaproject.

The authors have seen megaprojects in which the discrete projects within the megaproject were treated as barely-related planets in a common solar system whose only shared experience was the solar system owner at the center. Conversely, the authors have participated in two megaprojects whose leadership recognized the essential relatedness of all of the efforts and instituted a common, facilitated partnering program cutting across all contract lines and disparate sites (in one case, literally hundreds of miles apart).

The Fix for Megaprojects

Horizontality

We believe that one way to address each of the summarized reasons for failure in partnering is by establishing meaningful project teams across horizontal levels of competence. Traditional contractual relationships establish vertical silos of entities. The people

on the project live and work in these vertical silos; their communication and responsibilities tend to be vertical – up and down each silo's chain of command, and then over and up/down to another organizational silo.

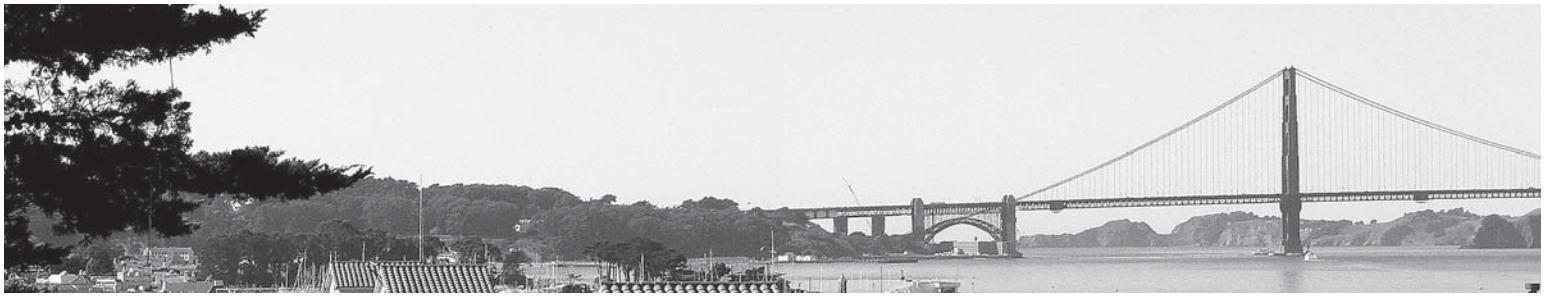
However, if a project is a network of complex commitments, those commitments need to be made by the people who actually carry out the work. Thus, executing the project requires effective horizontal relationships, i.e., people working at their levels of competence and authority with others of similar competence and authority. That means, for example, that field-level people (superintendents, inspectors, and field managers) work together, forming a strong, cooperative bond. At the next level "up," it means that project managers, design managers, owner's representatives, and construction managers come together as a manager team. These teams work collaboratively, reporting to an executive team comprised of the top-level people from the owner, designer, contractor, major subcontractor, and construction manager organizations.

In this realigned mode of executive, manager, and field teams, the focus of each team is the project itself, not their intraorganizational or interpersonal relationships. Meeting commitments are based on shared experience and shared responsibility. Each of these teams focuses on its level of competence and authority. For example, executives do what executives do – they decide issues of overall cost, schedule, and contract. Project managers make decisions on project execution details, such as change orders or how the work is managed, and make recommendations to the executives on issues beyond their authority. In this scenario, those recommendations are *team* recommendations of all the players at a project management level. This provides the benefit of a well-thought out collective decision to individual managers within their own organizational silos.

This reporting structure – both empowered and challenged by the executives – allows the manager team to pull together to meet the needs of the project. Knowing they must identify and resolve day-to-day issues, report regularly as a team to the executives, and generally behave responsibly and cooperatively, these managers use their shared experience to bond as a team. Field-level people typically live in this "get-it-done" real world, anyway. Thus, they operate well in such a horizontal atmosphere, with a corresponding alignment of managers and executives above them. This creates a more harmonious and efficient structure and positions the teams to handle disputes at the lowest level possible.

Simultaneity

In addition to forming horizontal teams at levels of competence, effective partnering also allows for impeccable coordination of efforts on the project. This frees project participants to think of the project as a group of simultaneous events that are not necessarily segmented or sequential. For example, although tunnel finishes naturally follows



electrical system installation, impeccable coordination between trades may allow scheduling of simultaneous efforts in different areas of the project.

True collaboration (what the authors think of as " true partnering") has allowed managers to completely rethink how projects are sequenced. In a recent medical center project, for example, the planners were waiting for floor layouts to see what heavy equipment would be placed before they believed they could order steel for the building. But it turned out (after discussions with the steel subcontractor, the medical equipment subcontractor, and others in the *design* phase of the project) that a slightly larger steel order would hold heavy machinery wherever it was placed in the facility. The project was able to place its steel order months in advance of the traditional time, resulting in huge savings in time and staging, and resulting in a budget that was more accurate earlier in the project. These savings more than offset the small additional cost of "extra" steel.

Partnering at the outset of the design phase of the job (even in a design-bid-build contract) can result in the development of efficiencies throughout the project. This allows several efforts to commence simultaneously, clipping large chunks of time out of the schedule. Continuous partnering, impeccable coordination, increased relatedness—all add to project efficiencies that reduce costs of construction and virtually eliminate claims at the end of the job.

Effective Partnering Can Make a Significant Contribution

Successful partnering acknowledges and manages the "political space" between and among the various individuals and horizontal teams within the megaproject. Regularly facilitated partnering sessions of the whole project team establish affinities, efficiencies and relations between parts and pieces of the project that result in cost and time savings. For example, regular individual team meetings help the field level delivery teams focus on the work 30 to 90 days out. Such meetings coordinate the efforts needed to accomplish the work and manage the commitments between the team and those commitments made by the team to other project teams. Beyond the daily and weekly check-in sessions, these partnering sessions also offer a regular forum for managers individually and collectively to monitor the effectiveness of the project's communication and decision-making systems (submittals, schedules, requests for information, and change orders). Trust is tracked on the project at each team level from month to month and recorded at these meetings. Teams can forecast risks and anticipate opportunities and make action plans to minimize those risks and maximize the opportunities. By pulling these reports, assessments, and plans together in summary form every month, the manager team can then report their assessments and recommendations for further action in summary form, as a group, to the executive team.

Making Partnering "Scalable" to Megaprojects

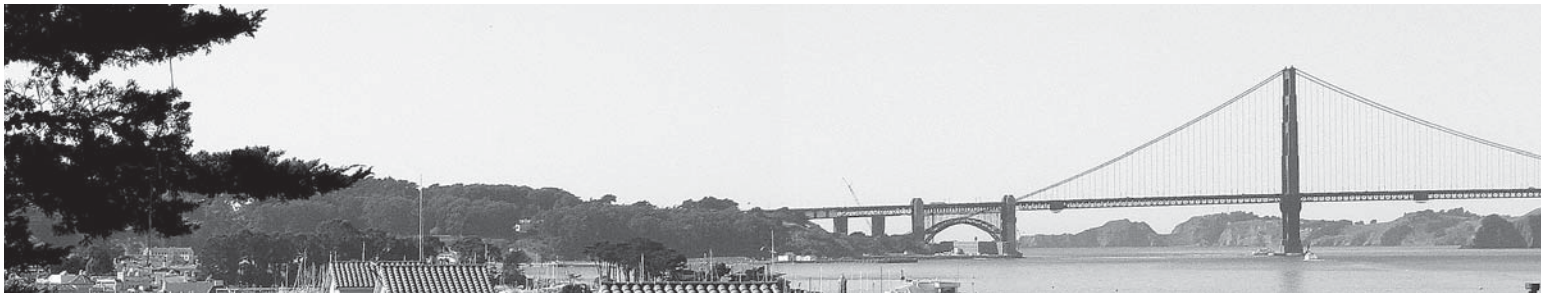
As described above, fully effective partnering in a megaproject requires recognition of the essential relatedness of all of the individual projects or sub-projects which make up the megaproject. A common, facilitated partnering *program,* cutting across all contract lines and disparate sites, is the key to maintaining the unity of interrelated efforts. The program must be seen as a whole and treated holistically.

Such "up-scaled" partnering creates "project first" horizontal teams at the field, manager, and executive levels. Each of these teams includes participants from the designer, the contractor, trade partners and suppliers and these teams can be further broken down into responsible categories. Each horizontal team is then related across project lines into integrated mega-teams at their appropriate competence levels as well. The formation of these teams allows routine and meaningful communication and coordination among the various projects that form the program.

Because megaprojects may contain many different "projects," it is important that teams elevate their thinking from just "project first" (i.e., "What can I do to help my project?") to "program first" (i.e., "How does success on my particular aspect of the project affect success of the program?"). For instance, in a recent program to develop emergency stored water, several projects (dam raise, tunnel installation for transporting water between reservoirs, hydroelectric plant installation in large transport pipes) were covered in the program. The program can be thought of as a megaproject, and each of the component parts as a several-hundred-million-dollar project. Each of those projects had to be coordinated to make the overall program work; each participant on each project had to be cognizant of the effect of that project on the larger program and coordinate its work accordingly.

These "program" teams anticipate opportunities for improving program performance by looking at efficiencies across the program. They also resolve conflicts between various projects to enhance development of the program. This kind of collaborative partnering has also proven effective in dealing with large public agencies that need cooperation among departments, among project participants, and also across the entire capital improvement program.

Scaling the partnering effort to embrace the entire program and create what one program director called a "culture of facilitation" – in which the partnering facilitators mentor the program leaders in facilitating onsite team meetings at various levels – brings collaboration and teamwork into a megaproject, which is the real promise of partnering. In broadening the partnering scope across the entire program, there is a heightened, expanded role for the executive team. This larger role for selected company and agency executives offers a regular forum for high-level monitoring of the progress of the various projects. It allows for the monitoring of necessary inter-project or all-program coordina-



tion. Further, it serves as a constant backstop for unresolved problems, unexpected negotiations, and those conflicts that ripen into disputes. It is the ultimate assurance that project activities are conducted as an efficient production organization, cutting across all company and project silos. The all-program executive team is empowered to make the decisions necessary to fulfill the program, and to review and, if appropriate, approve the recommendations of other all project teams.

This structure also addresses the concern that construction partnering fails because it does not concentrate on the kinds of things partnering in the production business does, viz., on supply-side relationships that grow into long-term relationships. Often in mega-projects, teams are joint ventures of various organizations. The structuring of the joint venture teams means that company silos must be broken down right away and that partnerships be made that may well have lasting effects on the relationships of the parties – even where the parties have been competitors in the past. Partnering those projects means that the parties have to address supply-side, on-going shared relationships much as Toyota has addressed on-going concerns with suppliers by partnering with those suppliers in developing leaner ways of supplying Toyota's needs.[7]

As new forms of agreement become more widely used, partnering and the on-going collaboration it promises become even more important. In design-build contracts, for instance, the power of cooperation between the designer, the contractor, and the owner requires collaboration across company silos. Integrated Project Delivery on larger projects requires collaborative relationships in order to integrate the delivery of the project—the very essence of the promise of partnering is what allows such integration. The rapid development of single access points for design and building modeling (building information modeling or "BIM") for production and control of design sets implies a new level of collaboration on projects for the entire team. These developing project delivery systems demand impeccable coordination and defined relatedness and a project culture that breaks down the organizational silos and makes real collaboration possible. The true underpinnings of partnering, mindfully applied to these projects, will make these delivery systems viable, economically feasible, and culturally desirable.

Relevance of Older Contract Forms

Older contract forms often address partnering as a startup effort with few or no expectations and deliverables. While this can be an adequate base on which to build a good foundation, partnering can use a contractual lynchpin to ensure its effectiveness. The basic framework should draw from the experiences of the California, Ohio, and Texas DOT programs and provide at least:

- A kick-off partnering session;

- Monthly or quarterly follow-up sessions (Caltrans recommends monthly evaluations);
- A close-out workshop; and
- A provision within the contract for facilitated dispute resolution processes that emphasize the importance of taking responsibility for the dispute and resolving it at the level closest to the work. This system is outside and in lieu of traditional claims procedures and should not merely include a rote dispute resolution step-ladder of options.

Most older forms of contracts, including public agency contracts, can be amended with a simple partnering section that incorporates the above language (in the last bulleted paragraph). States that have allowed their contracting agencies to enter into design-build contracts already have the authority and often the mechanism in place to allow such amendments. Because transportation departments have been such advocates of partnering over the years, it is a good idea to check with the relevant state's department of transportation to see what agreements and specifications for partnering they may have adopted. These can be readily converted into a section on partnering.

The authors recommend that any partnering addenda to older contracts also modify the dispute resolution provisions of the contract to bring them into line with the idea of a facilitated, responsibility-based approach to problem-solving. Problem-solving is much more efficient, economic, and efficacious than dispute resolution and should be part of every partnering specification.

Resources

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