

# Kluwer Mediation Blog

## Roots Of Construction Project Disputes Flow From Biblical Past

Joseph Grynbaum (Mediation Resolution International, LLC) · Thursday, March 20th, 2014

Have you ever wondered why the construction industry is still saddled with its culture of adversity, contractual conflict and a “who’s to blame” attitude? Or what causes job disputes to quickly escalate into full-blown claims despite the well intentioned calming efforts of the site managers?

The seeds of construction disputes are planted during the formation of the project team within the terms and conditions of the construction contract as well as the tone and attitudes of the contracting parties.

Could it be that the fertile soil in which these seeds germinate and grow is rooted in the biblical past? The Book of Genesis in the Old Testament tells the story of the first large construction project, and may be the genesis of how miscommunication among participants in the construction industry arose.

The story of the construction of the Tower of Babel relates how an apparently successful construction project, a township and tower that would reach far into the heavens, was undermined and ultimately failed in a spectacular way.

Utilizing a well-organized and skillful workforce under the guidance of innovative engineers and savvy project managers the project was well on its way to meet its owners’ objectives. Everyone on the job understood each other, spoke a common language and worked to the best of their abilities. So what went wrong and why?

Unfortunately, God, in his wisdom, did not wish to see the success of the project. He was concerned that man believed that entrance into his kingdom could be attained simply by building a structure high into the heavens in lieu of achieving spiritual integrity. His wrathful action was to deprive the various trades and management of a common language. This resulted in pandemonium as the once united workforce disintegrated into babble; the project quickly failed, and henceforth became known as “The Tower of Babel” story.

More than 5000 years later, this “Tower of Babel Syndrome” is still influencing the construction industry today. Armed with this knowledge shouldn’t the industry develop techniques to better align the different cultural languages that exist among the project players? In fact, many owners have already recognized the benefit of investing in trust-based procurement strategies in lieu of the more traditional strategy of adversity. Intelligent owners are acknowledging that today’s industry is

stretched thin, due to skilled labor shortages, increased claims and decreased margins, and unexpected problems, such as protracted disputes with associated unrestrained legal costs can force a firm into financial jeopardy.

One successful counter approach has been the Partnering method. If implemented correctly it is the simplest and most economical. To foster the partnering practice a neutral “facilitator” (or industry savvy mediator) is engaged to work with the project team to establish clear and open communication at the project kickoff, and then fortifies the lines of communication throughout the project duration. A skilled and construction capable team builder can promote an open exchange among all the contracted parties to help ensure that the team does not default to business-as-usual behavior exemplified by the Tower of Babel Syndrome.

The rewards that flow to the project when partnering is championed by management, and successfully implemented, are staggering. Tangible rewards include significant cost savings, the unleashing of employee innovation and the virtual elimination of finger pointing and associated claims that lead to intractable disputes. Other benefits include minimized misunderstandings and a heightened regard for safety and quality.

Another enhanced proactive dispute resolution technique, in addition to partnering, is now being applied in growing measure in the commercial and industrial construction sector; a sector undergoing unprecedented growth across the country.

Several project owners working with high risk lump-sum contractors have agreed to select a dispute resolution industry specialist, on a cost shared basis, in a deliberate effort to head-off future possible disputes. The impartial specialist (mediator) will attend project meetings, be copied on key documents and have open phone lines to key project personnel. His role is primarily to help the parties work together to ensure that disputed matters are brought to the surface, fully considered and resolved under his stewardship. As the benefits of this approach become known, the technique should become a common business tool to overcome the construction industry’s proclivity for adversarial communication.

For those project owners that want to explore more ambitious trust-based strategies and achieve break-through performance results, here’s a historical example of what has been achieved when a company decides to reinvent the business-as-usual procurement process.

With the strong support of its chief executive, UK based British Petroleum Company (BP) decided to invest in an alternative contracting approach to the commonly accepted way they previously managed a complex oil and gas rig construction project in the North Sea. The trigger was a dormant North Sea gas reserve named “Andrew” which had been a non-starter for more than 20 years, while BP tried without success to reduce its estimated construction cost of over 750 million dollars.

After careful selection of a project team that agreed to discard the business-as-usual adversarial model to design and construct Andrew in a collaborative way, without the constraints of only considering the lowest bidder and striving for maximum profit and minimum risk, the team came up with a revised target price and schedule.

Committed to a new aggressive target price of 550 million dollars and a four months shorter schedule than previously thought possible, everyone agreed to sign onto a project alliance agreement that promised significant bonuses to the team participants based upon a shared gain,

shared pain formula, and a proactive dispute resolution procedure to eliminate the possibility of claims after project completion.

The project outcome of this strategy was that Andrew's final cost came out to around 460 million dollars, which allowed a bonus distribution of 60 million dollars to flow to the project contractors. In addition, the project was completed two months under the already shortened target schedule, and its success has become the global benchmark for future projects, especially in the oil and gas industry.

Most recent project alliance successes, now referred to as integrated project delivery projects in construction sectors like transportation, telecommunications, water delivery, public institutions, etc, are positive indicators that the construction industry is able to overcome its biblical legacy and work together in more harmonious and profitable ways.

It will take visionary business leaders, influential owners and committed contractors, willing to set aside ingrained adversarial attitudes, to unleash employee innovation, avoid disputes, open up new and highly profitable business possibilities, and learn from the biblical legacy of history.

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