



The role of the Partnering Adviser as Mediator

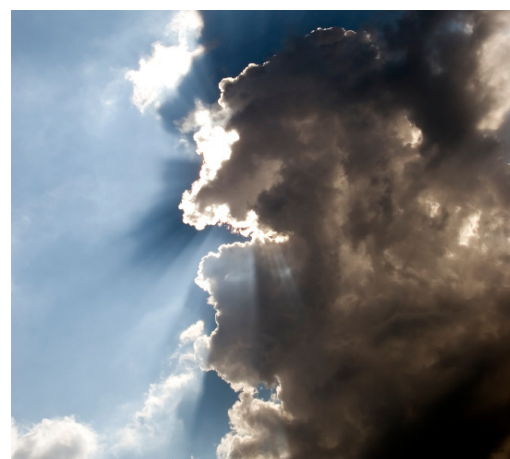
As the use of partnering contracts and in particular, PPC2000 and TPC2005 become more mature and commonplace, it is inevitable that they will be subject to potential dispute. Indeed, the current economic climate is a potential contributory factor in testing the resolve of partnering team members, particularly around the issue of value for money.

We are also experiencing tensions often exhibited by clients, where they entered into long term partnering contracts when the market was buoyant and now, where the market is more competitive, are seeking exit strategies to enable them to exploit potential cost savings by re-procuring contracts. From a contractor's perspective, the current climate drives low margin tendering, almost reverting to the old days of compulsive competitive tendering (CCT) whereby low margin tendering resulted in a claims culture once a contract was awarded. Of course, both the client and contractor view in these scenarios go against the spirit of partnering and the long-term benefits of such arrangements. However, such culture is giving rise to potential conflict and it is here where the Partnering Adviser can help.

The Construction Industry Council (CIC) in 'A Guide to Project Team Partnering' defined one of the key roles of the Partnering Adviser as: *'to provide a first port of call in the event of misunderstandings or disagreements between project partnering team members'*.

This has been translated contractually under clause 5.6 of PPC2000 (Amended 2008) to:

'assistance in the solving of problems and the avoidance or resolution of disputes in accordance with clause 27'



Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.



Clause 27 in itself deals with 'Problem Solving and Dispute Avoidance or Resolution' and in particular, uses the 'Problem Solving Hierarchy' as the means for escalating any dispute, most usually, firstly through the Core Group and then conciliation, adjudication, arbitration or litigation. Indeed, clause 27.4 promotes the use of alternative dispute resolution as a means of resolving a dispute if attempts at core group level are not satisfactory. (TPC2005 (Amended 2008) deals with dispute avoidance or resolution in broadly the same way as PPC2000 (Amended 2008) under Clause 14).

So the role of the Partnering Adviser is to *assist* in resolving disputes. How about therefore if the Partnering Adviser could actually do more than merely assist, but act as Mediator? After all, the Partnering Adviser is *jointly appointed* by the partnering team members, is *independent* and is there to offer *fair and constructive* advice. Having some knowledge of the contract could therefore be quite helpful, though not essential in providing a facilitative role in helping partnering team members resolve their differences. Most importantly, mediation is a sustainable approach, most likely resulting in continuation of the contract and a genuine 'win-win' scenario for the parties.

The problem is, that many Partnering Advisers tend to come from either a Construction Consultant background or as a Solicitor. Historically, Partnering Advisers may well have been involved in conflict resolution adopting traditionally methods including arbitration and litigation, appointed by one party to protect their interests no matter what and importantly, resulting in a 'win-lose' situation. Mediation, on the other hand offers an alternative means of dispute resolution by getting the parties to focus on 'interests', or in other words, 'the bigger picture'. Therefore the Partnering Adviser acting as a Mediator requires a different set of skills.

Mediation is not an easy thing to do and increasingly, mediation is being recognised as a profession and discipline in itself with formal accreditation by the likes of CEDR (Centre for Effective Dispute Resolution). Mediation is not simply 'getting the parties around the table' to talk things through. Indeed, this is probably the worst approach, since the mediator will learn very little from a joint session in this type of format. In fact, mediation is a very structured approach comprising the following key stages:

Preliminary Contact - The Mediator makes contact with the disputing parties to outline the process of mediation and to gather information to prepare the Mediation Agreement governing the terms of the process of mediation;

Written Submissions - Parties to the Mediation Process submit their written summaries of the case (without prejudice) to the mediator;

Initial private meetings - Brief meetings on the day of mediation to establish protocols for the day and address any initial concerns;

Joint meeting/Opening Statements - The Mediator outlines the process of mediation, which is followed by opening statements from the parties. Key issues for resolution may be defined;

Private and confidential meetings - Key issues are explored. The Mediator may convey feelings between parties. The mediator may act as a negotiator between the parties as settlement approaches;

Joint meeting/Conclusion - As settlement approaches it may be necessary to conduct joint meetings to focus the parties on the key issues

Settlement - When the parties have reached agreement, a Settlement Agreement and Tomlin Order is prepared which sets out the terms of the agreement and also to 'stay' further legal action.



In most cases, the mediation itself only lasts for one day (sometimes 2 days, but rarely more). Whilst some preparation is required, mediation in itself is relatively quick. Therefore, this also means that mediation is also relatively cheap. Typically, the parties will share the cost of mediation on the basis that both parties have willingly entered into mediation. All in all, mediation is quick, cheap and most importantly, effective at resolving disputes.

As a means of resolving disputes, the Civil Procedure Rules 1998 promote the use of ADR (Alternative Dispute Resolution) and views litigation as a 'last resort'. In some countries, conflicting parties must attempt ADR before a case is brought to trial. Increasingly, mediation is being used in resolving construction disputes. PPC2000 and TPC2005 should be commended for making mediation (or conciliation) an explicit term under the Agreement, something not prevalent under other contract forms. However, the partnering team members have a lifetime of traditional attitudes to disputes and despite the fact that the contract may promote the use of mediation, it is unlikely many of them properly understand the process and in particular, appreciate the benefits of mediation.

Therefore, the Partnering Adviser has a very important role to play in helping to promote an approach to dispute resolution. For those Partnering Advisers who are not trained mediators, they can recommend mediation, but for those that are, there are opportunities to support partnering team members who may be in dispute to resolve their differences and focus on the real benefits of being in a partnering agreement.

Cameron Solve is a new division of Cameron Consulting offering mediation services. Neil Thody is an accredited mediator through CEDR, specialising in the resolution of construction disputes as well as being a qualified Partnering Adviser. For further information, please contact neil.thody@cameron-consulting.co.uk.



The great thing in this world is not so much where we stand, as in what direction we are moving.