

“Set in Stone” Dispute Resolution

Just because your building is set in stone doesn't mean your conflict resolution system should be set in stone. Most construction contracts and subcontracts contain some mechanism for “Claims” or “Dispute Resolution”. Of course, these provisions were written by attorneys, so the conflict resolution system typically involves using attorneys: theirs and yours, pitted against each other. Guess who wins...the attorneys.

Let's face it: people disagree and construction people seem to disagree more frequently than most. That is because there is so much risk – known and unknown – in every construction project. Our contracts and subcontracts are instruments for assigning risk between the parties. The risks become a “hot potato” which no one wants, so we keep tossing it to someone else. When we disagree on who owns the risk, we invoke the contract's conflict resolution system, which usually means that even if mediation is one of the steps, the end of the road is a lawsuit decided by a judge, jury or arbitrator who knows little about construction. By the time you reach the end of this road, you have also reached the end of your rope, and the cost of the process – attorneys fees, your time wasted on negative energy, delayed payment – makes losers of everyone.

Don't be bound by these “set in stone” systems. Keep your disagreements in the Change Order section of the contract. The change order spec is usually very robust, allowing for both direct and indirect costs to be included. Use it.

In construction, when two parties disagree about additional costs or delays, it is usually because we don't trust the other guy's “interpretations” or “data”. We disagree about interpretations of events and interpretations of the contract. Or we don't trust the other person's data – facts, numbers, calculations. The solution? BUY WHAT YOU NEED. Work with an independent third party – hired and paid for by both of you – to review the facts of the issue, the contract and the circumstances and make an independent, non-binding recommendation on entitlement (the “what”) and quantum (“how much”).

When negotiation fails, before you both hire attorneys, suggest that both sides work together to find out the truth by hiring one independent attorney and/or forensic consultant to advise the project participants on that specific issue. Give them only a few weeks to do their analysis. Split the cost. Once both sides see the unbiased facts of the dispute – and your chances of prevailing if it did go to court or arbitration – you have a factual, unemotional basis for reaching an informed decision WITHIN THE CHANGE ORDER SYSTEM. This can be done in almost any contract.

It's a little like going to marriage counseling instead of divorce court. And it works.

Learn more about the methods described above at projectrealign.com.