

Mediation – bringing the issues into view

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Quantum Forensic Planning Director Lucia Vernon, discusses the issues currently affecting construction projects in the Middle East and how mediation can help reach a negotiated settlement for both parties in a timely and cost effective way.

The FIFA World Cup is coming to Qatar in 2022 and so there is not much time left to complete the huge amount of work that goes with this. The stadiums, roads, railway and metro, and the hotels for all the supporters coming to watch their country's team need to be completed before that time.

Many contracts are running late but the employers still want the project to be completed on time and in the original budget or even cheaper. Because of this, nearly every contractor has to make claims for extension of time with the delay analysis to avoid having to pay delay damages or penalties for late completion.

"The Middle East is full of exciting and unique construction projects, no wonder so many companies want to play a part

There are two very well-known industry guidelines that help delay experts in producing their analyses to quantify extension of time entitlement in construction contracts. One is the American Association for the Advancement of Cost Engineering (AACE) International's Recommended Practice No. 29R-03. The second is

the British Society of Construction Law (SCL) Protocol. Both of these guidelines are very useful in terms of selecting the correct delay analysis methodology for analysing the project, such as Impacted As-Planned, Time Impact Analysis, As-Planned versus As-built analysis, observational Windows analysis or Summary As-planned vs As-built "In the current climate nearly every contractor makes claims for extension of time

All of these methodologies are used by different experts each with their own opinion as to how the delay analysis should be applied or prepared using the supporting planning software or simply by drawing an overview of the analysis in Excel.

Contractors usually submit their claims supported by a delay analysis to the employer asking for an extension of time, usually with prolongation costs. The employer's delay experts very often respond to the contractor's claim using a different delay analysis methodology and evaluation of the entitlement due to the contractor. The contractor's delay expert may have prepared a Time Impact Analysis, the employer's expert may have used Windows analysis. Which of these analyses is better? We should remember that the story of the project will stay the same as we cannot change the past. This situation will very often happen and as a delay expert it is part of my everyday life.

Claim preparation with the delay



analyses can be a very long process. Bear in mind that the quality of the documentation which the contractor has and the time for the analysis dictate directly the quality of the delay analysis. For example, you can spend around one month on an average project such as tower building to prepare the analysis and submit it to the employer. When you think your job has finished and you move on to the next job, somebody will just call you to come and attend a meeting to present your analysis. In my experience these types of the meeting can repeat every month and you are explaining the same things and you still do not have any results during the year.

"Claim preparation with the delay analyses can be a very long process The contractor is getting frustrated and not sure about the outcome of the claim. He is very often scared of being charged with liquidated damages, not being able to pay his staff and at the end he would like to still work for the employer.

On the other hand the employer would like to get the job ready, is not completely sure how much his project will cost and if he can trust the contractor to finish it.

In the Middle East resources are limited and the employer needs to

make sure he has somebody to carry out jobs for him. He does not want to be embarrassed by not finishing the project and not having a contractor to build his next project.

As a result of two different opinions the contractor and employer have two delay analysis which are analysing the same project but showing a different entitlement and suggestion. Two different delay analyses can very often create a dispute between the two parties which could be solved much quicker than it looks at first. The situation is very sensitive for both sides and they would like to solve it as soon as possible without anybody knowing they have problems and are very close to dispute because of the delay analysis.

The concurrency issue is directly connected with the prolongation cost entitlement and very often this is the main point where the two experts have a different opinion. Are there any options how these two parties can reach agreement without going to arbitration or to court? Arbitration or any court process will be very time consuming and expensive, at the end the money could be better spent on something that is visible.

Nobody wants to feel embarrassed, especially in the Arabic culture so most disputes are settled between two company representatives during a nice cup of tea or coffee.

But what if there is a cultural difference and the contractor is European for example. This could possibly become a problem in understanding how disputes are dealt with in the different countries with their own specific rules, regulations and cultural norms. This is where I can see a big potential for using the mediation process.

"Mediation is a voluntary process which both parties enter into freely. Mediation is a voluntary process which means that both the parties will voluntarily come and try to solve their dispute using an independent, unbiased mediator who can help them to reach a negotiated settlement. Mediation is not possible without the willing participation of

all parties, and will cease if one party walks out, which they are free to do at any time. It is non-binding up until the point of agreement and is also 'without prejudice', which means that any admission, concession or offer made during the negotiations cannot be used in any subsequent arbitration or litigation process up until the point of the signed settlement agreement. It is a private dispute resolution process where both parties will discuss their problems separately in private rooms with the mediator and at the end they will meet and sign the settlement agreement. The mediator is not negotiating between the parties, their goal is to bring the parties together to understand their differences and objectives, and more so their common goals, and to give them the opportunity to reach a solution.

The mediation process usefully has five stages which are: preparation, opening, exploration, negotiation and closing. Personally, I think the preparation stage is the most important for the mediator to understand the project, in my case, both delay analysis methodologies as well. During the opening statement the mediator presents the mediation process and both parties present their opening statements, in this case their chosen delay analysis.

The exploration stage is confidential between the mediator and the parties and is without prejudice. Active listening is very important for the mediator for them to start building a rapport with both of the parties. The next stage is negotiation when the mediator can help to frame and prioritise the options for the parties. Once the parties have reached an agreement, the mediator will need to check the reality of this and the closing stage can begin.

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How does this tie-in with being a delay expert and a mediator at the same time?

During my professional career as a delay expert I was asked to present my opinion as to whose fault it was that a project was late. As a mediator, my role is not to give such an opinion but to encourage both parties to solve their dispute regarding the extension of time entitlement and concurrency. Many delay experts describe delay analysis as being like an enigma, so no wonder it can be difficult for a lot of people to understand the differences between the methodologies applied and how the results should be read and can possibly be manipulated.

At this time mediation would be a very good solution to discover the differences between the two delay experts and try to help them to see the other's observations. Being a delay expert and mediator at the same time I can see a great advantage to being able to ask questions regarding the analyses to both parties.

The Middle East is full of exciting and unique construction projects, no wonder so many companies and people want to be a part of this. So remember, if you are on the Contractor or Employer side there is something that both parties have in common and that is the project which they are building together. Both of them have the same goal, if you do not like the other party it does not matter! Try to resolve your dispute for the sake of the successful opening of the building, road or project, you are working on which will give glory to both the builder and the Owner.

Remember, mediation is suitable for everyone who is: committed to their projects; would like to keep their relationships, and the parties are willing to negotiate for themselves to clear up multiply issues. Mediation is also for everyone who requires privacy and confidentiality and is under external or time pressure to settle.

At the end mediation is for the right people at the table to finalise their project and in good faith!

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