

NARRATIVE OF RESOLEX MOCK MEDIATION HELD AT THE IDRC ON TUESDAY 30 JANUARY 2007

Introduction

Chris Ryan welcomed everyone to the evening where KCCLA and ResoLex were going to act out the resolution of a dispute by means of a technique known as contracted mediation. It was explained that project or contracted mediation has been around for a number of years and has been used successfully on a number of projects.

The purpose of the evening was to:

- 1 Illustrate how mediation works in practice, for the benefit of those unfamiliar with the process;
- 2 Highlight the flexibility of the mediation process in resolving disputes;
- 3 Demonstrate how innovative solutions can be found to resolve disputes, as well as providing a framework for anticipated problems;
- 4 Show how relationships can be maintained on site by providing a contractual mechanism for resolution before positions, both commercial and legal, become entrenched.

The Problem

As the position statements of the two sides had been previously distributed, The problem was briefly outlined:

The year is 2008 and there is great excitement about the forthcoming London Olympics in 2012. However, difficulties are occurring on the construction of the new velodrome at Stratford, due to be completed by December 2009.

- The Employer is the Olympics Delivery Authority (ODA);
- The main contractor, Stadium Construction Limited, is in dispute with its steel subcontractor, Associated Steel Structures Limited.
- The principal areas of concern are as follows:
 - The late release of design information by the ODA's architect, Cycle Design;
 - Elements of the outline design were incomplete, which has led to problems in designing and fabricating the various steel columns and a delay in commencing on site;
 - Having started the erection process, it has been discovered that a number of crucial connections fabricated by Associated are not within tolerance leading to buckling;

- Further design changes in the steel work ordered by Cycle Design;
- The slow rate of fabrication by Associated off-site.

The Contract

- The parties entered into an NEC Version 3 Form of Contract. The Contract was amended to provide a stepped resolution procedure commencing with a contracted mediation. At the start of the Contract ResoLex set up a panel of mediators, independent of the parties to the contract, who were required to act as a neutral third party to facilitate the settling of disputes as they arose.
- At the beginning of the Contract, the panel met with the parties to get an understanding of the works to be undertaken, as well as agreeing the procedures in the event that one or both parties requested that the panel resolve any difference or dispute.
- As the problems began to unfold, ResoLex held various meetings with the parties to address head-on the problems that were beginning to arise.
- Associated suggest to Stadium that all the current problems be placed before the Panel with a view to resolving all outstanding matters. They agree:
 - Settlement of Associated's claim for delay and loss and expense;
 - Increasing the rate of Associated's progress on the site;
 - Valuing changes in the design ordered by Cycle Design;
 - Resolving applications for payment;
 - Improving cash flow;
 - Ensuring Associated can complete on time.
- ResoLex appoint Phillip Howell-Richardson from the Panel to act as Mediator.

Chris explained that the scene was set for the opening session of the Mediation, at which the Mediator explains how he proposes to conduct the Mediation. After which, Stadium and Associated would set out their views orally about the problems that have been encountered to complement the written submissions contained in their Position Papers. Counsel for Stadium is Geraint Webb of Henderson Chambers, with Stephen Woodward of Trett Consulting acting as the client representative. Counsel for Associated is Andrew Burr of Atkin Chambers, with Shy Jackson of MacFarlane's acting as the client representative.

Opening Session of the Mediation

The Mediator welcomed both parties and encouraged them to approach the meeting with decision making in mind. The Mediator suggested the parties confronted their issues with the objective of getting a signed settlement agreement by 7.30pm. He reminded the parties that the Mediation was without prejudice to the parties' positions and as such, a safe place to get

the matter sorted. He emphasised that this was a very high profile project, which had already attracted adverse press comment, and reminded the parties that what was said and done today would be in absolute confidence.

The Mediator explained that the process would commence with each side being given six or seven minutes to explain what each saw the dispute being about. He encouraged the parties to really listen to what the other was saying and he confirmed that the process was down to the parties; he was just there to provide guidance. The Mediator asked both representatives to confirm they were attending with authority, in good faith, to settle. Both representatives confirmed they had the necessary authority.

Stadium's Opening Submissions

Stadium confirmed they had seen Associated's position statement and were thankful to note their desire to reach a sensible solution. However, Stadium asserted that Associated's position was built entirely on a false premise. Further, they appeared to be blaming everyone else, without accepting any responsibility for the problems that had occurred.

Stadium explained how, when Associated finally fabricated and installed the steel columns, they buckled. These defects resulted from the columns not being in accordance with the specification or otherwise being out of tolerance. Stadium asserted that Associated were not able to avoid accepting this in the mediation and the defects were not only a breach of contract, but a very significant cause of the delay.

Turning to Associated's extension of time claim, Stadium asserted it would fail as a matter of causation. Stadium wanted Associated to demonstrate that they could get the project back on track.

- Design Changes

Stadium accepted there had been design changes which they had had valued by an independent expert as £1m. Whilst Associated were claiming £2m Stadium believed this was their attempt to dress up their own losses because of the design changes.

- Time at Large

Stadium rejected this claim in its entirety; it being bad in fact and in law.

- Extension of Time

Stadium asserted this was not a contract where time was at large or could ever be at large. If Associated continues to maintain time is at large, Stadium would litigate the matter later, and in the meantime instruct a new contractor.

- Financial

Stadium confirmed they rejected Associated's £2m extension of time claim, but said they were there attending in good faith and wanted to understand how Associated could get the project back on track.

To conclude, Stadium asserted there were quality problems. The velodrome must be completed by December 2009 and the critical path for completion was at risk, with the result that it would affect other trades.

Associated's Opening Submissions

Associated took a much more robust view of the dispute. They complained that whilst they were the Claimant they had had to take the Respondent's position and present their submissions after Stadium.

Associated produced a large file of legal authorities and an Industry Practice text book which they asserted would confirm Associated's entitlement to damages. Associated submitted that Stadium were wrong as to both the facts and the law where there were concurrent events these were irrelevant to a sub-contractor's entitlement to an extension of time.

Associated explained there were serious problems with the design information provided by Cycle Design. Associated explained that when the contract was signed in March 2007 they were due to receive all design information 20 weeks before the project commenced, which was crucial in finalising the fabrication design. Due to it being provided late, Associated had tried to catch up but this was impossible because the design was constantly being changed. Associated claimed the real problem was that the final, settled design was never given to them. They concluded their submissions by stating that the last thing they wanted to do was adjudicate or litigate this matter, however, they felt Stadium had to accept some responsibility.

The Mediator then explained that the parties had the option of staying together and continuing to discuss the issues, or each party could have a private session with the Mediator. Both parties agreed the latter.

Narrative

It was explained that from the position statements it was evident the parties were some £3m apart, this being £2m for the loss and expense as a result of the extension of time claim and £1m being the value of the instructed variations to the design. Chris highlighted that having set out their positions the Mediator had suggested he discuss the issues in private with each of the parties. Firstly he met with Stadium.

Stadium's Second Session in Private with the Mediator

Stadium told the Mediator there was nothing new in Associated's claims and they felt robust on their valuation of the claim. The Mediator asked them to turn the issues over and decide which legal arguments they were confident about and those which they were prepared to concede.

Stadium responded by confirming their confidence in defeating the repudiatory breach issue. They felt it was a strong area of their case and they suspected Associated were trying to take a strategic stance on it. The Mediator suggested Stadium return to issues where there may be common ground.

Stadium said their main priority was to indemnify the work that needed to be done. Settling Associated's extension of time claim was not going to get the velodrome finished. Stadium admitted that whilst the extension of time claim was not justified in being 20 weeks, they accepted an extension of time was appropriate.

The Mediator asked Stadium privately what they would be prepared to concede. He said the starting point should be the £1m valuation of the variations. Stadium replied that this was a robust figure, however, the variations did not have a time impact whereas an extension of time claim would. Stadium accepted that if an extension of time were to be granted, they would be in a worse mess than they were now. Stadium confirmed that time and delivery of the project was of utmost importance.

The Mediator summarised Stadium's position and suggested he raise the following two issues with Associated:

- 1 Associated needed to give some indication they had analysed the legal merits of their case, in particular their repudiatory breach claim. They also need to confirm that time was not at large, and could not be.
- 2 Associated needed to address the seriousness of the present situation and appreciate that things had got so desperate that Stadium were looking at alternative suppliers.

Stadium hoped this would encourage a positive reaction whereby a structured deal could be concluded.

Narrative

Chris explained that having discussed matters with Stadium the Mediator left and joined Associated in their room to discuss their legal position.

Associated's Second Session in Private with the Mediator

Associated began by explaining to the Mediator that they were unlikely to pursue their repudiatory breach point. Associated wanted to focus on the extension of time claim and the fact that time was at large. Associated felt so strongly about this that they referred to the ResoLex Guidance Notes which make provision for expert determination. This, they felt was something which could be proposed in order to assess the extension of time claim.

Associated confirmed they did still feel strongly about their repudiatory breach claim, and it was annoying to be told by Stadium their claim was inadequate. Associated confirmed they were willing to take their claim forward, and to demonstrate this they produced numerous schedules documenting that the reasons for delay were due to the failure to provide design information.

The Mediator confirmed the message from Stadium was:

- 1 Stadium did not accept Associated had a repudiatory breach claim and requested some indication that Associated would take responsibility for the problems that were occurring.

- 2 Associated needed to address the seriousness of the velodrome of being completed on time. Stadium warned them they would go to another supplier if necessary. However, Stadium would listen to the steps Associated suggested could be taken to complete the velodrome by December 2009.

Associated confirmed they would not be there if they did not realise there were problems with their repudiatory breach claim. If they were willing to drop that claim, however, it was unrealistic for Stadium to assume they could employ someone else who could complete the velodrome on time. Associated confirmed they could complete the job. However, they needed an injection of cash in advance and an acknowledgement by Stadium that matters were serious.

The Mediator surmised by stating he would take to Stadium the following two points:

- 1 Associated accepted there were difficulties with their repudiatory breach argument and they were willing, for the purposes of the Mediation, to put that to one side if other issues could be resolved.
- 2 The reality was that it would be impossible for Stadium to employ another subcontractor at this point. It followed that any agreement for an extension of time must include some money up front. Associated had their backup documents ready to prove their claim. They were willing to complete the job, however, they could not do it for free.

Narrative

It was explained that matters had fast forwarded and, having had a number of sessions with the parties, the Mediator understood the real concerns behind their formal positions. The Mediator decided to discuss the commercial position with Stadium.

Stadium's Commercial Session – in Private with the Mediator

Stadium required a change of attitude from Associated. Firstly it had been noticed on site that there were few days when full production had been evident. Therefore Stadium wanted a definite plan as to how Associated intended to complete the works.

Secondly, if Stadium paid out, they wanted to see a way of recovering the money further up the line. This was a major issue for Stadium and if Associated could satisfy them that there had been a real error on behalf of Cycle Design, then they would be able to support Stadium in a claim against the ODA. However, Stadium needed to be satisfied that any claim against the designer was good.

Thirdly, Stadium were serious about exploring the option of using another supplier. The velodrome must be completed by December 2009; it was already 20 weeks late.

The Mediator told Stadium that Associated believed they would actually be placing the whole project at risk in getting a new supplier. Stadium disagreed with this; they just wanted assurance from Associated that the deadline could be met. Linked to this was their fourth point; that it might be possible to include a bonus scheme or provide acceleration costs within a settlement. Stadium stated that Associated had accepted the repudiatory breach claim

would not be pursued at that stage. Stadium believed Associated needed to hit the ground running, ensuring there was no further loss of production while a plan was put into effect.

Stadium confirmed that the four issues were related and this was how they proposed to take matters forward. The Mediator asked Stadium to visualise what they really needed for the future. Stadium responded by stating that they wanted the velodrome completed on time. They could envisage this by means of bonus payments measured against Associated's performance. A bonus scheme would be preferred over agreeing to acceleration costs, however, Stadium were happy for the lawyers to sort out the finer detail.

Associated's Commercial Session in Private with the Mediator

Associated claimed that time was running on and it was now time for Stadium to put some money on the table. The Mediator confirmed that in principle Stadium were prepared to make a payment but no amount had been disclosed. The Mediator explained the four important issues for Stadium.

The Mediator stated that these four issues could form the basis of a settlement if acceptable, in principle, to Associated. The Mediator felt the parties were positive in going forward and suggested that now was the time for everyone to re-join.

Narrative

It was explained the Mediator had decided that the parties were getting close to concluding a settlement in principle and therefore it was time to try and facilitate a negotiation with the parties face to face.

Second Joint Session with the Mediator

The Mediator confirmed there was an agreement that a sum of money should pass from Stadium to Associated, there should be some way of measuring progress towards completion and that Associated would work with the current Cycle design. The Mediator suggested it was now time to start talking figures as both parties were £3m apart.

Stadium claimed they would like the money to be linked to performance and they required guarantees that the work would be finished by December 2009. Stadium claimed they were willing to offer £0.5m. Associated stated they wanted someone independent to value the works to which Stadium responded they could see the advantage of this in principle and therefore they were willing to agree the appointment of an appropriate valuer.

Associated explained how cash flow was crucial and they required a substantial percentage of their applications for payment once submitted. The guarantee of a bonus at the end of a job was not going to help them. Stadium claimed they wanted a full and final settlement of this matter as they felt the need to draw a line under all the issues. Associated replied by stating they knew Stadium were looking at Cycle Design and to that regard they were prepared to provide reasonable assistance in any claim Stadium brought against them.

Stadium stated they wanted an independent expert to look at the quality of the works because that was an area of concern. Associated stated this was acceptable in principle, however, they needed to move quickly without another level of interference being involved in the process of

completing on time. Associated claimed they were willing to give Stadium full access and Stadium agreed to undertake regular inspections.

The Mediator asked both parties if there were any other areas of principle which needed to be concluded. Associated claimed the whole way the design process had been managed had caused delay to the project and therefore there needed to be a design freeze to prevent further changes. Stadium's response to this was that they were prepared to look at it, and offered a design freeze of six weeks. Associated concurred and stated that both parties' programmers could speak and finalise this.

The Mediator commented there was a lot to do in terms of finalising the settlement. Stadium agreed there was a lot of drafting to be done by the lawyers.

Stadium also claimed they were putting together a tender for a new project and suggested Associated could be involved in that project. Associated replied by stating the matter of money still needed to be concluded and they needed to know how much Stadium were prepared to pay up front. Associated suggested there should be an immediate on-account payment of £1m with the balance to be agreed by an independent expert. Stadium agreed to this and confirmed the payment could be made within 14 days. The Mediator congratulated both parties on agreeing the main issues in principle.

Narrative

It was stated that the mediation had come to an end, with the broad heads agreed. The devil was in the detail but hopefully the matter would be resolved following which the detailed agreement would be signed by both parties.

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