

## PROJECT MEDIATION

By Nicholas Gould

The construction industry benefits from a wide range of dispute resolution techniques. The traditional processes of arbitration and litigation have in part made way for mediation and more recently adjudication under the Housing Grants, Construction and Regeneration Act 1996. Mediation has developed slowly since around the start of the 90's. Hybrid and multi-stage processes such as dispute review boards or dispute escalation clauses have become more widely used on some projects. At the other end of the scale management techniques such as partnering are attempts to avoid disputes arising.

'Contracted Mediation' or 'Project Mediation' attempts to fuse team building, dispute avoidance and dispute resolution in one procedure. A contracted mediation or project mediation panel is appointed at the outset of the project. The impartial contracted mediation panel consists of one lawyer and one commercial expert who are both trained mediators. The panel assists in organising and attends an initial meeting at the start of the project and may conduct one or more workshops at the outset of the project or during the course of the project as necessary.

The panel may also visit the project periodically during the life of the project. In this respect the panel therefore has a working knowledge of the project and more importantly the individuals working on that project. That knowledge allows the panel to resolve contractual differences before they escalate, because the panel provides an immediate forum for the confidential discussion and potential mediation of differences or disputes. Experiences with contracted mediation in practice are limited. However, contracted mediation was used on Jersey Airport.

The only publicly reported project where contracted mediation has been used was Jersey Airport taxiway. The contract sum was approximately £15M, and the contracted mediation panel cost approximately £15,000. According to the article in Construction Manager a variety of disputes were resolved and the project finished one day ahead of schedule and approximately £800,000 below budget. Much of the project's success has been attributed to the use of the contracted mediation process.

The parties to the construction contract have recognised that there is a risk that they might have disputes during the course of the building work but they have also recognised that a standing mediation panel can help to avoid those disputes during the course of the work. This is because the parties to the construction contract will get to know the individual mediators, and those mediators will not only have an understanding of the project, but will get to know the individuals working on the project. There is therefore the potential for the contracted mediation panel to become involved not just in disputes, but also in the avoidance of disputes before the parties become entrenched and turn to adjudication, arbitration or litigation.

The experience at Jersey raises an important observation and that is the amount of the contract sum by comparison to the cost of the contracted mediation process. Most of the structured ADR procedures such as dispute review boards are only economically viable because they are used on substantial projects. This is because of the costs associated with establishing and running a 3 man dispute review board. A dispute review board is established at the start of the project, and then follows the project by making site visits. Disputes are then referred to that board, which will make recommendations only or binding decisions depending upon the drafting of the contract between the contractor and the employer.

However a contracted mediation panel is viable for projects with a much lower contract sum. Statistics indicate that around 80% of construction work carried out in this country has a contract sum in £10's of millions rather than £100's of millions. Therefore, the contracted mediation has the potential for use on around 80% of the construction projects carried out in this country.

The author is currently on a contract mediation panel of two members. The project concerns a large hospital development in the South East of the UK. Work commenced in the Summer of 2002, and will be on-going for at least another year. It is of course too early to say whether the process has been a complete success in respect of this project. However, the feedback has been positive and a variety of issues have been explored and resolved through the panel.