

**Case Studies on Dispute Prevention**

(Cement Case Study)

(prepared 2022)

<b>Description of parties:</b>	<p>A cement manufacturer (“Owner”) that wanted to double its production capacity of one of its cement plants without interrupting the operations of the existing plant.</p> <p>The Owner hired a cement manufacturing engineering firm from the Netherlands (“Engineer”). This firm was commissioned to design the new manufacturing facility, to be located on the premises of the existing plant and have its production facilities integrated with existing plant operations.</p> <p>The Owner also hired a cement plant general contractor firm from the United States (“General Contractor”). This firm was asked to develop a construction strategy for construction of the new production facilities designed by the Engineer, to identify the subcontractors needed to help the General Contractor accomplish construction and to quote a lump sum price for construction.</p>
<b>Brief history of relationship and arrangement:</b>	<p>The roles of the Owner, the Engineer, and the General Contractor (including the Subcontractors working for the General Contractor) had to be memorialized in the form of legally binding contracts.</p> <p>Since the first function to be performed was the engineering design, the Owner-Engineer contract was the first to be signed.</p> <p>The next contract, the Owner-General Contractor contract, had to be negotiated and signed, along with the subcontracts between the General Contractor and its various subcontractors.</p>
<b>Nature of issue, conflict, or dispute:</b>	<p>A law firm was engaged to develop a practical and legal strategy for facilitating the smooth functioning amongst all of the parties and to help the parties enter into a coordinated set of arrangements.</p>
<b>Nature of dispute prevention mechanism deployed:</b>	<p><b>Contractual provisions:</b> Each of the contracts negotiated contained provisions encouraging open communications, provisions for notice and opportunity to cure any perceived failure to perform as well as covenants of good faith and fair dealing.</p> <p><b>Realistic Risk Allocation:</b> All predictable risks were to be identified by the applicable parties before entering into a contract, and allocated realistically so that each risk would be assigned to the party most capable of managing, controlling or, if necessary, insuring against the risk.</p>

**Partnering:** Each contract contained a commitment on the part of each party and any of its Subcontractors to engage in periodic “Partnering” exercises to establish cooperative relationships among all project participants. Before actual construction commenced, there was a Partnering retreat, held at a conference center over a long weekend, attended by every employee of a project participant who had significant responsibilities on the project. The retreat was presided over by an expert facilitator, who encouraged all parties to “walk through” all operations of the project in advance, get to know each other, and establish an atmosphere of cooperation. Special attention was given to the importance of not allowing construction activities to interfere with or disrupt the existing manufacturing operations. (During these exercises certain individuals were identified as being not well suited for the cooperative approach, and their employers promptly replaced them with more cooperative individuals.)

**Incentives:** In the Owner-General Contractor contract, a Subcontractor Bonus Pool was created to be funded by the Owner. The bonus was to be paid at the conclusion of the project to all of the subcontractors on the project in proportion to their subcontract prices, if the subcontractors cooperated with each other. However, there was a stipulation that the bonuses could be paid either to every subcontractor or to none. The point of this stipulation was that, if any subcontractor failed to cooperate with the other subcontractors, no one would be paid a bonus, thus encouraging every subcontractor to consider the interests of the project and the subcontractors as a group rather than just its own parochial interest.

**Dispute Review Board:** In the Owner-General Contract, the parties agreed to the appointment of a neutral Dispute Review Board, selected jointly by the parties, to be readily available to provide objective, impartial advice to the parties in any case where there might be a problem or difference of opinion; and if necessary to render a non-binding opinion on any contested issue between the parties.

**How was the actual or potential conflict or dispute prevented or resolved?**

The Project proceeded smoothly, under the management of the General Contractor’s very experienced Project Manager. Bottlenecks, conflicts, and problems that arose were quickly solved, and the original schedule was closely adhered to. Ongoing manufacturing operations were not disrupted. Managers on the project met periodically with the members of the Dispute Board, without any need for input or advice from the DRB.

“Refresher” Partnering exercises were repeated periodically with the same facilitator, reinforcing the spirit of cooperation.

Just as the project was being completed, the General Contractor’s corporate management revealed to the Owner that a project-end audit of the General Contractor’s total costs on the Project had shown that the General Contractor had suffered a loss on the project of over \$10 million dollars, and initially asked the Owner to pay that amount on the theory that the project had received a benefit in

that amount. However, the General Contractor could point to no change in the scope of the project or action by the Owner that explained this cost overage. The Owner's best guess was that the bulk of the unexpected costs occurred from Contractor inefficiencies that had occurred after the original General Manager had been transferred to another project.

The General Contractor's corporate management and Owner had many discussions about this loss, and the General Contractor at one point took preliminary steps toward asking for a ruling from the DRB. Ultimately, the General Contractor forthrightly acknowledged that the loss was its own fault. This admission was consistent with the candid and open relationship which had been established between these parties and had continued throughout the course of the project.

**If none deployed,  
nature of dispute  
prevention mechanism  
that might have been  
deployed:**

**Lessons from the case  
study:**

**Motivation:** the variety of dispute prevention mechanisms deployed worked to motivate the parties to work cooperatively and minimize the need for intervention from third party mechanisms.

**Trust:** the partnering exercises, in particular, created a trusting environment that helped resolve the conflict over final payment without further disruption.