

Facilitated Claims/Dispute Resolution

A Process for Closing Out Projects Effectively

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Concept Paper
May 1999

WHY FACILITATED CLAIMS RESOLUTION?

It takes too long to close out claims the way we do it now

On Caltrans projects it currently takes four hundred plus days to get from contract acceptance to final determination. The process of closing out projects has become time consuming and inefficient. It often takes weeks, or even months, to gain a clear understanding of the issues, then more time to identify where the true disagreements lie, and still more time to effect resolution. It is next to impossible for the project teams to remember the true essence of any project issue two, three, four (or more) years after completion. In order to shorten the time it takes to resolve claims and to improve the quality of our decisions, the authors have developed a facilitated claims resolution process.

Control and decision making stays with the involved parties

Unlike the dispute review board (DRB) process, facilitated claims resolution allows the disputing parties to resolve issues themselves. The locus of control remains with the involved parties; control is not given to a third party (the DRB board) which decides who's right and who's wrong. It should also be noted that a DRB is not possible after a job is finalized. Generally, the issues discussed at and resolved by a facilitated claims resolution process are not the type of issues well suited for a DRB.

Educates less experienced field personnel

Today's field personnel (both Caltrans' and contractor's) are not as experienced and field savvy as in the past, and therefore less able to resolve project issues. Another factor increasing the number of unresolved claims is a lack of documentation. While we don't want to write positioning letters, good project management does call for good documentation. We need to do a better job of training our field personnel on how to document their jobs, and how to organize that documentation. Facilitated Claims Resolution gives field personnel a forum for presenting their documentation and views, as well as an opportunity to learn what is required to resolve project issues.

WHAT IS FACILITATED CLAIMS RESOLUTION?

Facilitated claims resolution is an extension of the partnering process, bringing all stakeholders together with a trained, neutral facilitator. The session is held in an informal setting, with each side presenting their "story", facts, and supporting information. With the help of the facilitator, issues are broken down into parts (sub issues), and each part is resolved based on its merits. The process itself creates a deadline for resolution of project issues.

Facilitated claims resolution is a continuation of the issue resolution ladder developed at the partnering session. Generally the final level in the ladder for Caltrans is the District Chief, and for the contractor the owner or principal. The facilitated claims resolution session provides this final level a neutral process for resolving difficult issues (difficult by definition since they have been elevated to the final level, otherwise they would have already been resolved).

The authors recommend that:

- facilitated claims resolution be substituted for the District Claims Meeting (which occurs prior to the Caltrans Claims Board of Review);
- facilitated claims resolution be called for thirty days after return of the PFE (contractor's response);
- this process should be utilized whether or not a project is fraught with problems – facilitated claims resolution will allow for a smooth close out of any project.

Further, we feel that projects need not, and indeed should not, wait until close out to initiate a facilitated claims resolution process. At major milestones, or specific percentages of completion, each project should determine if there are unresolved issues (potential claims) for which this process could be utilized. Such a periodic review would compel the project team to take the time to resolve any outstanding issues. It is important not to let issues drag out, bogging down the remainder of the project. Resolving issues as they arise will also permit faster project close out (since there will be fewer issues to address at the end of the project).

WHAT IS THE PROCESS?

Deciding to call for a facilitated claims resolution session

A facilitated claims resolution session is usually requested by either the District Construction Chief (Caltrans) or by the owner/principal (contractor). The next step is to agree upon a neutral facilitator. It is important that the facilitator be a trained neutral, experienced in dispute resolution and negotiation – this is not a partnering session.

After the facilitator is selected, and a date for the session agreed to, a list of outstanding issues is sent to all parties. The facilitator determines the order in which the issues will be addressed (with the concurrence of the parties). Once the order is identified, the parties complete their preparation.

Preparation is critical

Good preparation is key to the success of the session. Preparation for the session should include the following for each issue:

- Identification of the problem (read the claim; state where the disagreement lies)
- Chronology of events (contractor's and Caltrans's versions)
- Relevant specifications, plans, and documentation (letters, journal entries)
- Discussion of the problem (Caltrans's and contractor's versions)
- Discussion of how the project was built (in regard to the issue)

Your presentation should be similar in quality, completeness, and formality to a presentation you would make to a DRB. It should present your version of the facts, each supported by

documentation and relevant exhibits. Presentation boards, pictures, highlighted copies of documents, etc. will help you make your case. Remember, each side must be able to “justify” any agreement that is reached. For example, Caltrans must agree to the reasoning behind the dollars being requested; the contractor cannot just throw out numbers, the logic behind the numbers, how they were arrived at, must be presented. This allows the decision maker for Caltrans to “lobby” the agreements reached on the project to Sacramento.

It is each presenter’s (both contractor and Caltrans) job to present the facts as they see them. It is the decision makers’ job to look at the facts and to find a fair, justifiable resolution.

Understanding the different roles

The facilitated claims resolution session is called for the benefit of the decision makers, so they can make good decisions and come to fair resolution. As part of this process, the session attendees have specific roles. These roles are defined below.

- Facilitator** The mutually agreed upon trained neutral who conducts the session. The facilitator records all agreements made, as well as all “homework” assignments. The facilitator develops the session agenda based on either the PFE items or on notice of potential claims (NOPC); these define the issues. The facilitator also assists in breaking down large, complex issues into smaller, more manageable issues that can be addressed one at a time. The facilitator determines the order in which the items will be address (with the concurrence of the parties).
- Presenters** These are members of the project field team, both from Caltrans and the contractor (and subcontractor if appropriate). The presenters are responsible for all preparation and presentation of the facts for each issue – after all, they are the ones who know the issues best. We want them to present the facts as they see them, to tell their “story”, and to be available to answer questions from the decision makers. However, presenters are not decision makers.
- Experts** These include consultants and designers who have been hired to evaluate or analyze some aspect of the issue(s). They are there to have their expertise drawn upon as needed.
- Decision Influencers** These include the Caltrans Office Chief, Caltrans Construction Engineer, contractor’s Operations/Construction Manager, contractor’s Project Estimator. Decision influencers were not involved in the day-to-day activities of the project, but were responsible for its oversight. They are a critical part to the understanding of issues, but are not a part of the decision making (unless requested by the decision makers).
- Decision Makers** These include the Caltrans Headquarters’ Representative, District Construction Chief, and Local Partner, and the contractor’s Owner/Principal/Local Area Manager. These are the people with the authority and responsibility to make a decision or to support any decisions made. It is for their benefit that the facilitated claims resolution session is held, so they can discover

the facts of the issues, identify where the disagreements lie, and then work to resolve each issue on its merits.

Facilitated claims resolution session – what to expect

For complex issues it should be expected that more than one session (more than one day) will be required in order to reach resolution. It is not unusual for the participants initially not to understand where the real problems/disagreements lie. Many times the first session ends up being devoted to discovering what the issues really are, with “homework” being assigned to prepare for a second and perhaps a third session. At the second session new/additional facts/analyses are presented, allowing the decision makers to reach a more concrete resolution. If the decision makers still require further information, subsequent sessions are scheduled and held until either resolution is reached or impasse declared. If impasse is reached the issue is elevated to the Caltrans Claims Board of Review.

The following presents a simplified description of the general flow of a typical session, which starts at 8:00am and ends at 5:00pm. A session will vary given the specific issues and circumstances. The facilitator should develop a unique outline/agenda for each claims resolution session.

- The agenda, ground rules, and expectations are set by the facilitator. Introductions of participants are made, along with identification of their role in the project. An overview of the project is presented. **Facilitator**
- Presentation of the first specific issue. Caltrans usually starts with an overview of the issue, including such things as how the contractor was paid, the relevant specifications, plans, and documentation, timelines, etc. The contractor then makes a similar presentation, explaining how they see things, including such things as how the item/project was bid, what changed, supporting documentation, timelines, etc. **Presenters/field team**
- Each side has an opportunity to respond to the other side’s supporting documentation. **Presenters/field team**
- Questions by the decision makers and influencers to the presenters and field team members. **Decision Makers**
- Individual caucuses may held (contractor decision makers and influencers meet in one room, Caltrans decision makers and influencers in another. Each may call upon their own presenters/field teams, or experts to answer questions). **Decision Makers**
- Joint caucuses may be held (Caltrans and contractor decision makers meet together; they may include decision influencers, but the decision is still theirs to make; presenters from either side may be called to answer questions). **Decision Makers**
- A resolution is proposed or the need for additional information in order to make a decision is identified (in the joint caucus). If more information is required, “homework” is assigned to the presenters. **Decision Makers**
- Individual caucus(es) to discuss the proposed resolution (may be called by either party or the facilitator). Repeated caucuses may be held before an agreement is struck. **Decision Makers**

- Final resolution is reached or next steps identified. If at impasse, it will be stated what the impasse entails. **Decision Makers**
- Identification of need for subsequent session and setting the agenda for the subsequent session. As 5:00pm approaches and there are still issues requiring resolution, the facilitator asks the decision makers if they wish to continue the process. If so, a date is set for the next session, agenda items are selected, and the first item on the agenda is assigned as “homework”. **Decision Makers, Facilitator**
- Signing of the Facilitated Claims Resolution Agreements/Commitments document – all participants sign indicating their personal commitment at the end of each session to the agreements struck and the homework assigned. **All participants**
- If at impasse, the Decision Makers meet once more to try and break the impasse. If unsuccessful, the issue is passed on to the Caltrans Claims Board of Review. **Decision Makers**

While most sessions are scheduled from 8:00am to 5:00pm, many participants fatigue after about six hours, after which there are diminishing returns. Decision Makers and the facilitator should discuss the length of the session.

CONCLUSIONS AND RECOMMENDATIONS

We conclude that the facilitated claims resolution process should be used to both shorten the time it takes to resolve claims and to arrive at better resolutions to project issues at close out. The process should definitely be used on any project with, complex issues, and is recommended for any project that has unresolved issues at close out.

We also recommend that this process be used during the project to resolve potential claims so there will be no (or far fewer) lingering issues at close out.

We feel that as Facilitated Claims Resolution is a continuation of the partnering process, it should utilize the partnering specification, Caltrans and the contractor sharing equally in the cost of the process.

If you have any questions, please contact the authors.