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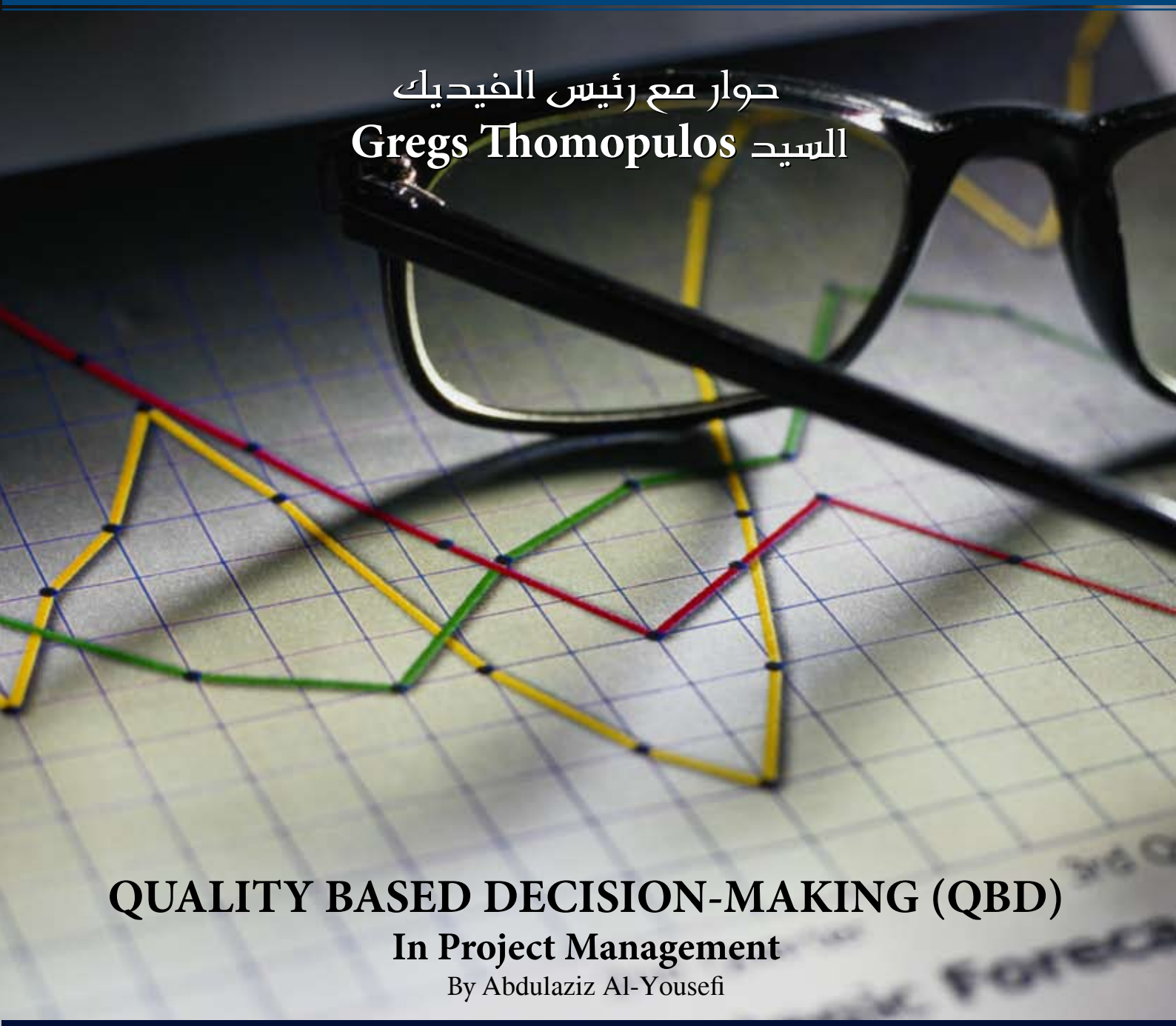

حوار مع رئيس الفيديك
السيد Gregs Thomopulos

QUALITY BASED DECISION-MAKING (QBD)
In Project Management
By Abdulaziz Al-Yousefi

Mediation: An Effective Technique
To Resolve Construction Disputes
By Issam Srour

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القانونية الإلكترونية

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الحمد لله، فإن مجلة المهندس القانونية الالكترونية لا تزال تلقى من المهندسين ترحيباً وتشجيعاً، وهذا دليل خير لأن فيه إشارة إلى وجود إدراك بقيمة العلم والمعرفة في بناء المستقبل.

من جانبنا، إذا أردنا أن نبيّن أهمية المعرفة نقول: أن المعرفة ترفع شأن صاحبها وتجعله مقصداً لأخذ المشورة، وتمنحه حكمة ودراية وعلماً بما خُفي عن غيره، وتحميه من التجارب غير الناجحة التي تصيب أقرانه. والمعرفة هي السبيل إلى التطور والقيادة، ومن خلالها تنفتح أبواب الفرص وتزداد أسباب النجاح.

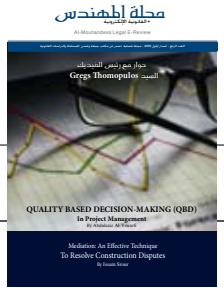
وسعياً منا إلى نشر المعرفة، يأتي هذا العدد الرابع فريداً وغنياً. فهو يحتوي على حوار أجرته المجلة مع رئيس الفيديك أجاب فيها على الأسئلة التي وَجّهَتها إليه.

كما انه يتضمن دراستين تعتبران ذات أهمية بالغة في إدارة المشاريع: الأولى تتعلق بمعايير النوعية الواجب اعتمادها عند اتخاذ القرارات في المشاريع الهندسية، والثانية تتناول الوساطة كآلية فعّالة لحل النزاعات المتعلقة بالانشاءات.

وإلى جانب الدراسات، تتضمن المجلة اجتهادات قضائية واستشارات قانونية في مسائل تهم المهندسين، بالإضافة إلى ما صدر حديثاً من قوانين ومراسيم.

بظهور العدد الرابع، تكون المجلة قد اقتربت من السنة الأولى على صدورها. وإذا كانت المسيرة قد انطلقت فإننا نأمل أن تصل إلى مبتغاها.

إدارة المجلة



الفهرس

حوار مع رئيس الفيديك
السيد Gregs Thomopulos

حاوره المحامي خليل غصن

العالم يتوجه نحو مثالية التنظيم والتكامل في كافة المجالات، و«عَقد الفيديك» يطمح للتوافق الحقيقي مع النظام القانوني لمختلف الدول في تنظيم العلاقات في قطاع الإنشاءات متطرقاً إلى أدق التفاصيل بهدف التقليل من المخاطر. وضمن هذا الإطار القى السيد Gregs Thomopulos بتاريخ ٢٠٠٩/٧/٧ محاضرة في نقابة المهندسين في بيروت حول هذا العقد وأجرينا معه الحوار التالي:

■ هل استطاع عقد الفيديك أن يخترق خصائص كل دولة ونظامها العام؟

نحن نسعى إلى إيجاد عقد يكون متوافقاً مع جميع أنظمة الدول. وإلى حين تحقيق ذلك، فإن عقد الفيديك ينقسم إلى قسمين: الشروط العامة والشروط الخاصة. والقسم الثاني أي الشروط الخاصة مخصص كي يضع فيه الفرقاء البنود التي يريدونها والتي تتلاءم مع وضعهم الخاص ومع النظام القانوني لدولتهم.

■ هل من النافع أن يكون عقد الفيديك مكوناً من صفحات عديدة نظراً أن معظم من يوقعه لا يقرأه كله؟

في الواقع، ان عقد الفيديك يهدف إلى تنظيم العلاقات في قطاع الإنشاءات ويحرص على تقليل المخاطر التي تؤدي إلى نشوء الخلافات. لذلك فهو يتطرق إلى أدق تفاصيل العلاقة التعاقدية، و هو ما أدى إلى الحجم الذي هو عليه. وجميع المتهنين في قطاع الإنشاءات على اطلاع بحرفية ما ورد فيه.

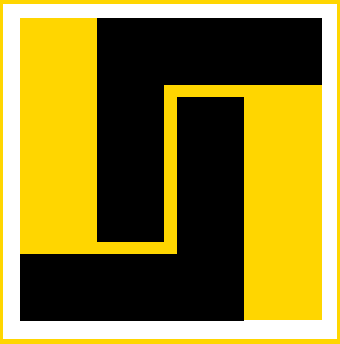
■ هل عقد الفيديك ملائم لجميع أنواع المشاريع حتى الصغيرة منها؟

بالنسبة للمشاريع الصغيرة فلقد وضعنا عقداً يتلاءم معها ويعرف بـ "Short form contract" وهو للمشاريع التي لا تزيد قيمتها عن المليون دولار.

■ أحياناً يعمد أعضاء المجلس الاستشاري لفض النزاعات إلى التصرف كمحكمين، وأحياناً يستند المحكمون إلى ما توصل إليه مجلس

■ فض النزاعات، هل لا يزال هناك ضرورة للفصل بينهما؟

الضرورة لا تزال قائمة باعتبار أن دور كل منهما مختلف عن الآخر. فالمجلس يسعى إلى إيجاد تسوية وإنهاء الخلاف حبياً بشكل يضمن استمرار العلاقة، أما التحكيم فقراره ملزم. بالإضافة الى أن تكاليف وأتعاب التحكيم تزيد بكثير عن تكاليف وأتعاب أعضاء مجلس فض النزاعات. فالعبرة ليست في السلوك ولكن في طبيعة المهام وطبيعة القرار الذي سيصدر.



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QUALITY BASED DECISION-MAKING (QBD) IN PROJECT MANAGEMENT

Written by ABDULAZIZ S. AL-YOUSEFI

Mr. Abdulaziz AL-YOUSEFI is the President of AL-YOUSEFI VALUE ENGINEERING (YVE) and served in the past: as the president of The SAVE International- Arabian Gulf chapter; the General Secretary of the Saudi Council of Engineers and the Vice president of PMI-AGC. He is a board member of SAVE International Certification Board, the Saudi Council of Engineers, King Abdulaziz Quality Award and Saudi National Quality Council.

Abstract

Poor value and quality do exist in all engineering projects due to many factors. One of the most critical factors is the process of decision making or lack of quantifiable decision tools. Decisions are normally based on cost and/or time, since they can be estimated and measured. In most case, those decisions depend on the experience and knowledge of the decision makers.

However, few decisions have been made based on Quality and Performance. That is because of lack of quantifiable tools to measure them. Quality can be defined as «conformance to requirements» but the question that is always being asked: «How can we measure this conformity» or in another word «Can we measure Quality?». In engineering project, the answer is neither yes nor no. The answer is «we should». The fact of the matter is «If we cannot measure it, we cannot improve it»

Quality Based Decision-making (QBD) is a new methodology that comprises of some practical tools. QBD purpose is to clearly identify and prioritize the most important areas for improvements.

This paper will explaine and show how QBD can improve decision-making that leads to optimal expenditure of owner funds while meeting required function, quality and performance.

Introduction

Before doing brainstorming and ideas generation sessions, we need a solid base for discussion that prioritizes potential areas (subject) for improvement. This paper establishes this base by introducing the methodology QBD & demonstrates some practical tools that will differentiate between needs and desires by defining four level of priorities.

In order to explain QBD, we need, first, to describe some of its tools. They are as follows:

1 **M**anagement **D**ecision **M**atrix **(MDM)**: It measures the level of importance

2 **Q**uality **S**atisfaction **M**odel **(QSM)**: It defines the rate of satisfaction

3 **Q**uality **P**riority **M**odel **(QPM)**: It prioritizes potential areas for improvements via combining MDM and QSM.

What is **Q**uality **M**anagement **(QM)**?

So far, there is no agreeable definition exist for Quality Management. But different quality experts tried to define it according to the industry they work in. QM is a group of thoughts and principles. It consists of methods, tools and techniques and years of experience. QM can be defined as "A cooperative form of doing business that relies on the capabilities of both labor and management, using teamwork, to continually improve quality, economy and productivity to complete satisfaction of the customer".

Quality Priority Model (QPM):
Combine the level of importance with the rate of satisfaction.

Rather than dwelling on QM concept and definitions, let us introduce the methodology of QBD and its quantifiable tools that will help us to identify potential areas for improvement of our work.

Identifying areas of potential improvement is one of the most important challenges facing management. We know from experience that most improvements identified address specific issues. Specifying these issues is essential in any decision making session.
In order to explain what QPM is, let us assume we want to establish a Value Engineering (VE) Program in an organization. The team used the following methodology to identify and select areas for improvements:
1 The team reviews the available information and documents to allow each team member to identify area of improvements.

2 Team members were asked to suggest areas that they felt could be improved. No effort was made to identify how they might be improved. It was enough that one or more team members felt that a particular area could benefit from this effort.

3 These identified potential areas for Value study were discussed, listed, and arranged in generally functional categories.

Management Decision Matrix (MDM):
Measuring level of importance.

The results of the previous work were compiled and became the agenda for more discussion of specific functional requirements and functional alternatives. Identifying specific "Value-improvable" issues change from project to project and from study to study.
Let us assume that the management team came up with the top ten (10) most important improvement potential areas (categories), as follows:

A-Management Support of the VE Program.
B-Adequate VE training
C-Acceptance of Change and management flexibility.
D-Suitable VE Study Team
E-The right VE Study facilitator
F-Having the right information
G-Time of conducting VE Studies
H-Written Procedures for the VE Program.
I-VE and Quality Awareness
J-Following up the implementation of VE Studies recommendations and proposals.

These improvement potential areas are in no particular order. In order to determine the level of importance of each area, we tabulate them as shown in figure1. This is a paired comparison between all categories.
We begin by comparing category A with category B. by placing (in the box where A intersects with B) one of the following five ratings:

A1 A is more important than B, but minor preference and count one point for A
A2 A is more important than B, but major preference and count for two points for A
B1 B is more important than A, but minor preference and count for one point for B
B2 B is more important than A, but major preference and count for two points for B
AB A and B have the same preference and count one point for A and one point for B.

Then we compare the importance of A with the rest of categories. Then we move to B and compare it with the rest, and then we do the same with C, D, E, F, G, H and J.

We determine the number of occurrence of each letter and put it in row X. For example, A gets 11 points and B gets 5 points and so on.
The total number of occurrences of all categories is 69. Therefore, the percentage (%) weight of each category is determined by the formula Y= 100 (X/69). Thus, it is 16% for A and 7% for B and so on.

Finally we set the highest number in row Y (which is A=16) to 10. Accordingly, we adjust the numbers in row Z to be out of 10 using the formula: 10(Y/16). By this we get

	Non-Monetary Criteria										
A	Management Support	A									
B	Adequate VE Training	A2	B								
C	Acceptance of Change	A1	BC	C							
D	Suitable VE Team	A1	BD	D1	D						
E	The right VE facilitator	AE	E1	E2	E1	E					
F	Proper information	A1	BF	F1	DF	F1	F				
G	Time of VE Study	AG	BG	G1	D1	EG	F1	G			
H	Written Procedures	AH	H2	H1	DH	EH	FH	H1	H		
I	VE Awareness	A2	BI	C	D1	E2	F1	G1	H1	I	
J	Follow-up system	AJ	J1	J1	DJ	EJ	J1	GJ	HJ	J1	J	Total
X	Number of occurrences	11	5	2	7	10	7	6	10	2	9	69
Y	Percentage (%)	16	7	3	10	14	10	9	14	3	13	100
Z	Weight (out of 10)	10	5	2	6	9	6	5	9	2	8	

Importance scoring
2 points for Major Preference, **1** point for minor, **1** point for same
X= Total Number of points (occurrences) for all
Y= 100 (x / Total points of all letters)
Z= 10 (y / Highest points)

Figure 1 - **M**anagement **D**ecision **M**atrix **(MDM)**

the level of importance of each category out 10 as shown in row Z of figure 1.

Quality Satisfaction Model (QSM):
It defines the rate of satisfaction.
Now, that we determined the weight of the importance of each potential improvement area, we move to develop the quality profile of our existing practice by using the « **Quality Satisfaction Model (QSM)**» where we measure the degree of satisfaction within the organization for each potential area via asking team members to give their judgment of the rate of satisfaction, out of 10, whereas: **10 is most satisfied**, meaning, it has been well taking care of. While **1 is least satisfied** and it needs to be improved.

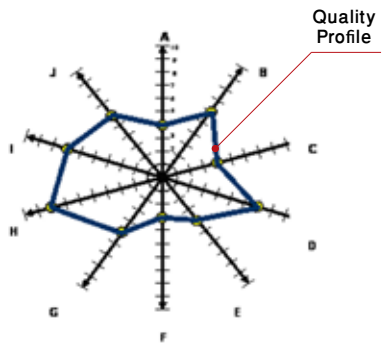

Figure 2 - Quality Satisfaction Model (QSM)

For example, the team agreed to give A=4 out of 10 and give B=5 of 10, and so on. Once we are done with the satisfaction rating of all categories, we tie the points together to form the «Quality Profile (QP)». If QP gets smaller this means we have more poor quality areas. Therefore, QSM lets you visualize the level of quality rather than just reading it.

Priority of potential areas for improvement

The level of importance (Figure 1) and the rate of satisfaction (Figure 2) are summarized in figure (3) and graphically represented in the Quality Priority Model (Figure 4), where It prioritize potential areas for improvements, as follow:

Priority No. 1
(top left quadrant of figure 4):
Potential areas with high importance and low satisfaction. These are the top priority and should be discussed first.

	Potential Areas for improvements	Level of Importance Out of 10	Rate of Satisfaction Out of 10
A	Management Support	10	4
B	Adequate VE training	5	6
C	Acceptance of Change	2	4
D	Suitable VE Team	6	7
E	The right VE facilitator	9	4
F	Having proper information	6	3
G	Time of VE Study	5	5
H	Written Procedures	9	8
I	VE awareness	2	7
J	Follow-up system	8	6

Figure 3 - Level of importance and rate of satisfaction

Priority No. 2
(bottom left quadrant of figure 4): Potential areas with low importance but with low satisfaction. They are medium priority.

Priority No. 3
(top right quadrant of figure 4): Potential areas with high importance, but high satisfaction. They are medium low priority.

Priority No. 4
(bottom right quadrant of figure 4): Potential areas with low importance and high satisfaction. These are the lowest priority and will probably discuss them if we have some spare time.

Figure 4 - Quality Priority Model (QPM): Combining the level of importance with the rate of satisfaction

Priority No. 1 A,E and F)	Priority No. 2 G and C	Priority No. 3 H, J and D	Priority No. 4 B and I
Management Support	Time of VE Study	Written procedures	Adequate VE Training
The right facilitator	Acceptance to Change	Follow-up System	VE awareness
Having proper information		Suitable VE Team	

Figure 5 - Priorities of potential areas for improvement

Therefore, The VE team discussed and generated ideas according to the following sequence of priority: (Figure 5).

Conclusion

Upon the completion of this analysis, we brainstorm and generate some ideas around these subjects. However, brainstorming and generating ideas are useless if we do not have solid base for discussion and have clearly defined needs and requirements. QBD methodology establishes this base by using practical tools that will help management team to prioritize potential areas for improvement. Furthermore, it differentiates between needs and desires by defining four level of priorities.

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Mediation: An Effective Technique
To Resolve Construction Disputes

Written by ISSAM SROUR, Ph.D.

Dr. Issam Srour is an assistant professor in Engineering Management at the American University of Beirut. He is also a certified mediator with the state of Texas, United States of America.

Abstract

Mediation, an assisted negotiation process facilitated by a neutral third party, is a fast and cost effective technique to resolve disputes. This paper makes the case for the use of mediation to resolve construction related disputes, presents a typical process followed by mediators, and highlights key attributes of a successful construction mediator.

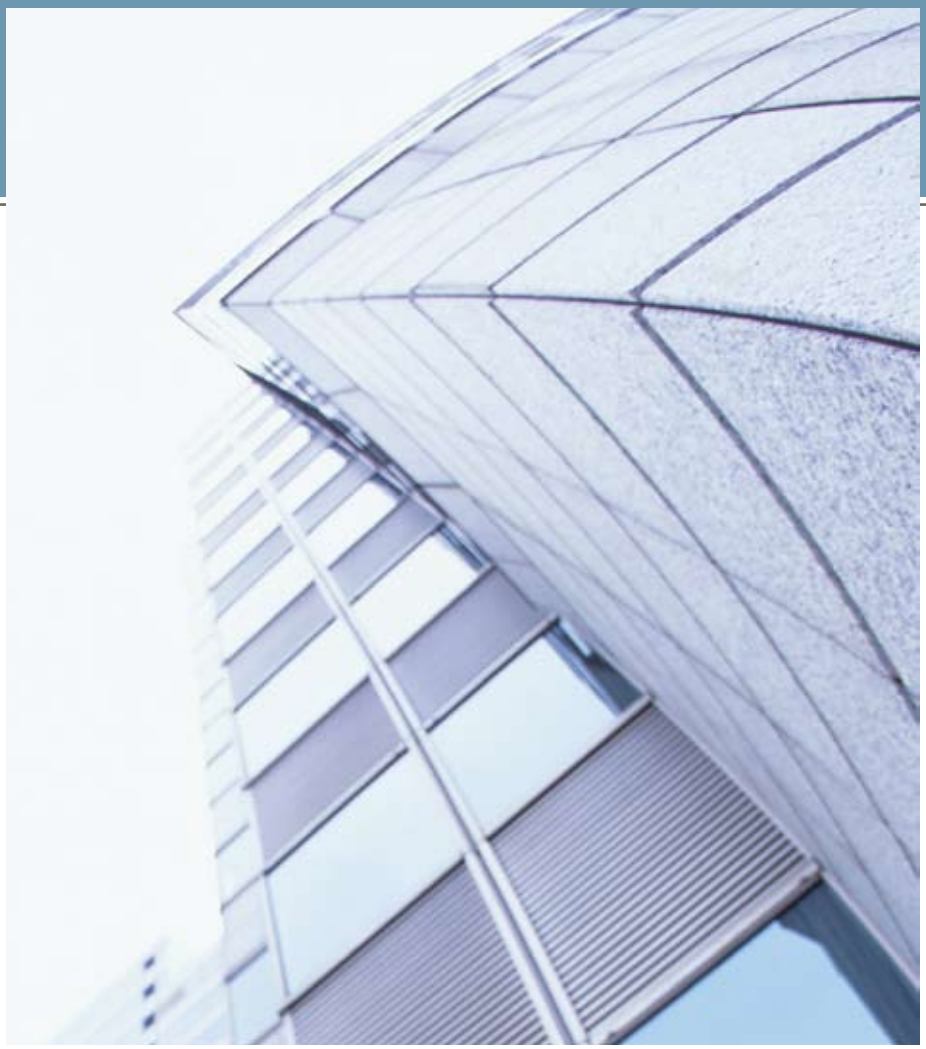
Introduction

Regardless of their type (residential, commercial, infrastructural or industrial) or size (small, large, or mega), construction projects consist of a complex mixture of architecture, engineering, manufacturing, government regulations, insurance, and craftsmanship. The parties involved on these projects include owners, engineers, architects, contractors, manufacturers, suppliers, insurers, laborers, and legal professionals.

Disagreements are inevitable with such complexity. Variation orders, requests for a time extension, deficient work, professional negligence and issues with payments are common areas of disagreement. If not promptly and effectively managed, disagreements become disputes.

Mediation: An Effective Technique

To Resolve Construction Disputes



The construction industry's susceptibility for disputes is well documented in history. The law stated in the Hammurabi code, published around 2,200 B.C., holds those in charge of construction buildings "liable for injuries caused by their failure to properly perform their responsibilities" (Cheeks, 2003). While the retribution in that time consisted of an eye-for-an-eye approach, today financial damages serve as retribution.

Historically, litigation and arbitration were the primary techniques for determining a "fair" allocation of financial damages and therefore resolving construction disputes. However, such processes can take months or even years to reach a final resolution. Furthermore, the cost of litigating or arbitrating construction disputes quite often exceeds the value of the issues involved.

These economic reasons have encouraged industry practitioners to look for alternative and more effective dispute resolution processes. Mediation, a voluntary and confidential negotiation facilitated by a skilled third party (called a mediator), is a great example of a fast and cost effective alternative dispute resolution technique. The use of mediation to resolve construction disputes is on the rise.

Why Should the Construction Industry Use Mediation to Resolve Disputes?

Among the most compelling arguments for using mediation to resolve construction disputes are that it is generally faster and cheaper than traditional techniques such as litigation or arbitration. Mediation usually takes only one day. The mediator's fee is comparable to what a legal consultant charges for one day worth of work, which is usually quite minimal compared to the value of the dispute.

Richbell (2008) provides a list of

additional benefits that mediation offers as compared to other dispute resolution techniques. First and foremost, mediation facilitates the achievement of "better deals". Generally, negotiating parties are not totally open with each other, fearing that the revealed information can weaken their positions. However, these same parties might be willing to share sensitive information with an independent and neutral third party. Being in that unique position, the mediator can identify common needs and the things that are "cheap concessions to one yet valuable gains to the other".

Finality of the outcome is another advantage of mediation over other dispute resolution techniques. A judge or an arbitrator imposes the outcome of litigation or arbitration. As a result the decision usually does not meet the demands of at least one of the parties involved. This dissatisfaction can lead to an appeal in a higher court or judicial system. Conversely, the outcome of mediation is more sustainable since it is the result of a mutual agreement crafted by the involved parties.

The settling of a dispute via mutual agreement offers other advantages, namely the preservation and strengthening of on-going relationships. This is essential for an industry such as construction where paths frequently cross. Having an unresolved dispute, or a dispute ended through an adversarial technique such as litigation or arbitration, can have a detrimental impact on the relationship between construction professionals (e.g., owner and designer, engineer and contractor) who may need to work together on future projects.

Another benefit of mediation is the flexibility it offers in terms of process and outcome. A good mediator will tailor the mediation to fit the needs of the parties involved in the dispute. For example, most mediations start with a joint meeting, but that is not always the norm – in some instances, the amount of negative emotion is so high that it prevents parties from being in the same room. In such cases, the mediator relies on separate or caucus meetings with each of the parties. Caucus meetings also serve to encourage a party to share sensitive information with the mediator without releasing the information to the other parties.

Anatomy of Construction Mediation

The debate on whether mediation is an art or a science is open. Scholars such as Kovach (2004) consider mediation as an art because of its inherent flexibility and application to a wide range of disputes (e.g., construction, tenant-landlord, family, labor). Nevertheless, Kovach (2004) notes that most mediations do follow a set structure, as shown in the figure 1.

Preliminary arrangements describe all the steps that take place prior to the mediation session. On the side of the parties involved in the dispute, these steps include mediator selection, identification of attendees, review of background information, determination of a "walk-away"

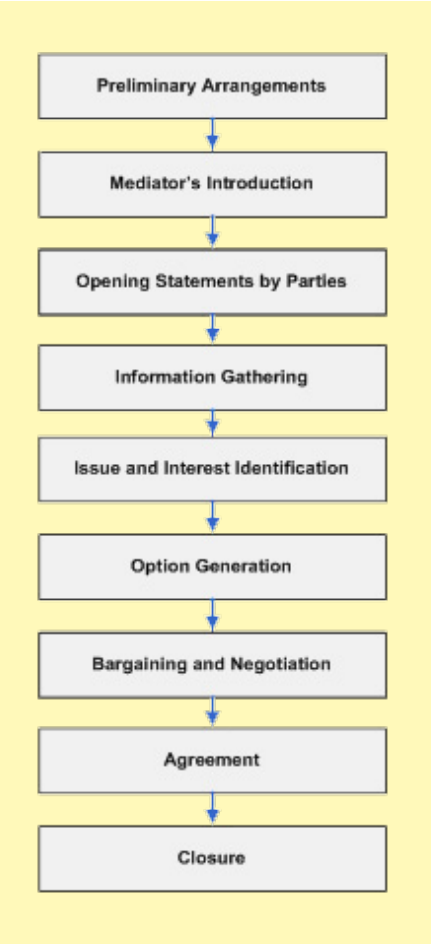


Figure 1
A Typical Mediation Process
(Kovach 2004)

point, and settlement authority. In addition to arranging the logistics, the mediator should use this period to gather information on, and develop some understanding of, the dispute. The burden of this phase rests with the mediator who will meet with the attorneys representing each of the parties and perform a thorough review of project documentation shared by the parties.

The next phase in the process consists of an introduction provided by the mediator. A typical introduction covers the mediation process and the ground rules for the mediation session. Each party will then deliver opening statements on their views of the dispute. The opening statement fulfills two goals. First, it provides a chance for the parties to express their anger or frustration before moving on to settlement options. Second, it provides the mediator, and often the other parties, a chance to gather new background information.

It is very rare that the parties' opening statements give a clear and comprehensive picture of the dispute. This is why most mediators engage in a series of "open-ended" questions, with the aim of gaining a full understanding of the dispute as well as the relationships between the different parties.

Following the process of information gathering the process of listing the main issues and the stand of the different parties regarding these issues ensues. The mediator will also use this time to determine what each party "really wants", i.e. their needs and their priorities. These will be essential for generating ideas or options for settlement.

The negotiation process starts once potential options have been determined. The mediator's role is to facilitate this "give and take" process and to engage the parties in "reality testing". For this purpose, it is common that the mediator check, with each party, the likelihood of getting what it is hoping for.

A successful negotiation session

leads to an agreement documented by the mediator or the legal representatives of the different parties. An agreement, signed with copies distributed to the different parties, signals the end of the dispute.

The art of crafting this structured process into a meaningful experience for both parties rests with the mediator. In fact, one can claim the success of mediation depends almost entirely on the skills and abilities of the mediator.

The "Perfect" Construction Mediator

"An effective mediator may make the difference between a sustainable settlement, leaving the parties satisfied with both the process and outcome on one end of the spectrum or having the matter decided by some binding mechanism such as arbitrator or litigation on the other side of the spectrum" (Harmon, 2006). To succeed in mediating construction disputes, the mediator should have three sets of skills shown in the figure 2.

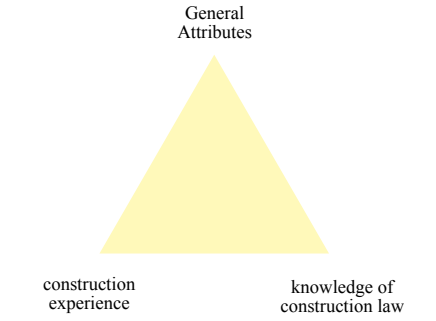


Figure 2
Characteristics of a Successful Construction Mediator

First and foremost, a construction mediator should possess the skills that any mediator should have -- including patience, persistence, and continued optimism. He or she should also have the ability to gain the respect of the parties and their representatives through a display of leadership qualities. The mediator should have a strong personality while showing sympathy and understanding of the burdens that the disputants have to undergo. Tenacity is also an important quality especially when the likelihood of success becomes doubtful. Many mediators believe that the breakthrough to success often times follows the "darkest" periods in the mediation (Madden, 2001). The possession of effective verbal (e.g., active listening and intelligible speaking) and non-verbal communication skills (e.g., nods, direct eye contact, body language) is also a key characteristic of a successful mediator (Kovach 2004). An effective mediator should strive to maintain neutrality and confidentiality prior, during, and after the mediation session. Finally,

a good mediator is one who knows how to make parties concentrate on interests rather than rights or entitlements.

These skills are necessary but sometimes not sufficient to become a successful construction mediator. As previously stated, the ability of a mediator to gain the respect of the parties is critical. In construction cases, both experience in the construction industry and knowledge of construction law help the mediator gain that respect.

Complex construction disputes often involve technical construction issues, a multitude of parties, and a specialized body of law. In order to understand the dispute, the mediator should be familiar with industry practices and terminology such as "variation order", "deferred site conditions", and "RFI" (**R**equest **F**or **I**nformation). The mediator should know about time and cost management procedures on construction projects (e.g., submittals, approvals, estimated and actual budgets). He or she must understand how extended job site and home office overhead costs are determined and the suitability of different cost reporting techniques (e.g. total cost versus modified cost). This familiarity with the construction industry helps the mediator conduct a reality check of the strengths and weaknesses of the parties' arguments (Madden, 2001).

In addition to having construction experience, the "perfect" construction mediator should have the legal background pertaining to construction disputes. The mediator should be able to answer, or at least contribute to, questions such as: "is it likely that the other party will succeed? What are the risks on my side? What is the extent of potential liability on each side? If the case goes to court, what would be the estimated costs we would incur?".

Construction mediators should also be familiar with the legal effects of a variation order containing "full and complete compensation" language, the legal authority to direct extra work or issue variation orders in public versus private projects, and the legal rights, obligations, and liabilities of the contractor in design-build projects. Construction mediators need to understand the right to withdraw a subcontractor's bid on public and private projects, the theories of liquidated damages and the methods of calculating them, and the use of "critical-path" analysis to determine the cause of delays (Malpasuto, 2002). Without a working knowledge of these concepts, a mediator cannot realistically assist the parties in their evaluation of the risks in their case.

Conclusion

Lebanon is a small country with a limited number of owners, developers, engineers, contractors, and suppliers. In this context the construction industry cannot sustain long, drawn-out, or bitter disputes. Having a tool to quickly and cost-effectively resolve conflicts is key to the ongoing success of the Lebanese construction industry. This article raised the potential of mediation, described the structure of a general mediation, and highlighted the preferred qualities of a mediator for just this purpose.

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إجتهادات قضائية

1

يجوز لنقابة المهندسين لتحصيل حقوقها المترتبة لها تجاه شركة مقاولة اتخاذ تدابير بوجه المهندس الذي يديرها: محكمة التمييز المدنية، الغرفة الخامسة، قرار رقم 84 تاريخ 2008/6/24، منشور في مجلة العدل 2009، العدد2 ص618:

«حيث أن ما أثاره المستأنف حول استقلالية شخصية الشركة التي يديرها ويمثلها عن شخصه لا يكفي بحد ذاته للقول بأن التدبير المشكو منه والمتخذ بحقه يدخل في مصاف التعدي الواضح الذي يختص قضاء المستعجل لازالته ذلك أن هذا التدبير قد أتى في نطاق موقف عام اتخذته النقابة، والقرارات التي تتخذها بهذا الشأن تسري بوجه جميع المنتسبين ما لم ترجع عنها هيئة المندوبين أو تبطلها المحكمة الناظرة في الموضوع وهذا ما لم يحصل، فضلاً عن أن الشركات التي تتعاطى المقاولات وهي مصنفة على اسم أحد المهندسين ليست أعضاء في نقابة المهندسين حتى يكون بإمكان النقابة أن تلجأ إلى تحصيل حقوقها بصورة مباشرة تجاهها، فمن الطبيعي اذن أن تتخذ بعض التدابير الآيلة إلى ذلك عن طريق فرض هذا الواجب على المهندسين المنتسبين إليها الذين يبقى بامكانهم وهم أعضاء في هذه الشركات تأمين هذه الحقوق بسهولة دون أن تكون النقابة أو يكون المهندس مضطرين للجوء إلى مراجعة القضاء وتحمل الأعباء الناتجة عن ذلك».

2

إن مرور الزمن عن أعمال المقاولة يختلف عن مدة مرور الزمن عن الأعمال الهندسية: القاضي المنفرد المدني في راشيا، قرار رقم 19 تاريخ 2008/10/16، منشور في مجلة العدل 2009، العدد 2 ص821:

«حيث أنه سنداً للمادة 352 فقرة 4 موجبات وعقود يسقط بمرور الزمن بعد سنتين حق دعوى مهندسي البناء والمساحة وسائر المهندسين والخبراء من أجل الخطط التي يرسمونها أو الأعمال التي يجرونها أو المسلفات التي يقدمونها. وتبتدئ المدة من تاريخ تسليم الخطط أو إتمام الأعمال أو أداء المسلفات».

«وحيث أن المدعي قد نفذ العقد بصفته مقاولاً بغض النظر عن مهنة الهندسة، وأن الأجرة المترتبة له ناتجة عن أعمال مقاولة لجهة إشادة البناء وليس عن أعمال هندسية مرتبطة بأتعاب هندسية وبالتالي يسري عليها مرور الزمن العادي أي العشري وتكون شروط المادة 352 موجبات وعقود فقرة 4 غير متوفرة في الدعوى».

3

إن وجود بند تحكيمي في عقد مقاولة لا يحجب اختصاص قاضي الأمور المستعجلة لاتخاذ تدابير مؤقتة واحتياطية: قاضي الأمور المستعجلة في بيروت، قرار رقم 2002/554 تاريخ 2002/12/12، منشور في مجلة العدل 2002، العدد 4 ص787:

«حيث يجوز للفرقاء المتعاقدين إعمالاً لمبدأ سلطان الإرادة أن يدرجوا في العقد التجاري بنداً ينص على أن تحل بطريق التحكيم جميع المنازعات التي تنشأ عن تنفيذ عقد المقاولة أو تفسيره أو صحته وفقاً للمادة 762/أ.م.م».

«وحيث يمكن للفرقاء الاتفاق على أن تطبق الهيئة التحكيمية قانوناً أجنبياً على المنازعة وفقاً للمادة 767/أ.م.م.

«وحيث تجدر الإشارة إلى أن قاضي الأمور المستعجلة مختص دولياً لاتخاذ أي تدبير مؤقت أو احتياطي منوي تنفيذه في لبنان وفقاً للمادة /78/ أ.م.م».

«وحيث لا يحجب البند التحكيمي المنصوص عنه في عقد المقاولة الرئيسي ـ الذي لم يتطرق لمسألة التدابير المؤقتة أو الاحتياطية ـ سلطة قاضي العجلة لاتخاذ التدابير المذكورة عندما لا يكون المحكم قد وضع يده على النزاع شرط توافر عنصري اختصاصه العام وعند توافر عنصر العجلة الحادة في حال وضع المحكم يده على النزاع».

«وحيث يكمل القضاء المستعجل مهمة القضاء التحكيمي إذ يمتاز بسرعة البت بالتدبير المطلوب خصوصاً عند عدم تشكيل الهيئة التحكيمية ما يعطي البند بعده الحقيقي».

4

Cour d'appel de paris, 29 Septembre 1994, Recueil DALLOZ 1995, sommaires commentés p.210:

"Constitue des actes de concurrence déloyale le fait, pour une entreprise, d'embaucher la majorité des ingenieurs d'une société avant que ceux-ci aient notifié à leur employeur l'intention de le quitter et soient libres de tout engagement, alors que l'entreprise coupable ne pouvait ignorer que ces propositions d'embauche au moment où elle manifestait l'intention de rompre son contrat la liant à son concurrent provoqueraient l'éxode massif des ingenieurs de ce dernier, de telles manoeuvres déloyales ayant été accomplies en vue de détourner à son profit le savoir - faire des ingenieurs de son concurrent et entrainant sa désorganisation."

تعليق المجلة:

بمقتضى الاجتهاد الفرنسي فإن قيام شركة بالتعاقد مع أغلبية المهندسين الذين يعملون لدى شركة ثانية يمكن أن يؤلف منافسة غير مشروعة إذا تم هذا التعاقد قبل أن يعلم المهندسون الشركة الثانية بنيتهم بتركها. وقد أعتبر هذا الاجتهاد أن الشركة الأولى بهذا العمل تسعى بطرق ملتوية إلى الحصول على معرفة ومهارة مهندسي الشركة الثانية المنافسة والتسبب بخلل في نظام عملها.

سؤال وجواب

ما الفرق بين التحكيم والوساطة؟

التحكيم Arbitration نوع من القضاء الخاص حيث يتفق الفريقان برضاهما على حل أي نزاع ينشأ بينهما بواسطة شخص يسمى محكم يفصل بالنزاع بقرار ملزم له قوة الحكم القضائي. أما الوساطة Mediation فهي وسيلة لتسوية النزاع حبياً حيث يتفق الفريقان على اللجوء إلى شخص يسمى الوسيط ليقرب وجهات النظر بينهما تمهيداً لتوقيع اتفاقية ترعى مصالح الفريقين.

ما هي الشركة الأكثر ملاءمة لممارسة أعمال المقاولة؟

إن أعمال المقاولة تفترض إبرام عقود تجارية عديدة مما يعرض ذمة المقاول المالية لمخاطر. لذلك ننصح عادة بإنشاء شركة مساهمة أو شركة محدودة المسؤولية تتم ممارسة أعمال المقاولة من خلالها لأن مسؤولية كل شريك فيها تكون محددة بقدر مساهمته أو حصته في الشركة.

ما هو الرسم المالي الذي يتوجب على عقود المقاولات؟

إن مقدار رسم الطابع المالي على عقود المقاولات هو 3 بالألف من قيمة العقد. وإن تسديده يتم إما من خلال لصق الطوابع وإما نقداً أو بواسطة شيك يحرر بإسم أمين صندوق الخزينة المركزي. ويجب تسديد الرسم خلال خمسة أيام تلي تاريخ توقيع العقد وإلا ترتبت غرامة مالية قد تبلغ عشرة أضعاف الرسم.

هل يمكن للمهندس أن يتعرض للإفلاس

نعم، يمكن أن يصدر حكم قضائي يعلن إفلاس مهندس إذا تحقق شرطان:

الشرط الأول: أن يمتهن المهندس ممارسة عمل تجاري، ويدخل من بينها أعمال المقاولات.

الشرط الثاني: أن يتوقف المهندس عن دفع دين نتج عن عمله التجاري.

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1

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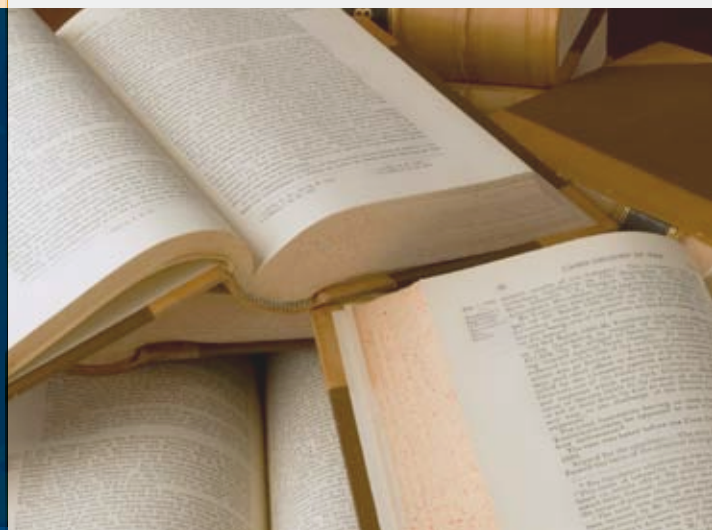
المعرفة

تحددُ مسارَك

مجلة المهندس
• القانونية الإلكترونية



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