

Honouring the observance rather than the breach

Guest editor **Amanda Bucklow**, a widely respected Independent Commercial Mediator, says none of the changes in construction practice over the past 20 years or so have tackled the underlying causes of the industry's adversarial culture. Adjudication has been no help as it undermines both the contract and performance.

There will be many reading this who will remember Green Shield Stamps: the loyalty scheme used by petrol stations and supermarkets from the 70s until 1991 when the scheme morphed into Argos. If you aren't old enough to remember Green Shield Stamps, then bring to mind a coffee card where you collect 9 stamps which you cash in to get a free coffee. You know you can choose the most expensive coffee even if you collected stamps on 9 (single) espressos.

Conflicts, disputes and especially adjudicated decisions are a loyalty scheme. Where a dispute is adjudicated there will always be a losing party. That party collects a stamp. When the sense of injustice is particularly strong they will collect a stamp worth 10 ordinary stamps.

At some point the book is cashed in for the big dispute that was always going to happen except now it is a stew of every wrong and injustice experienced, richly seasoned with assumptions, recollections and perceptions all based on self-protection. Such is the nature of human beings and a function of the scales of fairness in our heads. It is not a case of 'moving on' when profit is at stake, keeping your job, getting the next job or even fighting for survival. If you are the losing party those become a greater priority.

Many of the changes over the last 25 years have to my mind 'honoured the breach and not the observance'. Standard contracts, making adjudication compulsory (mostly), and a standardised tendering process have addressed clarity but not complexity. Those changes have not addressed the underlying causes of conflict or disputes. They have not encouraged a move away from the adversarial culture.

How does adjudication undermine both the contract and the performance?

You will rightly sense that I am not a fan of

adjudication or imposed decisions. Those are the last resort and for people who will not or who cannot make their own decisions. However, I am not a fan because for many reasons adjudication fundamentally undermines both the contract and the performance.

Adjudication is not designed to deal with the underlying problems neither does it deal with changing the culture. These problems are not addressed by a simplified mechanism for dispute resolution (honouring the breach). They are systemic problems enshrined in the tendering process and the performance of the contract which are realised at the interface between the contract and the human beings responsible for delivering the project. Those systemic problems are embedded at the very beginning of the contracting process: the scoring on value for money and quality, the assumptions about the way things are done around here, the penalties for non-performance, multifarious z-clauses that are deemed necessary to deal with the enduring reality that one size simply does not fit all. Until those shortcomings are dealt with in a more modern way nothing will change.

The modern way includes measuring and valuing as yet unmeasured and undervalued assets and behaviours. Why invest in technology, software, collaboration models, resolving disputes early, brand, reputation if those count for very little in the next bid?

In the current scoring system it is very possible to score 100% on value for money by being the cheapest. If you are the cheapest then you are leaving something out and/or you are laying off risk to others in the supply chain. Both approaches will increase the likelihood of disputes. To score 100% on quality is improbable on the current criteria.

The understanding of value for money is cost.

Buyers, especially in the public sector, must choose the lowest price. Not to do so is to invite challenge and that is de facto an expensive dispute. Where the offer price is lower than the budget, the assumption is that there is something in the 'back pocket' to deal with the inevitable overspend. That assumes underperformance from the outset and therefore disputes will flow.

When it comes to valuing quality even where 80% of the scoring is allocated to quality it is very difficult for new blood, innovative thinking or smaller firms to compete on the real quality they might bring and the value they may add. At 60% it is hardly worth the expense and effort to participate. 'No one gets fired for hiring x.'

There is a resistance and an inability to measure intangible value. The construction industry is not alone in undervaluing intangible assets:

'In 1975 intangible assets accounted for 17% of corporate value. Today it is 87%. If you strip out real estate it is about 96%.' (Paul Adams, CEO, EverEdge Global.)

We live in a knowledge economy. Put simply, knowledge and managing knowledge are more valuable in today's economy than laptops and desks. Knowledge sharing is the catalyst for improvement. That relies on collaboration and trust and where there is trust there is profit and added value. Imposed decisions (adjudication) undermine trust. The prospect of adjudication undermines partnering, collaboration and relationships. Damaged relationships means loss of knowledge which cannot be passed on to the next project. And we end up in the log jam of déjà vu.

Everyone talks about collaboration. Human beings are hard wired to be collaborative. It is environment and circumstances that turn the innate human capacity to collaborate into self-protective behaviours. Any threat that provokes self-protection is counter-productive. An adversarial culture will never deliver value for money by any measure.

If we really want collaboration, team-work, transparency, partnering and fewer claims we must honour the observance. Adjudication does not honour the observance. It honours the breach. Throughout the contract, performance will be calibrated to protect positions and protect profit which results in living the claim from the very start. The claim that is already on the balance sheet

because it is made tangible: it was assumed from the very beginning in the tendering process.

Recognising and measuring problems and conflicts

It is right to assume there will be conflicts. There should be many and the paradox is that the more conflicts there are the *more transparent* the performance of the contractual parties because they are recognising problems not burying them. We should recognise the number of conflicts. Measure them. Reward people for dealing with them through negotiation and agreement because a negotiated agreement is worth more than any imposed decision which will only sit in the loyalty programme. And it costs less. Unless the performance measures include the capacity for reaching agreement, and sharing knowledge is recognised as delivering 'value for money', there is no motivation for anyone to participate or support new behaviours.

Realising the value of different assets and skills

To move from honouring the breach to honouring the observance we need to realise the value of some very different assets and skills:

- ◆ Revisit the value of assets on the balance sheet so that companies know exactly what they have in terms of knowhow, brand, design, proprietary software and other intangibles. Only then will they value them and only then will they support the development and deployment in their own organisations.
- ◆ Switch valuing claims to valuing agreement, appropriate risk allocation and payment performance.
- ◆ Reward bidders for the number of disputes on a project, the number resolved and score very highly where those disputes are *not* adjudicated but agreed through structured negotiation and implemented in a timely fashion.
- ◆ Move those measures to the value for money part of the tendering process and allocate higher value than costs. They are inextricably linked.

I recently asked a very experienced construction professional with an unbroken record of 'on time, on budget and no outstanding claims' on several landmark construction projects what was her experience of adjudication as a way to resolve problems? She answered 'I don't let my contracts get to that stage.' **CL**