

An investigation into the mediation of disputes in the South African construction industry

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COMMENT

I refer to recent correspondence on the above topic which appeared in the March 2006 issue of your journal.

The terms mediation and mediator as used in SAICE's General Conditions of Contract could probably be misnomers. The SAICE mediator's primary task is not to effect reconciliation, but to submit an opinion after having pursued enquiries to establish the facts of the dispute. Although Clause 58.2.4 does give him (or her) the power to propose compromises, he (or she) is not required to settle the dispute by using persuasive or conciliatory techniques.

GCC's procedural guidelines on mediation, although not contractual, are however somewhat formal. In fact, a leading light in the legal profession once described our procedure, perhaps scornfully, as a 'non-binding arbitration'. Nevertheless, during the 1972-2000 era, when contract disputes were fairly frequent, SAICE estimated that about 75 % of mediation opinions were being accepted, thus eliminating the need to refer a number of potentially lengthy and costly disputes to arbitration or the courts. I therefore believe that our type of mediation has proved successful, and should not be converted into an extension of negotiations that, in any event, have already failed. Although GCC mediation clauses could do with some modification, which no doubt SAICE will undertake in due course, the system has been shown to work.

I therefore venture to offer a few comments and suggestions, which, in fact, require no alteration to the existing document:

■ At any hearing, which should not be avoided and is usually essential, the mediator should encourage full and free debate from both sides, and not run the proceedings on the formal lines of an arbitration court or a courtroom. The mediator

should in fact regard the hearing as 'his day', and conduct proceedings somewhat in the manner of the French 'interlocutory' system. In such a somewhat informal atmosphere, incidents and actions seem to come to light that clarify issues in contention and that were not recorded in the written submissions.

■ Employers have a tendency to stay away from hearings, leaving their appointed Engineer to represent them, while, on the other hand, senior contractor representatives invariably make a point of attending. In my experience however presence at the hearing of both principals to the contract has not only expedited settlement but has brought about agreement or 'deals'.

An unfettered debate, as suggested above, often seems to convince senior representatives from both parties, who themselves might have not been concerned with day-to-day events on the contract, that their respective site representatives might have committed errors of commission, omission and judgement, and that there could therefore be room for compromise.

■ It should be borne in mind also that mediation claims theoretically have no upper limit. It is much easier, for example, to reach settlement on a small claim than on one amounting to several millions of rand. Furthermore it is possible for a business or mining corporation to agree to a snap settlement, while a public authority might need and prefer an outside, unbiased opinion before giving away taxpayers' money.

■ In regard to the search for statistics, I would suggest that mediators who are appointed by SAICE should be asked to report back on the outcomes of their disputes. This might be a painless and accurate method of collecting data for the future.

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