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## Independent Facilitation: A Better Way of Avoiding Conflict

Construction projects and their associated contractual arrangements are becoming ever more complex. Multi-layered supply chains give rise to the need for many interfaces and relationships to be managed. On the face of it, good project management and clear communication will enable such issues to be managed. However, this has been compounded by the challenges of COVID-19 which has brought unprecedented impacts on time, resources, cash flow and profitability, fundamentally altering the commercial and contractual landscape almost overnight.

Faced with these circumstances, the need to find a pragmatic approach to achieve solutions acceptable to all parties, which can be implemented expeditiously, is of paramount importance.

Traditionally, parties may have resorted to the well-trodden path of dispute resolution procedures with adjudication providing the initial remedy. However, such procedures incur cost, time input from the parties and the inevitable degradation of working relationships. A more collaborative and pragmatic method of resolution will undoubtedly bring significant benefits and engagement to all parties involved.

Indeed, in March 2020, Lord Burnett, the Lord Chief Justice encouraged parties to “explore...the possibility for compromise”, pointing out that the COVID-19 lockdown means that the benefits of settling over litigating are greater than ever. The Construction Leadership Council has also observed that: “There is a real concern that the construction industry will become embroiled in costly and long-running disputes over the effects of the pandemic on projects if it does not look to engage in collaborative discussions to resolve these issues”, which is further endorsed by the UK Government advocating ‘responsible and fair behaviour...amongst parties to contracts’.

If the parties to the contract are committed to achieving a speedy, low cost and pragmatic resolution to any differences then an alternative option is available to them: Independent Facilitation.

The parties can agree the procedure which may be managed without party representation, thereby reducing cost. That said, it is recommended the parties are guided by an experienced facilitator, who can draw upon years of experience to provide a process appropriate to each situation. Generally, the parties will submit a brief position statement with only essential documents in support. This enables an informed open discussion with the parties and an objective opinion to be formed in relation to any differences between the parties including current issues arising from the COVID-19 impact on the project’s schedule.

Critical to success is independent, even handed facilitation of joint working sessions structured as collaborative discussions conducted online via video conference, which bring with them a different dynamic. Far fewer opportunities are provided for the distractions of emotive rhetoric and party posturing, as the parties are guided by the

facilitator to focus solely on the process for resolution of their differences.

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Conflict avoidance procedures using independent facilitation have been adopted by a number of UK and overseas infrastructure and utility companies who have been faced with seemingly intractable commercial circumstances. In each of their respective situations, independent facilitation encouraged open discussion and raised challenges to each party’s position to promote a more informed and conciliatory approach from all parties concerned. This approach has the objective of reaching agreement, but with either a binding or non-binding recommendation to be issued in relation to any items not agreed at the conclusion of the procedure. The benefits from the process of early resolution, improved cash flow, modest cost and enhanced relationships are obvious, but this process also provides a departure from the adversarial approach which is becoming all too familiar in the management of construction projects.

If you require any further information, please contact [enquiries@hka.com](mailto:enquiries@hka.com).