

UTILIZATION OF A THIRD PARTY NEUTRAL (TPN) TO AVOID AND RESOLVE DISPUTES



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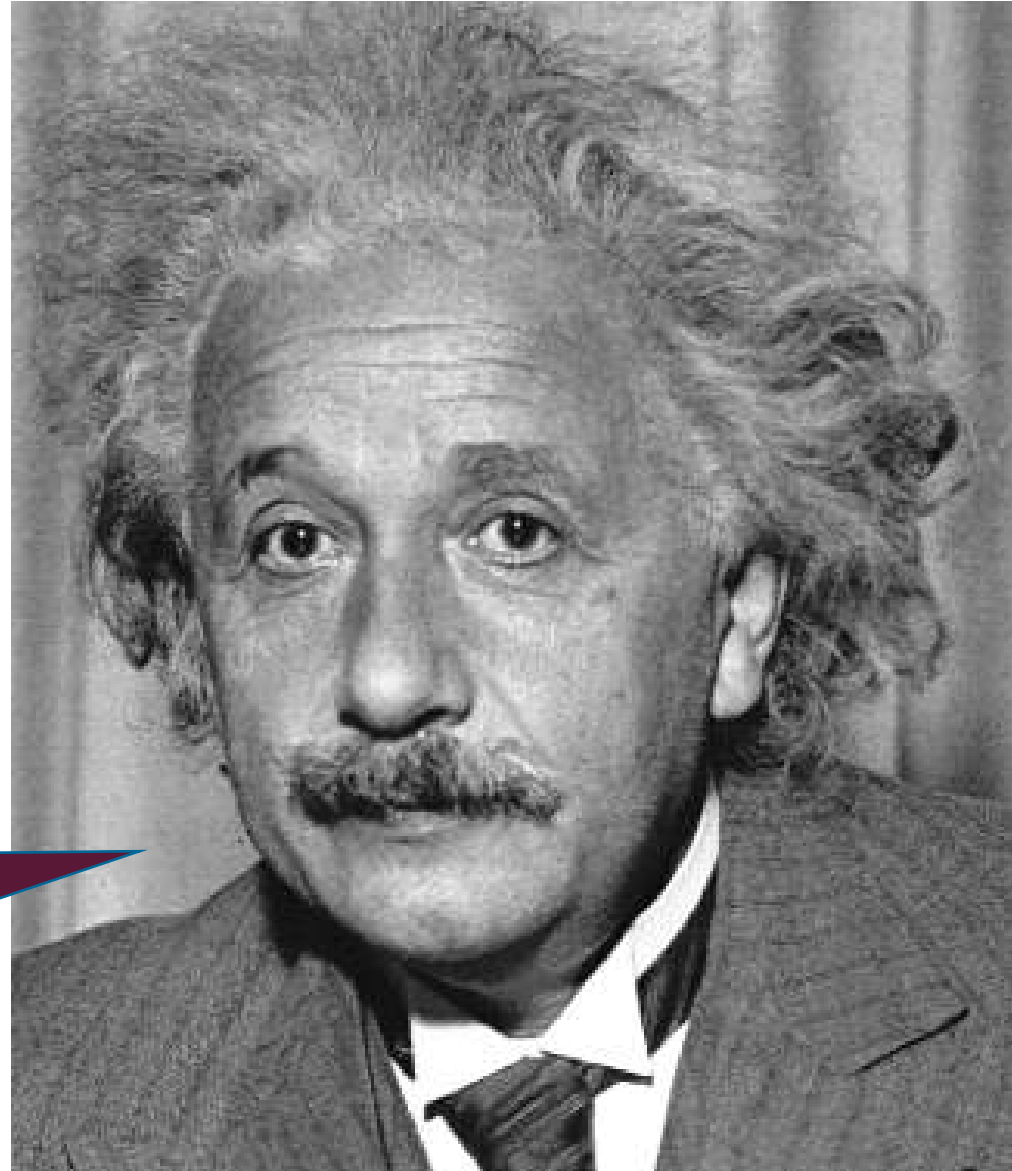
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**A Construction Project Does
NOT Have To Be An
Adversarial Endeavor**

*“You cannot
simultaneously prevent
and
prepare for war.”*

Albert Einstein



PREVENTING CLAIMS AND DISPUTES – IS IT POSSIBLE?

WHAT IS THE PROBLEM?

- We cannot totally shift risk to eliminate disputes and conflicts on a construction project.
- Parties do not want to plan the project assuming there will be issues in dispute.

PREVENTING CLAIMS AND DISPUTES – IS IT POSSIBLE?

WHAT IS THE PROBLEM?

- There is a tendency to try and avoid the issues giving rise to claims.
- Parties take a wait and see approach instead of addressing and resolving the issues.
- There is a lack of proactive management to prevent conflicts from becoming claims.

PREVENTING CLAIMS AND DISPUTES – IS IT POSSIBLE?

WHAT IS THE PROBLEM?

- The reality is that construction is an industry where the structure of the contracts and the data flow create adversarial positions and conflicts.
- There are no perfect contracts or set of drawings or specifications.
- Parties become defensive and position based.
- Instead of being collaborative we become adversarial.

PREVENTING CLAIMS AND DISPUTES – IS IT POSSIBLE?

WHAT IS THE PROBLEM?



Disputes Are Not Black Or White
They Are Shades Of Grey

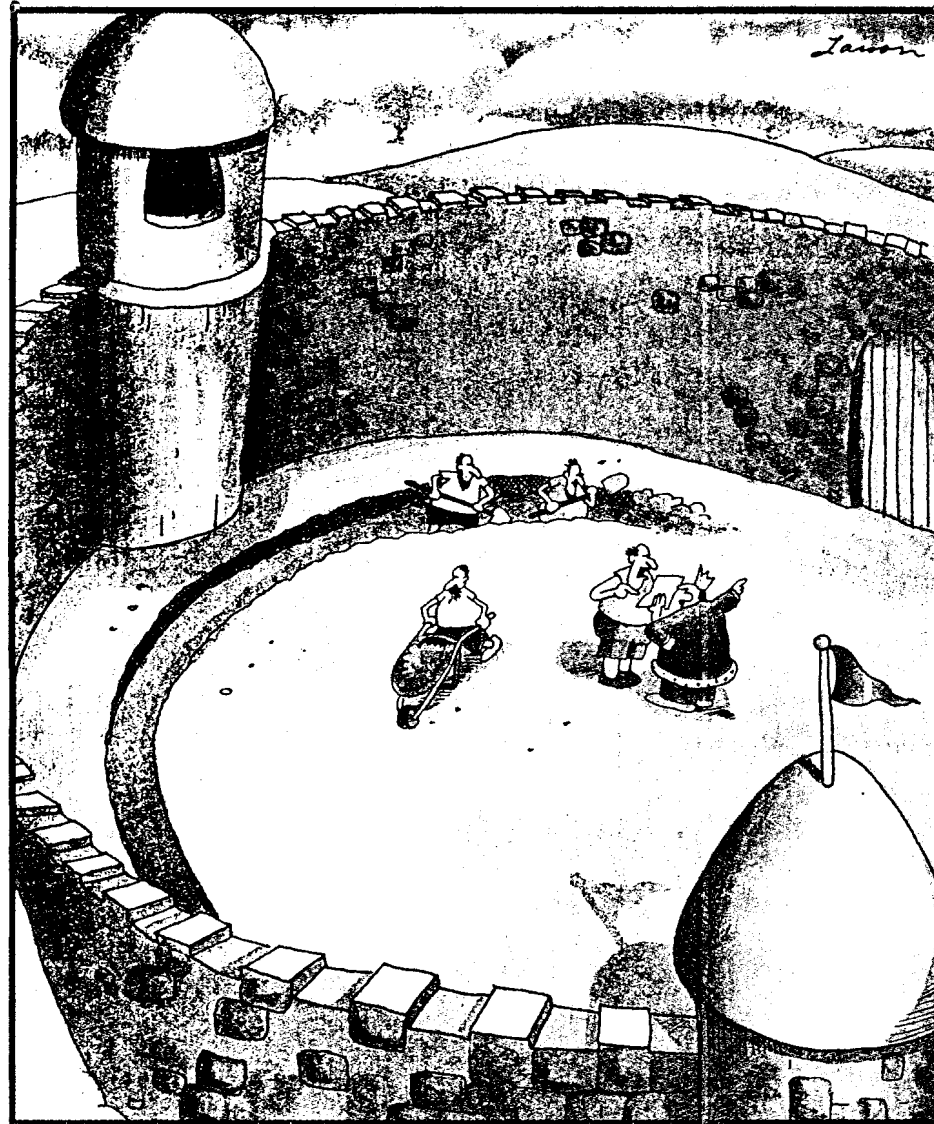
PREVENTING CLAIMS AND DISPUTES – IS IT POSSIBLE?

WHAT IS THE PROBLEM?

- What we can do is understand that all disputes and conflicts do not need to become claims.
- Disputes and potential claims can be managed to resolve them before they turn into post-construction litigation matters.
- The question is not whether conflicts will arise, but how they will be handled when they arise.
- This has led to the creation of the TPN Process.

HISTORY

To understand the TPN process, a bit of history.



Suddenly, a heated exchange took place between the king and the moat contractor.

Roots of the TPN go back to 1975.

- Process started on the I-70 Eisenhower Tunnel in Colorado.
- Due to number of claims on Tunnel 1, a decision was made to add a new process on Tunnel 2.
- The Dispute Review Board (“DRB”) process was implemented.

- The DRB process was to engage ADR professionals at the beginning of Tunnel 2 who would be available on short notice to review claims and render opinions on disputed issues.
- This process grew from 1975 until today and is used worldwide on a wide variety of construction projects.
- In the United States, the DRB process is very common on State DOT and Infrastructure (or “PUC”) projects. Also used on west coast State college system projects.

- The process has been modified slightly from its original name of Dispute *Review* Boards to Dispute *Resolution* Boards (still called “DRB’s”).
- Some other names of similar process: DRA (Dispute Resolution Advisor); DRT (Dispute Resolution Team).
- The process remains fairly consistent that the intent is to resolve disputes quickly in real time, with the project participants, in order to avoid claims and litigation/arbitration to keep the focus on the project.
- The DRB process is a quick reaction approach where the individual or panel stays up to date on the progress of the work and who can be available to render opinions on disputed issues.

- The Third Party Neutral (“TPN”) is the next evolution of the DRB process to have a PROACTIVE, not REACTIVE process.
- The TPN process goal is not to resolve disputes, but instead help the participants *AVOID* disputes and claims.
- This is not theory or a proposed process. It is being used, and it works.



So What Is the Typical Dispute Process Prior to Use of a TPN?

- Direct Negotiations
- Mediation
- Arbitration or Litigation

So Where Does Use of a TPN Fit In?

- Direct Negotiations
- **TPN Process**
- Mediation
- Arbitration or Litigation

- When implemented in 2016, over \$7B in capital improvements and new tool install planned to be performed by 2020.
- New green field construction connecting separate fabrication buildings, reconfiguration of existing fabs, new tools, new wastewater collection and distribution system, new wastewater treatment plant.
- 2 prime contractors.
- Average of approximately 6,000 construction workers on site (peak of over 8,000).

- All being performed in a working fabrication facility running 24/7.
- Work included having to breach into clean spaces and tie into existing infrastructure.
- Work on projects where both contractors working at the same time.
- Work on projects (whether by one contractor or both) had to be interconnected to enable entire facility to operate as one.

WHAT COULD POSSIBLY GO WRONG?

- Organized as construction begins on each project.
- TPN selected and approved by owner and the prime contractors.
- Once selected, TPN has access to all contract and project documents.
- TPN attends regularly scheduled project meetings and site visits to meet with the owner and contractor(s) in meetings such as: huddle, OAC, scheduling, change order management, risk, coordination/integration, project management team (PMT).

- Site walks of the projects are held to observe progress and discuss issues/problems with the construction.
- TPN confers with the owner and contractor representatives and becomes familiar with projects' procedures and participants.
- TPN is kept abreast of job progress and potential disputes.

- The TPN encourages conflict resolution at the job level between the owner and prime contractor(s) before conflicts become disputes.
- The TPN is engaged to provide independent neutral advice, opinions, facilitation, mediation, and arbitration services in order to resolve issues (can include technical, entitlement, quantum, and schedule, that may be related to change orders, potential claims, impacts, delays) in real time to avoid having the projects plagued with post-construction claims and litigation.

- Any issue in conflict can be referred to the TPN by either party for assistance, advice, opinion, recommendation, facilitation, informal mediation – quickly, in real time, and in a manner that allows disputes to be decided so the project can continue with a focus on the work rather than unresolved dispute issues.

- And if the parties still cannot resolve the issue/dispute (with help or informal discussion), they can ask the TPN for a hearing.
- The hearing procedure includes an opportunity for each party to explain its position and an opportunity for the other party to respond.

- After the hearing, the TPN deliberates in private to consider the claims to entitlement and defenses to those claims in light of the relevant contract documents, correspondence, other documentation, and the facts of the dispute.
- The TPN opinion is presented in a written report that includes the reasoning that led to each recommendation.

- The TPN encourages conflict resolution at the job level between the owner and contractor before conflicts become disputes.
- The TPN creates an environment of trust that there will be fair resolution of conflicts.
- The goal is that guidance from the TPN provides the parties with a level of trust that a hearing recommendation is fair and correct under the contract.

So Where Does Use of a TPN Fit In?

- Direct Negotiations
- **TPN Process**
- Mediation
- Arbitration or Litigation

TPN DETAILS ON PROGRESSION OF DISPUTES FROM DIRECT NEGOTIATION TO BINDING RESOLUTION

- Dispute resolution starts with direct discussions at the field level within level of authority.
- Escalation of direct discussions to the project management team or senior management team.
- If not successful, upon the request of either party, the TPN can informally assist the parties in the resolution of disputes and other project issues by acting in the role of a facilitator or mediator. The TPN has discretion in determining the form and method of informal assistance, including engaging in *ex parte* communications with the parties.

TPN DETAILS ON PROGRESSION OF DISPUTES FROM DIRECT NEGOTIATION TO BINDING RESOLUTION

- If direct discussions not successful, and informal assistance not successful or the parties do not want informal assistance, the dispute is then referred to the TPN for a hearing. Either party can request the hearing.

TPN DETAILS ON PROGRESSION OF DISPUTES FROM DIRECT NEGOTIATION TO BINDING RESOLUTION

- Two types of hearing depending on size of issue: Small Claim and Large Claim.
- Both allow for submittal of hearing statements and a hearing presentation by the project team (only project personnel (and not lawyers) participate in the hearing).
- Small Claim process is binding baseball arbitration. By contract, the award is final and binding and the parties waive any right to appeal or pursue any other dispute resolution process.

TPN DETAILS ON PROGRESSION OF DISPUTES FROM DIRECT NEGOTIATION TO BINDING RESOLUTION

- Large Claim process can be a hearing, or the TPN can be a neutral expert (conducting an independent investigation). Either process concludes with a TPN reasoned recommendation.
- The parties' senior management attempt to negotiate a resolution based upon the TPN recommendation (the TPN recommendation in Large Claims is non-binding).
- If negotiation not successful, AAA mediation and then arbitration/litigation.

TPN DETAILS ON PROGRESSION OF DISPUTES FROM DIRECT NEGOTIATION TO BINDING RESOLUTION

- Key provision: waiver of prevailing party attorney fees, costs, experts.
- Key provision: TPN reasoned recommendation admissible in arbitration/litigation.

THE RESULTS

- Engaged at end of 2016 to be on projects starting 2017.
- Over 10 projects now complete and turned over to owner.
- Well over \$7B of construction completed.
- As between owner and prime contractors, no post-construction claims, arbitration, or litigation. Neither owner or prime contractors had to engage outside counsel. All issues resolved by the parties internally.

- Phoenix Children's' Hospital used a similar process (a mixture of DRB and TPN elements – meaning not solely reactive but proactive to “push” dealing with issues).
- \$300M Project.
- At completion, project under budget and 1 month ahead of schedule.
- No claims, outstanding issues, mediation, arbitration, litigation.
- The Process Works!!

WHY DOES THE TPN PROCESS WORK?

- TPN establishes a level of trust that conflict management / resolution and dispute avoidance are fair, reasonable, and beneficial to the project.
- TPN focuses on the needs of the project, not the individual parties.
- Independent, neutral, objective, professional oversight.
- TPN validates that negotiating and resolving outstanding issues are beneficial to the project and not a threat to the participants.

WHY DOES THE TPN PROCESS WORK?

- No other process has the benefit of an independent, experienced ADR professional who visits the site during performance of a project with the purpose of managing disputes and conflict to avoid claims, or litigation.

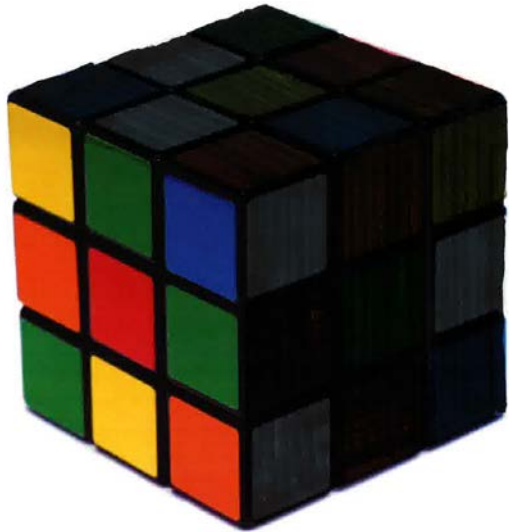
THE PERSPECTIVE OF A DISPUTE

The TPN Perspective

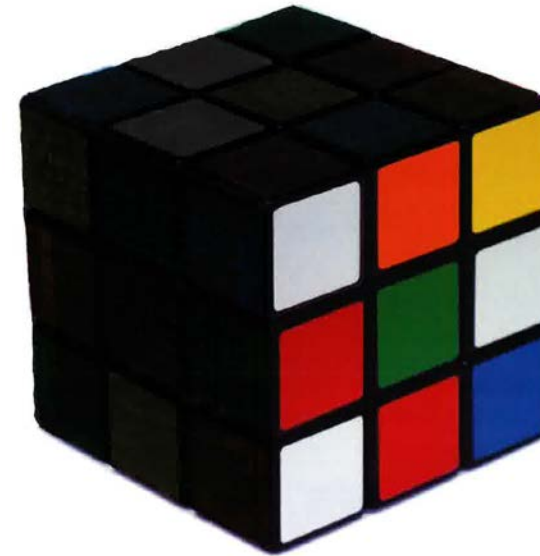


THE PERSPECTIVE OF A DISPUTE

Party A's Perspective

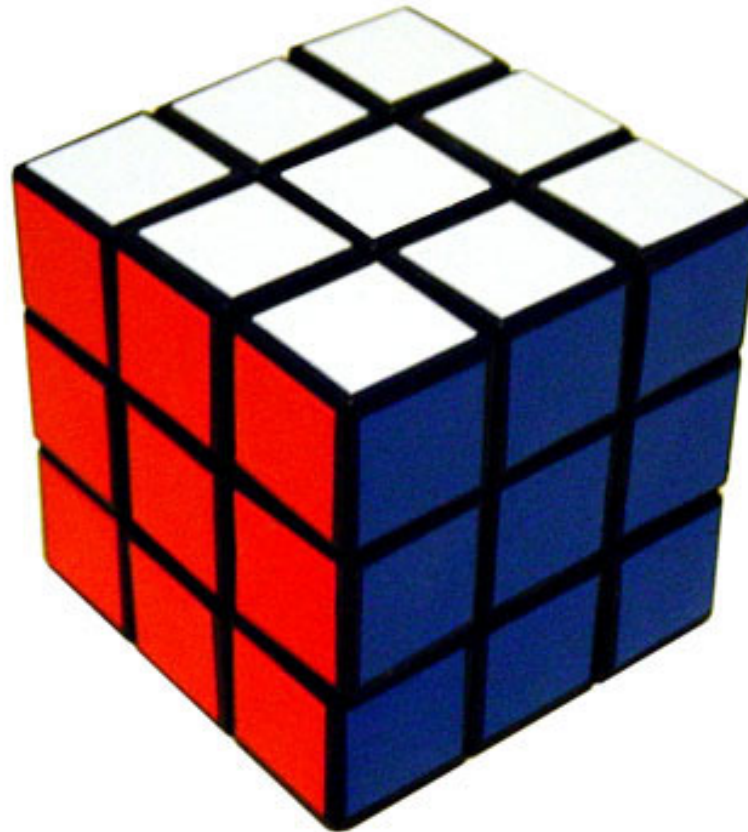


Party B's Perspective



THE PERSPECTIVE OF A DISPUTE

Collaboration Allows for Resolution



THE TPN PROCESS CREATES A CULTURAL CHANGE

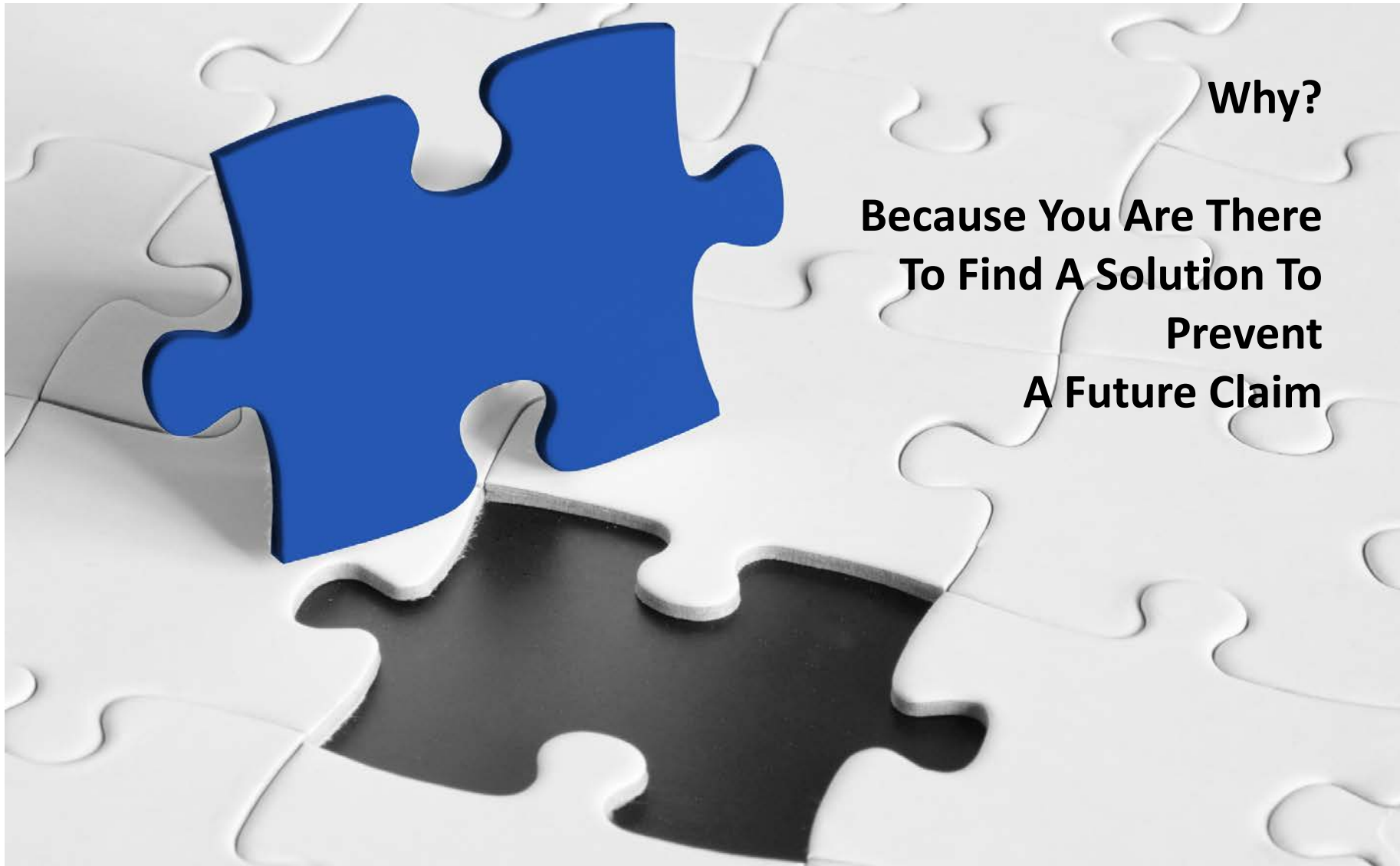
- Focus on what is in the best interest of the project.
- Do not avoid issues.
- Do not lose site of the bigger picture.
- Remember what the cost of a claim is.



THE TPN PROCESS CREATES A CULTURAL CHANGE

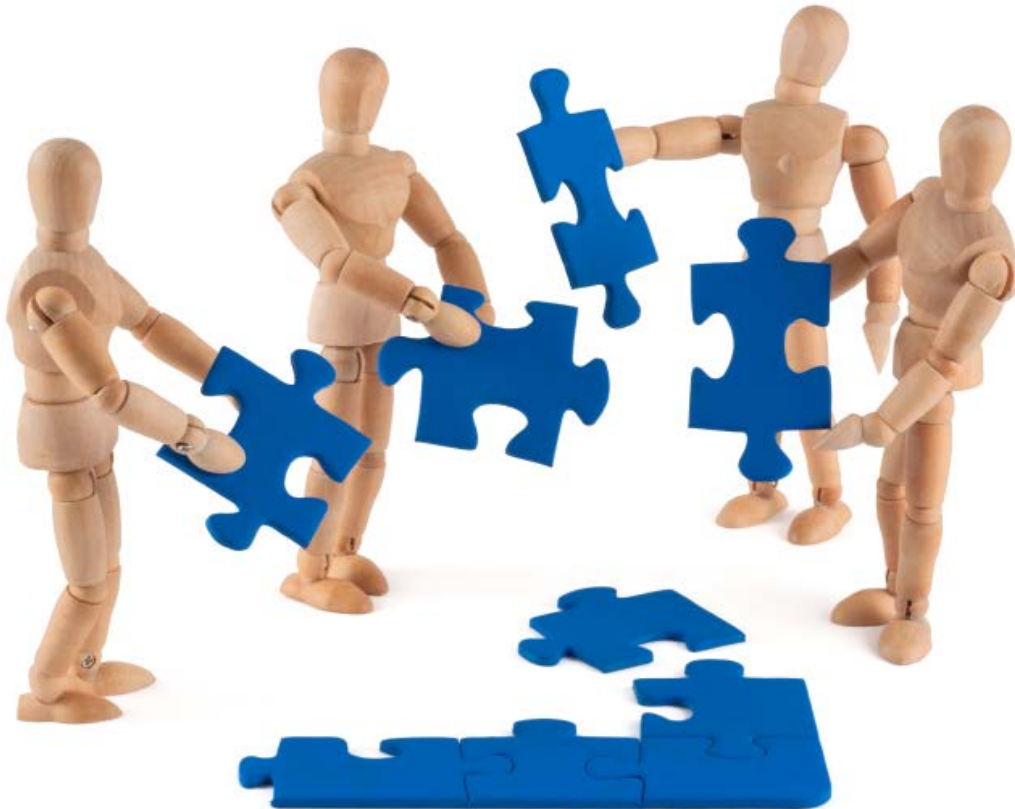


THE TPN PROCESS CREATES A CULTURAL CHANGE



THE TPN PROCESS CREATES A CULTURAL CHANGE

Every Dispute Resolution Builds Success And Trust To Avoid
Future Claims



The Best Interest Of The
Project Must Remain The
Goal.

Assist – Don't Resist.

THE TPN PROCESS CREATES A CULTURAL CHANGE



*"You cannot shake hands
with a closed fist."*
Golda Meir and Indira Gandhi

MORE INFORMATION ON THE TPN PROCESS FOUND AT THE DRBF.

- Process based upon the Dispute Resolution Board Foundation (“DRBF”) guidelines.
- See: <https://www.drb.org>
- The TPN process is the next step to be more proactive rather than reactive.
- Goal is not just to resolve disputes but to avoid them by resolution of issues before becoming disputes.

WHO ELSE CAN BENEFIT FROM THE TPN PROCESS?

- Any Complex and Lengthy Construction Project.
- Any Owner with a Large Capital Improvement Plan.
- Any Owner with Multiple Assets and On-Going Improvements.
- Any Owner and Contractor Who Want to be Proactive to Avoid Disputes.
- Examples of Projects Using the TPN/DRB Process: Roads, Bridges, Infrastructure, Universities, Hospitals, Manufacturing, Industrial.

- Did the TPN process eliminate conflicts, issues, and disputes? NO. While **conflicts are inherent** in construction, **disputes are avoidable**. The question is not whether conflicts will arise, but how they are handled when they arise to keep disputes from becoming post-construction claims.
- No other process has the benefit of an independent/neutral, experienced ADR professional who visits the site during performance of a construction project to resolve issues and avoid disputes in real time.
- No other process has a neutral advocate managing issues to avoid claims and disputes for the benefit of the project – not the participants.

Any questions?



