

# Forum

## The East Side Access Project – Changing the Paradigm for Disputes

by  
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### Introduction

The Metropolitan Transportation authority (“MTA”) operates the largest transit and commuter rail transportation system in North America and one of the largest in the world. The MTA claims that no area of the country is more thoroughly integrated into its public transportation network than the New York City metropolitan region. As a result, the region’s economy and quality of life depends on the smooth daily operation of the MTA public transportation, bridge and tunnel network. The scope of benefits provided by the MTA consists of servicing two billion passengers each year and approximately eight million passengers each weekday ([www.mta.nyc.ny.us/mta/cap2000-2004](http://www.mta.nyc.ny.us/mta/cap2000-2004)).

One of the most important activities

affecting the economy and well-being of this region is advancing the MTA five-year capital program for rebuilding the region’s mass transportation network and improving that network to achieve even greater reliability and enhanced service levels. The first five-year capital program was launched in 1982 in an effort to “reverse a near-complete breakdown of the New York City public transportation system” ([www.mta.nyc.ny.us/mta/cap2000-2004](http://www.mta.nyc.ny.us/mta/cap2000-2004)). Over the period of ten years, a program of “sustained rescue and recovery work was implemented” ([www.mta.nyc.ny.us/mta/cap2000-2004](http://www.mta.nyc.ny.us/mta/cap2000-2004)).

Necessary investments concentrated on the restoration and maintenance of the existing MTA network. As a result of these efforts, MTA agencies made major advances in bringing substantial portions of their assets into a state-of-good-

*(Continued on page 6)*

### In this issue of the *Forum*

THE EAST SIDE ACCESS PROJECT – CHANGING THE PARADIGM FOR DISPUTES	1
AL MATHEWS AWARD NOMINATION INFORMATION	5
OTHER NEWS	8
BOARD OF DIRECTORS BUSINESS	14
NEW FOUNDATION MEMBERS	18

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*(Continued from page 6)*

Branch and Main Line to a new 8 track, four-platform, LIRR terminal beneath GCT's lower level. It will involve more than 20,000 linear feet of new hard-rock and soft-ground tunnels between Long Island City and Manhattan, including outfitting the lower-level of the existing 63<sup>rd</sup> Street-Queens Tunnel, which is part of the 63<sup>rd</sup> Street Subway line. The project also will involve a major reconfiguration of the west side of GCT's lower track level, construct a new passenger concourse for LIRR passengers, new access points at GCT, reconfiguration of New York City Transit's Lexington Avenue subway station to accommodate increased passenger traffic, a new commuter rail station at Sunnyside Yard in Long Island City, and a new railcar storage yard in Queens, as well as traction power, signals, and communications systems ([www.mta.nyc.ny.us/planning/esas](http://www.mta.nyc.ny.us/planning/esas)).

Two engineering options were examined for the Manhattan alignment. Engineering Option 1 has been shelved and Engineering Option 2, which was the preferred option, will create a new deeper terminal beneath GCT's lower level tracks. Several design schemes for the new platforms and tracks are currently under design review and options are being explored. The net result, each platform will have stairs and escalators rising to four mezzanine-level cross-passageways above and perpendicular to the platforms. From these common passageways, stairs and escalators will rise to a large concourse for the LIRR in the area currently occupied by Metro-North's Madison Yard.

The MTA selected the joint venture of Bechtel Infrastructure Inc./URS, Inc. ("Bechtel/URS") as the project manager for this project in November 1998. The duration of the construction project is 2000 to 2010. The Bechtel/URS program management team serves as the LIRR's primary day-to-

day manager and will supervise the Tunnel Engineering and Systems Engineering Consultants as well as the Environmental Consultant. The program management team also recommends approaches to all design and construction requirements, promotes utilization of the most cost-effective design, conducts value engineering and constructibility reviews, prepares consultant scopes of work, manages construction and force account activities, and manage the project's budget and schedule.

### Current Status

A Major Investment Study on the East Side Access project was completed in March 1998. In June 1998, the New York Metropolitan Transportation Council (NYMTC), the Metropolitan Planning Organization, passed a resolution endorsing the recommended extension of the LIRR into Grand Central Terminal. In September 1998, Federal Transit Administration approved preliminary engineering and preparation of an Environmental Impact Statement for the project which detailed the possible environmental effects of having LIRR trains into GCT. The Draft Environmental Impact Statement was approved in May 2000; the Final Environmental Impact Statement approved in March 2001. In May 2001 the MTA received a Record of Decision from the Federal government which concluded that the East Side Access project was a worthy project and finalized the environmental mitigation effort to be required of the project. These approvals in addition to others will allow Federal funds to be released. These Federal funds are pending but letters of "No Prejudice" have been received by the MTA which allows the final design to go forward.

### Shifting the Dispute Paradigm

All construction projects have conflicts, (Augustine, 1993; Clegg, 1992; Fenn, et al, 1997; Kane, 1992; McManamy, 1994; Stanley, 1989) but not all conflicts escalate into disputes. Many people confuse the terms of conflict and dispute and some

*(Continued on page 9)*

*(Continued from page 1)*

repair. The capital program for 1995-1999 period has been an astounding achievement and by the end of 1999 had commenced close to \$12 billion of work critical for the continued operation of MTA services. Including all of the investments made since 1982, approximately \$35 billion of work was completed or underway by the end of 2000 ([www.mta.nyc.ny.us/mta/cap2000-2004](http://www.mta.nyc.ny.us/mta/cap2000-2004)).

In the 1990's the MTA's primary focus was the restoration of the system, but it had also enacted improvements that enhanced rider services. In addition in 1996, under New York's Governor George E. Pataki's Master Links program, the MTA began a planning effort to improve the regional transportation system. In this effort, the MTA agencies are cooperating with New York City and the Port Authority of New York and New Jersey the purpose of which is to establish a unified regional transportation system that will link important business centers, communities and airports with each other and the rest of the region. This effort focused on several projects: to provide Long Island commuters with access to the east side of Manhattan via Grand Central Terminal; to improve subway services on the east side of Manhattan with the construction of a new service along Second Avenue; to provide Metro-North riders direct access to the west side of Manhattan via Penn Station; and to provide direct rail access to LaGuardia and JFK airports ([www.mta.nyc.ny.us/mta/cap2000-2004](http://www.mta.nyc.ny.us/mta/cap2000-2004)). The MTA's Capital Program for the 2000-2004 period totals over \$17 billion. Today, the final designs for the LIRR access to Grand Central Terminal are underway ([www.mta.nyc.ny.us/mta/cap2000-2004](http://www.mta.nyc.ny.us/mta/cap2000-2004)).

**East Side Access Project**

The East Side Access project will improve access to Manhattan's East Side for commuters in the Long Island Transportation Corridor, which includes Manhattan, Brooklyn, Queens, and Nassau and Suffolk counties. The benefits of transportation improvements include expanded seat-

ing capacity on the Long Island Rail Road ("LIRR") system and a reduced number of standees on LIRR trains during peak hours, less train congestion at New York's Pennsylvania Station ("Penn Station") and a more balanced use of Manhattan's railroad terminals, and significantly reduced congestion on the regional highway network and East River crossings resulting in improved air quality ([www.mta.nyc.ny.us/planning/esas/3description.htm](http://www.mta.nyc.ny.us/planning/esas/3description.htm)).

The entire East Side Access ("ESA") project is the largest single construction program undertaken by the MTA in its entire history. The total capital construction cost of this project is \$3.7 billion. The tunnel engineering portion encompasses the construction of new soft-ground tunnels in Queens that will connect to the existing 63<sup>rd</sup> Street tunnel, and new hard-rock tunnels under Manhattan's west side leading to Grand Central Terminal, as well as a new station in Sunnyside, Queens and new yards and maintenance facilities. Bechtel/URS was engaged to assist the MTA in achieving its goal. Bechtel/URS's work involves program management of planning, preliminary and final design as well as construction phase services ([www.mta.nyc.ny.us/planning/esas/3description.htm](http://www.mta.nyc.ny.us/planning/esas/3description.htm)).

The LIRR is the busiest commuter railroad system in the country operating a train every 150 seconds into Penn Station, however, its only entry into Manhattan is Penn Station on the west side. Penn Station has reached its capacity and is constrained for future growth. The East Side Access project will ease congestion at Penn Station by offering direct service between Long Island and east Midtown Manhattan. Early studies determined that over one-half of the LIRR's customers work within Grand Central Terminal (GCT) area. Providing service to the terminal will save nearly 100,000 commuters more than 30 minutes commuting time each day ([www.mta.nyc.ny.us/planning/esas](http://www.mta.nyc.ny.us/planning/esas)).

The ESA project will be a complex construction effort. The overall route will connect both LIRR's Port Washington

*(Continued on page 7)*

**Construction  
Dispute Review  
Board Manual by  
Matyas, Mathews,  
Smith and Sperry**

An essential reference for all construction professionals, this book shows you how to use Dispute Review Boards to solve construction disputes on the job, avoid claims and thereby reduce project costs. This definitive manual provides all the procedures required to employ the DRB process, and fully explains the benefits and pitfalls of DRBs. Whether you're an owner, contractor, construction manager, attorney or construction lender, this time- and money-saving sourcebook offers you the most complete guidance now available on the successful establishment and practice of a DRB during construction.

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order.**

**New Country Representatives for India and Australia and New Zealand Announced**

Board member and International Committee chair Peter Chapman has announced selection of new Country Representatives for India and Australia and New Zealand.

The new representative for India is Shri K. Subramanian. He replaces Jim Neville who has taken a new position in Paris.

Norman Reich has been named to replace T.J. "Max" McDougall as Country Representative for Australia and New Zealand.

The DRBF thanks Jim and Max for their hard work on behalf of the Foundation and wishes each of them well in their new endeavors. □

consider them one in the same. They are not (Harmon, 2001). A conflict is defined a legitimate disagreement between the parties and includes, but is not limited to, additional or extra work, specification requirements disagreeing with information contained on the contract drawings, lack of information causing project impacts, the proper method of performing an item of work, etc. A dispute is the escalation of a conflict to an emotional level and involves irrational behavior, which deteriorates the working relationship between the parties and inhibits the resolution of the conflict to the satisfaction of both parties.

Unresolved disputes occurring during the course of construction can result in significant out of pocket costs to both the contractor and owner in terms of legal fees, expert witness costs, and consultant fees. Other hidden financial costs result to both parties as well. These costs are the diversion of manpower from new work to prepare for depositions, bring the attorney and/or consultant up to speed concerning the problems of the project and nature of the work, and/or to be witnesses at the trial or arbitration. Moreover, there is the emotional cost in the loss of the relationship between the parties, as well as the price escalation of the conflict has on the construction process itself, in terms of job satisfaction by employees of both parties as well as the progress of the project itself.

Large complex projects such as the individual contracts being let for the ESA project, and in particular, the tunneling portions of the work can range in duration from 2 to 4 years or more, involve a number of significant resources from both the perspective of the Owner and the contractor such as equipment, material, labor, risk, and costs. Therefore, any viable means to reduce the incidence of conflicts or disputes should have a positive effect on the outcome of the project, in terms of actual and emotional costs. Moreover, unresolved conflicts and their resulting legal and consulting fees add no value to the project itself. Unfortunately, these costs are generally unrecoverable or at

best, though seldom partially recoverable.

**Dispute Review Board for the ESA**

One main preventative technique that the MTA considered for the ESA Project is the use of a contractually mandated Dispute Review Board (DRB). The DRB is a vehicle of the contract. Based on the published East Side Access General Terms & Conditions, a three-member panel of experienced industry neutrals will be formed by the parties at the start of each major construction contract, and will be kept informed of the construction process and ongoing issues via period joint meetings with the contractor and MTA representatives. The DRB's formation, make-up, and operation are detailed in the specifications. The DRB is empowered to provide recommendations on disputes brought to it by the parties.

Currently the MTA anticipates using DRBs on 14 of its contracts. These contracts will cover such work as major civil and structural work, including soft ground and hard rock tunnels, open cut excavation, as well as ventilation plants and structures. The Arch Street Yard Design/Build project, a negotiated procurement contract, also contains the DRB provisions. Proposals are currently being reviewed and considered for this work.

As any experienced industry professional will admit, the reality is that most disputes are not open-and-shut cases. Having a sitting DRB on these contracts for such vital work encourages the parties to recognize that legitimate differences of opinion will naturally arise during the course of any business transaction, particularly one that involves as many parties and complexities as does the East Side Access construction. In one sense, the presence of a venerable DRB is intended to encourage the parties to develop an interest-based, rather than position-based discussion to resolve their differences. Moreover, the presence of a DRB will encourage the MTA and contractors to change their philosophy concerning disagreements from adversarial to cooperative. The MTA, in

*(Continued on page 10)*

*(Continued from page 9)*

its decision to choose the DRB process demonstrates that it emphasizes open communication, early identification of potential problems, and the timely resolution of these problems. The more the parties believe that conflicts can be resolved successfully, the greater the chance in pursuing resolution as a goal (Mayer, 2000).

By shifting from the current conflict resolution paradigm in New York City public infrastructure construction, which is recognized in the industry as fostering an adversarial dispute stance, to a new mutually cooperative paradigm utilizing the DRB process, the MTA should realize a reduction in the number and costs of disputes during the construction process. This should allow both the MTA and contractor's staff to concentrate on achieving the goal of a project delivered on time and within anticipated costs rather than taking hard and fast positions concerning disputes.

In addition, with a respected DRB panel, the parties will feel obligated to appear reasonable and responsible and will not put forth frivolous or marginal claims because they are more concerned about how the DRB panel of their choosing is evaluating them than how the opponent is (Denning 1993; Greenhalgh, 1999).

With the ESA project contracts, the DRB is not just a form of alternate dispute resolution, but it will function as a vehicle to avoiding disputes, not merely resolving them. The decisions of the DRB will not be binding on the parties. Furthermore, DRB decisions for these projects will not be admissible in any litigation should the dispute remain unresolved. Nevertheless, the combined wisdom of three figures respected in the industry will be compelling and may allow both parties to see their positions as others within the construction community will see them. With the historically significant success of other DRB projects, it is likely that the ESA project will realize the same success.

Nevertheless, having the DRB provision in the ESA contracts is not a panacea; it does not guarantee that there will be no

changes, claims, or conflicts, which are not resolved by the end of the project. Moreover, it does not require the parties give up any rights nor does it render any contractual provision meaningless. The preliminary contract changes and claims procedures will still be adhered to. Only when disputes remain unresolved after the contract claims procedure are the parties permitted to be brought to the DRB. If the parties chose not to accept the DRB's recommendation, whatever judicial relief that was available in the contract, is still available.

The DRB process in the ESA projects is a dispute resolution methodology which requires real efforts on the part of the parties to change their mind-set from the traditional us against them attitude to one of the win/win outcome of a collaborative problem solving approach. It can bring the issues of a conflict into better focus and refocus the lens through which the parties view the conflict.

### **Conclusion**

Problems and disagreements are an inherent part of all construction projects. When Owner, contractors, and architect/engineers do not deal effectively and directly with these disputes, they often escalate into major conflicts. These major conflicts are counterproductive to the progress of the project. Unresolved disputes become costly and often force the contractor to finance the project. These disputes also have long term negative effects. The MTA is taking an unprecedented step towards shifting this paradigm and working away from a us versus them mentality to a more collaborative, even handed dispute resolution approach utilizing the DRB process.

Alternate Dispute Resolution ("ADR") in the construction industry (e.g., arbitration and mediation) has been around for decades. Unfortunately, what individuals fail to realize is that ADR is not a substitute for some basic dispute resolution techniques such as effective and timely communication, timely answers to queries, clear contract documents, competent and consistent construction management, and the like which should

*(Continued on page 12)*

(Continued from page 10)

be utilized during the course of the project. Moreover, these traditional ADR mechanisms are not timely in that they are generally utilized at or after project completion rather than contemporaneous with the dispute itself. Therefore, they do not address the party's needs of resolving the conflict, maintain the relationship, and keep the project moving.

The EAS project is a high profile project. NYC and vicinity is known throughout the contracting industry as a difficult work environment due to crowding, unknown subsurface conditions, etc. The MTA is testing the DRB process on this important project. Inasmuch as unresolved conflicts deteriorate the parties working relationship and create emotion and stress as well as financial costs, a contemporaneous dispute resolution process serves the interests of all the main parties (contractor, MTA and subsidiaries) as well as secondary parties (Federal government, etc). Projects which are not completed on time generally costs addition money not only in project costs, but also ancillary costs to resolve the dispute. Ancillary costs paid to attorneys, consultants, expert witnesses, etc. are an unrecoverable cost of a dispute. Money spent on ancillary costs to resolve the dispute only benefit those who are in the industry to resolve disputes, but do not add one cent of value to the project itself. Money spent on attorneys, etc. to resolve a dispute is money not available for capital improvements that serve the public as a whole. By using the DRB process to resolve disputes in a fair and even handed manner, the MTA is seeking to add value to its projects to benefit the traveling public.

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(Continued on page 13)