

DISPUTE BOARDS IN THE UNITED STATES – AN OWNER’S PERSPECTIVE

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1. Personal Experience

a. My history in a nutshell.

I am an Assistant County Attorney for Broward County, Florida, with primary responsibility for the legal support for contracts and contract administration, for design and construction contracts for public projects. Prior to this engagement, for over 33 years I held a similar position in the Miami-Dade County Attorney’s office, just south of Broward County. In short, I am a government lawyer.

In Florida, counties are responsible for building and operating a significant portion of local infrastructure. During my tenure, Miami-Dade County built local roads and bridges, several performing arts centers and museums, light and heavy rail transit facilities, water and sewer transmission and treatment facilities, a zoo, several stadiums and other parks facilities, expanded an international airport and seaport, and built County Hall administrative office tower. I was involved in it all.

b. My first two dispute boards.

I used a Dispute Board for the first time about 10 years ago on a significant performing arts center project in Miami-Dade County. The project was a jewel box – no two structural elements had the same dimensions; it consisted of two large performance halls seating over 2500, a small performance space seating about 200, administrative offices, and a state-of-the-art back-of-house. It consisted of two separate buildings which spanned a Federal highway, and had a construction cost of roughly \$450 million US. The County selected a Construction Manager at Risk to build the project, and during contract negotiations, the Construction Manager suggested a dispute board as a way to minimize disputes that might delay construction activity; my client agreed.

The County staff was generally familiar with the concept of Dispute Boards, because at that time, the State of Florida Department of Transportation had already instituted the practice of requiring Dispute Boards on all of its contracts, but no one within the County, including me, had any actual direct experience with dispute boards. I found some model dispute board contract provisions online, and modified them. As a primary drafter of the construction management contract, I made some

poor choices in the structuring of the Dispute Board. The process was so painful that the parties agreed to delete the Dispute Board by change order.

When that project ended, I began to educate myself about best practices in the operation of dispute boards.

My second project using a Dispute Board was a completion project for an international terminal expansion at Miami International Airport North Terminal, which had a construction value of just under \$2 billion US. That project was a very challenging project to install. Initially the project was being developed by a tenant airline, but several years into the project the project stalled, and County and its developer-tenant airline agreed that the County would take over the completion of the project, which was then about 30% constructed. The airline terminated its construction manager, who in turn terminated all the trade contracts, and the County procured a new construction manager to complete the project. Not only were there incomplete and deficient construction conditions, but the project was performed in phases in a fully operational airport, with various unknown existing conditions both above and below ground. The project needed to interface with other prime contracts that impacted the schedule and progress of the work, including a design-build baggage handling system and an automated people mover. The North Terminal project presented enormous challenges.

Yet, the North Terminal project finished with no claims, no mediations, no arbitrations, and no litigation. In 2011 the project won the Gold award from the Construction Owners Association of America for exemplary contract administration. After its experience with the North Terminal Project, the County staff decided to include Dispute Board in other projects.

2. What I Learned From My First Dispute Board

In drafting the Dispute Board specification and operating procedures for the Performing Arts Center, I made a number of structural mistakes. The impact of those errors was compounded by the flawed implementation of the Board process.

a. Flawed structure for the dispute board process.

The Performing Arts Center Dispute Board process was structured in a way that had mistaken underlying assumptions. The process required a demand for compensation or performance to be formally presented to the other party and rejected before the issue could be discussed with the board. Then the parties had to mediate before the matter, which had now hardened into a dispute, before it could be considered by the Dispute Board. Then the challenging party had to present a formal position paper to the Dispute Board, and the responding party had to respond with a formal submission. Then the Board could address the dispute for the first time.

The parties had already assumed adversarial positions by the time mediation commenced. Mediation was always a failure, because the Dispute Board meeting followed closely upon its heels, and there was no motivation from either party to modify their position. The dispute presented to the Dispute Board was always stale and festering, having been a source of irritation to both parties for months before the Dispute Board first heard about it.

No “real-time” intervention by the Dispute Board was possible under this structure. The structure created by the Dispute Board specification was simply too rigid and unyielding to produce optimal benefits.

b. Flawed implementation of a poor process.

The Performing Arts Center Dispute Board members were not empanelled for months after the contract was awarded, because the parties could not agree on the identity of the panel members. By that time, the entire pre-construction phase had passed, the underground structures were in place, and the building was above the first story before the Dispute Board met for its initial introduction to the project. Any opportunity to get ahead of issues with the Dispute Board’s assistance was squandered.

Attorneys for both parties choreographed all presentations to the Dispute Board, and filtered information furnished to the Dispute Board members. Massive submissions to the board, filling several binders, were offered before each monthly meeting. Rather than hearing from the actual field personnel with personal knowledge, paid consultants, who had no direct contact with the project, but who had construction conclusions from the project records, made elaborate presentations. Each monthly Dispute Board meeting contained a formal hearing and became, in effect, an monthly arbitration for a single issue, or for a handful of issues. Anticipating a painful experience from a Dispute Board meeting, the parties started cancelling Dispute Board meetings. Issues piled up and compounded without reaching resolution.

The Dispute Board found itself looking backwards at the job, and had little time or opportunity to impact future events.

The one element of Dispute Board activity that we did properly was to select Board members who were trained, experienced and had the appropriate demeanor and technical skills to evaluate project situations.

3. What Changed on My Second Dispute Board

a. No lawyers invited.

The Airport specification provides that attorneys are not anticipated to attend Dispute Board meetings. From the start through completion, no attorney

representing either the owner or the construction manager ever attended a Dispute Board meeting. No formal dispute hearings were ever requested or held.

The Dispute Board was maintained as a project management tool, not reserved as a weapon of mass destruction.

b. Addressed today's news, not yesterday's history.

The project team (owner, designer and contractor) established the agenda for the dispute board meetings, which mirrored the current weekly project meeting agenda. Eventually, the project executives arranged to meet in advance of a scheduled Dispute Board meeting, and worked out their issues, so they could advise the Dispute Board that there were no pending disputes and the project was progressing satisfactorily. Dispute Board members acted as a sounding board for proposed solutions to accommodate or work around unexpected difficulties encountered on site.

4. Why do Owners Use Dispute Boards?

My current employer, Broward County, has determined to include Dispute Boards on its complex or sensitive projects. It hopes that implementing Dispute Boards will allow it (i) to avoid claims, particularly massive claims at the end of jobs asserting difficulties from the early project stages, (ii) to minimize impacts on the project schedule due to unforeseen conditions or unanticipated late changes in the scope of the work, and (iii) to maintain predictability over the use of available funds.

Often when a staff member of an Owner directly experiences litigation over a prior construction project, that staff person will encourage the Owner to include a Dispute Board in subsequent projects. Whether the Owner won or lost the prior litigation is immaterial; the staff is eager to avoid further litigation. In order to advocate for inclusion of a Dispute Board, a public Owner's staff person must be comfortable that the Dispute Board is within the boundaries of best construction practices and that it would be a prudent expenditure of public dollars. There are a number of qualities that Dispute Boards offer that are attractive to Owners:

- Unlike mediation, arbitration, conciliation, litigation, standing neutral, and early case evaluation services, Dispute Boards offer the opportunity to change future behavior on a job. Neither mediation nor arbitration offers the parties this benefit, because these processes evaluate past behavior; in contrast, Dispute Boards offer options for future action.
- Unlike traditional "partnering" arrangements, Dispute Boards can convert into arbitration panels, either binding or non-binding, and so,

are more effective than traditional partnering programs in eliciting cooperation among the parties.

- Non-parties can participate in Dispute Board meetings. These participants can include subcontractors, tenants and lenders. Participation by these stakeholders in the Dispute Board process enables consensus to be reached with all interested parties in a single forum.
- In the context of a hierarchical bureaucracy (which can impose oversight by elected officials, administrative supervisors, auditors, and outside funding agencies) a Dispute Board offers independent, neutral and competent validation of decisions by the Owner's staff to pay for extra work during the progress of the project.
- Projects with Dispute Boards have a jobsite ambiance that is more collegial and less adversarial than traditional projects. No Owner wants to have the job that the contractor hates to work on.
- Surprise claims are almost eliminated. Job conditions are discussed regularly, and a Contractor's failure to raise a significant job condition at Dispute Board meetings can lead to a waiver or abandonment of claims arising from prior impacts it failed to disclose to the Owner.

Consideration of these factors can convince an Owner who has no experience with Dispute Boards to try a "pilot" project.

5. Growth of Dispute Boards in the USA – Not Your Father's Board

The DRBF is aware of several thousand projects that used Dispute Boards in the United States since 1975. The prevalence of Dispute Boards is not evenly distributed across the United States, but varies widely from region to region, and state to state. In general, the use of boards began with tunnel projects, grew to include road contracts, and is now often also used in public building ("Vertical") projects, including airport terminals, hospitals, performing arts centers, power generation and university facilities. While these projects initially included reactive boards, whose primary objective was to provide rough justice on an expedited and inexpensive basis, the growing trend in the United States is toward proactive Dispute Boards whose primary purpose is to mitigate and to avoid disputes altogether.

The University of Washington, an early adopter of Dispute Boards in vertical construction projects, reports that during the past twenty years, it has completed approximately 60 projects having an aggregate dollar value of \$6 billion US that

utilized Dispute Boards. During that time, it experienced only two formal dispute hearings, and four informal dispute hearings, no arbitration and no litigation in its capital development program.

Such anecdotal evidence from satisfied owners is a strong motivator to other owners to use Dispute Boards on their planned projects.