The Dispute Review Board

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The Boston Federal Courthouse: Could This Be a Model for DRBs in Building Construction?

by
Blasdel A. Reardon

"For the Dispute Review Board (DRB), eight of the stakeholders were selected. These persons were all executives with the design or contracting firms."

At the DRBF Conference in Seattle in 1999, questions were raised as to how the use of DRBs could be substantially expanded within building (vertical) construction projects. In response, at the recent DRBF Conference in Boston, five panelists explained the use of a DRB at the Boston Federal Courthouse (FCH) construction from 1994 to 1997.

Instead of just reciting the mechanics of DRB selection and detailed accounts of disputes at the FCH project, the panel presentation described the evolution of the entire ADR process used at FCH and then attempted to answer a number of question. Is the Boston Federal Courthouse a model for dispute avoidance and resolution on future building construction--public or private? If so, what criteria should be used for selecting projects for a similar ADR process, and how should the DRB concept be marketed to building owners and constructors? As will be shown, several new questions about the composition of DRBs were raised following this very interesting presentation.

For those readers not familiar with the Boston Federal Courthouse, it is a massive ten-story red brick structure facing Boston's rapidly changing waterfront. The project was controversial in many respects, most notably cost, design, and location. Owned by the General Services Administration (GSA), the FCH had an estimated construction budget of approximately $160 million, while ostensibly containing only eleven federal courtrooms. In reality, there are 2500 rooms in the structure including daytime holding cells, judges' chambers, judicial staff offices, administrative offices, along with

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public amenities not usually found in judicial buildings and their surroundings. The design of the FCH is not only striking and magnificent, but also unique. The former characteristics refer primarily to its very large curved glass wall facing the harbor. Its uniqueness refers to the open and welcoming interior (within security considerations) that differentiates this courthouse from most others wherein justice is meted out away from the public. In this regard, the GSA certainly deferred to the wishes of the Federal Judiciary to return "justice" to public view as. opposed to seclusion. And finally as to location, the FCH "broke new ground" by being so far away from downtown Boston at the entrance to what is now the rapidly developing South Boston Seaport District.

Surrounded by all of-the foregoing controversy, there was intense determination by GSA and the Federal Judiciary to build the FCH within budget, finish it on time, and to avoid prolonged and embarrassing construction disputes. This is where the DRDF conference panelists began their presentation. (All of the panelists were intimately involved in the FCH project either as owner, designer, construction manager, or subcontractor.)

Consistent with the modus operandi of GSA and strongly supported by the Construction Quality Manager --Parsons/ Brinckerhoff (PBCS) and also advocated by the awarded General Contractor George Hyman Company (nka Clark Construction), partnering was prescribed for the entire design/construction team. Unlike many projects where partnering is prescribed and then conducted as "window dressing", the commitment of GSA, PBCS, and Clark was so strong that it continued throughout the life of the FCH project in two ways. Led by the renowned partnering facilitator Ralph J. Stephenson, there were three "initial" partnering sessions for the construction team. The first of these in late 1994 included a Federal Judge and representatives of GSA, PBCS, the designers, the General Contractor, and the major sub-contractors for a two-day session. Out of this a partnering charter was created. Six months later, a second partnering session was held which included the additional sub-contractors selected to date. The charter was updated accordingly. Still, six months later the last of the all-day partnering sessions was held to include the remaining subcontractors and major suppliers. Ultimately, the FCH partnering charter contained twenty-eight points of agreement, several of which dealt with objectives such as dispute avoidance and resolution in a timely, fair, cost effective way. Another charter objective dealt with open communications among the project stakeholders, as the FCH team referred to themselves. . Needless to say, this partnering arrangement and commitment was new to most of these stakeholders.

When pressed to identify specific means to achieve the dispute avoidance/ resolution and communications objectives within the partnering charter, the stakeholders, with the guidance of facilitator Stephenson, chose several techniques. The first was a five-step model for resolving disputes; the second was a Dispute Review Board to oversee the entire ADR process; the third was a joint monthly meeting of the executives of all the firms involved: i.e. GSA, PBCS, designers, Clark, and the subcontractors to assess the progress of the FCH project. With regard to the five-step dispute resolution model, the first three steps relied upon the stakeholders themselves probably using the motto, " the deal I make for myself is better than the deal which others make for me". Only the fifth and final step relied upon lawyers. The intervening fourth step placed the resolution of a dispute solely in the hands of the GSA Contracting Officer (CO). In written form, the dispute resolution model looked like this:

1) Settle the dispute in the field
2) Settle the dispute in the office
3) Settle the dispute by mediation
4) Let the CO decide
5) Go to Washington DC and settle the dispute in Federal Claims Court

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TO CONTACT THE DRBF OFFICE

Dispute Review Board Foundation
6100 Southcenter Blvd., Suite 115
Seattle, WA 98188-2441

206-248-6156
206-248-6453 (FAX)
888-523-5208 Toll free (US only)
E-mail: home@ drb.org.

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The first four steps are non-adversarial whereas the fifth step is obviously adversarial. The use of a Dispute Review Board and the Joint Monthly Executive Progress meetings were closely related techniques that grew out of the partnering charter. For the Dispute Review Board (DRB), eight of the stakeholders were selected. These persons were all executives with the design or contracting firms. PBCS guided this selection, and I can only assume that an assessment of one's ability to be **both** objective and knowledgeable in the FCH project must have figured heavily in the selection. As will be seen, the dual purpose of this internal DRB was to diffuse smoldering problems that could flame into a dispute and to provide a source of mediators for those formal disputes which could not be settled by the disputants alone. At the monthly executive progress meetings wherein all facets of the FCH project were discussed and communicated as appropriate, the DRB panelists were regularly asked for their assessment of any potential or impending situations which could cause a problem or claim at a future date.

The decision to conclude that an issue could not be resolved at step 2 according to the model above rested ultimately with PBCS. This was indeed a delicate balance between acknowledging too early that the parties could not resolve the matter by themselves or letting the matter fester so long as to cause acrimony among the parties or interfere with the construction progress. Concurrent with this decision to go to Step 3 (mediation), the PBCS Executive proposed to all of the disputants a mediation team comprised of three of the eight DRB panelists. With agreement of all disputants, the mediators convened the disputants and proceeded to work with them over a period of weeks or months to find a solution if possible. By the end of the FCH project, only six disputes reached the mediation step in the dispute resolution process and none went further. As a subcontractor, DRB panelist, and mediator on two of the disputes, I often wondered if the notion of peer DRB panelists and mediators promoted the desire by the disputants to settle potential claims themselves rather than face their peers whom they learned could be very impartial and thorough in their discovery and mediation responsibilities.

When preparing this presentation for the DRBF Conference in Boston, one of the panelists (who himself was a subcontractor, DRB member, mediator, **and** later a disputant) interviewed seven other disputants and/or DRB panelists to gain their reactions to the FCH dispute avoidance and resolution practices described previously. While not unanimous in their responses, there was general agreement that the process was fair, timely, and cost effective, and desirable on future projects. For most of the participants the FCH was their first personal encounter with partnering, Dispute Review Boards, and mediation in its true participatory form, wherein the dispute is viewed by disputants "from each side of the table". The one common reaction to the FCH process was a desire for quantitative feedback following each of the six mediations. Translated, this means "how much did each party ultimately pay or give up monetarily?"

So how did the FCH project conclude? Thanks to many factors, including its dispute management model described previously, the Boston Federal Courthouse was completed with a superb safety record, only a few weeks behind the original schedule, five percent above the $160 million budget, and with only six formal disputes, none of which was litigated. Counting the direct costs of the partnering effort, and the "free" (donated) time of the project stakeholders, DRB members and mediators, the DRBF panelists estimated that the entire use of the foregoing dispute model was worth $250,000 to $400,000 to the Boston Federal Courthouse project. or slightly less than one-fourth percent of construction cost. A final tribute to all persons who contributed to the creation, design, construction, and management of this project was the installation in the ro-

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tunda of the Boston Federal Courthouse of a plaque containing more than 1300 names.

During the second half of their presentation the DRBF panel turned from the specifics of the FCH project to consider the promotion of this or a similar ADR model on other building projects. One of the panelists had given considerable thought to identifying criteria for "marketing" formal dispute avoidance/ resolution to the vertical segment of the construction industry. Among the criteria were these factors: Owner i.e. purpose of the structure; reputation and integrity of the design team; reputation and integrity of the contractors; funding sources, consultants, regulatory agencies involved; type of project, i.e. public, public/private, private, academic, industrial, medical, mega-project; amount of risk sharing/type of procurement procedures; design/ construction sequence; system of quantity survey; and local influences i.e. labor relations, politics, neighbors etc.; and lastly size, and length of the project and continuing relationships thereafter. Some conclusions of the panel were:

> If ownership of the structure is to be short lived, the likelihood of any interest in a strong ADR process is unlikely. Conversely, where the ownership is one "of a trust" i. e. academic, medical, or museum purposes, the likelihood of the desire for a structured dispute avoidance/resolution process increases.
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> The more repetitive building construction is for the owner, the more opportunity exists for a structured ADR process involving such techniques as partnering, DRBs, and mediation;
>
> The combined "attitude" or receptivity of the owner, designer, and general contractor to solving job problems in a participatory vs. confrontational way directly influences the wisdom of using a structured dispute avoidance/resolution process such as that used at the Boston Federal Courthouse. Stated another way, the "project attitude" toward risk sharing dramatically affects the potential for a non-confrontational dispute management model.
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> The larger the number of participants (official and unofficial) in the project, the higher is the potential for the need for a formal dispute management model. Conversely, the larger the number of participants, the more difficult is the task of creating a structured dispute avoidance/resolution method.
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> Commitment is paramount to the success of a formal dispute management model such as that used at the FCH. Keeping the partnering charter in front of all project participants and regularly reminding them of the way differences of opinion are handled, whether large or small, requires the delicate hand of w hat I call a benevolent dictator. Is the project likely to have such a person?
>
> How receptive and open-minded will the involved financial, bonding, and any regulatory interests be to a participatory dispute avoidance/resolution model?
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> Can a formal dispute avoidance/ resolution model which requires partnering, employment of a dispute review board, and mediation, outlined in a documented multi-step process which precludes litigation, be created while assuring due-process considerations?

Following the DRBF presentation, several questions and observations arose both at the DRBF Boston Conference and subsequently regarding the dispute avoidance and resolution model of the FCH:

> Relative to the use of "insiders" for the Dispute Review Board members and mediators, can internal

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members really be viewed as neutrals? In other words, can stakeholders be trusted in these capacities or are they so enmeshed in the project and personal relationships that they will not be objective, but rather broker deals to avoid or settle disputes? As one DRBF Conference attendee said, "Who knows but it worked at the Courthouse"

Can you really teach stakeholders to see mediation, not as negotiating, but rather as viewing a construction debate "from both sides of the table"?

When some stakeholders perform also as DRB members and mediators, are they better or less able to move project disputants from emotional/reactive positions to intellectual/interest based deliberations?

Regardless of whether or not stakeholders are used to identify potential disputes and to help resolve those matters which do become formal disputes, is not any formal construction dispute management model a preemptive ADR strike because it means seizing the opportunity to shift disputes from being emotion driven to interest driven?

Lastly, partnering, DRBs, and mandatory mediation are all attempts to get construction stakeholders to avoid and/or settle their disputes themselves. Is one technique a precursor to another? Is one technique more productive than another? Are all three techniques when used together an extraordinary deterrent to construction disputes? Or by a continuing commitment, expressed as a written model, have the building construction stakeholders benevolently manipulated themselves into a new belief system wherein individual goals are supplanted by a common philosophy of first trying to work together?

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All in all, the Boston Federal Courthouse presentation was an enlightening and provocative session.

Blase Reardon is a Dispute Review Board member, mediator and arbitrator based in Boston. He is the former Chief Operating Officer of A. F. Underhill, a specialty subcontractor which worked on the Boston Federal Courthouse. □