

This is the second part of a two-part article about the interplay between Partnering and Dispute Review Boards. The first article explored issues raised by the use of both processes on construction projects. This article provides information on various ways that users of Partnering and DRBs are implementing the two processes.

Optimizing the Use of Partnering and DRBs on Projects:

Differing Approaches by User Agencies

By Kurt L. Dettman

Introduction

As discussed in the first part of this article¹ some public agencies use both partnering and Dispute Review Boards (DRBs)² on projects. The challenge is how to cost effectively manage these distinct, but complementary, processes to achieve the “zero claims” goal of most project teams. Set out below are examples of how some agencies are handling this interplay, ranging from complete separation to complete integration.³ It should be noted that these examples are not intended to be comprehensive descriptions of the programs, but rather simply highlight (and provoke discussion on) some unique or innovative features of how these agencies are using both partnering and DRBs on some projects.

Washington Department of Transportation

The Washington State Department of Transportation (WSDOT) is a long time user of both partnering and DRBs. WSDOT Specification Section 1-09.11 provides that DRBs may be established for a specific dispute or (preferably) they may be established in the contract as bid on projects \$10M and above. WSDOT views partnering and DRBs as two distinct

¹ K. Dettman, *Optimizing the Use of Partnering and DRBs on Projects*, DRBF Forum, Vol. 17, Issue 1, March 2013.

² This article focuses on the use of U.S.-style Dispute Review Boards, not on FIDIC, Multilateral Development Bank, or ICC Dispute Boards. However, readers using different Dispute Board approaches are encouraged to consider the role that partnering could play in other contexts.

³ The examples are drawn from interviews and email exchanges with representatives of Sound Transit (Joe Gildner and Jim Niemer), Caltrans (Andy Alvarado and Ken Solak), Washington State Department of Transportation (Craig McDaniel), Wisconsin Department of Transportation (Dennis Manney (Kraemer) and Ryan Luck), and Ohio Department of Transportation (Gary Angles, Pam Clawson, and Chase Wells). The author thanks those representatives for their time and input in assembling these examples.

processes. Partnering is about communication, understanding each party's goals, alignment and concerns, etc. Partnering may elevate concerns with regard to value based requirements to the executive level, such as safety and quality issues. WSDOT prefers that the DRB's focus is on monitoring project progress and the behavior of the parties prior to a dispute and interpreting the contract in the event of a dispute. Therefore, WSDOT does not want the DRB participating in a mentoring type role, as would be done by a partnering facilitator. If issues get into contractor or WSDOT behavior (or misbehavior), or there are business decisions that have to be made on escalating disputes, those issues are better resolved directly by the parties using the partnering approach. In the case of WSDOT, HQ construction plays a role as issues get escalated and is in a position to make risk based decisions.

Sound Transit

Sound Transit (ST) is a long time user of both partnering and DRBs for its heavy civil underground construction projects. ST's General Condition 11.04, Partnering, establishes the principles of project partnering and ST's Specification 01 27 00, Disputes Review Board, specifies the requirements for establishing and operating a DRB. ST views partnering and DRBs as complementary processes, but places most emphasis on a robust "executive partnering process".

ST starts its projects with a conventional partnering process with a professional partnering facilitator engaging key executives together with key project-level staff and third-party stakeholders to develop a partnering charter that sets out the project's overall goals and specific measurable objectives. Once these goals and objectives are established the facilitator solicits regular feedback on the team's effectiveness in achieving these goals and objectives. The team also delineates the issues/risks that will likely occur in the prosecution of the work and this list is a dynamic tool that is reviewed/updated throughout the course of the contract. Another product of the partnering session is an agreement on an escalation ladder for the Contractor and Owner (and possibly stakeholders), identifying key personnel for each level of decision making. For example, typical levels include four tiers identified as project management, sponsor, executive, and senior executive. The ladder is supplemented with a

resolution policy for issues and disputes that promotes partnering but does not supersede the Contract terms related to change orders, claims, and alternate dispute resolution.

ST partnering program calls for project managers and sponsors to meet monthly and the Executive Partnering meetings are held quarterly. At each level open issues are discussed and the parties attempt to resolve these issues. ST expects the DRB members to take a proactive, probing role in assessing what issues are occurring on the project, but to respect and encourage the partnering process. The real “action” on resolving issues and disputes, however, happens in the project manager/sponsor meetings and occasionally at the Executive Partnering sessions. ST’s view is that most issues are resolved through the partnering process; the DRB is there if and when the project sponsors and executives are unable to resolve these issues themselves.

Wisconsin Department of Transportation

The Wisconsin Department of Transportation (WisDOT) uses both partnering and DRBs. WisDOT Standard Specification Sections 105.13.6.4 and 105.13.7.3 provides for referral of a claim to a DRB, under certain circumstances, as part of the administrative claims process.

Although the WisDOT specification on its face is a relatively conventional approach to partnering and DRBs, one of the more interesting uses of both processes was implemented on the Marquette Interchange Reconstruction Project Core and South Leg Projects (\$359M) in the heart of Milwaukee, Wisconsin. In summary, the project had the traditional partnering kick-off session to develop a partnering charter, etc. Likewise, a DRB was established to have regular quarterly site visits and be available to hear disputes. As the project evolved, the parties decided to have the DRB Chair “actively participate” in the partnering sessions, which dealt with a myriad of project management issues.⁴ This participation included getting the DRB Chair’s opinion on how the DRB might view an issue, which was then used to facilitate resolution in the partnering sessions. In interviews representatives of the contractor and WisDOT also mentioned that there were executive level partnering meetings as well every two

⁴ The Marquette Interchange Reconstruction Project DRB and Partnering Program is described in detail in: Whited, G. and Dolby, J., “DRB Enhanced Partnering on the Marquette Interchange: Case Study”, Journal of Legal Affairs and Dispute Resolution in Engineering and Construction (Vol. 3, No. 2, May 2011). See also WisDOT/FHWA Best Practices white paper: http://www.fhwa.dot.gov/ipd/pdfs/project_delivery/best_pract_marquette_10_10_08.pdf.

weeks. Ultimately, over the four years of the project there were 58 partnering meetings (vs. 12 planned, plus the kick-off) and 12 DRB meetings (vs. the 36 planned), and no disputes were referred to the DRB for hearings.

Caltrans

Caltrans specifications provide for both partnering and DRBs. Caltrans Standard Specification Section 5-1.09A-D requires partnering on projects over \$1M. Section 5-1.43E provides for the claim resolution process, including the use of Dispute Resolution Boards and Dispute Resolution Advisors (DRAs). One of the innovative features of the Caltrans program is Section 5-1.09A of the Standard Specifications for projects with DRBs. It permits the parties to have a facilitated partnering session or “facilitated dispute resolution” session before referring a matter to a DRB. The concept is to get the parties talking about the dispute and, if it is not resolved, to clarify and narrow the issues to those where the DRB’s non-binding recommendations can assist the parties in further negotiations. Caltrans encourages partnering to continue even after a claim is submitted to a DRB and a recommendation is received. Thus, a DRB recommendation is viewed as a tool to be used as part of the partnering process continuum—resolution of disputes can occur before, during and after the formal DRB process.

Ohio Department of Transportation

The Ohio Department of Transportation (ODOT) uses both partnering and dispute resolution processes, including DRBs and, beginning in 2013, DRAs. While ODOT has had specifications for partnering and dispute resolution for years, in its 2013 Construction & Materials Specification Manual it included the dispute resolution processes in the Partnering section, in recognition that dispute resolution processes are partnering tools.

ODOT views partnering and DRBs/DRAs as distinct but complementary processes. On many of its largest projects ODOT has included provisions for both a Partnering Facilitator and a DRB or a DRA. The Cleveland Innerbelt Project is one such project. This 4 year \$287M design/build project constructs a new structure to carry Westbound I-90 over the Cuyahoga River Valley through Cleveland, Ohio. Tom Hyland, the Project Engineer of the project for ODOT

explains the DRB handles the technical issues such as design, construction and the project schedule and Partnering “deals more with getting all of the personalities on the project to work together”. A half-day quarterly partnering session includes ODOT’s lead inspectors, the Contractor’s foremen, subcontractors and major suppliers, utilities and local agency representatives. During the partnering meetings the “worker bees” get “down in the weeds”, Tom explains, to find solutions to current and upcoming issues. Then “we’ve worked out all the issues before the DRB meets.”

In order to further enhance ODOT’s Partnering Program, a “Partnering Facilitator Standards and Expectations” manual was recently published. The manual acts as a guide throughout the Facilitated Partnering Process to help standardize and maintain consistency among Facilitators. ODOT feels it is the role of the Partnering Facilitator to provide detailed advice and coaching to project teams on issues/disputes relating to the day-to-day management of the project.

Recommended Partnering/DRB Checklist of Questions

Based on the varied experience of these user agencies, the following is a suggested checklist of questions that project teams may want to consider in order to implement both partnering and DRBs in the most cost effective manner:

1. What is the project’s “dispute risk profile” developed as part of the project risk identification/risk mitigation process? The dispute risk profile can include things such as:

- What types of delivery method is being used, and in particular how are risks allocated (for example, design-bid-build vs. CM/GC vs. design-build)?
- What types of disputes might occur (for example, differing site conditions, delay claims, performance specification requirements, etc.)?
- What are the anticipated complexity and frequency of potential disputes (for example, complex time claims vs. small, repetitive claims)?
- What process is in place for decision making and issue escalation (for example, is there a process for escalating management involvement on claims)?

- What type of third party assistance could help the parties in resolving disputes at the project level (for example, negotiation coaching vs. expert opinion)?
- What is the level of experience of the project team in managing the type of project at issue and in the project's approach to management both at the field and executive levels (for example, have the owner and contractor teams worked a similar type of project delivery method; have they used partnering and/or DRBs)?
- Are there outside stakeholders that will have a big influence on the outcome of the project (for example, permitting agencies or railroads)? Do they need to have a role in the process either at the beginning or at certain project milestones?
- Are there alternative dispute resolution processes that are available and, if so, how do they fit into the partnering/DRB process (for example, does the DRB lead to arbitration or litigation and what is the impact of the prior process on the follow-on processes)?⁵

2. What is the project's approach to coordinating partnering and DRBs?

- Does the project plan to implement partnering that includes stakeholders other than the immediate project team?
- What experience does the project team have in implementing both partnering and DRBs?
- Will the partnering process be continuous throughout the course of the project?
- Will the project implement the partnering itself or will it use a professional partnering facilitator?
- How will the resources needed and costs of partnering and DRBs be shared?
- Does the project team have a clear vision and objectives of what it wants to get from the partnering process?

⁵ For an exploration of the relationship between partnering and alternative dispute resolution processes, see Dettman, K. and Bayer, R., *Alignment Partnering: A Bridge to ADR Processes?*, *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* (Vol. 5, No. 2 2013).

- What stakeholders will it cover?
- What are the “partnered” topics or subject areas?
- What impact will partnering have on project management issues and decisions?
- How will partnering be implemented within the framework of the contract terms and allocation of risk?
- Does the project team have a clear vision and objectives of what it wants to get from the DRB process?
 - Will the DRB be used for dispute avoidance as well as dispute resolution?
 - Will the DRB be available for advisory recommendations or just formal recommendations?
 - What is the effect of the DRB outcome on downstream processes if there is no resolution at the DRB level?
- When will partnering sessions and DRB meetings be scheduled and how will they be coordinated?
- If the project team plans to use both partnering and DRBs, have the parties discussed and mapped out specifically what role partnering will play vis a vis the DRB process?

Conclusion

What is clear from the examples above is that there is not a “right or wrong way” to implement both partnering and DRB processes. There are different options available, each with a proven track record on construction projects or programs. However, the real lesson here is that, whichever approach is used, it should be done in a knowledgeable and transparent manner that supports overall project management objectives.

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