

This is the first part of a two-part article on the interplay between Partnering and Dispute Review Boards. The first article will explore the issues raised by the use of both approaches on construction projects. The second article will provide information on the different ways that users of Partnering and DRBs are implementing the two approaches.

Optimizing the Use of Partnering and DRBs on Projects

By Kurt L. Dettman

Introduction

Some state Departments of Transportation use both partnering and Dispute Review Boards (DRBs)¹ on projects. Questions have been raised, however, about the interplay between partnering and DRBs: If a project is considering using both processes, can they co-exist or do they overlap functions? If a project implements both, what is the best way to optimize their use without duplication of effort (and cost)? This article examines these questions and proposes some ways to address them.

What are the Similarities and Differences Between Partnering and DRBs?

The beginning point of this discussion is distinguishing between the two processes. In 1991, the Construction Industry Institute published *In Search of Partnering Excellence* to promote partnering as a means of reducing adversarial relationships. That study used the following definition of partnering:

. . . a long-term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources. This requires changing traditional relationships to a shared culture without regard to organizational boundaries. The relationship is based upon trust, dedication to common goals, and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost effectiveness, increased opportunity for innovation, and the continuous improvement of quality products and services [Construction Industry Institute, *In Search of Partnering Excellence*, Special Publication 17-1, University of Texas, 1991].

¹ 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.

As members of the DRBF will know, the DRB is established at the beginning of a project, receives project updates, periodically meets with the project parties, promotes dispute avoidance by discussing issues with the parties in the regular meetings, provides informal advisory opinions when requested, holds informal (but thorough hearings) on disputes, and issues detailed, non-binding findings and recommendations that the parties can accept, reject, or use as the basis for further negotiations.

Partnering focuses primarily on the parties' management relationship and day-to-day issues and conflicts that arise during the course of the project. A typical partnering session covers issues such as:

- What are the project's goals and objectives?
- What will the project's performance metrics be?
- What is working/not working from a management standpoint?
- What are the management issues, commercial issues, or construction challenges that project team should focus on?
- What can the project teams do to work better together (more collaboratively) to make the project function better?
- What are the lines of communication and decision making, and how can they be made more effective?
- Is there an issue resolution ladder to address issues or conflicts before they turn into disputes?
- Does the management team need to have field level working groups established to develop and implement specific management initiatives?

Partnering sessions bring all stakeholders to the table so that a broad range of project management issues can be addressed. These can include a multiplicity of project participants such as the design engineers and consultants, as well as third parties such as funding entities, utilities, railroads, municipal or county agencies, etc. Partnering sessions also are intended to promote trust and confidence between the project parties by having them open up on issues and challenges that they face depending on their contractual, funding, regulatory, or management relationship to other parties and the project as a whole.

DRBs can address similar issues, such as:

- At the kick-off meeting, are key stakeholders represented?
- What is the project organization (responsibility and reporting chain)?

- What is the screening/resolution process for disputes, issues and claims that might get to the DRB?
- What are the challenges that the parties have or expect in execution of the project?
- At periodic meetings, what are the pending issues, challenges, or potential disputes and how do the parties intend to resolve them?
- (If requested by both parties) what is the DRB's verbal advisory opinion on a potential dispute to aid the parties in resolving it themselves without a formal claim?

However, the DRB process is not the same as partnering in some significant respects:

- Except perhaps for the kick-off meeting, the DRB deals almost exclusively with the owner and contractor organizations, not other stakeholders.
- The DRB does not involve itself in day-to-day organizational or project management issues.
- Although the DRB can ask questions, it does not delve into the root causes of problems or issues in the same manner that partnering sessions can address.
- The DRB must remain neutral and objective (above reproach in conduct or perception), especially on issues that may become formal disputes.
- DRBs do not provide advice on day-to-day project management issues.
- The DRB must make the "hard calls" on formal claims that may leave one party in a "losing" position on either or both of the facts or contract terms in dispute.
- Unlike a partnering facilitator, the DRB is not permitted to explore compromises or identify commercial solutions to help the parties resolve disputes.
- Once the DRB has issued findings and recommendations on a dispute, its job is done as to that issue.

In essence, the partnering facilitator (and partnering process) has much more flexibility and maneuvering room to manage the "political and commercial space" between and among the project management team (and other stakeholders). Although the DRB process has dispute prevention features, in order to preserve its neutrality and objectivity for resolution of formal claims, it must keep a respectful distance between itself, the parties, and the day-to-day management of the project. In contrast, the partnering facilitator is hired to reduce or eliminate that friction between the parties (and stakeholders) in order to address day-to-day management issues, conflicts and relationships.

Can Partnering and DRBs Co-exist on a Project?

Partnering and DRBs can co-exist as long as the parties understand and accept the differing, but often complimentary, roles of partnering and DRBs. For example, partnering can be used effectively to set up collaborative and successful management teams (and manage day-to-day project management issues as they come up). DRBs can be used to address potential disputes in the Board's regular meetings and/or through the advisory opinion process, and of course, be available for authoritative third party opinions on claims if that is what is needed to assist the parties in resolving disputes through further negotiation.

Obviously one of the biggest challenges for the parties is the cost of using both partnering and DRBs. These costs include the out-of-pocket expenses for the partnering facilitator and the DRB, as well as the transactional costs of the parties preparing for and participating in both partnering sessions and regular DRB meetings (and potentially, hearings). Those of us who have handled construction claims either as an advocate or as a third party neutral know the enormous costs and delay associated with formal claim resolution process—typically, the combined costs of partnering and DRBs are a fraction of the “battle costs” of even one formal claim resolution process. That said, many organizations today are facing budget crises that require every expense to be looked at carefully.

One way to address the cost issue is to do a risk management “cost/benefit” analysis that combine the following factors: size of project, type and size of claims that may arise, frictional costs of resolving claims, and other intangible benefits that come from a collaborative, smooth functioning project team. Most likely projects of a sufficient size and complexity will be needed to justify the carrying costs of both partnering and DRBs on the same project. However, if one views the partnering and DRB costs as “risk mitigation,” then the size of project versus the outlay of costs would probably militate in favor of a dollar threshold where the potential size of the claims and attendant battle costs outweigh the costs of partnering/DRBs. An alternative for smaller projects could be initial partnering session and appointment of a Dispute Resolution Advisor (as done by Caltrans and the Ohio Department of Transportation), with the idea that the parties can activate either or both if needed.

If a project selects both processes, what is the best way to optimize their use without duplication of effort (and cost)?

Returning to an early theme of this article, the key to optimizing both partnering and DRBs is to clearly understand (and implement) their different roles, but in a complementary manner. This could be done in the following way:

- Hold an initial partnering session with project participants and a broad range of stakeholders to establish goals and objectives for the project; commit to a collaborative, cohesive and trustworthy project management team; address any particular issues early on (what's working that needs to be kept or enhanced? what's not working that needs to be fixed?); implement clear lines of communication and decision making; establish an issue resolution ladder to manage issues and conflicts in real time; and clearly define the role expected of the DRB in relation to the partnering process.
- At DRB kick-off meeting discuss and understand the dispute prevention aspects of the DRB process; brief the DRB on the project management approach and philosophy reflected in its partnering approach; discuss the proactive use of advisory opinions on issues or disputes that could become formal claims; discuss the dispute resolution role of the DRB; and discuss how partnering will work in conjunction with the DRB process.
- Hold regular partnering sessions with the project team (and key stakeholders) to assess how the partnering relationship is working; address specific management or other issues that have arisen; and explore whether the DRB process could assist in any issues or disputes that might become formal claims.
- Between regular DRB meetings keep the DRB fully informed about the issues on and status of the project; at regular DRB meetings be prepared for open communications on issues or challenges facing the project; use the DRB for advisory opinions where appropriate; and keep in mind that even the formal process is advisory in the sense that it is a non-binding recommendation to assist the parties in coming to resolution of claims at the project level.
- Partnering also could be used as part of the parties' process in considering the DRB's advisory recommendations or formal recommendations on disputes. Interestingly, one could envision a process where a partnering facilitator could assist the parties in negotiations after a DRB has issued formal findings and recommendations.
- As a practical cost-saving measure, after the initial partnering session and DRB kick-off meeting, the follow up partnering/DRB meetings could be held on the same day to minimize the transactional impact on the project team. For example, the DRB meeting could be held first (with the Partnering facilitator in attendance, observing only); issues and challenges could be identified for the DRB; and after the DRB meeting there could be a partnering session to address the issues that came up in the DRB meeting or any other management issues that the parties choose to address).

Conclusion

Partnering and DRB processes have distinct roles to play on projects. Project teams should understand and implement those roles in a thoughtful and deliberate manner. However, partnering and DRBs can successfully be combined as complementary processes on construction projects, thus enhancing the project delivery process for all participants and mitigating the risk of disputes and claims.

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