



NEWSLETTER



Engineering Professions
Association of Namibia

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The Potential Use of DRBs on Public Private Partnership Projects

Inside this issue:

DRB's on Public Private Partnerships	1
In This Issue	1
Adjudicator Performance Review	2
Upcoming Event: ADR Seminar	2
Adjudicator CFI	3
Professional Liability	3
Construction Adjudication Course	4
Alternative Dispute Resolution Seminar	5
Case Law: Must the Employer pay?	6
Article	8
Paper	9

There is a funding crisis for infrastructure developments not only abroad, but in our region here in southern Africa as well. As a result more and more larger construction projects are being privately financed, although such infrastructure will eventually be transferred to state or local authority ownership.

This funding crisis is fostering a new importance for public private partnerships (P3) in the menu of project delivery options for public infrastructure projects. P3s can attract private sector funding sources and improve project delivery and timing by utilizing innovative financing and integrated contracting methods. P3s can range from completion of a facility under a design-build contract to privatization of a facility with long term operating obligations. We have the pleasure to reproduce an article with the permission from the Dispute Resolution Board Foundation, which addresses some considerations for the potential use of Dispute Review Boards (DRBs) in the context of P3s. The full article can be found on **page 9** of this publication.



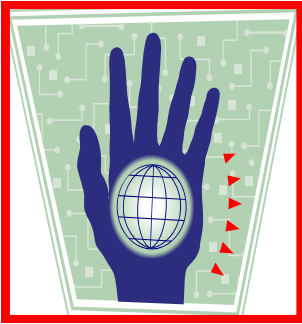
In This Issue

This Issue of the *NAL Newsletter* is crammed with the latest information regarding dispute resolution in the local as well as international construction industry. Discussed in this Issue is the potential use of dispute review boards on private public partnerships. This is timely since many developments are underway in Namibia, that are privately financed or managed.

Also included is the matter of professional negligence and liability. It is becoming more important for professionals and their clients understand this liability and its impact on projects.

'*Must the Employer pay once payment has been certified by the Engineer?*' is the question that is asked by the court in a recent SCA case in South Africa. The court's findings would be of interest to anyone involved in the construction industry, be it as employer, contractor or the engineer.





URGENT REMINDER

Continued Learning Requirements for registered adjudicators: Due date for registration to remain current:

1 August 2011

Adjudicators can however become compliant again thereafter

Visit the EPA
website at
www.engineers-namibia.org



Any contributions to this Newsletter are welcome!

Adjudicator Performance Review

In order to ensure that adequate standards are maintained by adjudicators registered on the National Adjudicator List, provision is made for adjudicator performance review. Performance review has been widely discussed on both the forums facilitated by the EPA-NAL, i.e. the DABFORUM and the NATDAB forum, with the process of establishing a workable system now having been concluded. The guidelines document on Performance Review (ADJUDICATOR'S PERFORMANCE REVIEW PROCEDURE) was accepted by the NAL Committee in August 2011 and was submitted to the EPA for implementation.

A full version of the 'ADJUDICATOR'S PERFORMANCE REVIEW PROCEDURE' document can be viewed on the following website:

www.engineers-namibia.org/NAL

Upcoming Event: Trends in Alternative Dispute Resolution in the Construction Industry — Seminar

The Seminar will be held at the Safari Court Conference Centre on 20 October 2011 at 14:30.

The Seminar aims to discuss trends in alternative dispute resolution locally, in the region and internationally, outlining the various forms of ADR available; to highlight the latest developments in the FIDIC suite of documents including the removal of the judicial function of the Engineer in modern forms of contract, and the introduction of an independent DAB. Speakers will discuss the establishment of dispute boards and the hazards of so called 'ad hoc' DAB's, and relate experiences from the construction industry locally, in the region and beyond. More information on page 5.

Attendance is free, and highly recommended.

[Book your place now via e-mail:epa@africaonline.com.na](mailto:epa@africaonline.com.na)

FROM THE PUBLISHING COMMITTEE

This Newsletter is published by the *NAL Committee* of the *Engineering Professions Association*. Any enquiries regarding any article or information contained herein, or contributions for inclusion in the next issue can be directed to the NAL Registrar, *Engineering Professions Association*, telephone 223009, fax 223009 or e-mail as follows: epa@africaonline.com.na.

Where case law summaries are included in this publication, the comprehensive judgement can be requested from the Editor via e-mail:

Brunauer.Ronald@gmail.com

Expression of Interest for persons wishing to register on the NAL as Adjudicator

From time to time the EPA NAL calls for expression of interest of persons that are interested in dispute resolution to be registered as adjudicator on the NAL. A call for Expression of Interest was recently placed in the local print media. The application of interested persons usually entails the submission of a cv as well as the completion of a standard form that is available from the Registrar of the NAL, or on the website www.engineers-namibia.org and follow the link to the National Adjudicator List pages. Applicants can, by means of the application form, evaluate themselves to ascertain whether they achieve the required credits for a particular category of registration. Applicant are further required to attend a course in dispute resolution and adjudication that will be arranged by the EPA this year. Details will be released in a subsequent issue of this Newsletter.

During the evaluation cycle for new applications, provision will also be made for registered adjudicators that wish to upgrade from one to another category of registration.



Professional Negligence and Liability

A recent article by Chris Binnington addresses the sometimes sensitive issue of liability of professionals. The article has been reproduced in this publication courtesy of **Binnington Copeland and Associates (Pty) Ltd.**

The historic approach to contracting has typically seen employers engaging the services of professionals to produce designs which are then put out to tender for contractors to construct. In the past 15 to 20 ars there has been a significant change in the way in which projects are procured and the introduction of Design and Build contracts as well as Design Build and Operate contracts has seen traditional roles fulfilled by professionals changing. Learn more on **page 9**.



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The Engineering Professions Association of Namibia offers the following

CONSTRUCTION ADJUDICATION COURSE

Adjudication is bringing dramatic changes to dispute resolution both internationally and in South Africa, and is rapidly becoming the preferred method for resolving construction disputes. In recent years, the use of adjudication has gained momentum, and it has become essential to all involved in construction projects to get a thorough understanding of this process.

The course on Construction Dispute Adjudication is compulsory for persons wishing to be registered on the National Adjudicator's List

The course will be held at the Safari Conference Centre on 19 and 20 October 2011.

Course Content

Some of the issues to be covered in this one day seminar are the following:

- What is adjudication?
- How does adjudication differ from arbitration, litigation, mediation.
- Adjudication as a creature of contract
- Adjudication as conceived under NEC, under FIDIC, under GCC and under JBCC
- The CIDB Rules for adjudication
- Who can act as adjudicator; Choosing the adjudicator
- Powers and authority of the adjudicator
- Paying the adjudicator
- The adjudicator's decision as immediately binding
- Appeal against the decision of the adjudicator
- Ad hoc vs standing adjudication
- Advantages and disadvantages of adjudication
 - Step-by-step through the adjudication process.

ADJUDICATOR NOMINATION

Employer Registration

For lower nomination fees, organisations can register with the EPA NAL.

Contact Registrar at e-mail: epa@africaonline.com.na

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ALTERNATIVE DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY: SEMINAR

The Seminar aims to discuss trends in alternative dispute resolution locally, in the region and internationally, outlining the various forms of ADR available; to highlight the latest developments in the FIDIC suite of documents including the removal of the judicial function of the Engineer in modern forms of contract, and the introduction of an independent DAB. The establishment of dispute boards. The benefits of adjudication over arbitration as first step in dispute resolution. The hazards of so called 'ad hoc' DAB's. Related experiences from the construction industry.

Omatako Room 1, Safari Court Conference Centre, Windhoek

Date: 20 October 2011

Time: 14:30

Program:

- 14:30 **Welcome and introduction** – Master of Ceremonies
- 14:35 **Trends in ADR in South Africa and the region** – Kevin Spence of Binnington, Copeland and Associates
- 14:50 **How the ACEN represents FIDIC in Namibia and supports ADR** – Peter Forster of ACEN
- 15:05 **The activities of PAMAN** – Peter F Koep of PAMAN
- 15:15 **The EPA National Adjudicator's List** – Ako Al-Jaf and Andreas Helmich of the EPA
- 15:30 **Tea & coffee**
- 15:50 **Keynote Address/ Presentation: ADR growing internationally**

**Attendance is free,
courtesy of our sponsors**

Book your place now!

About the Keynote speaker:

Gordon L. Jaynes

Gordon is a lawyer in private practice, based in England and specialized in contractual aspects of international construction projects. He is Chairman Emeritus of the International Bar Association Committee on International Construction Projects and Founding Chairman of the Inter-Pacific Bar Association of the same name. He serves on the Editorial Boards of The International Construction Law Review and Construction Law International and is an experienced trainer in various countries on all forms of engineering and construction contracts. His work in international Dispute Boards began in 1994 when he served as a consultant to The World Bank in establishing its contract provisions for use in such Boards. He was a member of the Task Force which produced the International Chamber of Commerce Dispute Board Rules, and a founding member of FIDIC's Assessment Panel for Adjudicators, vetting applicants for entry to the FIDIC President's List of Approved Adjudicators, for service in DABs on contracts using FIDIC Conditions. Gordon has received the DRB Foundation's Al Mathews Award for outstanding service in promoting international use of Dispute Boards. The Award is the Foundation's highest honour. Gordon currently chairs three Dispute Boards in China and Romania. He can be reached at glj4law@aol.com.



CASE LAW

Must the Employer pay once payment is certified by the Engineer?

The following is a brief summary of a recent court case heard by the Supreme court of Appeal of South Africa on 3 March 2011. *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd & another* (157/10) [2011] ZASCA 115 (08 June 2011).

Introduction

The Judgement Summary includes the following phrases: Contract – breach of – contractor entitled to cancel where no opportunity afforded to remedy defects in construction works.

The case is of interest both due to the consideration of the Court of technical matters such as design and construction, as well as for its legal aspects. The question that arises is whether, under the JBCC Series (as well as most modern suits of contract documents), the Employer is required to pay once such payment has been certified by the Engineer or Principle agent, and what the consequences are if he does not pay. The respondent in this case is the Contractor, a joint venture comprising of WK Construction (Pty) Limited and Wynford's Civil and Development CC, both carrying on business as civil contractors in Port Elizabeth, was the first defendant in the court below in an action for damages instituted by the appellant. The appellant is the Employer, MSC Depots (Pty) Ltd. The parties concluded a written agreement in terms of which the respondent was to carry out certain construction works, 'comprising bulk earth-works, paving, storm water, water and sewerage reticulation and mast lighting' at the appellant's container park in Despatch in the Eastern Cape. In simple terms, the respondent was engaged to construct a container depot where the appellant, a shipping company, was to store, in containers, motor vehicle parts which it would deliver, when required, to Volkswagen South Africa, a motor manufacturer, at its premises in Uitenhage. At, or close to, practical completion, certain deflections became visible on the interlocking pavement surface.

For clarity:

Absolution: forgiveness / pardon

prima facie: sufficient in law to establish a case or fact, unless disproved

Once the defect was noticed, the Employer's director, Mr *Georgiev*, stopped payment which in turn elicited a response from the Engineer that such a recommendation would constitute a breach of the agreement. Notwithstanding, the amount was not paid, remains outstanding and the Contractor's entitlement thereto has clearly been established. . . . The JBCC 2000 vested the Engineer / Principal Agent with full authority and obligation to act in terms of the agreement, but, despite the latter's recommendation that payment be effected, the Employer desisted from acting in compliance with the principal agent's recommendation. In the words of the Judge, 'In such circumstances there can be no question that the [appellant] prevented [Naidoo] from exercising its independent judgment regarding the performance of its duty. Quite clearly the [respondent] suffered prejudice thereby, which entitled it to cancel the agreement.' As a result of non-payment, the Contractor terminated the Contract. The Employer argued that the Contractor was not entitled to do so, since the contractor itself was in breach of its own obligation to execute the work with due skill and expedience, which then denies it the right to terminate.

Contractor in breach?

Under JBCC 200, if the Contractor is in breach of a material term, it may not terminate the Contract. It had to be established whether, as contended by the Employer, the Contractor was in breach of his obligation to exercise due skill and expedience during the construction process. During the hearings a number of expert opinions were submitted, and authors of these were cross questioned by the Court. Doyle's (one such expert witness) testimony on his findings and conclusions may be summarised thus: His observations as reflected in his (Vawda Thompson) report were much the same as those recorded in the soils report, which noted, inter alia, the presence of oversize material such as gravel (quarry) and stone within the layers and varying thickness of the bedding sand below the interlock paving blocks. During the remedial work he

noted that 40 per cent of the bedding sand was in excess of the specification required by the South African Bureau of Standards. The compaction of the bedding sand varied between a thickness of 20mm to 50mm across four test pits whereas the specified thickness is 15mm to 35mm. Several timber level pegs were found within the layer works. It seemed that the paving blocks, which should have been laid from one side for the interlock to meet up perfectly, were laid from two different directions, which made it almost impossible to meet properly. The result was a butt joint with a series of cut blocks which dramatically weakened the load characteristics of the pavement. The blocks started to break up against the butt joint and the joint consequently failed. The manholes were damaged by the reach stackers running over their concrete aprons. Doyle conducted an independent test of the bedding sand and noted that it did not meet the required grading. A large percentage of it was considerably finer. As to the oversize material (he referred to the stone as 'boulders') in the layer works he said the effect would be that during compaction the compaction equipment would ride over it 'without actually acting on the material that surrounds [it]', with the result that the desired compaction around the large material would not be achieved. The same would apply to the area around the timber pegs. The in-situ material, he said, was poorly compacted, thus impacting on the bearing capacity of the pavement.

The Judge noted that, importantly, Doyle confirmed what he noted in his report that the design works (for the depot) by Naidoo were deficient in three respects, namely (a) the absence of beams to restrain the paving blocks from substantial movement (caused by the weight of the load over areas where there was an excess in the bedding sand) so as to keep creeping of the blocks to a minimum; (b) the manhole aprons were not designed to have sufficient strength; and (c) no provision was made for drainage of both surface and subterranean water. In cross-examination he added that there was also a defect in the design of the layer works in that there was no specific instruction for their stabilization with lime. He concluded, however, that the failures in the pavement at 10 meter intervals across two lines traversed by the reach stackers were indicative of a construction issue and not due to the defect in the layer works. He said the failures would have been the result, possibly, of the contractor's failure to properly compact the layer works at 'grid lines' along which level pegs would be placed indicating the level of the layer works. But he conceded that if the layer works design was insufficient for the pavement to take the load to which it was subjected, then the layers will deflect. He also agreed with a view expressed by Dr Brian Shackle,¹⁶ an engineer, in a summary of his expert opinion, that the absence of the drainage mentioned above was 'a very serious design defect'.

A further expert witness, McLeod, could not make a definitive statement that there was indeed a construction deficiency in the pavement, because, he said, he had not been to the site but only looked at the soils report and drew his conclusions of a possible construction fault from the Lockpave program. In running the test (on the program) he used the Naidoo design specifications. He agreed in cross-examination that the actual pavement was 'modularly stronger' than the Naidoo design, that is the work as constructed was better than designed; that the materials used in the top four layers were better than those required by the design and that the compaction in those layers was higher than the levels of compaction required in terms of the contract.

It was found by the court that the Contractor was not in breach of his obligation to exercise reasonable skill during the construction process.

Conclusion

The Judge explained that we are not here dealing with a claim for performance of a contractual obligation the performance of which was conditional on the performance of a reciprocal obligation by the claimant. **In the present matter the respondent's entitlement to payment of the amount certified, which payment was stopped by Georgiev, was not dependent, or conditional on, any reciprocal obligation on its part.** In conclusion, the Appeal Judge agrees with the court a quo that where a contractor is willing and able to attend to defects that manifested themselves prior to final completion being reached in terms of clause 26, such contractor cannot be in breach of clause 15.3 provided he remedies such defects with due skill, diligence, regularity and expedition. There being no prima facie evidence that the respondent was in breach of its obligations under clause 15.3 of the agreement at the end of the appellant's case absolution (pardon) from the instance was, in his view, correctly granted by the court a quo.

It is clearly evident from this case, which is refreshingly devoid of numerous citations of earlier cases, that the courts uphold the provisions of the contract, in this case the requirement of the Employer to pay upon certification by the Engineer / Principal Agent.

The following article is reproduced with permission from Binnington Copeland and Associates (Pty) Ltd:

Professional Negligence and Liability

By Chris D Binnington Pr Eng

The historic approach to contracting has typically seen employers engaging the services of professionals to produce designs which are then put out to tender for contractors to construct. In the past 15 to 20 years there has been a significant change in the way in which projects are procured and the introduction of Design and Build contracts as well as Design Build and Operate contracts has seen traditional roles fulfilled by professionals changing.

In Design Build and Design Build Operate contracts the designer now forms part of the contractor's professional team and his contractual obligations are accordingly directed at the contractor rather than the employer. Under these circumstances does the professional attract any higher level of responsibility when compared to an engagement by an employer? The starting point for this debate is a clear understanding that when a contractor is tasked with the responsibility to design, and thereafter engage the services of a professional to create the design, the contractor's liability for design will be absolute. This means that in so far as the employer is concerned, the design produced by the contractor must be fit for purpose, i.e. it must work! Professionals do not normally contract with their employers, whether such employers are the Employer, or in the case of Design and Build, the Contractor, other than on a basis of "due skill care and diligence". Accordingly, the Professional will not usually warrant that his design will be "fit for purpose", albeit the Contractor will be liable for this higher standard of care. Accordingly, the fact that the design fails, whilst this would be a breach of contract by a contractor in a Design and Build contract, will not automatically be a breach of the professional's contractual duty of due skill and care unless it can be shown that the professional has been negligent.

This hiatus between the contractor's and the professional's duties can create serious difficulties for a Design and Build contractor who will have relied upon the professional to design the works but then finds that he has no rights of recourse against the designer where the design fails but where there has been no negligence on the part of the professional.

This precise situation occurred in the UK where TV station ITN contracted with a designer to design a transmission mast which was to be over 400metres in height. The designer came up with a novel cable stayed solution which, in terms of the code of practice at the time, had to be capable of dealing with gusts of wind up to 80 miles per hour. In the result the mast collapsed at wind speeds less than 30 miles per hour and ITN sued the designer for breach of contract. It was found by the court that the designer had used reasonable skill and care in the design and therefore there was no negligence and no right of recourse by the Employer notwithstanding the heap of structural steel lying at the base of where the mast had stood!

Two situations arise out of the above. Firstly, how is negligence established and secondly can a contractor or an employer who wishes to have a design which is fit for purpose achieve this higher standard when the professional is appointed and how is it achieved.

The legal test for negligence in these circumstances is simply stated, namely, a comparison of the performance of the allegedly negligent professional with the standards of performance which would be expected of other professionals who operate in a similar field. Establishing the comparison is where the difficulty lies. In order to impose on a professional the higher duty of fitness for purpose would necessitate an express term of the professional's appointment to clearly state that this standard is to be applied. This of course necessitates a willingness on the part of the professional to enter into a contract with this as a term of the contract. Professionals are often reluctant to accept such an imposition since it will be very difficult to obtain Professional Indemnity insurance for "fitness for purpose". The professional will accordingly be personally exposed, or his consulting practice will be exposed should a claim arise where no insurance cover is in place.

Professionals and employers would be well advised to familiarise themselves with the above consequences in order to avoid falling foul of the financial consequences which could flow from being caught in this negligence trap.

The following article is reproduced with permission from the Dispute Resolution Board Foundation.

The Potential Use of DRBs on Public Private Partnership Projects

By: Kurt Dettman and Chris Kane

There is a funding crisis for transportation infrastructure in the United States due to the ever increasing costs of rehabilitating, replacing and upgrading these critical assets. At the same time the weak economy in the U.S. and shortage of public funds are stretching government budgets to the breaking point. Simply put, there is not enough public money to fund major infrastructure projects that are vital to the continued economic competitiveness of the nation.

This funding crisis is fostering a new importance for public private partnerships (P3) in the menu of project delivery options for public infrastructure projects. P3s can attract private sector funding sources and improve project delivery and timing by utilizing innovative financing and integrated contracting methods. P3s can range from completion of a facility under a design-build contract to privatization of a facility with long term operating obligations.

Dispute avoidance and dispute resolution in any new and complicated form of project delivery takes on greater importance due to the new and different contractual relationships that are formed, especially the intersection of public and private interests in what has traditionally been a government function. This article addresses some considerations for the potential use of Dispute Review Boards (DRBs) in the context of P3s. Transportation P3 projects, such as a toll road project or a rail transit project, are the focus since they are often more expensive and carry higher risks for all parties. For purposes of this article, the authors will assume a full P3 model that includes design, build, operate and maintain responsibilities over a 30 to 50 year period.

Background on P3s

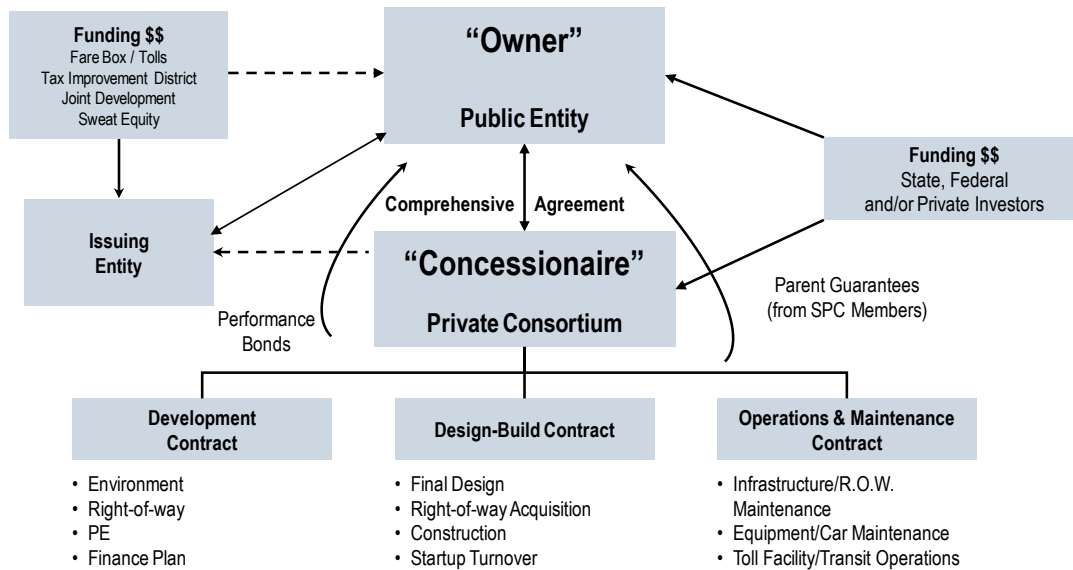
To work best, P3s are structured to share risk and reward between the public partner and the private partners. A project structure must be established that integrates all the necessary elements of the project into one endeavor: planning, environmental permitting and compliance, financing, procurement, design, construction, user fee setting, operations, maintenance and capital asset replacement, and “hand back” requirements. A typical P3 will include a master agreement, referred to here as the comprehensive or concession agreement (CA), between the public partner (owner) and the private partner (concessionaire). Within the CA there may one or more requirements for the Concessionaire to perform: project development; project financing; design-build delivery; operations and maintenance (O&M); and capital asset replacement.

FIGURE A indicates how a typical P3 is structured. The owner is best served working through a single, accountable “at risk” entity (the concessionaire) representing the interests of the entire project and delivering it with the optimum balance of planning, design development, construction costs, delivery schedule, operations, and life cycle costs. Underneath the concessionaire there are often major contracts and subcontracts with a design-build contractor, prime sub-

contractors, an operator and, possibly, a major equipment supplier. In addition there will be financial lenders that are backing the concessionaire—the financial lenders will have a direct interest in the costs and timing of delivery and operation of the facility since it provides the revenue stream financing the project construction and operational costs the lenders are underwriting.

FIGURE A

P3 Project Structure



Claim Risk Profile of a P3

In order to assess the utility of using DRBs, the development of a claim risk profile is helpful. The following are some potential types of claims that may arise under a P3 contractual arrangement:

The Owner—Concessionaire Interface: Although in the typical P3 most of the project delivery risk (and associated control) is allocated to the concessionaire and its team, there are still contractual issues that remain between the owner and concessionaire, especially with respect to (a) environmental permitting and compliance issues, (b) utility relocation and right of way acquisition, (c) force majeure events and (d) issues that require owner input or approval on design decisions and performance requirements. Sometimes financial issues also come into play, for example where fundamental assumptions on traffic, user rates and costs prove to be incorrect. In this area of fundamental “deal points,” it is important to have dispute avoidance and resolution systems in place to maintain the commercial relationship between the owner and the concessionaire, particularly when dealing with 30 to 50 year CAs.

Within the Concessionaire Team: The team comprised of the concessionaire, the design-build contractor, prime subcontractors, and operator, together with their financial lenders, retains most

of the risk: delivering and operating an infrastructure megaproject with all the challenges inherent in those types of projects. Here, typically the design-build contractor will own “traditional” claims exposure for delay, disruption, extra work, differing site conditions, etc. Avoidance and resolution of these types of claims becomes even more important where the concessionaire has guaranteed the owner a price and schedule for delivery of the project. There are typically liquidated damages for late delivery where untimely opening of the project to revenue operations may result in financial penalties owed to both the owner and the financial lenders. Ultimately, the concessionaire and its financial lenders are looking to the design-build team to resolve issues so that the concessionaire and its financial lenders will meet their economic goals, as well as deliver the quality product that the owner (and the public) will expect and require.

Current Practice in P3 CAs: Review of a few of the recent transportation CAs that have reached financial closing indicates a current trend for dispute resolution on these projects. Current practice appears to favor the use of an on-call arbitration panel, activated only if and when a dispute arises. Although these are sometimes denominated as “Dispute Boards,” they are not the standing panel associated with DRBs. Sometimes there are two types of panels identified in CAs, one for “technical issues” and one for “financial issues.” Typically the smaller amount dispute decisions are binding and the decisions on larger amount disputes may be subject to appeal in court. The distinction between technical and financial panels has some merit since finance is typically a critical aspect to these agreements.

Is There a Place for DRBs on P3s?

The first question that an owner will ask is whether the owner has less risk of “traditional” claims for additional time or money on P3 projects. Initially, one might conclude that P3s, from an owner’s perspective, are less risky than the traditional design—bid—build projects (DBB Projects) on which DRBs have been used with great success. The reason for this initial conclusion is that under P3 CAs, much of the traditional design risk (under the *Spearin* Doctrine), coordination risk, and operational risk of the owner is now passed to the concessionaire. The concessionaire, in turn, passes that risk downstream to a design-build contractor, and thence to prime subcontractors, and later to an operator. In addition, many CAs severely limit the grounds on which the concessionaire can make claims against the owner to fundamental commercial “deal points,” as contrasted with typical DBB project changes and claims provisions (for example, constructability issues, differing site conditions, or delay events).

So, if there is a lower risk of claims against the owner for additional time or money from the concessionaire, does that obviate the need for dispute avoidance and resolution mechanisms like DRBs? The authors propose that although there may be differences in the type of claim risks to the owner on P3s, as contrasted with DBB projects, there are still fundamental commercial “deal point” claim risks that warrant consideration of the use of DRBs. In addition, the importance of maintaining a relationship of trust and confidence for 30 to 50 years or more makes the use of a DRB’s standing panel of neutrals even more important. However, as discussed below, the function and scope of the DRB process may need to be changed to some degree to fit the different contractual relationships within the P3 structure.

Another reason for owners to consider using DRBs is that many times owners are subject to public scrutiny as to whether the public’s interests are being protected when what would otherwise be a public project is, in essence, being privatized. The DRB, as an independent, expert, neutral panel can provide transparency and justification to the public for decisions that the owner makes on any claims brought by the concessionaire. Likewise, the concessionaire can use DRB

reports as the basis for its decisions and concomitant justification to its financial lenders, as well as its design-build team and operator.

A final reason for the owner to consider using DRBs is that claims between the owner and concessionaire, focused as they often are on fundamental deal points, can presage default terminations. Defaults on these types of projects have huge implications for the parties, the financial backers, and the public. The benefit of having expert, neutral opinions on these types of claims can assist both parties from engaging in what is the equivalent of “mutual assured destruction” arising from a contested default termination.

What Kinds Of DRBs Could Be Used?

It is helpful to further explore four potential friction points where claims can arise, in order to assess what type of DRB would fit best with the character of each type of potential claim risk profile.

Friction Point One: Owner—Concessionaire Interface.

The first friction point is the owner—concessionaire interface. Here, as noted above, there will be fewer, but more fundamental, “deal point” claims that can be made. That said, “a claim is a claim,” regardless of its character. Having a DRB available to assist the parties in resolving “deal point” claims can be very helpful to preserving the working relationship, especially where the relationship between the owner and the concessionaire can span decades.

Given the different claim profile of the owner—concessionaire interface, however, there are some aspects of the character and role of the DRB that warrant consideration. First, since the typical project claims for time and money will arise much less frequently as between the owner and concessionaire, the DRB could be an “on-call” DRB similar to the Dispute Resolution Advisor model used by Caltrans. Second, since the owner—concessionaire claims will not necessarily be grounded in the day to day work on the project, the DRB could be comprised of members with different skill sets than a typical engineering and construction management-centric DRB. Law and financial expertise are important skills to be considered, which are somewhat different than those required by traditional DRBs. Third, given the potentially decades-long P3 relationship, the owner and concessionaire might also consider having a DRB for the construction phase and then a different DRB for the operations phase as different types of claims might arise during these project phases.

Friction Point Two: Concessionaire—Design Build

The second friction point is the concessionaire—design-build contractor interface. This interface focuses on the contractual allocation of risk between the concessionaire and design-builder contractor. Under the typical design-build contract the concessionaire will try to mirror its design-build obligations and risks under the CA with the owner, that is, a shedding of design, constructability and delivery issues to its design-build contractor. The types of claims between the design-build contractor and the concessionaire less frequently will involve “deal points” akin to those between the concessionaire and owner. However, they will include more detailed claims issues regarding any limitation of liability that the design-builder may have been able to negotiate, as well as any integration and coordination risk that may exist for equipment operation, start-up and turn

over. The same DRB considerations as those relating to concessionaire—owner claims would apply to this interface, i.e., the “on-call” approach with DRB members attuned to the type of claims permitted as between the concessionaire and design-builder contractor.

Friction Point Three: Design-Build Contractor Team

The third friction point lies within the design-build contractor team. The contractual relationship within the design-build contractor team (the general contractor, the designer/engineer, the trade contractors, and suppliers) covers the actual construction and delivery of the project. This contractual interface will encompass the more typical claims that arise from project construction and delivery: design issues, extra work, constructability, delay, interference/disruption, etc. Here, the DRB model that has worked well on many heavy civil projects to prevent and resolve disputes can be used since issues within design-build contractor team will need to be resolved in “real time” as that is where the work is being progressed and the money is being spent.

Given the more typical claim profile within the design-build contractor team, the more typical DRB could be used, i.e., formed at the beginning of the project, comprised of engineers/construction managers/construction lawyers, regular site visits, and the DRB claim hearing process.

Friction Point Four: Concessionaire—Operator

The fourth friction point is between the concessionaire and operator. The issues here will revolve around long term operations and maintenance and capital asset replacement requirements. This interface will raise some of the same considerations and the concessionaire—design-build contractor interface. Although the character of the potential claims may be different (operations vs. construction), the avoidance and resolution of claims would still be in the parties’ best interests. There also may be integration and coordination issues caused by the design-build contractor. Therefore, a DRB can still be helpful in avoiding and resolving claims, albeit the composition of the DRB would need to be calibrated to the character of the claims (operational vs. construction) and the degree of involvement could be less because of the lower frequency of claims that would arise out of routine O&M operations and asset replacement requirements.

Potential Options for P3 DRBs

Separate DRBs for Each Interface Friction Point

If one concludes that each of the friction points discussed above could benefit from the dispute avoidance and dispute resolution functions of a DRB, it would be possible to set up a DRB for one or more of the friction points. As noted above, the composition, duration, and role of the DRB would need to be tailored to the claim risk profile based the predictable type, size, and frequency of potential claims. Another option is to implement DRB(s) only for friction points where the parties agree that the additional carrying costs of the DRB(s) are justified.

Omnibus P3 DRB

Although one or more separate DRBs for each friction point is certainly feasible, it does raise some additional challenges to implementation: justifying additional cost (up to four DRBs), additional coordination that will be needed to tailor each DRB for that applicable contractual relationships, and the potential for different results from different DRBs on the same project. One way to address these challenges is to use an “omnibus” DRB that is set up to handle all issues arising on the P3 project, with the costs being shared on a pro rata basis depending on the user of the process. Thus, for example, if the owner and concessionaire did not feel the need for periodic site visits given the limited types of claims that could be brought under the CA or the concessionaire—design-build contractor agreements, the design-builder contractor (that presumably would like periodic site visits for the typical claims within the design-build contractor team) could pay for the periodic visits. Likewise, if there was a claim that was only between the concessionaire and the owner, the concessionaire and owner would pay for the hearing on that claim. Although more complex to administer than the typical DRB, this flexible approach would still be much less costly than the possibility of multiple claim paths and numerous potential arbitrations or litigations.

In addition to saving on transactional costs, the advantage of the omnibus P3 DRB is that it would have a holistic view of the entire project, allowing it to take all appropriate P3 factors into account and thus increasing the likelihood of uniformity and consistency in the DRB’s findings and recommendations across all contractual friction points. Given the broader scope of potential issues, the composition of this type of DRB could include members from a variety of backgrounds, for example finance, construction and legal. The parties could also permit the DRB to retain, with party approval, subject matter experts to assist the DRB if it had to deal with technical issues arising from one of the subsidiary contractual interfaces.

P3 DRB Pool

One question that deserves additional thought is how a P3 DRB would be selected. Since there at least four primary parties, there may be a benefit in having a pre-selected pool with designated, qualified DRB chairs and members. Panels could involve more than three members if, for example, there was an issue between the design-builder contractor and the operator, which could also involve the concessionaire (holding both of the contracts). Careful consideration would need to be given to: the mix of the pre-qualified DRB pool; how DRBs would be selected (and replaced); and how the DRB pool could be kept apprised of (and to the extent necessary, involved in) the P3 project in order to provide dispute prevention services as well as dispute resolution services.

Conclusion

P3s involve high stakes and high risks for all parties to the deal as a whole regardless of the allocation of risk between particular participants. Although the types of claims may vary among the parties, there is still the same overall risk (indeed, predictability) that claims will arise. The track record of DRBs helping parties resolve claims on major infrastructure projects can be applied with equal force to P3 projects, albeit with thoughtful variation depending on the contractual relationship and potential claims that need to be addressed.

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END OF PUBLICATION
