THE DISPUTE RESOLVER

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YOU CANNOT ALWAYS CONTRACT YOUR WAY OUT OF A PROBLEM (The Case for Dispute Resolution in Mega and Large Complex Construction Projects)

Most experienced commercial transaction and construction attorneys strive to negotiate a concisely written and well-drafted contract that addresses all scenarios and issues that creative and highly contemplative professionals can conjure. Although contracts are extremely important in construction projects, "you can't generally contract your way out of a problem," states Michael Loulakis, a founder of Capital Project Strategies, LLC and a nationally recognized expert on project delivery systems in complex public sector design-build projects and public-private partnership programs. Loulakis adds, "the contract certainly matters. But particularly when the losses are big, litigators prosecuting the contractors often find effective ways to argue that facts and circumstances trump the contract." However, "the difference between the best construction projects and the worst construction projects is not the written words of the contracts but how the parties have committed to engage collaboratively and with trust to complete the project," notes Robynn Thaxton, an attorney and consultant with Thaxton Parkinson PLLC and Progressive Design-Build Consulting, LLC and one of the leading experts in construction law and alternative procurement on a national basis.[i]

In large, complex construction projects, the need for parties to collaboratively resolve disputes is highlighted by the judicial acceptance of the "Doctrine of the Contextual Contract"[ii] to interpret construction contracts. "As construction's increasing technological and managerial complexity came to be recognized, some common law courts began turning away from strict interpretation of language within the four corners of a contract and moving toward recognizing in the enforcement of contracts the construction industry's own experience, customs, practices and implied conditions and duties and the factual context underlying the contract. Courts [began the journey] along the road from 'text' to 'context.'"[iii] Thus, the precise wording of the contract has become less important and industry practices and other conditions provide insight for resolving disputes. Consequently, despite the specific language of any construction contract and the clear allocation of responsibilities and risks, early dispute evaluation and resolution are critical to a successful project.

The completeness of the project design and the information known at the time of pricing and contract execution will vary depending on the contract delivery method, thus, by nature, certain delivery methods are more susceptible to contract disputes than other delivery methods. But, alternative dispute resolution ("ADR") provisions should exist in every construction contract (regardless of the delivery method) to facilitate early dispute evaluation and resolution. As Loulakis states, "I do not think the delivery method should influence the inclusion of alternative dispute resolution processes in contracts. You still need a robust alternative dispute process in large construction projects to resolve disputes."

As a result, "sophisticated owners and construction managers on large complex projects devote significant precontract planning to develop and incorporate into contract documents various escalating ADR dispute-filtering methods tailored to addressing disputes by type and size."[iv] Ten of the most widely accepted alternative dispute resolution methods used in the construction industry are (1) informal discussion and partnering, (2) structured negotiations, (3) standing project neutral, (4) initial decision-maker, (5) standing dispute review board, (6) expert determination, (7) evaluative mediation and conciliation, (8) adjudication (initial decision binding until completion of project; "pay now, argue later"), (9) minitrials and mini-arbitrations, and (10) arbitration.[v]

Although not technically a dispute resolution method, Thaxton recommends that one of the best dispute prevention practices in construction is a robust project-level issue detection process. She recommends that the project team maintain a risk log and a trends log, which acts as an early warning system, permits the parties to anticipate and

monitor issues, gives the parties permission to participate in the resolution of the issues and permits the parties to resolve issues that may impact the project before the issuance of a change order. "Creating such logs permits the parties to collaboratively monitor the issues and partner to agree on the process to cooperatively resolve such issues," states Thaxton.

Another dispute resolution practice used as an engine for successful construction projects is a robust structured step resolution process customized to incorporate many of the most widely accepted alternative dispute resolution methods. Thaxton advocates a step resolution process that starts with a binding resolution of outstanding issues at the lowest authorized project level, which could be at the construction foreman, construction superintendent or project manager level and comparable project-level members of the owner and design team. If an issue exceeds any authority level, the issue moves to the next level of project professional for resolution, before proceeding to the executive level and then to the next levels in the step resolution process, which could involve referring the matter to a Dispute Review (or Resolution) Board ("DRB"). Thaxton notes that "often the threat of taking an issue to the DRB will resolve the issue."

The use of DRBs is gaining wider acceptance in public construction projects. In some industries, such as tunneling, DRBs are mandatory, notes Loulakis. "I do not recall any bored tunnel project that did not call for a dispute resolution board to resolve differences between the geotechnical baseline or geotechnical data reports and site conditions discovered during construction." Loulakis notes that, although dispute resolution boards in roads and bridge projects are not as widely accepted as in tunneling projects, 15 state departments of transportation ("DOTs") use DRBs,[vi] 18 DOTs authorize mediation,[vii] and 15 DOTs authorize arbitration. Importantly, some DOTs that do not have express DRB authority have used DRBs on some of their big projects, "largely because the industry has demanded it." According to Loulakis, the most commonly used DRB model in domestic construction is the Dispute Resolution Board Foundation model.[viii]

One leading example of implementing a robust dispute resolution process, including DRBs, in a large, sophisticated megaproject involving tunneling is the construction of the Big Dig. The Big Dig was a megaproject in Boston constructed from 1984 through 2007 at a cost of over $8.08 billion. The project rerouted the then-elevated Central Artery of Interstate 93 that cut across Boston into the O'Neill Tunnel and built the Ted Williams Tunnel to extend Interstate 90 to Logan International Airport, constructed the Zakim Bunker Hill Bridge and funded a dozen projects to improve the region's public transportation system. In addition to other issues encountered on the project, the Big Dig tunnel workers encountered many unexpected geological and archaeological barriers, ranging from glacial debris to foundations of buried houses and a number of sunken ships lying within the reclaimed land.[ix] The use of DRBs, as well as other dispute resolution methods, greatly assisted in resolving geotechnical and other issues among several hundred prime contracts and subcontracts required to coordinate and complete the project. The robust dispute resolution process implemented in the construction of the Big Dig set the framework for structuring the dispute resolution process for many subsequent megaprojects.[x]

Given their complexities, evolving technologies and numerous experts and professionals required to complete complex construction projects, disputes are inevitable. However, if owners, contractors, prime project team members, and their consultants and attorneys engage in substantial precontract planning for management of disputes and incorporate robust dispute resolution processes in project contracts, the project team will be able to manage disputes constructively, acknowledge and appreciate differences of opinion and thought, and work cooperatively to resolve the disputes. The results of such efforts will more likely lead to a project completed with ingenuity, innovation and creativity that can be applied in future large, complex construction projects.

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[i] Information contained in this article and attributed to Michael C. Loulakis and Robynne Thaxton were gathered from personal interviews with these professionals.

[ii] See Phil Bruner, *Construction Law; Its Historical Origins and 20th Century Emergence as a Major Field of Modern American and International Legal Practice*, The University of Arkansas Law Review Symposium Fayetteville, Arkansas (March 12, 2022), citing at footnote 10 *United States v. Lennox Metal Manufacturing Co.,* 225 F.2d 302 (2d Cir. 1955. ("Even if a word in a written agreement is not ambiguous on its face, the better authorities hold that its context, its 'environment' must be taken into account in deciding what the parties mutually had in mind when they used that verbal assemble.") See also, Eggleston, Posner and Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 N.W. U. L. Rev. 91, 94 (2000) ("[L]awyers, judges and legislatures cannot evaluate contract rules without understanding the contracts that these rules are supposed to regulate. Yet, the law review literature on contracts is almost completely devoid of the positive analysis of contracts.").

[iii] *Id*.

[iv] See Phil Bruner, "Rapid Resolution ADR," Constr. Law, Volume 31, Number 2 (Spring 2011). Reproduced with permission by JAMS.

[v] *Id*.

[vi] There are a variety of ways that DOTs are implementing the DRB process – from one-person DRBs to ad hoc DRBs only convened when there is a dispute)

[vii] All but three of the 18 DOTs that authorize mediation require that the mediation be mutually agreed upon before it can be used, as opposed to making it mandatory if requested by a party.

[viii] See DRBF Model Documents, https://www.drb.org/drbf-model-documents

[ix] See The Big Dig, https://en.wikipedia.org/wiki/Big_Dig

[x] See "Resolving Megaproject Claims: Lesson from Boston's 'Big Dig,'" 30 Constr. Law. 5 (Spring 2010).