Law, Justice & Development Week 2013
Dispute Boards and Public Private Partnerships
November 19, 2013
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Starting Point:
Dispute Systems Design (DSD)

Dispute Systems Design Steps:

➤ Develop a “Claim Risk Profile”:
  ➤ Parties/Friction Points
  ➤ Types of Disputes

➤ Understand and Effectively Deploy:
  ➤ Dispute Avoidance Tools
  ➤ Dispute Resolution Tools
• Owner risk event — DSCs, permitting, ROW
• Scope issues
• Owner changes (pricing)
• Owner interference
• Warranty issues
• O&M issues (esp. capital maintenance)
• Handback requirements
• Toll revenue/ROI issues

Lenders Guarantors

• Construction funding vs. operational funding
• Toll revenues vs. ROI
• Credit risk, esp. if unfunded liabilities for additional costs, delay, LDs, etc.

Concessionaire

• Sub production/execution delays
• Design/workmanship issues
• Scope/pricing issues
• Warranties
• Product issues
• Long-term warranties
• O&M issues w/materials & equipment

Insurers Sureties

• E&O claims
• GL claims
• BR claims
• WC claims
• Surety issues, esp. subs
• Completed Ops coverage
• Operational coverages vs. construction coverages

DB Team

P3 Friction Points

Subcontractors Subconsultants Suppliers

• Contractor/Designer relationship (JV vs. sub)
• Production/execution delays
• Design vs. workmanship issues
Summary: Key P3 Mega Project Features

➤ Complex, high risk
➤ Many phases, changing stakeholders
➤ Construction Phase and Operational Phase impacts on the environment and community
➤ Relationship building is as important as P3 program management and delivery plans
Standing DBs on Mega Projects

Benefits:
- Encourages collaboration among parties
- Improves relationship with external stakeholders
- Maximizes dispute prevention role

Challenges:
- Defining scope of role/responsibility
- Different project phases/players over time
- Long term commitment by all parties
Case Study: I-595 in Florida

- P3 agreement between Florida DOT and Concessionaire
- DBFOM agreement spanning 35 years (largest P3 in US)
- US$1.2 Billion
- Three member standing DRB (bt. owner and concessionaire)
- Standing DRB within DBT
Case Study: LISEA High Speed Rail

- 50-year P3 concession contract
- Largest ever rail concession contract
- €7.8 Billion
- Three member standing Dispute Board (bt. Owner and Concessionaire)
Smaller P3 Projects

-> Single Person Standing Dispute Board

-> Benefits:
   -> Scalability: smaller issues, lower costs
   -> Easier to offer informal assistance (advisory opinions)

-> Challenges:
   -> Lose benefit of 3-member DB complementary skill sets
Single Person DB Models

- **Caltrans Dispute Resolution Advisor**
  - Single person appointed at project start
  - No regular site visits
  - Available to parties to address and resolve issues early (as called upon)

- **Hong Kong Dispute Resolution Advisor**
  - Gatekeeper for the parties to select best resolution path
Key Requirements for Successful DB Implementation on P3s

- Use **Standing Board** (not ad hoc)
  - Initiated at beginning of project
  - Regular site visits
  - Remains in place through all phases of the project, including concession operations phase
Key Requirements for Successful DB Implementation on P3s

- Emphasis on dispute prevention attributes
  - Expand role to include all P3 parties
  - Expand role to include outside stakeholders
  - Early identification/resolution of issues
  - Informal assistance/advisory opinions encouraged
Key Requirements for Successful DB Implementation on P3s

- Emphasis on **quality** of DB members
  - Experienced in the work of the project
  - Experienced in alternative project delivery
  - Experienced in collaboration/facilitation
  - Available to serve for the duration of the project
Public Private Partnerships: What is Different?

- Complex, long-term relationships
- More shared risk and reward
- More stakeholders, including outside groups (environmental, social, etc.)
- Greater need for “real time” dispute avoidance and dispute resolution systems

.... all leading to a requirement for collaboration among all parties.
Questions?
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