



DRBF *Forum*

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Lessons Learned: The Use of Dispute Boards on a Public Private Partnership Project

By Ron Finlay, Louise
Hart and John Tyrill

Introduction

Following completion of a Public Private Partnership (PPP) for a major rail project in New South Wales (NSW), Australia (Project) and as the members of the Dispute Avoidance Board (DAB), we were invited to prepare a report on the Lessons Learned from the Project itself and the interaction between the parties' representatives and the DAB members. This article is based on that report and the Lessons Learned endorsed by the parties.

These lessons are generally applicable for all Dispute Avoidance Boards and Projects with a DAB.

Background

The Project was structured as a "typical" availability PPP between the concession giver, a NSW Government agency (Principal), and the special purpose vehicle/equity provider OpCo. OpCo had let two further sub-contracts being:

- (a) A design and delivery contract (D&D); and
- (b) An operations and maintenance contract (O&M).

The Project was part of a larger project which consisted of three major interfacing contracts, with a total

delivery value of AUD\$7.3 billion and completed in approximately six years.

The role of OpCo was to design, construct, operate and maintain the PPP rail system for 15 years.

Following completion of the Project, representatives of the Principal, OpCo, D&D and O&M all contributed to a Lessons Learned paper which each of the participants took away to enable them to use on their respective next projects.

The Lessons Learned are set out in the following sections:

Lesson #1: Signalling Intentions

The Principal elected to use the name "Dispute Avoidance Board" rather than "Dispute Resolution Board" as a signal to the tenderers and the ultimately successful OpCo of its resolve to avoid and prevent disputes (and thus prevent issues from becoming disputes) and not just resolve and determine disputes.

Lessons Learned: Using the name "Dispute Avoidance Board" rather than "Dispute Resolution Board" sends a signal or message to the tenderers of the Principal's intent to avoid and prevent disputes.

Lesson #2: Attendance of D&D and O&M at DAB Meetings

Although the DAB Agreement was between Principal and OpCo, the DAB encouraged (and Principal and OpCo readily agreed) that representatives from both D&D and O&M should be represented as observers at all DAB meetings and from the outset.

The presence and active participation of representatives from D&D and O&M in the DAB meetings were extremely productive and helpful to identify issues in relation to the Project, have those issues discussed openly between all parties and the DAB, and generally the DAB meeting became an appropriate venue for devising solutions.

Lesson Learned: Where a DAB is established between the concession giver (in this case, Principal) and the SPV (in this case, OpCo), it is essential for the overall health and well-being of the PPP Project for the Design & Construct Contractor (in this case, D&D) and the Operator and Maintainer (in this case O&M) to be represented at, and actively participate in, DAB meetings. In future PPP contracts, this attendance should be prescribed in the various contract documents and in the DAB Agreement.

Lesson #3: Principal's Requirements

The Project Deed was a comprehensive document which included a mature identification, development and articulation of the Principal's Requirements. This has been an important factor in an efficient Project delivery and has generally avoided unnecessary variations, changes, delays and disruption.

Lessons Learned: The investment of time in establishing the Principal's

Requirements to a mature level of detail is a sound investment.

Lesson #4: Stakeholder Engagement

There had been considerable community consultation by the Principal prior to letting the Project Contracts, and the level of stakeholder engagement was apparent from the outset. After the appointment of OpCo and D&D, the level of community and stakeholder engagement continued at a very high level.

Lessons Learned: It is critically important for all major projects to have extensive community engagement and support for the Project.

Lesson #5: Project Teams

Quality project teams by both parties are essential for efficient project management and delivery. From the DAB's experience on other projects, where there are poor quality members of project teams making questionable or bad decisions (sometimes in an adversarial manner), problems and disputes arise between parties over effects upon obligations, rights and interests. On the worst of such projects, there are numerous disruptive changes in project teams, and sometimes persons performing an important role and making a good contribution are questionably removed. Ultimately, it is all about people.

On this Project, both parties had in place quality "A" teams. Importantly, personnel were largely maintained unchanged throughout the Project. In consequence, Project history and the reasons for decisions and actions were not lost. The level of knowledge and understanding demonstrated at DAB meetings by key Project officers of events and issues was consistently very impressive. It was clear to DAB Members that the key

Project personnel in attendance at DAB meetings were essential for efficient management and decision making and that the loss of those personnel would have been extraordinarily disruptive to Project delivery.

Lessons Learned: Quality and consistency of project teams by both parties are essential for efficient project management and delivery.

Lesson #6: Reports, Presentations and Meeting Conduct

It is important for the effective functioning of the DAB that the DAB members are kept adequately informed of progress, issues, claims and disputes. The reporting on this Project was thorough and detailed. The monthly reports of D&D, OpCo and the Independent Certifier were thorough, of a high quality level of detail and delivered to the DAB members in a timely manner. The DAB from early stages requested that there be a joint presentation by both Principal and OpCo, but this was extended, from early days, to include D&D and O&M where appropriate.

The parties' presentations to the DAB were thorough and detailed. In fact, the parties' presentations were an exemplar for DAB briefing and were much better than has occurred on any other project in the DAB Members' collective experience.

The fact that the Joint Presentation addressed all of the issues raised in the minutes by the DAB was a strong indication of the parties' attention to the issues raised by the DAB for consideration.

As the DAB meetings fell into a regular pattern, the fact that the Joint Presentation

was produced several business days in advance of the DAB meeting was a credit to the parties and an indication of their willingness to apply their minds, in advance of a DAB meeting, to the issues that needed to be dealt with and the results / status presented.

The DAB commends the quality of the Joint Presentations made by the parties and, in the DAB Members' opinion, is an exemplar for complex projects of this kind.

Lessons Learned: The preparation of high-quality monthly reports, which were also provided to the DAB, to keep the DAB informed about progress, issues, claims and disputes is essential to a functioning DAB.

Lessons Learned: The preparation of a joint presentation by Principal and OpCo (with the support of D&D and O&M) is a best practice method of ensuring that issues are raised and addressed prior to, and at, a DAB meeting.

Lessons Learned: Allowing time for the preparation of a joint presentation by all parties to the DAB, at DAB meetings, including prior distribution of the presentation to the DAB is best practice.

Lesson #7: DAB Meeting Conduct

The DAB has mentioned above the early decision by Principal and OpCo to involve both D&D and O&M in DAB meetings.

Apart from the allure of inclusion, it is the D&D in the early stages of the Project that has most information and, likely, the source of most issues on a Project such as time / delay issues. Having D&D and O&M at the table, allowing them to participate in the presentation

and being available for questions all were extremely beneficial to the overall relationships established.

Lesson #8: Communication

Based upon briefings at DAB meetings and also the nature and extent of the parties' agreed outcomes, it has been DAB members' assessment that communications between the parties were (as required for efficient project delivery) good, open, transparent and honest.

The parties invested considerable time, effort and expense in the relationship and communications, through various facilitated relationship workshops. The advantages of these workshops were evident to the DAB.

The decision to locate project teams in the same building clearly also contributed to the excellent level of communication between the parties.

Lessons Learned: Any investments in relationship building and maintenance as well as communication protocols are well worth the effort.

Lessons Learned: The co-location of members of the Principal, OpCo, D&D, the O&M and the Independent Certifier inevitably leads to improved communications, less email/letter writing, more face-to-face meetings and the development of more personal relationships and is to be recommended as best practice.

Lesson #9: Procurement Interface

It is understood that considerable time was undertaken by Principal to determine the three major procurement contracts for the major project. The procurement process created at least

two major contract interfaces, the risk of which needed to be managed by Principal. With the delays to one of the other projects, the risk to the Principal of one of those interfaces manifested, through no fault of OpCo.

Lessons Learned: The lesson learned from this interface issue is not so much about the procurement choices but how to handle a risk when it is realised. Having continuity of personnel, highly skilled management, investing in the relationship and communicating well are all factors that will assist in mitigating the effects of realised interface risks.

Lesson #10: Design/Documentation

Because it rarely became an issue, it was obvious to the DAB that D&D had selected high quality, competent, adequately resourced design professionals and the relationship between D&D and the designers appeared from the outside to work well.

In addition, the management of Design and Documentation also appeared to proceed well, although there were obvious pressures in the early days for Design to keep up. The result seemed to the DAB to avoid fast-tracked design and construction with the Contractor not proceeding to construction too early, at risk, without approval for construction with only partial design/documentation package approvals.

D&C projects are very sensitive to timely and quality performance of Design and Documentation and to any delays in achieving issued for construction status. On the very best projects, the design, documentation, review and Approved for Construction (AFC) process are invisible. On the worst projects, problems in those processes cause considerable delay and disruption to performance. The DAB

considers that on this Project, any issues were largely invisible, once through the process described in the next paragraph. Considerable problems in the design, documentation, review and AFC process occurred, including failures in coordination, disrupted iterative processes, redesign/re-documentation loops, construction on the basis of partial AFC and construction taking place at risk without AFC. To their considerable credit, the parties focused on resolving those issues by extensive workshops held over a period of time involving all the design disciplines. Those workshops identified critically required Design and Documentation to enable the design team to focus efforts and for programming purposes. The design team also identified and resolved coordination problems. Thereby the parties resolved issues and avoided potentially significant delay, disruption and disputes. Whilst the DAB encouraged the parties to undertake and pursue those efforts, it was not involved in them. The outcome of those workshops avoided likely necessity to refer issues to the DAB for assistance.

There also appeared to the DAB for there to be a positive, constructive, proactive relationship between Principal, OpCo, D&D and the Independent Certifier.

One of the features that we observed was a constant interaction between the parties and the Independent Certifier to ensure that the Independent Certifier had the appropriate level of resources to meet the demanding requirements for package approvals.

Lessons Learned: The selection of high quality, competent, adequately resourced design professionals is essential to success.

Lessons Learned: Developing and maintaining a positive, constructive,

proactive relationship between the contract parties and the Independent Certifier is essential to success.

Lesson #11: Authorities/Services

Because it never emerged as a serious issue, it was obvious to the DAB that there had been early proactive engagement by OpCo and D&D with Authorities regarding services requirements and it appeared there was a good working relationship with the service providers. Similarly, there had been early engagement, pre-Contract, by the Principal with the independent rail regulator to better understand the requirements of the regulator and assist with embedding these requirements into the various contracts.

The relationship with the independent rail regulator is critical to the successful implementation and commissioning of a rail line, and again the parties seem to have established a strong working relationship with the regulator.

Lessons Learned: Developing and maintaining a strong, co-operative relationship between the contract parties and the Authorities and regulator is an essential key to success.

Lesson #12: Ageing Unresolved Issues

Following a meeting where DAB Members commented that the ageing of unresolved issues that might lead to claims (such as unagreed modifications or variations, EOT claims, unresolved RFIs) was something of a litmus test of good or bad Project management, the parties' special efforts to address and resolve outstanding, ageing issues was evident by the following meeting. Subsequently, ageing of unresolved issues and claims was a matter which



was constantly monitored and addressed throughout the Project.

Lessons Learned: Addressing issues that might lead to claims in a timely manner provides certainty for all contracting parties.

Lesson #13: Contract Administration

The parties made special efforts to ensure compliance with contractual notice and claim requirements to ensure timely and adequate information and to avoid the potential for disputes over the contractual and legal consequences of non-compliance.

Where compliance with continuing notice requirements was likely to tie up Project personnel and be counterproductive to timely Project delivery or negotiations regarding the consequences of late handover from an earlier, interfacing project, the parties cooperatively entered into standstill agreements to suspend those obligations without adverse consequences.

Lessons Learned: Compliance with contract administration requirements is obviously critical, but agreeing to sensible standstill arrangements from time to time and as appropriate demonstrates a mature contractual relationship particularly where those arrangements do not disadvantage any party.

Lesson #14: Issue Identification and Resolution

The DAB was thorough in listing issues that it considered may emerge into difficult issues, and possibly claims. The fact that each of these issues raised by the DAB was actively considered between DAB meetings and reported was a credit to the parties.

Although there were a number

of occasions where unresolved modifications, change events and the like were, in the DAB's opinion, "falling behind", the parties were always in communication about those issues.

There was one occasion when the parties informally requested the DAB to provide an Advisory Opinion on a difficult issue. The DAB Members concluded that it was in the interests of the parties and the Project that the parties themselves should resolve that issue and the DAB, in effect, "pushed back" against providing an Advisory Opinion. This was successful as the parties ultimately resolved the issue between themselves.

Lessons Learned: Issues and disputes should, so far as possible, be owned and resolved by the Project parties.

Lesson #15: Program resequencing

It was obvious to the DAB that the interface delays referred to above and other associated issues were of such magnitude that they were likely to require matters to be resolved in a timely manner to ensure that project objectives could be maintained. To the parties' credit, they embarked upon a structured process, relevantly involving the project team leaders and CEOs of respective organisations, to assist in the resolution overall of the issues.

The DAB observed from the side line these issues as they were occurring and continued to encourage the parties to resolve the issues and resequencing of the program to maintain achievement of project objectives. The complicated structure of a PPP meant that more time needed to be committed to the process and more parties/stakeholders needed to have their interests explained and satisfied.

Lessons Learned: Whenever a range of issues emerge, parties to a project should endeavour to reach a global resolution with or without the assistance of the DAB.

Lesson #16: Outsourcing Determinations

The DAB Agreement split the DAB's role of avoidance/prevention with determination by "outsourcing determinations". This was seemingly made on the basis that if the DAB was to undertake a determination, the unsuccessful party's resentment could then hinder the DAB's more important dispute avoidance role. The agreement sought to overcome this potential issue by removing the decision/determination-making function from the DAB and outsourcing determinations to an independent expert agreed upon by the parties or selected by the DAB, if the parties were unable to reach agreement on the expert.

The remaining function of the DAB was avoidance and prevention and, as part of those techniques, the DAB retained the right to provide "Advisory Opinions".

In their collective experience, the DAB members do not believe there is an advantage in separating avoidance and prevention from determinations. These roles are necessarily complementary, and "outsourcing determinations" to a third party denies the parties the considerable expertise and built-up knowledge and experience that the DAB members will have obtained during their role on the Project. It is not the DAB members' experience that an opinion

or determination in favour of one of the parties (or partly in favour of each party) adversely affects the DAB's capacity subsequently to meet with the parties and function properly. If anything, the parties seem to have a greater respect for the DAB members, after such (usually complex and difficult) work.

Lessons Learned: It is not necessary to separate the avoidance and prevention role of the DAB from the determination role of the DAB. Experienced DAB members can accommodate both avoidance and prevention (including Advisory Opinions) as well as determinations and still maintain the trust and relationship to make avoidance and prevention an ongoing success.

Conclusion

From the DAB's perspective, the overriding impressive characteristics of this Project were:

- (a) the quality of key Project personnel and the professional performance of their roles, functions and obligations;
- (b) the parties' open, transparent and honest communications and the effort they put into developing and maintaining those relationships and communications;
- (c) the impressive degree of best for Project (and Project stakeholders) cooperation and mutual problem solving (for example, the original dates for completion were remarkably close to the actual dates, given the significant delays to certain access points); and
- (d) the parties' own efforts to resolve issues and to avoid what would likely otherwise have been a costly and time-consuming dispute.

The authors can be reached as follows:

Ron Finlay
Email: ron.finlay@fincon.com.au

Louise Hart
Email: louise.hart750@gmail.com
John Tyrill
Email: john.tyrill@gmail.com