

## **Resolving Contract Disputes Between Transportation Agencies, Contractors and Subcontractors**

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Procurement of construction services for transportation infrastructure facilities can often times result in an adversarial relationship between the contractors, subcontractors, and owner agencies. Unfortunately, a significant amount of time is spent on disputes, subsequent claims, arbitration and increased litigation. It goes without saying that along with more complex contracts come increased opportunities for contractual disputes.

While I am not advocating that transportation agencies or contractors or subcontractors yield to requests from each other when disputes arise solely to avoid claims, I do believe it is essential for the parties to make every effort, within the provisions of the contract, to resolve disputes at the lowest cost and with the least time-consuming solution. Additionally, the goal should always be to promote a cooperative attitude and maintain a good working relationship because the parties will continue to work together after the dispute is resolved.

One option to resolve disagreements without getting entangled in time-consuming litigation is by providing for a dispute review board (DRB) in the project contract. The review board consists of a panel of experienced, impartial reviewers that review the facts of a dispute and makes recommendations on the basis of those facts and the board's expertise.<sup>1</sup>

According to statistics produced by the Dispute Review Board Foundation, by 2000, 97 percent of construction disputes using DRBs were settled without proceeding to litigation. These disputes involved 757 projects and \$39.5 billion.<sup>2</sup> Additionally, the use of DRBs after 2001 is projected at 85% of the average growth rate. The DRBF has stated that this percentage is conservative in light of the continuing and expanding use of DRBs by state highway departments and by recent decisions to make DRBs available for use on all highway projects in California and Florida, as well as highway maintenance projects in Florida.<sup>3</sup> In turn, the Dispute Review Board

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<sup>1</sup> <http://www.fhwa.dot.gov/construction/fs02009.cfm>

<sup>2</sup> Id.

<sup>3</sup> [http://www.drb.org/database\\_intro.htm](http://www.drb.org/database_intro.htm)

Foundation reports that a growing number of State departments of transportation are using DRBs to resolve disputes.<sup>4</sup>

Specifically, in Florida, the Florida Department of Transportation (“FDOT”) has set up Regional Dispute Review Boards (“RDRBs”) in each district. The role of this RDRB is to provide specialized expertise in technical areas and in administration of construction contracts to assist the FDOT and the Contractor in resolving disputes in a timely and equitable manner.<sup>5</sup>

There are numerous advantages to utilizing a DRB, especially for complex construction projects. The goal of DRBs is the quick resolution of construction disputes so that construction jobs get completed faster. Disagreements are settled contemporaneously with the construction project, which allows the parties to free up time and resources and the costs of pursuing court claims are avoided. Further, DRBs offer a forum for subcontractor complaints.<sup>6</sup>

As with other transportation agencies, when contract disputes with FDOT arise, these disputes may only be submitted by the prime contractor as the signatory on the main contract responsible for the completion of the entire project. Specifically, Section 337.11(1), Florida Statutes, provides that contracts between FDOT and prime contractors create no third party beneficiary rights in those who are not parties to the contract, such as subcontractors.<sup>7</sup> Thus, a subcontractor cannot directly bring a claim against FDOT. Moreover, the subcontractor has no recourse against the FDOT based on contractual breaches or mistreatment by the prime contractor, as no obligation has been created in the FDOT as a result of the relationship between the prime contractor and subcontractor.

In those instances, the subcontractor may submit what is commonly referred to as a “pass-through” claim to the prime contractor, who will in turn bring the claim on behalf of the subcontractor against the agency. Because many claims involve subcontractors, DRBs are able to assign responsibility between the owner and primary contractor for those claims.

Further, all claims presented to the FDOT for equitable adjustment of time or compensation, including the pass-through claims of the subcontractor, must be certified under oath and in writing, by the prime contractor.<sup>8</sup> The claim certification requirement is one of the

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<sup>4</sup> The nonprofit Dispute Review Board Foundation has compiled statistics on the success of DRBs in minimizing construction litigation. Additional statistics on DRB use in highway construction by State, type and size of project, and dispute outcome through the year 2000 are available from the Dispute Review Board Foundation.

<sup>5</sup> <http://www.dot.state.fl.us/construction/CONSTADM/DRB/Guideline.shtm>

<sup>6</sup> <http://www.fhwa.dot.gov/construction/fs02009.cfm>

<sup>7</sup> Fla. Stat. § 337.11 (2008).

<sup>8</sup> Section 5-12.9, Florida Department of Transportation, *Standard Specifications for Road and Bridge Construction, 2007*; <http://www2.dot.state.fl.us/SpecificationsEstimates/Implemented/CurrentBK/Default.aspx>

tools used by the FDOT to guard against the presentment of fraudulent claims. The certification requires the prime contractor to affirm that the claim is made in good faith, that the supportive data is accurate and that to the prime's best knowledge and belief, the amount of the claim accurately reflects what the prime contractor in good faith believes to be the FDOT's liability.<sup>9</sup> Failure to comply with the certification requirements may discharge the FDOT's obligation to review the claim.<sup>10</sup>

Undoubtedly, because transportation agencies, contractors and subcontractors maintain an on-going working relationship for an extended period of time, when working on complex and large transportation projects, it is essential for the parties to find positive, cost-effective ways to resolve disputes quickly. By proactively working together toward preemptive disposition of contract disputes through options such as the DRBs, combined with ensuring the proper claims certification process is followed by the contractors and subcontractors, the result is a more positive atmosphere at the job site, cost savings to all parties, and a more cooperative and lasting working relationship going forward.

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<sup>9</sup> Id.

<sup>10</sup> Section 4-3.2, *Standard Specifications for Road and Bridge Construction*, 2007.