



Forum

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Idaho Transportation Department Adopts DRBs for Construction Claim Resolution

“The CIRT’s goal was to develop a set of recommendations to resolve construction issues... at the lowest appropriate level and at the earliest appropriate date.”

By John A. Gates P.E. and Stephen A. Bywater J.D.

In recent years the Idaho Transportation Department (ITD) has experienced an increase both in number and in cost of construction claims on its highway projects. In the early months of 2001, ITD organized an action team known as the Construction Issue Resolution Team (CIRT). This team was made up of representatives from ITD (Construction & Legal), the Federal Highway Administration, and highway contractors. The CIRT recognized that claims prevention starts with a good set of contract documents. However, the CIRT’s charge was to come up with a better system of claims resolution,



not claims prevention. The CIRT’s goal was to develop a set of recommendations to resolve construction issues (disputes or claims) at the lowest appropriate level and at the earliest appropriate date.

In its analysis of the current construction claims resolution process the CIRT found several factors that contributed to general dissatisfaction with the process. Among them were:

- Claims take too long to resolve.
- There is often a need for more expertise and guidance on technical issues at the project level, e.g., complex schedule analysis.

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President's Page

This edition of the *Forum* heralds the debut of its new editor: Ann McGough (see Ann's note in this issue). Ann is taking over the reins from Larry Rogers, who was the genesis of the *Forum* in the early days of the formation of the DRBF. Over the years, Larry has worn all the hats (reporter, copy editor, manager, and publisher) and done all the work, on a limited budget, that has gone into making the *Forum* the quality product that it is today. The *Forum* is one of the most important interfaces between the Foundation and both its members and the industry.

On behalf of the Foundation's officers and directors I would like to commend Larry's efforts and express our gratitude. In addition to his expanding role as Training Director (see the report on Australia in this issue) and Membership Director, Larry will be tackling other assignments on the Foundation's behalf. In particular, he will be responsible for developing the full market potential of the Foundation's web site: another extremely significant interface between the DRBF, its members, and the industry.

On a different note, I recently received a letter from one of our practitioner-members expressing his frustration in obtaining DRB assignments through the Foundation. I know that others have expressed the same frustrations, and I would like to share my response to this member with the rest of you:

"...I view my membership in the Foundation as the premier networking opportunity to meet those members that are active on DRBs and who are in a position to assist my efforts. I have found that active involvement in committee work, meetings, contributions to the *Forum*, and posting my resume on the website have expanded my marketing opportunities.

As you noted, the Foundation should be "a source for agencies, contractors and engineers to locate potential DRB members." To some extent it already is. I believe this will increase as the Foundation continues to aggressively market the DRB concept to DRB users worldwide, and maintain the Foundation's leadership position in promoting professionalism among practitioners through its training programs, the development of ethical standards and best practices, and educational & data compilation efforts.

Through all of these measures, it is my hope that membership will flourish through a process of attraction rather than promotion."

I appreciate the time this member took to write me with his concerns, and I encourage all of our members to foster open dialogue either through letters to the *Forum* or by contacting any of the officers and directors of your Foundation. □

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Mark Your Calendar

DRBF Annual Conference in Washington, DC USA
18-19 October 2003

DRBF International Conference in Paris, France
Tentative date: 15 November 2003

Committee Reports

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The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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Marketing

The Marketing Committee has been actively working on the development and production of several DRBF marketing pieces. Graphics and text have been developed for the new DRBF brochure and cover folder, and the first draft has been reviewed by the Board of Directors. The final draft was scheduled for completion by mid-January, 2003, with printing scheduled for late January, 2003. Materials should be available for distribution in early February 2003. In addition, the Board of Directors has approved modifications to the membership brochure and covers for the Member Directory to match the new graphics theme. The graphics standard set by the marketing pieces will be reflected in the *Forum* (beginning with this issue) and on the web site, so that the DRBF is

sending a cohesive image and brand through all its communication vehicles.

With regard to conference activities, information has been provided to the ASCE Construction Institute which will present a program on alternate forms of dispute resolution at a seminar in conjunction with the Beavers' Dinner in Los Angeles on January 17, 2003, and the Moles' Dinner in New York on January 29, 2003.

In early December 2002, John Nichols and Bernie Smith attended the 2002 FHWA Steel Bridge Conference in Salt Lake City where they gave a paper and displayed DRBF literature at a booth.

A technical paper for the June 2003 APTA
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Letters and E-mail to the DRBF

On Dec. 18th, I gave a presentation on DRBs to the Engineering Management Committee of the National Capital Section of ASCE in Fairfax, VA. The topic was well received by the attendees, thanks in large part to the DRBF power point package provided. What came through loud and clear to me was that a huge part of our industry has heard of the term DRB but does not know much about the concept. This includes professionals in firms advertising dispute resolution as one of their services! The package is great and easily supports a forty to forty-five minute presentation. I used many of the bullets to relate anecdotal incidents in my own Board experience or to elaborate on certain key points such as the requirement of impartiality of all Board members and the avoidance of ex-parte communication.

I do have suggestions to slightly modify the DRBF package. I presented the information about the DRBF at the end of the talk, theorizing that I would present the history, structure, function and success of

DRBs before hitting the group with the commercial. Several attendees immediately requested our web site address after getting information on the DRBF. I also promoted the chance to attend our next annual conference in Washington. As an enticement, could we come up with a reduced rate for locals who are interested to learn about us at our annual meeting? The other suggestion I have is an enhancement of the history bullet and adding a slide or two about the early development of DRBs. In this regard, I referred to a couple of acetates I developed for my earlier World Bank presentations on DRBs. I broadened the historical presentation to the audience to give better historical perspective. You do not see as much grey hair in the audience as you see at a DRBF conference. Many current practitioners have no knowledge of the acrimonious, contentious and litigious climate of the 1960s to 1980s that drove the development of DRBs.

Hal McKittrick □

The Great Disputology Debate



By Ernesto E. Henriod

The city of Christchurch, New Zealand, was host to an assembly of international experts from all sides of the

contract management spectrum last year at a conference on *The Contract in Successful Project Management*. It was organized by the Centre for Advanced Engineering (CAE), with the collaboration of other local and international professional institutions, and the participation of senior engineers, project managers, consultants, and arbitrators from the Pacific region and the world at large. The World Bank and the Asian Development Bank were represented by senior managers.

The subject of the papers presented, and the ensuing discussions, ranged from essential legal principles to the latest developments in contract forms and, inevitably, produced an important debate around the subject of “disputology.” This is a very apt term coined by the late Sir Michael Kerr in his Keating lecture of 1996. To my mind, it describes graphically the business of, on the one hand, creating opportunities for disputes and, on the other, attending to their resolution.

Perhaps the debate can best be summed up by a few statements: first, one by David Williams, Queen’s Counsel and arbitrator of considerable international repute, who stated,

“Multi-tiered dispute resolution clauses have become commonplace in international construction contracts. They typically call for consultation, negotiation or mediation before a dispute can go to arbitration. While these clauses are fashionable, in practice they can create more problems than

they solve, especially if they are not drafted properly. Moreover, a danger with such procedures is that they become just an expensive and time-consuming prelude to arbitration.”

Mr. Williams went on to discuss case history and papers written on the subject. However, embarking straight to arbitration means that a dispute has been allowed to develop unchecked, and must be referred to an external panel to decide its worth. It is a drastic step to take, and may sour the relationships on a project, as there may be winners and losers. In this context, the Hon. Mr. Justice Hartman, writing in Asian Dispute Review commented on the adversarial culture which has plagued dispute resolution in the past:



“The old spirit was more of a warrior code, the tactics of combat dictated by which side you represented. That has been fine, no doubt, for those initiated into the code, the civil litigation lawyers. But Lord Woolfe found that litigants were, in the main, not satisfied with the system. They criticized it for being too slow and far too uncertain, too expensive, incomprehensible to the uninitiated and too susceptible to abuse.”

Further, Dr. Martin Barnes, executive director of the Major Projects Association of the UK and principal author of the New Engineering Contract (NEC) of the Institution of Civil Engineers, had this to say about arbitration at the CAE Conference:

“My experience, which may not be typical, is that the outcome of arbitration is, more often than not, a decision which is unconnected with the realities of what actually happened. By the time the arbitrator makes his decision

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(or their decision, if there are more of them, which is usual in international arbitration), the issues at stake have been banged and buffeted about for so long that their resemblance to what really happened on the project has disappeared.”

Strong words, indeed, on all sides. No doubt, many practitioners still favour confrontation, and they will end in court--be it before arbitrators or a judge. Nevertheless, we must be keenly aware that arbitration is an important backstop, when everything else has failed and a dispute has developed. It would be foolhardy to enter into a contract which did not include arbitration as a last resort. This is particularly true in international projects involving agencies of countries that are signatories of the New York Convention, which provides the important comfort of assured enforceability of an arbitral award.

Over three days of substantive papers and intense discussions, the assembled experts and managers came to the conclusion that, given the examples coming out of the USA, Europe, Asia and Australasia, the traditional culture of confrontation is changing towards one of collaboration, largely resulting from the emergence of the contract “neutral” and innovative forms of contract. In turn, this culture change has fostered the resurgence of a host of contract approaches which rely on mutual trust and the belief that working together towards a common goal will benefit both sides. Target contracts, partnering, alliancing, public/private partnerships and the BOT family of contracts are being used extensively, as well as the traditional forms of contract based on bids and standard forms of agreement.

In the 1980's, Dispute Review Boards (now renamed Dispute **Resolution** Boards) led the challenge to the culture of confrontation. The adoption of DRBs for contracts that hitherto had been a hotbed of confrontation and disputes showed the construction profession how to reach the

end result without recourse to the courts. DRBs were accepted at an early stage by the World Bank (and now are “**mandatory**” in the contracts it finances), and later adopted by FIDIC in its international forms of contract with a slightly different name, Dispute Adjudication Boards, but with comparable constitution and objectives.

Frank McDonough and I took up the subject of the Dispute Resolution Boards and gave conference participants the history and evolution of DRBs and the Foundation. The most dramatic illustration of the advantages of DRBs we quoted came from the January 2002 issue of the *Forum*, which showed that by the end of 2001, 818 projects with a total value of \$41 billion had benefited from DRBs. Among that huge number of contracts, only 31 disputes had to be referred to arbitration or the courts of law.

The international application of DRBs has continued to spread, since the days of the El Cajon dam in Honduras, a World Bank project of the 1980's. Of late, large hydro projects financed by the World Bank in China, such as **Ertan** (civil works valued at \$2 billion) and **Xyaolangdi** (35 billion Yuan, including \$1.2 billion in foreign currency) have also been completed successfully with the assistance of DRBs.

The New Engineering Contract (NEC) was another key development in the evolution towards a collaborative approach to project management. Drafting started in the mid-1980's, launched by the Institution of Civil Engineers of London. It has been claimed that the resulting contract form is now used in over 90% of all infrastructure projects in Great Britain; it is used in more than 20 other countries; and the World Bank adopted a variation of an early draft of the NEC for its Smaller Contracts document in the early 1990's.

The NEC is a flexible contract form, allowing its application to various management approaches: from *target* to *schedule of rates* contracts. It is based on establishing and

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keeping good communications among the parties, for instance, providing logical channels for the management of changes. Dispute resolution is entrusted to an adjudicator, appointed at the start of the contract. However, the NEC adjudicator—as opposed to the DRB practice—does not follow progress on site or receive regular reports but rather, is “on tap” to resolve disputes as they arise and before they fester into major problems. Nevertheless, as reported by Martin Barnes, adjudicators have had very little work, given the nature of the relationships fostered by the NEC.

Dr. Nael Bunni, international authority on construction risk and insurance, and immediate past president of the Institute of Chartered Arbitrators, London, gave us an excellent account of the latest FIDIC suite of contract documents and his views on international arbitration. Sir Ian Barker and David Williams, QC (see above) also spoke about international arbitration.

The CAE Conference went much further—we had important discussions on contract risk and risk management; mediation; the experience with joint ventures in Asia; contract conditions in China (the last two papers presented by speakers from Singapore and China), and other subjects, all related to the core themes of *innovations in contract forms and dispute prevention and resolution*.

The Centre for Advanced Engineering has published (November 2002) a book which collects the conference papers with a very minor amount of editing, seeking to retain the strength of the convictions of the presenters. The CAE web page gives you a list of the authors, the chapter headings, and a sample chapter written by Dr. Martin Barnes. Log into www.caenz.com, click on Publications/ Current & Backlist Books and find “**The Contract in Successful Project Management.**” The 300-plus page book can be ordered directly from CAE through the above link. □

Other News

Raymond Henn Receives ASCE’s 2002 Roebling Award



DRB Foundation Member Raymond Henn, principal with Lyman Henn, Inc. in Denver, Colorado, is the recipient of the American Society of Civil Engineers’ (ASCE) 2002 Roebling Award.

According to the ASCE, “The Roebling Award recognizes and honors an individual who has made an outstanding contribution toward the advancement of Construction Engineering.” Ray’s award citation reads, “In recognition of his many years of dedication, innovation, and effective service to the heavy construction industry.”

Ray was nominated for the Roebling Award by President and CEO Galyn Ripentrop and Executive Vice President Bob Pond of Frontier-Kemper Constructors.

Counting Ray’s award, there have only been eight Roebling Awards given since its inception in 1987. Ray received his award at the ASCE National Convention in Washington, D.C. Ray delivered the “Roebling Lecture” at the ASCE Construction Institute’s breakfast, held during the National Convention.

Please join us in congratulating DRBF member Ray Henn for this prestigious professional achievement. □

If you’ve got news about members, DRBs or other things of interest to our members, we’d like to hear it.

**Deadline for the next issue is
April 1, 2003**

Summary from Annual Meeting

Breakout Session Group 3

Process Integrity—Legal Developments

A. Board Member Selection

The perception of bias of the members is the most critical issue facing the selection process. In many areas of the construction industry, particularly underground construction, board members know the contractors. This can give owners a “perception of bias.” Reasonable steps should be taken prior to the first meeting to diffuse the perception. Board members should focus on establishing a relationship and common ground with the owner’s representatives.

B. Ex Parte Communication

Ex Parte communications are another potential source of “perception of bias.” Board members, and the chairman in particular, must be mindful of *ex parte* communications, particularly during site tours. Although *ex parte* communications are prohibited by the DRB Rules, it is important to reinforce the rules during the process. Board members should make sure they spend equal time with the owner and contractor representation during the site tour.

C. Admissibility of DRB Recommendations

Several recent court cases in Massachusetts have addressed the admissibility of the DRB recommendation. The courts have generally given great weight to the recommendations. The consensus of the members at the meeting was that the process would be undermined if the recommendation was not admissible in a later proceeding.

D. DRBs Deciding Legal, Non-Technical Contract Issues

The conclusion reached was that the DRBs should hear and make recommendations on all issues brought to the board, including legal, non-technical issues.

E. Participation in the Hearing by Attorneys and Consultants

The conclusion reached was that attorneys should be allowed to be present at the hearings, but should only participate in an active sense at the request of the board. Participation by true technical experts should be encouraged. Consultants who act as just “claim consultants” should not be encouraged to participate.

F. Binding Nature of the DRB Recommendation

The group’s consensus was that the recommendation should not generally be binding. The reasoning is that DRBs are in the business convincing business not the mandating business.

G. Advisory Opinions

Advisory opinions by the boards are excellent tools. The advisory process should be inserted in the contract documents. This is a priority issue that should be addressed quickly by the Foundation.

H. The Hearing Itself

Cross examination should not be permitted. If one party does not attend, should the hearing go forward? The consensus was if the conduct of a hearing is a condition precedent to taking the next step in the disputes process, then the hearing should be conducted even in the absence of one party.

I. Enforcement of the Contract

It was decided that the board had to fairly enforce the terms of the contract and could not resort to fireside equity.

J. Payment of Board Members

The consensus was that it would be best if all members were paid from the same source of funds. Payment by individual parties fosters the idea of “my member” versus “your member.”

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- Too many claims are forced into litigation for resolution.
- ITD's existing administrative process did not provide for a neutral review of the claim.

In seeking a solution to these concerns the CIRT consulted with construction representatives, construction law attorneys and highway engineers. Publications addressing issue and dispute resolution were examined and the procedures for resolution of construction issues in transportation and public works departments of several other states were also reviewed. The consensus reached by the CIRT after examination of these resources was that issues and disputes are best handled at the earliest possible date and at the lowest appropriate level. The CIRT also found that to date in Idaho traditional partnering has generally not been effective in the prevention or resolution of highway construction claims.

In the course of the CIRT's research and examination of these issues, it found that the DRB process was given enthusiastic support and accolades where it had been implemented as a dispute resolution tool.

The CIRT developed an approach for Idaho designed to produce fair and equitable issue resolution, and to streamline the process. The approach established three separate methods to aid in issue resolution:

(1) A *Dispute Review Board* specification (which includes a process for both informal and formal DRBs) which is designed to be project specific and would be included in the contract prior to bid. This specification follows in large part the recommendations of the DRB Foundation for the formal DRB process. DRBs are established on selected projects based on size or complexity. 3-member DRBs are established on the larger projects and 1-member DRBs are used on smaller projects. The informal DRB process is available to provide informal non-binding preliminary re-

view regarding an emerging dispute. Informal DRB review meetings are oral discussions with input and comment encouraged from all parties. After deliberation the informal DRB provides initial impressions and guidance verbally. The cost of the DRB is shared equally by the contractor and ITD and there is a bid item in the contract for the DRB with a pre-entered amount that represents the estimated amount of ITD's share of the total cost of the DRB.

(2) A specification creating a standing *Claim Review Board* (CRB) which is available to review claims on a statewide basis at the chief engineer level of the ITD administrative appeals process. Members of the CRB serve 3-year rotating terms and there are alternates available to serve if there is a conflict of interest or availability problem. The CRB is established as a 3-member board but may be convened as a 1-member board. The CRB process mirrors the formal DRB process and is designed to provide a method to resolve claims that were in process prior to the adoption of the new specifications and to handle issues that arise on new projects where a DRB was not established under the contract. The CRB will only be used if agreed to by both parties with the cost to be shared equally. There is no bid item for the CRB. The members of the DRBs and CRB are required by the specifications to attend and successfully complete DRB training prior to participating on the Boards.

(3) A *Technical Analysis Support* (TAS) specification which is available on all contracts. This specification establishes a process for the owner and the contractor to mutually seek technical expertise and guidance regarding a technical issue or problem on a project from an agreed-upon expert who is charged to act in the best interests of the project.

The CIRT presented its proposed process and specifications to the leadership of ITD and to the Idaho Chapter of the AGC for

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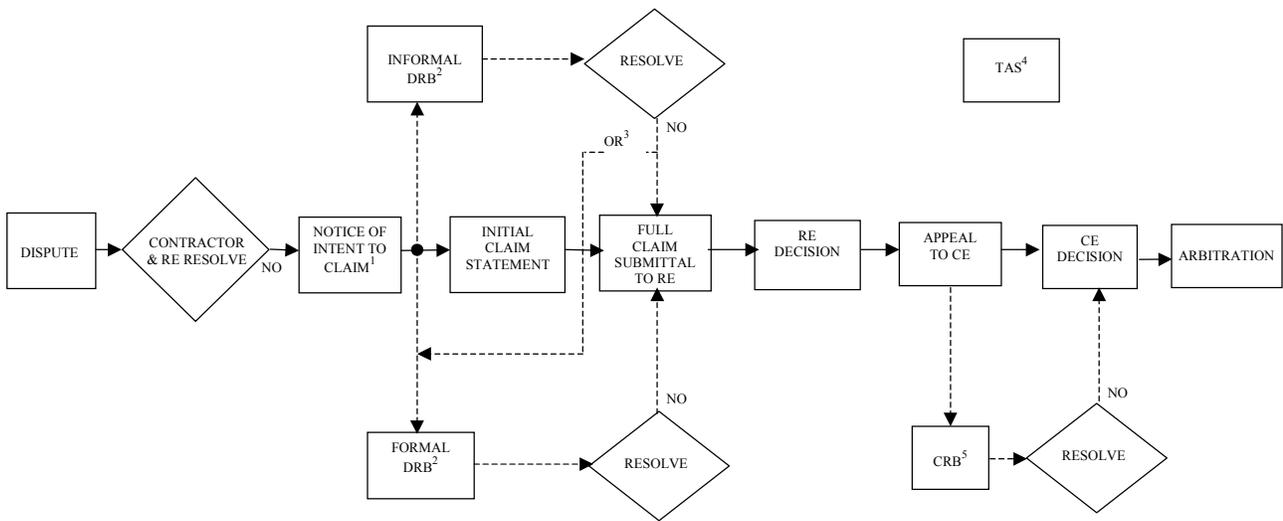
review and comment. The new specifications were approved by the Idaho Transportation Board in February of 2002. A training session presented by the DRB Foundation for potential DRB members and participants was held in Boise that same month.

ITD began putting the new DRB and CRB specifications into contracts in the spring of 2002 so feedback will be coming in soon. To date, ITD has established DRBs on 4 new projects, but there have been no project level DRB hearings. ITD has had 3 DRB/CRB hearings on claims that were pending in the claim appeal process. There were two 1-member DRB hearings and one 3-member CRB hearing. So far there have been two decisions rendered and they have both been accepted by all of the parties.

See below for a flowchart illustrating ITD’s new Dispute Resolution Process. □

John A. Gates P.E. is claims engineer for the Idaho Transportation Department. Stephen A. Bywater J.D. is a deputy attorney general for Idaho assigned to the Idaho Transportation Department.

CONSTRUCTION DISPUTE RESOLUTION PROCESS
Idaho Transportation Department
December 2002



NOTES:

1. Notice of Intent must be given whether or not DRB or CRB is anticipated.
2. Formal or informal DRB may be requested at any point during the RE review after notice of intent. However, the earlier the better.
3. Informal DRB may be resubmitted to formal DRB.
4. Technical Analysis Support (TAS) is available at any point in the process.
5. CRB will not be available for claims on those projects where a DRB was established and available to review the dispute.

DRBF Board Meeting Summary Minutes

By Peter M. Douglass
Secretary/Treasurer

OCTOBER 4, 2002 MEETING

A DRBF Board of Directors meeting was held on October 4, 2002 in conjunction with the DRBF Annual Meeting with 18 directors and officers participating.

President Jack Woolf opened the meeting by distributing DRBF logo pins, and noting that each of the general members at the Annual Meeting will receive a logo pin. The directors and officers pins have a small stone in them to identify their role in the DRBF.

Jack also introduced the three new DRBF directors: Mr. Sammie D. Guy, Mr. John W. Nichols, and Mr. Robert A. Rubin.

Treasurer's Report:

Pete Douglass reported that DRBF revenues for 2002 are very close to the budget except that membership revenues are projected to be ~ \$20,000 short. 2002 expenses are lower than budgeted by ~ \$25,000 because we did not hire an Executive Director, and by another \$12,500 because we did not spend the entire marketing budget that was allocated. As a result, the projected 2002 contribution to the DRBF reserve fund is expected to be greater than budgeted.

Discussion of the 2003 budget proposal that was provided to the Board was deferred.

The name change from "Dispute Review Board Foundation" to "Dispute Resolution Board Foundation" is official.

Regional and International Chapters:

The Board agreed that excess funds collected from DRBF Chapters that remain unused for a period of two years should then go into the DRBF general operating fund. Steve Fox noted that it would be necessary to set up

written operating procedures to facilitate this transfer of funds. He also noted that the International Chapter now has \$1800 in their fund that will be drawn on for the next International Meeting in 2003.

Membership Benefits:

The group discussed the possible development of DRBF "logoware" such as hats, shirts, stick-on logos, etc. It was generally agreed that these might be nice giveaway items at the Annual Meeting or Training Sessions, but that as a non-profit organization we cannot show profit from the sale of such items as income.

Someone needs to be assigned responsibility for the DRBF website as the resume section is not being utilized and the Annual Meeting was not even listed on the calendar. It was agreed that Craig Neff should be notified that individuals can enter their resumes under several different specialties.

Possible group discounts were discussed wherein more than one member from the same organization might be discounted, but no discount for more than one member from the same "organization." It was suggested that more consideration be given to the concept of "paired membership" where two organizations might join together to share a single membership.

Officer/Director Tenure:

Jack Woolf noted that the offices of president elect, president and past president are each one year and director positions are for a maximum of two terms of three years. Two of our directors have reached their maximum this year. Our by-laws are silent on when a person who has rotated off can be renominated. The Board discussed it, and it was suggested that a one year period off the Board may be sufficient.

Board of Directors Meeting Schedule

The Board has scheduled telephone meetings for:

March 14, 2003
May 9, 2003
July 11, 2003
September 12, 2003

If you have something you would like the Board to discuss or consider, notify Brison Shipley or one of the Directors.

Training Workshops:

Larry Rogers reported that there have been 12 workshops in 2002 but that the economic downturn has reduced the number of workshops sponsored by public agencies and 2003 is expected to have fewer workshops. The states of Idaho and Virginia are considering adopting the use of DRBs on all state construction projects which, like Florida, leads to the need for more workshops. Adele McKillop and Larry have been pursuing Canadian agencies for possible workshops.

Larry noted that we expect to offer workshops in conjunction with the 2003 ABA conference in Boston and with the AUA 2004 conference in Atlanta. We need to piggy back with conferences by other organizations such as ASSHTO, AGC, etc.

Regarding possible Continuing Education Credits for DRBF Workshop attendance, Larry noted that the requirements tend to be state specific and he is always willing to fill out the applications if someone sends him the forms to fill out.

It was reported that roughly 40 to 50% of our DRBF membership has attended the DRBF workshops. It was suggested that we may need to train more workshop leaders, on a regional basis, to make workshops more readily available. Could also offer a senior training session for experienced DRB members or maybe an annual update workshop to relay current changes and practices.

It was noted that AAA has done a poor job of promoting and advocating the use of DRBs with only two Boards being set up and handled through the AAA, to the best of anyone's knowledge.

Membership:

Larry Rogers had submitted a report to each of the directors and officers in advance of the meeting that indicated a total 2002 membership of 540, reflecting a steady growth over the past 5 years. However, Sustaining, Corporate and Institutional memberships have shown a

slight but steady decline in numbers over the same period. There was an increase in the numbers that didn't renew their membership, which was at least partially attributed to the increase in dues. A target membership of 700 for 2003 was considered attainable and was adopted by the Board.

Jimmy Lairscey noted that we need to get more states to adopt full scale support/mandate of DRBs. The Inspector General's report in the *Orlando Business Journal* provides excellent proof of DRB success based on some 90 Florida projects.

It was agreed we need to develop a better brochure that is available to everyone.

Reformatting the Forum:

Consultant Ann McGough joined the Board meeting to present her recommendations regarding the *Forum* (having already submitted a full written report to each of the Board members). The discussion covered basic layout, editorial mix, printing, fulfillment, and advertising.

A possible scenario of introducing business card size ads at \$200 each could generate as much as \$2000 per issue or \$8000 per year. Following considerable discussion, the Board remained split on whether to allow advertising or not and agreed to try to assess the general membership's position on this at the Annual Meeting.

A motion was passed unanimously to adopt Ann's recommendations, including 4 color printing on the cover, but holding off on the advertising pending the outcome of the general membership's response.

DRB Manual Update:

Joe Sperry reported that he and Bob Smith would maintain control of what goes into the revised manual. Other discussions included what format (hard bound, paperback, loose leaf, etc) seemed desirable. Possibly multiple formats are available as there are a number of printers who store everything digitally and they can print on demand. E-publishers could also open up

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marketing through e-mail book sales. It was noted that hardbound books set a high standard, but paperback is cheaper and can facilitate wider distribution. A motion was passed approving the their plan.

Code of Ethics:

Brison Shipley noted that he had received no significant comments on his original Code of Ethics, suggesting that it was OK with the membership. A motion was passed to adopt the Code and to publish it in the *Forum* and put it on the website. It was agreed that violations would be addressed with informal reprimands, if deemed appropriate.

E & O Insurance:

Brison reported that the insurance underwriters are talking about “insurable risk” as when someone is sued, i.e. pre-paid legal services when you need legal counsel. Bob Rubin said that we do not fit into an insurance “cubby hole.” Jimmy Lairscey noted that even in Florida where the Board members are considered to be professionally liable for their services, nobody has been sued in the six years that DRBs have been in practice.

Strategic Plan:

Brison had distributed the Strategic Plan to the Board prior to the meeting, noting the need for more systematic marketing to DRB users and the need for some empirical data on cost savings attributable to DRBs. With respect to the latter, he sees the need for a “white paper” addressing this issue; however, the costs of litigation, arbitration, etc. in California and the Federal Government go into a general pot and the dollars expended are not assigned to specific projects. Therefore, some help is needed in coming up with credible expenses when DRBs are not employed.

Marketing:

Bill Edgerton handed out a draft brochure for review and comment by the Board. The Board was generally impressed but deferred comment until later. Bill also noted that he had sent out a survey to some 30 users of DRBs with interesting feedback.

World Bank:

Armando Araujo reported that DRBs are

mandatory on WB projects in excess of \$50 million. A single expert is recommended on lesser projects. Armando said that he could provide a summary of the WB’s past experience. He also noted that the DRBF’s main function would be to assist in selling the concept and not so much to train future DRB members. Peter Chapman felt that we should focus our efforts on five areas and Armando further noted that we need to focus those efforts where the process can work (i.e. where there is not too much corruption). He felt that Mexico is a strong possibility.

International:

Peter Chapman said China has shown a keen interest in DRBs on three projects to date and he has drafted an agreement to work together with CETAC for the Beijing World Games in 2008 involving possibly \$40 billion worth of construction.

Peter also indicated that he envisioned the International Annual Meeting for 2003 to be in two parts, the first part involving active DRB participants to be held in Paris in May 2003, and the 2nd part to be a meeting in Beijing in June 2003 with employer organizations that may need DRBs. Peter requested help for the International Meeting from anyone that was willing.

DRBF Annual Meeting in 2003:

Peter Chapman suggested Washington, D.C. on the weekend of October 18, 2003 for the DRBF Annual Meeting in the US.

Other:

Armando Araujo provided the World Bank’s classification and listing of countries that fall into the “lower,” “middle” and “upper middle” income groups and suggested that individuals from each of these countries be given the opportunity to become members of the DRBF at the Emerging Nations class of membership. It was suggested, however, that correspondence with this class be provided by e-mail only, as regular mail is very expensive. Following discussion, a motion was passed to include individuals from all three groups in this membership class.

Next DRBF Board of Directors Meetings:

For ease of scheduling, it was agreed that telephonic conference call Board meetings be scheduled for the 2nd Friday of every other month.

NOVEMBER 8, 2002 MEETING

A DRBF Board of Directors meeting was held by conference call on November 8, 2002 with 15 directors and officers participating.

Treasurer's Report:

Current projections for 2002 put our total revenues, including income from the Annual Meeting and Workshops minus the projected expenses for 2002, at roughly a \$31,000 increase in the DRBF Reserve Fund. Marketing brochure costs applied to this year's budget will reduce this number.

International:

Peter Chapman reported that he and Igor Leto and Gordon Jaynes had attended a meeting in Paris last week with several French engineers and had tentatively selected Friday, May 23, 2003 and Saturday, May 24, 2003 for the 2003 International Meeting of the DRBF.

The first day would be an introduction/promotional meeting for invited owners and employers with the 2nd day set up as a general meeting day for DRBF members.

Peter reported that the Contractor's Federation in Australia is promoting DRBs and they have a board meeting in November 2002 at which they would like to present information on what training the DRBF could provide. Jim Donaldson reported that he has been working with Larry Rogers and Jim Barrett (Australia) on "Train the Trainer" workshops and it is expected that money issues can be worked out with the Australian representatives. Jim Donaldson has received an outline that looks very good. Jim will stay on top of this and will keep Brison, Peter, and Norman Reich (our Australia Rep.) informed.

Armando Araujo reported that the October 8, 2002 meeting at the World Bank in

Washington, D.C. was very good and our president, Brison Shipley, attended.

Marketing:

Bill Edgerton reported that he has transmitted a 2002 marketing report to Larry Rogers and that he will send a copy to Steve Fox for the DRBF reference file.

Bill has also received a proposal to develop and print a marketing brochure and presentation folder for the DRBF at a cost of roughly \$20,000 for the first 1500 copies. Steve Fox reported that he receives 10 to 15 requests per month for this type of information and that there are many other uses for such a brochure. A motion was passed directing Bill Edgerton to proceed with the proposed brochure and flyer and for Brison to forward a copy of the signed contract to Bill Edgerton and Steve Fox.

John Nichols advised that he would be attending a conference in Salt Lake City on December 12, 2002 with about 350 attendees from the engineering community and he proposed that the DRBF move forward with Larry Rogers tri-fold in a manner that is fast enough for John to use at the December 12, 2002 conference. A motion was passed unanimously by the Board to move forward with the tri-fold as John suggested.

Forum:

Brison suggested that the DRBF transition Ann McGough into the position of editor of the DRBF *Forum* as previously discussed. Brison is responsible for the transition, working with the Executive Committee.

USCIB Membership:

Brison reported that Jack Woolf had followed up on this as agreed to at the Annual Meeting Board meeting and that the price had been reduced. Brison deferred further comment until Jack was available.

Manual Re-Write:

Joe Sperry and Bob Smith have had some discussion on format, but have nothing more defined than the outline from October. Joe suggested that we send out a ques-

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tionnaire to the membership and Bill Edgerton advised that the way we ask the questions is key to getting information back that is readily reducible.

Pete Douglass said that he and Hugh Cronin were putting out a questionnaire for the DRB Session at the upcoming Rapid Excavation and Tunneling Conference (RETC) in June. It was agreed that we need to be sensitive to sending out too many questionnaires on the same subject, although the RETC audience represents a fraction of the industries using DRBs. It was agreed that we need a game plan and timeline to manage the development of the questionnaire like a project. A committee was established for this purpose consisting of Bill Edgerton, Pete Douglass, Bob Smith, Joe Sperry, Bill Baker and John Nichols.

Corporate/Institutional Grant Money:

Peter Chapman suggested that the DRBF try to get \$5-10,000 grants per year from various corporations that support the DRB process. Peter agreed to draft a letter appealing to large corporations and then send it to the Board for review. Armando Araujo agreed to put together a list of names and Peter suggested each Board member come up with a list of five large corporations they believe could be approached.

White Paper/Empirical Data:

Brison is pulling together a white paper providing a comparison between DRB costs and would have been costs for litigation (with all assumptions identified). He expressed the need for help in this effort.

Jimmy Lairscey reported that the Florida Attorney General pulled data off the web site in preparing his comparison. The average cost add-ons based on the records from 75 Florida DOT projects indicated that projects with DRBs averaged 12% whereas projects without DRBs averaged 20%. Jimmy agreed to send this information to Brison and to John Nichols. Jimmy also indicated that he will be having a meeting with university professors in about 2 weeks and he will inquire into possible studies to

collect additional data on project over-runs and under-runs.

Brison indicated that Kathleen Harmon's research on DRBs will not generate cost / benefit information.

Bob Rubin offered to work on would have been legal costs if someone provides a hypothetical case with the number of disputes, etc. John Nichols offered to assist in this effort by providing the added costs of consultants for the owner and the contractor presentations.

Other:

Brison indicated that he needed sample contracts for employment of DRBs on projects so that he can submit them to the insurance underwriter for use in arriving at liability insurance rates. Several of the Board members offered to send samples.

Bob Rubin indicated that there could be some benefit to having ASCE publish the DRB Manual re-write in that they have a two page listing of their publications that gets distributed to some 125,000 ASCE recipients. Concern was expressed that ASCE may not promote the publication any better than the existing publisher. Bob indicated that he will try to probe the possibilities with ASCE without committing to anything.

JANUARY 10, 2003 MEETING

A Board of Directors meeting was held by conference call on January 10, 2003 with 14 directors and officers participating.

Treasurer's Report:

Some recent marketing expenditures, such as the cost of developing and printing the new brochure, have been assigned to the 2002 budget and the 2002 financial statement is in the process of being finalized. The assigned marketing expenditures are consistent with 2002 budgeted amounts. Pete Douglass met with Steve Fox to make final adjustments to the proposed 2003 DRBF budget and that document is in the process of being finalized.

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(Committee reports continued from page 3)
 conference in San Jose is currently under development, and is anticipated to be delivered in the session on Alternative Dispute Resolution.

Bill Edgerton

International

The Third International Conference will be held in association with the International Chamber of Commerce and the International Federation of Consulting Engineers (FIDIC). The venue will be Paris but, owing to other conferences being held in Paris in the Spring (and which include sections concerning dispute resolution and dispute boards) it has been decided that the DRBF Paris Conference will take place in Autumn (Fall) on a date yet to be decided. This conference will NOT conflict with the 2003 Annual Conference in Washington.

Some delegates at the 2002 Orlando Conference expressed an interest in attending the next FIDIC adjudicator assessment workshop. This workshop is designed to test, examine and assess persons who wish to be considered for the FIDIC President's list of adjudicators. The next assessment workshop (3 days) is planned to be in late May or early June 2003 in the UK. Those who would like further details should contact the FIDIC Secretariat at fidic@fidic.org. Those attending the workshop should be well versed in FIDIC forms of contract as the workshop is for assessment purposes and not basic training. Those who would like basic training in FIDIC contracts should also contact FIDIC at that address.

UK 'China' Conference

In the UK on Tuesday 25th March a conference is to be held entitled "Construction Projects: Investment and Risk in China." Gordon Jaynes and Peter Chapman will be speaking on behalf of the DRBF. Should you wish to attend, contact IBC at www.constructionlawonline.com/china.

The DRBF's 'sister' organisation in the UK - 'The Adjudication Society'

As many readers of the *Forum* will know,

adjudication of construction disputes is a statutory right under UK law. Adjudication is proving both popular and successful and can incorporate the DRB process. Other countries are following the UK example with similar legislation (e.g. New Zealand) and it is possible that statutory adjudication will be developed throughout the world in the years ahead.

In 2002, the Adjudication Society was formed in the UK. The founder and current chairman of the Society is Peter Chapman, DRBF President-elect. The Society is 'virtual' in that communications are via email although meetings are held within 6 regions of the UK and the first annual conference was held in November 2002. Newsletters are published 4 times each year. Membership currently stands at about 750. Most importantly, membership is currently **free** so all you have to do is register on the Society's web site at www.adjudication.org.

Peter Chapman

Education/Training

We are working with Jim Barrett of the Australian Constructors Association to go to Australia in the near future to do the Administration and Practice workshop and the Advanced Chaining workshop followed by two days of "Train the Trainer" to create a team of people to offer DRB workshops throughout Australia. In addition, Jim has said that while we are there he would like us to do presentations and meet with key people in Australia to urge the increased use of DRBs in that part of the world.

In the US we have two workshops tentatively set in conjunction with the FDOT conference in Daytona in April, one set for May in Boston in conjunction with the ABA Construction Forum, two scheduled for June in Seattle along with a one-day regional DRBF conference (Northwest region and Western Canada) and at least two scheduled in October during the Annual Meeting. I am also trying to set up workshops with the Idaho Transportation Department, Caltrans, DART and possible work-

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shops in Las Vegas. If any of you have ideas for others, please let me know.

During the next month I will also be updating the training material and developing an Ethics workshop to be offered to members. Any suggestions for changes to the training material are appreciated.

Larry Rogers

Data Compilation

The final tabulation of DRBs is completed for 2002. The summary page provides data covering a 15 year period. The numbers continue to increase with over 900 projects having or currently using DRBs, an increase of over 250 projects since 2000. The dollar value of construction projects using DRBs has increased \$10.8 billion to over \$46 billion during the same two year period (a 30+ % increase).

The graphs covering the years 1997-2002 show consistent correlation between the number of projects with DRBs, the number of disputes settled and the total contract values. While averages are potential pitfalls, the average value of a project with a DRB is \$50 million. And, yes -- we all know of projects under \$50 million with a DRB. However, as DRBs continue to spread in use it is a reasonable expectation that the average project will be smaller.

The reporting of disputes going on to arbitration or litigation is less than the number reported last year. Foundation members with first hand knowledge of the 'litigated' items are making a concerted effort to secure accurate data AND most importantly what the outcome of the litigation or arbitration was. Was the DRB's decision upheld? Or was a settlement reached on the courthouse steps? If so, it should move from the litigated to settled column.

The World Bank is anticipating an effort to secure data for our Tabulation Report from its projects with DRBs.

The trend which started to develop in 1999

continues and is a growing concern. That is, we are not receiving updates and input from several of the large continuing projects, particularly with regards to new and planned contracts. We need every members' assistance to ensure the full recording of DRB utilization occurs. The complete and accurate reporting of DRBs will assist all of us in demonstrating their value to the construction industry. Keep in mind, owners and contractors are our potential clients and we are all selling the DRB process!

We acknowledge and thank all members for their efforts in contributing data for the 2002 Tabulation. Without your efforts this report would not be possible. A special thank you for reporting on DOT projects goes to Jack Norton and John Duke (FL), Ken Darby (CA) and Norm Anderson (WA).

Finally, a special thanks to Steve Fox for his help contacting members for data, following up with contacts and help compiling the materials. His efforts reflect our desire to continually improve the accuracy and quality of the Tabulation.

If you would like a copy of the full Tabulation of DRBs, please contact the DRBF office to have it mailed or e-mailed. It is 32 pages which includes a summary, a graph, and 30 pages of tabulations.

Richard Downs □

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K. Report Content

The report should be strictly factual and should avoid any editorial comments about the parties or their positions. The report should be sufficiently detailed so that it convinces the parties of the strengths and weaknesses of their positions. If there is a minority report it should be anonymous.

L. Variations of the DRB Process

Variations of the DRB process should be discouraged. The process works. Variations are really not DRBs.

M. Training

Training members continues to be of paramount importance for effective boards. □

(Board minutes continued from p. 14)

Membership is well ahead of last year at this time due to more timely distribution of renewal letters and early efforts of Membership Director Larry Rogers.

DRB Manual Rewrite:

Bob Smith is continuing to interact with McGraw-Hill and expects final resolution by mid-January. A survey questionnaire has been drafted and it would be desirable to distribute this questionnaire to our membership and other organizations by e-mail. However, the DRBF does not have a complete listing of e-mail addresses. It was suggested our Regional Representatives may be able to contact members to obtain current e-mail addresses and that students may be willing to assist in this effort.

Marketing:

Bill Edgerton has distributed a new DRBF brochure (11 X 17 format folded in the middle) to the Board members for their review and comment. Bill advised that this brochure could go to publication as early as next week. Discussions by the Board resulted in several suggestions regarding international project representation, brochure graphics regarding DRB statistics and Florida's comparisons of project costs with and without DRBs. A motion was passed to have Bill pursue the Board's suggestions, make the changes that he believes are warranted, and then proceed with printing the brochure.

Bill also suggested updating the existing DRBF membership brochure and has asked his production assistant (Gerry Yoes) to review it and make suggestions. Gerry suggests that the format be changed to an 8.5 X 11 tri-fold format to be distributed with new member applications. The DRBF Directory for 2003 was also discussed with Board suggestions that it be organized by both Region and Country (noting the respective DRBF representative for each), that the cover color be consistent with the new brochure (corner color tabs to indicate different years) and that we try to get the Directory out earlier in the year. A motion was passed to have Bill Edgerton

proceed with updating and preparing both the Membership Brochure and the 2003 Member Directory.

International:

Peter Chapman noted that the Annual International Meeting to be held in Paris will not be held in May due to potential conflicts with planned ICC and FIDIC activities, but will be held later in the year. It is intended that the International meeting will consist of a Friday informational meeting for invited French contractors and owners, followed by the general DRBF meeting to be held on Saturday.

Adele McKillop informed the Board that she has had meetings with British Columbia highway and bridge departments and they are open minded regarding use of the DRB concept in BC. Larry Rogers has had discussions about setting up meetings with other groups, including a March 2003 meeting in Victoria, BC.

Jim Donaldson reported that he and Larry Rogers are scheduled for 7 days in Australia in March 2003. This trip is sponsored by the Australia Contractor's Association and will include two days of DRB Workshops, two days of "Train the Trainer" directed at developing Australia's own DRB Workshop trainers, and trips to several cities to talk with contractors and owners.

DRBF Annual Meeting :

The DRBF Annual Meeting is scheduled for October 18 and 19, 2003 in Washington, DC and is expected to follow a breakout session format with a couple of keynote speakers. The Board meeting will be held on Friday evening, October 17th.

Spreading the Word:

Jack Woolf indicated that the DRBF has joined the US Council for International Business and that the ICC Dispute Resolution meeting is upcoming. The proposed agenda is very much about arbitration and Jack will explore getting a segment of the meeting devoted to DRBs.

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Corporate/Institutional Grant Money:

Peter Chapman agreed to draft a letter that could be sent to corporations and institutions that might be willing to provide grant money for efforts directed at promoting the use of DRBs. Brison Shipley and Jack Woolf will review the draft and provide comments to Peter.

White Paper:

Brison Shipley reported that he has prepared a white paper providing a hypothetical cost comparison between projects employing a DRB and those employing conventional claims resolution through other proceedings. The white paper has been reviewed by John Nichols and Bob Rubin who provided input. The Board felt such an approach was worthwhile.

Other:

Brison Shipley will attempt to contact the ENR Construction Users Roundtable that was identified in the 11/25/02 issue.

Bob Smith reported that academia contains limited commonality of course curriculums regarding construction dispute resolution and although there is an annual meeting of professors that teach these courses, it is a loose network that looks at engineering schools curriculum in such areas. Jim Donaldson will obtain some names to pursue from the American Council of Construction Education.

Brison will send a copy of the current strategic plan to the Board for review and consideration of needed updates.

John Nichols suggested that a monthly single page newsletter that reported on significant DRB issues would be well received and should be considered. □

New Editor for the *Forum*

I am pleased to have this opportunity to introduce myself as the new editor of the *Forum*. I became involved with the Dispute Resolution Board Foundation last summer, when I was retained as a communication consultant to work with Larry Rogers and the Board on a redesign of the newsletter. I enjoyed working with your leadership, and talking with many members during a telephone survey at the beginning of the project. When I was given the opportunity to come on board as your editor, I was delighted.

My educational background is in print journalism and public relations, and my industry experience covers construction, project financing and development, industrial engineering, furniture, property management and trade show production. Before becoming a consultant, I served in the corporate communications department of J.A. Jones, Inc. I retired (so to speak) upon the birth of my children, triplets born in September of 2001. As if things weren't exciting enough around here, I am expecting another child (just one!) this spring.

I hope you will not hesitate to provide input, feedback, and constructive criticism on my work with the *Forum*. My goal is to maintain its role as the primary communication vehicle for the organization, and provide relevant, informative, and sometimes challenging content on a timely basis.

Ann McGough

Workshop Calendar

April 10, 2003 Daytona, Florida
Users' Workshop

April 11, 2003 Daytona, Florida
Administration and Practice Workshop

May 10, 2003 Boston, Massachusetts
Administration and Practice Workshop

June 16, 2003 Seattle, Washington
Administration and Practice Workshop

June 17, 2003 Seattle, Washington
Advanced/Chairing Workshop

October 20, 2003 Washington, DC
Administration and Practice Workshop

October 21, 2003 Washington, DC
Advanced/Chairing Workshop

Attendees should take the Administration and Practice workshop prior to the Chairing Workshop. Registration fee includes lunch and materials. Each participant will receive a DRBF Certificate of Completion. The cost is \$395 for non-DRBF attendees and \$345 for DRBF members. To register for a workshop, contact the Dispute Review Board Foundation.

WELCOME TO NEW FOUNDATION MEMBERS

MEMBER ADDITIONS OCTOBER THROUGH DECEMBER 2002

Harvey Armstrong
Harvey Armstrong &
Associates
Longwood, FL USA

Crandall Bates
Balfour Beatty Construction
Suisun City, CA USA

Gordon Costa
Trauner Consulting Services
San Diego, CA USA

Janet Donelson
Donelson Consulting, LLP
Seattle, WA USA

William O. Downs
Port Orange, FL USA

Ronald D. Drake
Drake Project Development
Arroyo Grande, CA USA

Simon Foster
Atlanta, GA USA

Stephanie N. Grindell, P.E.
Trumbull Corporation
Ft. Lauderdale, FL USA

Hugh E. Hackney
Locke Leddell & Sapp
Dallas, TX USA

Wendell L. Hartman
Anaheim, CA USA

Joe H. Henderson
Santa Rosa, CA USA

Nguyen Van Hoa
Q.C.S.C. Co. Ltd
Ho Chi Minh City, VIETNAM

John Gates
Idaho Transportation Dept.
Boise, ID USA

Stephen G. Kaster
Stevens Inc.
Bainbridge Island, WA USA

Fred W. King
Olympia, WA USA

Lawrence W. Mathis
Forestville, CA USA

M. James McCombs
Washington Group Int'l
Miami, FL USA

Richard Moseman
Redding, CA USA

David Opperman
Freehills
Melbourne, VIC
AUSTRALIA

Phung Thi Quang
Q.C.S.C. Co. Ltd
Da Nang, VIETNAM

W. Shelby Reaves
The Reaves Group
Winter Park, FL USA

Brad H. Rinzler
The Haskell Company
Jacksonville, FL USA

Tom Scanlan
Pacific S.W. Construction &
Equipment, Inc.
El Cajon, CA USA

Kazunobu Shimura
Student at King's College
London, UK

James R. Sly
Hamilton Construction Co.
Springfield, OR USA

Richard F. Smith
Smith, Pachter, McWorter &
Allen
Vienna, VA USA

Corbett Haselgrove-Spurin
University of Glamorgan
Treforest, RCT UK

Masaru Takei
Takei International Inc.
Yachiyo-shi, Chiba-ken
JAPAN

Nguyen Thi Thanh
Q.C.S.C. Co. Ltd
Da Nang, VIETNAM

Richard J. Raeon
Warner Construction
Consultants, Inc.
Rockville, MD USA

Jon M. Wickwire
Wickwire Gavin P.C.
Vienna, VA USA

Charles J. (Chuck) Williams
ODC Synergy Inc.
Overland Park, KS USA

Frank N. Young, Jr.
FNY Associates, Inc.
Bellevue, WA USA



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Dispute Resolution Board Foundation
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Seattle, WA 98188-2441

FOUNDATION FORUM



Now accepting ideas and suggestions for the Web Site Project

We are set to break ground on a renovation project for the Foundation’s web site. We’ll be freshening up the look as well as adding features and content that members and the industry need and expect from DRBF. Now is your chance to influence the redesign by sending your comments to Larry Rogers at rgrsadr@cs.com. Providing input and ideas today will help us avoid disputes once the project is underway.

Visit www.drb.org today and make your voice heard!