

1.2 Overview of the Process and Best Practice Guidelines

1.2.1 Introduction

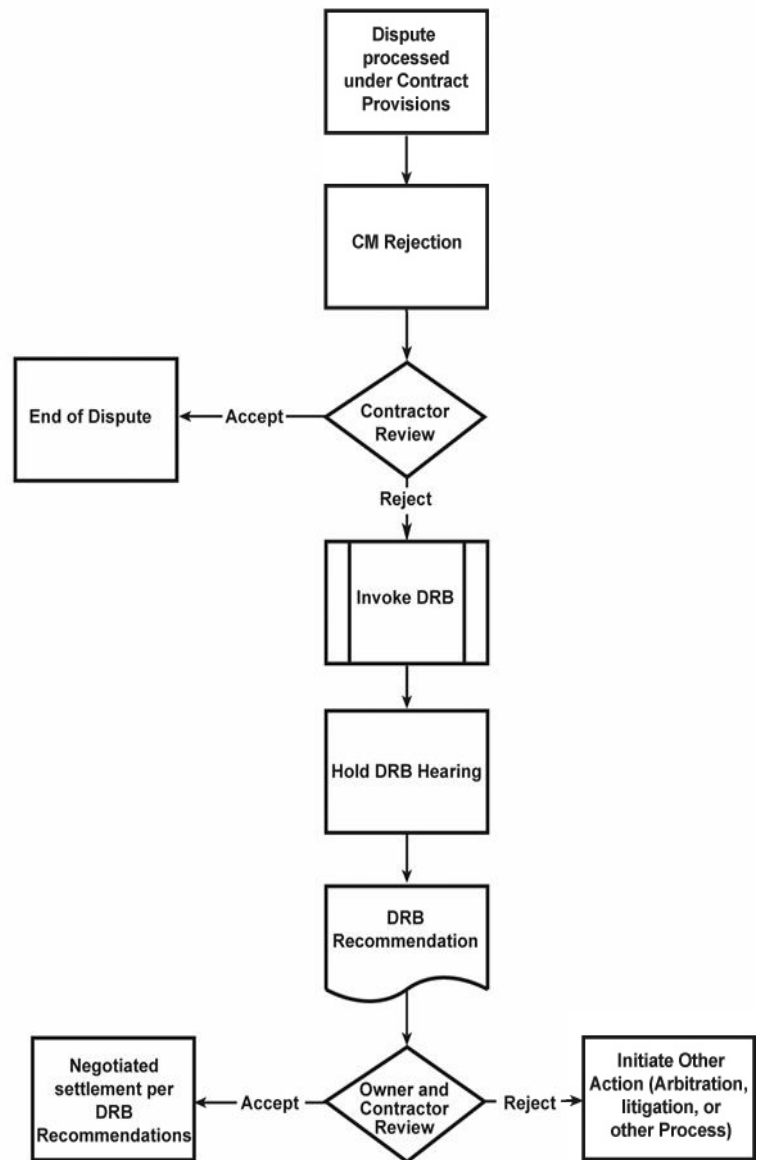
The DRB process is included in construction contracts to assist project participants in avoiding and resolving disputes. A DRB is typically composed of a panel of three respected and impartial professionals, who are experienced in the specific type of construction proposed and who assist in avoiding and resolving disputes.

In most instances DRB provisions are incorporated into the contract's overall change order / claim / dispute resolution mechanism prior to bidding the work. The DRB hearing process should be inserted in the dispute resolution ladder between the contractor's request for an equitable adjustment and the engineer's or owner's final decision.

To implement a DRB, the Board members are selected and approved by both the owner and contractor soon after award of the contract. The DRB is officially established when the parties and Board members execute a three-party agreement.

The DRB should be organized after the contract is executed and preferably before construction begins. Utilization of the DRB process from the very start of a project maximizes its benefit and value. Experience has shown that any delay reduces its effectiveness. The Board members are provided with all contract documents and copies of construction progress reports and minutes of weekly project meetings. In this way, the DRB is kept current with ongoing progress of the work, and is ready to address problems and disputes as they arise.

Brief status meetings and site tours are held periodically at the job site. At these meetings the Board members confer with the owner and contractor representatives, become familiar with project procedures and participants, and are kept abreast of job progress and potential disputes. The DRB encourages the resolution of disputes at the job level and, at the parties' mutual request, may provide informal advice on potential disputes. Thus, the DRB assists the parties by facilitating a harmonious atmosphere and by encouraging prompt solutions to job problems.



When the parties cannot resolve disputes by themselves in a timely manner, the dispute may be referred to the DRB by either party for a hearing and written report. The dispute hearing procedure includes an opportunity for each party to explain its position and an opportunity for the other party to respond. The DRB conducts the hearing and hears all pertinent testimony from the parties. Board members may ask probing questions. The objective is to fully air the dispute and determine the facts. Conducted properly, the hearing allows each side to challenge the other's premises and arguments in a courteous and professional manner. After the hearing, the Board members deliberate in private where they consider the claims to entitlement and defenses to those claims in light of the relevant contract documents, correspondence, other documentation, and the facts of the dispute. The Board members' recommendations are presented in a written report that includes the reasoning that led to each recommendation. The recommendations are not binding on the parties. This minimizes animosity between the parties and, as a result, subsequent negotiations between the parties usually result in prompt and economical resolution of disputes.

The party's willingness to accept the DRB's recommendations is enhanced by trust in each Board member's impartiality and confidence in their technical expertise, their firsthand understanding of the project conditions and practical judgment — as well as by the parties' opportunity to fully air the dispute. The parties' confidence in the DRB process and their knowledge of the individual Board members, gained during the period of construction, plays an important role. Acceptance of the recommendation is also influenced by the fact that it is admissible in subsequent arbitration or litigation in the event that negotiations are unsuccessful.

1.2.2 Best Practice Guidelines

This Manual is intended to serve as a reference guide for users and participants in applying the DRB process. It explains various practices and procedures that have resulted in the success experienced to date. While this process can be customized to suit a particular project, and certain modifications are acceptable in special circumstances, there are certain practices and procedures that are so important to the success of the DRB process that they should be strictly followed whenever possible. These best practices are summarized below, and include references to other sections of the Manual for detailed discussion and explanation. Readers are strongly encouraged to review the referenced chapters to fully understand and apply the guidelines. There are four sets of best practices: Specification Provisions, Actions by the Parties, Behavior of Board Members, and Dispute Hearings.

Specification Provisions

There is a set of essential provisions that must be included in the contract specifications to assure the success of the DRB process. These provisions contain requirements that are not found in other alternative dispute resolution concepts. Revising or deleting any of these provisions places the success of the DRB process at risk; the effectiveness of the DRB and the quality of its contributions to the parties may be severely compromised. In adding provisions for the DRB to the contract documents, owners are discouraged from revising the DRBF Guide Specification [2A] * and Three Party Agreement [2B] or the Dispute Board provisions of FIDIC and the World Bank Procurement of Works (see Section 4). The following are essential specifications provisions.

1. Provide a selection procedure that ensures absolute neutrality of the selected Board members.
[2.2.2 and 2A]

* [2A] refers to Section 2, Appendix A; [2.2.4] would refer to Section 2, Chapter 2, Part 4.

2. Require periodic meeting that start soon after award of the contract and continue as long as work from which disputes might arise is underway. [2.3.2 and 2A.5]
3. Include a three-party agreement that binds the parties and the DRB. [2B]
4. Require that the owner and contractor share equally all costs of the DRB. The Board is a resource for both parties to the contract and equal cost sharing encourages both parties to utilize it when needed. Payment of board invoices should be from one source. [2A.7]
5. Establish informal hearing procedures for faster dispute resolution. Oral, advisory non-binding opinions are issued. This does not preclude a subsequent formal DRB hearing. [2.4 and 2A.6.H]
6. Allow the DRB to hear disputes on all aspects of the contract. Language limiting issues to be heard enhances the potential for future litigation. [2.5.1, 2.11.1.1,2 and 2A.2]
7. Either party may refer a dispute to the DRB. [2.5.1 and 2A.6]
8. Allow prompt hearing of disputes by not requiring multiple steps of submittals, denials, decisions, final decisions and appeals before a dispute can be brought to the DRB. [2.5]
9. Provide that recommendations are not binding on either party. [2A.1]
10. Ensure that recommendations are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation. [2A.1]
11. Absolve Board members from personal or professional liability arising from their DRB activities, as long as these activities are conducted in good faith. [2.11.2.1 and 2B.XI]
12. Allow termination of Board members only by agreement of both parties. [2.9 and 2B.X]
13. Ensure that Board members cannot be called as witnesses in subsequent proceedings. [2B.XI]

Recommendations

Typical DRB practice in the U.S., Canada and many other countries includes non-binding recommendations.

Multinational practice typically uses a form of “binding in the interim” recommendation, which is deemed accepted by both parties unless specifically objected to within a certain time period. See Section 4, “Multinational Practice” for further discussion.

Actions by the Parties

In addition to the above specification requirements, the contracting parties must take specific actions to facilitate the establishment and operation of the DRB and the overall dispute resolution process. The following are essential actions by the parties to the construction contract.

1. Establish the DRB promptly after the contract is executed, preferably before construction begins, and no later than ninety days after the contract is executed. [2.2.1 and 2A.4]
2. Fully investigate the qualifications, especially conflicts of interest and neutrality, of all Board nominees before approving them. [2.2.2]
3. Reject all nominees that have a problematic conflict of interest or even a hint of bias. [2.2.2]
4. Provide Board members with copies of construction progress reports and minutes of weekly project meetings. [2.3.1.3]
5. Arrange for periodic meetings and site visits with the DRB on a regular basis. It is bad practice to curtail DRB meetings simply because there are no apparent disagreements or disputes. [2.3.2]

6. Do not require the DRB to prepare minutes of periodic meetings. *[2.3.4]*
7. Promptly negotiate to resolve disputes and, if negotiations fail, take disputes to the DRB as soon as possible. *[2.5 and 2A.6]*
8. Dedicate the resources required to fully present and defend disputes in front of the DRB. *[2.6]*

Behavior of Board Members

Each Board member must strive to maintain the confidence of the parties, and thus facilitate the dispute resolution process. The following are essential behaviors of Board members.

1. Adhere to the DRBF Code of Ethics. At the outset fully disclose all known past and present relationships with, or interests between any party to the contract, or related parties such as subcontractors, design professionals, construction managers and site supervisors. Immediately disclose relationships or interests discovered or established subsequent to initial disclosure. *[1.6, 2.10.1, 3.2]*
2. Remain neutral and avoid any behavior that could lead to a perception of bias, including any ex parte communications. Board members are not an advocate for either party. *[1.6, 2.10.1, 3.2]*
3. Avoid all conflicts of interest and notify the parties of any actions that could be perceived as such. Have no financial interest in the contract or in any party involved in the design or construction of the contract. Have no discussions and make no agreements for future employment or any other business relationships while serving on the DRB. *[1.6, 2.10.1, 3.2]*
4. Become familiar with the contract, plans, specifications and other contract requirements, such as coordination and scheduling. *[3.3.4]*
5. Do not request that the parties furnish progress documents that they do not already produce in the normal course of business. *[3.4.1]*
6. Keep abreast of job activities and developments by reviewing periodic construction progress reports and minutes of weekly project meetings and by periodic meetings. *[3.4.4]*
7. Make no disclosures of project information that is not within the public domain without permission of both parties. *[2.10.3, 2B.VIII and 3.4.4]*
8. Never give advice on conduct of the work. *[3.4.1 and 3.4.3]*
9. Encourage the parties to proactively discuss and resolve potential disputes before they escalate to the point where a hearing is required. *[3.4.3]*
10. Never promote disputes or comment on the validity of disputes or other issues. *[3.4.3 and 3.6.3]*
11. Do not accede to a single party's resignation request without reaching agreement within the DRB that this solution would best serve the parties. *[3.8]*

Dispute Hearings

To ensure a prompt and economical hearing, and provide the best chance for resolution of the dispute, the following best practices must be adhered to by the parties and Board members.

1. The parties clearly define the issues in dispute. *[2.6.2 and 3.6.1]*

2. The parties exchange and submit to the DRB concise statements of their positions with supporting documentation for review prior to the hearing. *[2.6.3]*
3. To the maximum extent possible, the parties submit supporting documentation as joint exhibits. *[2.6.2]*
4. The parties submit a list of presenters and proposed attendees at least two weeks prior to the hearing. *[2.6.7]*
5. The DRB conducts the hearing, deliberates, and prepares the recommendations and report in a professional, impartial and expeditious manner. *[2.7.2]*
6. During the hearing and subsequent deliberations no indication of the DRB's or any Board member's position should be revealed. *[3.6.3 and 3.7.1]*
7. The DRB gives each party ample opportunity to fully convey its position. *[2.7.3 and 3.6.3]*
8. Presentation of information not included in the pre-hearing exchanges is discouraged. If additional information has been developed after submittal of the position papers, and the DRB decides to permit this information to be introduced, the other party must be given ample time to consider and respond to it. *[3.6.3]*
9. The DRB may ask for additional information, documentation and testimony as needed to determine the facts of the dispute. *[2.7.3 and 3.6.3]*
10. DRB recommendations and reports address only the issues in dispute, as defined or agreed by the parties. *[3.7.2]*
11. DRB recommendations are based only on the facts of the case and the contract provisions. *[3.7.2]*
12. DRB recommendations and report are concise, yet complete. *[3.7.2]*
13. The DRB makes every effort to prepare unanimous recommendations and report. *[3.7.3]*
14. The DRB provides clarification whenever requested. *[2A.6.G and 3.7.6]*
15. Only in certain circumstances does the DRB reconsider its recommendations. A request for reconsideration should be based on additional evidence rather than a continuation of argument previously heard. *[2A.6.G and 3.7.7]*