

## 1.4 Deciding to Have a Dispute Review Board

### 1.4.1 Potential for Disputes

When planning a construction project, owners should ask:

*Can disputes be expected? If so, could they be serious enough to specify a DRB?*

In 1994 the Construction Industry Institute sponsored a study of the predictability of contract disputes.<sup>1</sup> This study found that once the contract is awarded, the potential for disputes is predictable. However, the decision to use a DRB should be made long before the contract is awarded. What can owners do during the design phase to realistically evaluate the potential for disputes? The questions used in the study can provide excellent guidance.

To determine the likelihood that your project will generate disputes, consider the following:

- **The previous experience of your organization with construction projects.** Evaluate whether disputes were difficult to resolve, disrupted construction, or went to litigation. Ask the same questions of the construction management group that will oversee the work.
- **The personnel you plan to assign to administer the contract.** Have they demonstrated the ability to get along with contractor's personnel, to get the work completed as specified without significant disputes?
- **The contract documents.** Is this the type of contract you normally use or is this type new to your organization? Do the technical specifications require state-of-the-art methods or materials? Are the plans and specifications complete or will they be completed after award of construction? Are the other contract documents your standard or do they include untried provisions that could be problematical? Are these and other risks fairly identified and allocated? Are the contractual requirements reasonable or might the contractor consider them difficult or beyond the current state-of-the-art?
- **The contractors who might likely be awarded the work.** Have they worked for you before, or will many bidders be new to your organization? Would the contractors be from some distance away and not be familiar with conditions at the site? Have you pre-qualified experienced and capable contractors? Could your solicitation attract inexperienced contractors?
- **The work.** Is the project exceptionally large or are there internal milestones or completion dates that could be hard to meet? Is the project adequately funded, with adequate budget for changes? Is the design exceptionally complex or difficult to execute? Have you built similar projects in the recent past or does this project have features that are unique, requiring innovative construction methods? Do these features push or exceed the current state-of-the-art of that sector of the construction industry? What are the chances of the contractor being

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<sup>1</sup> Diekmann, James E.; Girard, Matthew J.; and Abdul-Hadi, Nader. DPI-Disputes Potential Index: A Study into the Predictability of Contract Disputes. A report to the Construction Industry Institute, 1994.

less than adequately experienced in this type and/or complexity of construction? Are there risks of differing site conditions?

Owners can be guided by their answers to these questions. However, significant claims sometimes arise even on projects considered relatively problem free at the outset. With no DRB in place, resolution can be expensive, time-consuming and unsatisfactory. Thus, even if consideration suggests a DRB may not be necessary in a given situation, establishing a DRB is prudent to help ensure disputes are kept to a minimum.

Many owners have guidelines that require DRBs on all projects in excess of a certain size (often US\$10 million) and/or duration, or on unusually complex or difficult jobs.

For owners who aren't familiar with DRBs, it might be helpful to sit in on a periodic DRB meeting or even a dispute hearing to get a better understanding of the process. Call the DRBF for assistance in arranging to observe a DRB in action.

## 1.4.2 Costs

The direct costs include the fees and expenses of the Board members. The parties should also consider the indirect costs of their employees' time in preparing for and participating in DRB meetings. However, the commitment and interruption is considerably less than that involved in the resolution of disputes involving arbitration or litigation.

The Board member costs should be shared equally by the parties to avoid any perception of allegiance to either party. This is usually accomplished by having the contractor pay all of the Board member fees and expenses, and the inclusion of an allowance item in the bidding schedule from which the owner can reimburse the contractor for the owner's half of these costs.

The direct costs include periodic meetings and site visits, which usually average about four per year, document review and preparation time, and hearing time, including time to deliberate and prepare the recommendation. Each Board member's professional fees usually are in the range of \$1,000 to \$2,000 per day for meetings or hearings, with an hourly fee for document review and study time.

Periodic meetings and site visits normally require one day. Time spent reviewing progress reports and other documents and preparing for periodic visits is usually nominal. Chairman duties will require somewhat more time. Travel and subsistence expenses as well as other reimbursable costs can be estimated with reasonable accuracy.

The expense of periodic meetings can be thought of as prevention costs, yielding the benefit of dispute avoidance as a result of the Board's presence. Although the value is difficult to quantify, owners and contractors who have used the DRB process generally agree that the value far exceeds the cost.

The cost of a hearing depends upon the time required for review of the parties' pre-hearing submittals, the hearing itself, and the time required for the DRB to deliberate and prepare the written recommendation(s) with supporting rationale. For a simple case,

**Note:** Retainers are usually paid in multinational practice to secure the availability and independence of the Board members.

the hearing could occur during a periodic meeting followed immediately by the deliberations, with the recommendation issued shortly thereafter. Complex disputes might require several days of hearings and several weeks for DRB deliberations and report preparation.

DRB cost ranges from 0.05% of final construction contract cost, for relatively dispute-free projects, to a maximum of 0.25% for difficult projects with disputes. Considering only projects that refer disputes to the Board or that had difficult problems, the cost ranges from 0.04% to 0.26% with an average of 0.15% of final construction contract cost, including an average of four dispute recommendations.

### **1.4.3 Other Considerations**

**Attracting Bidders.** Many contractors have expressed reservations about bidding work where there is no DRB to assist in the resolution of disputes. Inclusion of a DRB on contract work can encourage contractors to submit bids on work that they might otherwise decline to bid. This is especially true where the owner is new to bidding this type of work and the contractor is unsure of the owner's approach to resolving disputes. Similarly, inclusion of a DRB can attract bidders on projects where the owner's record of past dealings with contractors has been unfavorable or cause for concern amongst contractors.

**Reduced Bid Prices.** An owner's inclusion of a DRB on a project is a strong indication that the owner is seeking a level playing field in the execution of the project work. Further, the inclusion of a DRB is an indication that the owner is looking to avoid disputes, or at least accomplish timely resolution of them so as to keep the primary objectives of accomplishing the work in focus, before unproductive adversarial attitudes can develop.

Contractors typically include contingency amounts in their bid prices to cover the cost of pursuing resolution of disputes that may arise. To this end, knowing that a Board of respected knowledgeable individuals experienced in the type of work to be contracted will hear disputes before proceeding to adversarial, costly and time-consuming litigation (or other binding forms of dispute resolution) is generally considered a strong benefit when bidding the work. Similarly, the bidding contractor knows that the DRB will remain up to date on the progress of the work throughout construction, requiring limited further enlightenment or education in the event of a dispute. As such, some contractors have indicated that the inclusion of a DRB has lowered their bid price by as much as 10 percent.