

## 1.5 Concerns

This section identifies and addresses some previously stated concerns. These concerns should not be a factor when the DRB process is implemented correctly and effectively.

### 1.5.1 DRBs Do Not Add Value

The fundamental cost-effectiveness of a DRB readily demonstrates that establishing and operating a DRB is a highly effective investment, even if there are no disputes. Although it is difficult to quantify the benefits in dollars it is well known that such benefits exist. The following advantages relate to value added by a DRB:

- Potentially lower bids, especially from contractors who are familiar with the DRB process, and particularly to owners that are generally unknown within the industry. Inclusion of a DRB shows bidders that a rational dispute resolution mechanism is provided.
- Better communication and less acrimony on the job site.
- Issues are discussed and frequently resolved before they become disputes.
- Timely and cost-effective resolution of disputes at the job-site level and fewer end-of-project unresolved claims.
- Lower total contract completion cost.

There is no doubt that the cost is easily justified if even one piece of litigation is avoided.

### 1.5.2 Board Members Will Ignore the Contract and Impose Their Own Concepts of Fairness and Equity

It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. Rather, a competent and conscientious DRB will strive for a recommendation consistent with all terms of the contract. The standard three-party agreement requires the DRB to comply with applicable laws and contract provisions.

Member selection is an important factor in achieving a DRB that is aware of its duties and responsibilities. Board members who are determined to correct seemingly unfair contract provisions should be reminded that the contractor agreed to the terms of the contract. If necessary, such a DRB member should be terminated as provided in the three-party DRB agreement. As a further safeguard, the parties have the option of rejecting or seeking clarification of any recommendation.

Just like a judge, jury, or arbitrator, each Board member will have his or her personal views of fairness and equity. A Board member who is respected in the industry will be capable and comfortable putting those personal views aside. Moreover, it is not a single member's view that prevails; the pressure of the other members should serve to prevent a gross miscarriage of justice. It is difficult to hide a bias or prejudice in a well-reasoned recommendation.

### **1.5.3 The DRB Process Promotes Disputes**

Since the effort and expense of submitting a dispute to a DRB are relatively small, it has been argued that a contractor might abuse the DRB process and utilize it to test the viability of seemingly marginal claims. Experience has shown that this has not been a significant factor, probably because most contractors do not want to face the loss of credibility with Board members which would likely result from asking them to consider non-meritorious claims.

### **1.5.4 Board Members May be Unqualified**

There is no excuse for selecting an unqualified Board member when the contracting parties apply appropriate selection criteria. Users have not experienced difficulty in obtaining qualified members, especially when they are willing to consider candidates other than those in their local area. DRBF training workshops throughout the U.S. and abroad will further ensure qualified candidates in most regions.

Some public owners solicit Board members through an advertised request for qualifications, a process that often culminates in personal interviews and evaluation against established criteria, including specific construction experience as well as dispute resolution experience. Given the standard provision that member qualifications are subject to review and approval by both contracting parties, as long as the parties take this responsibility seriously and both do their due diligence in investigating each nominee's background, there is no valid basis for concern that the parties will end up with an unqualified Board member.

### **1.5.5 Board Members May be Biased**

Without question, each Board member must be totally neutral and impartial. This is the primary key to the success of the DRB process. The parties must be willing to reject all proposed members who might be other than neutral. The conflict-of-interest standards, coupled with the ability of either contracting party to reject a nominee, puts the ability to select truly neutral and impartial Board members within the power of the contracting parties.

There may be a tendency in the beginning of a project for the parties to accommodate each other in an attempt to "get along." During this 'honeymoon' phase, one of the parties may be especially hesitant to reject a proposed Board member nominated by the other. Because of the importance of mutual unconditional acceptance of all Board members in this process, it is essential that both parties assure themselves that all selected Board members are completely unbiased. If there is any question or concern about a proposed Board member, that nominee must not be approved.

### **1.5.6 DRBs Introduce Acrimony and Promote Posturing**

It has been argued that, by forcing the parties to bring their disputes to a hearing, the parties are encouraged to take positions that are not conducive to resolution of the dispute. In practice, however, just the opposite occurs. Properly executed, the DRB process prevents or reduces acrimony, helps to avoid or resolve disputes in a timely fashion, reduces protracted disagreements that lead to entrenchment of each party's views and focuses both parties' efforts toward the project objectives. During periodic meetings the DRB encourages the parties to solve their issues before they become disputes.

### **1.5.7 DRBs Lack Legal Procedures and Standards**

Some critics argue that the DRB process, which involves relatively informal fact-finding procedures, characterized by limited documentary discovery and unsworn testimony without cross-examination, is a drawback. Such concerns are unfounded, since disputes of material fact seldom remain after the hearing process. The extensive documentation in most projects, as well as the ready availability of knowledgeable, contemporaneous witnesses, minimizes factual disputes. The DRB process uses experienced construction professionals who can readily interpret contract documents and drawings, observe site conditions first-hand, and evaluate construction practices while applying appropriate construction industry standards. Furthermore, while it is not cross-examination, probing questions from knowledgeable Board members is often far more effective in revealing inaccuracies or weaknesses in a party's position than a lawyer's cross-examination. Also, the rebuttal process facilitates questioning of each party without embracing hostility that generally inhibits open and honest discussion and disclosure of key circumstances in a dispute.

### **1.5.8 The DRB Process is "Claims Review," Not "Dispute Resolution"**

In an effort to ensure that the owner's staff has thoroughly reviewed all aspects of a dispute, some contract documents place the DRB review very late in the dispute resolution process, e.g., after submittal of a detailed claim package, and in some cases after receipt of the contracting officer's final decision. This places the DRB in the position of evaluating the dispute after the claim has been formally denied by the owner, rather than guiding the parties toward early resolution of their differences.

One argument expressed by owners is the need to know the cost of a claim before making a decision. A DRB has the unique opportunity to hear and provide a recommendation on the merit of a claim without considering quantum. Merit is not a function of the cost and, conversely, the Board's finding of merit does not force the owner to issue a change order. Generally, once merit is established, the parties are able to negotiate quantum without the DRB's assistance. If not, the DRB is available to conduct a subsequent hearing on quantum, if requested. This avoids placing the burden (and cost) of preparing and reviewing detailed cost backup information before merit is even established.

Further, most experienced Board members have observed that after preparation and review of substantial written documentation, and subsequent denial of claims, the parties' positions tend to become entrenched and hardened. The result is that both parties have greater difficulty accepting DRB recommendations that are not consistent with their viewpoint, and the disputes continue. One of the benefits of the DRB process is timely consideration and resolution of disputes before the more formal and costly claims process is initiated. Thus, the DRBF strongly recommends that the DRB process, especially in disputes over merit, be placed early in the contract disputes ladder.

### **1.5.9 DRBs Favor Contractors**

Some owners have voiced concerns that the DRB process appears to favor contractors. This may be because it sometimes appears that the contractor "wins" more often than the owner. There are three primary reasons for this perception:

- Most contractors do not want to face the loss of credibility with Board members. As a result, contractors usually will only bring disputes to the DRB that they feel will prevail. This has the effect of “weeding out” disputes that have little merit. This is in fact one of the benefits of the DRB – the change in behavior of the parties. Nonetheless, because only the stronger disputes are brought to the DRB, sometimes it appears that the contractor wins more than would be the case without a DRB.
- Owners and their field representatives are often hesitant or lack the authority to settle valid claims at the job level due to the owner’s deeper management structures, frequently with political oversight. In these circumstances, a DRB recommendation may help to obtain upper management approval of a settlement to the dispute. As a result, the disputes that are brought to the DRB for resolution may include a number of valid contractor claims that might have been resolved by the parties at the job level. However, the resulting DRB recommendations can add to the perception that DRBs favor contractors.
- Occasionally a dispute will arise over the adequacy and/or correctness of the contract documents. Not surprisingly, some owners are reluctant to admit that their engineering consultants are fallible. As a result, disputes founded upon this basis are sometimes referred to the DRB instead of being settled by the parties in negotiations. Given their experience with similar construction, the DRB usually recognizes the flaws in contract documents that can result in a recommendation in favor of the contractor. This outcome could also result in the owner’s perception that the DRB is biased in favor of the contractor.

Due to the confidential nature of DRB proceedings and the consequent lack of reported information, there are no hard statistics on what percentage of disputes are actually recommended in favor of the owner or the contractor. However, in light of the DRB’s role in filtering out spurious disputes and its reported success in dispute avoidance, the DRB process should not be construed as favoring the contractors.