

## **2.11 Implementation**

The decision to implement a DRB is usually made by the owner before the project is bid, but can be added after award by change order. As described in Section 1 of this Manual, the owner's motivation to use DRBs is to avoid disputes whenever possible, facilitate dispute resolution, minimize cost, and avoid the unpredictability associated with litigation. In addition, bidders recognize the benefits of this dispute avoidance and resolution system and take contract provisions for the DRB into account when deciding whether to bid a project and when estimating the cost and risks associated with the project. However, in order for the DRB process to work effectively, it is imperative that the owner be committed to the basic principles. Incorporating a DRB on a project simply in an effort to obtain better bids could result in failure of the process.

The DRB process is extremely flexible and can be tailored to many situations, although the basic requirement of impartial and unbiased Board members must never be compromised.

Typically the DRB specification is incorporated into the contract, as either a "supplemental general provision," a "special provision," or a similar provision, depending upon the owner's format. The Guide Specification in Appendix 2A may be used by owners when preparing their contract. It reflects best practices that are critical to the success of the DRB process. It lists the required qualifications of, and sets forth the method for selecting Board members, specifies the method by which disputes are referred to the DRB for hearings, establishes certain hearing procedures including the use of outside experts if warranted, and includes the method for compensating Board members for their services.

The Three-Party Agreement (TPA) is to be included in the contract documents as a blank form of the agreement that will be signed by the owner, the contractor and the Board members after the DRB has been appointed. The TPA is the contract that binds the Board members and the contracting parties. It defines the DRB's scope of work and responsibilities, the owner's and contractor's responsibilities, and the time for beginning and completion of DRB activities. It is the agreement between these three parties, and thus differs from the DRB specification that is the provision of the contract between the owner and the contractor that establishes the means for administering the TPA.

When the DRB specification and TPA are incorporated into the contract documents other provisions of the contract must be coordinated to avoid conflicts and ambiguities. Such sections may include "Disputes," "Claims," and "Measurement and Payment."

### **2.11.1 The DRBF Guide Specification**

The DRBF Guide Specification refines and amplifies previous guide specifications and includes revisions based on recent DRB experience.

This specification has been reviewed by and thoroughly discussed with experienced owners, contractors and DRB practitioners. The provisions establish a framework to achieve the best possible results from the operation of DRBs. Revisions to this specification may reduce the effectiveness of the DRB and the DRB process as well as the quality of its contributions to the parties. Specifiers should carefully consider potential impacts of any changes to these specifications.

#### **2.11.1.1 Specification Commentary**

The following paragraphs comment on specific sections in the guide specification:

Article 1.C specifies that the provisions of the TPA take precedence over the specification. The Specification and TPA are complementary documents that serve different purposes. The TPA generally sets forth the obligations of the three parties, whereas the Specification establishes the means for administering the TPA. The TPA must take precedence over the DRB Specification because the DRB is not a party to the construction contract of which this Specification is a part.

Article 1.E requires that disputes be referred to the DRB as a condition precedent to initiating any subsequent dispute resolution process. The General Conditions may contain a disputes resolution clause that sets forth a “disputes ladder” of steps that must be followed before a dispute can be litigated. The DRB Specification is not intended to detail that procedure, but simply to note that, if a DRB is specified, it should be an early step in the process.

Article 2 is a placeholder to allow the owner to set aside specific elements of the contract that it does not want the DRB to review. This may be appropriate with respect to items that are not related to the contract between the owner and the contractor. Excepted elements should be kept to the minimum possible and must be explicitly defined. Limiting the DRB’s authority to technical issues and restricting their authority to hear disputes over contract interpretation is counterproductive, especially since all disputes are ultimately related to contract interpretation. DRB members are selected in part because of their familiarity with contract interpretation and, because of their periodic meetings and project updates, are in a better position to assess contract interpretation disputes in the context of project specific work activities than would be an arbitrator or the courts that are not familiar with the work.

Article 3 sets forth the qualifications for Board members. Some owners have added a clause allowing the parties to agree to relax these requirements. The argument is usually to the effect that the requirements may be impractical in some cases and that the parties should be given the flexibility to adapt if they so jointly agree. Relaxing these requirements is strongly discouraged because the language as written provides a proven method for selecting impartial Board members.

Article 4.B lists the material that should be requested of DRB nominees to assist the contracting parties to decide who should serve on the DRB. Information such as copies of prior DRB reports should not be requested since it may violate the confidentiality requirements.

The method of selection specified in Article 4.C is Method 1 of the three methods for member selection identified in Section 2.2.4 of this Manual. If another method is preferred, modify this language accordingly.

A summary of the contract dispute resolution process is included in Article 6. The DRB process is intended to supplement the disputes resolution provisions established by the contract, and not to replace them. Therefore, care must be taken to integrate the DRB provisions into the disputes resolution procedures established elsewhere in the contract. It is important that the contract provide a detailed roadmap for both the definition and resolution of disputes.

Effective dispute resolution can only be achieved if the disputes are addressed in a timely manner. For that reason, Article 6.B.2 permits either party to refer a dispute to the DRB if the other party fails to adhere to either the contract-specified timetable, or a “reasonable period of time” in the event that the contract does not specify a timetable.

The conduct of the hearing in Article 6.D.3 is intended to provide a broad framework within which the DRB may establish operating procedures and rules of conduct. The owner should be careful to not over-specify the conduct of the hearing.

The time periods set forth in Article 6.G.5.a are generally recommended, although owners who must first secure acceptance of the recommendation from a governing board may require additional time.

Article 6.G.5.c allows owners to accept an entitlement-only report in order to begin the negotiation of quantum, without incurring an obligation for any particular quantum amount.

### **2.11.1.2 Specification Variations**

Occasionally, some owners will modify the guideline DRB specifications in ways that attempt to “tilt the playing field” to their advantage or protect themselves from what they anticipate could be unfair treatment by the DRB.

The following are some variations that have been proposed for use on projects in North America:

- **Inadmissibility of DRB Reports in Subsequent Resolution Proceedings**

Article 1.D of the guide specification provides that DRB reports shall be admissible in subsequent dispute resolution proceedings. Changing this provision to make DRB reports inadmissible undermines the value of the entire DRB process. This lack of faith in the process may suggest to contractors that the owner is not sincere in providing for a DRB and is only including it to get the contractors to tender for the work or reduce their bids. Owners that have included this provision have often been frustrated by courts that, after learning from the contractor’s attorney of the DRB process and resulting report recommendation(s), have instructed the parties to settle the dispute in accordance with the DRB recommendation(s), provided the recommendation(s) did not violate contract law. Because of this past experience, many contractors now disregard an “inadmissibility” clause.

- **Binding Recommendations**

In North America, a DRB that provides binding recommendations can be perceived as little more than a three-member arbitration panel working under the limiting rules of a DRB (i.e. no sworn testimony, no cross examination, no lawyer participation, etc.). It is for these reasons that Article 1.D of the guide specification requires that DRB reports shall not be binding on either party. Binding recommendations from a DRB can change the hearing from a discussion among peers, wherein the parties maintain control of the final outcome, to a contentious, win-lose proceeding, often with lawyers working with and coaching the parties. One of the major reasons for the wide acceptance of the DRB process in North America is that its recommendations are not binding.

If binding recommendations are prescribed, they should only be used in special circumstances where both parties have specifically agreed to it in advance, and preferably allowing for final court appeal if contested within a stated period following submission of the report. In such an event, the recommendations should become “binding in the interim” and must be complied with until the courts overturn them.

Multinational forms of contract such as FIDIC and World Bank documents mandate the use of binding recommendations on their projects because these contracts are often performed in remote locations and/or in countries with legal systems that do not provide for equitable treatment of the parties to a construction contract and do not provide for effective enforceability of awards. The provision for binding recommendations gives assurance to foreign bidders that their rights to recovery under the contract will be protected. If the parties do not accept the DRB recommendation, it becomes “binding in the interim” and must be complied with until it is overturned in subsequent arbitration. See Section 4, “Multinational Practice” for further discussion.

- **Limits on Prior DRB Experience**

This variation wherein the contract specifies that each Board member shall have served on no more than “x” number of prior DRBs is directed at eliminating the perceived “good ole boy” group the parties may draw from in selecting Board members. The DRBF is supportive of increasing the number of qualified Board members available for participation on DRBs. However, having Board members who are experienced in administering the process is most beneficial to the project. The selection of new Board members who are inexperienced in the process should be limited and a new member should not serve as Chair. The DRBF is expanding its training workshops offered throughout the US and abroad to ensure that qualified candidates are available locally.

## **2.11.2 The Guide Three-Party Agreement**

The TPA is the contract that binds the Board members and the contracting parties. It establishes the scope of the work for the DRB, the responsibilities of the parties, the duration of the DRB services, Board member compensation and reimbursement of services, and legal relations. It is executed no later than at the first DRB meeting.

### **2.11.2.1 Three-Party Agreement Commentary**

The following paragraphs comment on specific sections in the guide TPA:

In Article VII.C, the “subject to limitations...” language is intended for per diem restrictions as may be contained in certain government contracts. In adopting this agreement, owners may wish to insert the appropriate restriction here, so that it is clear to all parties.

The language on quasi-judicial immunity in Article XI.C and the hold harmless language included in Article XI.D is intended to make it clear that the DRB members serve only to assist the parties in resolving their contract disputes. This language should not be modified. Doing so would suggest an attempt to hold the Board members personally or professionally liable for their efforts to resolve disputes for the parties. In addition, it would underscore a lack of confidence in the DRB process, and create an atmosphere that is not conducive to dispute resolution. Once named in a lawsuit the DRB member must provide a defense, hire an attorney, and be subjected to multiple court hearings, even though they should have no liability in the case. Further, the deliberations of the DRB are strictly confidential and subpoenas that require the members to discuss those deliberations put them in an awkward, if not impossible, situation. Specification language that requires DRB members to carry professional liability insurance does not help the dispute resolution process. Such insurance may be unavailable at any price for purchase by individuals, thus narrowing the field of potential members to those who are employed by a firm that can carry it – with all the potential conflicts of interest that may result.

Board members offer their services and recommendations based on many years of experience in the construction industry and on a belief that the DRB process leads to more effective dispute resolution than binding arbitration or litigation. Many desirable Board members come from the ranks of retired or semi-retired members of the construction industry. Attempts to make Board members personally or professionally liable for their services are likely to result in such experienced personnel becoming unwilling to serve.

### **2.11.2.2 Three-Party Agreement Variations**

Some contracts have required that the Board members be under separate contract to the party that nominated them, rather than one of the parties paying all of the member's invoices and then compensating (or crediting) the other party for 50% of the total charges. This sends a message (and the possible perception of bias) that each party's nominee is an employee (representative) of the nominating party, which is contrary to the process and ethics for DRB members. Further, some consulting contracts include mandatory indemnity and/or insurance provisions that are contrary to the terms of the TPA. Board members should resist entering into such separate contracts.

### **2.11.3 Variations to the Model DRB Process**

Several variations to the model DRB process have been used in attempts primarily to reduce cost and increase efficiency and/or effectiveness of the DRB.

The following paragraphs identify some of the variations that have been used. While some of the variations offer possibilities for success when used in certain circumstances, others have proven to be ineffective or even counterproductive. In any event, essentially all of the variations described below sacrifice one or more of the unique DRB benefits that make it one of the most successful alternative dispute resolution methods available to the construction industry.

#### **2.11.3.1 Five-Member DRB**

A five-member DRB has been used on some very large, complex projects involving many construction disciplines. In this variation two members are selected by each party (subject to agreement by the other party) and both parties jointly select a fifth member to serve as Chair. All five Board members receive regular reports and attend the periodic meetings and the dispute hearings. Upon being notified of a pending dispute to be referred to the DRB, the DRB chair selects two of the four other members to form a three-member panel that will hear the dispute and prepare the DRB's written report. The primary advantage is the ability to choose among four members in shaping a hearing panel consistent with the particular fields of expertise required. The obvious disadvantage is the increased cost of additional members. This variation is particularly attractive for large projects with many technical disciplines. It was used on the Channel Tunnel between England and France, which included not only design and construction of the tunnels, but also the permanent terminal facilities and the rolling stock. A similar variation was used in slightly different form for the Hong Kong Airport and the Docklands Railway in the UK.

#### **2.11.3.2 Interlocking Board Member**

For a large construction program or system with a number of contracts to be awarded to different contractors, there may be perceived benefits to having a single Board member serve on more than one DRB within the program. The primary advantage is that the interlocking member can provide consistency in the solution of disputes among the contracts. However, this advantage may be outweighed by the perception that the interlocking Board member could be partial to the party that nominated him or her.

### **2.11.3.3 Consolidated DRB**

Where multiple contracts are let on a single project with similar contract conditions, it may appear that efficiencies can be achieved by using a single “consolidated” DRB, particularly when the same contractor has multiple contracts with the same owner. When different contractors are awarded the contracts, Board members can be selected through a third party or by having all the contractors agree to the member selection procedures. This variation has distinct advantages when Board members must travel great distances. It can also be advantageous when there are critical interfaces among separate contractors. The obvious disadvantage is when the contracts involve a diversity of construction technologies that demand a variety of experience and special expertise that is not available on a single three-member DRB. Multiple contractors or diverse technologies may lead to one or more parties becoming dissatisfied with the sitting DRB. The main use of this type of DRB to date has been on the Central Artery Project in Boston, Massachusetts and on multinational projects where this variation is sometimes required by the lending agency.

### **2.11.3.4 Standing DRB**

Owners having a small number of contracts involving similar types of construction, all to be awarded in the same geographic area over a period of several years, have occasionally established a single “standing” DRB to gain efficiency. In this case, the local chapter of the contractor association represents the contractors in selection of the Board members since the DRB is established before the construction contracts have been awarded. Unless the standing Board members are acceptable to all the contractors, the apparent efficiencies can be quickly lost in reduced effectiveness (mutual acceptability) of the DRB. Some owners have addressed this concern by providing an option that the individual contractors do not have to use the standing DRB.

### **2.11.3.5 Regional DRB**

The Florida Department of Transportation uses a modification of the standby DRB called a Regional DRB; there are nine throughout Florida. All contracts that do not have a project specific DRB have access to the local regional DRB. Each Regional DRB has five members in order to allow the contractor some choice, and to allow flexibility in case there is a conflict of interest with any party to the contract. Disputes are heard by the three mutually selected members of the regional DRB.

As currently practiced, the regional DRBs suffer a significant disadvantage in that they do not periodically meet and visit the job site and do not receive progress updates, nor other documents for specific projects, until a dispute is referred to them. Although the regional nature and common type of construction (highways) tends to facilitate familiarity with and recognition of the Board members, the benefits of the DRB’s efforts towards dispute avoidance are lost.

### **2.11.3.6 Standby DRB**

In this variation, a DRB is selected but is on “standby” until called upon to consider a dispute. Similar to regional DRBs, this cost reducing variation sacrifices the tremendous advantages offered by periodic meetings and site visits, which not only ensure that Board members are familiar with the project but also encourage the parties to avoid disputes or to resolve them amicably. The standby DRB further limits the Board members’ opportunities to establish rapport and credibility with the parties, which greatly facilitates dispute resolution. Also lost is the ability for the Board members to get to know and

work with each other before the dispute hearing. The DRBF does not recommend use of standby DRBs.

### **2.11.3.7 Single-Member DRB**

This DRB variation has been operated successfully on some projects to date. A single-member DRB, however, is only acceptable when both parties are comfortable with a single neutral and when such a neutral, having all the desired qualifications, is available. Particularly suitable for small contracts that can't justify the cost of a three person DRB, a single-member DRB should always incorporate periodic meetings and site visits and interim progress updates, or it becomes little more than non-binding arbitration. A single DRB member must be especially skilled in all aspects of the construction and the DRB process. The contract should provide for the expansion of the DRB to three members in the event a major issue is brought before the DRB.

### **2.11.3.8 One-meeting DRB**

On some projects, a DRB has been selected promptly and had an organizational (kick-off) meeting with the parties to introduce the players and become familiar with the site. The DRB has then gone on standby until called on to consider a dispute. The Board members are kept familiar with the progress of the work by periodic reports. This sacrifices the advantages offered by periodic meetings and site visits, especially the benefits gained by having the DRB develop rapport and credibility with the parties and proactively encourage discussion about pending disputes. The DRBF does not recommend use of a one-meeting DRB.

### **2.11.3.9 DRB Organized After or Near Completion of the Project**

A DRB organized at the end of the project to handle accumulated disputes is similar to an informal, non-binding arbitration panel. At this point, the two parties have often developed an adversarial relationship and have taken "hard" positions. Many of the unique advantages of the DRB process are lost.

However, a DRB is much less expensive than arbitration or litigation and DRBs have successfully assisted the parties in settling disputes at this late stage, especially when the parties have not developed an adversarial relationship and genuinely want to settle their disputes without going to arbitration or litigation.