

2.2 Member Selection

Selection of Board members is critical to the entire DRB process.

This chapter discusses the appropriate time period for establishing the DRB, includes the criteria for DRB membership, describes how the selection process works, and points out potential problems to be avoided.

2.2.1 When to Establish the DRB

Board members should be selected and the DRB established before site work commences. Success of the DRB process depends in part on the parties and the Board members developing rapport, and getting to know and trust each other takes time. The first DRB meeting should be set as soon as possible after site work begins. Early Board member selection and DRB startup cannot be over-emphasized.

Many times the relationship between the parties becomes strained soon after award of the contract, when issues relating to submittals, site preparation and utilities are discovered. It is important that the DRB be activated as soon as possible after award of the contract to be available as a resource to facilitate communications and resolve issues based on contemporaneous knowledge of the circumstances of the dispute.

2.2.2 Ensuring Member Impartiality and Neutrality

An essential element in the DRB process is that each contracting party be completely satisfied with every Board member. Both parties must carefully investigate nominees to ensure that each nominee is experienced and technically qualified. More importantly, each party must be satisfied that the nominees are impartial and have no conflicts of interest.

If either party is uncomfortable with a nominee, it not only has the right to reject that nominee, it must reject that nominee, or the DRB process may not be effective.

Because of the importance of Board member impartiality and the serious consequences that conflicts of interest have on this dispute resolution process, all current and past relationships between prospective Board members and the parties involved in the contract must be fully disclosed and understood. In addition potential Board members must recognize that there will be restrictions on their future relationship with the parties.

Relationships that could affect the perception of Board member impartiality include direct employment, consulting assignments, financial ties, close personal or professional relationships, and service on other DRBs with any party involved in the contract.

The following guidelines are recommended:

Definitions

Party directly involved: The contracting parties: the owner, the contractor and all joint-venture partners.

Party indirectly involved: The construction manager, subcontractors of any tier, suppliers, designers, architects, other professional service firms, or consultants to any party.

Financial ties: Ownership interest, loans, receivables or payables, etc.

Prohibited: Service as a DRB member should not be allowed.

Disclose: A written statement to both parties setting forth all the facts.

Written permission: Written acknowledgement that both parties are aware of the disclosed facts and agree that they do not preclude participation as a DRB member.

1. Direct Employment

- a. Current employees of any of the parties directly or indirectly involved must be prohibited from serving as Board members for the project.
- b. It is not recommended that past employees of either party serve as Board members. However, if a prospective Board member is a past employee of one of the parties directly involved, then, in addition to disclosure, permission from the other party must be obtained before agreeing to serve on the DRB.
- c. If a prospective Board member is a past employee of one of the parties indirectly involved, this must be disclosed to both parties prior to appointment to the DRB.
- d. Discussions concerning future employment of a Board member by a party directly or indirectly involved are prohibited throughout the life of the contract.

2. Consulting Assignments

- a. Individuals who are employed in a consulting capacity by any of the parties directly involved must be prohibited from serving as Board members for the project.
- b. Individuals currently employed as a consultant by one of the parties indirectly involved must, in addition to disclosure, obtain permission from both contracting parties before agreeing to serve on the DRB.
- c. Previous employment as a consultant by any party directly or indirectly involved must be disclosed prior to appointment.
- d. Discussions with a Board member about future consulting work with one of the parties directly involved is prohibited.
- e. Board members should obtain permission from both parties prior to agreeing on future consulting for parties indirectly involved.

3. Financial Ties

- a. Individuals with current financial ties to any of the parties directly involved must be prohibited from serving as Board members for the project.
- b. Individuals with current financial ties to any of the parties indirectly involved must disclose such relationships prior to appointment.
- c. Previous financial ties with any party directly or indirectly involved must be disclosed prior to appointment to the DRB.
- d. During the course of the project, the establishment of financial ties or discussions about future such financial ties with any party directly involved is prohibited.
- e. Obtain permission from both contracting parties before discussing future financial ties with any party indirectly involved in the project.

4. Close Personal or Professional Relationships

- a. Close personal or professional relationships that could give rise to the perception of bias with a key member of any party directly or indirectly involved must be disclosed and such relationship completely understood and accepted by the parties prior to appointment to the DRB.
- b. The establishment of close personal or professional relationships with a key member of the parties directly or indirectly involved during the course of the project must be avoided. In the

event that such relationships develop, Board members must disclose the nature of the relationships to both parties, and offer his/her resignation if warranted.

5. Services as a DRB member on another contract involving one or more of the parties

- a. Candidates must disclose all past and current service as a Board member on projects where any of the parties directly or indirectly involved were also involved. Describe the role of the involved parties on the other project.
- b. In addition to disclosure, obtain permission from each contracting party before agreeing to serve on another DRB for a contract in which one of the contracting parties is directly involved. If one of the contracting parties is indirectly involved on the other contract, this must be disclosed along with a description of their role on the other contract.
- c. Before agreeing to serve on another DRB for a contract in which a party indirectly involved is involved on both projects, disclose this relationship to both contracting parties and obtain permission whenever the role of the indirectly involved party is significant.

These guidelines are summarized in the following table where “past” is anytime prior to execution of the DRB three-party agreement on this project, “current” is anytime during the life of the project, and “future” is anytime after completion of the DRB on the contract.

		Directly Involved	Indirectly Involved
Direct Employment	Past	Permission Required	Disclose
	Current	Prohibited	Prohibited
	Future	Discussion is Prohibited	Discussion is Prohibited
Consulting Assignments	Past	Disclose	Disclose
	Current	Prohibited	Permission Required
	Future	Discussion is Prohibited	Permission Required
Financial Ties	Past	Disclose	Disclose
	Current	Prohibited	Disclose
	Future	Discussion is Prohibited	Permission Required
Close Personal or Professional Relationships	Past	Disclose	Disclose
	Current	Prohibited	Disclose
	Future	Avoid / Disclose	Avoid / Disclose
DRB Member on Another Project Involving One or More of the Parties	Past	Disclose	Disclose
	Current	Disclose	Disclose
	Future	Permission Required	Permission Required

In addition, potential Board members must not have had any prior substantial involvement in the project, in the judgment of either party, nor may they have any financial interest in the contract or project, other than service as a Board member.

The repeated selection of the same individual by either (1) a particular owner or contractor, or (2) only owners or only contractors can lead to the perception of bias. While individuals in these categories may be completely impartial and neutral, it is the perception of bias that is the concern. The important point is that both parties should avoid selecting Board members that may engender the perception of bias.

It is difficult to envision a specification that addresses all possibilities of perceived bias. However, the parties are in control of this situation and each party must remember that the other party needs to feel comfortable with every Board member if they are going to trust these individuals to recommend acceptable resolutions of their disputes.

2.2.3 Qualifications of Board Members

When nominating prospective Board members, the contracting parties should recognize the following necessary attributes:

- Complete objectivity, neutrality, impartiality and freedom from bias and conflict of interest for the duration of the contract.
- Dedication to the objectives and principles of the DRB process.

In addition to these attributes, the parties must evaluate the experience and qualifications of the prospective members for the specific project, with respect to:

- Interpretation of contract documents
- Resolution of construction disputes
- The type of construction involved
- The specific construction methods to be used
- The dispute-prone facets of the work

Prospective members should demonstrate experience, training, and understanding of the DRB process and a demonstrated ability to write in a clear, concise, and convincing manner. If considered for Chair, they should also demonstrate an expertise in running effective meetings in difficult circumstances.

Selection of Board members who are full-time employees of firms that could possibly become interested in obtaining work from either of the contracting parties is discouraged.

It should be recognized that all individuals are products of their own experience, and that their perspective on issues is based on that experience. To that end, it is desirable to select a DRB that includes members who have an understanding of both the owner's and the contractor's perspectives.

For some projects, depending upon the complexity of the work and provisions of the contract documents, the contracting parties may want to consider including an experienced construction attorney as one of the Board members.

Multinational practice normally includes attorneys. See Section 4 for further information.
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Within the United States, there has been considerable controversy over whether attorneys should be eligible for appointment to DRBs. The primary concerns seem to be that:

- Attorneys on DRBs may result in the hearings becoming more formal and/or adversarial with less open and candid discussion and,
- Once intimately involved in the process, the organized legal community may push to alter the process in ways that render DRBs less effective in fostering common sense resolution.

Many attorneys have demonstrated a keen interest in resolving disputes without recourse to binding judicial processes and are strongly supportive of the DRB process. Attorneys who are dedicated to the principles and process of DRBs, while satisfying the other criteria for membership, should be considered eligible to serve on DRBs. Many attorneys meet the requirements outlined in the guide specification, hold degrees in engineering and/or have significant project experience and a thorough

understanding of construction law. Such attorneys can bring to DRBs a wealth of experience in contract law, contract interpretation, and the writing of recommendations. DRBs in the U.S. that have included attorneys as Board members have generally experienced commendable results.

2.2.4 Methods of Member Selection

Selection of impartial and neutral members by any method depends on both parties thoroughly investigating the proposed members and rejecting those where bias or the perception of bias exists. Several methods have been used for selecting members, of which the three most commonly used are:

Joint Selection

The parties meet and discuss the qualifications of all prospective Board members and jointly select the three-member DRB. The parties may select the Chair, or delegate that responsibility to the selected members themselves. One advantage of this method is the elimination of any notion of allegiance to the nominating party. Another advantage is that the parties can better assure that the Board members have the attributes and experience required to handle the disputes that they believe might occur on the project.

This method is preferred by many for the selection of Board members.

Nomination by Each Party

Using this method, each party nominates a member and submits to the other party for approval. Once approved, the two appointed Board members nominate the third member, subject to the approval of both parties. The third member, not nominated by either party, frequently serves as Chair of the DRB. This method has been the most commonly used in the U.S.

This method has occasionally empanelled members who were biased or perceived to be biased toward the nominating party. Even if the resulting members are truly neutral, this method of selection can result in Board members being known as “the owner’s representative” or “the contractor’s representative,” thereby giving the perception of bias. When bias is suspected during the selection process, the parties are sometimes hesitant to reject the other’s nominee in an effort to minimize disagreements early in the project. Similarly, one party may accept the other party’s nominee on the tacit condition that its nominee also be accepted. Such practices should be avoided as it is likely to cause a perception of bias in the future.

Slate of Candidates

Using this method, each party proposes a list of three to five prospective Board members. Each party then selects one from the other’s list. If a party were to reject the entire list, then a new list is submitted. The two selected Board members nominate the third, subject to approval by both parties. Again, the third member, not selected by either party, frequently serves as Chair.

2.2.5 Process for Member Selection

Frequently, the contractor and owner will know one or more qualified candidates. If a party does not have such knowledge, it can obtain information from someone who has had DRB experience or from the resumes on the DRBF web site. Alternatively, one may review the tabulation of DRBs on the web site and inquire of owners or contractors who have had DRBs. In some cases, owner agencies have solicited letters of interest in trade journals prior to contract procurement.

Selection of members usually takes the following steps:

1. Identify the experience appropriate for the specific project.
2. Identify candidates with the appropriate experience, who are available, have no immediately apparent bias or conflicts, and are interested in serving on the DRB.
3. Send candidates a description of the work, a copy of the DRB specification and TPA, and a list of the directly and indirectly involved parties and their key project personnel.
4. Obtain from all candidates:
 - Resume.
 - Tabulation of previous experience on active and completed DRBs including for each project.
 - Name of project.
 - Contract amount.
 - Name of owner.
 - Name of contractor.
 - Party by whom selected, when applicable.
 - Names of the other Board members.
 - If served as Chair.
 - Number of disputes heard.
 - Statement of availability and interest in serving.
 - DRB trainings, including course name and year attended.
 - Disclosure statement including:
 - Previous involvement with the project
 - Previous involvements and relationships with all parties directly and indirectly involved in the project
 - Close personal and professional relationships with any key personnel of any of the parties directly and indirectly involved in the project.
 - Current billing rate.
5. Evaluate qualifications of potential candidates.
6. Do a background check of preferred candidates with owners and contractors who have been parties to previous projects where the preferred candidates served on DRBs.
7. If desired, interview preferred candidates by telephone or in person.
8. Select and notify those Board members.
9. Send each selected Board member a copy of all contract documents. All selected Board members should be provided with each other's information included in Item 4 above.

If the third member has not been jointly selected by the contracting parties, the first two members will be responsible for nominating the third. Information on desirable candidates who were considered by

the parties is sometimes provided to the first two selected members for their consideration in selecting the third member. If the two appointed members are well acquainted, a telephone conference may be sufficient to identify an appropriate third member. In some cases, it may be advisable for the first two members to meet personally and discuss possible candidates.

In addition to possessing the necessary attributes and qualifications listed above, the third member should supplement the technical expertise and background of the first two members, in order to provide experience in as many facets of the work as possible. The third member, if he or she is to act as Chair, should have DRB experience as well as expertise in running effective meetings.

After the third candidate has been identified, the candidate should receive the information identified in item 3 above. The information listed in item 4 above should be submitted by the candidate to the two selected Board members for their review. The first two members may wish to interview the candidate. Once the third member is nominated, a package containing the nominee's information (item 4 above) should be sent to each of the parties for their consideration in approving the final member.

Appointment to a Board of an experienced and respected construction professional that does not have DRB experience is certainly acceptable, but should be handled with care. Such a person, when familiar with and committed to the DRB process, can serve very effectively as a member of a Board along with two experienced DRB members.

2.2.6 Selecting the Chair

The third member frequently acts as Chair of the DRB. However, this should not be required and may not be the best choice. The Chair should be chosen primarily for his or her experience on DRBs and a demonstrated ability to take charge and lead the DRB activities. The specification should not require that the third member, if nominated by the other two selected Board members, automatically becomes the DRB Chair.

Other considerations that should go into the selection of the Chair include:

- Intimate familiarity with the DRB process and the role of the DRB in general meetings with the parties, in DRB hearings, and in advisory opinions.
- Availability and willingness to shoulder a greater share of the DRB workload as all communications with the parties must be handled by the Chair.
- Prior training through the DRBF Chairing workshop.
- Good communications skills that encourage open, informal discussions in a controlled, yet non-threatening manner.