

2 . 3 Operation of the DRB

Immediately after selection and approval of the Board members, the contracting parties should expect the DRB Chair to contact them to establish a date for the first meeting. The DRB should meet in private before the first meeting to get acquainted, affirm that all members fully ascribe to the Code of Ethics and understand the process, and discuss the draft operating procedures.

2.3.1 First Meeting with the Parties

Following introductions, a list of names with affiliations, project position, mail and e-mail addresses, and phone and fax numbers of all parties should be compiled and distributed to all attendees.

Discussion at the first meeting, in addition to the standard agenda items [2.3.3], is likely to include:

1. Work plan and schedule

To bring the Board members up to speed on the project, the owner describes the work and the contractor describes the work plan, including the basic methods and sequence of construction. Copies of the contractor's approved baseline schedule should be provided to the DRB. A copy of the bid tabulation may be requested. (The basic contract documents should have already been distributed to the Board members.)

2. DRB operating procedures

The DRB prepares and presents draft operating procedures, incorporating the requirements of the contract relating to DRBs and best DRB practices and procedures. Procedures are flexible in order to adapt to the needs of the contracting parties. The procedures will govern:

- Meeting specifics, such as agendas, minutes, attendance, etc.
- Referral of a dispute to the DRB, including notice, time requirements, material to be submitted, etc.
- Hearings, including conduct, attendance, format, etc.
- DRB written reports
- Advisory opinions are often discussed and consideration given to incorporating by change order, if not already permitted under the contract. [2.4]

Revisions are made as agreed and revised procedures are submitted to the parties after the meeting for additional comments and eventual approval. All parties agree to the procedures and to any subsequent changes.

3. Materials to be sent to the Board members between meetings

To keep the DRB advised on job progress, the parties typically provide periodic progress reporting documents and progress meeting minutes, already being prepared in the normal course of the work. Identify which party is responsible for distribution to the Board members.

4. Principles related to maintaining impartiality

The parties' concern with maintaining impartiality or the perception thereof does not end with the selection of Board members. To ensure impartiality, the following must be emphasized:

- All project-related communications between the Board members and the parties must be made directly with and through the Chair, except during meetings with the parties and distribution of progress documents. The parties must never contact any member other than the Chair; likewise, Board members other than the Chair must never contact either party. All written correspondence between one party and the Chair is to be copied to the other party and sent directly to the other Board members.
- Board members cannot advise either party on conduct of the work and neither party may request advice from Board members.
- Board members will refrain from expressing opinions on the merits of disputes or potential disputes.
- Individual Board members should never be thought of or referred to as the representative of a party to the contract. Board members should not think of themselves as a representative of the party that nominated them.
- The site tour must include representatives from each party.
- The entire group should remain together throughout the site tour.

5. The Chair's point of contact with each of the contracting parties

To avoid miscommunication, the Chair should have one point of contact with each party. Commonly the Chair's only contact is to establish agendas and meeting arrangements with the owner and contractor's representatives and to arrange for additional documentation needed by DRB members.

6. Invoicing procedures

The mechanics of invoicing, consistent with the TPA, should be established, including such details as agreed time to review progress documents, timing of submittal of invoices, required back-up data, and where to send invoices. Typically each Board member submits his or her invoice directly to the contractor, who, with the approval of the owner, pays the approved amount and bills the owner for one-half the amount.

7. Frequency of meetings

Discuss and agree on the frequency of periodic meetings and site visits. The dates for the next two or more meetings should be set.

8. The proactive role of the DRB

The DRB may not usurp the discretion, authority, or decision-making power of either party. However, through pro-active discussion it should encourage the parties to engage in frequent and open communications to resolve disputes without referral to the DRB. If it becomes clear that the parties cannot resolve their differences, the DRB should encourage prompt referral of the dispute for a hearing (or possibly an advisory opinion – see 2.4).

2.3.2 Frequency of Meetings

It is of critical importance that the DRB meet periodically throughout construction to encourage the parties to settle issues before they become disputes. These periodic meetings are helpful in establishing the needed rapport (knowledge, trust and confidence) among the parties and the Board members that facilitates avoidance as well as resolution of disputes. Waiting until a dispute arises to meet with the DRB undermines the process, making it essentially an arbitration panel, without binding resolution. Experience has shown that one of the greatest values of a DRB lies in the regular, periodic meetings throughout the course of the project where the parties, assisted by the DRB, discuss issues openly and work together to avoid disputes.

Meetings should be held as often as necessary to avoid issues from becoming disputes. This usually depends on the work in progress and issues at hand. Periodic meetings and site visits should be on a regular basis. Some projects meet as often as monthly, but in any event, meetings should not be less often than quarterly. They should continue as long as work from which disputes might arise is underway. The Board members must be familiar with all major aspects of the work and the associated conditions.

On building projects DRBs frequently meet every month. On some highway projects the DRB meets once a month for the first six months and bi-monthly thereafter. DRBs on tunnel projects have traditionally met once every three months. Projects with dispute problems meet more often. On a fast track project, meeting as often as once a month may be desirable.

The DRB's periodic presence fosters open and substantive communication between the parties.

2.3.3 Agenda for Periodic Meetings

It is desirable for the meeting agenda to be developed by the DRB Chair, with input from the owner, contractor and other Board members. The agenda may vary as circumstances dictate, but typically includes, as a minimum, the following:

1. The Chair convenes the meeting and, when there are minutes, requests approval of the previous meeting minutes.
2. The owner and the contractor, either concurrently or sequentially, discuss the work accomplished since the last meeting, the status of the work schedule, plans for future work, potential disputes, claims and other controversies, and proposed solutions.
3. The owner reviews the status of each change order. Discussion with the DRB may help move the change order process along when it bogs down.
4. The contractor explains the status of all pending claims and the prospects for resolution. Discussion with the DRB can often help move negotiations forward to resolution, thereby heading off disputes that might otherwise have been referred for a hearing.
5. Field observation of all active segments of the work. Board members are always accompanied by both contractor and owner personnel to avoid ex parte communication and any perception of partiality.
6. Establish the next two or more meeting dates to assure everyone will be available.

2.3.4 Minutes

Preparation of DRB meeting minutes, although generally not required, can serve a useful function in recording "action items" and as a general reminder of the discussions held and views expressed at prior

meetings. It should, however, be noted in the first meeting and agreed to by the parties that such DRB meeting minutes are for information only and are not an official record for future reference in DRB hearings or other subsequent proceedings. To do so would undermine the open, honest and informal nature of discussions that are directed at resolving issues before they become full-fledged disputes.

When minutes of the DRB meetings are required under the contract, or agreed to by the parties and the DRB, they should be prepared by a representative of one of the parties. Expecting a member of the DRB to take the minutes should be avoided, as it will detract from the DRB's ability to focus on and understand the project and the issues under discussion.

2.3.5 Special Meetings

The DRB should be available to meet on short notice when requested by the parties. Special meetings may be called by either party or the DRB as necessary to consider some urgent unforeseen condition, or other matter demanding prompt observation, attention, or consideration. The Chair coordinates with the parties and Board members to set the time, place, and agenda for special meetings

2.3.6 Encourage Open Communication and Negotiation to Settle Disputes

During meetings the DRB should question the parties at length as to the progress of negotiations to settle disputes, with a view to have the parties settle the disputes themselves. Such dispute avoidance efforts are an important feature of the DRB process; a truly successful DRB may have no hearings. All disputes should be completely aired between the parties and serious negotiations exhausted before referring a dispute to the DRB.