

2.4 Advisory Opinions

The usual DRB procedure for dispute resolution consists of the prompt referral of a dispute to the DRB, preparation of position papers by the owner and contractor, holding a hearing, and issuing a written report containing the DRB's recommendation. Although the DRB hearing procedure is far more efficient than litigation and other judicial processes, it still requires the parties to prepare written documents, presentations at a hearing, and preparation of a written report by the DRB.

Advisory opinions are typically used soon after the parties find they have a potential dispute and have carefully considered and formed their positions and conducted preliminary negotiations, but before expenditure of additional resources and further hardening of the parties' positions.

Advisory opinions have been used on many projects to provide quick insight into the DRB's likely assessment of the relative merits of the parties' positions on a dispute. Frequently advisory opinions are used when the parties disagree as to the interpretation of a specific provision of the contract. This process is quick and may be entirely oral and does not prejudice the opportunity for a DRB hearing if the dispute is not resolved and either party chooses to request one.

Experience to date with advisory opinions has been very positive, with resolution of the dispute generally accomplished without the need for a hearing.

Advisory opinions are an informal method of advising the parties on resolving potential disputes before they escalate. Both parties have to agree to seek an advisory opinion. The procedure for requesting and issuing advisory opinions should be discussed with the DRB at the first meeting with the parties. Provided that both parties agree to an advisory opinion, the process would proceed as follows:

- Although this is not necessary, the parties sometimes submit a brief written claim statement and some documentation supporting their position to the DRB and to the other party at the prescribed time prior to the meeting. Submission in writing enables the DRB to be prepared and educate itself on the issue.
- The advisory meeting is normally held in conjunction with a periodic meeting, although advisory opinions are not generally issued on an impromptu basis. The meeting itself consists of brief oral presentations by each party, followed by any questions from the DRB.
- A short intermission is taken to allow the Board members to caucus and form their opinion.
- The meeting is then reconvened, and the DRB provides an oral opinion on the matter.

Advisory opinions are always "based only upon information available at the time," "subject to change later based upon further data," and "not to be used or referred to in future disputes on this issue."

The DRB may or may not issue a written opinion, but if a written advisory opinion is issued, it must be at the specific request of both parties. Some of the factors that should be considered in making this decision include:

- Written advisory opinions may (1) serve to avoid subsequent disputes as to what the DRB actually said, i.e., the issue of each party hearing what they want to hear, and (2) assist resolution in the event that one of the parties needs to obtain approval from higher authority.
- The absence of written advisory opinions maintains the informality of the proceeding, which may assist in reaching agreement of the parties.

The parties consider the DRB's opinion in their continued efforts to resolve the dispute among themselves.

The opinion is only advisory and does not require an acceptance or rejection by either party. If the dispute is not resolved and a hearing is held, the oral presentations and advisory opinion are completely disregarded and the traditional DRB hearing procedure is followed.

When deciding whether a dispute should be submitted for an advisory opinion, the parties should consider the complexity of the dispute. The parties and the DRB should recognize that if the issues are more complex than can be realistically dealt with in an advisory opinion, the DRB may refuse to hear the dispute on an informal basis. In general, however, such an informal presentation of a dispute and the subsequent DRB opinion provides useful input in the negotiation process at minimal cost.

Advisory opinions should be limited to merit issues only as a discussion of quantum is too complex.