

2.5 Referral of a Dispute to the DRB

For maximum effectiveness, the DRB should become involved as soon as it becomes clear that a bona fide dispute exists. The contracting parties should make every effort to resolve issues without taking them to the DRB. However, disputes should be referred to the DRB as soon as one of the contracting parties believes that a negotiated settlement cannot be reached.

The DRBF recommends that the contract dispute resolution ladder provide for receipt of a DRB report before the owner makes a “final decision” on the dispute. See illustration.

To achieve the best use of the DRB process, it is important not to include steps in the contract that delay referral of disputes to the DRB, such as an owner’s “final decision.” Such requirements undermine the benefits of timely and cost effective dispute resolution. The guide specification provides for prompt referral of disputes to the DRB.

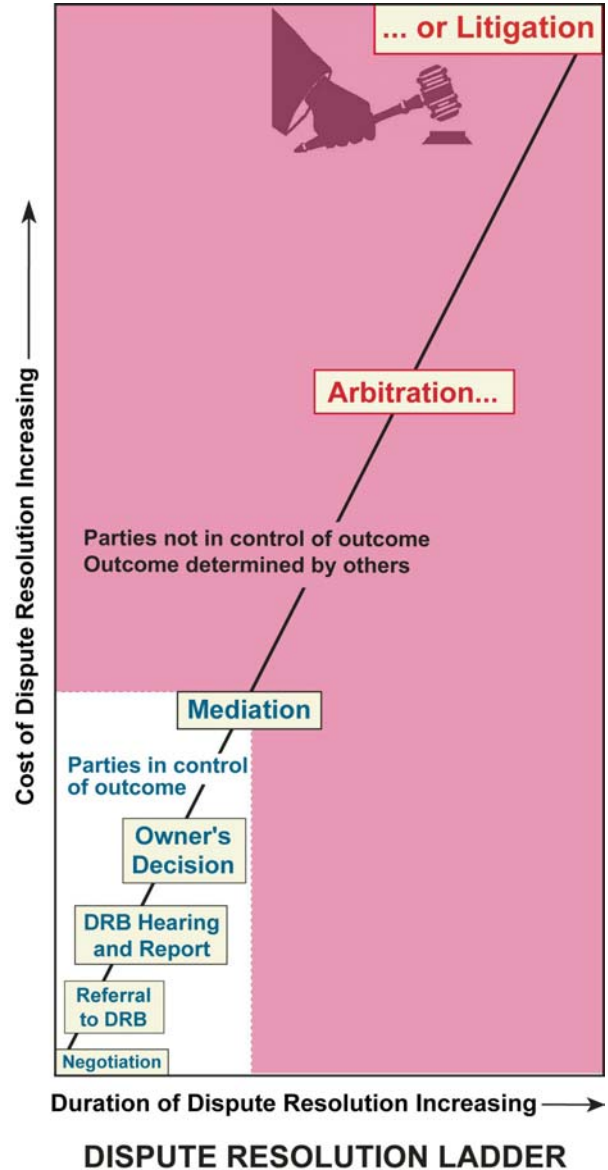
The DRB must operate within the contract and statutory requirements. It may be necessary to make modifications to portions of the general conditions to clearly identify where in the process the DRB will provide dispute resolution assistance.

The DRB process is a dispute resolution process, not a claims review process. It is not productive to require that the contractor prepare voluminous documentation, including calculation of quantum, for submittal to the owner for review and final decision prior to referring the dispute to the DRB. This increases the difficulty of the dispute, fosters animosity between the contracting parties, and leads to unproductive posturing between the parties. It also diverts the owner’s and contractor’s efforts from prosecution of the work.

2.5.1 Limitations

Contract specifications should provide that either the contractor or the owner may refer any issue to the DRB once it becomes clear, in the opinion of either party, that a dispute or controversy exists and is not likely to be resolved without DRB participation. In addition, the guide specifications permit either party to refer a dispute for a DRB hearing if the other party fails to meet their contractual or otherwise reasonable deadlines for handling the dispute.

Some owners have limited the DRB’s jurisdiction to technical issues as distinct from matters requiring the application or interpretation of the general and supplementary conditions and special provisions of the contract. Board members are just as able to deal with all matters under the contract, as construction



industry arbitrators who commonly issue binding decisions on all contractual issues. Limiting jurisdiction of the DRB reduces its ability to perform the services intended and has generated controversies over which disputes are eligible to be heard.

Claims by contractors against owners on behalf of subcontractors or suppliers (pass-through claims) may be heard by the DRB. Disputes by a subcontractor or supplier with the contractor, or both the owner and the contractor, cannot be considered by the DRB. The TPA is with the owner and contractor; subcontractors and suppliers are not included. Hearing disputes between the contractor and his subcontractors or suppliers could prejudice the DRB in future disputes between the owner and the contractor.

2.5.2 Letter of Referral

Referral of a dispute to the DRB, by either the contractor or the owner, should be to the DRB Chair, with copies to the other party and the other Board members.

The letter of referral should concisely describe the nature and extent of the dispute that is being referred to the DRB, as well as the scope of the desired report: merit (entitlement) only, merit with guidelines for quantum if merit is found, or merit with quantum amount if merit is found.

2.5.3 Scope of Recommendation

Many disputes involve only merit. If quantum is involved and merit is recommended, it is common for DRBs to offer guidelines for quantum along with the recommendation for entitlement. Once the DRB becomes aware of the details surrounding a dispute, it is usually in a good position to determine whether guidelines for quantum would be beneficial to the parties.

Entitlement should be agreed by the parties first, followed by renewed negotiation efforts before asking the DRB to determine the quantum amount. The parties are frequently in a much better position to negotiate quantum issues. It is usually very time consuming and costly for the DRB to become sufficiently familiar with the production and the contractual cost provisions necessary to establish the quantum amount. However, the DRB's purpose is to assist in dispute resolution and if the parties request that the DRB recommend the quantum amount, the DRB will do so.