

2.6 Preparation for the Hearing

2.6.1 Scheduling the Hearing

Upon receipt of the dispute referral letter, the Chair consults with the other two Board members and both parties to establish a date for the hearing. Allowance is made for the time the parties need for preparation and submittal of position papers and their review by the DRB. Often, hearings are conducted following the regular agenda at the next periodic DRB meeting unless the matter is urgent, in which case the hearing would be scheduled as agreed with the parties. Large or complex disputes may take more time than available at a periodic meeting.

2.6.2 Common Reference Document

To facilitate the DRB's review of the issues and preparation of the report, the DRB operating procedures frequently require the parties to prepare a joint statement of dispute and a common reference document (CRD), comprised of materials such as correspondence, reports, and other records, that they believe will help the Board members understand the dispute. In order to minimize the volume of material the CRD should only include copies of pertinent portions of the contract documents for easy reference. It should be arranged in a logical manner, e.g., correspondence, contract documents, job records, etc., and page numbered (Bates Stamp) for easy reference.

Since the parties have previously negotiated to settle the dispute and have thoroughly considering each other's positions, the CRD should be easy to assemble and there should be no disagreement as to what to include.

2.6.3 Position Papers

Each party also prepares a paper describing its position and submits it to the other party and the DRB, in advance of the hearing. Position papers should concisely summarize the party's position, explain relevant factual information, and give the contractual justification for their position, all referenced to specific pages in the CRD. It is critically important that all facts and arguments a party intends to put forth during the hearing be included so the other party has the opportunity to provide a considered response at the hearing. It is also beneficial for each party to include their understanding of the other party's position and explain why they believe the other party's position is without merit. To avoid giving one party an advantage, the deadline for submittal of each party's position paper must be the same.

If new issues or arguments are presented in the position papers, rebuttal papers may be permitted before the hearing, but are not required. Only responses to new material in the other party's position paper may be included in rebuttal papers.

2.6.5 Submittal

All documents are submitted in accordance with the deadlines in the DRB operating procedures, unless the DRB and both parties have agreed to modifications. It is important that both parties and the DRB adhere to the schedule established for the hearing. Failure to do so can lead to postponements of the hearing and escalated animosity.

2.6.6 Location and Facilities

Hearings may be conducted at any mutually acceptable location that provides all the required facilities and access to any additional reference documents that might be needed. The job site is generally preferred because many of the hearing participants and necessary records are readily available.

The owner usually arranges for the hearing room and necessary facilities. A typical hearing requires a room large enough to comfortably accommodate 10 to 15 people, although this varies depending on the complexity of the hearing. Board members sit together in a position where they can clearly see the speaker and any displays or visual aids. Participants are often seated around a large table with sufficient space to lay out drawings. It is important to provide adequate seating and table space for the DRB and participants to spread out documents and to take private notes.

Marker boards or flipcharts may be provided to facilitate presentations. Wall space to hang drawings, plots, or charts should be available. Electronic and other equipment should be on hand for presentations. Presentation materials should be distributed to the Board and the other party at the beginning of the presentation in order to facilitate note taking during the hearing and for easy reference in subsequent Board deliberations and report preparation. Reproduction facilities should be available to facilitate copying and distribution of information developed during the hearing.

2.6.7 Participation

Participation should be limited to the decision makers from each of the contracting parties, participants in the prior good-faith negotiations, and those with first-hand familiarity with the facts of the dispute, such as inspectors, superintendents and foremen.

All participants and their roles at the hearing must be disclosed sufficiently in advance to allow both parties to adequately prepare for the hearing. The DRB's operating procedures usually provide for each party to submit a list of the people who will participate, as well as those who will attend as observers. Delaying this submittal negatively affects the DRB process. If attendance is controversial, the DRB, in accord with the operating procedures, will determine who will participate in the hearing as well as who may attend as observers.

Full-time project employees who are familiar with the events surrounding the issue in dispute should make the primary hearing presentations. Experts may testify in complicated technical disputes. Experts, along with their subject matter, must be identified with adequate time for the other party to prepare its response. Failure to provide ample notice may result in postponement of the hearing or exclusion of the expert's presentation until the other party has had adequate time to prepare.

Occasionally parties request that their attorneys attend as observers so they may hear all the evidence, and thus knowledgeably participate in subsequent discussions regarding the DRB's recommendation. The contracting parties' legal counsel may attend hearings, but are not allowed to participate in the DRB hearings as this can intimidate hearing participants and inhibit open and candid discussion. If legal counsel participation is requested, the parties and the DRB should discuss the pros and cons. The DRB will allow such participation in the hearing if requested by both parties.

Unless required by open meeting laws, the parties should not admit media representatives to the hearing, since their attendance will likely inhibit open and candid discussion.

On rare occasions one of the contracting parties may refuse to attend a hearing. If this happens and the DRB is obligated by the TPA to proceed with the hearing, the hearing must be held. Sometimes the contract language makes the hearing a necessary condition before the dispute may be pursued in

subsequent proceedings. In this case the parties should expect the DRB to proceed with the hearing even if the TPA does not specifically require it to do so. In deciding whether to proceed if neither of these cases apply, the parties should expect the DRB to take into account the specific circumstances of the refusal, e.g., whether the failure to appear is because the party legitimately needs additional time to prepare for the hearing, an essential witness is not available, or whether it is simply a refusal to comply with the contract terms. DRB recommendations are certainly more likely to result in settlement of the dispute if both parties participate in the hearings. Therefore, the parties can expect the DRB to attempt to get both parties to the hearing, even if it requires temporary postponement.