

2 . 8 The Report

The DRB will formalize its findings and recommendations in a written report, signed by all three Board members and submitted to the owner and the contractor as soon as possible after completion of the hearing.

The report typically includes concise statements of the dispute and the two opposing positions, the DRB's findings as to the facts of the dispute, the recommendation, and the rationale for the recommendation. The report will be specific regarding the reasons for the DRB's recommendations and will include references to contract clauses and/or significant facts as appropriate.

The Board members will make every effort to prepare a unanimous report. If they cannot, the dissenting findings and recommendations will be included in the report, along with the majority findings and recommendations. The minority findings and recommendations will identify the issues of disagreement. Whether the report is signed so as to identify the dissenting member depends on the circumstances of the dissent and is left to the discretion of the DRB.

2.8.1 Acceptance

Acceptance of the DRB's recommendations is entirely voluntary. The specifications usually provide for a certain time period within which the parties must accept or reject the DRB's recommendations. The goal of the supporting rationale in the DRB's report is to convince both parties to accept the merit recommendations, and to facilitate a negotiated quantum settlement when needed. Failing successful settlement negotiations, the parties may return to the DRB for a recommendation on quantum.

When a party does not accept a DRB recommendation, the case generally moves to the next step in the dispute resolution process. Before proceeding with the next step, the parties should review the findings and recommendations carefully to determine if the DRB understood all of the information and considered all of the provisions of the contract.

2.8.2 Clarification and Reconsideration

A party can request that the DRB clarify the rationale behind the recommendations. Sometimes what was assumed to be agreement on a factual matter turns out to be incorrect and clarification is needed. Either party may request clarification of elements of the DRB report within a specified time period following receipt of the DRB report.

Reconsideration should be the exception, not the rule. A party can request that the DRB reconsider the dispute upon the submission of new evidence or when, in the DRB's opinion, they misunderstood or failed to consider pertinent facts of the dispute. Reconsideration will not be granted because one party doesn't like the DRB recommendation or wants to portray evidence already submitted in a different way. The standards and criteria for reconsideration should be set forth in the contract; if they are not, they should be established by the DRB in the operating procedures. Requests for reconsideration must be made within a specified time period following receipt of the DRB report.

When the DRB feels that a request for reconsideration or clarification is justified and will likely lead to an acceptable resolution of the dispute, it should honor the request.

2.8.3 Subsequent Dispute Resolution Activities

Because this process is not mediation, the DRB cannot compromise its findings and recommendations or substitute its own idea of fairness for terms of the contract, in an effort to resolve the dispute. However, it is generally far more productive for the parties to compromise their positions and settle the dispute. Recognizing this, the parties usually continue their negotiations using the DRB recommendations as a guide. In the vast majority of cases these subsequent negotiations are successful.

The owner's acceptance of a DRB recommendation on entitlement does not require the issuance of a change order. The owner is only obligated to issue a change order when all aspects of the dispute, including quantum, are fully resolved, and it is agreed that a modification to the contract for either time or money, or both, is required.

On rare occasions, the parties have failed to reach agreement despite the good efforts of the DRB. In such cases, depending upon the specific contract language, one of the parties may initiate arbitration or litigation proceedings.

Contract specification language typically permits the DRB's report to be admitted as evidence in these subsequent proceedings. Experience has shown that this practice has been a major factor in the effectiveness of DRBs since it allows the litigation forum access to a reasoned written report prepared by knowledgeable industry experts who have witnessed, first hand, the construction of the project.

By virtue of the Three-Party Agreement, Board members may not participate in any subsequent arbitration or litigation proceedings. This provision is necessary because the DRB's findings and recommendations are prepared in a collaborative effort among all the Board members during private and confidential deliberations. This is an important aspect of the DRB process, and results in well-reasoned opinions that consider all aspects of the dispute. Attempts to modify this process by removing restrictions against participation in future proceedings may lead to less effective dispute resolution.