

## 3.3 Establishment of the DRB

### 3.3.1 Identification of Board Member Candidates

The contracting parties identify prospective members in a number of ways. Often they know individuals from previous work or prospective members are referred by consultants. On occasion owners have advertised for Letters of Interest.

Occasionally prospective Board members learn of a project that they have reason to believe will incorporate the DRB process, and they make their interest in serving on such a DRB known to the parties. Soliciting DRB assignments by direct communication with owners or contractors requires care. However, it is reasonable to let the parties know of your interest. In communicating this with the parties it is particularly important to emphasize that, if selected, you will have no allegiance to either party, irrespective of the nominating party. This assurance is consistent with the DRBF Code of Ethics and basic DRB principles.

Prospective members should carefully consider the following before agreeing to serve:

- Expertise in the type of construction involved,
- Availability during the anticipated duration of construction,
- Previous involvement in the project,
- Relationships that could lead to a perception of bias, including previous involvement with any of the parties directly or indirectly involved and/or their key project personnel, and
- Anticipation of future assignments with either party that could influence impartiality.

### 3.3.2 Member Selection Process

Steps of the member selection process include:

1. The parties' inquiry into prospective Board member's interest, experience and availability.
2. Transmittal of the following to the prospective Board members for their review and consideration:
  - a. DRB specification and TPA,
  - b. Project description,
  - c. Names of the directly and indirectly involved parties and their key personnel assigned to the project and,
  - d. Names of other prospective Board members under consideration.
3. The prospective Board member's review of the DRB specification, TPA, and other materials provided.

The term "party directly involved in the project" includes the owner and contractor and each joint-venture partner.

The term "party indirectly involved in the project" includes the construction manager, subcontractors of any tier, suppliers, designers, architects, engineers and other professional service firms, consultants to the project, et al. Depending upon how close the various funding agencies are to the operations of the project, they could also be considered "parties indirectly involved" and be subject to the same level of disclosure.

4. Submittal of prospective Board member's disclosure statement, resume and tabulation of DRB experience.
5. Selection and appointment.

Make it clear to all parties that the findings and recommendations will be based solely on the provisions of the contract, the facts of any dispute and prevailing law. This emphasizes to the parties that selection of the DRB must not be based upon the anticipation of the nominating party receiving favorable recommendations or other considerations from any of the Board members.

It is desirable that prospective members should be experienced in the type of contract and type of construction in addition to fully understanding the DRB process. Candidates should carefully review the DRB sections of the contract documents and the TPA to assure that the provisions are acceptable. Candidates should not agree to serve on a DRB that would require them to be in conflict with the Code of Ethics, the basic DRB principles or would place the Board member in a position of personal or professional liability. Candidates are encouraged to express the reasons they decline to serve.

During the selection process the parties will ask prospective members for their resume, a disclosure statement, and a tabulation of their DRB experience. (If these are not requested, the nominees should provide these materials on their own initiative.) It is imperative that individuals being considered for DRB assignments disclose all situations that could be interpreted as partiality or bias.

Prospective members must fully disclose all past, current and anticipated future relationships with all parties directly and indirectly involved in the project. In order to prepare these disclosure statements, prospective Board members must have a list of all the parties involved. Usually all subcontractors, suppliers or consultants are not known at the start of construction. However, when these do become known, immediate disclosure of any such relationships must be made.

When performing a self-evaluation of how others may view your impartiality, the DRBF recommends evaluating past, current and future relationships with all parties to the contract, both direct and indirect in the following areas:

1. Direct Employment
2. Consulting Assignments
3. Financial Ties
4. Close Personal or Professional Relationships
5. DRB Member on another project involving one or more of the parties

Guidelines for prohibited relationships, those that must be disclosed, and those where written permission should be obtained from the parties, are contained in Section 2.2.2 of this Manual. These disclosures are intended to ensure that both parties are fully aware of all relationships between candidates and any parties involved in the project when making Board member selections. Failure to fully comply could result in not being approved as a Board member. In addition, if already a Board member, failure to stay in compliance could result in dismissal. It is always better to err on the side of over disclosure.

To ensure that the tabulation of DRB experience is complete, show the name and location of the project, dates of DRB service, names of owner and contractor, and origin of membership – whether nominated by the owner or contractor, by the other Board members, or jointly by both parties. Also indicate the DRB's on which you served as Chair. It is suggested that the tabulation include the names of the other Board members, the contract value of the project and the number of disputes

heard. (See Appendix 3A for an example Disclosure Statement, including a tabulation of DRB experience.)

Depending upon specific contract language regarding Board member compensation, candidates may be asked for a fee schedule.

### **3.3.3 Selection of Third Member and the Chair**

The Chair can be selected by the parties (if the parties select all three members) or by the Board. If the Chair has not been selected by the parties, this is the first order of business of the DRB.

When the parties use a selection method wherein the parties select only two members, these two must first nominate a third. The first two members should review the plans and specifications as necessary to understand the work and select a third member who will complement their experience. The prospective third member must submit the disclosure statement, resume and tabulation of DRB experience as described above for review by the parties.

The DRB Chair is a key to the DRB's successful operation. The third member should not automatically be the Chair. Selection of the Chair should include serious consideration of the most able and successful Board member with the skill and experience to lead the DRB in resolving issues before they become disputes as well as managing potentially contentious meetings and deliberations.

### **3.3.4 Preparation for Initial Meeting with the Parties**

As soon as possible after selection and approval of all three Board members, the Chair and the parties should establish a date for the first DRB meeting.

Determine how familiar the parties are with the DRB process. It is good practice to give each party a copy of this Manual to assure that everyone is working from the same guidelines. This is particularly important if either or both parties are new to the process.

Early in a construction project the parties may have different priorities than starting the DRB. The Chair should emphasize the importance of getting the DRB introduced to the project and project participants promptly. Some contracts specify the time frame for the initial DRB meeting.

The Chair, in consultation with the two other Board members, should prepare the draft DRB Operating Procedures. After conferring with the parties, and discussing with the other Board members, the Chair prepares the agenda for the first meeting with the parties. (See Appendix 3C for example agendas.) The draft Operating Procedures and the agenda should be submitted to the parties at least two weeks prior to the first DRB meeting.

The Chair should prepare a preliminary list with the mail and e-mail addresses of each Board member, and the phone, cell phone, and fax numbers of the Chair and each party's tentative contact with the Chair. This list will be used by the parties and the DRB to send progress reports, invoices, payments, etc.

The Board members should perform a brief familiarity review of critical portions of the contract documents prior to the first meeting with the parties.

### **3.3.5 Private Meeting of Board Members**

The Board members should meet privately before the first meeting with the parties to become acquainted and to agree on how to implement the DRB process. A key element for success of the DRB process is for the Board members to demonstrate their general unanimity and competence to the parties.

The time required for this meeting will depend on the members' prior experience with the DRB process and with each other. This discussion should include the following matters:

1. The role of the Chair. Ideally the DRB is a partnership of equals with the Chair having the additional duties of coordinating the work of the DRB, communicating with the parties, chairing the meetings and hearings, and making procedural decisions.
2. Understanding of the process. Confirm that all Board members correctly understand the DRB process and are committed to their duties and responsibilities as Board members.
3. The importance of impartiality. Discuss and affirm the principle that each Board member is to be impartial and neutral in all respects. If there are any questions of possible conflict of interest or bias, they must be addressed at the first meeting with the parties and resolved.
4. Continuous disclosure. Reaffirm the continuing obligation to disclose any relationships that could give the perception of Board member bias.
5. Communications. Agree that all communications between the DRB and the contracting parties will be made only through the Chair except during meetings with the parties. (This does not include distribution of documents by the parties which should be made directly to each Board member.)
6. Plans for future DRB meetings.
  - The need to schedule more than two periodic meetings in advance to accommodate other commitments.
  - Extent to which the Board should be proactive to encourage resolution of issues before they become disputes.
  - The need to hear disputes in a timely manner.
  - The need for all Board members to remain together during site tours and for each party to have a representative present with the Board.
  - Travel logistics. In order to demonstrate the DRB's function as a group, not as individuals, Board members are encouraged to arrive at meetings together.
7. Discuss what progress documents to request from the parties and the time anticipated to review those documents.