

3.4 Operation of the DRB

3.4.1 First Meeting with the Parties

The DRB Chair, prior to opening meetings, should arrange for an attendance list to be compiled and distributed, containing the name, affiliation and project role of each attendee. Phone numbers and e-mail addresses are not recommended since it may imply more communication with the Board members than is appropriate. The Three Party Agreement should be signed before opening the meeting.

The meeting follows the agenda previously distributed by the Chair. (Refer to Appendix 3C for sample agendas.)

The meeting attendees, including the Board members, should introduce themselves, describing their position and role on the project as well as a brief summary of their background and work experience. Any previously unknown or undisclosed relationships with any of the attendees should be disclosed at this time.

Meeting minutes, if required by contract are usually prepared by an owner's representative. These are circulated to the other party and all three Board members prior to the next meeting, so they can be corrected if necessary and adopted as a record of the previous meeting. In order to encourage open and honest communication, it should be noted that such meeting minutes are an unofficial record. Board members make their own personal notes, but it is not good practice for Board members to prepare the minutes as it distracts them from giving their full attention to the meeting.

Although the Chair needs to control the meeting as needed, it should be stressed that this is an informal meeting intended to encourage open and honest communication with the parties and strict adherence to formal meeting etiquette should be avoided.

First the owner describes the project, including critical design details, interfaces with other projects, geotechnical, environmental, third party funding and other constraints, and interim and final completion dates.

The contractor next describes plans to accomplish the work, the personnel and equipment resources it plans to utilize, major subcontractors and suppliers involved, and details of the construction schedule. These owner and contractor presentations usually transition into a round-table discussion of plans to accomplish the work in answer to questions from the Board members.

The Chair then discusses the DRB process and its implementation on the project.

1. If any principal attendees are not familiar with the process, the Chair explains the role of the DRB, emphasizing dispute avoidance as well as dispute resolution. The Board members should be prepared to discuss and answer questions concerning the process. Refer to the Best Practice Guidelines [1.2.2], other sections of this Manual, or to www.drb.org for additional information.

If any of the parties have previously used the DRB process, determine if they have been satisfied with the process and the outcome, ask if there were any problems with the process, and discuss how these might be avoided on this project.

Point out that if it becomes clear that the parties cannot resolve their differences, the DRB will encourage prompt referral of disputes for a hearing.

2. Discuss the contract provisions that pertain to dispute resolution:

- The complete contractual procedure, including time frames for submitting disputes to the DRB should be thoroughly understood. Determine if clarification of the contractual procedure is required prior to referral of a dispute to the DRB. If the language in the contract is not specific, the DRB should draft a suggested procedure for discussion with the parties. This procedure, agreed to by all parties, should be incorporated into the DRB Operating Procedures before the next meeting.
 - If the contract requires a lengthy claim and “engineer’s decision” process before the dispute can be referred to the DRB, discuss the benefits of bringing disputes promptly and directly to the DRB (Refer to Section 2.5.) and mention that the parties can do this by mutual agreement.
 - Does the contract provide for and are the parties familiar with advisory opinions? If not, explain this process, relay its reported success and see if the parties are open to this preliminary process that often leads to resolution of disputes without resorting to DRB hearings.
 - Ask who will make the final decision for each party regarding acceptance or rejection of DRB recommendations.
 - Identify the next step if a DRB recommendation is not accepted and if there is a contractual time limit to take this step.
 - Ask if the parties are using “partnering” and, if so, discuss their plans for it. Point out to the parties that Board members do not attend partnering sessions, as that could inhibit free and open partnering discussions and could prejudice the Board members in later proceedings. However it is permissible for the Board Chair to explain the DRB process at the initial partnering session. This may be especially helpful if either or both of the parties lack familiarity with the DRB process. Projects have benefited from the DRB encouraging periodic partnering meetings.
3. The Chair discusses the previously transmitted DRB Operating Procedures, considers suggestions for additions and revisions, and seeks concurrence.
 4. Frequency of meetings should be discussed and decided by mutual agreement rather than by directive or unilateral decision of any one party. The parties must clearly understand that a DRB is not an arbitration panel; it doesn’t only meet after there’s a dispute. DRBs meet periodically throughout construction so they are able to encourage the parties to settle issues before they become disputes. In so doing, DRBs become aware of issues on a contemporaneous basis; this feature distinguishes the DRB process from all other alternative dispute resolution forums.
 5. Identify the specific documents required by the Board members to understand the work. These usually include a copy of all the contract documents and a summary level version of the contractor’s approved baseline construction schedule.
 6. Decide what periodic reports are to be provided to each Board member and how those are to be delivered. These normally include minutes of weekly project meetings, a weekly progress report and significant schedule updates. The DRB should only request documents that are produced in the normal course of business. Although the owner is generally responsible for preparing such progress reports, the contractor commonly produces a report on progress and it

The DRB Operating Procedures do not take precedence over or modify the contract documents and can be changed at any time by agreement of the parties and the DRB.

is desirable to receive copies of this report as well to ensure that the Board is familiar with each party's perspective.

7. Make it clear that all communications between the DRB and the parties must be made through the Chair, except during meetings with the parties.
 - The contracting parties must not contact any member of the DRB other than the Chair.
 - Board members other than the Chair must not contact any employee of the contracting parties or the indirectly involved parties.
 - The Chair must only contact the designated representative of each party.
 - Indirectly involved parties must not contact any member of the DRB.

There must be no ex parte communications. However, all written correspondence between a contracting party and the Chair is to be copied to the other party and directly to the other Board members.

8. Determine when, where and to whom DRB invoices are submitted.
9. If not previously established, discuss DRB member billing rates and contractual restrictions such as expenses.
10. Remind the parties that the DRB cannot give advice to either party regarding construction methods and execution of the work.
11. Make it clear that during meetings, as well as hearings, Board members will refrain from expressing opinions on the merits of disputes or potential disputes.
12. Set dates for the next two meetings.
13. If construction is underway at the time of the first meeting additional items should be discussed as listed in 3.4.2, below.

Throughout the meeting, the DRB must manage the DRB process in a business-like fashion and respond promptly to the needs of the parties.

3.4.2 Subsequent Meetings with the Parties

The agenda for each meeting is prepared by the Chair in consultation with the parties and other DRB members. The agenda will vary to suit the project and the circumstances, but will usually include the following items:

1. The Chair convenes the meeting. An attendance sheet is circulated and signed by all attendees with their affiliation and project role. If meeting minutes are prepared, those of the previous meeting are corrected if necessary and adopted, as a record of the previous meeting.
2. The contractor describes the work accomplished since the last meeting, the current status of the work and the construction schedule progress (schedule days gained/lost since the last meeting, the reason for the gain/loss and proposed solutions, if any), and plans for future work with particular emphasis on the period of time from the present until the DRB's next scheduled meeting.
3. The owner's representative then describes its perspective of the status of the work including its view of construction progress.

4. An open discussion by both owner and contractor of possible construction problems, potential disputes (without arguing the merits), the status of unresolved issues, a report on meetings to resolve issues and the progress achieved, the status of contract change orders, and any foreseen future potential problems.

It is important for the parties to discuss unresolved issues. Appropriate, tactful questioning from the DRB at this time can often assist in resolution of potential disputes.

If either party believes that a matter is urgent, the parties and DRB should schedule an advisory opinion or a full hearing at its earliest convenience, taking into account the time required for the parties to prepare and submit documentation for review.

When a hearing is scheduled it is best to discuss face-to-face the details of referring a dispute to the DRB and preparing for the hearing, including the joint statement of dispute, the common reference document and the position papers and the schedule for submitting these documents.

5. Set tentative dates for at least the next two meetings.

Special DRB meetings may be requested by the parties to enable consideration of some emergency issue, or to observe an alleged differing site condition, or some other important project activity or event.

Holding DRB meetings at a frequency of one to three months seems to be most effective for allowing the DRB to stay current with contract progress. Projects that get off to a fast start and larger, more complex projects may require more frequent meetings in the beginning in order to bring the DRB “up to speed,” thereafter settling into a less frequent schedule.

6. Visit all active portions of the work. Both contractor and owner personnel must accompany Board members during site visits and all should remain within earshot throughout the site visit. The parties should point out and discuss potential issues and disputes as they become visible during the site visit.
7. If any key personnel change during the course of the project, re-visit the appropriate sections of the discussion of the DRB process and its implementation, as listed in Section 3.4.1.

3.4.3 Board Member Conduct During Meetings and Site Visits

Board members should ask questions to ensure they understand the construction methods being used, scheduling, and other project topics. However, such inquiries from Board members with extensive construction experience may result in field personnel interpreting the questions as advice. Board members must be certain that their questions are not so interpreted or misused by the parties.

Board members must not give suggestions on construction methods or on solutions to construction problems. Relaying personal knowledge and experience may be construed as giving advice.

Encourage the parties to actively discuss and resolve potential disputes before they escalate to the point where a hearing is required. Ask questions to ensure that the DRB is informed as to the status of all disputes, or issues that may become disputes in the future. Ask probing questions so all parties fully understand the issues, but don't comment on the credibility or viability of issues. The questions must be carefully and tactfully posed. Do not take positions of advocacy.

One of the primary benefits of the DRB process is that it can help the parties avoid disputes and is not there just to resolve disputes. Therefore, the DRB should encourage the parties to settle their disputes

without referral to the DRB. Often just clarification of the issues is sufficient to enable the parties to move to resolution without the time and cost of a DRB hearing.

Board members must strive to avoid a perception of bias by their conduct or questions during meetings and site visits. During site visits it is best for the Board members to always stay together and remain within earshot of at least one representative of each party. Always ask questions so both parties clearly hear the question and both have the opportunity to participate in any answer given.

3.4.4 Board Member Duties Between Meetings

Board members' obligations are typically set forth in the Three Party Agreement. Between meetings Board members should:

- Stay advised of job activities and developments by reviewing construction progress reports and minutes of weekly project meetings.
- Notify the Chair of any potential conflicts of interest that develop.
- Refrain from disclosing sensitive project information.
- Explore with the other Board members proactive methods for prompt resolution of issues and disputes before hearings are required.

No Board members except the Chair may communicate with the parties.

3.4.5 DRB Chair Duties Between Meetings

The Chair's role is to provide leadership in the management of the DRB process. The Chair's duties between meetings include:

- Correspondence with the other Board members regarding items that should be addressed at upcoming DRB meetings.
- Prepare a draft agenda for each upcoming DRB meeting, contact the parties and other Board members for their input, and prepare and distribute the final agenda.
- Handle all correspondence and communications with the parties, except invoicing directly by DRB members and distribution of project materials by the parties.
- Investigate Board member misconduct, discuss with the other Board members, and develop and implement a course of action, if necessary, to correct such misconduct.
- Discuss potential conflicts of interest of Board members and ensure disclosure to the parties.

The Chair is responsible for submitting information to the DRBF for the DRB Database, recognizing that data considered sensitive by either party should not be provided.

3.4.6 Behaviors that Obstruct the DRB Process

Occasionally the contracting parties may behave in such a manner as to obstruct the DRB process. Examples of such behaviors are:

- Violations of the "no ex parte communication" rule
- Refusing to settle even minor issues with the other party
- Bringing minor disputes to the DRB
- Refusing to bring disputes to the DRB in a timely manner

- Letting disputes accumulate for a global settlement
- Failure to attend, or attending but not participating in, DRB meetings and/or hearings
- Failure to meet agreed dates for submittal of documentation in preparation for hearings
- Disruptive behavior at DRB periodic meetings and/or hearings
- Rejection of all adverse recommendations

These behaviors are symptomatic of a project that is not using the DRB process effectively. Although the Board members may have limited ability to affect these behaviors in a direct manner, it is their obligation to minimize such obstructive behaviors to the extent possible, either by encouragement, discouragement, or other means, all within the bounds of propriety and the provisions of the contract.