

## 3.5 Advisory Opinions

### 3.5.1 Introduction

Use of the advisory opinion procedure may expedite the settlement process and is certainly less costly and less time consuming than a DRB hearing. Where advisory opinions have been used, their success in promoting resolution of the dispute has led to wide endorsement of this approach. Sometimes advisory opinions are included in the specifications; more often they are instituted by agreement of the parties.

Unlike full DRB hearings, a request for an advisory opinion must be agreed to by both parties. Prior to referring an issue for an advisory opinion, the parties should thoroughly consider and discuss the issue with each other. The parties should recognize that if the issues are more complex than can be realistically dealt with by the informal nature of the advisory opinion process, the DRB may decline to give an opinion. In making this determination, the DRB should take into consideration the complexity of the issues, whether experts may be necessary, and/or the length and complexity of the presentations.

A DRB advisory opinion does not require acceptance or rejection by the parties. The DRB's preliminary views on the issue form a basis for the parties to negotiate a settlement without further assistance from the DRB. If the issue is not resolved and a DRB hearing is held, no reference to the advisory opinion is allowed. All positions, evidence and other relevant data are resubmitted at the hearing. The parties are not bound by their earlier presentations at the advisory opinion meeting and the DRB is not bound by its advisory opinion.

### 3.5.2 Method

The process varies depending upon the desires of the parties, but typically includes the following steps:

1. In conference with the parties, the Chair sets the date for presentation. Normally, this is in conjunction with the next scheduled meeting. If the matter is more urgent a special meeting may be held.
2. The parties may define the issue in writing by each preparing a short summary of its position and submitting it to the DRB and the other party prior to the meeting. Normally the parties do not submit comprehensive position papers or backup documentation.
3. At the meeting each party is given ample time to present its position, make rebuttals, provide key contract documents, and respond to the DRB's questions and requests.
4. The DRB then meets in private until they agree on a response to the parties. It is recommended that the DRB write the opinion, including the rationale, to ensure clarity and unanimity among the Board members. This can be handwritten, as it is not usually a lengthy document and copies are not provided to the parties.
5. The DRB then orally delivers its view regarding the positions presented by the parties. Usually the opinion is given the same day. The Chair should read from the handwritten opinion. The opinion is usually not given to the parties in

In some circumstances, after hearing the parties' presentations, the DRB may determine that the dispute is too complex for them to issue an advisory opinion. In such cases, they should immediately advise the parties and suggest scheduling a DRB hearing.

writing. If both parties request that the opinion be provided in writing, and the Board agrees to this, then it should be typed, reviewed for clarity, and submitted to the parties expeditiously.

6. After the advisory opinion is read, the parties may ask for clarifications.

The time required for these meetings varies widely, depending on the scope and complexity of the issue(s), but they are often short, thirty minutes to an hour or so.

Occasionally the DRB, in its private deliberation, is unable to formulate an opinion and so advises the parties. Nonetheless, this opportunity for the parties to state their positions in a clear, uninterrupted fashion, and with subsequent questions from the DRB, is often a useful step in resolving disputes. Advisory opinions are often sufficient to enable the parties to promptly resolve the dispute without a DRB hearing.