

3.6 Hearings

3.6.1 Preparations

Upon receipt of the letter requesting a hearing, the DRB Chair should consult with the other two Board members, the contractor, and the owner to fix a date for the hearing.

Soon after the hearing is scheduled, the parties should strive to jointly agree on the exact wording of a statement of the dispute. Occasionally one party does not understand the nature of the dispute, or in some cases the parties disagree as to its potential ramifications. If the parties are unable to reach agreement on this statement each party should define it from their perspective and the DRB should then restate the dispute in their own terms and provide it to the parties prior to preparation of the position papers.

The parties should also jointly agree on the requested scope of the recommendation (refer to Section 2, Chapter 5). If the parties do not agree, the DRB should work with the parties to reach agreement prior to preparation of the position papers.

Normally, the hearing should take place at the earliest date convenient for all concerned. Allowance must be made for the time the parties will need for preparation. Dates for exchange of position papers should be established in accordance with the DRB Operating Procedures. When a matter is not urgent or will not require lengthy presentations, the hearing could be held in conjunction with the next scheduled DRB meeting.

In some cases the DRB may request permission of the parties to engage outside experts to advise it on technical (audit, geotechnical, schedule analysis, unusual construction materials or techniques, etc.) or legal issues that may be outside the experience or expertise of the Board members. This will usually require that the hearing be delayed for engagement and scheduling of the expert. In seeking the permission of the parties the DRB should also obtain agreement to the terms of compensation for engaging such expertise.

The Chair should prepare a hearing agenda (refer to Section 3, Appendix 3D) and circulate it prior to the actual hearing date. At least two weeks prior to the hearing the parties should submit to the DRB and the other party a list of proposed attendees and their role at the hearing. If the parties cannot agree on the attendees the DRB should decide.

The DRB may request participation of key personnel likely to have first hand knowledge of the facts in dispute – superintendents, inspectors, etc. Whenever possible the person making the final decision on acceptance or rejection of the recommendation should attend the hearing.

Occasionally the parties may request that their attorneys attend as observers so they may hear all the evidence and argument, and thus knowledgeably contribute to subsequent in-house discussions regarding acceptance of the DRB's recommendation.

It is not recommended that the parties' legal counsel participate in the DRB hearings as this can intimidate hearing participants and inhibit open and candid discussion. If one or both parties request legal counsel participation, the pros and cons should be discussed with the DRB. The DRB should seriously consider such participation in the hearing if requested by both parties.

DRB hearings are private and therefore are not open to the public.

3.6.2 Position Papers

Each party prepares a position paper in advance of the hearing. The Chair should insist that the parties include all arguments they will put forth at the hearing in their position papers.

The position paper is to include a statement of the dispute, the party's position, and all arguments they will put forth at the hearing, including the contractual justification, reference material and pertinent exhibits. Refer to Section 3, Appendix B, DRB Operating Procedures.

It is common practice to ask the parties to jointly prepare a common reference document to facilitate DRB review and understanding of the position papers, and to minimize confusion during the hearing. This is usually composed of a common set of exhibits that include stipulations to facts, dates, quantities, etc. At least one to two weeks or more, depending on the complexity of the dispute, should be allowed for the parties to jointly prepare the common reference document.

Within each party's position paper, there should be a reference to specific provisions of the contract documents. Visual aids, exhibits, charts or summaries of documents may be included in order to facilitate the DRB's understanding of the issues, but voluminous records are discouraged.

The position papers and the common reference document are submitted to the other party and the DRB simultaneously, in accordance with the time frame previously established with the DRB. Position papers should be complete so as to avoid surprise presentations at the hearing, and the DRB typically will not permit any further exhibits or correspondence regarding the dispute between the time of submittal of the position papers and the hearing, unless it allows the submittal of rebuttal papers.

3.6.3 Rebuttal Papers

It is sometimes desirable for the parties to submit written rebuttals to the position papers before the hearing. The DRB must consider several factors before agreeing to allow the parties to submit pre-hearing rebuttal papers:

- Rebuttal papers give the parties the opportunity to counter each other's facts and arguments in hard copy before the hearing. The issues are clarified and the DRB better understands where the parties differ.
- Rebuttal papers are usually not needed when the parties have fully disclosed all arguments during negotiations and when disputes are confined to only a few issues. Rebuttal papers should not be used without good reason; they complicate and extend the process and make preparation for the hearing more arduous for everyone.
- If the use of rebuttal papers becomes commonplace on a project, the advantages may be lost due to one or both parties withholding arguments from the position papers in order to include them in the rebuttal paper.

The decision to have pre-hearing rebuttal papers is made on a case-by-case basis by the Chair in consultation with other Board members and the parties, usually when scheduling the hearing or sometimes after receipt of the position papers. Rebuttal papers should be brief.

3.6.4 Conducting Hearings

In opening the hearing the Chair should review the hearing procedures set forth in the DRB Operating Procedures with the parties and determine if there is agreement on each item. If there is disagreement on any item, resolve any differences before proceeding. This should include:

- Review the sequence of the hearing.
- Review plans for breaks, caucuses (if required), meal arrangements, etc.
- Confirm that position papers, written rebuttals, etc. have been submitted and exchanged between the parties in accordance with the DRB Operating Procedures.
- Confirm the scope of the recommendation desired by the parties.
- Explain that the DRB hearing will be informal.
- All attendees sign an attendance sheet every day.
- Presentations will not be made under oath.
- There will be no cross-examination.
- Interruptions will not be permitted while a party is making its presentation, other than clarification requests or other questions by the DRB.
- The Board members will ask questions whenever necessary to uncover the facts and ensure that they fully understand the parties' positions. To this end, they may question the parties during their presentations on the facts of the case, and solicit their interpretation of the contract documents. Avoid questions that could be construed as favoring either party. The parties should not infer or otherwise construe that the DRB is favoring one side or the other by the nature of these questions.
- Direct questioning of one party by the other party is not permitted. (Some interaction between the parties may be allowed as long as it is courteous and productive and is carefully controlled by the Chair.)
- If electronic visual and/or audio presentation aids are used, a hard copy must be distributed to each Board member and the other party prior to the presentation to facilitate note taking.
- No stenographic, video, or audio recording of the proceedings will be allowed except as noted below.
- Cell phones are to be turned off.
- Board members will refrain from expressing any opinion regarding the merits of either party's position.

The party referring the dispute to the DRB makes its presentation first, followed by the other party. Each party is then allowed successive rebuttals until all information has been presented and all aspects of the dispute have been thoroughly covered.

If it becomes apparent during the hearing that either party has not addressed a key provision of the contract documents, the DRB should ask both parties for their interpretation of that provision. If this is discovered after the hearing, both parties should be asked to address that provision in writing.

Generally, each Board member takes individual notes during the hearing, so the services of a court reporter are not required. Use of court reporters should be discouraged as it might inhibit open and

candid discussion. However, if one of the parties insists upon such service and is willing to bear the costs, and the other party will allow it, and the dispute is such that a transcription might be helpful in resolving the dispute, the DRB may allow it, always with the proviso that both parties and the DRB simultaneously receive copies of the transcript. Audio or video recording should always be prohibited, since it tends to inhibit discussion.

The DRB should not render a report based on information that both parties have not had an opportunity to fully address. Should new information be offered that is not contained in the position or rebuttal papers previously submitted to the DRB and the other party, the new information should either not be permitted to be introduced, or the hearing continued if necessary to allow the other party to review, research and rebut such new information.

The hearing should not be closed until both parties have nothing further to add.

During or after the hearing, the DRB may request further documents or information that would assist the DRB in making its findings and recommendations including purchase orders, materials delivery slips, or other job records. The request may necessitate additional hearings in order for the DRB to ask questions in order to fully understand such additional material. The Chair should make all requests for such additional materials, and direct any questions to the parties after the conclusion of the hearing. Copies of post-hearing submittals and written responses to the DRB must be simultaneously provided to the other party.

Other than as part of their written report, Board members must never express any opinions concerning the merits of either party's position or of the probable outcome of the dispute.

3.6.5 Disputes Involving Subcontractors

A DRB may hear any dispute by a subcontractor (including any pass through disputes by a lower tier subcontractor or supplier) against the contractor that is actionable by the contractor against the owner in matters arising from the contract work.

A DRB has no authority to consider or hear subcontractor disputes between the subcontractor(s) or supplier(s) and the contractor that are not actionable by the contractor against the owner. The Three-Party Agreement with the DRB is only with the owner and the contractor. The subcontractor or supplier had no input to the selection to the members, and typically has no participation in the DRB meetings. Forcing a subcontractor to bring disputes with the prime contractor to a DRB over which they had no input could affect, to their detriment, the results of subsequent appeal of that dispute. Furthermore, hearing such disputes could prejudice subsequent resolution of disputes between the prime contractor and the owner.

At any DRB hearing on a dispute that includes subcontractor issues, the contractor must require that each subcontractor that is involved in the dispute have present an authorized representative with actual knowledge of the facts underlying the subcontractor issue. The subcontractor representative must be available to answer questions raised by the DRB and the owner's representatives.

3.6.6 Disputes Over the DRB's Authority to Hear Disputes

Sometimes the parties contend that the DRB is not authorized to hear a dispute, either because the precedent process established by the contract has not been completed, because the specifications inadvisably limit the DRB process to only disputes on certain portions of the contract, or for other reasons.

When there is disagreement among the parties as to whether the DRB has authority to hear a particular dispute, the DRB should consider the nature of the disagreement regarding the authority issue and the nature of the dispute, and then decide whether the wiser course is to proceed with a hearing, or to encourage the parties to resolve the authority issue before the DRB proceeds to hear the dispute. If the parties are amenable, the DRB could hear the authority issue.

3.6.7 A Party's Refusal to Attend

In the case of one party refusing to attend the hearing, unless this condition is addressed by the Three-Party Agreement, the DRB must decide whether to proceed with the hearing without that party's presence, to postpone the hearing, or to cancel it. One of the factors that should be considered in making this decision is whether the refusing party simply needs additional time to prepare, or is unwilling to participate for reasons directed at obstructing the process.

The DRB must recognize its contractual obligation (by virtue of the Three-Party Agreement) to provide a forum for hearing disputes. Sometimes the referring party is precluded by the contract from pursuing subsequent dispute resolution measures unless the DRB dispute resolution process has been followed. In this case, the DRB must proceed with the hearing unless otherwise provided by the contract and render a report according to the facts made available to it by the attending party and any pre-hearing documentation submitted by the non-attending party.

When the contract does not preclude the referring party from pursuing subsequent dispute resolution measures, the DRB must proceed at their discretion, considering (a) the provisions of the Three-Party Agreement, (b) the facts and circumstances of the dispute as know to them, (c) what course of action will likely resolve the dispute, and (d) the ramifications of refusing to hear the dispute.