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Concept

1 . 1 Introduction and Development of the DRB Concept

Managers of successful construction projects resolve disputes fairly and efficiently. Some projects are blessed with participants possessing the right combination of leadership skills, technical ability, business acumen, and interpersonal skills to resolve disputes among themselves. Other projects are cursed with problems and disputes that are contentious and difficult to resolve. Most projects lie between these two extremes. Owners embarking on a construction program need to develop a mechanism for resolving the range of disputes they might encounter during the execution of a project. One of the most effective tools is the Dispute Review Board (DRB).

Over the years the construction industry dealt with the resolution of claims and disputes through a variety of methods. One of the most successful and enduring is the DRB. A simple description of a DRB is that it is a board of impartial professionals formed at the beginning of the project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes for the duration of the project.

Records of the construction industry through the early part of the twentieth century contain little information on the frequency and seriousness of disputes and litigation. It appears that up until the 1940s, commonly used procedures – such as prompt, informal negotiation, or a ruling by the architect or engineer – were generally sufficient to resolve most disputes at the job level.

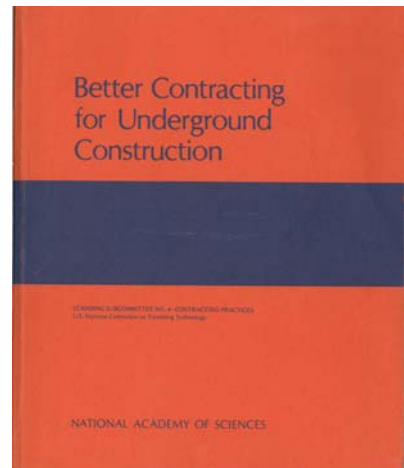
After World War II, competition for construction contracts became intense, and contractors were forced to accept lower profit margins. Further, construction contracts became much more complex, and the construction process was burdened with non-technical demands such as environmental regulations, governmental and socio-economic requirements and public interest group pressures. The financial stability of many contractors with tight margins required that they pursue all available means to protect their bottom line, and a growing body of lawyers and consultants stood ready to assist them.

As this deterioration became more evident, and relationships became more adversarial, the construction industry sought sensible solutions. Arbitration became more popular, as it was less expensive and faster than litigation. However, it became increasingly more costly and time consuming, less satisfactory, and adversarial. Although arbitration continues to offer certain benefits unavailable in litigation – primarily the use of neutrals experienced in the field from which the dispute arises – the cost and time of arbitration today can easily rival that of complex litigation. The ensuing movement away from litigation and arbitration is marked by several events that led to development of the DRB concept.

In 1972 the U.S. National Committee on Tunneling Technology sponsored a study of contracting practices throughout the world to develop recommendations for improved contracting methods in the United States. The study concluded that contracting practices in the United States formed a serious barrier to the containment of rapidly escalating construction costs and contract disputes.

Results were presented in the report *Better Contracting for Underground Construction*, published in 1974. The *Better Contracting* report frequently commented on the deleterious effect of claims, disputes, and litigation upon the efficiency of the construction process. Many recommendations were aimed at mitigating this problem. Over the years, an increasing number of consulting engineers and owners adopted its recommendations.

This report exposed many of the problems facing the construction industry and increased awareness of the high cost of claims, disputes, and litigation to the industry and to the public.



In 1975 the underground industry first used the DRB process during construction of the second bore of the Eisenhower Tunnel on I-70 in Colorado. It was an overwhelming success; the DRB heard three disputes, owner-contractor relations were cordial throughout construction, and all parties were pleased at the end of the project. Other successful DRBs followed, and soon other sectors of the construction industry began to recognize the unique features of DRBs for resolving disputes. The record during the next three decades, as illustrated in the bar charts in Appendix A, shows the dramatic increase in use and success of DRBs, not only in underground, but in highway, heavy civil, process and building construction.



As the success of the DRB process became more apparent, the use of DRBs greatly expanded in North America as well as throughout the world.

The Dispute Resolution Board Foundation (DRBF) was established in 1996 to promote use of the process, and serve as a technical clearinghouse for owners, contractors, and Board members in order to improve the dispute resolution process. The DRBF has initiated programs for providing DRB information and educational opportunities for all parties involved in construction disputes. For more information on the Foundation, see www.drb.org.

The Manual is a living document that will be changed whenever necessary to reflect the continuing experience gained through the use of DRBs. This section can be downloaded from the DRBF web site (www.drb.org) in PDF format.

1.2 Overview of the Process and Best Practice Guidelines

1.2.1 Introduction

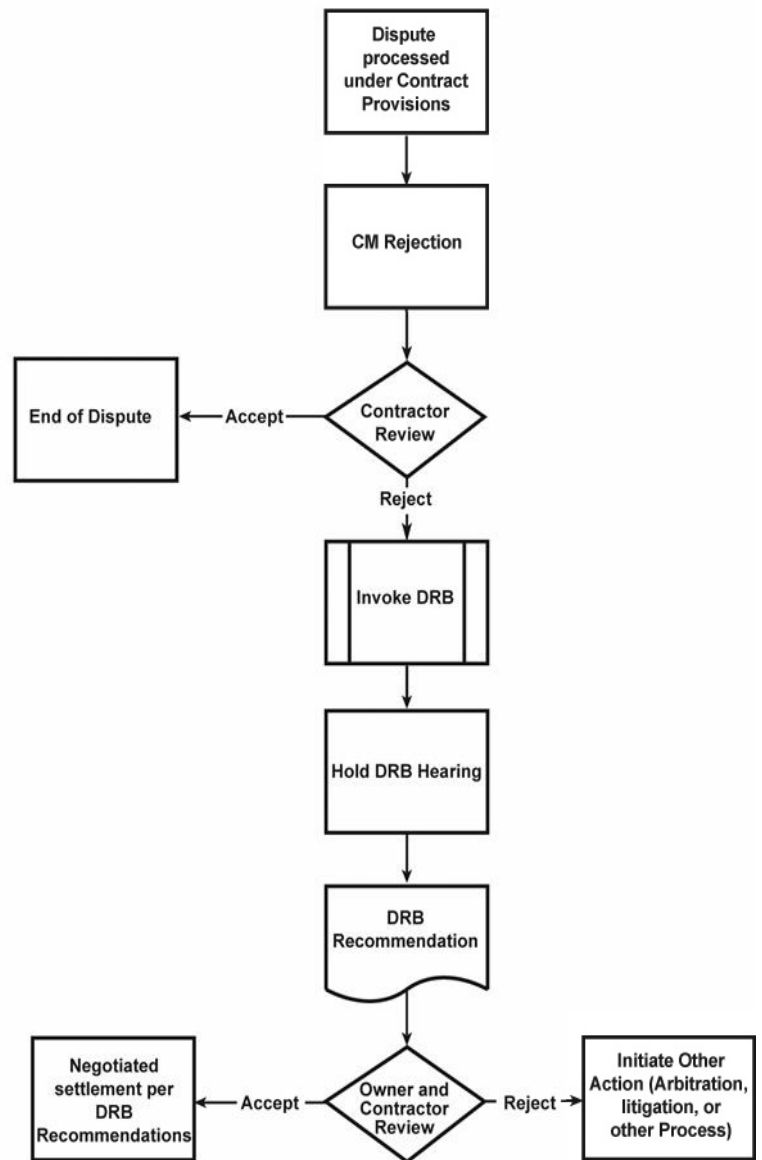
The DRB process is included in construction contracts to assist project participants in avoiding and resolving disputes. A DRB is typically composed of a panel of three respected and impartial professionals, who are experienced in the specific type of construction proposed and who assist in avoiding and resolving disputes.

In most instances DRB provisions are incorporated into the contract's overall change order / claim / dispute resolution mechanism prior to bidding the work. The DRB hearing process should be inserted in the dispute resolution ladder between the contractor's request for an equitable adjustment and the engineer's or owner's final decision.

To implement a DRB, the Board members are selected and approved by both the owner and contractor soon after award of the contract. The DRB is officially established when the parties and Board members execute a three-party agreement.

The DRB should be organized after the contract is executed and preferably before construction begins. Utilization of the DRB process from the very start of a project maximizes its benefit and value. Experience has shown that any delay reduces its effectiveness. The Board members are provided with all contract documents and copies of construction progress reports and minutes of weekly project meetings. In this way, the DRB is kept current with ongoing progress of the work, and is ready to address problems and disputes as they arise.

Brief status meetings and site tours are held periodically at the job site. At these meetings the Board members confer with the owner and contractor representatives, become familiar with project procedures and participants, and are kept abreast of job progress and potential disputes. The DRB encourages the resolution of disputes at the job level and, at the parties' mutual request, may provide informal advice on potential disputes. Thus, the DRB assists the parties by facilitating a harmonious atmosphere and by encouraging prompt solutions to job problems.



When the parties cannot resolve disputes by themselves in a timely manner, the dispute may be referred to the DRB by either party for a hearing and written report. The dispute hearing procedure includes an opportunity for each party to explain its position and an opportunity for the other party to respond. The DRB conducts the hearing and hears all pertinent testimony from the parties. Board members may ask probing questions. The objective is to fully air the dispute and determine the facts. Conducted properly, the hearing allows each side to challenge the other's premises and arguments in a courteous and professional manner. After the hearing, the Board members deliberate in private where they consider the claims to entitlement and defenses to those claims in light of the relevant contract documents, correspondence, other documentation, and the facts of the dispute. The Board members' recommendations are presented in a written report that includes the reasoning that led to each recommendation. The recommendations are not binding on the parties. This minimizes animosity between the parties and, as a result, subsequent negotiations between the parties usually result in prompt and economical resolution of disputes.

The party's willingness to accept the DRB's recommendations is enhanced by trust in each Board member's impartiality and confidence in their technical expertise, their firsthand understanding of the project conditions and practical judgment — as well as by the parties' opportunity to fully air the dispute. The parties' confidence in the DRB process and their knowledge of the individual Board members, gained during the period of construction, plays an important role. Acceptance of the recommendation is also influenced by the fact that it is admissible in subsequent arbitration or litigation in the event that negotiations are unsuccessful.

1.2.2 Best Practice Guidelines

This Manual is intended to serve as a reference guide for users and participants in applying the DRB process. It explains various practices and procedures that have resulted in the success experienced to date. While this process can be customized to suit a particular project, and certain modifications are acceptable in special circumstances, there are certain practices and procedures that are so important to the success of the DRB process that they should be strictly followed whenever possible. These best practices are summarized below, and include references to other sections of the Manual for detailed discussion and explanation. Readers are strongly encouraged to review the referenced chapters to fully understand and apply the guidelines. There are four sets of best practices: Specification Provisions, Actions by the Parties, Behavior of Board Members, and Dispute Hearings.

Specification Provisions

There is a set of essential provisions that must be included in the contract specifications to assure the success of the DRB process. These provisions contain requirements that are not found in other alternative dispute resolution concepts. Revising or deleting any of these provisions places the success of the DRB process at risk; the effectiveness of the DRB and the quality of its contributions to the parties may be severely compromised. In adding provisions for the DRB to the contract documents, owners are discouraged from revising the DRBF Guide Specification [2A] * and Three Party Agreement [2B] or the Dispute Board provisions of FIDIC and the World Bank Procurement of Works (see Section 4). The following are essential specifications provisions.

1. Provide a selection procedure that ensures absolute neutrality of the selected Board members.
[2.2.2 and 2A]

* [2A] refers to Section 2, Appendix A; [2.2.4] would refer to Section 2, Chapter 2, Part 4.

2. Require periodic meeting that start soon after award of the contract and continue as long as work from which disputes might arise is underway. [2.3.2 and 2A.5]
3. Include a three-party agreement that binds the parties and the DRB. [2B]
4. Require that the owner and contractor share equally all costs of the DRB. The Board is a resource for both parties to the contract and equal cost sharing encourages both parties to utilize it when needed. Payment of board invoices should be from one source. [2A.7]
5. Establish informal hearing procedures for faster dispute resolution. Oral, advisory non-binding opinions are issued. This does not preclude a subsequent formal DRB hearing. [2.4 and 2A.6.H]
6. Allow the DRB to hear disputes on all aspects of the contract. Language limiting issues to be heard enhances the potential for future litigation. [2.5.1, 2.11.1.1,2 and 2A.2]
7. Either party may refer a dispute to the DRB. [2.5.1 and 2A.6]
8. Allow prompt hearing of disputes by not requiring multiple steps of submittals, denials, decisions, final decisions and appeals before a dispute can be brought to the DRB. [2.5]
9. Provide that recommendations are not binding on either party. [2A.1]
10. Ensure that recommendations are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation. [2A.1]
11. Absolve Board members from personal or professional liability arising from their DRB activities, as long as these activities are conducted in good faith. [2.11.2.1 and 2B.XI]
12. Allow termination of Board members only by agreement of both parties. [2.9 and 2B.X]
13. Ensure that Board members cannot be called as witnesses in subsequent proceedings. [2B.XI]

Recommendations

Typical DRB practice in the U.S., Canada and many other countries includes non-binding recommendations.

Multinational practice typically uses a form of “binding in the interim” recommendation, which is deemed accepted by both parties unless specifically objected to within a certain time period. See Section 4, “Multinational Practice” for further discussion.

Actions by the Parties

In addition to the above specification requirements, the contracting parties must take specific actions to facilitate the establishment and operation of the DRB and the overall dispute resolution process. The following are essential actions by the parties to the construction contract.

1. Establish the DRB promptly after the contract is executed, preferably before construction begins, and no later than ninety days after the contract is executed. [2.2.1 and 2A.4]
2. Fully investigate the qualifications, especially conflicts of interest and neutrality, of all Board nominees before approving them. [2.2.2]
3. Reject all nominees that have a problematic conflict of interest or even a hint of bias. [2.2.2]
4. Provide Board members with copies of construction progress reports and minutes of weekly project meetings. [2.3.1.3]
5. Arrange for periodic meetings and site visits with the DRB on a regular basis. It is bad practice to curtail DRB meetings simply because there are no apparent disagreements or disputes. [2.3.2]

6. Do not require the DRB to prepare minutes of periodic meetings. *[2.3.4]*
7. Promptly negotiate to resolve disputes and, if negotiations fail, take disputes to the DRB as soon as possible. *[2.5 and 2A.6]*
8. Dedicate the resources required to fully present and defend disputes in front of the DRB. *[2.6]*

Behavior of Board Members

Each Board member must strive to maintain the confidence of the parties, and thus facilitate the dispute resolution process. The following are essential behaviors of Board members.

1. Adhere to the DRBF Code of Ethics. At the outset fully disclose all known past and present relationships with, or interests between any party to the contract, or related parties such as subcontractors, design professionals, construction managers and site supervisors. Immediately disclose relationships or interests discovered or established subsequent to initial disclosure. *[1.6, 2.10.1, 3.2]*
2. Remain neutral and avoid any behavior that could lead to a perception of bias, including any ex parte communications. Board members are not an advocate for either party. *[1.6, 2.10.1, 3.2]*
3. Avoid all conflicts of interest and notify the parties of any actions that could be perceived as such. Have no financial interest in the contract or in any party involved in the design or construction of the contract. Have no discussions and make no agreements for future employment or any other business relationships while serving on the DRB. *[1.6, 2.10.1, 3.2]*
4. Become familiar with the contract, plans, specifications and other contract requirements, such as coordination and scheduling. *[3.3.4]*
5. Do not request that the parties furnish progress documents that they do not already produce in the normal course of business. *[3.4.1]*
6. Keep abreast of job activities and developments by reviewing periodic construction progress reports and minutes of weekly project meetings and by periodic meetings. *[3.4.4]*
7. Make no disclosures of project information that is not within the public domain without permission of both parties. *[2.10.3, 2B.VIII and 3.4.4]*
8. Never give advice on conduct of the work. *[3.4.1 and 3.4.3]*
9. Encourage the parties to proactively discuss and resolve potential disputes before they escalate to the point where a hearing is required. *[3.4.3]*
10. Never promote disputes or comment on the validity of disputes or other issues. *[3.4.3 and 3.6.3]*
11. Do not accede to a single party's resignation request without reaching agreement within the DRB that this solution would best serve the parties. *[3.8]*

Dispute Hearings

To ensure a prompt and economical hearing, and provide the best chance for resolution of the dispute, the following best practices must be adhered to by the parties and Board members.

1. The parties clearly define the issues in dispute. *[2.6.2 and 3.6.1]*

2. The parties exchange and submit to the DRB concise statements of their positions with supporting documentation for review prior to the hearing. *[2.6.3]*
3. To the maximum extent possible, the parties submit supporting documentation as joint exhibits. *[2.6.2]*
4. The parties submit a list of presenters and proposed attendees at least two weeks prior to the hearing. *[2.6.7]*
5. The DRB conducts the hearing, deliberates, and prepares the recommendations and report in a professional, impartial and expeditious manner. *[2.7.2]*
6. During the hearing and subsequent deliberations no indication of the DRB's or any Board member's position should be revealed. *[3.6.3 and 3.7.1]*
7. The DRB gives each party ample opportunity to fully convey its position. *[2.7.3 and 3.6.3]*
8. Presentation of information not included in the pre-hearing exchanges is discouraged. If additional information has been developed after submittal of the position papers, and the DRB decides to permit this information to be introduced, the other party must be given ample time to consider and respond to it. *[3.6.3]*
9. The DRB may ask for additional information, documentation and testimony as needed to determine the facts of the dispute. *[2.7.3 and 3.6.3]*
10. DRB recommendations and reports address only the issues in dispute, as defined or agreed by the parties. *[3.7.2]*
11. DRB recommendations are based only on the facts of the case and the contract provisions. *[3.7.2]*
12. DRB recommendations and report are concise, yet complete. *[3.7.2]*
13. The DRB makes every effort to prepare unanimous recommendations and report. *[3.7.3]*
14. The DRB provides clarification whenever requested. *[2A.6.G and 3.7.6]*
15. Only in certain circumstances does the DRB reconsider its recommendations. A request for reconsideration should be based on additional evidence rather than a continuation of argument previously heard. *[2A.6.G and 3.7.7]*

1.3 Benefits

The DRB process provides benefits to all participants on the construction project —and to the project itself. These benefits accrue in terms of both claim avoidance and resolution of disputes.

The primary benefit is claim avoidance. The very existence of a readily available dispute resolution process that uses a panel of mutually selected, technically knowledgeable and experienced neutrals familiar with the project tends to promote agreement on problems that would otherwise be referred to arbitration or litigation after a long and acrimonious period of posturing. Experience has demonstrated that the DRB process facilitates positive relations, open communication, and the trust and cooperation that is necessary for the parties to resolve problems amicably. There are several reasons for this result, including: (1) the parties are reluctant to posture by taking tenuous or extreme positions, because they do not want to lose their credibility with the Board members and (2) since the DRB encourages the prompt referral of disputes and handles disputes on an individual basis, the aggregation of claims is minimized, thus avoiding an ever-growing backlog of unresolved claims which can create an atmosphere that fosters acrimony.

The DRB encourages the parties to settle claims and disputes in a prompt, businesslike manner. During the periodic meetings the Board members ask about any potential problems, claims, or disputes and review the status report of outstanding claims. The parties are led to focus on early identification and resolution of problems and, in the event of an impasse, use the DRB for prompt assistance. On many projects the parties resolve all potential disputes with none formally referred to the DRB.

The DRB process has been found to be more successful than any other method of alternative dispute resolution for construction disputes. This process has experienced a very high rate of success in resolving disputes without resorting to litigation – the resolution rate is over 98 percent to date. Several unique factors account for this remarkable statistic. A DRB provides the parties with an impartial forum and an informed and rational basis for resolution of their dispute. The Board members have knowledge and experience with (1) the design and construction issues germane to the project, (2) the construction means and methods employed on the project, (3) the interpretation and application of contract documents, and (4) other processes of dispute resolution. As a non-binding process, the parties remain in control of the ultimate resolution.

The DRB process is very cost effective when compared with other methods of dispute resolution, and especially so if the high costs of arbitration or litigation are considered. As a “standing neutral” method, the DRB process typically addresses disputes soon after an impasse between the parties. Early resolution greatly reduces costs to the parties, such as legal and consultant fees, as well as the loss of productive project time for owners and contractors. The DRB process provides a better-informed dispute analysis because individuals with first-hand knowledge of the facts are readily available and, in many instances, the Board members can actually observe the field condition or construction operation that is related to the dispute.

Cost savings actually begin with more and lower bids, including subcontractor quotes, because of reduced risk of prolonged disputes. It is generally accepted that fair contracting practices result in lower bids because litigation contingencies are reduced. When a contract includes a DRB provision, prospective contractors know that if disputes occur, they will be considered expeditiously by a mutually selected panel of technically knowledgeable and impartial neutrals already familiar with the project. Thus, the risks of long delays and substantial costs are significantly reduced. In addition, earlier resolution means an earlier start to the payment process for contract modifications accepted by the owner.

From the owner’s perspective, having a DRB on a construction project encourages on-going dispute resolution and minimizes end-of-the-contract claims. This permits the owner to more closely control the budget and avoid the high expense and unpredictability of post project litigation. In addition, a DRB recommendation documents the basis upon which the parties may reach resolution.

A DRB recommendation is especially helpful for public owners because frequently the decision to accept settlement of a dispute must be approved by a governing board such as a school board, city council, county board of supervisors, or other similar public governing board. A well-reasoned analysis of the dispute by a panel of neutral professionals with construction backgrounds provides credibility to support the public owner’s decision to accept the DRB recommendation.

The DRB process is flexible in fulfilling the needs of projects because it has several unique advantages over other means of dispute resolution. The advantages include:

- Board members continually monitor the project during construction. This allows them to readily understand what has occurred in a way no other process can match.
- Board members get to know and understand the individuals managing the contract and vice versa. This builds a relationship of respect and trust with the parties during construction.
- The DRB may provide advisory opinions to assist in mitigating potential disputes. This occurs long before the disputes would otherwise be resolved through any alternative process.
- Board members’ ongoing knowledge of the project facilitates finding the truth. This provides strong support for the DRB’s recommendation.
- Although DRB practice provides for recommendations that are not binding on the parties, history shows that they are almost always used in reaching a resolution to the dispute. In the few instances where the dispute has progressed to subsequent proceedings, DRB recommendations have carried considerable weight because they were made by independent, experienced professionals, who had knowledge of the events as they occurred.

Note: Multinational practice differs slightly. See Chapter 1.5 and Section 4 for further information.

While a number of other methods for resolving disputes exist, none of them contain the added benefit of independent, experienced professionals who visit the site during performance of the project. These other methods only start to address the problem after the dispute has been formalized, without the benefit of having followed development of the project. This may be after the project has been completed and the participants have scattered, retired or even passed away.

When “partnering” is conducted on a construction project, the presence of a DRB has the effect of enhancing the partnering process by encouraging the parties to fully utilize the partnering process for dispute resolution.

In summary, experience has shown that the DRB’s presence influences the behavior of the parties in such a way as to minimize disputes. When conflicts do arise, the DRB is able to make recommendations for settlement quickly, before adversarial attitudes escalate to the extent that construction is compromised.

Data on the Use of DRBs and DBs

The use of DRBs is growing so fast and so widely that reliable data has become impossible to collect. In addition, data on DBs outside North America has always been limited because most contracts require Board members to “treat the details of the contract ... as ... confidential,” causing concern over

reporting even minimal data. Therefore the DRBF will no longer update the database in the detail currently presented on the website. However, information of a more limited nature will be collected and reported as noted below.

Estimated Use of DRBs and DBs

Based on data collected through 2001, worldwide use of DRBs is growing in excess of 15% a year. Through the end of 2006, it is estimated that over 2,000 projects worth over US \$100 billion have had DRBs or DBs.

Over 200 construction contracts with DRBs start every year, worth over US \$7 billion. An estimated 200 disputes are settled each year through the use of DRBs. More importantly, it is often reported that more disputes are avoided by ongoing interaction with the DRB than are actually heard.

Increased use of advisory opinions has contributed to the avoidance of disputes. This process is inexpensive, rapid, informal, and is implemented prior to the parties becoming entrenched in adversarial positions. The reported success of advisory opinions is nearly 100%.

North American DRBs

In the U.S. and Canada, DRBs have been used extensively with much success.

- Project values have ranged from: one over \$1 billion: a hundred under \$5 million: six projects under \$1 million; and have averaged \$42 million each.
- 58% of the projects were “dispute free” - no disputes requiring hearings were brought to the DRB.
- 98.7% of the projects were completed without resorting to subsequent dispute resolution methods. This has been referred to as the “success rate” of the DRB process.

Owner agencies that have used DRBs include:

- State highway departments. California, Florida, Massachusetts and Washington are the largest users. The highway departments of Idaho, Minnesota, Mississippi, Ohio, Oregon, South Carolina, Utah, Virginia and Wisconsin also have active DRBs. Denver’s \$1.3 billion T-Rex project, as well as a number of private toll road projects, used DRBs.

The California Department of Transportation (Caltrans) and Florida Department of Transportation (FDOT) use DRBs on almost all projects. Caltrans is starting to use a 1-person DRB called a Disputes Review Advisor (DRA) on all projects greater than \$3 million and less than \$10 million and longer than 100 days duration. FDOT assigns each project valued at less than \$10 million to a regional DRB. FDOT recently decided to provide DRBs for all maintenance contracts.

- Public transit authorities in Dallas, Houston, Los Angeles, Minneapolis, New York, Phoenix, Pittsburgh, Sacramento, San Diego, San Francisco, Seattle and Washington D.C.
- Dozens of cities and counties for various public works projects, including bridge rehabilitation, building renovation, combined sewer overflow tunnels, convention centers, court houses, highways, libraries, parking structures, prisons, sewer pipelines and tunnels, sewerage treatment facilities, schools and water supply projects.

- Universities, including the University of California, Ohio State University, the University of Washington, and Washington State University, on various construction projects including an art gallery, classroom and medical buildings, libraries, research facilities, and sports complexes.
- Airport expansions, dams, various Federal projects, hydroelectric projects, mines, manufacturing plants, office buildings, port facilities, private research laboratories, and stadiums.
- Australia, Canada and New Zealand have also used the North American DRB process on large projects.

International Dispute Board (DB) Process

Reported worldwide projects employing the Dispute Board process have ranged in value from US \$15 billion for the Eurotunnel to one project of US \$2 million.

DBs are used extensively by development banks and, from these positive experiences, have been adopted by many other owners. DBs have been used in Bangladesh, Botswana, Denmark, Dominican Republic, Ethiopia, Honduras, Hong Kong, Hungary, India, Ireland, Italy, Lesotho, Madagascar, Mozambique, Pakistan, Peoples Republic of China, Poland, Romania, Sudan, Uganda, the UK and Vietnam.

The use of DRBs and DBs throughout the world continues to grow.

1.4 Deciding to Have a Dispute Review Board

1.4.1 Potential for Disputes

When planning a construction project, owners should ask:

Can disputes be expected? If so, could they be serious enough to specify a DRB?

In 1994 the Construction Industry Institute sponsored a study of the predictability of contract disputes.¹ This study found that once the contract is awarded, the potential for disputes is predictable. However, the decision to use a DRB should be made long before the contract is awarded. What can owners do during the design phase to realistically evaluate the potential for disputes? The questions used in the study can provide excellent guidance.

To determine the likelihood that your project will generate disputes, consider the following:

- **The previous experience of your organization with construction projects.** Evaluate whether disputes were difficult to resolve, disrupted construction, or went to litigation. Ask the same questions of the construction management group that will oversee the work.
- **The personnel you plan to assign to administer the contract.** Have they demonstrated the ability to get along with contractor's personnel, to get the work completed as specified without significant disputes?
- **The contract documents.** Is this the type of contract you normally use or is this type new to your organization? Do the technical specifications require state-of-the-art methods or materials? Are the plans and specifications complete or will they be completed after award of construction? Are the other contract documents your standard or do they include untried provisions that could be problematical? Are these and other risks fairly identified and allocated? Are the contractual requirements reasonable or might the contractor consider them difficult or beyond the current state-of-the-art?
- **The contractors who might likely be awarded the work.** Have they worked for you before, or will many bidders be new to your organization? Would the contractors be from some distance away and not be familiar with conditions at the site? Have you pre-qualified experienced and capable contractors? Could your solicitation attract inexperienced contractors?
- **The work.** Is the project exceptionally large or are there internal milestones or completion dates that could be hard to meet? Is the project adequately funded, with adequate budget for changes? Is the design exceptionally complex or difficult to execute? Have you built similar projects in the recent past or does this project have features that are unique, requiring innovative construction methods? Do these features push or exceed the current state-of-the-art of that sector of the construction industry? What are the chances of the contractor being less than adequately experienced in this type and/or complexity of construction? Are there risks of differing site conditions?

Owners can be guided by their answers to these questions. However, significant claims sometimes arise even on projects considered relatively problem free at the outset. With no DRB in place, resolution can be expensive, time-consuming and unsatisfactory. Thus, even if consideration suggests

¹ Diekmann, James E.; Girard, Matthew J.; and Abdul-Hadi, Nader. DPI-Disputes Potential Index: A Study into the Predictability of Contract Disputes. A report to the Construction Industry Institute, 1994.

a DRB may not be necessary in a given situation, establishing a DRB is prudent to help ensure disputes are kept to a minimum.

Many owners have guidelines that require DRBs on all projects in excess of a certain size (often US\$10 million) and/or duration, or on unusually complex or difficult jobs.

For owners who aren't familiar with DRBs, it might be helpful to sit in on a periodic DRB meeting or even a dispute hearing to get a better understanding of the process. Call the DRBF for assistance in arranging to observe a DRB in action.

1.4.2 **Costs**

The direct costs include the fees and expenses of the Board members. The parties should also consider the indirect costs of their employees' time in preparing for and participating in DRB meetings. However, the commitment and interruption is considerably less than that involved in the resolution of disputes involving arbitration or litigation.

The Board member costs should be shared equally by the parties to avoid any perception of allegiance to either party. This is usually accomplished by having the contractor pay all of the Board member fees and expenses, and the inclusion of an allowance item in the bidding schedule from which the owner can reimburse the contractor for the owner's half of these costs.

The direct costs include periodic meetings and site visits, which usually average about four per year, document review and preparation time, and hearing time, including time to deliberate and prepare the recommendation. Each Board member's professional fees usually are in the range of \$1,000 to \$2,000 per day for meetings or hearings, with an hourly fee for document review and study time.

Periodic meetings and site visits normally require one day. Time spent reviewing progress reports and other documents and preparing for periodic visits is usually nominal. Chairman duties will require somewhat more time. Travel and subsistence expenses as well as other reimbursable costs can be estimated with reasonable accuracy.

The expense of periodic meetings can be thought of as prevention costs, yielding the benefit of dispute avoidance as a result of the Board's presence. Although the value is difficult to quantify, owners and contractors who have used the DRB process generally agree that the value far exceeds the cost.

The cost of a hearing depends upon the time required for review of the parties' pre-hearing submittals, the hearing itself, and the time required for the DRB to deliberate and prepare the written recommendation(s) with supporting rationale. For a simple case, the hearing could occur during a periodic meeting followed immediately by the deliberations, with the recommendation issued shortly thereafter. Complex disputes might require several days of hearings and several weeks for DRB deliberations and report preparation.

<p>Note: Retainers are usually paid in multinational practice to secure the availability and independence of the Board members.</p>
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DRB cost ranges from 0.05% of final construction contract cost, for relatively dispute-free projects, to a maximum of 0.25% for difficult projects with disputes. Considering only projects that refer disputes to the Board or that had difficult problems, the cost ranges from 0.04% to 0.26% with an average of 0.15% of final construction contract cost, including an average of four dispute recommendations.

1.4.3 **Other Considerations**

Attracting Bidders. Many contractors have expressed reservations about bidding work where there is no DRB to assist in the resolution of disputes. Inclusion of a DRB on contract work can encourage

contractors to submit bids on work that they might otherwise decline to bid. This is especially true where the owner is new to bidding this type of work and the contractor is unsure of the owner's approach to resolving disputes. Similarly, inclusion of a DRB can attract bidders on projects where the owner's record of past dealings with contractors has been unfavorable or cause for concern amongst contractors.

Reduced Bid Prices. An owner's inclusion of a DRB on a project is a strong indication that the owner is seeking a level playing field in the execution of the project work. Further, the inclusion of a DRB is an indication that the owner is looking to avoid disputes, or at least accomplish timely resolution of them so as to keep the primary objectives of accomplishing the work in focus, before unproductive adversarial attitudes can develop.

Contractors typically include contingency amounts in their bid prices to cover the cost of pursuing resolution of disputes that may arise. To this end, knowing that a Board of respected knowledgeable individuals experienced in the type of work to be contracted will hear disputes before proceeding to adversarial, costly and time-consuming litigation (or other binding forms of dispute resolution) is generally considered a strong benefit when bidding the work. Similarly, the bidding contractor knows that the DRB will remain up to date on the progress of the work throughout construction, requiring limited further enlightenment or education in the event of a dispute. As such, some contractors have indicated that the inclusion of a DRB has lowered their bid price by as much as 10 percent.

1.5 Concerns

This section identifies and addresses some previously stated concerns. These concerns should not be a factor when the DRB process is implemented correctly and effectively.

1.5.1 DRBs Do Not Add Value

The fundamental cost-effectiveness of a DRB readily demonstrates that establishing and operating a DRB is a highly effective investment, even if there are no disputes. Although it is difficult to quantify the benefits in dollars it is well known that such benefits exist. The following advantages relate to value added by a DRB:

- Potentially lower bids, especially from contractors who are familiar with the DRB process, and particularly to owners that are generally unknown within the industry. Inclusion of a DRB shows bidders that a rational dispute resolution mechanism is provided.
- Better communication and less acrimony on the job site.
- Issues are discussed and frequently resolved before they become disputes.
- Timely and cost-effective resolution of disputes at the job-site level and fewer end-of-project unresolved claims.
- Lower total contract completion cost.

There is no doubt that the cost is easily justified if even one piece of litigation is avoided.

1.5.2 Board Members Will Ignore the Contract and Impose Their Own Concepts of Fairness and Equity

It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. Rather, a competent and conscientious DRB will strive for a recommendation consistent with all terms of the contract. The standard three-party agreement requires the DRB to comply with applicable laws and contract provisions.

Member selection is an important factor in achieving a DRB that is aware of its duties and responsibilities. Board members who are determined to correct seemingly unfair contract provisions should be reminded that the contractor agreed to the terms of the contract. If necessary, such a DRB member should be terminated as provided in the three-party DRB agreement. As a further safeguard, the parties have the option of rejecting or seeking clarification of any recommendation.

Just like a judge, jury, or arbitrator, each Board member will have his or her personal views of fairness and equity. A Board member who is respected in the industry will be capable and comfortable putting those personal views aside. Moreover, it is not a single member's view that prevails; the pressure of the other members should serve to prevent a gross miscarriage of justice. It is difficult to hide a bias or prejudice in a well-reasoned recommendation.

1.5.3 The DRB Process Promotes Disputes

Since the effort and expense of submitting a dispute to a DRB are relatively small, it has been argued that a contractor might abuse the DRB process and utilize it to test the viability of seemingly marginal claims. Experience has shown that this has not been a significant factor, probably because most contractors do not want to face the loss of credibility with Board members which would likely result from asking them to consider non-meritorious claims.

1.5.4 Board Members May be Unqualified

There is no excuse for selecting an unqualified Board member when the contracting parties apply appropriate selection criteria. Users have not experienced difficulty in obtaining qualified members, especially when they are willing to consider candidates other than those in their local area. DRBF training workshops throughout the U.S. and abroad will further ensure qualified candidates in most regions.

Some public owners solicit Board members through an advertised request for qualifications, a process that often culminates in personal interviews and evaluation against established criteria, including specific construction experience as well as dispute resolution experience. Given the standard provision that member qualifications are subject to review and approval by both contracting parties, as long as the parties take this responsibility seriously and both do their due diligence in investigating each nominee's background, there is no valid basis for concern that the parties will end up with an unqualified Board member.

1.5.5 Board Members May be Biased

Without question, each Board member must be totally neutral and impartial. This is the primary key to the success of the DRB process. The parties must be willing to reject all proposed members who might be other than neutral. The conflict-of-interest standards, coupled with the ability of either contracting party to reject a nominee, puts the ability to select truly neutral and impartial Board members within the power of the contracting parties.

There may be a tendency in the beginning of a project for the parties to accommodate each other in an attempt to "get along." During this 'honeymoon' phase, one of the parties may be especially hesitant to reject a proposed Board member nominated by the other. Because of the importance of mutual unconditional acceptance of all Board members in this process, it is essential that both parties assure themselves that all selected Board members are completely unbiased. If there is any question or concern about a proposed Board member, that nominee must not be approved.

1.5.6 DRBs Introduce Acrimony and Promote Posturing

It has been argued that, by forcing the parties to bring their disputes to a hearing, the parties are encouraged to take positions that are not conducive to resolution of the dispute. In practice, however, just the opposite occurs. Properly executed, the DRB process prevents or reduces acrimony, helps to avoid or resolve disputes in a timely fashion, reduces protracted disagreements that lead to entrenchment of each party's views and focuses both parties' efforts toward the project objectives. During periodic meetings the DRB encourages the parties to solve their issues before they become disputes.

1.5.7 DRBs Lack Legal Procedures and Standards

Some critics argue that the DRB process, which involves relatively informal fact-finding procedures, characterized by limited documentary discovery and unsworn testimony without cross-examination, is a drawback. Such concerns are unfounded, since disputes of material fact seldom remain after the hearing process. The extensive documentation in most projects, as well as the ready availability of knowledgeable, contemporaneous witnesses, minimizes factual disputes. The DRB process uses experienced construction professionals who can readily interpret contract documents and drawings, observe site conditions first-hand, and evaluate construction practices while applying appropriate construction industry standards. Furthermore, while it is not cross-examination, probing questions from knowledgeable Board members is often far more effective in revealing inaccuracies or weaknesses in a party's position than a lawyer's cross-examination. Also, the rebuttal process facilitates questioning of each party without embracing hostility that generally inhibits open and honest discussion and disclosure of key circumstances in a dispute.

1.5.8 The DRB Process is "Claims Review," Not "Dispute Resolution"

In an effort to ensure that the owner's staff has thoroughly reviewed all aspects of a dispute, some contract documents place the DRB review very late in the dispute resolution process, e.g., after submittal of a detailed claim package, and in some cases after receipt of the contracting officer's final decision. This places the DRB in the position of evaluating the dispute after the claim has been formally denied by the owner, rather than guiding the parties toward early resolution of their differences.

One argument expressed by owners is the need to know the cost of a claim before making a decision. A DRB has the unique opportunity to hear and provide a recommendation on the merit of a claim without considering quantum. Merit is not a function of the cost and, conversely, the Board's finding of merit does not force the owner to issue a change order. Generally, once merit is established, the parties are able to negotiate quantum without the DRB's assistance. If not, the DRB is available to conduct a subsequent hearing on quantum, if requested. This avoids placing the burden (and cost) of preparing and reviewing detailed cost backup information before merit is even established.

Further, most experienced Board members have observed that after preparation and review of substantial written documentation, and subsequent denial of claims, the parties' positions tend to become entrenched and hardened. The result is that both parties have greater difficulty accepting DRB recommendations that are not consistent with their viewpoint, and the disputes continue. One of the benefits of the DRB process is timely consideration and resolution of disputes before the more formal and costly claims process is initiated. Thus, the DRBF strongly recommends that the DRB process, especially in disputes over merit, be placed early in the contract disputes ladder.

1.5.9 DRBs Favor Contractors

Some owners have voiced concerns that the DRB process appears to favor contractors. This may be because it sometimes appears that the contractor "wins" more often than the owner. There are three primary reasons for this perception:

- Most contractors do not want to face the loss of credibility with Board members. As a result, contractors usually will only bring disputes to the DRB that they feel will prevail. This has the effect of “weeding out” disputes that have little merit. This is in fact one of the benefits of the DRB – the change in behavior of the parties. Nonetheless, because only the stronger disputes are brought to the DRB, sometimes it appears that the contractor wins more than would be the case without a DRB.
- Owners and their field representatives are often hesitant or lack the authority to settle valid claims at the job level due to the owner’s deeper management structures, frequently with political oversight. In these circumstances, a DRB recommendation may help to obtain upper management approval of a settlement to the dispute. As a result, the disputes that are brought to the DRB for resolution may include a number of valid contractor claims that might have been resolved by the parties at the job level. However, the resulting DRB recommendations can add to the perception that DRBs favor contractors.
- Occasionally a dispute will arise over the adequacy and/or correctness of the contract documents. Not surprisingly, some owners are reluctant to admit that their engineering consultants are fallible. As a result, disputes founded upon this basis are sometimes referred to the DRB instead of being settled by the parties in negotiations. Given their experience with similar construction, the DRB usually recognizes the flaws in contract documents that can result in a recommendation in favor of the contractor. This outcome could also result in the owner’s perception that the DRB is biased in favor of the contractor.

Due to the confidential nature of DRB proceedings and the consequent lack of reported information, there are no hard statistics on what percentage of disputes are actually recommended in favor of the owner or the contractor. However, in light of the DRB’s role in filtering out spurious disputes and its reported success in dispute avoidance, the DRB process should not be construed as favoring the contractors.

1 . 6 **The DRBF Code of Ethics**

The DRB's role makes it essential that all Board members be trusted implicitly by the contracting parties. To this end, the DRBF has established a Code of Ethics, which sets forth the key elements of the behaviors to which all Board members must subscribe in order for the DRB process to function effectively. The following are the five Fundamental Canons of the DRBF Code of Ethics:

- Canon 1** Board members shall disclose any interest or relationship that could possibly be viewed as affecting impartiality or that might create an appearance of partiality or bias. This obligation to disclose is a continuing obligation throughout the life of the DRB.
- Canon 2** Conduct of Board members shall be above reproach. Even the appearance of a conflict of interest shall be avoided. There shall be no ex parte communication with the parties except as provided for in the DRB's Operating Procedures.
- Canon 3** Board members shall not use information acquired during DRB activities for personal advantage, or divulge any confidential information to others unless approved by the parties.
- Canon 4** Board members shall conduct meetings and hearings in an expeditious, diligent, orderly, and impartial manner.
- Canon 5** The DRB shall impartially consider all disputes referred to it. Reports shall be based solely on the provisions of the contract documents and the facts of the dispute.

Practice guidelines and further discussion of how Board members are expected to conduct themselves are included in Chapter 2.10.