

# 2

## User Guide

### 2 . 1 Introduction

This section of the Manual is written for owners and contractors and their representatives. It includes recommendations for best practices and procedures for ensuring successful DRBs, and describes:

- Selection of Board members [2.2].
- DRB operations during meetings [2.3].
- Advisory opinions [2.4].
- Referring disputes to the DRB [2.5].
- Preparing for a hearing [2.6].
- The format and conduct of a hearing [2.7].
- Use of DRB reports [2.8].
- Termination of DRB members [2.9].
- Practice Guidelines for DRB members [2.10].
- Implementation [2.11].

Appendix 2A presents a guide specification recommended for use in contract documents, with commentary on specific provisions. Appendix 2B presents the recommended Three-Party Agreement.

This Manual incorporates experience gained with DRBs since the previous edition and identifies practices that work best. It is a living document that will be changed whenever necessary to reflect the continuing experience gained through the use of DRBs. Your comments and suggestions are solicited and should be sent to the Dispute Resolution Board Foundation.

This document's usefulness will vary depending on the user's familiarity and past experience with the process, but should be of interest to all practitioners. Parties who are new to the DRB process and parties that have experienced difficulties with the process may find the document particularly helpful. Although recommended practice and procedures are presented in this document, it is not expected that all of the suggestions will be adopted by owners when current practices are working satisfactorily.

This section can be downloaded from the DRBF web site ([www.drb.org](http://www.drb.org)) in PDF format. The guide specification and TPA can be downloaded as Microsoft Word documents so that users may customize them to fit their own standard documents.

## 2.2 Member Selection

Selection of Board members is critical to the entire DRB process.

This chapter discusses the appropriate time period for establishing the DRB, includes the criteria for DRB membership, describes how the selection process works, and points out potential problems to be avoided.

### 2.2.1 When to Establish the DRB

Board members should be selected and the DRB established before site work commences. Success of the DRB process depends in part on the parties and the Board members developing rapport, and getting to know and trust each other takes time. The first DRB meeting should be set as soon as possible after site work begins. Early Board member selection and DRB startup cannot be over-emphasized.

Many times the relationship between the parties becomes strained soon after award of the contract, when issues relating to submittals, site preparation and utilities are discovered. It is important that the DRB be activated as soon as possible after award of the contract to be available as a resource to facilitate communications and resolve issues based on contemporaneous knowledge of the circumstances of the dispute.

### 2.2.2 Ensuring Member Impartiality and Neutrality

An essential element in the DRB process is that each contracting party be completely satisfied with every Board member. Both parties must carefully investigate nominees to ensure that each nominee is experienced and technically qualified. More importantly, each party must be satisfied that the nominees are impartial and have no conflicts of interest.

If either party is uncomfortable with a nominee, it not only has the right to reject that nominee, it must reject that nominee, or the DRB process may not be effective.

Because of the importance of Board member impartiality and the serious consequences that conflicts of interest have on this dispute resolution process, all current and past relationships between prospective Board members and the parties involved in the contract must be fully disclosed and understood. In addition potential Board members must recognize that there will be restrictions on their future relationship with the parties.

Relationships that could affect the perception of Board member impartiality include direct employment, consulting assignments, financial ties, close personal or professional relationships, and service on other DRBs with any party involved in the contract.

The following guidelines are recommended:

#### Definitions

**Party directly involved:** The contracting parties: the owner, the contractor and all joint-venture partners.

**Party indirectly involved:** The construction manager, subcontractors of any tier, suppliers, designers, architects, other professional service firms, or consultants to any party.

**Financial ties:** Ownership interest, loans, receivables or payables, etc.

**Prohibited:** Service as a DRB member should not be allowed.

**Disclose:** A written statement to both parties setting forth all the facts.

**Written permission:** Written acknowledgement that both parties are aware of the disclosed facts and agree that they do not preclude participation as a DRB member.

## **1. Direct Employment**

- a. Current employees of any of the parties directly or indirectly involved must be prohibited from serving as Board members for the project.
- b. It is not recommended that past employees of either party serve as Board members. However, if a prospective Board member is a past employee of one of the parties directly involved, then, in addition to disclosure, permission from the other party must be obtained before agreeing to serve on the DRB.
- c. If a prospective Board member is a past employee of one of the parties indirectly involved, this must be disclosed to both parties prior to appointment to the DRB.
- d. Discussions concerning future employment of a Board member by a party directly or indirectly involved are prohibited throughout the life of the contract.

## **2. Consulting Assignments**

- a. Individuals who are employed in a consulting capacity by any of the parties directly involved must be prohibited from serving as Board members for the project.
- b. Individuals currently employed as a consultant by one of the parties indirectly involved must, in addition to disclosure, obtain permission from both contracting parties before agreeing to serve on the DRB.
- c. Previous employment as a consultant by any party directly or indirectly involved must be disclosed prior to appointment.
- d. Discussions with a Board member about future consulting work with one of the parties directly involved is prohibited.
- e. Board members should obtain permission from both parties prior to agreeing on future consulting for parties indirectly involved.

## **3. Financial Ties**

- a. Individuals with current financial ties to any of the parties directly involved must be prohibited from serving as Board members for the project.
- b. Individuals with current financial ties to any of the parties indirectly involved must disclose such relationships prior to appointment.
- c. Previous financial ties with any party directly or indirectly involved must be disclosed prior to appointment to the DRB.
- d. During the course of the project, the establishment of financial ties or discussions about future such financial ties with any party directly involved is prohibited.
- e. Obtain permission from both contracting parties before discussing future financial ties with any party indirectly involved in the project.

## **4. Close Personal or Professional Relationships**

- a. Close personal or professional relationships that could give rise to the perception of bias with a key member of any party directly or indirectly involved must be disclosed and such relationship completely understood and accepted by the parties prior to appointment to the DRB.
- b. The establishment of close personal or professional relationships with a key member of the parties directly or indirectly involved during the course of the project must be avoided. In the

event that such relationships develop, Board members must disclose the nature of the relationships to both parties, and offer his/her resignation if warranted.

**5. Services as a DRB member on another contract involving one or more of the parties**

- a. Candidates must disclose all past and current service as a Board member on projects where any of the parties directly or indirectly involved were also involved. Describe the role of the involved parties on the other project.
- b. In addition to disclosure, obtain permission from each contracting party before agreeing to serve on another DRB for a contract in which one of the contracting parties is directly involved. If one of the contracting parties is indirectly involved on the other contract, this must be disclosed along with a description of their role on the other contract.
- c. Before agreeing to serve on another DRB for a contract in which a party indirectly involved is involved on both projects, disclose this relationship to both contracting parties and obtain permission whenever the role of the indirectly involved party is significant.

These guidelines are summarized in the following table where “past” is anytime prior to execution of the DRB three-party agreement on this project, “current” is anytime during the life of the project, and “future” is anytime after completion of the DRB on the contract.

		Directly Involved	Indirectly Involved
Direct Employment	Past	Permission Required	Disclose
	Current	Prohibited	Prohibited
	Future	Discussion is Prohibited	Discussion is Prohibited
Consulting Assignments	Past	Disclose	Disclose
	Current	Prohibited	Permission Required
	Future	Discussion is Prohibited	Permission Required
Financial Ties	Past	Disclose	Disclose
	Current	Prohibited	Disclose
	Future	Discussion is Prohibited	Permission Required
Close Personal or Professional Relationships	Past	Disclose	Disclose
	Current	Prohibited	Disclose
	Future	Avoid / Disclose	Avoid / Disclose
DRB Member on Another Project Involving One or More of the Parties	Past	Disclose	Disclose
	Current	Disclose	Disclose
	Future	Permission Required	Permission Required

In addition, potential Board members must not have had any prior substantial involvement in the project, in the judgment of either party, nor may they have any financial interest in the contract or project, other than service as a Board member.

The repeated selection of the same individual by either (1) a particular owner or contractor, or (2) only owners or only contractors can lead to the perception of bias. While individuals in these categories may be completely impartial and neutral, it is the perception of bias that is the concern. The important point is that both parties should avoid selecting Board members that may engender the perception of bias.

It is difficult to envision a specification that addresses all possibilities of perceived bias. However, the parties are in control of this situation and each party must remember that the other party needs to feel comfortable with every Board member if they are going to trust these individuals to recommend acceptable resolutions of their disputes.

### **2.2.3 Qualifications of Board Members**

When nominating prospective Board members, the contracting parties should recognize the following necessary attributes:

- Complete objectivity, neutrality, impartiality and freedom from bias and conflict of interest for the duration of the contract.
- Dedication to the objectives and principles of the DRB process.

In addition to these attributes, the parties must evaluate the experience and qualifications of the prospective members for the specific project, with respect to:

- Interpretation of contract documents
- Resolution of construction disputes
- The type of construction involved
- The specific construction methods to be used
- The dispute-prone facets of the work

Prospective members should demonstrate experience, training, and understanding of the DRB process and a demonstrated ability to write in a clear, concise, and convincing manner. If considered for Chair, they should also demonstrate an expertise in running effective meetings in difficult circumstances.

Selection of Board members who are full-time employees of firms that could possibly become interested in obtaining work from either of the contracting parties is discouraged.

It should be recognized that all individuals are products of their own experience, and that their perspective on issues is based on that experience. To that end, it is desirable to select a DRB that includes members who have an understanding of both the owner's and the contractor's perspectives.

For some projects, depending upon the complexity of the work and provisions of the contract documents, the contracting parties may want to consider including an experienced construction attorney as one of the Board members.

Multinational practice normally includes attorneys. See Section 4 for further information.
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Within the United States, there has been considerable controversy over whether attorneys should be eligible for appointment to DRBs. The primary concerns seem to be that:

- Attorneys on DRBs may result in the hearings becoming more formal and/or adversarial with less open and candid discussion and,
- Once intimately involved in the process, the organized legal community may push to alter the process in ways that render DRBs less effective in fostering common sense resolution.

Many attorneys have demonstrated a keen interest in resolving disputes without recourse to binding judicial processes and are strongly supportive of the DRB process. Attorneys who are dedicated to the principles and process of DRBs, while satisfying the other criteria for membership, should be considered eligible to serve on DRBs. Many attorneys meet the requirements outlined in the guide specification, hold degrees in engineering and/or have significant project experience and a thorough

understanding of construction law. Such attorneys can bring to DRBs a wealth of experience in contract law, contract interpretation, and the writing of recommendations. DRBs in the U.S. that have included attorneys as Board members have generally experienced commendable results.

## **2.2.4 Methods of Member Selection**

Selection of impartial and neutral members by any method depends on both parties thoroughly investigating the proposed members and rejecting those where bias or the perception of bias exists. Several methods have been used for selecting members, of which the three most commonly used are:

### **Joint Selection**

The parties meet and discuss the qualifications of all prospective Board members and jointly select the three-member DRB. The parties may select the Chair, or delegate that responsibility to the selected members themselves. One advantage of this method is the elimination of any notion of allegiance to the nominating party. Another advantage is that the parties can better assure that the Board members have the attributes and experience required to handle the disputes that they believe might occur on the project.

This method is preferred by many for the selection of Board members.

### **Nomination by Each Party**

Using this method, each party nominates a member and submits to the other party for approval. Once approved, the two appointed Board members nominate the third member, subject to the approval of both parties. The third member, not nominated by either party, frequently serves as Chair of the DRB. This method has been the most commonly used in the U.S.

This method has occasionally empanelled members who were biased or perceived to be biased toward the nominating party. Even if the resulting members are truly neutral, this method of selection can result in Board members being known as “the owner’s representative” or “the contractor’s representative,” thereby giving the perception of bias. When bias is suspected during the selection process, the parties are sometimes hesitant to reject the other’s nominee in an effort to minimize disagreements early in the project. Similarly, one party may accept the other party’s nominee on the tacit condition that its nominee also be accepted. Such practices should be avoided as it is likely to cause a perception of bias in the future.

### **Slate of Candidates**

Using this method, each party proposes a list of three to five prospective Board members. Each party then selects one from the other’s list. If a party were to reject the entire list, then a new list is submitted. The two selected Board members nominate the third, subject to approval by both parties. Again, the third member, not selected by either party, frequently serves as Chair.

## **2.2.5 Process for Member Selection**

Frequently, the contractor and owner will know one or more qualified candidates. If a party does not have such knowledge, it can obtain information from someone who has had DRB experience or from the resumes on the DRBF web site. Alternatively, one may review the tabulation of DRBs on the web site and inquire of owners or contractors who have had DRBs. In some cases, owner agencies have solicited letters of interest in trade journals prior to contract procurement.

Selection of members usually takes the following steps:

1. Identify the experience appropriate for the specific project.
2. Identify candidates with the appropriate experience, who are available, have no immediately apparent bias or conflicts, and are interested in serving on the DRB.
3. Send candidates a description of the work, a copy of the DRB specification and TPA, and a list of the directly and indirectly involved parties and their key project personnel.
4. Obtain from all candidates:
  - Resume.
  - Tabulation of previous experience on active and completed DRBs including for each project.
  - Name of project.
  - Contract amount.
  - Name of owner.
  - Name of contractor.
  - Party by whom selected, when applicable.
  - Names of the other Board members.
  - If served as Chair.
  - Number of disputes heard.
  - Statement of availability and interest in serving.
  - DRB trainings, including course name and year attended.
  - Disclosure statement including:
    - Previous involvement with the project
    - Previous involvements and relationships with all parties directly and indirectly involved in the project
    - Close personal and professional relationships with any key personnel of any of the parties directly and indirectly involved in the project.
  - Current billing rate.
5. Evaluate qualifications of potential candidates.
6. Do a background check of preferred candidates with owners and contractors who have been parties to previous projects where the preferred candidates served on DRBs.
7. If desired, interview preferred candidates by telephone or in person.
8. Select and notify those Board members.
9. Send each selected Board member a copy of all contract documents. All selected Board members should be provided with each other's information included in Item 4 above.

If the third member has not been jointly selected by the contracting parties, the first two members will be responsible for nominating the third. Information on desirable candidates who were considered by

the parties is sometimes provided to the first two selected members for their consideration in selecting the third member. If the two appointed members are well acquainted, a telephone conference may be sufficient to identify an appropriate third member. In some cases, it may be advisable for the first two members to meet personally and discuss possible candidates.

In addition to possessing the necessary attributes and qualifications listed above, the third member should supplement the technical expertise and background of the first two members, in order to provide experience in as many facets of the work as possible. The third member, if he or she is to act as Chair, should have DRB experience as well as expertise in running effective meetings.

After the third candidate has been identified, the candidate should receive the information identified in item 3 above. The information listed in item 4 above should be submitted by the candidate to the two selected Board members for their review. The first two members may wish to interview the candidate. Once the third member is nominated, a package containing the nominee's information (item 4 above) should be sent to each of the parties for their consideration in approving the final member.

Appointment to a Board of an experienced and respected construction professional that does not have DRB experience is certainly acceptable, but should be handled with care. Such a person, when familiar with and committed to the DRB process, can serve very effectively as a member of a Board along with two experienced DRB members.

## **2.2.6 Selecting the Chair**

The third member frequently acts as Chair of the DRB. However, this should not be required and may not be the best choice. The Chair should be chosen primarily for his or her experience on DRBs and a demonstrated ability to take charge and lead the DRB activities. The specification should not require that the third member, if nominated by the other two selected Board members, automatically becomes the DRB Chair.

Other considerations that should go into the selection of the Chair include:

- Intimate familiarity with the DRB process and the role of the DRB in general meetings with the parties, in DRB hearings, and in advisory opinions.
- Availability and willingness to shoulder a greater share of the DRB workload as all communications with the parties must be handled by the Chair.
- Prior training through the DRBF Chairing workshop.
- Good communications skills that encourage open, informal discussions in a controlled, yet non-threatening manner.

## **2 . 3      Operation of the DRB**

Immediately after selection and approval of the Board members, the contracting parties should expect the DRB Chair to contact them to establish a date for the first meeting. The DRB should meet in private before the first meeting to get acquainted, affirm that all members fully ascribe to the Code of Ethics and understand the process, and discuss the draft operating procedures.

### **2.3.1      First Meeting with the Parties**

Following introductions, a list of names with affiliations, project position, mail and e-mail addresses, and phone and fax numbers of all parties should be compiled and distributed to all attendees.

Discussion at the first meeting, in addition to the standard agenda items [2.3.3], is likely to include:

#### **1.      Work plan and schedule**

To bring the Board members up to speed on the project, the owner describes the work and the contractor describes the work plan, including the basic methods and sequence of construction. Copies of the contractor's approved baseline schedule should be provided to the DRB. A copy of the bid tabulation may be requested. (The basic contract documents should have already been distributed to the Board members.)

#### **2.      DRB operating procedures**

The DRB prepares and presents draft operating procedures, incorporating the requirements of the contract relating to DRBs and best DRB practices and procedures. Procedures are flexible in order to adapt to the needs of the contracting parties. The procedures will govern:

- Meeting specifics, such as agendas, minutes, attendance, etc.
- Referral of a dispute to the DRB, including notice, time requirements, material to be submitted, etc.
- Hearings, including conduct, attendance, format, etc.
- DRB written reports
- Advisory opinions are often discussed and consideration given to incorporating by change order, if not already permitted under the contract. [2.4]

Revisions are made as agreed and revised procedures are submitted to the parties after the meeting for additional comments and eventual approval. All parties agree to the procedures and to any subsequent changes.

#### **3.      Materials to be sent to the Board members between meetings**

To keep the DRB advised on job progress, the parties typically provide periodic progress reporting documents and progress meeting minutes, already being prepared in the normal course of the work. Identify which party is responsible for distribution to the Board members.

#### **4. Principles related to maintaining impartiality**

The parties' concern with maintaining impartiality or the perception thereof does not end with the selection of Board members. To ensure impartiality, the following must be emphasized:

- All project-related communications between the Board members and the parties must be made directly with and through the Chair, except during meetings with the parties and distribution of progress documents. The parties must never contact any member other than the Chair; likewise, Board members other than the Chair must never contact either party. All written correspondence between one party and the Chair is to be copied to the other party and sent directly to the other Board members.
- Board members cannot advise either party on conduct of the work and neither party may request advice from Board members.
- Board members will refrain from expressing opinions on the merits of disputes or potential disputes.
- Individual Board members should never be thought of or referred to as the representative of a party to the contract. Board members should not think of themselves as a representative of the party that nominated them.
- The site tour must include representatives from each party.
- The entire group should remain together throughout the site tour.

#### **5. The Chair's point of contact with each of the contracting parties**

To avoid miscommunication, the Chair should have one point of contact with each party. Commonly the Chair's only contact is to establish agendas and meeting arrangements with the owner and contractor's representatives and to arrange for additional documentation needed by DRB members.

#### **6. Invoicing procedures**

The mechanics of invoicing, consistent with the TPA, should be established, including such details as agreed time to review progress documents, timing of submittal of invoices, required back-up data, and where to send invoices. Typically each Board member submits his or her invoice directly to the contractor, who, with the approval of the owner, pays the approved amount and bills the owner for one-half the amount.

#### **7. Frequency of meetings**

Discuss and agree on the frequency of periodic meetings and site visits. The dates for the next two or more meetings should be set.

#### **8. The proactive role of the DRB**

The DRB may not usurp the discretion, authority, or decision-making power of either party. However, through pro-active discussion it should encourage the parties to engage in frequent and open communications to resolve disputes without referral to the DRB. If it becomes clear that the parties cannot resolve their differences, the DRB should encourage prompt referral of the dispute for a hearing (or possibly an advisory opinion – see 2.4).

### **2.3.2 Frequency of Meetings**

It is of critical importance that the DRB meet periodically throughout construction to encourage the parties to settle issues before they become disputes. These periodic meetings are helpful in establishing the needed rapport (knowledge, trust and confidence) among the parties and the Board members that facilitates avoidance as well as resolution of disputes. Waiting until a dispute arises to meet with the DRB undermines the process, making it essentially an arbitration panel, without binding resolution. Experience has shown that one of the greatest values of a DRB lies in the regular, periodic meetings throughout the course of the project where the parties, assisted by the DRB, discuss issues openly and work together to avoid disputes.

Meetings should be held as often as necessary to avoid issues from becoming disputes. This usually depends on the work in progress and issues at hand. Periodic meetings and site visits should be on a regular basis. Some projects meet as often as monthly, but in any event, meetings should not be less often than quarterly. They should continue as long as work from which disputes might arise is underway. The Board members must be familiar with all major aspects of the work and the associated conditions.

On building projects DRBs frequently meet every month. On some highway projects the DRB meets once a month for the first six months and bi-monthly thereafter. DRBs on tunnel projects have traditionally met once every three months. Projects with dispute problems meet more often. On a fast track project, meeting as often as once a month may be desirable.

The DRB's periodic presence fosters open and substantive communication between the parties.

### **2.3.3 Agenda for Periodic Meetings**

It is desirable for the meeting agenda to be developed by the DRB Chair, with input from the owner, contractor and other Board members. The agenda may vary as circumstances dictate, but typically includes, as a minimum, the following:

1. The Chair convenes the meeting and, when there are minutes, requests approval of the previous meeting minutes.
2. The owner and the contractor, either concurrently or sequentially, discuss the work accomplished since the last meeting, the status of the work schedule, plans for future work, potential disputes, claims and other controversies, and proposed solutions.
3. The owner reviews the status of each change order. Discussion with the DRB may help move the change order process along when it bogs down.
4. The contractor explains the status of all pending claims and the prospects for resolution. Discussion with the DRB can often help move negotiations forward to resolution, thereby heading off disputes that might otherwise have been referred for a hearing.
5. Field observation of all active segments of the work. Board members are always accompanied by both contractor and owner personnel to avoid ex parte communication and any perception of partiality.
6. Establish the next two or more meeting dates to assure everyone will be available.

### **2.3.4 Minutes**

Preparation of DRB meeting minutes, although generally not required, can serve a useful function in recording "action items" and as a general reminder of the discussions held and views expressed at prior

meetings. It should, however, be noted in the first meeting and agreed to by the parties that such DRB meeting minutes are for information only and are not an official record for future reference in DRB hearings or other subsequent proceedings. To do so would undermine the open, honest and informal nature of discussions that are directed at resolving issues before they become full-fledged disputes.

When minutes of the DRB meetings are required under the contract, or agreed to by the parties and the DRB, they should be prepared by a representative of one of the parties. Expecting a member of the DRB to take the minutes should be avoided, as it will detract from the DRB's ability to focus on and understand the project and the issues under discussion.

### **2.3.5 Special Meetings**

The DRB should be available to meet on short notice when requested by the parties. Special meetings may be called by either party or the DRB as necessary to consider some urgent unforeseen condition, or other matter demanding prompt observation, attention, or consideration. The Chair coordinates with the parties and Board members to set the time, place, and agenda for special meetings

### **2.3.6 Encourage Open Communication and Negotiation to Settle Disputes**

During meetings the DRB should question the parties at length as to the progress of negotiations to settle disputes, with a view to have the parties settle the disputes themselves. Such dispute avoidance efforts are an important feature of the DRB process; a truly successful DRB may have no hearings. All disputes should be completely aired between the parties and serious negotiations exhausted before referring a dispute to the DRB.

## 2.4 Advisory Opinions

The usual DRB procedure for dispute resolution consists of the prompt referral of a dispute to the DRB, preparation of position papers by the owner and contractor, holding a hearing, and issuing a written report containing the DRB's recommendation. Although the DRB hearing procedure is far more efficient than litigation and other judicial processes, it still requires the parties to prepare written documents, presentations at a hearing, and preparation of a written report by the DRB.

Advisory opinions are typically used soon after the parties find they have a potential dispute and have carefully considered and formed their positions and conducted preliminary negotiations, but before expenditure of additional resources and further hardening of the parties' positions.

Advisory opinions have been used on many projects to provide quick insight into the DRB's likely assessment of the relative merits of the parties' positions on a dispute. Frequently advisory opinions are used when the parties disagree as to the interpretation of a specific provision of the contract. This process is quick and may be entirely oral and does not prejudice the opportunity for a DRB hearing if the dispute is not resolved and either party chooses to request one.

Experience to date with advisory opinions has been very positive, with resolution of the dispute generally accomplished without the need for a hearing.
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Advisory opinions are an informal method of advising the parties on resolving potential disputes before they escalate. Both parties have to agree to seek an advisory opinion. The procedure for requesting and issuing advisory opinions should be discussed with the DRB at the first meeting with the parties. Provided that both parties agree to an advisory opinion, the process would proceed as follows:

- Although this is not necessary, the parties sometimes submit a brief written claim statement and some documentation supporting their position to the DRB and to the other party at the prescribed time prior to the meeting. Submission in writing enables the DRB to be prepared and educate itself on the issue.
- The advisory meeting is normally held in conjunction with a periodic meeting, although advisory opinions are not generally issued on an impromptu basis. The meeting itself consists of brief oral presentations by each party, followed by any questions from the DRB.
- A short intermission is taken to allow the Board members to caucus and form their opinion.
- The meeting is then reconvened, and the DRB provides an oral opinion on the matter.

Advisory opinions are always "based only upon information available at the time," "subject to change later based upon further data," and "not to be used or referred to in future disputes on this issue."

The DRB may or may not issue a written opinion, but if a written advisory opinion is issued, it must be at the specific request of both parties. Some of the factors that should be considered in making this decision include:

- Written advisory opinions may (1) serve to avoid subsequent disputes as to what the DRB actually said, i.e., the issue of each party hearing what they want to hear, and (2) assist resolution in the event that one of the parties needs to obtain approval from higher authority.
- The absence of written advisory opinions maintains the informality of the proceeding, which may assist in reaching agreement of the parties.

The parties consider the DRB's opinion in their continued efforts to resolve the dispute among themselves.

The opinion is only advisory and does not require an acceptance or rejection by either party. If the dispute is not resolved and a hearing is held, the oral presentations and advisory opinion are completely disregarded and the traditional DRB hearing procedure is followed.

When deciding whether a dispute should be submitted for an advisory opinion, the parties should consider the complexity of the dispute. The parties and the DRB should recognize that if the issues are more complex than can be realistically dealt with in an advisory opinion, the DRB may refuse to hear the dispute on an informal basis. In general, however, such an informal presentation of a dispute and the subsequent DRB opinion provides useful input in the negotiation process at minimal cost.

Advisory opinions should be limited to merit issues only as a discussion of quantum is too complex.

## 2.5 Referral of a Dispute to the DRB

For maximum effectiveness, the DRB should become involved as soon as it becomes clear that a bona fide dispute exists. The contracting parties should make every effort to resolve issues without taking them to the DRB. However, disputes should be referred to the DRB as soon as one of the contracting parties believes that a negotiated settlement cannot be reached.

The DRBF recommends that the contract dispute resolution ladder provide for receipt of a DRB report before the owner makes a “final decision” on the dispute. See illustration.

To achieve the best use of the DRB process, it is important not to include steps in the contract that delay referral of disputes to the DRB, such as an owner’s “final decision.” Such requirements undermine the benefits of timely and cost effective dispute resolution. The guide specification provides for prompt referral of disputes to the DRB.

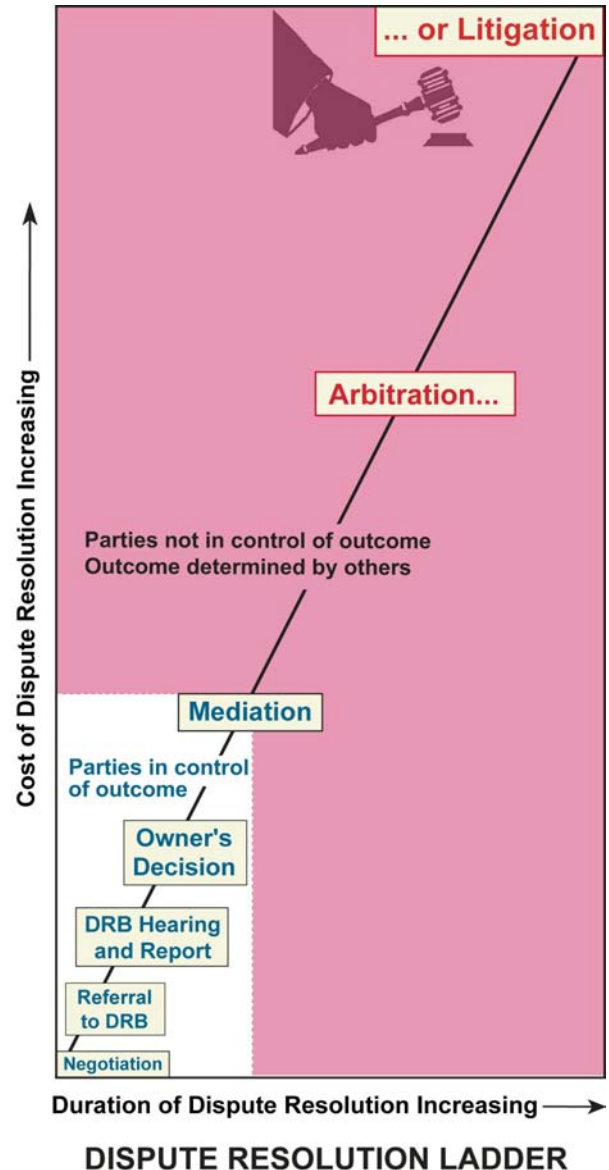
The DRB must operate within the contract and statutory requirements. It may be necessary to make modifications to portions of the general conditions to clearly identify where in the process the DRB will provide dispute resolution assistance.

The DRB process is a dispute resolution process, not a claims review process. It is not productive to require that the contractor prepare voluminous documentation, including calculation of quantum, for submittal to the owner for review and final decision prior to referring the dispute to the DRB. This increases the difficulty of the dispute, fosters animosity between the contracting parties, and leads to unproductive posturing between the parties. It also diverts the owner’s and contractor’s efforts from prosecution of the work.

### 2.5.1 Limitations

Contract specifications should provide that either the contractor or the owner may refer any issue to the DRB once it becomes clear, in the opinion of either party, that a dispute or controversy exists and is not likely to be resolved without DRB participation. In addition, the guide specifications permit either party to refer a dispute for a DRB hearing if the other party fails to meet their contractual or otherwise reasonable deadlines for handling the dispute.

Some owners have limited the DRB’s jurisdiction to technical issues as distinct from matters requiring the application or interpretation of the general and supplementary conditions and special provisions of the contract. Board members are just as able to deal with all matters under the contract, as construction



industry arbitrators who commonly issue binding decisions on all contractual issues. Limiting jurisdiction of the DRB reduces its ability to perform the services intended and has generated controversies over which disputes are eligible to be heard.

Claims by contractors against owners on behalf of subcontractors or suppliers (pass-through claims) may be heard by the DRB. Disputes by a subcontractor or supplier with the contractor, or both the owner and the contractor, cannot be considered by the DRB. The TPA is with the owner and contractor; subcontractors and suppliers are not included. Hearing disputes between the contractor and his subcontractors or suppliers could prejudice the DRB in future disputes between the owner and the contractor.

### **2.5.2      Letter of Referral**

Referral of a dispute to the DRB, by either the contractor or the owner, should be to the DRB Chair, with copies to the other party and the other Board members.

The letter of referral should concisely describe the nature and extent of the dispute that is being referred to the DRB, as well as the scope of the desired report: merit (entitlement) only, merit with guidelines for quantum if merit is found, or merit with quantum amount if merit is found.

### **2.5.3      Scope of Recommendation**

Many disputes involve only merit. If quantum is involved and merit is recommended, it is common for DRBs to offer guidelines for quantum along with the recommendation for entitlement. Once the DRB becomes aware of the details surrounding a dispute, it is usually in a good position to determine whether guidelines for quantum would be beneficial to the parties.

Entitlement should be agreed by the parties first, followed by renewed negotiation efforts before asking the DRB to determine the quantum amount. The parties are frequently in a much better position to negotiate quantum issues. It is usually very time consuming and costly for the DRB to become sufficiently familiar with the production and the contractual cost provisions necessary to establish the quantum amount. However, the DRB's purpose is to assist in dispute resolution and if the parties request that the DRB recommend the quantum amount, the DRB will do so.

## **2.6 Preparation for the Hearing**

### **2.6.1 Scheduling the Hearing**

Upon receipt of the dispute referral letter, the Chair consults with the other two Board members and both parties to establish a date for the hearing. Allowance is made for the time the parties need for preparation and submittal of position papers and their review by the DRB. Often, hearings are conducted following the regular agenda at the next periodic DRB meeting unless the matter is urgent, in which case the hearing would be scheduled as agreed with the parties. Large or complex disputes may take more time than available at a periodic meeting.

### **2.6.2 Common Reference Document**

To facilitate the DRB's review of the issues and preparation of the report, the DRB operating procedures frequently require the parties to prepare a joint statement of dispute and a common reference document (CRD), comprised of materials such as correspondence, reports, and other records, that they believe will help the Board members understand the dispute. In order to minimize the volume of material the CRD should only include copies of pertinent portions of the contract documents for easy reference. It should be arranged in a logical manner, e.g., correspondence, contract documents, job records, etc., and page numbered (Bates Stamp) for easy reference.

Since the parties have previously negotiated to settle the dispute and have thoroughly considering each other's positions, the CRD should be easy to assemble and there should be no disagreement as to what to include.

### **2.6.3 Position Papers**

Each party also prepares a paper describing its position and submits it to the other party and the DRB, in advance of the hearing. Position papers should concisely summarize the party's position, explain relevant factual information, and give the contractual justification for their position, all referenced to specific pages in the CRD. It is critically important that all facts and arguments a party intends to put forth during the hearing be included so the other party has the opportunity to provide a considered response at the hearing. It is also beneficial for each party to include their understanding of the other party's position and explain why they believe the other party's position is without merit. To avoid giving one party an advantage, the deadline for submittal of each party's position paper must be the same.

If new issues or arguments are presented in the position papers, rebuttal papers may be permitted before the hearing, but are not required. Only responses to new material in the other party's position paper may be included in rebuttal papers.

### **2.6.5 Submittal**

All documents are submitted in accordance with the deadlines in the DRB operating procedures, unless the DRB and both parties have agreed to modifications. It is important that both parties and the DRB adhere to the schedule established for the hearing. Failure to do so can lead to postponements of the hearing and escalated animosity.

## **2.6.6 Location and Facilities**

Hearings may be conducted at any mutually acceptable location that provides all the required facilities and access to any additional reference documents that might be needed. The job site is generally preferred because many of the hearing participants and necessary records are readily available.

The owner usually arranges for the hearing room and necessary facilities. A typical hearing requires a room large enough to comfortably accommodate 10 to 15 people, although this varies depending on the complexity of the hearing. Board members sit together in a position where they can clearly see the speaker and any displays or visual aids. Participants are often seated around a large table with sufficient space to lay out drawings. It is important to provide adequate seating and table space for the DRB and participants to spread out documents and to take private notes.

Marker boards or flipcharts may be provided to facilitate presentations. Wall space to hang drawings, plots, or charts should be available. Electronic and other equipment should be on hand for presentations. Presentation materials should be distributed to the Board and the other party at the beginning of the presentation in order to facilitate note taking during the hearing and for easy reference in subsequent Board deliberations and report preparation. Reproduction facilities should be available to facilitate copying and distribution of information developed during the hearing.

## **2.6.7 Participation**

Participation should be limited to the decision makers from each of the contracting parties, participants in the prior good-faith negotiations, and those with first-hand familiarity with the facts of the dispute, such as inspectors, superintendents and foremen.

All participants and their roles at the hearing must be disclosed sufficiently in advance to allow both parties to adequately prepare for the hearing. The DRB's operating procedures usually provide for each party to submit a list of the people who will participate, as well as those who will attend as observers. Delaying this submittal negatively affects the DRB process. If attendance is controversial, the DRB, in accord with the operating procedures, will determine who will participate in the hearing as well as who may attend as observers.

Full-time project employees who are familiar with the events surrounding the issue in dispute should make the primary hearing presentations. Experts may testify in complicated technical disputes. Experts, along with their subject matter, must be identified with adequate time for the other party to prepare its response. Failure to provide ample notice may result in postponement of the hearing or exclusion of the expert's presentation until the other party has had adequate time to prepare.

Occasionally parties request that their attorneys attend as observers so they may hear all the evidence, and thus knowledgeably participate in subsequent discussions regarding the DRB's recommendation. The contracting parties' legal counsel may attend hearings, but are not allowed to participate in the DRB hearings as this can intimidate hearing participants and inhibit open and candid discussion. If legal counsel participation is requested, the parties and the DRB should discuss the pros and cons. The DRB will allow such participation in the hearing if requested by both parties.

Unless required by open meeting laws, the parties should not admit media representatives to the hearing, since their attendance will likely inhibit open and candid discussion.

On rare occasions one of the contracting parties may refuse to attend a hearing. If this happens and the DRB is obligated by the TPA to proceed with the hearing, the hearing must be held. Sometimes the contract language makes the hearing a necessary condition before the dispute may be pursued in

subsequent proceedings. In this case the parties should expect the DRB to proceed with the hearing even if the TPA does not specifically require it to do so. In deciding whether to proceed if neither of these cases apply, the parties should expect the DRB to take into account the specific circumstances of the refusal, e.g., whether the failure to appear is because the party legitimately needs additional time to prepare for the hearing, an essential witness is not available, or whether it is simply a refusal to comply with the contract terms. DRB recommendations are certainly more likely to result in settlement of the dispute if both parties participate in the hearings. Therefore, the parties can expect the DRB to attempt to get both parties to the hearing, even if it requires temporary postponement.

## **2.7 The Hearing**

### **2.7.1 Introduction**

Multiple disputes may be heard at the same hearing, depending on the estimated time for presentations, questions and discussion. However, experience has shown that usually no more than two disputes should be heard in one day and that additional disputes should not be heard before the reports on the first disputes are complete and submitted.

There must be adequate time at the hearing to ensure that each party has the opportunity to be fully heard and that the DRB is satisfied that it understands each party's position and supporting arguments and the facts surrounding the dispute. The DRB must be satisfied that all pertinent information has been presented and understood. The parties must feel that they have been given ample opportunity to present their positions.

The DRB hearing is not a judicial process: oaths are not administered, legal rules of evidence are not observed, and cross-examination is not permitted. The format of the hearing is established by the DRB's operating procedures, and will allow each party to present all relevant material, generally without interruption.

Typically, the claimant makes its presentation first, followed by the other party. Rebuttals are then heard, followed by questions from the Board members and further rebuttals by the parties. Each party must be given ample opportunity to present its case and to rebut information presented by the other party. Direct questioning of one party by the other party is not permitted.

Hearing presentations may include a summary of position statements, discussion and explanation of documentary evidence, and presentation of visual aids and demonstrative evidence.

Information, such as written consultant reports, must be provided sufficiently in advance to enable the Board members a thorough review and the other party an opportunity to review and respond or prepare a rebuttal. Surprise information at the hearing is contrary to the open, cooperative attitude sought in the DRB process. Although surprise information is strongly discouraged, if additional information has been developed after submittal of the position papers, and the DRB decides to permit this information to be introduced at the hearing, the other party will be given ample time to consider and respond to it. This may necessitate the hearing being resumed at a later date, with the consequent delay and added cost.

Typically, each Board member takes individual notes during the hearing; the services of a court reporter are not required. However, if one of the parties insists upon such service, and is willing to bear the costs, the DRB may allow it, with the proviso that both parties and all Board members simultaneously receive copies of the transcript. Audio or video recording is prohibited, as it is likely to inhibit open and candid discussion.

During the hearing, the DRB may request further information, such as additional correspondence, daily field reports, compilations of agreed data, material delivery receipts, etc. The request may necessitate an additional hearing to consider and understand the new material.

### **2.7.2 Conduct**

DRB hearings must be conducted in a manner that encourages openness, candor, and the thorough disclosure of all pertinent information bearing on the dispute. DRB operating procedures are formulated, and modified as appropriate, to accomplish this objective while ensuring that the hearing

will proceed in an orderly, respectful and efficient manner. Board members may ask questions whenever necessary to uncover the facts and ensure that they fully understand the parties' positions. They may question the parties during their presentations on the facts of the case, and solicit their interpretation of the contract documents. The parties should not infer or otherwise construe that the DRB is favoring one side or the other by the nature of these questions.

The DRB decides all procedural issues, including recesses, adjournments, and continuation of hearings.

### **2.7.3 Conclusion**

The hearing will not be closed until the Board members are satisfied that both parties have nothing more of substance to add, and the DRB believes that it has a full understanding of the dispute.

At the conclusion of the hearing, if the DRB believes that additional documentation or other information is required for a full understanding of the issues, it may request that such information be submitted, and the hearing left open pending receipt of the additional materials. The other party and the DRB should receive the additional documentation at the same time. It is seldom necessary to reconvene the hearing; however, this may be done depending on the nature of the additional materials received and the DRB's perception of the need for additional discussion by the parties.

Contract specifications often include a time period within which the DRB is expected to submit its written report containing recommendations and supporting rationale. Where no time period is specified, or the specified time is insufficient based on the Board members' availability or the complexity of the dispute, the DRB should indicate immediately following the hearing when the parties may expect the written report.

When the hearing is complete, and all necessary information and presentations have been received by the DRB, the hearing is closed.

Sometimes in difficult cases, while preparing the report after the hearing is closed, the DRB realizes that additional documents or information are needed. The Chair will simultaneously request such information from the parties. Replies to the DRB are copied to the other party.

## **2 . 8      The Report**

The DRB will formalize its findings and recommendations in a written report, signed by all three Board members and submitted to the owner and the contractor as soon as possible after completion of the hearing.

The report typically includes concise statements of the dispute and the two opposing positions, the DRB's findings as to the facts of the dispute, the recommendation, and the rationale for the recommendation. The report will be specific regarding the reasons for the DRB's recommendations and will include references to contract clauses and/or significant facts as appropriate.

The Board members will make every effort to prepare a unanimous report. If they cannot, the dissenting findings and recommendations will be included in the report, along with the majority findings and recommendations. The minority findings and recommendations will identify the issues of disagreement. Whether the report is signed so as to identify the dissenting member depends on the circumstances of the dissent and is left to the discretion of the DRB.

### **2.8.1      Acceptance**

Acceptance of the DRB's recommendations is entirely voluntary. The specifications usually provide for a certain time period within which the parties must accept or reject the DRB's recommendations. The goal of the supporting rationale in the DRB's report is to convince both parties to accept the merit recommendations, and to facilitate a negotiated quantum settlement when needed. Failing successful settlement negotiations, the parties may return to the DRB for a recommendation on quantum.

When a party does not accept a DRB recommendation, the case generally moves to the next step in the dispute resolution process. Before proceeding with the next step, the parties should review the findings and recommendations carefully to determine if the DRB understood all of the information and considered all of the provisions of the contract.

### **2.8.2      Clarification and Reconsideration**

A party can request that the DRB clarify the rationale behind the recommendations. Sometimes what was assumed to be agreement on a factual matter turns out to be incorrect and clarification is needed. Either party may request clarification of elements of the DRB report within a specified time period following receipt of the DRB report.

Reconsideration should be the exception, not the rule. A party can request that the DRB reconsider the dispute upon the submission of new evidence or when, in the DRB's opinion, they misunderstood or failed to consider pertinent facts of the dispute. Reconsideration will not be granted because one party doesn't like the DRB recommendation or wants to portray evidence already submitted in a different way. The standards and criteria for reconsideration should be set forth in the contract; if they are not, they should be established by the DRB in the operating procedures. Requests for reconsideration must be made within a specified time period following receipt of the DRB report.

When the DRB feels that a request for reconsideration or clarification is justified and will likely lead to an acceptable resolution of the dispute, it should honor the request.

### **2.8.3 Subsequent Dispute Resolution Activities**

Because this process is not mediation, the DRB cannot compromise its findings and recommendations or substitute its own idea of fairness for terms of the contract, in an effort to resolve the dispute. However, it is generally far more productive for the parties to compromise their positions and settle the dispute. Recognizing this, the parties usually continue their negotiations using the DRB recommendations as a guide. In the vast majority of cases these subsequent negotiations are successful.

The owner's acceptance of a DRB recommendation on entitlement does not require the issuance of a change order. The owner is only obligated to issue a change order when all aspects of the dispute, including quantum, are fully resolved, and it is agreed that a modification to the contract for either time or money, or both, is required.

On rare occasions, the parties have failed to reach agreement despite the good efforts of the DRB. In such cases, depending upon the specific contract language, one of the parties may initiate arbitration or litigation proceedings.

Contract specification language typically permits the DRB's report to be admitted as evidence in these subsequent proceedings. Experience has shown that this practice has been a major factor in the effectiveness of DRBs since it allows the litigation forum access to a reasoned written report prepared by knowledgeable industry experts who have witnessed, first hand, the construction of the project.

By virtue of the Three-Party Agreement, Board members may not participate in any subsequent arbitration or litigation proceedings. This provision is necessary because the DRB's findings and recommendations are prepared in a collaborative effort among all the Board members during private and confidential deliberations. This is an important aspect of the DRB process, and results in well-reasoned opinions that consider all aspects of the dispute. Attempts to modify this process by removing restrictions against participation in future proceedings may lead to less effective dispute resolution.

## **2 . 9      Termination of DRB Members**

The recommended three-party agreement provides that neither the owner nor contractor can unilaterally terminate any appointed Board members or the DRB itself. Individual Board members or the entire DRB can be terminated only by the agreement of both parties.

This provision prevents one party from changing the makeup of the DRB just because they don't like the recommendations. The other party may not want to terminate the DRB or any of the Board members when the DRB has been meeting with the parties for some time and is familiar with the parties and the work of the contract. If the party wanting to terminate the DRB or any Board member cannot convince the other party to agree to the termination, that party may stop participating (refuse to attend meetings and/or hearings), rather than continuing to use the process and simply reject unfavorable future DRB recommendations.

In this event, the parties can still solve their disputes with litigation. The party wanting to continue with the original DRB must decide whether they would rather litigate, or whether they believe it more in their interest to proceed with the DRB process using a new DRB or a new Board member.

Resolution of disputes is much more likely when both parties completely trust the DRB. This is more important than keeping a DRB simply because of its knowledge of the participants and the project.

If an entire DRB is replaced, either due to resignation or to dismissal by the parties, it should be asked to perform no further work other than completing any unfinished DRB reports on previously referred disputes for which hearings had been completed. Previous reports that were accepted by both parties should not be revisited by a new DRB. Having a new DRB revisit previous disputes, whose reports were rejected, may help the parties resolve the disputes rather than proceed to litigation.

The problems involved with removing Board members emphasize the importance of initially selecting impartial and neutral Board members. It is critical to spend enough time researching backgrounds, past experience, etc. of proposed members, rather than just accept whomever the other party proposes during the honeymoon phase of the contract.

## 2 . 10 Practice Guidelines for DRB Members

The Fundamental Canons of Ethics established by the DRBF [1.6 and 3.2] set forth the key elements of the behaviors to which all Board members must subscribe in order for the DRB process to function effectively. Because a key element in the success of the DRB process is the contracting parties' trust in each Board member's impartiality, this chapter provides practice guidelines to assist both the parties and DRB members in complying with the letter and the intent of the Canons of Ethics.

### Canon 1

#### 2.10.1 **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.**

The disclosure of interests or relationships between a Board member and a party involved in the contract that may create an appearance of partiality or bias is necessary to protect the credibility of the DRB. Board members must be perceived by both parties as impartial and independent individuals who are able to prepare reports and make recommendations that are not influenced by any member's relationship with other parties to the dispute.

The provisions of this Canon apply to all parties involved in the project.

Board members:

1. Must not have any financial interest in any party directly or indirectly involved in the project, or a financial interest in the contract or the project, except for payment for service on the DRB. "Financial interest" includes, for example, the beneficial ownership of shares in a party, whether held personally or by family members, other relatives, friends, or in legal arrangements such as trusts, partnerships, other companies or the like. The intention is that a member must not profit, however indirectly, from the results of DRB service except by payment established under the DRB arrangements.
2. Must disclose, in writing to both parties prior to appointment to the DRB, all current and previous employment by, or financial ties to, any party directly or indirectly involved in the project, including consultancy services on other projects. All previous and current service as a Board member, mediator, or arbitrator pursuant to other contracts involving one or more of the parties (or a constituent part of any of the parties) also must be disclosed. Full disclosure in advance of appointment will ensure that each party can assess and become satisfied that such contact will not affect the independence and impartiality of the member's service.
3. Must disclose, in writing to both parties prior to appointment, any and all professional or personal relationships with any director, officer, or employee of any party directly or indirectly

- The term "party directly involved in the project" includes the owner and contractor and all joint-venture partners individually.
- 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.

involved in the project, and any and all prior involvement in the project to which the contract relates. Persons with the depth of experience desired for DRB service often will have had some previous professional contact with one or more of the parties. Disclosure of relationships is to ensure that all parties are made aware of any non-financial relationships that might be perceived as affecting impartiality or independence. Examples would include a family relationship, whether by birth or marriage; employment of a relative; a close working relationship in a professional society; common membership on a board of directors of another company or organization; or classmates at a university.

4. Must not, while serving on a DRB, have an employment relationship in any capacity, including either as full- or part-time employee, as a consultant, expert witness, mediator or arbitrator, by parties involved in the contract, pursuant to the following guidelines:
  - a. Any such employment relationship with one of the parties directly involved in the contract is strictly prohibited.
  - b. Obtain written consent of both parties directly involved before agreeing to any such relationship with one of the parties indirectly involved in the contract.
  - c. Obtain written consent of both parties directly involved before serving as a Board member on another project involving one of those parties.
5. Must not, while serving on a DRB, engage in discussions or make any agreement regarding future employment relationships, either as a direct employee, as a consultant, or otherwise, pursuant to the following guidelines:
  - a. Any such discussions with one of the parties directly involved in the contract are strictly prohibited.
  - b. Obtain written consent of both parties directly involved before engaging in such discussions with one of the parties indirectly involved in the contract.
  - c. Obtain written consent of both parties directly involved before agreeing to serve as a Board member, mediator or arbitrator on another project involving one of those parties.
6. Disclose to the parties and to fellow Board members, in writing, any fact or circumstance that might be such as to cause either party to reasonably question their continued impartiality.

As with each aspect of disclosure, the standard of conduct must be such that a member not only must remain independent and impartial, but also always be perceived to be such. Disclosures must include any approach that could be perceived by either party to the contract as an attempt to influence the member's independence or impartiality. Any request to a Board member to resign from the DRB must be disclosed to the other party.

## Canon 2

### 2.10.2 **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.**

Board members must avoid giving any appearance of impropriety in communications with the parties and to abstain from any ex parte communications. Board members are appointed to undertake a serious task: to render reports on issues that may have important consequences for either or both parties. It is proper that these members behave in a serious and professional manner in all dealings with the parties. Accordingly, Board members must refrain from private conduct that might give rise to doubts regarding capability to discharge the task of serving on a DRB.

When in surroundings where a member is likely to be known by others in addition to the parties, a Board member must behave with discretion and in a manner befitting a person to whom the parties have committed in confidence matters of importance.

Examples of impropriety include:

- Private meetings or other private communications with one of the contracting parties.
- Giving advice on construction means or methods or contract administration.
- Making derogatory comments on the contract, the project, or the actions or inactions of the parties.
- Criticism of the design or constructability of the project.
- Criticism or disparagement of any party or other Board member.
- Prejudging or commenting on the merits of a potential issue.
- Offering legal advice or opinion.
- Discussion of future employment or other business opportunity.
- Acceptance of or giving gifts, including travel, entertainment, or meals, even during recognised holidays which feature exchanging of gifts.

Board members must be sensitive to the possibility that even the most innocent of comments can be perceived by a party as an indication of bias.

Comments at a DRB meeting such as, "I have known the contractor's project manager for years, and he knows what he is talking about," do not instill trust and confidence in the process from the perspective of the owner's representatives.

## Canon 3

### 2.10.3 **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.**

A Board member's position of trust must be unassailable. The DRB process provides a private and confidential means for parties to settle their contractual disputes. The parties' positions, arguments, and the DRB's findings and reports are usually not available to the general public except as may be

provided by the parties or by law (e.g. Freedom of Information Acts). This information should not be divulged except as required by law. Board members must respect this confidentiality and treat the contract and any other details of the project disclosed to the DRB, as well as all activities as Board members (which are clearly not public knowledge), as confidential among the parties and the members.

Except for reporting statistical data for the DRBF Database and listing the project on their resume, a Board member must make no disclosures, oral or written, regarding any matter disclosed during his/her activities on the DRB without the prior written permission of the parties. Information gained by a Board member during the DRB process must not be used, or passed on to others, with intent that the information be used for such person's personal advantage or gain.

## **Canon 4**

### **2.10.4 Board members shall conduct meetings and hearings in an expeditious, diligent, orderly, and impartial manner.**

The parties expect DRB proceedings will be conducted in an expeditious, diligent and impartial manner. During meetings and hearings members defer to the authority of the Chair on all procedural matters.

When appropriate during the hearing, ask questions where further explanation, information and clarification are necessary. The DRB must ensure that each party is permitted a reasonable opportunity for fully presenting its case and in responding to the opposing party's case. The goal of the hearing is to provide a forum for a full, impartial and complete discussion of the dispute.

A time period may be stipulated in the contract in which the DRB is to render its report. While extensions to the stipulated period may be necessary in certain cases, the DRB should attempt to adhere to the stated time periods in all but the most complicated disputes and referrals.

## **Canon 5**

### **2.10.5 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.**

The paramount purpose of the DRB process is impartial consideration of all disputes referred to the DRB. This requires that members act without favor to either party to the dispute. DRB reports must set forth the facts, and the DRB's findings and recommendations must be based on those facts, the provisions of the contract documents and prevailing law.

Members must make every effort to achieve unanimity of opinion with the other members regarding disputes referred to the DRB.

Criticizing a party's actions, personnel or procedures has no place in a DRB report, and will only lead to feelings that the DRB is biased against the recipient of such criticism. Rejection of the report is a likely end result. Keep the report professional, objective and impersonal.

## **2.11 Implementation**

The decision to implement a DRB is usually made by the owner before the project is bid, but can be added after award by change order. As described in Section 1 of this Manual, the owner's motivation to use DRBs is to avoid disputes whenever possible, facilitate dispute resolution, minimize cost, and avoid the unpredictability associated with litigation. In addition, bidders recognize the benefits of this dispute avoidance and resolution system and take contract provisions for the DRB into account when deciding whether to bid a project and when estimating the cost and risks associated with the project. However, in order for the DRB process to work effectively, it is imperative that the owner be committed to the basic principles. Incorporating a DRB on a project simply in an effort to obtain better bids could result in failure of the process.

The DRB process is extremely flexible and can be tailored to many situations, although the basic requirement of impartial and unbiased Board members must never be compromised.

Typically the DRB specification is incorporated into the contract, as either a "supplemental general provision," a "special provision," or a similar provision, depending upon the owner's format. The Guide Specification in Appendix 2A may be used by owners when preparing their contract. It reflects best practices that are critical to the success of the DRB process. It lists the required qualifications of, and sets forth the method for selecting Board members, specifies the method by which disputes are referred to the DRB for hearings, establishes certain hearing procedures including the use of outside experts if warranted, and includes the method for compensating Board members for their services.

The Three-Party Agreement (TPA) is to be included in the contract documents as a blank form of the agreement that will be signed by the owner, the contractor and the Board members after the DRB has been appointed. The TPA is the contract that binds the Board members and the contracting parties. It defines the DRB's scope of work and responsibilities, the owner's and contractor's responsibilities, and the time for beginning and completion of DRB activities. It is the agreement between these three parties, and thus differs from the DRB specification that is the provision of the contract between the owner and the contractor that establishes the means for administering the TPA.

When the DRB specification and TPA are incorporated into the contract documents other provisions of the contract must be coordinated to avoid conflicts and ambiguities. Such sections may include "Disputes," "Claims," and "Measurement and Payment."

### **2.11.1 The DRBF Guide Specification**

The DRBF Guide Specification refines and amplifies previous guide specifications and includes revisions based on recent DRB experience.

This specification has been reviewed by and thoroughly discussed with experienced owners, contractors and DRB practitioners. The provisions establish a framework to achieve the best possible results from the operation of DRBs. Revisions to this specification may reduce the effectiveness of the DRB and the DRB process as well as the quality of its contributions to the parties. Specifiers should carefully consider potential impacts of any changes to these specifications.

#### **2.11.1.1 Specification Commentary**

The following paragraphs comment on specific sections in the guide specification:

Article 1.C specifies that the provisions of the TPA take precedence over the specification. The Specification and TPA are complementary documents that serve different purposes. The TPA generally sets forth the obligations of the three parties, whereas the Specification establishes the means for administering the TPA. The TPA must take precedence over the DRB Specification because the DRB is not a party to the construction contract of which this Specification is a part.

Article 1.E requires that disputes be referred to the DRB as a condition precedent to initiating any subsequent dispute resolution process. The General Conditions may contain a disputes resolution clause that sets forth a “disputes ladder” of steps that must be followed before a dispute can be litigated. The DRB Specification is not intended to detail that procedure, but simply to note that, if a DRB is specified, it should be an early step in the process.

Article 2 is a placeholder to allow the owner to set aside specific elements of the contract that it does not want the DRB to review. This may be appropriate with respect to items that are not related to the contract between the owner and the contractor. Excepted elements should be kept to the minimum possible and must be explicitly defined. Limiting the DRB’s authority to technical issues and restricting their authority to hear disputes over contract interpretation is counterproductive, especially since all disputes are ultimately related to contract interpretation. DRB members are selected in part because of their familiarity with contract interpretation and, because of their periodic meetings and project updates, are in a better position to assess contract interpretation disputes in the context of project specific work activities than would be an arbitrator or the courts that are not familiar with the work.

Article 3 sets forth the qualifications for Board members. Some owners have added a clause allowing the parties to agree to relax these requirements. The argument is usually to the effect that the requirements may be impractical in some cases and that the parties should be given the flexibility to adapt if they so jointly agree. Relaxing these requirements is strongly discouraged because the language as written provides a proven method for selecting impartial Board members.

Article 4.B lists the material that should be requested of DRB nominees to assist the contracting parties to decide who should serve on the DRB. Information such as copies of prior DRB reports should not be requested since it may violate the confidentiality requirements.

The method of selection specified in Article 4.C is Method 1 of the three methods for member selection identified in Section 2.2.4 of this Manual. If another method is preferred, modify this language accordingly.

A summary of the contract dispute resolution process is included in Article 6. The DRB process is intended to supplement the disputes resolution provisions established by the contract, and not to replace them. Therefore, care must be taken to integrate the DRB provisions into the disputes resolution procedures established elsewhere in the contract. It is important that the contract provide a detailed roadmap for both the definition and resolution of disputes.

Effective dispute resolution can only be achieved if the disputes are addressed in a timely manner. For that reason, Article 6.B.2 permits either party to refer a dispute to the DRB if the other party fails to adhere to either the contract-specified timetable, or a “reasonable period of time” in the event that the contract does not specify a timetable.

The conduct of the hearing in Article 6.D.3 is intended to provide a broad framework within which the DRB may establish operating procedures and rules of conduct. The owner should be careful to not over-specify the conduct of the hearing.

The time periods set forth in Article 6.G.5.a are generally recommended, although owners who must first secure acceptance of the recommendation from a governing board may require additional time.

Article 6.G.5.c allows owners to accept an entitlement-only report in order to begin the negotiation of quantum, without incurring an obligation for any particular quantum amount.

### **2.11.1.2 Specification Variations**

Occasionally, some owners will modify the guideline DRB specifications in ways that attempt to “tilt the playing field” to their advantage or protect themselves from what they anticipate could be unfair treatment by the DRB.

The following are some variations that have been proposed for use on projects in North America:

- **Inadmissibility of DRB Reports in Subsequent Resolution Proceedings**

Article 1.D of the guide specification provides that DRB reports shall be admissible in subsequent dispute resolution proceedings. Changing this provision to make DRB reports inadmissible undermines the value of the entire DRB process. This lack of faith in the process may suggest to contractors that the owner is not sincere in providing for a DRB and is only including it to get the contractors to tender for the work or reduce their bids. Owners that have included this provision have often been frustrated by courts that, after learning from the contractor’s attorney of the DRB process and resulting report recommendation(s), have instructed the parties to settle the dispute in accordance with the DRB recommendation(s), provided the recommendation(s) did not violate contract law. Because of this past experience, many contractors now disregard an “inadmissibility” clause.

- **Binding Recommendations**

In North America, a DRB that provides binding recommendations can be perceived as little more than a three-member arbitration panel working under the limiting rules of a DRB (i.e. no sworn testimony, no cross examination, no lawyer participation, etc.). It is for these reasons that Article 1.D of the guide specification requires that DRB reports shall not be binding on either party. Binding recommendations from a DRB can change the hearing from a discussion among peers, wherein the parties maintain control of the final outcome, to a contentious, win-lose proceeding, often with lawyers working with and coaching the parties. One of the major reasons for the wide acceptance of the DRB process in North America is that its recommendations are not binding.

If binding recommendations are prescribed, they should only be used in special circumstances where both parties have specifically agreed to it in advance, and preferably allowing for final court appeal if contested within a stated period following submission of the report. In such an event, the recommendations should become “binding in the interim” and must be complied with until the courts overturn them.

Multinational forms of contract such as FIDIC and World Bank documents mandate the use of binding recommendations on their projects because these contracts are often performed in remote locations and/or in countries with legal systems that do not provide for equitable treatment of the parties to a construction contract and do not provide for effective enforceability of awards. The provision for binding recommendations gives assurance to foreign bidders that their rights to recovery under the contract will be protected. If the parties do not accept the DRB recommendation, it becomes “binding in the interim” and must be complied with until it is overturned in subsequent arbitration. See Section 4, “Multinational Practice” for further discussion.

- **Limits on Prior DRB Experience**

This variation wherein the contract specifies that each Board member shall have served on no more than “x” number of prior DRBs is directed at eliminating the perceived “good ole boy” group the parties may draw from in selecting Board members. The DRBF is supportive of increasing the number of qualified Board members available for participation on DRBs. However, having Board members who are experienced in administering the process is most beneficial to the project. The selection of new Board members who are inexperienced in the process should be limited and a new member should not serve as Chair. The DRBF is expanding its training workshops offered throughout the US and abroad to ensure that qualified candidates are available locally.

## **2.11.2 The Guide Three-Party Agreement**

The TPA is the contract that binds the Board members and the contracting parties. It establishes the scope of the work for the DRB, the responsibilities of the parties, the duration of the DRB services, Board member compensation and reimbursement of services, and legal relations. It is executed no later than at the first DRB meeting.

### **2.11.2.1 Three-Party Agreement Commentary**

The following paragraphs comment on specific sections in the guide TPA:

In Article VII.C, the “subject to limitations...” language is intended for per diem restrictions as may be contained in certain government contracts. In adopting this agreement, owners may wish to insert the appropriate restriction here, so that it is clear to all parties.

The language on quasi-judicial immunity in Article XI.C and the hold harmless language included in Article XI.D is intended to make it clear that the DRB members serve only to assist the parties in resolving their contract disputes. This language should not be modified. Doing so would suggest an attempt to hold the Board members personally or professionally liable for their efforts to resolve disputes for the parties. In addition, it would underscore a lack of confidence in the DRB process, and create an atmosphere that is not conducive to dispute resolution. Once named in a lawsuit the DRB member must provide a defense, hire an attorney, and be subjected to multiple court hearings, even though they should have no liability in the case. Further, the deliberations of the DRB are strictly confidential and subpoenas that require the members to discuss those deliberations put them in an awkward, if not impossible, situation. Specification language that requires DRB members to carry professional liability insurance does not help the dispute resolution process. Such insurance may be unavailable at any price for purchase by individuals, thus narrowing the field of potential members to those who are employed by a firm that can carry it – with all the potential conflicts of interest that may result.

Board members offer their services and recommendations based on many years of experience in the construction industry and on a belief that the DRB process leads to more effective dispute resolution than binding arbitration or litigation. Many desirable Board members come from the ranks of retired or semi-retired members of the construction industry. Attempts to make Board members personally or professionally liable for their services are likely to result in such experienced personnel becoming unwilling to serve.

### **2.11.2.2 Three-Party Agreement Variations**

Some contracts have required that the Board members be under separate contract to the party that nominated them, rather than one of the parties paying all of the member's invoices and then compensating (or crediting) the other party for 50% of the total charges. This sends a message (and the possible perception of bias) that each party's nominee is an employee (representative) of the nominating party, which is contrary to the process and ethics for DRB members. Further, some consulting contracts include mandatory indemnity and/or insurance provisions that are contrary to the terms of the TPA. Board members should resist entering into such separate contracts.

### **2.11.3 Variations to the Model DRB Process**

Several variations to the model DRB process have been used in attempts primarily to reduce cost and increase efficiency and/or effectiveness of the DRB.

The following paragraphs identify some of the variations that have been used. While some of the variations offer possibilities for success when used in certain circumstances, others have proven to be ineffective or even counterproductive. In any event, essentially all of the variations described below sacrifice one or more of the unique DRB benefits that make it one of the most successful alternative dispute resolution methods available to the construction industry.

#### **2.11.3.1 Five-Member DRB**

A five-member DRB has been used on some very large, complex projects involving many construction disciplines. In this variation two members are selected by each party (subject to agreement by the other party) and both parties jointly select a fifth member to serve as Chair. All five Board members receive regular reports and attend the periodic meetings and the dispute hearings. Upon being notified of a pending dispute to be referred to the DRB, the DRB chair selects two of the four other members to form a three-member panel that will hear the dispute and prepare the DRB's written report. The primary advantage is the ability to choose among four members in shaping a hearing panel consistent with the particular fields of expertise required. The obvious disadvantage is the increased cost of additional members. This variation is particularly attractive for large projects with many technical disciplines. It was used on the Channel Tunnel between England and France, which included not only design and construction of the tunnels, but also the permanent terminal facilities and the rolling stock. A similar variation was used in slightly different form for the Hong Kong Airport and the Docklands Railway in the UK.

#### **2.11.3.2 Interlocking Board Member**

For a large construction program or system with a number of contracts to be awarded to different contractors, there may be perceived benefits to having a single Board member serve on more than one DRB within the program. The primary advantage is that the interlocking member can provide consistency in the solution of disputes among the contracts. However, this advantage may be outweighed by the perception that the interlocking Board member could be partial to the party that nominated him or her.

### **2.11.3.3 Consolidated DRB**

Where multiple contracts are let on a single project with similar contract conditions, it may appear that efficiencies can be achieved by using a single “consolidated” DRB, particularly when the same contractor has multiple contracts with the same owner. When different contractors are awarded the contracts, Board members can be selected through a third party or by having all the contractors agree to the member selection procedures. This variation has distinct advantages when Board members must travel great distances. It can also be advantageous when there are critical interfaces among separate contractors. The obvious disadvantage is when the contracts involve a diversity of construction technologies that demand a variety of experience and special expertise that is not available on a single three-member DRB. Multiple contractors or diverse technologies may lead to one or more parties becoming dissatisfied with the sitting DRB. The main use of this type of DRB to date has been on the Central Artery Project in Boston, Massachusetts and on multinational projects where this variation is sometimes required by the lending agency.

### **2.11.3.4 Standing DRB**

Owners having a small number of contracts involving similar types of construction, all to be awarded in the same geographic area over a period of several years, have occasionally established a single “standing” DRB to gain efficiency. In this case, the local chapter of the contractor association represents the contractors in selection of the Board members since the DRB is established before the construction contracts have been awarded. Unless the standing Board members are acceptable to all the contractors, the apparent efficiencies can be quickly lost in reduced effectiveness (mutual acceptability) of the DRB. Some owners have addressed this concern by providing an option that the individual contractors do not have to use the standing DRB.

### **2.11.3.5 Regional DRB**

The Florida Department of Transportation uses a modification of the standby DRB called a Regional DRB; there are nine throughout Florida. All contracts that do not have a project specific DRB have access to the local regional DRB. Each Regional DRB has five members in order to allow the contractor some choice, and to allow flexibility in case there is a conflict of interest with any party to the contract. Disputes are heard by the three mutually selected members of the regional DRB.

As currently practiced, the regional DRBs suffer a significant disadvantage in that they do not periodically meet and visit the job site and do not receive progress updates, nor other documents for specific projects, until a dispute is referred to them. Although the regional nature and common type of construction (highways) tends to facilitate familiarity with and recognition of the Board members, the benefits of the DRB’s efforts towards dispute avoidance are lost.

### **2.11.3.6 Standby DRB**

In this variation, a DRB is selected but is on “standby” until called upon to consider a dispute. Similar to regional DRBs, this cost reducing variation sacrifices the tremendous advantages offered by periodic meetings and site visits, which not only ensure that Board members are familiar with the project but also encourage the parties to avoid disputes or to resolve them amicably. The standby DRB further limits the Board members’ opportunities to establish rapport and credibility with the parties, which greatly facilitates dispute resolution. Also lost is the ability for the Board members to get to know and

work with each other before the dispute hearing. The DRBF does not recommend use of standby DRBs.

### **2.11.3.7 Single-Member DRB**

This DRB variation has been operated successfully on some projects to date. A single-member DRB, however, is only acceptable when both parties are comfortable with a single neutral and when such a neutral, having all the desired qualifications, is available. Particularly suitable for small contracts that can't justify the cost of a three person DRB, a single-member DRB should always incorporate periodic meetings and site visits and interim progress updates, or it becomes little more than non-binding arbitration. A single DRB member must be especially skilled in all aspects of the construction and the DRB process. The contract should provide for the expansion of the DRB to three members in the event a major issue is brought before the DRB.

### **2.11.3.8 One-meeting DRB**

On some projects, a DRB has been selected promptly and had an organizational (kick-off) meeting with the parties to introduce the players and become familiar with the site. The DRB has then gone on standby until called on to consider a dispute. The Board members are kept familiar with the progress of the work by periodic reports. This sacrifices the advantages offered by periodic meetings and site visits, especially the benefits gained by having the DRB develop rapport and credibility with the parties and proactively encourage discussion about pending disputes. The DRBF does not recommend use of a one-meeting DRB.

### **2.11.3.9 DRB Organized After or Near Completion of the Project**

A DRB organized at the end of the project to handle accumulated disputes is similar to an informal, non-binding arbitration panel. At this point, the two parties have often developed an adversarial relationship and have taken "hard" positions. Many of the unique advantages of the DRB process are lost.

However, a DRB is much less expensive than arbitration or litigation and DRBs have successfully assisted the parties in settling disputes at this late stage, especially when the parties have not developed an adversarial relationship and genuinely want to settle their disputes without going to arbitration or litigation.