

# 3

## Members Guide

### 3 . 1 Introduction

This section of the Manual is written for Dispute Board members. It should be read in conjunction with corresponding chapters in the Users section, especially those portions on selection of the Chair, DRB meetings and hearings.

This section incorporates the extensive experience gained with DRBs since the 1996 Manual, and identifies practices that work best. It describes:

- The Code of Ethics [3.2]
- Establishment of the DRB [3.3]
  - Identification of Board members
  - Member selection process
  - Selection of Chair
  - Preparation for first meeting with the parties
  - Preliminary meeting of Board members
- Operation of the DRB [3.4]
  - First meeting with the parties
  - Subsequent meetings with the parties
  - Conduct of DRB during meetings and site visits
  - Board member duties between meetings
  - Board Chair duties between meetings
  - Behaviors that obstruct the DRB process
- Advisory Opinions [3.5]
- Hearings [3.6]
  - Preparations
  - Rebuttal Papers
  - Conducting hearings
  - Disputes involving subcontractors
  - Disputes over the DRB's authority to hear disputes
  - A party's refusal to attend
- Deliberations and Report [3.7]
  - Deliberations
  - Report and recommendations
  - Minority reports
  - Delivering the report
  - Acceptance/rejection
  - Clarifications
  - Reconsideration or appeal to the DRB

- Resignation [3.8]

Appendices to this section are:

- Example of Disclosure Statement – Appendix 3A\*
- Example of DRB Operating Procedures – Appendix 3B\*
- Examples of Meeting Agendas – Appendix 3C\*
- Example of Hearing Agenda – Appendix 3D\*
- Sample Format of DRB Report – Appendix 3E
- Examples of Reports – Appendix 3F

This section's usefulness will vary depending on the user's familiarity and past experience with the process, but should be of interest to all practitioners. Board members who are new to the DRB process and members that have experienced difficulties with the process may find this section particularly helpful.

The DRB process is intended to be flexible. Application can vary widely depending on the situation and the parties involved. However, the Best Practice Guidelines [1.2.2] are universally applicable and modifications to any of these may jeopardize the process. Other facets, such as those covered in the chapters on operation, advisory opinions, hearings, and resignation are subject to the provisions of the contract, and to the situation and the parties. The material in these chapters and the appendices present common application and is not intended to be prescriptive.

This section will be revised as necessary to reflect experience gained through continued use of DRBs.

*Appendices A, B, C and D can be downloaded as Microsoft Word documents so they may be customized.*

## **3 . 2      The DRBF Code of Ethics**

The Fundamental Canons of the DRBF Code of Ethics are set forth in Chapter 1.6 and discussed in Chapter 2.10. For ease of reference, and to emphasize their importance, the Canons of the Code of Ethics are listed again in this chapter.

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

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

## 3.3 Establishment of the DRB

### 3.3.1 Identification of Board Member Candidates

The contracting parties identify prospective members in a number of ways. Often they know individuals from previous work or prospective members are referred by consultants. On occasion owners have advertised for Letters of Interest.

Occasionally prospective Board members learn of a project that they have reason to believe will incorporate the DRB process, and they make their interest in serving on such a DRB known to the parties. Soliciting DRB assignments by direct communication with owners or contractors requires care. However, it is reasonable to let the parties know of your interest. In communicating this with the parties it is particularly important to emphasize that, if selected, you will have no allegiance to either party, irrespective of the nominating party. This assurance is consistent with the DRBF Code of Ethics and basic DRB principles.

Prospective members should carefully consider the following before agreeing to serve:

- Expertise in the type of construction involved,
- Availability during the anticipated duration of construction,
- Previous involvement in the project,
- Relationships that could lead to a perception of bias, including previous involvement with any of the parties directly or indirectly involved and/or their key project personnel, and
- Anticipation of future assignments with either party that could influence impartiality.

### 3.3.2 Member Selection Process

Steps of the member selection process include:

1. The parties' inquiry into prospective Board member's interest, experience and availability.
2. Transmittal of the following to the prospective Board members for their review and consideration:
  - a. DRB specification and TPA,
  - b. Project description,
  - c. Names of the directly and indirectly involved parties and their key personnel assigned to the project and,
  - d. Names of other prospective Board members under consideration.
3. The prospective Board member's review of the DRB specification, TPA, and other materials provided.

The term "party directly involved in the project" includes the owner and contractor and each joint-venture partner.

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. Depending upon how close the various funding agencies are to the operations of the project, they could also be considered "parties indirectly involved" and be subject to the same level of disclosure.

4. Submittal of prospective Board member's disclosure statement, resume and tabulation of DRB experience.
5. Selection and appointment.

Make it clear to all parties that the findings and recommendations will be based solely on the provisions of the contract, the facts of any dispute and prevailing law. This emphasizes to the parties that selection of the DRB must not be based upon the anticipation of the nominating party receiving favorable recommendations or other considerations from any of the Board members.

It is desirable that prospective members should be experienced in the type of contract and type of construction in addition to fully understanding the DRB process. Candidates should carefully review the DRB sections of the contract documents and the TPA to assure that the provisions are acceptable. Candidates should not agree to serve on a DRB that would require them to be in conflict with the Code of Ethics, the basic DRB principles or would place the Board member in a position of personal or professional liability. Candidates are encouraged to express the reasons they decline to serve.

During the selection process the parties will ask prospective members for their resume, a disclosure statement, and a tabulation of their DRB experience. (If these are not requested, the nominees should provide these materials on their own initiative.) It is imperative that individuals being considered for DRB assignments disclose all situations that could be interpreted as partiality or bias.

Prospective members must fully disclose all past, current and anticipated future relationships with all parties directly and indirectly involved in the project. In order to prepare these disclosure statements, prospective Board members must have a list of all the parties involved. Usually all subcontractors, suppliers or consultants are not known at the start of construction. However, when these do become known, immediate disclosure of any such relationships must be made.

When performing a self-evaluation of how others may view your impartiality, the DRBF recommends evaluating past, current and future relationships with all parties to the contract, both direct and indirect in the following areas:

1. Direct Employment
2. Consulting Assignments
3. Financial Ties
4. Close Personal or Professional Relationships
5. DRB Member on another project involving one or more of the parties

Guidelines for prohibited relationships, those that must be disclosed, and those where written permission should be obtained from the parties, are contained in Section 2.2.2 of this Manual. These disclosures are intended to ensure that both parties are fully aware of all relationships between candidates and any parties involved in the project when making Board member selections. Failure to fully comply could result in not being approved as a Board member. In addition, if already a Board member, failure to stay in compliance could result in dismissal. It is always better to err on the side of over disclosure.

To ensure that the tabulation of DRB experience is complete, show the name and location of the project, dates of DRB service, names of owner and contractor, and origin of membership – whether nominated by the owner or contractor, by the other Board members, or jointly by both parties. Also indicate the DRB's on which you served as Chair. It is suggested that the tabulation include the names of the other Board members, the contract value of the project and the number of disputes

heard. (See Appendix 3A for an example Disclosure Statement, including a tabulation of DRB experience.)

Depending upon specific contract language regarding Board member compensation, candidates may be asked for a fee schedule.

### **3.3.3 Selection of Third Member and the Chair**

The Chair can be selected by the parties (if the parties select all three members) or by the Board. If the Chair has not been selected by the parties, this is the first order of business of the DRB.

When the parties use a selection method wherein the parties select only two members, these two must first nominate a third. The first two members should review the plans and specifications as necessary to understand the work and select a third member who will complement their experience. The prospective third member must submit the disclosure statement, resume and tabulation of DRB experience as described above for review by the parties.

The DRB Chair is a key to the DRB's successful operation. The third member should not automatically be the Chair. Selection of the Chair should include serious consideration of the most able and successful Board member with the skill and experience to lead the DRB in resolving issues before they become disputes as well as managing potentially contentious meetings and deliberations.

### **3.3.4 Preparation for Initial Meeting with the Parties**

As soon as possible after selection and approval of all three Board members, the Chair and the parties should establish a date for the first DRB meeting.

Determine how familiar the parties are with the DRB process. It is good practice to give each party a copy of this Manual to assure that everyone is working from the same guidelines. This is particularly important if either or both parties are new to the process.

Early in a construction project the parties may have different priorities than starting the DRB. The Chair should emphasize the importance of getting the DRB introduced to the project and project participants promptly. Some contracts specify the time frame for the initial DRB meeting.

The Chair, in consultation with the two other Board members, should prepare the draft DRB Operating Procedures. After conferring with the parties, and discussing with the other Board members, the Chair prepares the agenda for the first meeting with the parties. (See Appendix 3C for example agendas.) The draft Operating Procedures and the agenda should be submitted to the parties at least two weeks prior to the first DRB meeting.

The Chair should prepare a preliminary list with the mail and e-mail addresses of each Board member, and the phone, cell phone, and fax numbers of the Chair and each party's tentative contact with the Chair. This list will be used by the parties and the DRB to send progress reports, invoices, payments, etc.

The Board members should perform a brief familiarity review of critical portions of the contract documents prior to the first meeting with the parties.

### **3.3.5 Private Meeting of Board Members**

The Board members should meet privately before the first meeting with the parties to become acquainted and to agree on how to implement the DRB process. A key element for success of the DRB process is for the Board members to demonstrate their general unanimity and competence to the parties.

The time required for this meeting will depend on the members' prior experience with the DRB process and with each other. This discussion should include the following matters:

1. The role of the Chair. Ideally the DRB is a partnership of equals with the Chair having the additional duties of coordinating the work of the DRB, communicating with the parties, chairing the meetings and hearings, and making procedural decisions.
2. Understanding of the process. Confirm that all Board members correctly understand the DRB process and are committed to their duties and responsibilities as Board members.
3. The importance of impartiality. Discuss and affirm the principle that each Board member is to be impartial and neutral in all respects. If there are any questions of possible conflict of interest or bias, they must be addressed at the first meeting with the parties and resolved.
4. Continuous disclosure. Reaffirm the continuing obligation to disclose any relationships that could give the perception of Board member bias.
5. Communications. Agree that all communications between the DRB and the contracting parties will be made only through the Chair except during meetings with the parties. (This does not include distribution of documents by the parties which should be made directly to each Board member.)
6. Plans for future DRB meetings.
  - The need to schedule more than two periodic meetings in advance to accommodate other commitments.
  - Extent to which the Board should be proactive to encourage resolution of issues before they become disputes.
  - The need to hear disputes in a timely manner.
  - The need for all Board members to remain together during site tours and for each party to have a representative present with the Board.
  - Travel logistics. In order to demonstrate the DRB's function as a group, not as individuals, Board members are encouraged to arrive at meetings together.
7. Discuss what progress documents to request from the parties and the time anticipated to review those documents.

## 3.4 Operation of the DRB

### 3.4.1 First Meeting with the Parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **3.4.2 Subsequent Meetings with the Parties**

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

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

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

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

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

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

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

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

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

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

### **3.4.3 Board Member Conduct During Meetings and Site Visits**

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

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

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

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

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

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

### **3.4.4 Board Member Duties Between Meetings**

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

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

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

### **3.4.5 DRB Chair Duties Between Meetings**

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

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

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

### **3.4.6 Behaviors that Obstruct the DRB Process**

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

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

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

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

## 3.5 Advisory Opinions

### 3.5.1 Introduction

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

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

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

### 3.5.2 Method

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

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

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

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

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

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

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

## **3.6 Hearings**

### **3.6.1 Preparations**

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

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

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

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

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

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

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

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

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

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

### **3.6.2 Position Papers**

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

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

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

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

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

### **3.6.3 Rebuttal Papers**

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

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

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

### 3.6.4 Conducting Hearings

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

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

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

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

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

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

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

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

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

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

### **3.6.5 Disputes Involving Subcontractors**

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

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

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

### **3.6.6 Disputes Over the DRB's Authority to Hear Disputes**

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

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

### **3.6.7 A Party's Refusal to Attend**

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

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

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

## **3.7 Deliberations and Report**

### **3.7.1 Deliberations**

After the hearing is closed, the DRB meets privately to discuss the dispute and reach a recommendation. If all three members have generally similar conclusions, the main effort will be directed toward composing the report. If not, one or more sessions may be held to reconcile differences. DRB deliberations can be conducted at any convenient location. Care should be exercised to ensure privacy.

In order to ensure timely completion of the report, the DRB may prepare a schedule covering all anticipated steps to complete its deliberations and prepare its report, taking into account other commitments of the individual members.

Basic objectives of the deliberations include:

- Finding and agreeing on the pertinent facts
- Reaching agreement on interpretation of the pertinent contract requirements
- Agreeing on the DRB's position with respect to the issues, questions, and disputes posed by the parties in the referral
- Composing the report so that the recommendation and the supporting rationale are straightforward and easy to understand.

If time allows and Board members are available, initial deliberations are held and an outline of the report is prepared immediately after the hearing. Later, drafts of the report are exchanged by facsimile or e-mail, followed by telephone conference discussions until agreement is reached. The Chair should take the lead in organizing these activities and keeping them on schedule.

Details of the dispute must never be discussed outside the DRB deliberations.

If, during the deliberations, the need arises for additional information, such as copies of documents not in the DRB's possession, a request may be made to either party with a copy of the request to the other party. The additional information is provided to the other party as well as the DRB. The DRB must not consider additional information in support of or against either party without both parties having the opportunity to address the additional information.

### **3.7.2 Report and Recommendations**

Recommendations must be based on the information presented by the parties and must be compatible with all applicable provisions of the contract, the facts and circumstances related to the dispute and applicable laws and regulations. It is most important that the Board members be familiar with and thoroughly consider all applicable provisions of the contract when preparing their report. Depending on the facts and circumstances, the DRB may need to consider relevant industry practice and standards in developing its findings and conclusions. However, the DRB must not ignore any provision of the contract documents, even if not discussed by either party.

DRBs must not recommend a compromise settlement according to what they believe would be acceptable to both the parties. It is essential that all recommendations be based solely on the provisions of the contract, the facts of the dispute and applicable laws and regulations. Any

recommendation that is not consistent with the contract language, facts, and circumstances of the dispute will likely undermine the credibility of the DRB.

In some cases, various provisions of the contract may be perceived by some of the Board members as unfair to one of the parties. Individual notions of “fairness” or “equity” are not part of the contract, and have no place in the DRB process. Relief from an unfair contract is with the courts.

The DRB must limit its recommendations and reports to the issues in dispute. The parties, and not the DRB, determine which issues are referred to the DRB.

The parties may pose questions to the DRB in their position papers. Well-considered answers to these questions may be critical to the resolution of the dispute. The DRB should endeavor to respond to such questions, to the extent reasonable and necessary.

Even when the DRB has initially been asked to address only entitlement, later if both parties agree the DRB may include suggested guidelines for resolving quantum.

While drafting the report, it should be kept in mind that reports are usually non-binding. The DRB must therefore strive to convince both parties of the wisdom and benefits of accepting the report. This is best accomplished by demonstrating that all points raised in the position papers and at the hearing have been considered. Every important point of each party's position should be summarized, both points accepted as well as those rejected by the DRB. The DRB's logic and line of reasoning should be fully explained, in a clear and logical sequence that both parties can fully understand and accept. Do not disparage either party's positions or presentations.

Reports should neither be extremely brief, with little explanation, nor long and wordy, with pages of material having little relevance to the basic issues in dispute. Both of these extremes should be avoided. The report should be concise, yet detailed enough for a member of either party, including those unfamiliar with the dispute, to adequately understand the issue, the positions of the parties and the reasoning supporting the recommendations of the DRB. The report must be professional, objective and impersonal.

It is often helpful to include a chronology of the events associated with and leading to the dispute, and a listing of the particular sections of the contract cited by each party in support of their position.

Writing to convince an owner's board of directors or other decision makers not present at the hearing, must be more thorough and detailed than might be necessary to convince the project personnel alone, or the head of the contractor firm. All disputes, particularly those involving large dollar amounts and disputes that could result in arbitration or litigation, deserve a thorough, detailed and convincing report, bearing in mind that the DRB report will almost certainly be admissible as evidence in any subsequent proceedings.

One Board member is usually delegated to assemble the first draft of the report. For complex disputes having several different issues, this work may be divided among the members. The first draft is circulated among the members for comments and revisions. This process is continued, with the wording of all elements carefully considered until the document is finalized.

In extremely complex disputes, especially when the parties disagree on many facts and when disputes involve many documents, the DRB may wish to issue a draft of its understanding of the positions of the parties and facts of the dispute, not including the recommendations, prior to preparing its complete report. Time for review by the parties should be limited. Establish a deadline for the parties to submit their comments after conferring with them.

### **3.7.3 Minority Reports**

The goal is always to produce a unanimous report. By thoroughly reviewing and exploring one another's perspectives and by reasonable compromise, the members can almost always prepare a report acceptable to all.

Dissenting opinions are discouraged and should be offered only when the dissenting member strongly disagrees with the majority opinion. Keep in mind that a dissenting opinion may undermine the entire DRB process on the project, especially the aspect of resolving issues before they become disputes. If, however, in spite of their best efforts, the DRB is unable to reach a unanimous conclusion, the dissenting member, preferably with input for the other Board members, prepares a minority position with supporting rationale. This is included with the majority report.

Whether the report is signed so as to identify the dissenting member depends on the circumstances of the dissent and is up to the DRB. This decision deserves careful consideration.

- On one hand, if the dissenting member is identified and was nominated by the party that did not prevail, that party may be more likely to reject the report.
- On the other hand, if the DRB has established a policy of not identifying the dissenting member, the ability of the other Board members to convince the reluctant member to accept the majority opinion is diminished.

The DRB's policy on identifying the dissenting member must be decided for each dispute, taking into account the above considerations.

### **3.7.4 Delivering the Report**

A common practice is to prepare and sign the signature page and later, when the report is complete, attach it and submit it by facsimile, mail or overnight delivery to the parties. This page should have identifying material at the top such as the dispute number and name. An alternative practice is to simultaneously transmit an unsigned copy by facsimile or e-mail to the parties, with the record copies circulated by mail to the other Board members for signatures and then sent on by mail to the parties. Another method, by agreement of all parties, is for the Chair to sign the report: "FOR AND WITH THE CONCURRENCE OF ALL MEMBERS."

### **3.7.5 Acceptance/Rejection**

In choosing to accept or reject a recommendation, the parties look primarily at the rationale expressed in the report. If the rationale does not adequately support the recommendation, the parties are not likely to accept it.

When a party does not accept a DRB recommendation, the dispute may continue on to other venues for resolution. However, the parties almost always continue their negotiations using the DRB report as a guide, and those negotiations are usually successful.

### **3.7.6 Clarifications**

Detailed requests for clarification of specific elements of a DRB report can be made by either party and should be made in writing within the contractually specified time period following receipt of the report, with a copy of the request going to the other party.

Sometimes a party is honestly unable to understand the rationale for a recommendation and thus has a legitimate basis for seeking clarification. Occasionally what was believed to be agreement on a factual matter turns out to be incorrect and clarification is needed. The DRB may only need to address specific questions for the parties to become convinced to accept the report. The DRB should respond in writing to any requests for clarification.

Clarifications should be completed as quickly as possible. It is common to specify that clarification requests be submitted within 10 days, and for the DRB to respond within a similar time frame.
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Occasionally a party will submit what it considers to be a request for clarification, but which in reality is nothing more than an attempt to re-argue the dispute. DRBs should tactfully decline to be drawn into an argument with either party about whether the DRB correctly decided the dispute or not.

Each party should be permitted to submit only one request for clarification of any individual DRB report.

### **3.7.7 Reconsideration or Appeal to the DRB**

Reconsideration should be the exception, not the rule. The standards, criteria and time frame for reconsideration should be set forth in the DRB specification; if they are not, they should be established by the DRB in the Operating Procedures. Reconsideration should only be based on evidence not available prior to or during the hearing. A valid request for reconsideration depends on submission of new evidence or a reasonable demonstration that the DRB misunderstood or failed to consider pertinent facts of the dispute. The DRB should honor a request for reconsideration only when reconsideration is justified. If one party submits new evidence to the DRB, the other party must be given an opportunity to review and respond to that evidence before the DRB determines whether reconsideration of its report is warranted.

Reconsideration should not be granted simply because one party either

- doesn't like the report,
- wants to portray evidence in a different way,
- wants to present information that was available but not offered at the hearing,
- or to assert an additional argument.

Rearguing the same issue on the same facts is not productive and the DRB should respectfully decline to reconsider the recommendation.

Each party should be permitted only one request for reconsideration for each DRB report.

Usually, an additional hearing is not needed. The DRB reviews any new evidence together with commentary from the parties and, if necessary, prepares a clarified or revised report that responds to the issues raised.

## 3.8 Resignation

The Three-Party Agreement provides that the entire DRB, or any individual Board member, may be terminated with agreement of both contracting parties. A more difficult situation can occur when one or more of the Board members are asked to resign by only one of the parties. Determining how this request should be handled is difficult, the issues are complex, and the resulting actions can be controversial. The underlying reasons behind the resignation request must be considered.

It may be that one of the parties simply doesn't like the reports made by the DRB and is obstructing the process in order to gain an advantage with either future hearings or at subsequent dispute resolution venues. If the Board members have been nominated by individual parties instead of collectively by both, the nominating party may feel that they are entitled to request the resignation of the member that they nominated. However, neither the typical specification, nor the recommended Three-Party Agreement provides for this option. Acceding to a resignation request made for this reason is not recommended, because that would allow the parties to think that they could control the reports by changing Board members. This encourages wrong behavior on the part of the obstructing party.

Occasionally one of the contracting parties is reluctant to refer disputes to a DRB hearing. This may be because they have lost faith in the DRB's impartiality. Board members must take proactive measures to avoid this situation. If the Chair senses that this is a possibility, he or she should investigate the situation and do everything possible to address it, including discussions and correspondence with both parties to understand their concerns and points of view. After thorough investigation and discussion among the Board members:

- If the DRB concludes that one of the members is an obstacle to the dispute resolution process, the member in question should resign for the benefit of the project.
- If the DRB concludes that despite the fact that none of the Board members have violated any principles of impartiality, one or both of the contracting parties no longer trust the DRB to be impartial, then the DRB has lost much of its value and replacement of the entire DRB with new Board members should be considered. In such a case, the entire DRB should offer its resignation, in order to benefit the project's dispute resolution process. The decision to accept this resignation resides with the contracting parties, which should agree to any such action. In the event that the parties disagree as to whether the DRB should be replaced, then the resignation is deemed not to be accepted. This is so that neither party is deprived of the benefit of the contractual dispute resolution process. The effective date of such an action must be contingent on the parties having selected new Board members and successfully establishing the replacement DRB.

When considering resignation, Board members are sometimes concerned with issues such as the loss of members' project knowledge, the value of the members' experience, and how strongly the other party and/or the other Board members feel about resignation. Although these are significant reasons for the success of the DRB process, they should not be overriding factors in the decision to resign.

Members must carefully consider if their resignation will contribute to the success of the project and the process. They must resign if there's a chance it could help the parties resolve their disputes without litigation, but resist any request that is based upon one party's attempt to gain an advantage over the other party.