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Dispute Review Boards (DRBs): Real Time Avoidance and Resolution of Disputes

By Kurt Dettman

The DRB process appears to be effective in assisting in the resolution of disputes, leading to more timely completion of projects, reduced cost overruns and avoidance of claims. Utilization of DRBs on larger projects can serve to motivate greater cooperation between parties resulting in fewer unresolved claims and a reduced litigation potential.

Florida Department of Transportation
Office of Inspector General

The Dispute Review Board being performed on the CA/T Project is truly a Best Practice within the industry. It is practical, reliable and cost-effective. The track record of resolving issues at a very early stage is clearly evident and should be shared with other State DOTs.

U.S. Federal Highway Administration, “Process Review of Dispute
Review Board Process on Central Artery/Ted Williams Tunnel Project”

Introduction

What is it about DRBs that warrant such strong affirmative comments by two governmental agencies involved in construction projects? This article will briefly summarize some basic facts about how DRBs operate and analyze why they work well to resolve almost all the disputes that come before them.

What is a DRB?

A typical DRB is comprised of three members¹ who are selected for their extensive experience in the work of the contract and proven track record in understanding and being able to resolve claims. Most owners also have rigorous criteria to avoid conflicts of interest since the DRB members are expected to be impartial. Because all DRB members must be approved by both parties, they are not “party representatives” on the DRB.

Selection processes vary, but usually the owner and the contractor each propose to the other party a nominee meeting set qualifications criteria, and the other party approves the appointment. Typically, the two nominees, once approved, select a Chair, who is subject both parties’ approval. The Chair

¹ Some owners use one-person DRBs on smaller projects. A one-person DRB operates in the same manner as a three-person DRB. Sometimes the one-person DRB is referred to as a “Dispute Resolution Advisor.”

manages the actions of the DRB itself and the overall DRB process. Most DRBs are comprised of engineers, contractors and construction managers. Some owners prefer to have a construction lawyer serve as the Chair, with the two “wing panelists” providing the technical expertise.

The parties’ and the DRB’s respective responsibilities are set out in a “Three Party Agreement” (the three parties being the owner, the contractor, and the DRB). On most projects the owner and the contractor share equally in the costs of the DRB. Three Party Agreements typically include, among other things, the duties and responsibilities of the three parties, an agreement not to subpoena DRB members or their papers in subsequent legal proceedings, and an indemnification/hold harmless provision in favor of the DRB. The purpose of these provisions is to ensure that the DRB is providing its expert, objective recommendations without fear of later repercussions—in essence, the parties want DRBs “to call it like they see it.”

How Does a DRB Operate?

The DRB is organized at the beginning of construction and meets periodically at the jobsite as determined by the pace of construction operations. On some projects the DRB will meet at the project once per month (for example, building projects), but more typically it meets once per quarter (for example, highway projects). Although the frequency of meetings can vary depending on the type of project, the fundamental goal is to keep the DRB fully informed about the progress of the job. In between meetings the DRB is supplied with regularly prepared project documents such as progress meeting minutes and schedule updates. In this way, the DRB keeps abreast of job progress and developments as the project unfolds.

Shortly after it is appointed, the DRB usually issues “operating procedures” that spell out how the DRB will implement its process. These typically cover logistics such as periodic meetings, how and in what time frames disputes will be processed, and rules to prevent *ex parte* communications and maintain the neutrality of the DRB. The DRB reviews the operating procedures with the parties before they are adopted to make sure that the parties understand and accept them.

At the initial job site meeting, the DRB is provided with the contract plans and specifications, gets a briefing from the owner’s and contractor’s personnel about the plan for constructing the project and any challenges that the parties foresee, and familiarizes itself the project’s procedures, documents, and stakeholders. At the periodic job site visits the DRB gets an update on the progress of construction, hears about issues that may cause cost increases or schedule delays, and is apprised of any disputes that may become claims that the DRB may be asked to review. The DRB also conducts a job site visit, with the parties present, to observe first-hand the status of the work in the field.

At these periodic meetings the DRB encourages the parties to engage in an open dialogue, put all open issues on the table, and work together to resolve issues and potential disputes. One of the other positive effects of the regular DRB meeting is that often senior people from both the owner and contractor organizations attend the meetings. This means not only that senior decision makers from both organizations learn about what is actually happening on the project, but also means that they can make decisions at or as a result of the meeting. This senior level interaction can have the ameliorative effect of heading off potential issues that, left unresolved, could ripen into disputes.

How Does The DRB Help Resolve Disputes?

Most construction contracts have notice of claim and step negotiation processes that are a prerequisite to taking a dispute to the DRB. Once the process has run its course without resolution,

either party may formally bring a dispute to the DRB. The DRB Chair typically will confer with the parties on a particular claim to ensure collective understanding on: what is at issue in the claim and what the parties are asking the DRB to do; the form, length and content of papers and documents that will be submitted; scheduling all the steps of the process; and laying the groundwork for the hearing itself. Prior to the hearing the Chair usually confers again with the parties to ensure that the hearing process is understood and that appropriate preparations are being made by both parties.

One of the key considerations that the DRB takes into account in managing the hearing process is that lawyers are not involved (at least directly) and the process does not have the formal process trappings of arbitration or litigation. Indeed, most DRB specifications limit the role of lawyers in the hearing process, except as to purely legal issues. Moreover, although the DRB will be dealing with sophisticated construction professionals, they may not be dealing with organizations that are used to presenting claims to third party, expert boards. The DRB may need to assist the parties in shaping the presentation process, both written and oral. The DRB also will have to consider the logistics of the hearing, including who will participate in the hearing (witnesses, experts, lawyers and senior executives), how long it will take, etc.

The DRB hearing itself is informal—although the parties often use a PowerPoint format, the presentations usually consist of each side explaining its position to the DRB. There is no argument by legal counsel (in most hearings lawyers are not even present), swearing of witnesses, marking of exhibits, cross examination, or stenographic record. Despite its informality, however, the parties are given equal time to make their arguments and counter-arguments and answer the DRB's questions.

The hearing process itself is quite efficient because the DRB brings to the hearing many years of dealing with construction disputes, knows the presenters, and has actual first-hand knowledge of the project issues that gave rise to the dispute before them. This makes the DRB hearings very efficient, with incisive questioning by the DRB and full participation by the people who are actually building the job. This informal but focused process can be contrasted with other (lengthy) hearing processes where the presentations are made through lawyer direct examination and cross-examination of witnesses or presentations by hired consultants or experts who were never on the job.

Some owners also use the DRB in an advisory role on issues before they become formal disputes. Under the advisory opinion process, the parties agree to informally bring an issue to the DRB. Usually the parties each prepare a one page summary of the issue and provide the DRB with key documents. The DRB then meets with the parties (usually at the regular site visit) and listens to the parties' views on the issue. The DRB confers in private and then returns to give the parties oral feedback on the DRB's view of the issue based on the information presented. There is no record kept of the process, and the parties do not have to accept or reject the DRB's views, but use its feedback for continued negotiations. If the parties do not resolve the issue they can still resort to the formal DRB process and "the slate is wiped clean" at the formal hearing both for the parties and the DRB.

As to formal disputes, after the hearing concludes, the DRB confers and usually within 30 days after the hearing issues to both parties detailed findings and recommendations on how to resolve the dispute. Many times the parties will ask the DRB to give its recommendations on entitlement only, on the assumption that if they agree on entitlement, they can also agree on the costs. But, the DRB remains available to hear the cost elements of the dispute if the parties cannot work it out.

It is important to note that the DRB does not act in a mediator-like role or base its findings and recommendations on "equity"—the DRB gives the parties its interpretation of the proper outcome of the dispute based on the facts presented, the pertinent project records, and the applicable contract

terms or law. Indeed, most Three Party Agreements explicitly require the DRB to base its findings and recommendations only on the facts presented, the contract/contract documents, and applicable law.

DRB findings and recommendations are non-binding—the parties are free to accept them, reject them, or keep negotiating. The reality, however, is that the parties have received a “sneak preview” of what might happen if they were to proceed on to arbitration or litigation. There is also the view that the parties are getting the best possible analysis of the claim by objective and project-knowledgeable industry experts, in contrast to, for example, a judge and jury that do not know very much about construction.

The Dispute Resolution Board Foundation² recommends that although DRB findings and recommendations should be non-binding, they should nonetheless be admissible in subsequent legal proceedings. The basis for this recommendation is that it will require the parties to take the DRB’s recommendations seriously as they may not be able to back away from it later. The admissibility or non-admissibility of DRB findings and recommendations is something that the owner will need to consider in gauging whether it will encourage resolution of claims at the project level.

What Makes DRBs Effective?³

There are several factors that make DRBs effective, including the following:

- The parties are committed to a process that is intended to resolve disputes at the project level
- DRB members are respected and experienced industry professionals
- DRB members are neutral (impartial) and objective
- DRB members are chosen by consensus and costs are shared equally so that both parties have an investment, both managerial and monetary, in the process
- The DRB process starts at the beginning of the project and is in place throughout the lifecycle of the project
- As a result of its involvement in the project, the DRB becomes familiar with the players, the issues and the project’s history
- The DRB meetings allow periodic, open communication among all project participants that helps avoid issues becoming disputes

² The Dispute Resolution Board Foundation is the non-profit organization that promotes the use of DRBs around the world. Its web site, www.drb.org, has a wealth of information about DRBs, including a Manual, a model Three Party Agreement, and other DRB-related paperwork.

³ A 2003 national survey of construction industry professionals (111 respondents) who had worked on construction dispute resolution, in aggregate, on 1,423 projects dealing with 1,695 disputes, found that 54% stated DRBs were appropriate for all types of construction projects; 35% stated DRBs reduced the bid price; and 99% believed that DRBs improved communications on a project. A study by the Florida Department of Transportation concluded that contracts lasting longer than one year with DRBs had less cost and time overruns than comparable contracts without DRBs. (Statistics courtesy of the DRBF).

- The DRB meetings promote the involvement of all stakeholders and senior decision makers
- The relatively informal hearing process permits the parties themselves (as opposed to their lawyers) an opportunity to present their sides of the claim
- The hearing process is thorough, but focused—it is, therefore, much less expensive than arbitration or litigation
- The findings and recommendations are detailed so that the parties have the benefit of the DRB's evaluation of the claim in all of its aspects (factual, contractual, and legal)
- The DRB makes its findings and recommendations based on the information presented by the parties and within the four corners of the contract documents
- The DRB findings and recommendations are non-binding, leaving ultimate control of the outcome to the parties
- The DRB findings and recommendations give the parties a basis on which to assess risk exposure and make better informed business judgments

Summary

A DRB is a non-adversarial project management technique that features a pro-active, real time, dispute avoidance and resolution approach during the course of a project. DRBs have a proven track record in the avoidance and resolution of construction claims – keeping control of the timing, the costs and the process of claim resolution with the owner and the contractor, where it properly belongs.

Kurt Dettman is the principal of Constructive Dispute Resolutions, an ADR practice specializing in all aspects of dispute avoidance and resolution in the construction industry. He is the Co-Chair of the DRBF Transportation and Energy Committees, has written and presented extensively about DRBs, and conducts training on DRB practice and administration. He can be reached at kdettman@adr.com. © 2010.

The Dispute Resolution Board Foundation is a not-for-profit, worldwide volunteer organization of over 600 construction industry professionals interested in promoting the avoidance and resolution of construction disputes through a DRB process.

For more information visit
www.drb.org