

**American Bar Association
Forum on the Construction Industry**

The Dispute Review Board

**Adrian L. Bastianelli, III
Peckar & Abramson, P.C.
Washington, DC**

Presented at the 2012 Fall Meeting

**October 18-19, 2012
Sheraton Hotel, Boston, MA**

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THE DISPUTES REVIEW BOARD

I. What Is a DRB?

The Dispute Review Board (“DRB”),¹ sometimes referred to as a Dispute Resolution Board, Dispute Adjudication Board, Dispute Board, or DRB, is a creation of the construction industry. It was developed by predominately non-lawyer, construction professionals who were dissatisfied with the use of arbitration and litigation for deciding construction disputes.²

Like arbitration, the DRB process is a contractual undertaking that can be designed to fit the particular needs, requirements, and objectives of the parties to the contract. The DRB most often consists of three independent board members with expertise in the type of construction being used on the project. For example, if the project is a highway, the DRB members are experts in highway construction.

The key feature of the process is that the board visits the project on a regular basis, typically four times a year, to observe construction and monitor potential disputes. These regular site visits help the DRB members become familiar with the construction process, the potential disputes, and the persons who will become witnesses, if a dispute is submitted to the DRB. It also has the prophylactic effect of encouraging open communications and resolution of disputes before they become formal claims.

When a dispute cannot be resolved by the Parties through negotiation, either party may submit the dispute to the DRB. The board hears the dispute in an informal setting with the presentations made by personnel involved in the job. Lawyers are not involved in the presentations.

The DRB provides written recommendations for resolution of the dispute, with an explanation of its reasoning. The DRB's recommendations, often on liability only, are not binding on the parties. The recommendations, however, are normally admissible in court pursuant to the terms of the contract. The recommendations often are used to negotiate a settlement of the dispute.

The DRB also may provide advisory opinions to the parties orally on an expedited basis. These advisory opinions are based on more limited presentations than the formal DRB recommendations. The opinions do not bind the DRB if the parties subsequently elect to present a claim through the more formal process.

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II. The DRB Foundation

The Dispute Resolution Board Foundation ("DRBF") was created in 1996 by the founders of the Dispute Review Board process to support and promote the use of Dispute Boards. A non-profit organization, the DRBF is an international association of construction industry professionals committed to real time dispute avoidance and resolution through the use of Dispute Boards. Members represent owner organizations and employers, architects, engineers, contractors, legal professionals, funding agencies and consultants.

The DRBF continues to grow with over 700 members in fifty-nine countries. The DRBF offers form contract provisions for DRBs, Three Party Agreements, Code of Ethics, and training for DRB members, as well as other services. It is the depository for a large volume of information on DRBs.

III. Selection of DRB Members

One key to gaining the trust of the parties to a dispute is to have highly competent neutrals that the parties trust. The selection of the DRB members therefore is a foundation of the process.

Each party selects a member, who should be an expert in the type of construction being performed. While selected by a party, the member becomes a neutral. In order to insure complete trust by the parties in all of the members of the panel, each party has an absolute right to reject the member proposed by the other party. Since the parties are in the beginning stages of construction and are trying to cooperate, it typically is not difficult to obtain approval of the DRB members appointed by the parties.

The two members then select a third member, who must also be approved by both parties. Typically the third member serves as chair. If a lawyer is included on the DRB, he normally is third member of the panel and is not a party appointed. When one party selects a lawyer, there is pressure on the other party to do the same. All three members of the DRB become neutral upon appointment and are not allowed to have *ex parte* conversations about the project with any of the Parties.

In summary, the panel consists of three independent experts who the parties have an absolute right to reject. The parties could not ask for a better group of persons to help them in the resolution of their disputes.

A. Use of Lawyers as DRB Members

A key to the DRB process are panel members who have construction expertise and therefore, can understand the technical issues and industry practice. These members are not lawyers.

However, disputes often involve legal issues where an attorney's input is valuable. Further, attorneys for the parties will be involved in deciding whether to accept the recommendations or reject them and go to arbitration or court. The attorney DRB member can provide a valuable contribution in drafting recommendations that will satisfy the parties' lawyers.

B. Payment of DRB Members

DRB members are compensated for their time and expenses. Their rates vary widely. Florida and California Departments of Transportation pay relatively low rates for DRB members, while other parties agree to pay normal rates for highly qualified consultants. The rate dictates to some degree the quality of the board members.

IV. Regular Meetings and Site Visits

The characteristic that distinguishes DRBs from almost every other form of ADR is the regular meeting and site visit. Typically the DRB visits the project four times per year, but in some types of projects (especially vertical construction) the site visits occur monthly or at some other agreed interval.

During the visits, the DRB and parties meet at the job to discuss the progress, difficulties encountered, schedule status, and potential disputes. The DRB members then visit the site to observe the construction, with emphasis on the areas where there are potential disputes.

The regular meetings and site visits serve several important purposes. The fact that the DRB has the opportunity to observe the construction as a whole and in particular, the construction giving rise to the dispute, provides the DRB with a tremendous advantage in determining the merits of a dispute.

The DRB members get to meet the job site personnel in an informal, non-adversarial setting when there are no disputes. This knowledge of the individuals assists in evaluating the subsequent presentations to the DRB. Further, the DRB hears about the disputes before the attorneys have had the opportunity to frame the claims and coach the witnesses and therefore, has a better sense of the root cause and key elements of the dispute.

The DRB process encourages settlement and resolution of disputes even before presentation to the DRB. First, the parties are forced to discuss potential disputes with each other in front of the DRB at each meeting. The open and frank discussion of the problems in a non-adversarial setting often applies the impetus to the parties to resolve their disputes through negotiation.

Second, the DRB typically develops the respect of the parties during the site visits. As a result, the parties are reluctant to present non-meritorious claims or positions to the DRB. As a result, many claims and defenses never make it to the DRB, and, if a dispute is presented to the DRB, the parties are more likely to listen to the DRB's recommendations if they have trust and confidence in the quality and integrity of the DRB.

In summary, the regular meetings and site visits are the cornerstone of DRB's success. The parties and DRB should fight the tendency to postpone or eliminate the site

visits to save time and money. When the site visits are eliminated, the DRB simply becomes, in essence, a non-binding arbitration panel.

V. Hearings

The DRB endeavors to hear disputes and issue recommendations in real time, rather than long after the project is complete and memories have faded, as typically occurs in arbitration and litigation. Early dispute resolution makes it easier to determine the facts accurately and makes the recommendations more relevant.

Either party has the right to refer a dispute to the DRB at any time. The parties then submit position papers and relevant documents.

The hearings are dramatically different than hearings in arbitration and litigation. They are informal and non-adversarial – much more like a mediation presentations than an arbitration hearing. The presentations are made by the persons involved in the actual construction. Openness, candor, and full disclosure are encouraged. Typically, lawyers are not allowed to make presentations, except to address legal issues. While cross examination is not permitted, the parties may suggest questions to be asked, and the DRB members are allowed to ask questions. Even without cross examination, the DRB has a good idea regarding credibility because they know the witnesses and the facts because they were there.

The process is designed to allow the parties to fully present their positions and yet maintain their relationship for the remainder of the job.

VI. Recommendations

The DRB does not issue a decision, verdict, or award like an arbitration panel or court. Instead it provides written recommendations that include an analysis to support the DRB's conclusions. The recommendations are not binding. As a result, the DRB must use its ability to persuade in order to convince the parties that its recommendations should be accepted. The parties typically use the recommendations as a basis to negotiate a final resolution of the dispute.

DRB provisions often contain a statement that the recommendations of the DRB are admissible in a subsequent court or arbitration proceeding, while other contracts take the opposite approach and specifically state that the recommendations are not admissible.³ Good arguments can be made for both approaches. Making a DRB recommendation admissible in a later proceeding provides a major impetus in encouraging the parties to accept recommendations even though the recommendations non-binding. However, making the recommendation admissible may cause the parties to treat the DRB hearing more like an arbitration or litigation. In addition, the admission of the DRB recommendation may have an undue influence on a court or jury.

The DRB process relies on the ability of the DRB to persuade the parties that the DRB's recommendations should be adopted or used as a basis for the settlement. Since the parties are not bound by the recommendations and maintain the option to subsequently litigate the dispute *de novo* in arbitration or court, the parties are less likely to turn the DRB hearing into a full blown trial and are willing to use the less formal and expensive procedures.

VII. The Informal or Advisory DRB Process

One of the key elements of the DRB as originally conceived was real time recommendations without the expenditure of substantial cost and time. However, because of the importance of the recommendations and the size of some claims, the process often has been delayed and extended and developed many of the bad attributes of arbitration and litigation. To avoid this problem, the informal or advisory DRB process has evolved to the point where it has become a recommended best practice to include it in DRB specifications.⁴

In this process, the parties typically provide the DRB members with short position papers and documents shortly before a regularly scheduled DRB meeting. At the meeting abbreviated oral presentations are made. Seldom is quantum addressed, but compensation guidelines may be addressed if that is a sticking point.

The DRB caucuses after the presentations and provides an immediate verbal advisory recommendation. The advisory recommendation does not preclude the parties from subsequently pursuing the dispute through the formal DRB process. This informal advisory process provides the parties with a far faster and less expensive method to resolve their claims by negotiation truly in real time.

VIII. Drafting the DRB Clauses and Agreements

The *DRBF Practices and Procedures* contains a set of guide specifications for use in contracts, which are attached hereto. The factors that should be addressed in the contract include:

- qualifications of DRB members;
- ethics requirements (neutrality);
- selection process for DRB members;
- timing of selection of DRB members;
- payment of DRB members;
- timing of site visits;

- method of referral of disputes to the DRB;
- pre-hearing submissions;
- hearing procedures;
- DRB recommendations;
- admissibility of DRB recommendations in future proceedings;
- informal or advisory opinions;
- clarification and reconsideration.

Once the panel is appointed, the DRB and parties should enter into a Three Party Agreement among the owner, contractor, and the DRB members. A sample Three Party Agreement is attached hereto. This agreement contains provisions addressing each party's obligations and responsibilities, payment terms, confidentiality, record keeping, and termination. It also typically includes a requirement for the owner and contractor to indemnify and hold the DRB harmless.

The new ConsensusDOCS is the first standard form contract that incorporates the DRB process.⁵ After an initial negotiation phase, the ConsensusDOCS allows the parties to checkoff either a DRB or mediation. If neither box is checked, the default is mediation. The provisions establishing the DRB in the ConsensusDOCS leave much to be desired and should be revised to follow the DRBF standard provisions more closely.

IX. Removal of a DRB Member

A thorny issue arises when a party becomes dissatisfied with a DRB member. Should the Party be able to dismiss that member?

Since the recommendations of the DRB are not binding, the DRB's effectiveness is dependent on its ability to persuade the parties to accept its recommendations. If a party does not trust a DRB member, that party is unlikely to be persuaded by that member (depending on the outcome of the dispute). As a result, a good argument can be made

that a DRB member should step down if one of the parties becomes dissatisfied with member, because the member can no longer function as an effective member of the DRB.

On the other hand, it would be unfair to allow one party to change the composition of the DRB just because one party was unhappy with the recommendations of a DRB member or for some other reason became dissatisfied with a DRB member. If a DRB member's contract could be terminated for no cause, an unscrupulous party could easily abuse the system by demanding that a member be replaced. In addition, the new DRB member would not have the benefit of the site visits, thereby defeating one of the main advantages of the DRB.

Moreover, where the recommendations are admissible in court, the dismissal of a member appointed and agreed to by one party would deprive the other party of the ability to use its appointed member's input in the recommendations in court or arbitration. The dismissal of a member could cause serious prejudice.

The DRB Foundation's position is that a Party may not dismiss a member without cause. If a Party no longer has faith in a member, it can refuse to participate in the DRB rather than reject all of its recommendations. Even this solution is less than adequate.

The "Big Dig" established a procedure where a party could non-renew its DRB member each year upon proper notice. That member, however, would hear disputes that were pending at the time of the non-renewal.

X. Cost

The DRB does not come without cost. DRB members typically charge on an hourly or daily basis plus expenses. They often are not local and have travel expenses. A

higher quality DRB member often results in higher cost. However, the cost of a DRB is typically less than one percent of the total project cost.

Since the existence of DRB typically results in the avoidance of arbitration or litigation, the DRB pays for itself very quickly. In addition, contractors may be willing to bid projects more competitively when there is a DRB in place that assures them that their disputes are likely to be resolved without arbitration or litigation. Finally, the DRB process increases the likelihood that the parties will be able to maintain good relations, even in difficult times, which has a cost benefit to both parties.

XI. Use and Success of DRBs

The rapid spread of the DRB process throughout the world has resulted in the process being used on more than \$200 billion worth of construction projects. Over the years, the Dispute Resolution Board Foundation has kept an extensive database of construction projects which use DRBs. On these projects approximately 98% of disputes were settled without arbitration or litigation. In addition, owner studies have shown significant decreases in cost and time overruns compared to projects without DRBs.

¹ The process described in this paper is the process recommended by The Dispute Resolution Board Foundation. See R. M. Matyas, A. A. Matthews, R. J. Smith, & R. E. Sperry, CONSTRUCTION DISPUTE REVIEW BOARD MANUAL (McGraw Hill 1961); DRBF PRACTICES AND PROCEDURES DRBF 1996). See also Daniel D. McMillan and Robert A. Rubin, *Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements*, 25:2 THE CONSTR. LAW. 14 (Spring 2005).

² While the DRB process originated in the United States, its use has grown dramatically around the world, albeit in a slightly different format. Jesse B. Grove and Richard Apuhn, *Comparative Experience with Dispute Boards in the United States and Abroad*, 32:3 CONSTR. LAW. 6 (Summer 2012).

³ For a discussion of the admissibility of DRB recommendations see Christopher T. Horner II, *Should Dispute Review Board Recommendations Be Considered in Subsequent Proceedings?*, 32:3 THE CONSTRUCTION LAWYER 17 (Summer 2012); John S. Vento, *The Admissibility of DRB Findings and Recommendations: Issues and Implications*, 5:2 JACCL 47 (Summer 2011).

⁴ Adrian L. Bastianelli III, *The Proactive DRB and the Use of the Advisory DRB Process*, 5:___ THE FORUM 1 (Jan. 2001).

⁵ Adrian L. Bastianelli III, *The DRB and the New Standard Form Contract Documents*, 12:3 THE FORUM 10 (Aug. 2008).