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**"Thinking Outside the Box"
on the Use of Dispute Review Boards**

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**“THINKING OUTSIDE THE BOX”
ON THE USE OF DISPUTE REVIEW BOARDS**

I. Introduction

The purpose of this paper is to provide a brief overview of the conventional Dispute Review Board (“DRB”) process, and then move “outside the box” to demonstrate how the DRB process can be more effectively used in the prevention and resolution of contractual issues and disputes.

II. Conventional DRBs

A. Definition

A DRB, as a form of ADR, is comprised of a panel of three persons who are knowledgeable both of the type of construction to be performed, as well as with contract documents and the resolution of contractual disputes. DRB members are usually required to have had at least fifteen years of experience in the construction contracting industry.

B. Overall DRB Objectives

The overall objectives of the DRB are to assist in the prevention of disputes and to assist in the timely resolution of disputes between the contracting parties during the course of the contract work.

C. Scope of Work

A DRB is established at the beginning of a contract to develop operating procedures that will govern the conduct of its business and reporting procedures. The DRB meets regularly with the parties at the project site. If there are disputes the parties cannot resolve, the DRB schedules hearings and issues non-binding recommendations to assist the parties in resolution.

D. Selection of DRB

The selection of the DRB is probably the most important step in the DRB process. Conventional practice is for each party to appoint a member and once approved by the other party the two appointed members select the Third member who, after approval by the parties, usually becomes the Chairperson.

E. DRB – Task 1

A Board's first task is to become familiar with the contract work and then to stay current on construction schedule, progress, and any contractual issues that may arise between the parties. The parties have a basic obligation to resolve any dispute themselves, first at the project level and, if unresolved, then to escalate up a "dispute ladder" established by the parties. The DRB should encourage this process to be carried out in a timely manner.

The kick-off meeting is the Board's first introduction to the parties. The Board is given a briefing on the contract work and its current status and work to be performed over the next three to four months. This discussion is followed by a walking tour of the whole jobsite and the active work areas.

Regular (typically quarterly) meetings are held at the project site. The meetings consist of a roundtable discussion with the parties to apprise the DRB on the work status, potential problem areas, and potential disputes. Such regular visits are held whether or not there are disputes and usually conclude with a jobsite tour.

The DRB receives interim reports from the parties, usually on a monthly basis providing contract work and schedule status, as well as information on potential issues.

F. DRB – Task 2

If the parties cannot resolve a dispute themselves, the DRB will schedule a hearing date based on a specified prehearing timeline that commences once an issue has been referred to the

DRB, but taking into consideration the needs and preferences of the parties. Usual practice is that either party may refer a dispute to the DRB for formal hearing.

There are two types of DRB hearings, namely, Formal or Informal/Advisory Opinion.

A Formal hearing requires the parties to submit position papers including exhibits in support of their respective positions to the DRB and the other party two to three weeks prior to a scheduled hearing date. Both parties are to be represented at the hearing by persons who are directly involved in the contract or who have direct knowledge of the dispute. The claimant presents its case first followed by the other party. Each party then makes one or more rebuttals until all aspects of the dispute are thoroughly covered. Each party is given ample time to fully present its position, make rebuttals, provide relevant documents, and respond to DRB questions and requests. There is no testimony under oath or cross examination during DRB hearings. Once the DRB has closed the hearing it will deliberate and prepare its non-binding written recommendation, including its findings and conclusions, which are then transmitted to the parties, usually fifteen to thirty days after the close of a hearing.

An Informal/Advisory Opinion requires both parties to agree to have a dispute heard by the DRB. Such hearings are usually held at a regular quarterly meeting. The parties prepare brief position papers and minimal exhibits which are sent to the DRB and the other party a few days prior to the hearing. At the hearing itself the parties present, rebut and answer DRB questions following which the Board deliberates in private and then renders its oral opinion to the parties. The whole process is usually completed in just a few hours. The DRB is not bound by its oral opinion in the event a dispute is later heard by the DRB in a formal hearing.

G. DRB Neutrality

The DRB members are neither representatives nor advocates of the parties and fairly and impartially consider disputes brought before them. They are not advisors or consultants in the management of the project

H. Benefits of the DRB Process

There are direct and indirect benefits from the DRB process. The mere presence of a DRB can be enticement enough for the parties to resolve disputes themselves. A DRB in a proactive role will continually encourage the parties to move a dispute through the dispute ladder to resolution in a timely manner.

The DRB process has an extraordinarily high rate of resolution of contractual disputes believed to be as high as 98%. There are documented savings in dispute resolution costs with practically all disputes being resolved during the course of the contract work. Finally, and very importantly, the process promotes positive working and personal relationships between the parties at all levels of a project.

III. “Thinking Outside the Box” in Setting Up a DRB Process

A. Drafting the Contract

Contract drafters should carefully think through the project’s approach to dispute prevention and resolution and how the DRB process fits into and supports the project’s goals. Preparers of a contract should provide for the DRB process in the contract documents as a mandatory step in the dispute process prior to proceeding to arbitration or litigation. A DRB specification and Three Party Agreement should be included in the contract documents. The Dispute Resolution Board Foundation (“DRBF”) Manual is good starting point in this process and includes draft DRB Specifications and Three Party Agreements. The Manual is based on industry best practices and is available from the DRBF.

B. Selection of the DRB

As noted above, selection of the members of the DRB is one of the most important decisions that can be made to enhance the success of the DRB process. It is preferable that the DRB members have complementary professional skills and experience, but the most common method of selection described above does not necessarily lend itself to this happening.

Other, improved methods of selection include:

- (1) Each party nominates three or four potential members, then each party selects one from the other party's group. Once confirmed, the two members select the Chair.
- (2) The parties jointly select all three members of the DRB from a group of qualified candidates who once confirmed decide who will be Chair. This method helps to ensure that the members' skills and experience are complementary and also promotes party "buy-in" on the subsequent results of the process.

C. Proactively Managing Conflicts and Disputes

Early establishment of the DRB within sixty days after contract award is important but is often resisted by the parties whose priorities in getting a project underway do not usually include dispute resolution. Subsequent regular meetings should be held at the jobsite every three months or more frequently, if required. The regular meetings should include in-depth discussions with the parties on potential problem areas and issues – without advocacy from either side.

The DRB should receive regular reports from the project (usually monthly) including schedule information and potential disputes, in order to keep informed of the project status between regular meetings.

It is important that the DRB be recognized as part of "the team" building the project, and this can be achieved, in part by encouraging use of the informal/advisory DRB process as well as

ensuring that the parties are properly communicating with one another and that issues are being addressed in “real time.”

D. Handling Claims at the DRB

The DRB process is not intended to be a legal one and is not a substitute for arbitration or litigation. The pre-hearing and hearing requirements and procedures are spelled out in the DRB specifications in the contract documents and the DRB Rules of Operation.

Usually, the parties’ attorneys do not participate in DRB meetings or hearings although some contracts provide for attendance only at hearings, as silent observers.

Including an attorney on the DRB is not uncommon and some owners require one of the DRB members to be an attorney.

E. The Big Debates

- Should DRB recommendation be admissible or inadmissible in a subsequent legal proceeding? The majority of contracts that provide for the DRB process allow the DRB recommendations to be admissible.

- Should DRBs Issue Binding or Non-Binding Decisions? Most DRBs are required by contract specification to provide non-binding recommendations.

- Binding DRBs may effectively become arbitration panels but are required to operate under the DRB provisions of a contract – the result is a hybrid. Some state statutes can turn the binding DRB process into an arbitration, and parties need to be aware of this potential unintended consequence.

Binding recommendations may become orders and may result in a negative or hostile atmosphere on the project. Parties are better served by staying with a mandatory non-binding DRB process prior to proceeding to arbitration or litigation.

One variation that has worked on some projects is to have recommendations on claims below a set threshold (say \$50,000) be binding and above the threshold non-binding.

F. Are There Variations on the “Classic” DRB

Some variations of the classic DRB include:

- DRB selection- parties jointly select the Board.
- Board becomes an integral part of the project team.
- Board operates pro-actively.
- Encourage use of Informal/Advisory hearing process.