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DRBF Practices and Procedures



Practices and Procedures

Dispute Review Boards
Dispute Resolution Boards
Dispute Adjudication Boards

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1

Concept

1 . 1 Introduction and Development of the DRB Concept

Managers of successful construction projects resolve disputes fairly and efficiently. Some projects are blessed with participants possessing the right combination of leadership skills, technical ability, business acumen, and interpersonal skills to resolve disputes among themselves. Other projects are cursed with problems and disputes that are contentious and difficult to resolve. Most projects lie between these two extremes. Owners embarking on a construction program need to develop a mechanism for resolving the range of disputes they might encounter during the execution of a project. One of the most effective tools is the Dispute Review Board (DRB).

Over the years the construction industry dealt with the resolution of claims and disputes through a variety of methods. One of the most successful and enduring is the DRB. A simple description of a DRB is that it is a board of impartial professionals formed at the beginning of the project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes for the duration of the project.

Records of the construction industry through the early part of the twentieth century contain little information on the frequency and seriousness of disputes and litigation. It appears that up until the 1940s, commonly used procedures – such as prompt, informal negotiation, or a ruling by the architect or engineer – were generally sufficient to resolve most disputes at the job level.

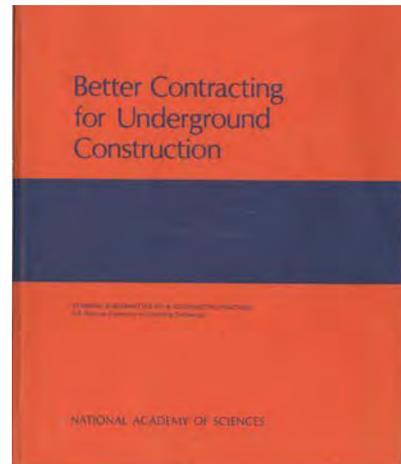
After World War II, competition for construction contracts became intense, and contractors were forced to accept lower profit margins. Further, construction contracts became much more complex, and the construction process was burdened with non-technical demands such as environmental regulations, governmental and socio-economic requirements and public interest group pressures. The financial stability of many contractors with tight margins required that they pursue all available means to protect their bottom line, and a growing body of lawyers and consultants stood ready to assist them.

As this deterioration became more evident, and relationships became more adversarial, the construction industry sought sensible solutions. Arbitration became more popular, as it was less expensive and faster than litigation. However, it became increasingly more costly and time consuming, less satisfactory, and adversarial. Although arbitration continues to offer certain benefits unavailable in litigation – primarily the use of neutrals experienced in the field from which the dispute arises – the cost and time of arbitration today can easily rival that of complex litigation. The ensuing movement away from litigation and arbitration is marked by several events that led to development of the DRB concept.

In 1972 the U.S. National Committee on Tunneling Technology sponsored a study of contracting practices throughout the world to develop recommendations for improved contracting methods in the United States. The study concluded that contracting practices in the United States formed a serious barrier to the containment of rapidly escalating construction costs and contract disputes.

Results were presented in the report *Better Contracting for Underground Construction*, published in 1974. The *Better Contracting* report frequently commented on the deleterious effect of claims, disputes, and litigation upon the efficiency of the construction process. Many recommendations were aimed at mitigating this problem. Over the years, an increasing number of consulting engineers and owners adopted its recommendations.

This report exposed many of the problems facing the construction industry and increased awareness of the high cost of claims, disputes, and litigation to the industry and to the public.



In 1975 the underground industry first used the DRB process during construction of the second bore of the Eisenhower Tunnel on I-70 in Colorado. It was an overwhelming success; the DRB heard three disputes, owner-contractor relations were cordial throughout construction, and all parties were pleased at the end of the project. Other successful DRBs followed, and soon other sectors of the construction industry began to recognize the unique features of DRBs for resolving disputes. The record during the next three decades, as illustrated in the bar charts in Appendix A, shows the dramatic increase in use and success of DRBs, not only in underground, but in highway, heavy civil, process and building construction.



As the success of the DRB process became more apparent, the use of DRBs greatly expanded in North America as well as throughout the world.

The Dispute Resolution Board Foundation (DRBF) was established in 1996 to promote use of the process, and serve as a technical clearinghouse for owners, contractors, and Board members in order to improve the dispute resolution process. The DRBF has initiated programs for providing DRB information and educational opportunities for all parties involved in construction disputes. For more information on the Foundation, see www.drb.org.

The Manual is a living document that will be changed whenever necessary to reflect the continuing experience gained through the use of DRBs. This section can be downloaded from the DRBF web site (www.drb.org) in PDF format.

1.2 Overview of the Process and Best Practice Guidelines

1.2.1 Introduction

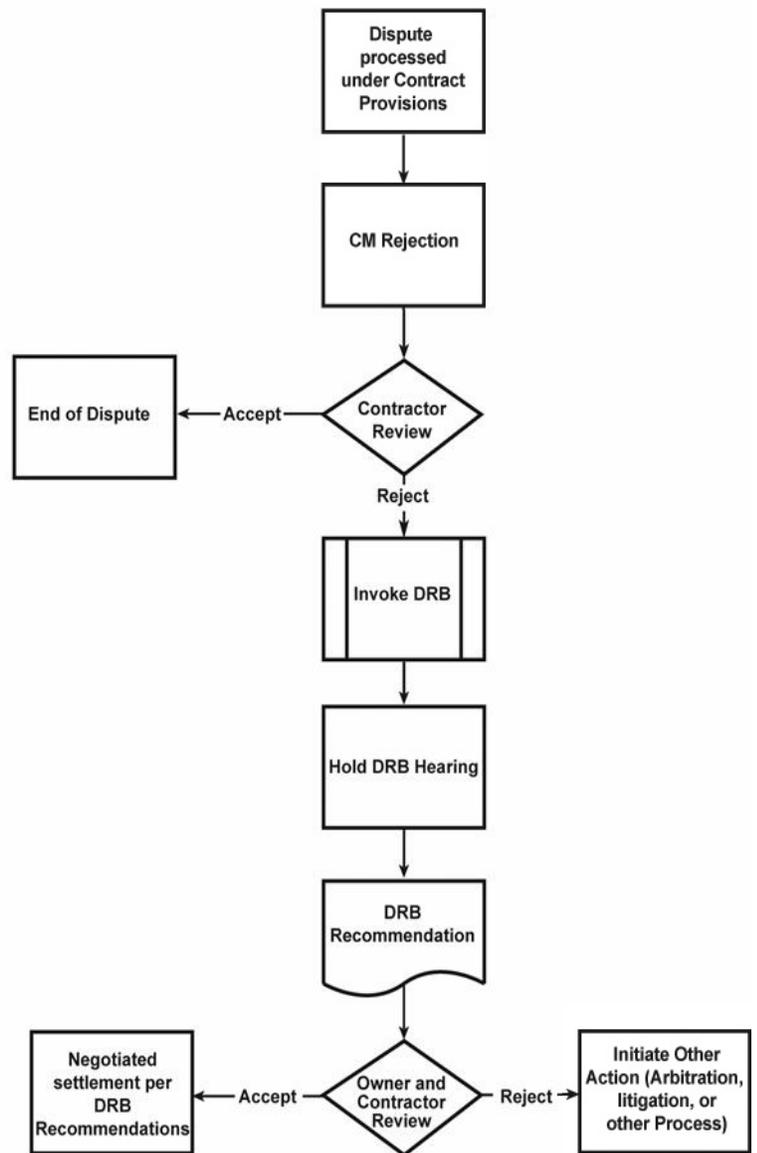
The DRB process is included in construction contracts to assist project participants in avoiding and resolving disputes. A DRB is typically composed of a panel of three respected and impartial professionals, who are experienced in the specific type of construction proposed and who assist in avoiding and resolving disputes.

In most instances DRB provisions are incorporated into the contract's overall change order / claim / dispute resolution mechanism prior to bidding the work. The DRB hearing process should be inserted in the dispute resolution ladder between the contractor's request for an equitable adjustment and the engineer's or owner's final decision.

To implement a DRB, the Board members are selected and approved by both the owner and contractor soon after award of the contract. The DRB is officially established when the parties and Board members execute a three-party agreement.

The DRB should be organized after the contract is executed and preferably before construction begins. Utilization of the DRB process from the very start of a project maximizes its benefit and value. Experience has shown that any delay reduces its effectiveness. The Board members are provided with all contract documents and copies of construction progress reports and minutes of weekly project meetings. In this way, the DRB is kept current with ongoing progress of the work, and is ready to address problems and disputes as they arise.

Brief status meetings and site tours are held periodically at the job site. At these meetings the Board members confer with the owner and contractor representatives, become familiar with project procedures and participants, and are kept abreast of job progress and potential disputes. The DRB encourages the resolution of disputes at the job level and, at the parties' mutual request, may provide informal advice on potential disputes. Thus, the DRB assists the parties by facilitating a harmonious atmosphere and by encouraging prompt solutions to job problems.



When the parties cannot resolve disputes by themselves in a timely manner, the dispute may be referred to the DRB by either party for a hearing and written report. The dispute hearing procedure includes an opportunity for each party to explain its position and an opportunity for the other party to respond. The DRB conducts the hearing and hears all pertinent testimony from the parties. Board members may ask probing questions. The objective is to fully air the dispute and determine the facts. Conducted properly, the hearing allows each side to challenge the other's premises and arguments in a courteous and professional manner. After the hearing, the Board members deliberate in private where they consider the claims to entitlement and defenses to those claims in light of the relevant contract documents, correspondence, other documentation, and the facts of the dispute. The Board members' recommendations are presented in a written report that includes the reasoning that led to each recommendation. The recommendations are not binding on the parties. This minimizes animosity between the parties and, as a result, subsequent negotiations between the parties usually result in prompt and economical resolution of disputes.

The party's willingness to accept the DRB's recommendations is enhanced by trust in each Board member's impartiality and confidence in their technical expertise, their firsthand understanding of the project conditions and practical judgment — as well as by the parties' opportunity to fully air the dispute. The parties' confidence in the DRB process and their knowledge of the individual Board members, gained during the period of construction, plays an important role. Acceptance of the recommendation is also influenced by the fact that it is admissible in subsequent arbitration or litigation in the event that negotiations are unsuccessful.

1.2.2 Best Practice Guidelines

This Manual is intended to serve as a reference guide for users and participants in applying the DRB process. It explains various practices and procedures that have resulted in the success experienced to date. While this process can be customized to suit a particular project, and certain modifications are acceptable in special circumstances, there are certain practices and procedures that are so important to the success of the DRB process that they should be strictly followed whenever possible. These best practices are summarized below, and include references to other sections of the Manual for detailed discussion and explanation. Readers are strongly encouraged to review the referenced chapters to fully understand and apply the guidelines. There are four sets of best practices: Specification Provisions, Actions by the Parties, Behavior of Board Members, and Dispute Hearings.

Specification Provisions

There is a set of essential provisions that must be included in the contract specifications to assure the success of the DRB process. These provisions contain requirements that are not found in other alternative dispute resolution concepts. Revising or deleting any of these provisions places the success of the DRB process at risk; the effectiveness of the DRB and the quality of its contributions to the parties may be severely compromised. In adding provisions for the DRB to the contract documents, owners are discouraged from revising the DRBF Guide Specification [2A] * and Three Party Agreement [2B] or the Dispute Board provisions of FIDIC and the World Bank Procurement of Works (see Section 4). The following are essential specifications provisions.

1. Provide a selection procedure that ensures absolute neutrality of the selected Board members.
[2.2.2 and 2A]

* [2A] refers to Section 2, Appendix A; [2.2.4] would refer to Section 2, Chapter 2, Part 4.

2. Require periodic meeting that start soon after award of the contract and continue as long as work from which disputes might arise is underway. [2.3.2 and 2A.5]
3. Include a three-party agreement that binds the parties and the DRB. [2B]
4. Require that the owner and contractor share equally all costs of the DRB. The Board is a resource for both parties to the contract and equal cost sharing encourages both parties to utilize it when needed. Payment of board invoices should be from one source. [2A.7]
5. Establish informal hearing procedures for faster dispute resolution. Oral, advisory non-binding opinions are issued. This does not preclude a subsequent formal DRB hearing. [2.4 and 2A.6.H]
6. Allow the DRB to hear disputes on all aspects of the contract. Language limiting issues to be heard enhances the potential for future litigation. [2.5.1, 2.11.1.1,2 and 2A.2]
7. Either party may refer a dispute to the DRB. [2.5.1 and 2A.6]
8. Allow prompt hearing of disputes by not requiring multiple steps of submittals, denials, decisions, final decisions and appeals before a dispute can be brought to the DRB. [2.5]
9. Provide that recommendations are not binding on either party. [2A.1]
10. Ensure that recommendations are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation. [2A.1]
11. Absolve Board members from personal or professional liability arising from their DRB activities, as long as these activities are conducted in good faith. [2.11.2.1 and 2B.XI]
12. Allow termination of Board members only by agreement of both parties. [2.9 and 2B.X]
13. Ensure that Board members cannot be called as witnesses in subsequent proceedings. [2B.XI]

Recommendations

Typical DRB practice in the U.S., Canada and many other countries includes non-binding recommendations.

Multinational practice typically uses a form of “binding in the interim” recommendation, which is deemed accepted by both parties unless specifically objected to within a certain time period. See Section 4, “Multinational Practice” for further discussion.

Actions by the Parties

In addition to the above specification requirements, the contracting parties must take specific actions to facilitate the establishment and operation of the DRB and the overall dispute resolution process. The following are essential actions by the parties to the construction contract.

1. Establish the DRB promptly after the contract is executed, preferably before construction begins, and no later than ninety days after the contract is executed. [2.2.1 and 2A.4]
2. Fully investigate the qualifications, especially conflicts of interest and neutrality, of all Board nominees before approving them. [2.2.2]
3. Reject all nominees that have a problematic conflict of interest or even a hint of bias. [2.2.2]
4. Provide Board members with copies of construction progress reports and minutes of weekly project meetings. [2.3.1.3]
5. Arrange for periodic meetings and site visits with the DRB on a regular basis. It is bad practice to curtail DRB meetings simply because there are no apparent disagreements or disputes. [2.3.2]

6. Do not require the DRB to prepare minutes of periodic meetings. *[2.3.4]*
7. Promptly negotiate to resolve disputes and, if negotiations fail, take disputes to the DRB as soon as possible. *[2.5 and 2A.6]*
8. Dedicate the resources required to fully present and defend disputes in front of the DRB. *[2.6]*

Behavior of Board Members

Each Board member must strive to maintain the confidence of the parties, and thus facilitate the dispute resolution process. The following are essential behaviors of Board members.

1. Adhere to the DRBF Code of Ethics. At the outset fully disclose all known past and present relationships with, or interests between any party to the contract, or related parties such as subcontractors, design professionals, construction managers and site supervisors. Immediately disclose relationships or interests discovered or established subsequent to initial disclosure. *[1.6, 2.10.1, 3.2]*
2. Remain neutral and avoid any behavior that could lead to a perception of bias, including any ex parte communications. Board members are not an advocate for either party. *[1.6, 2.10.1, 3.2]*
3. Avoid all conflicts of interest and notify the parties of any actions that could be perceived as such. Have no financial interest in the contract or in any party involved in the design or construction of the contract. Have no discussions and make no agreements for future employment or any other business relationships while serving on the DRB. *[1.6, 2.10.1, 3.2]*
4. Become familiar with the contract, plans, specifications and other contract requirements, such as coordination and scheduling. *[3.3.4]*
5. Do not request that the parties furnish progress documents that they do not already produce in the normal course of business. *[3.4.1]*
6. Keep abreast of job activities and developments by reviewing periodic construction progress reports and minutes of weekly project meetings and by periodic meetings. *[3.4.4]*
7. Make no disclosures of project information that is not within the public domain without permission of both parties. *[2.10.3, 2B.VIII and 3.4.4]*
8. Never give advice on conduct of the work. *[3.4.1 and 3.4.3]*
9. Encourage the parties to proactively discuss and resolve potential disputes before they escalate to the point where a hearing is required. *[3.4.3]*
10. Never promote disputes or comment on the validity of disputes or other issues. *[3.4.3 and 3.6.3]*
11. Do not accede to a single party's resignation request without reaching agreement within the DRB that this solution would best serve the parties. *[3.8]*

Dispute Hearings

To ensure a prompt and economical hearing, and provide the best chance for resolution of the dispute, the following best practices must be adhered to by the parties and Board members.

1. The parties clearly define the issues in dispute. *[2.6.2 and 3.6.1]*

2. The parties exchange and submit to the DRB concise statements of their positions with supporting documentation for review prior to the hearing. *[2.6.3]*
3. To the maximum extent possible, the parties submit supporting documentation as joint exhibits. *[2.6.2]*
4. The parties submit a list of presenters and proposed attendees at least two weeks prior to the hearing. *[2.6.7]*
5. The DRB conducts the hearing, deliberates, and prepares the recommendations and report in a professional, impartial and expeditious manner. *[2.7.2]*
6. During the hearing and subsequent deliberations no indication of the DRB's or any Board member's position should be revealed. *[3.6.3 and 3.7.1]*
7. The DRB gives each party ample opportunity to fully convey its position. *[2.7.3 and 3.6.3]*
8. Presentation of information not included in the pre-hearing exchanges is discouraged. If additional information has been developed after submittal of the position papers, and the DRB decides to permit this information to be introduced, the other party must be given ample time to consider and respond to it. *[3.6.3]*
9. The DRB may ask for additional information, documentation and testimony as needed to determine the facts of the dispute. *[2.7.3 and 3.6.3]*
10. DRB recommendations and reports address only the issues in dispute, as defined or agreed by the parties. *[3.7.2]*
11. DRB recommendations are based only on the facts of the case and the contract provisions. *[3.7.2]*
12. DRB recommendations and report are concise, yet complete. *[3.7.2]*
13. The DRB makes every effort to prepare unanimous recommendations and report. *[3.7.3]*
14. The DRB provides clarification whenever requested. *[2A.6.G and 3.7.6]*
15. Only in certain circumstances does the DRB reconsider its recommendations. A request for reconsideration should be based on additional evidence rather than a continuation of argument previously heard. *[2A.6.G and 3.7.7]*

1.3 Benefits

The DRB process provides benefits to all participants on the construction project —and to the project itself. These benefits accrue in terms of both claim avoidance and resolution of disputes.

The primary benefit is claim avoidance. The very existence of a readily available dispute resolution process that uses a panel of mutually selected, technically knowledgeable and experienced neutrals familiar with the project tends to promote agreement on problems that would otherwise be referred to arbitration or litigation after a long and acrimonious period of posturing. Experience has demonstrated that the DRB process facilitates positive relations, open communication, and the trust and cooperation that is necessary for the parties to resolve problems amicably. There are several reasons for this result, including: (1) the parties are reluctant to posture by taking tenuous or extreme positions, because they do not want to lose their credibility with the Board members and (2) since the DRB encourages the prompt referral of disputes and handles disputes on an individual basis, the aggregation of claims is minimized, thus avoiding an ever-growing backlog of unresolved claims which can create an atmosphere that fosters acrimony.

The DRB encourages the parties to settle claims and disputes in a prompt, businesslike manner. During the periodic meetings the Board members ask about any potential problems, claims, or disputes and review the status report of outstanding claims. The parties are led to focus on early identification and resolution of problems and, in the event of an impasse, use the DRB for prompt assistance. On many projects the parties resolve all potential disputes with none formally referred to the DRB.

The DRB process has been found to be more successful than any other method of alternative dispute resolution for construction disputes. This process has experienced a very high rate of success in resolving disputes without resorting to litigation – the resolution rate is over 98 percent to date. Several unique factors account for this remarkable statistic. A DRB provides the parties with an impartial forum and an informed and rational basis for resolution of their dispute. The Board members have knowledge and experience with (1) the design and construction issues germane to the project, (2) the construction means and methods employed on the project, (3) the interpretation and application of contract documents, and (4) other processes of dispute resolution. As a non-binding process, the parties remain in control of the ultimate resolution.

The DRB process is very cost effective when compared with other methods of dispute resolution, and especially so if the high costs of arbitration or litigation are considered. As a “standing neutral” method, the DRB process typically addresses disputes soon after an impasse between the parties. Early resolution greatly reduces costs to the parties, such as legal and consultant fees, as well as the loss of productive project time for owners and contractors. The DRB process provides a better-informed dispute analysis because individuals with first-hand knowledge of the facts are readily available and, in many instances, the Board members can actually observe the field condition or construction operation that is related to the dispute.

Cost savings actually begin with more and lower bids, including subcontractor quotes, because of reduced risk of prolonged disputes. It is generally accepted that fair contracting practices result in lower bids because litigation contingencies are reduced. When a contract includes a DRB provision, prospective contractors know that if disputes occur, they will be considered expeditiously by a mutually selected panel of technically knowledgeable and impartial neutrals already familiar with the project. Thus, the risks of long delays and substantial costs are significantly reduced. In addition, earlier resolution means an earlier start to the payment process for contract modifications accepted by the owner.

From the owner's perspective, having a DRB on a construction project encourages on-going dispute resolution and minimizes end-of-the-contract claims. This permits the owner to more closely control the budget and avoid the high expense and unpredictability of post project litigation. In addition, a DRB recommendation documents the basis upon which the parties may reach resolution.

A DRB recommendation is especially helpful for public owners because frequently the decision to accept settlement of a dispute must be approved by a governing board such as a school board, city council, county board of supervisors, or other similar public governing board. A well-reasoned analysis of the dispute by a panel of neutral professionals with construction backgrounds provides credibility to support the public owner's decision to accept the DRB recommendation.

The DRB process is flexible in fulfilling the needs of projects because it has several unique advantages over other means of dispute resolution. The advantages include:

- Board members continually monitor the project during construction. This allows them to readily understand what has occurred in a way no other process can match.
- Board members get to know and understand the individuals managing the contract and vice versa. This builds a relationship of respect and trust with the parties during construction.
- The DRB may provide advisory opinions to assist in mitigating potential disputes. This occurs long before the disputes would otherwise be resolved through any alternative process.
- Board members' ongoing knowledge of the project facilitates finding the truth. This provides strong support for the DRB's recommendation.
- Although DRB practice provides for recommendations that are not binding on the parties, history shows that they are almost always used in reaching a resolution to the dispute. In the few instances where the dispute has progressed to subsequent proceedings, DRB recommendations have carried considerable weight because they were made by independent, experienced professionals, who had knowledge of the events as they occurred.

Note: Multinational practice differs slightly. See Chapter 1.5 and Section 4 for further information.

While a number of other methods for resolving disputes exist, none of them contain the added benefit of independent, experienced professionals who visit the site during performance of the project. These other methods only start to address the problem after the dispute has been formalized, without the benefit of having followed development of the project. This may be after the project has been completed and the participants have scattered, retired or even passed away.

When "partnering" is conducted on a construction project, the presence of a DRB has the effect of enhancing the partnering process by encouraging the parties to fully utilize the partnering process for dispute resolution.

In summary, experience has shown that the DRB's presence influences the behavior of the parties in such a way as to minimize disputes. When conflicts do arise, the DRB is able to make recommendations for settlement quickly, before adversarial attitudes escalate to the extent that construction is compromised.

Data on the Use of DRBs and DBs

The use of DRBs is growing so fast and so widely that reliable data has become impossible to collect. In addition, data on DBs outside North America has always been limited because most contracts require Board members to "treat the details of the contract ... as ... confidential," causing concern over

reporting even minimal data. Therefore the DRBF will no longer update the database in the detail currently presented on the website. However, information of a more limited nature will be collected and reported as noted below.

Estimated Use of DRBs and DBs

Based on data collected through 2001, worldwide use of DRBs is growing in excess of 15% a year. Through the end of 2006, it is estimated that over 2,000 projects worth over US \$100 billion have had DRBs or DBs.

Over 200 construction contracts with DRBs start every year, worth over US \$7 billion. An estimated 200 disputes are settled each year through the use of DRBs. More importantly, it is often reported that more disputes are avoided by ongoing interaction with the DRB than are actually heard.

Increased use of advisory opinions has contributed to the avoidance of disputes. This process is inexpensive, rapid, informal, and is implemented prior to the parties becoming entrenched in adversarial positions. The reported success of advisory opinions is nearly 100%.

North American DRBs

In the U.S. and Canada, DRBs have been used extensively with much success.

- Project values have ranged from: one over \$1 billion: a hundred under \$5 million: six projects under \$1 million; and have averaged \$42 million each.
- 58% of the projects were “dispute free” - no disputes requiring hearings were brought to the DRB.
- 98.7% of the projects were completed without resorting to subsequent dispute resolution methods. This has been referred to as the “success rate” of the DRB process.

Owner agencies that have used DRBs include:

- State highway departments. California, Florida, Massachusetts and Washington are the largest users. The highway departments of Idaho, Minnesota, Mississippi, Ohio, Oregon, South Carolina, Utah, Virginia and Wisconsin also have active DRBs. Denver’s \$1.3 billion T-Rex project, as well as a number of private toll road projects, used DRBs.

The California Department of Transportation (Caltrans) and Florida Department of Transportation (FDOT) use DRBs on almost all projects. Caltrans is starting to use a 1-person DRB called a Disputes Review Advisor (DRA) on all projects greater than \$3 million and less than \$10 million and longer than 100 days duration. FDOT assigns each project valued at less than \$10 million to a regional DRB. FDOT recently decided to provide DRBs for all maintenance contracts.

- Public transit authorities in Dallas, Houston, Los Angeles, Minneapolis, New York, Phoenix, Pittsburgh, Sacramento, San Diego, San Francisco, Seattle and Washington D.C.
- Dozens of cities and counties for various public works projects, including bridge rehabilitation, building renovation, combined sewer overflow tunnels, convention centers, court houses, highways, libraries, parking structures, prisons, sewer pipelines and tunnels, sewerage treatment facilities, schools and water supply projects.

- Universities, including the University of California, Ohio State University, the University of Washington, and Washington State University, on various construction projects including an art gallery, classroom and medical buildings, libraries, research facilities, and sports complexes.
- Airport expansions, dams, various Federal projects, hydroelectric projects, mines, manufacturing plants, office buildings, port facilities, private research laboratories, and stadiums.
- Australia, Canada and New Zealand have also used the North American DRB process on large projects.

International Dispute Board (DB) Process

Reported worldwide projects employing the Dispute Board process have ranged in value from US \$15 billion for the Eurotunnel to one project of US \$2 million.

DBs are used extensively by development banks and, from these positive experiences, have been adopted by many other owners. DBs have been used in Bangladesh, Botswana, Denmark, Dominican Republic, Ethiopia, Honduras, Hong Kong, Hungary, India, Ireland, Italy, Lesotho, Madagascar, Mozambique, Pakistan, Peoples Republic of China, Poland, Romania, Sudan, Uganda, the UK and Vietnam.

The use of DRBs and DBs throughout the world continues to grow.

1.4 Deciding to Have a Dispute Review Board

1.4.1 Potential for Disputes

When planning a construction project, owners should ask:

Can disputes be expected? If so, could they be serious enough to specify a DRB?

In 1994 the Construction Industry Institute sponsored a study of the predictability of contract disputes.¹ This study found that once the contract is awarded, the potential for disputes is predictable. However, the decision to use a DRB should be made long before the contract is awarded. What can owners do during the design phase to realistically evaluate the potential for disputes? The questions used in the study can provide excellent guidance.

To determine the likelihood that your project will generate disputes, consider the following:

- **The previous experience of your organization with construction projects.** Evaluate whether disputes were difficult to resolve, disrupted construction, or went to litigation. Ask the same questions of the construction management group that will oversee the work.
- **The personnel you plan to assign to administer the contract.** Have they demonstrated the ability to get along with contractor's personnel, to get the work completed as specified without significant disputes?
- **The contract documents.** Is this the type of contract you normally use or is this type new to your organization? Do the technical specifications require state-of-the-art methods or materials? Are the plans and specifications complete or will they be completed after award of construction? Are the other contract documents your standard or do they include untried provisions that could be problematical? Are these and other risks fairly identified and allocated? Are the contractual requirements reasonable or might the contractor consider them difficult or beyond the current state-of-the-art?
- **The contractors who might likely be awarded the work.** Have they worked for you before, or will many bidders be new to your organization? Would the contractors be from some distance away and not be familiar with conditions at the site? Have you pre-qualified experienced and capable contractors? Could your solicitation attract inexperienced contractors?
- **The work.** Is the project exceptionally large or are there internal milestones or completion dates that could be hard to meet? Is the project adequately funded, with adequate budget for changes? Is the design exceptionally complex or difficult to execute? Have you built similar projects in the recent past or does this project have features that are unique, requiring innovative construction methods? Do these features push or exceed the current state-of-the-art of that sector of the construction industry? What are the chances of the contractor being less than adequately experienced in this type and/or complexity of construction? Are there risks of differing site conditions?

Owners can be guided by their answers to these questions. However, significant claims sometimes arise even on projects considered relatively problem free at the outset. With no DRB in place, resolution can be expensive, time-consuming and unsatisfactory. Thus, even if consideration suggests

¹ Diekmann, James E.; Girard, Matthew J.; and Abdul-Hadi, Nader. DPI-Disputes Potential Index: A Study into the Predictability of Contract Disputes. A report to the Construction Industry Institute, 1994.

a DRB may not be necessary in a given situation, establishing a DRB is prudent to help ensure disputes are kept to a minimum.

Many owners have guidelines that require DRBs on all projects in excess of a certain size (often US\$10 million) and/or duration, or on unusually complex or difficult jobs.

For owners who aren't familiar with DRBs, it might be helpful to sit in on a periodic DRB meeting or even a dispute hearing to get a better understanding of the process. Call the DRBF for assistance in arranging to observe a DRB in action.

1.4.2 Costs

The direct costs include the fees and expenses of the Board members. The parties should also consider the indirect costs of their employees' time in preparing for and participating in DRB meetings. However, the commitment and interruption is considerably less than that involved in the resolution of disputes involving arbitration or litigation.

The Board member costs should be shared equally by the parties to avoid any perception of allegiance to either party. This is usually accomplished by having the contractor pay all of the Board member fees and expenses, and the inclusion of an allowance item in the bidding schedule from which the owner can reimburse the contractor for the owner's half of these costs.

The direct costs include periodic meetings and site visits, which usually average about four per year, document review and preparation time, and hearing time, including time to deliberate and prepare the recommendation. Each Board member's professional fees usually are in the range of \$1,000 to \$2,000 per day for meetings or hearings, with an hourly fee for document review and study time.

Periodic meetings and site visits normally require one day. Time spent reviewing progress reports and other documents and preparing for periodic visits is usually nominal. Chairman duties will require somewhat more time. Travel and subsistence expenses as well as other reimbursable costs can be estimated with reasonable accuracy.

The expense of periodic meetings can be thought of as prevention costs, yielding the benefit of dispute avoidance as a result of the Board's presence. Although the value is difficult to quantify, owners and contractors who have used the DRB process generally agree that the value far exceeds the cost.

The cost of a hearing depends upon the time required for review of the parties' pre-hearing submittals, the hearing itself, and the time required for the DRB to deliberate and prepare the written recommendation(s) with supporting rationale. For a simple case, the hearing could occur during a periodic meeting followed immediately by the deliberations, with the recommendation issued shortly thereafter. Complex disputes might require several days of hearings and several weeks for DRB deliberations and report preparation.

Note: Retainers are usually paid in multinational practice to secure the availability and independence of the Board members.

DRB cost ranges from 0.05% of final construction contract cost, for relatively dispute-free projects, to a maximum of 0.25% for difficult projects with disputes. Considering only projects that refer disputes to the Board or that had difficult problems, the cost ranges from 0.04% to 0.26% with an average of 0.15% of final construction contract cost, including an average of four dispute recommendations.

1.4.3 Other Considerations

Attracting Bidders. Many contractors have expressed reservations about bidding work where there is no DRB to assist in the resolution of disputes. Inclusion of a DRB on contract work can encourage

contractors to submit bids on work that they might otherwise decline to bid. This is especially true where the owner is new to bidding this type of work and the contractor is unsure of the owner's approach to resolving disputes. Similarly, inclusion of a DRB can attract bidders on projects where the owner's record of past dealings with contractors has been unfavorable or cause for concern amongst contractors.

Reduced Bid Prices. An owner's inclusion of a DRB on a project is a strong indication that the owner is seeking a level playing field in the execution of the project work. Further, the inclusion of a DRB is an indication that the owner is looking to avoid disputes, or at least accomplish timely resolution of them so as to keep the primary objectives of accomplishing the work in focus, before unproductive adversarial attitudes can develop.

Contractors typically include contingency amounts in their bid prices to cover the cost of pursuing resolution of disputes that may arise. To this end, knowing that a Board of respected knowledgeable individuals experienced in the type of work to be contracted will hear disputes before proceeding to adversarial, costly and time-consuming litigation (or other binding forms of dispute resolution) is generally considered a strong benefit when bidding the work. Similarly, the bidding contractor knows that the DRB will remain up to date on the progress of the work throughout construction, requiring limited further enlightenment or education in the event of a dispute. As such, some contractors have indicated that the inclusion of a DRB has lowered their bid price by as much as 10 percent.

1.5 Concerns

This section identifies and addresses some previously stated concerns. These concerns should not be a factor when the DRB process is implemented correctly and effectively.

1.5.1 DRBs Do Not Add Value

The fundamental cost-effectiveness of a DRB readily demonstrates that establishing and operating a DRB is a highly effective investment, even if there are no disputes. Although it is difficult to quantify the benefits in dollars it is well known that such benefits exist. The following advantages relate to value added by a DRB:

- Potentially lower bids, especially from contractors who are familiar with the DRB process, and particularly to owners that are generally unknown within the industry. Inclusion of a DRB shows bidders that a rational dispute resolution mechanism is provided.
- Better communication and less acrimony on the job site.
- Issues are discussed and frequently resolved before they become disputes.
- Timely and cost-effective resolution of disputes at the job-site level and fewer end-of-project unresolved claims.
- Lower total contract completion cost.

There is no doubt that the cost is easily justified if even one piece of litigation is avoided.

1.5.2 Board Members Will Ignore the Contract and Impose Their Own Concepts of Fairness and Equity

It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. Rather, a competent and conscientious DRB will strive for a recommendation consistent with all terms of the contract. The standard three-party agreement requires the DRB to comply with applicable laws and contract provisions.

Member selection is an important factor in achieving a DRB that is aware of its duties and responsibilities. Board members who are determined to correct seemingly unfair contract provisions should be reminded that the contractor agreed to the terms of the contract. If necessary, such a DRB member should be terminated as provided in the three-party DRB agreement. As a further safeguard, the parties have the option of rejecting or seeking clarification of any recommendation.

Just like a judge, jury, or arbitrator, each Board member will have his or her personal views of fairness and equity. A Board member who is respected in the industry will be capable and comfortable putting those personal views aside. Moreover, it is not a single member's view that prevails; the pressure of the other members should serve to prevent a gross miscarriage of justice. It is difficult to hide a bias or prejudice in a well-reasoned recommendation.

1.5.3 The DRB Process Promotes Disputes

Since the effort and expense of submitting a dispute to a DRB are relatively small, it has been argued that a contractor might abuse the DRB process and utilize it to test the viability of seemingly marginal claims. Experience has shown that this has not been a significant factor, probably because most contractors do not want to face the loss of credibility with Board members which would likely result from asking them to consider non-meritorious claims.

1.5.4 Board Members May be Unqualified

There is no excuse for selecting an unqualified Board member when the contracting parties apply appropriate selection criteria. Users have not experienced difficulty in obtaining qualified members, especially when they are willing to consider candidates other than those in their local area. DRBF training workshops throughout the U.S. and abroad will further ensure qualified candidates in most regions.

Some public owners solicit Board members through an advertised request for qualifications, a process that often culminates in personal interviews and evaluation against established criteria, including specific construction experience as well as dispute resolution experience. Given the standard provision that member qualifications are subject to review and approval by both contracting parties, as long as the parties take this responsibility seriously and both do their due diligence in investigating each nominee's background, there is no valid basis for concern that the parties will end up with an unqualified Board member.

1.5.5 Board Members May be Biased

Without question, each Board member must be totally neutral and impartial. This is the primary key to the success of the DRB process. The parties must be willing to reject all proposed members who might be other than neutral. The conflict-of-interest standards, coupled with the ability of either contracting party to reject a nominee, puts the ability to select truly neutral and impartial Board members within the power of the contracting parties.

There may be a tendency in the beginning of a project for the parties to accommodate each other in an attempt to "get along." During this 'honeymoon' phase, one of the parties may be especially hesitant to reject a proposed Board member nominated by the other. Because of the importance of mutual unconditional acceptance of all Board members in this process, it is essential that both parties assure themselves that all selected Board members are completely unbiased. If there is any question or concern about a proposed Board member, that nominee must not be approved.

1.5.6 DRBs Introduce Acrimony and Promote Posturing

It has been argued that, by forcing the parties to bring their disputes to a hearing, the parties are encouraged to take positions that are not conducive to resolution of the dispute. In practice, however, just the opposite occurs. Properly executed, the DRB process prevents or reduces acrimony, helps to avoid or resolve disputes in a timely fashion, reduces protracted disagreements that lead to entrenchment of each party's views and focuses both parties' efforts toward the project objectives. During periodic meetings the DRB encourages the parties to solve their issues before they become disputes.

1.5.7 DRBs Lack Legal Procedures and Standards

Some critics argue that the DRB process, which involves relatively informal fact-finding procedures, characterized by limited documentary discovery and unsworn testimony without cross-examination, is a drawback. Such concerns are unfounded, since disputes of material fact seldom remain after the hearing process. The extensive documentation in most projects, as well as the ready availability of knowledgeable, contemporaneous witnesses, minimizes factual disputes. The DRB process uses experienced construction professionals who can readily interpret contract documents and drawings, observe site conditions first-hand, and evaluate construction practices while applying appropriate construction industry standards. Furthermore, while it is not cross-examination, probing questions from knowledgeable Board members is often far more effective in revealing inaccuracies or weaknesses in a party's position than a lawyer's cross-examination. Also, the rebuttal process facilitates questioning of each party without embracing hostility that generally inhibits open and honest discussion and disclosure of key circumstances in a dispute.

1.5.8 The DRB Process is "Claims Review," Not "Dispute Resolution"

In an effort to ensure that the owner's staff has thoroughly reviewed all aspects of a dispute, some contract documents place the DRB review very late in the dispute resolution process, e.g., after submittal of a detailed claim package, and in some cases after receipt of the contracting officer's final decision. This places the DRB in the position of evaluating the dispute after the claim has been formally denied by the owner, rather than guiding the parties toward early resolution of their differences.

One argument expressed by owners is the need to know the cost of a claim before making a decision. A DRB has the unique opportunity to hear and provide a recommendation on the merit of a claim without considering quantum. Merit is not a function of the cost and, conversely, the Board's finding of merit does not force the owner to issue a change order. Generally, once merit is established, the parties are able to negotiate quantum without the DRB's assistance. If not, the DRB is available to conduct a subsequent hearing on quantum, if requested. This avoids placing the burden (and cost) of preparing and reviewing detailed cost backup information before merit is even established.

Further, most experienced Board members have observed that after preparation and review of substantial written documentation, and subsequent denial of claims, the parties' positions tend to become entrenched and hardened. The result is that both parties have greater difficulty accepting DRB recommendations that are not consistent with their viewpoint, and the disputes continue. One of the benefits of the DRB process is timely consideration and resolution of disputes before the more formal and costly claims process is initiated. Thus, the DRBF strongly recommends that the DRB process, especially in disputes over merit, be placed early in the contract disputes ladder.

1.5.9 DRBs Favor Contractors

Some owners have voiced concerns that the DRB process appears to favor contractors. This may be because it sometimes appears that the contractor "wins" more often than the owner. There are three primary reasons for this perception:

- Most contractors do not want to face the loss of credibility with Board members. As a result, contractors usually will only bring disputes to the DRB that they feel will prevail. This has the effect of “weeding out” disputes that have little merit. This is in fact one of the benefits of the DRB – the change in behavior of the parties. Nonetheless, because only the stronger disputes are brought to the DRB, sometimes it appears that the contractor wins more than would be the case without a DRB.
- Owners and their field representatives are often hesitant or lack the authority to settle valid claims at the job level due to the owner’s deeper management structures, frequently with political oversight. In these circumstances, a DRB recommendation may help to obtain upper management approval of a settlement to the dispute. As a result, the disputes that are brought to the DRB for resolution may include a number of valid contractor claims that might have been resolved by the parties at the job level. However, the resulting DRB recommendations can add to the perception that DRBs favor contractors.
- Occasionally a dispute will arise over the adequacy and/or correctness of the contract documents. Not surprisingly, some owners are reluctant to admit that their engineering consultants are fallible. As a result, disputes founded upon this basis are sometimes referred to the DRB instead of being settled by the parties in negotiations. Given their experience with similar construction, the DRB usually recognizes the flaws in contract documents that can result in a recommendation in favor of the contractor. This outcome could also result in the owner’s perception that the DRB is biased in favor of the contractor.

Due to the confidential nature of DRB proceedings and the consequent lack of reported information, there are no hard statistics on what percentage of disputes are actually recommended in favor of the owner or the contractor. However, in light of the DRB’s role in filtering out spurious disputes and its reported success in dispute avoidance, the DRB process should not be construed as favoring the contractors.

1 . 6 **The DRBF Code of Ethics**

The DRB's role makes it essential that all Board members be trusted implicitly by the contracting parties. To this end, the DRBF has established a Code of Ethics, which sets forth the key elements of the behaviors to which all Board members must subscribe in order for the DRB process to function effectively. The following are the five Fundamental Canons of the DRBF Code of Ethics:

- 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 except as provided for in the DRB's Operating Procedures.

- 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.

2

User Guide

2 . 1 Introduction

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

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

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

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

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

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

2.2 Member Selection

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

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

2.2.1 When to Establish the DRB

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

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

2.2.2 Ensuring Member Impartiality and Neutrality

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

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

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

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

The following guidelines are recommended:

Definitions

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

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

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

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

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

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

1. Direct Employment

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

2. Consulting Assignments

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

3. Financial Ties

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

4. Close Personal or Professional Relationships

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

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

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

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

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

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

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

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

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

2.2.3 Qualifications of Board Members

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

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

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

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

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

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

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

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

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

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

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

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

2.2.4 Methods of Member Selection

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

Joint Selection

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

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

Nomination by Each Party

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

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

Slate of Candidates

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

2.2.5 Process for Member Selection

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

Selection of members usually takes the following steps:

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

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

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

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

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

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

2.2.6 Selecting the Chair

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

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

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

2 . 3 Operation of the DRB

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

2.3.1 First Meeting with the Parties

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

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

1. Work plan and schedule

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

2. DRB operating procedures

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

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

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

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

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

4. Principles related to maintaining impartiality

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

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

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

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

6. Invoicing procedures

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

7. Frequency of meetings

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

8. The proactive role of the DRB

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

2.3.2 Frequency of Meetings

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

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

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

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

2.3.3 Agenda for Periodic Meetings

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

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

2.3.4 Minutes

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

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

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

2.3.5 Special Meetings

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

2.3.6 Encourage Open Communication and Negotiation to Settle Disputes

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

2.4 Advisory Opinions

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

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

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

Experience to date with advisory opinions has been very positive, with resolution of the dispute generally accomplished without the need for a hearing.

Advisory opinions are an informal method of advising the parties on resolving potential disputes before they escalate. Both parties have to agree to seek an advisory opinion. The procedure for requesting and issuing advisory opinions should be discussed with the DRB at the first meeting with the parties. Provided that both parties agree to an advisory opinion, the process would proceed as follows:

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

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

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

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

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

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

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

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

2.5 Referral of a Dispute to the DRB

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

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

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

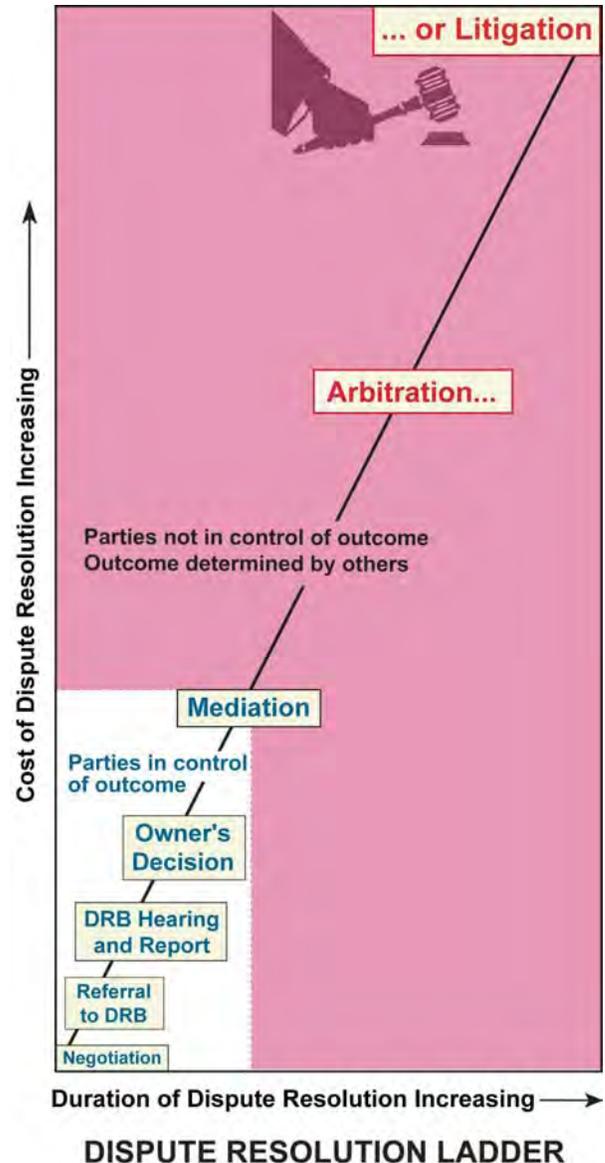
The DRB must operate within the contract and statutory requirements. It may be necessary to make modifications to portions of the general conditions to clearly identify where in the process the DRB will provide dispute resolution assistance.

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

2.5.1 Limitations

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

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



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

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

2.5.2 Letter of Referral

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

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

2.5.3 Scope of Recommendation

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

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

2.6 Preparation for the Hearing

2.6.1 Scheduling the Hearing

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

2.6.2 Common Reference Document

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

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

2.6.3 Position Papers

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

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

2.6.5 Submittal

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

2.6.6 Location and Facilities

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

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

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

2.6.7 Participation

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

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

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

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

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

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

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

2.7 The Hearing

2.7.1 Introduction

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

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

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

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

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

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

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

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

2.7.2 Conduct

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

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

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

2.7.3 Conclusion

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

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

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

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

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

2 . 8 The Report

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

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

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

2.8.1 Acceptance

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

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

2.8.2 Clarification and Reconsideration

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

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

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

2.8.3 Subsequent Dispute Resolution Activities

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

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

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

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

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

2 . 9 Termination of DRB Members

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

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

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

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

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

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

2 . 10 Practice Guidelines for DRB Members

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

Canon 1

2.10.1 **Board members shall disclose any interest or relationship that could possibly be viewed as affecting impartiality or that might create an appearance of partiality or bias. This obligation to disclose is a continuing obligation throughout the life of the DRB.**

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

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

Board members:

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

- The term "party directly involved in the project" includes the owner and contractor and all joint-venture partners individually.
- The term "party indirectly involved in the project" includes the construction manager, subcontractors of any tier, suppliers, designers, architects, engineers and other professional service firms, consultants to the project, et al.

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

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

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

Canon 2

2.10.2 **Conduct of Board members shall be above reproach. Even the appearance of a conflict of interest shall be avoided. There shall be no ex parte communication with the parties except as provided for in the DRB's Operating Procedures.**

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

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

Examples of impropriety include:

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

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

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

Canon 3

2.10.3 **Board members shall not use information acquired during DRB activities for personal advantage, or divulge any confidential information to others unless approved by the parties.**

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

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

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

Canon 4

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

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

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

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

Canon 5

2.10.5 **The DRB shall impartially consider all disputes referred to it. Reports shall be based solely on the provisions of the contract documents and the facts of the dispute.**

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

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

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

2.11 Implementation

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

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

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

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

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

2.11.1 The DRBF Guide Specification

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

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

2.11.1.1 Specification Commentary

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

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

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

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

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

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

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

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

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

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

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

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

2.11.1.2 Specification Variations

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

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

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

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

- **Binding Recommendations**

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

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

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

- **Limits on Prior DRB Experience**

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

2.11.2 The Guide Three-Party Agreement

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

2.11.2.1 Three-Party Agreement Commentary

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

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

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

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

2.11.2.2 Three-Party Agreement Variations

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

2.11.3 Variations to the Model DRB Process

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

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

2.11.3.1 Five-Member DRB

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

2.11.3.2 Interlocking Board Member

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

2.11.3.3 Consolidated DRB

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

2.11.3.4 Standing DRB

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

2.11.3.5 Regional DRB

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

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

2.11.3.6 Standby DRB

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

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

2.11.3.7 Single-Member DRB

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

2.11.3.8 One-meeting DRB

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

2.11.3.9 DRB Organized After or Near Completion of the Project

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

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

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 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.

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.

4

Multinational Practice

4 . 1 Introduction

This section of the Manual is primarily written for financing institutions, owners and their representatives, contractors and Board members on multinational construction projects. It also describes Dispute Board use in the U.K.

The term “multinational” as used herein refers to construction projects where multiple nationalities are involved in the contract. Often the foreign currency requirements for the project are obtained from a multinational development bank, such as The World Bank. The entity building the project often is part of the government of the country where the project is constructed, and the contractor typically is of a different nationality. Sometimes the contractor is a joint venture of companies of different nationalities, and may or may not include a contractor of the same nationality of the country where the project is constructed. Typically, the project will involve an organization to supervise the contractor, and the supervising entity may be of a nationality different from either that of the entity building the project or that of the contractor.

This section of the Manual uses the term “Dispute Board” (DB) to avoid the confusing array of references used by the various organizations in their documents, and to differentiate from DRBs used in North American practice.

In multinational use almost all DB practices and procedures are similar to those described in Sections 1, 2 and 3 of this Manual. However, there are some differences and those are discussed in this section.

Chapter 4.2 presents the history and general application of multinational DBs and DB practice in the U.K.

Chapter 4.3 discusses current practices and procedures that are unique to multinational DBs.

Chapter 4.4 provides links to various contract provisions for DBs.

4.2 History

The World Bank, the Fédération Internationale des Ingénieurs-Conseils (FIDIC), and the International Chamber of Commerce (ICC) have advocated multinational use of the DB process.

4.2.1 The World Bank and Other Development Banks

The first use of a DB by The World Bank was on the El Cajon hydropower project in Honduras in the 1980s. The project involved the tallest concrete arch dam in Latin America. The success of the DB at El Cajon, on which all disputes were resolved amicably by the time construction was complete, led The World Bank to suggest wider use of the technique for projects they financed.

DBs were first introduced in The World Bank's "Sample Bidding Documents for Procurement of Works" in the December 1991 edition. Developers of major projects were "encouraged to consider" a DB within the contractual procedure for settlement of disputes.

In January 1995 The World Bank published a new edition of one of its standard bidding documents entitled "Procurement of Works." As with earlier editions, it used the general conditions published by FIDIC, called "Conditions of Contract (International) for Works of Civil Engineering Construction." However, the FIDIC provision that gave "the Engineer" the duty of deciding disputes was deleted, and the use of a DB, with provisions similar to those used at El Cajon, was substituted. These provisions required the use of a DB from the outset of the contract, and all disputes were submitted to the DB for a written report and recommendation. If neither party gave written notice of objection within 14 days of receipt, the recommendation became final and binding. However, if a timely notice of objection was made, the recommendation was not binding, and it was left to the parties to continue to negotiate, with ultimate recourse to international arbitration.

Later, The World Bank provided that a three person DB must be used if the estimated cost of the contract, including contingencies, is US\$50 million or more. If the estimated cost is less than US\$50 million, the borrower can have a three or one person DB. If the estimated cost is US\$10 million or less, the borrower can use an adjudicator, appointed after a dispute arises.

Other multilateral development banks, such as the Asian Development Bank, used the same provisions, although most of the other banks simply recommended, and did not require, that borrowers adopt the DB system.

In May 2000 The World Bank published a new edition of "Procurement of Works" and modified the DB procedure to follow that of FIDIC (see below) and make immediate compliance with the recommendation mandatory, unless and until modified by an award by an international arbitration tribunal.

In May, 2005, a group of multilateral development banks and international financial institutions reached agreement on a new document "Procurement of Works and User's Guide" which abandoned the use of the 4th Edition (1987, as amended) "Conditions of Contract (International) for Works of Civil Engineering Construction," discussed in 4.2.2, below, and in its place substituted a new set of Conditions of Contract, developed in collaboration with FIDIC, an organization mentioned in 4.2.2, below.

The new Conditions are entitled "MDB Harmonized Conditions for Construction." They are a modification of the FIDIC 1999 Conditions for Construction, mentioned in 4.2.2, below. The modification is part of a "harmonization" of procurement of works by the major development lenders. The "harmonization" will simplify financing of contracts jointly by two or more development lenders,

and has created shorter and less complex documents for use by borrowers in contracting for construction work financed by the development lenders.

The new conditions require borrowers to have a Dispute Board for every contract for which any of the development lenders provide any funding, irrespective of the expected amount of the contract. The borrower has the option to select a three person Board or a one person Board, and is to indicate its choice in its Invitation to Bid. The consequence is that there will be many more Dispute Boards created, including in regions of the world where development lenders formerly recommended but did not require the use of Dispute Boards.

A sense of the sweep of this new requirement for Dispute Boards can be had from review of the institutions which have adopted the new conditions: African Development Bank, Asian Development Bank, Black Sea Trade and Development Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Bank for Reconstruction and Development (The World Bank), Islamic Bank for Development Bank [sic], and Nordic Development Fund.

In March, 2006, the 2005 edition of the MDB Harmonized Conditions was revised, and is available from FIDIC, at www.fidic.org/bookshop, or at The World Bank website, www.worldbank.org.

4.2.2 FIDIC

FIDIC is an international federation of national associations of consulting engineers. It publishes model forms of contract for use in international construction. The first and principal form was one for international civil works, first published in the late 1950s, with the title “Conditions of Contract (International) for Works of Civil Engineering Construction.” It became commonly known by the color of its cover, the “Red Book.” The *Red Book* was designed for construction contracts in which the contractor built to the employer’s design and was supervised an engineer, usually a firm of consulting engineers, engaged for the purpose of overseeing the work of the contractor. As it is the leading model form for use in international civil works projects, The World Bank adopted it, with changes, as noted above.

The “FIDIC Conditions of Contract” resolved disputes by written decisions of the employer’s engineer, whose decision was final, subject only to being altered by an arbitral award. When the engineer’s written decision was issued, it was effective immediately, and the parties were obliged to comply with it. Unless objected to within a stated time limit, the decision became final. If objected to within the time limit, the dispute could be taken on to international arbitration.¹ Nevertheless, the parties still had to comply with the decision unless and until the award of the arbitral tribunal altered it, which might be years later.

FIDIC uses the term “employer” instead of “owner.”
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This approach had been in use by FIDIC since the earliest publication of its model “General Conditions,” but was argued by some to be unsatisfactory for various reasons. Some of these reasons included the fact that some employers used an engineer who was part of the employer’s organization, instead of being an independent consulting engineer, and the fact that many of the disputes which required such decisions were disputes arising from the actions of the engineer, so that the engineer in effect sat in judgement on his own behaviour. Dissatisfaction with written decisions of the employer’s

¹ When differing nationalities are involved in a single contract, it can be difficult to agree to a single national court to which to turn for final resolution of disputes. This led to using international arbitration instead of a particular national court for final resolution of disputes.

engineer led to many disputes, which often would not be settled until long after completion of construction.

In 1995, FIDIC published a separate set of conditions for use on design-build turnkey contracts with major changes to the conditions of its *Red Book*. In the design-build turnkey conditions, the contractor is responsible for both design and construction, based upon a set of requirements supplied by the employer. In this new form, disputes were to be resolved by a Dispute Adjudication Board or Dispute Adjudication Expert. This was similar to the DB of The World Bank, with one principal difference: the determination of the DB, like that of the engineer under the *Red Book*, was immediately binding on the parties, and had to be complied with even if the DB determination was referred to international arbitration.

In 1996, FIDIC published a supplement to the *Red Book*, providing an optional amendment to the *Red Book*, deleting the arrangements for the engineer to make written decisions on disputes and substituting a DB, just as in the FIDIC design-build turnkey conditions.

In 1999, FIDIC published three major sets of model conditions involving DBs. The *Red Book* was given a new title, “Conditions for Construction.” Another set of conditions originally published for use in contracts for electrical and mechanical works (the *Yellow Book*) became “Conditions for Plant and Design-Build.” The third was a new set of conditions, “Conditions for EPC Turnkey” (EPC stands for engineer, procure and construct). Thus, the 1995 Design-Build Turnkey form was split to put “Design-Build” with “Plant” and “Turnkey” with “EPC.”

Only the *Red Book* has a true DB, established at the outset of the contract, unless the parties agree otherwise. The Design-Build and the Turnkey use what FIDIC calls an “ad hoc” DB, established only if and after a dispute arises, thus lacking the essential characteristic of having been in place from the beginning of the contract. Thus the “ad hoc” DB is similar to an arbitral tribunal.

FIDIC provides standard contract clauses for DBs and a model Three-Party Agreement.

4.2.3 International Chamber of Commerce

The ICC is an international entity comprised of national committees established in most countries involved in international commerce. It is well known for its ICC International Court of Arbitration, a body based in Paris which administers arbitrations held in accordance with its rules, but carried out anywhere in the world. It administers more international arbitrations than any other organization, and a large number of those arbitrations involve disputes arising in the international construction industry.

The ICC has a commission on arbitration that in recent years has become active in alternative dispute resolution. This led to the evaluation of DBs. In September 2004, the ICC published its rules on DBs, which created documents for three types of DBs:

- A Dispute Review Board, which resembles the DB as used by The World Bank from 1995 until 2000, and makes determinations that are not binding if objected to within 30 days.
- A Dispute Adjudication Board, which produces determinations that are immediately binding, although subject to review by arbitration.
- A Combined Dispute Board, which issues determinations that are not binding. However, if requested by either party, and if the Combined Dispute Board is convinced a binding determination is essential to the progress of the project, it has the power to issue a determination which is immediately binding, although subject to review by arbitration.

The ICC rules provide standard contract clauses for DBs and a model Three-Party Agreement.

4.2.4 U.K. Institution of Civil Engineers

In July 2004, the U.K. Institution of Civil Engineers (ICE) published its “Dispute Resolution Board Procedures,” to establish DBs under contracts using the ICE’s model conditions of contract, and to be compliant with England’s statutory system for adjudication of disputes arising from construction contracts.

The ICE DB procedures are based on FIDIC’s DB procedures, but contain necessary amendments to be compliant with the U.K. Housing Grants, Construction and Regeneration Act of 1996.

Under this act, parties to almost all construction contracts awarded in the U.K. are provided with a statutory right to have disputes adjudicated, at any time, by an adjudicator selected by the parties, or whose name is agreed pre-contract and stated in the contract agreement, or appointed by any one of several officially recognized Adjudication Nominating Bodies. The procedure for the adjudication (appointment, time limits for decisions, power of the adjudicator, payment of fees, etc.) must comply with specified rules set out in the act, or absent such rules, the Statutory Scheme for Adjudication (a statutory instrument published by the U.K. government) applied by default.

The ICE provides standard contract clauses for DBs and a model Three-Party Agreement.

4.3 Current Practice and Procedures

4.3.1 Training and Certification of Dispute Board Members

Many organizations, both commercial and professional, give short seminars and lectures about DBs. This training is informal and lasts only a day or two. It is not participatory training, but consists of a series of lectures with opportunity for questions.

FIDIC maintains a President's List of Approved Adjudicators, for use when asked to select DB members. The list is available to FIDIC members on the FIDIC website. The website also contains detailed instructions to apply for listing. Applicants must be members of one of the consulting engineering organizations that are members of FIDIC or themselves be members of FIDIC.

Documents are submitted with an application to facilitate assessment of the applicant's experience and standing in respect to dispute resolution. When the accumulation of applicants justifies, FIDIC arranges an Assessment Workshop, conducted by a three-person Assessment Panel. Applicants are required to become familiar with the FIDIC Conditions of Contract before attending the workshop.

The workshop is a strenuous two-day exercise. There are no lectures; instead there are a multiple choice answer quiz, an overnight assignment of writing an essay type answer to a hypothetical problem, quizzes requiring essay type answers, individual private interviews, and an end-of-workshop assignment of writing a DB decision, to be submitted within two weeks of the conclusion of the workshop. All three members of the Assessment Panel are in attendance throughout, and all review all written assignments and attend all private interviews. At the end of the assessment process, the Assessment Panel submits to FIDIC's Executive Committee a written report of its assessments of the applicants, and in due course the applicants are notified by FIDIC's executive director of the outcome of the assessment.

FIDIC plans to monitor the President's List to assure that its listees are active on DBs and require listees to report DB assignments periodically.

During the work of the task force that developed the ICC Dispute Board documents, there were discussions regarding the establishment of an ICC list of recommended Board members, but it was decided that this would be contrary to the ICC's long-standing policy of not maintaining lists of recommended arbitrators or mediators.

The World Bank does not maintain a list of recommended Board members.

Since 1996 the ICE has published a list of accredited Board members. The persons listed undergo a rigorous assessment, personal in-depth interviews, and are subject to regular review as to their continued suitability for inclusion of the list. When named as the default appointing authority, the president of the ICE appoints Board members and Chairs from the ICE DB list.

4.3.2 Member Selection

All of the standard DB documents have detailed provisions governing member selection. Generally, these provisions provide for both one-person and three-person DBs, and require that both parties to the contract approve all members.

For three-person DBs, The World Bank provisions call for selection to be made by each party selecting one member for approval by the other party, and those two select the third member, who serves as Chair. The FIDIC provisions call for selection by the same method, except that the Chair is approved

by the two parties. The ICC Rules provide for “joint appointment” by the parties of the first two members, with the third member to be proposed to the parties by the two members first chosen.

Most ideas for persons to nominate are by word of mouth or acquaintance with persons active in the field. Some parties choose from the published lists mentioned above. Parties also consult published lists of arbitrators and mediators.

Provisions are included for “default appointers” so that if either party fails to nominate a member or agreement cannot be reached on a Chair, the default appointer will select, so that neither party can prevent the formation of the DB and thus frustrate the process. Examples of default appointers are the president or vice president of FIDIC for FIDIC DBs, and the ICC Dispute Resolution Centre for DBs under the ICC. FIDIC and the ICC offer appointment services for DBs for a fee.

The ICC will hear challenges by the parties to an appointed DB member for alleged bias or partiality. A fee is charged for this service.

All three of the provisions cover replacement of DB members who resign or are incapacitated or die. The multinational DB systems deal with appointment and replacement of DB members in more detail than other DRBs.

4.3.3 Meetings

Language usually is not a problem with multinational DBs, as English is the dominant language in these contracts.

The standard forms in use in multinational contracts typically leave it to the parties to establish the frequency of regular visits of the DB. Published guidance suggests that DBs should visit quarterly. This is not a financial burden to the parties when the Board members are local to the project. However, where the DB is comprised of persons who must travel long distances, a site visit is a significant item of cost. For example, up to two days of paid travel time in each direction are normally allowed for a site visit. Often a stay in a hotel is required before proceeding on to site. Once at the site, the visit usually lasts two or three days. The result is that a routine visit can involve a week of daily fees for each Board member plus international airfares. Consequently the parties may attempt to increase the time between regular visits, endangering the effectiveness of the DB.

4.3.4 Conduct of Dispute Board Members

Conduct of Board members is most important in multinational practice. The World Bank, FIDIC and ICC provide detailed requirements to assure that DB members are and will remain independent of the parties. To this end, all Board members can strictly observe the DRBF Code of Ethics.

Persons of different nationalities, from different cultures, with different customs attend the meetings. Body language, gestures, facial expressions, and vocal inflections assume magnified importance, and must be borne in mind constantly, not only during meetings and hearings but also in social contacts between the Board members and the parties.

Board members must be aware of cultural differences. For example, there are cultures that do not like confrontation, so an aggressive voice tone or aggressive body language is unproductive. Some cultures find it difficult to express disagreement openly. This leads to seemingly bland remarks that are completely misunderstood by persons accustomed to clear, crisp statements of positions and reasons. Another challenging area is that many cultures show great respect and deference to older persons. This can carry over into what can be, and what cannot be said to older people.

4.3.5 Referral of a Dispute

Either party can refer a dispute to the DB. Some multinational contracts have added a specific requirement that the parties shall have made a strong effort to settle a dispute before referral to the DB. Others have specific reference to involvement of the DB in an attempt to resolve disagreements before they crystallize into disputes. These procedures provide for the DB to provide guidance to the parties in connection with potential disputes, similar to Advisory Opinions [2.4 and 3.5].

4.3.6 Hearings

Hearings with multinational DBs tend to be more formal than those in the North America. There are several reasons for this:

- Compared to practices in North America, multinational construction contracts tend to have less commonality between the parties. For example, the contractor may be a joint venture of firms of differing nationalities; the engineer may be a firm of consulting engineers from a different nation, and neither the contractor nor the engineer is of the same nationality as the employer. The contractor and/or the engineer may be new to the country of the project, and may not anticipate any further work in that country after completion of the contract. Thus, the parties may share little if any common attitudes and practices on construction or contractual matters.
- FIDIC and the development banks want determinations of disputes to be based on written presentations, to focus the points at issue and assure that they have been presented fully and clearly to the DB.
- Disputes on multinational construction projects often involve complex issues entailing large amounts of money. This leads to the use of lawyers to prepare written presentations to the DB to better assure clarity and completeness.
- These contracts commonly have government entities as employers. They are usually under intense scrutiny and publicity regarding resolution of problems on the project. Government officials sometimes face difficulty in settling disputes by negotiation because of the potential for charges of favouritism or even corruption. These officials want to establish a clear record of strict observance of the contract requirements, and to present every argument they can find which might defeat a claim against their government.

Nevertheless, hearings for multinational contracts usually are less formal than hearings in arbitration or litigation. The parties present their arguments through the persons who have been most directly involved in the performance of the contract. The use of lawyers to make presentations in the hearings is discouraged, except in relation to legal matters.

DB determinations are admissible in evidence in subsequent proceedings relating to the dispute.

4.3.7 Clarification and Reconsideration

The World Bank and FIDIC forms do not provide for clarification or reconsideration. As a practical matter, multinational DBs allow questions seeking clarifications, but have not engaged in reconsideration, absent new facts.

Article 24 of the ICC Rules provides for “Correction and Interpretation of Determinations.”

4.3.8 Subsequent Dispute Resolution Activities

Typical multinational DB provisions include international arbitration for final and binding resolution of disputes that have not otherwise become final and binding. This generally includes a provision that allows a shortcut to arbitration proceedings if a party fails to comply with a binding DB determination.

The standard Conditions of Contract promoted by The World Bank, FIDIC, and the ICC foresee arbitration in accordance with the published Rules of existing bodies such as the ICC International Court of Arbitration, the United Nations Commission on International Trade Law, or the London Court of International Arbitration.

The World Bank provisions foresee that a DB member can be called as a witness and give evidence before the arbitrators on any matter whatsoever relevant to the dispute. The FIDIC Guide comments: “Unless the Parties agree otherwise, no Member should participate in a future arbitration, either as an arbitrator or as witness.” The ICC Rules at Article 9(3) state: “Unless otherwise agreed by the Parties, a DB Member shall not act in any judicial, arbitration or similar proceedings relating to any Dispute, whether as a judge, as an arbitrator, as an expert, or as a representative or advisor of a Party.”

Occasionally a party fails to comply with an arbitral award, and it becomes necessary to seek enforcement of the arbitral award by appeal to a national court having jurisdiction over the person or assets of the failing party. Success in obtaining such enforcement is much easier if the nation, which was the seat of the arbitration, and the nation in which court enforcement is sought both are signatories to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. This should be kept in mind when considering the arbitration agreement established at the time of entering the contract.

4.3.9 Termination

The standard forms of The World Bank, FIDIC, and ICC all provide that the parties can terminate one member or the entire DB by written agreement. Replacement is by the same procedure as that used in choosing the member.

The World Bank and FIDIC forms provide that the DB will be available after substantial completion of construction and during the Defects Liability Period (typically one year), but without periodic site visits - a standby arrangement in case problems of defective design, materials, or workmanship arise.

4.3.10 Compensation and Payment

Forms of The World Bank, FIDIC, and ICC have comparable payment provisions. The parties share all costs equally. Board members are paid a daily fee while working or travelling plus a monthly retainer. Expenses, including business class air travel, are fully reimbursed.

The daily fee is agreed by the parties and DB members. The World Bank documents refer to the use, unless the parties otherwise agree, of the daily fee for arbitrators as established by the International Centre for the Settlement of Investment Disputes, an organization which is part of The World Bank.

The monthly retainer is intended to cover the DB member becoming familiar with the contract, reading periodic progress reports, maintaining files, all office overhead costs, and being available to come to the site on short notice. Typically, the retainer is an amount equal to three times the daily fee.

4.4 Links to Websites

Following is a brief description of materials available on The World Bank, FIDIC, ICC and ICE web sites, with links to those sites.

The World Bank

The Standard Bidding Documents for Procurement of Works, May 2004, is available in text or PDF. See Section XIII, “Disputes Settlement Procedure, Disputes Review Board’s Rules and Procedures.”

www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000009265_3970716143954

FIDIC

All FIDIC publications are available for purchase at the bookshop at

http://www1.fidic.org/bookshop/default_contracts.asp#collection

Details of the FIDIC President's List of Approved Adjudicators are also available.

International Chamber of Commerce

The complete ICC Dispute Board Rules can be read in English or downloaded in English or French at

http://www.iccwbo.org/drs/english/dispute_boards/rules.asp

Details of the ICC's International Centre for Expertise is available at

<http://www.iccwbo.org/home/bdrs/expertise/expertise.asp>

U. K. Institution of Civil Engineers

An application form requesting appointment of a Dispute Resolution Board Member/Chair may be downloaded in PDF.

An accredited list of adjudicators with detailed CVs may be downloaded.

The Dispute Resolution Board Procedure will be available for purchase from the bookshop (at “Services”) in 2005.

http://www.ice.org.uk/knowledge/knowledge_contracts.asp

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Glossary

Advisory opinion: The orally delivered product of an advisory opinion meeting.

Advisory opinion meeting: A meeting requested by both parties wherein each party makes a brief presentation to the DRB defending its position on an issue, followed by a discussion, a brief caucus by the Board and concluding with an oral presentation of the DRB's advisory opinion on the issue.

Bias: Favoring one party over the other. Used with "perception" to illustrate that bias can be inferred, perhaps incorrectly, by the other party.

Cause: A breach of a Board member's responsibilities that is considered sufficient to warrant dismissal of that Board member from a DRB.

Chair: The Board member who manages and coordinates implementation of the DRB process and serves as the sole contact between the parties and the DRB.

Common reference document: Materials such as correspondence, reports, and other records that either party considers important to the resolution of a dispute, combined into a paginated, indexed document and transmitted to the DRB prior to a hearing, to facilitate presentation and understanding of a dispute.

Decision: *See recommendation.*

Deliberation: A private meeting of the Board members after a hearing to discuss the dispute, develop findings and recommendation(s) and organize the DRB report preparation.

Disclose: To make known to both parties all facts that might affect a potential or appointed Board member's partiality or the perception of partiality.

Dispute: An issue between the parties that has been referred to the DRB for a recommendation.

DB: The abbreviation for Dispute Board on multinational projects. The three DB members collectively.

DRB: The abbreviation for Dispute Review Board. The three DRB members collectively.

DRBF: The Dispute Resolution Board Foundation.

DRB hearing: A gathering of all parties during which presentations on a dispute referred to the DRB by one of the parties are made to the DRB. Since DRB hearings are informal, reference to a "formal hearing" is considered inappropriate.

Entitlement: The condition when a party to a construction contract is due a consideration as a result of a DRB recommendation. See merit.

Ex parte communication: Refers to any contact between a Board member and a party to the contract that occurs outside of the periodic DRB meetings or hearings, except contacts by the Chair for meeting arrangements, etc.

- Fair / Fairness:** To avoid misunderstandings these words are no longer used in the Manual. Sometimes a person's opinion is that the contract terms are not "fair" to one of the parties. However, this must not have any bearing on a DRB recommendation since the DRB does not have the authority to change the terms of the contract. A party must go to court for relief from unfair contract terms.
- Financial ties:** Potential or appointed Board member ownership interest in, or loans, receivables or payables to or from any party to a construction contract.
- Issue:** A problem or disagreement that is being negotiated by the parties and has not been referred to the DRB for an advisory opinion or a hearing.
- Joint statement of dispute:** A short (one or more paragraphs) description of the dispute, jointly prepared and agreed to (to the maximum extent possible) by each of the parties. This is submitted to the DRB soon after a hearing is scheduled and before preparation of the common reference document.
- Letter of referral:** The letter from one of the parties to the DRB Chair requesting a hearing.
- Manual:** The "DRBF Practices and Procedures" document published by the DRBF and available on the Internet (DRB.org) or as a hard copy purchased from the DRBF.
- Merit:** The condition when a party to a construction contract is due a consideration as a result of a DRB recommendation. See entitlement.
- Multinational:** Refers to construction projects where multiple nationalities are involved in the contract. These projects are usually funded by a multinational development bank, the owner is the government of the country where the project is located, and the construction manager and contractor are often from other countries.
- Operating Procedures:** An informal agreement between the parties and the DRB, drafted by the DRB and approved by the parties, that details the DRB's planned procedures for implementing the DRB process, including dispute hearings.
- Partnering:** A voluntary system whereby the parties to a construction contract handle problems in a mutually agreeable manner before they turn into major issues that require outside assistance to resolve. Often used in conjunction with DRBs.
- Periodic meeting:** DRB meeting with the parties at regular intervals used to discuss progress of the work, problems encountered and proposed solutions, issues and potential disputes, and to view the work.
- PDF:** Adobe nomenclature for the format in which the Manual is available on the Internet.
- Party:** One of the parties to a construction contract, either the owner or prime contractor.
- Parties:** The two parties to a construction contract; the owner and prime contractor.
- Parties, contracting:** The parties to a construction contract – the owner and the prime contractor.
- Parties directly involved:** The owner and prime contractor, and each joint-venture partner.

Parties indirectly involved: The construction manager, subcontractors of any tier, suppliers, designers, architects, engineers and other professional service firms, consultants to the project, and, the funding agencies, depending on how close they are to the operation of the project.

Position papers: Documents prepared by each party after the common reference document is complete that concisely summarize the party's position, explain relevant factual information, and give the contractual justification for their position, with references to specific pages in the common reference document.

Presentation: Testimony and arguments by witnesses in a DRB advisory opinion or hearing.

Prohibited: Service as a DRB member should not be allowed in certain conditions.

Quantum: The amount of money and/or time established to settle a dispute. Quantum is seldom recommended by a DRB, however, if merit is found, guidelines for quantum are recommended when requested by the parties.

Rebuttal papers: Written rebuttals to position papers submitted by the parties to the DRB before the hearing.

Recommendation: The portion of a DRB report in which the DRB gives their opinion(s) on the merits of a dispute. (1) North America DRB recommendations are seldom binding on the parties, and thus are never referred to as "decisions." (2) In multi-national DB practice, recommendations are frequently "binding in the interim" (i.e., binding unless one of the parties files a timely written notice of objection) and thus are generally referred to as "decisions".

Report: The document prepared by the DRB for the parties after a hearing, containing its findings and supporting rationale and its recommendation(s) for resolution of the dispute.

Scope of the recommendation: Merit and sometimes quantum. Many disputes involve only merit. If quantum is involved and merit is recommended, it is common for the parties to request the DRB to recommend guidelines for determination of quantum.

Site visit / Site tour: The portion of the periodic meeting during which the DRB observes the active work, accompanied by representatives of the owner and contractor.

Specification: The portions of a construction contract that establish the detailed terms and conditions to be followed by the parties.

Testimony: Statements by witnesses in a DRB advisory opinion or hearing.

Three-Party Agreement: A document prepared by the owner and included in the construction specifications. This serves as the contract between the DRB and the parties and specifies the duties and responsibilities of each (the owner, contractor and DRB members) as to operation of the DRB.

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

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