Dispute Review Boards: How You and Your Project Can Benefit

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Learning Objectives

- Background on DRBs
- ConsensusDocs DRB Addendum and Three Party Agreement Provisions
- Practice Tips for Most Effective use of DRBs
- Your Questions
What is a DRB?

A Dispute Review Board (DRB) 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.
History of DRBs

- Early 1970s tunneling industry conducted studies on new approaches to dispute resolution
- First DRB used on second bore of I-70 Eisenhower Tunnel (1975)
- 1996 DRB Foundation established; DRB Manual published
- By 2010 over 2,200 US projects worth US $200B with DRBs
How do DRBs fit with Alternative Dispute Resolution (ADR) processes?

- DRB process builds in both dispute avoidance and dispute resolution
- DRB process can be added to precede existing claim processes, such as contracting officer decision, arbitration, or litigation
ADR Continuum

Low Cost Resolution

- Unassisted Negotiations
- Structured Negotiations
- Partnering
- Facilitation
- Conciliation

High Cost Resolution

- DISPUTE REVIEW BOARD
- Early Neutral Evaluation
- Joint Experts
- DISPUTE REVIEW BOARD
- Mediation
- Mini-Trial
- Arbitration
- Court Special Master
- Court Settlement Conference
- Bench Trial
- Jury Trial

More Control

Less Control

Less Time

More Time
Who is using DRBs?

Public and Private Projects

- Airports
- Bridges
- Buildings
- Dams
- Energy
- Highways
- Ports
- Power plants
- Underground
- Universities
- Medical facilities

What do they have in common?

- ✔ Lengthy duration
- ✔ Complex site/construction methods
- ✔ High risk
ConsensusDocs
DRB Working Group

• ConsensusDocs 200, Article 12.3, Dispute Mitigation Procedures—Project Neutral or DRB
• September 2012 Working Group established to draft DRB Addendum and Three Party Agreement
• August 2013 AGC issued 200.4 (DRB Addendum) and 200.5 (TPA)
• August 2013 DRBF became the 40th endorser of ConsensusDocs
DRB Working Group Topics

- General Provisions Regarding DRB Responsibilities
- DRB Member Qualifications
- Establishment of the DRB
- DRB Meetings
- DRB Advisory Opinion Process
- DRB Dispute Submission Process
- DRB Hearing Process
- DRB Reports
- Three-Party Agreement (TPA)
CD 200.0 Article 12

- 12.2—Direct Discussions
- 12.3—Dispute Mitigation Procedures
  - 12.3.2 Dispute Review Board
DRB Addendum (200.4)
Article 1: General

- Base Agreement terms govern, if there is a conflict (1.3)
- Except as provided otherwise, all matters that arise from performance of the Agreement, and any unresolved dispute, may be referred to DRB by either party (1.4)
- Parties may request DRB to “address any issue arising out of the Project” (1.4)
Article 2: Definitions

- Definitions primarily relate to conflict of interest issues
- See especially
  - Consulting Capacity (2.1)
  - Financial Ties (2.3)
  - Involved Entity (2.4)
Article 3: DRB Qualifications

- Experienced in type of construction (3.1)
- Experienced in interpretation and application of contract documents (3.1)
- Experienced in the resolution of construction disputes (3.1)
- Familiar with ADR (3.1)
- Trained in DRB best practices (3.1)
Article 3: DRB COI Provisions

- No current direct employment (3.2.1)
- No current consulting capacity (3.2.2)
- No financial ties (unless waived) (3.2.3)
- No close personal or professional ties (3.2.4)
- No prior involvement with the project (3.2.5)
- All other past relationships with the Parties or “Involved Entities” must be disclosed (3.2)
- Continuing obligation to avoid conflicts/disclose (3.3)
- Ethical obligations under Three Party Agreement (3.3)
Article 4: Establishment of the DRB

- Parties confer and jointly select a pool of prospective nominees (4.1 and 4.2)
- Parties provide list to DRB prospects for conflicts check (4.3)
- DRB nominees provide resumes and disclosures to parties (4.3)
- Parties jointly select DRB, including designating Chair if they wish (4.3)
- TPA is executed no later than first DRB meeting (4.3)
Practice Tips: Two basic attributes of a good DRB

- People
- Process
Attributes of a good DRB: People

- Neutral and impartial
- Skills and experience specific to the project type
- Trained in DRB processes and ethics
- Available for DRB meetings
Attributes of a good DRB: People

- Respected industry professionals
- Not technical advisors, but facilitate project planning and collaboration to avoid and resolve disputes
- Able to manage DRB processes effectively and efficiently
- Interested and engaged, with good “people skills”
Article 5: DRB Operations

- DRB to adopt Operating Procedures (5.1)
- DRB to visit project site periodically (5.2)
- Initial meeting to occur no later than 45 days after effective date of the Agreement (5.3)
- Parties to provide project update information to DRB (5.4)
- Regular meeting includes a site visit with parties (5.5)
- Other involved entities/stakeholders may be invited to attend (5.8)
Article 5: DRB Operations

- Primary purpose of DRB is to avoid disputes and help the parties mitigate the effect of unforeseen events (5.6)
- Statements at DRB meetings not admissible; deemed to be settlement discussions (5.7)
Article 5: DRB Operations

- DRB may give verbal Advisory Opinions (5.8)
  - Method for potentially avoiding a DRB hearing
  - May be implemented as part of parties’ direct discussions at periodic meetings
  - Must be jointly requested
  - Chair establishes the procedure and schedule
- If dispute not resolved by Advisory Opinion, parties may pursue formal claim and prior proceedings not considered (5.8)
Effective DRBs: Process

Define DRB’s proactive role:
• Monitor and facilitate job progress
• Foster open communication
• Encourage senior management attention
• Help the parties resolve issues before claims arise
• Keep decision making at the project level
Effective DRBs: Process

Hold periodic meetings:

- Motivate collaborative mitigation of potential impacts from unplanned events
- Focus on tomorrow—what are upcoming challenges?
- Drill deep
  - Whys?
  - What?
  - Who?
  - When?
Effective DRBs: Process

Use Verbal Advisory Opinions:

- Limited, high-level summary presentations
- Early “quick read”
- Best done before costs are incurred
- Advisory Opinion can be the basis for further negotiations
Article 6: Formal Dispute Resolution Process

- Prior to referral of dispute, direct discussions per Agreement—can include Advisory Opinion (6.1)
- Dispute referral in writing to DRB and other party (6.2)
- Within 10 days after receipt, Chair confers with parties about dispute process (6.2.1.1)
- Parties submit pre-hearing position papers—full justification for position (6.2.2)
Article 6: Formal Dispute Resolution Process

- Exchange presentation materials before hearing (6.2.5.2)
- Knowledgeable party representatives must attend (6.2.5.3)
- Subs with pass-through claims must attend (6.2.5.3.4)
Article 6: Formal Dispute Resolution Process

- Parties present their claim, with rebuttals permitted (6.2.5.4)
- No cross-examination, but DRB asks questions and parties, with DRB permission, can ask questions (6.2.5.4)
- Attorneys do not participate unless other party and DRB agree (6.2.5.3.3)
Article 6: Formal Dispute Resolution Process

- Experts must be disclosed at least 30 days before position paper due (6.2.7.1)
- Other party may then retain expert and make disclosure at least 10 days before position paper due (6.2.7.2)
- Expert reports to be exchanged as part of pre-hearing submittals (6.2.7.3)
Article 6: Formal Dispute Resolution Process

- DRB findings and recommendations include (6.2.8):
  - Issue in dispute and relief requested
  - Parties’ positions
  - Findings of fact
  - Analysis and rationale for recommendation(s)
  - Recommendation(s)

- Can include minority report but all DRB members sign (6.2.8.2)

- Formal report is admissible in subsequent proceedings (6.2.8.3)
Article 6: Formal Dispute Resolution Process

- Clarification and Reconsideration permitted within certain time frames (6.2.8.4; 6.2.8.5)
- DRB report is not binding on parties and they may proceed with binding process as per Base Agreement (6.2.8.6)
- Mediation also is an option after DRB issues report (6.2.8.7)
Three-Party Agreement (200.5)

- Scope of Services
- Ethics requirements
- Owner/Constructor responsibilities
- Duration of TPA
Three-Party Agreement (200.5)

- Shared costs
- Payment
- Confidentiality and recordkeeping
- Termination
- Independent contractor relationship
Key Functions of the DRB

Formal Proceedings
- Referral only after attempt to resolve first
- Issues/relief defined jointly by the parties
- Use of Common Reference Documents
- Written submissions
- Focused presentation materials
Effective DRBs: Process

Formal Proceedings

- No cross-examination by other party
- DRB members ask questions
- Limited use of expert presentations
- Attorneys may be seen but rarely heard
Effective DRBs: Process

Findings and Recommendations

- Written reasoned opinion as to entitlement and/or quantum and time
- Non-binding
- Admissible in subsequent arbitration or court hearings
Effective DRBs: Process

DRB Findings and Recommendations

- Based on the parties’ dispute as presented and the relief requested
- Based on the “four corners” of the contract documents
- No compromise verdict: “Call it like you see it”
Costs of DRBs

- Direct cost are a fraction of final construction contract amount, and are shared equally between the parties.
- Typical costs may include:
  - $1500 to $3000 per day per member
  - Travel time to meetings and expenses
  - Progress review between DRB meetings
Future of DRBs

DRBs on Alternative Project Delivery Projects

- APD fundamentally changes allocation of risk
- Some delivery models require more collaboration
- Dispute systems design (including DRBs) needs to reflect these changes
- DRBs may need to expand role to cover all parties
Future of DRBs

The “Claims Free Zone” Ideal

- DRBs focus on dispute prevention
- Parties use DRBs flexibly to resolve disputes at the project level
- DRBs become part of a “best for project” approach to project management
- Zero Disputes = Successful DRB
Questions?
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