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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.

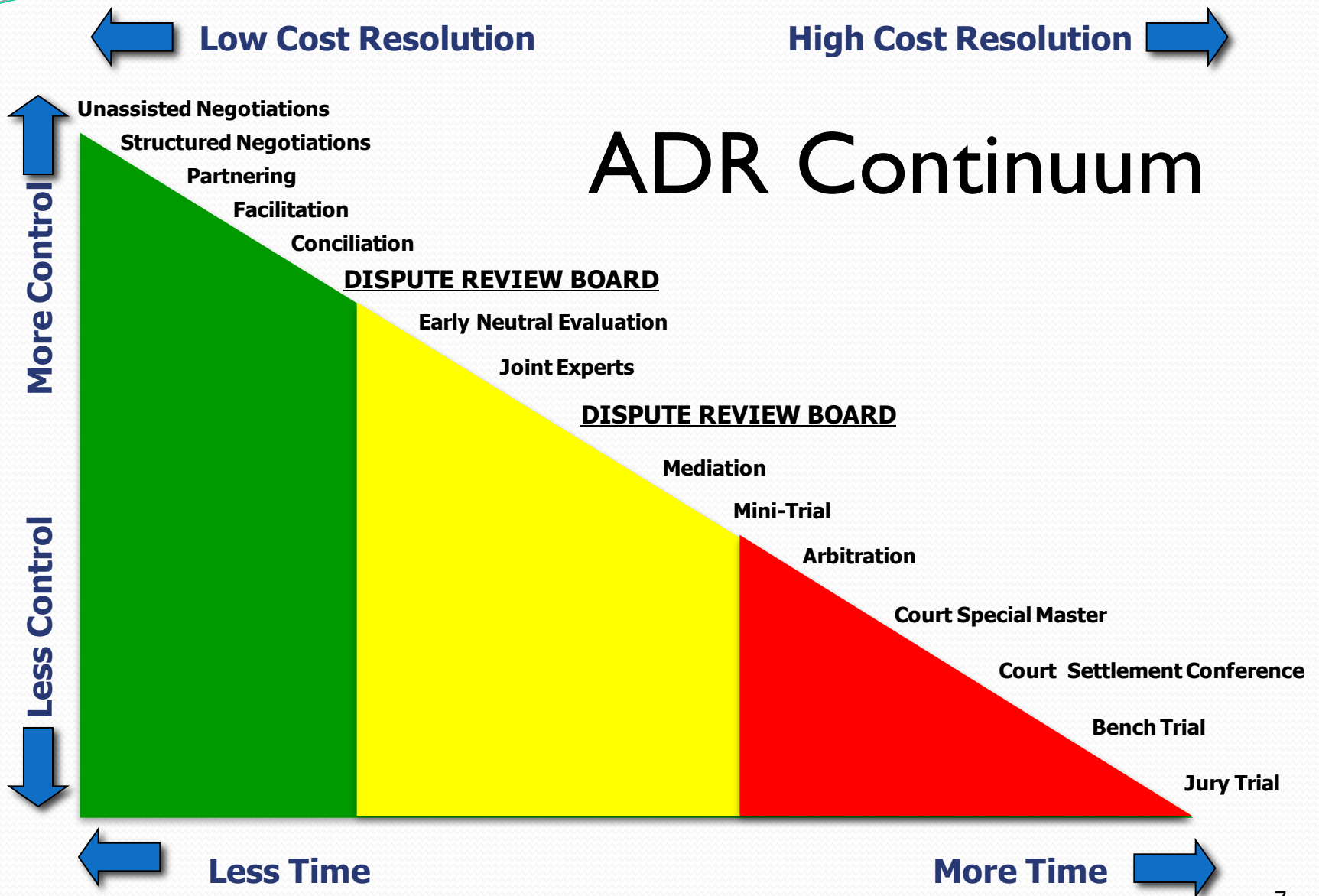
History of DRBs

- 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



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

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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



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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

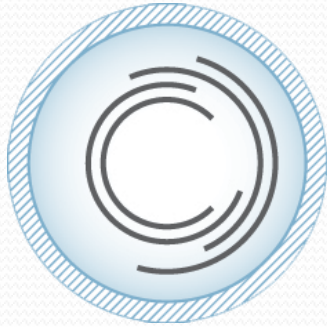
- Experts must be disclosed at least 30 days before position paper due (6.2.7.1)
- Other party may then retain expert and make disclosure at least 10 days before position paper due (6.2.7.2)
- Expert reports to be exchanged as part of pre-hearing submittals (6.2.7.3)

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)



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Three-Party Agreement (200.5)

- Scope of Services
- **Ethics requirements**
- Owner/Constructor responsibilities
- Duration of TPA



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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 costs 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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