

Using DRBs to Maintain Control of Large, Complex Construction Projects

BY KATHLEEN M. J. HARMON

The author holds a Ph.D. from Nova Southeastern University. She is president of Harmon/York Associates, a 29-year-old construction consulting firm located in Ridgefield Park, N.J. Her e-mail address is kharmon777@aol.com.

The case for dispute review boards, what they do, and where they have been used.

The construction business has never been simple. However, over the last 30 years it has become more complex and, unfortunately, litigious. Multiple parties, 500-plus page contracts in which the owner endeavors to transfer the risk of every contingency to the contractor (even those not within the contractor's control), unstable economic conditions, are just some of the conditions that have made construction projects ripe for disputes. Contractors naturally react to the owner's risk-shifting efforts with exceptions and clarifications to the terms and conditions.¹ The result has been that both owners and contractors rely more on legalistic maneuvering to attempt to control their risks.

The question of who should bear the responsibility for any particular risk has a logical answer. It should be borne by the entity that can best assess, evaluate, and control it. But just because a risk is properly allocated does not guarantee that disputes will be avoided, since along with more complex contracts, changes in the scope of work, design modifications, or improvements all increase the opportunities for contractual disputes to arise. Then, there are risks inherent in the construction process that also foster conflict, for example, unforeseen conditions and *force majeure* events.

Why DRBs?

Legal expenses that result from adversarial dispute resolution can have severe financial consequences on the parties to the dispute.² Consequently, one of the greatest challenges facing the construction industry today is how to resolve conflicts “in real time,” meaning as they occur, and failing that, to control the cost and time involved in resolving disputes at a later time. It is well known that issues left unresolved until the end of the project often result in either mediation, arbitration, or litigation, or some combination of mediation and an adversarial process. Finding an alternative to mediation is also desirable since, in challenging economic times, parties may be less willing or able to compromise.

It is clear that a real-time dispute resolution option that gives the owner and contractor (the contracting parties) control over the process, the costs, and the outcome, is better than traditional dispute resolution options. One option that fits this bill is a dispute review board (DRB). The DRB is a dispute avoidance and resolution technique that has most often been used in public construction projects. It has been shown to help prevent disputes and assist the rapid resolution of disputes brought to the DRB’s attention.

What Are DRBs?

The DRB process is different from other alternative dispute resolution (ADR) methodologies in that the issues tend to be construction- or contract-related. Legal issues generally are not involved. That is why, more often than not, construction experts, not lawyers, generally serve on DRBs.

The DRB has three members, usually highly respected and experienced construction professionals (often contractors, engineers, and archi-

ects) who are independent of the contractor and owner and chosen jointly by them. One member is proposed by the owner, the other by the contractor. Each party must approve the other party’s candidate. The third member of the board may be selected by the first two members, or be nominated by mutual agreement of the owner and the contractor and the chosen DRB members. The third member may chair the DRB. Often the qualifications of this person supplement those of the two DRB members first selected.

The purpose of the DRB is to monitor the project until the contracting parties agree to bring an unresolved issue to it.

Purpose of the DRB

The purpose of the DRB is to monitor the project until the contracting parties agree to bring an unresolved issue to it. The board’s members are selected during the pre-construction phase of the project. Once established, the board visits the site periodically, whether or not any unresolved disputes are present. As a result of the

regular site visits, the members of the DRB become familiar with the people working on the project and the issues they are facing. For this reason, it has been said that members of a DRB share the goals of the parties for a successful project. Parties to a construction contract generally consider a project to be a success if it is constructed in accordance with the plans and specifications, and completed within the time and budget originally anticipated by them.

How the DRB Works

Because the DRB members have become familiar with the project as a result of their regular site visits, when an unresolved issue is brought to them, the contracting parties do not need to educate them about the workings of the project, or the conditions of the work. The only information the DRB members need concerns the conflict itself, the conditions leading up to it and other events relating to it. By contrast, ADR processes that take place long after the conflict arose (even after the completion of construction) require the mediator or arbitrator to be educated on almost every aspect of the contract, the project, and the dynamics of the parties’ relationship, at great cost and loss of time.

When the contracting parties agree that their efforts to resolve the dispute on their own cannot go any further, they can bring the dispute to the DRB. They provide the DRB with a written document that briefly summarizes the dispute and

their respective views on the dispute, along with supporting documentation. They generally will also exchange these written documents.

The DRB will promptly schedule a hearing at which project participants with first-hand knowledge of the dispute will present oral testimony. While the parties have the opportunity to provide rebuttal testimony, they have no right to cross-examine anyone at the DRB hearing.

The job of the board is to develop a recommendation for the parties that will advise them how to resolve the dispute. After the close of the hearing, which usually takes no more than one day, the DRB members will review the documents and the testimony and decide on a recommended resolution of the dispute.

The Recommendation

The DRB recommendation is in writing. It usually acknowledges the party's perspectives on the dispute before providing a recommended resolution and the reasoning behind it.

DRB recommendations are generally unanimous and non-binding.³ However, some contracts provide that the recommendation is binding until contract completion.

It is important to keep in mind that a DRB is a servant of the contracting parties. It is not an adjudicatory body, like an arbitration panel or a court. A DRB recommendation provides the parties with the perspective of three respected experts in construction who are familiar with the project, the contract, the progress of construction, and the disputed issues. But it is the parties—the owner and contractor—who decide whether or not to implement the recommendation.⁴ They are usually free to accept it, reject it, or modify it as they see fit.

Benefits of the DRB

The primary benefits of having a DRB are:

- Disputes are avoided because the contracting parties do not want to embarrass themselves before respected DRB members, or waste the DRB members' time, or increase their own dispute resolution costs, by bringing minor problems to the board.

- Problems at the job site that the parties consider serious enough to bring to the DRB can be resolved promptly by taking the DRB's recommendation. Using the DRB at this time prevents these problems from escalating into intractable disputes that could bring a project to a halt.

- Parties that use a DRB are taking a professional approach to problem solving. They retain three respected industry experts to advise them how to resolve a problem and then they decide

how to proceed in light of that advice. Because they make this decision, they are likely to be more satisfied than if someone with no expertise (for example a judge or jury) imposes a solution on them.

- A DRB can facilitate continued negotiations by providing reasons for its recommendation. This tends to preserve the parties' relationship and enables the project to be constructed.

- Problems at the job side can stay out of the public arena.

Time and Cost Benefits

The DRB process also has time and cost benefits, even considering the cost of maintaining a DRB during a long-term contract. Here's why.

Because the DRB process is generally not binding, the usual practice of involving attorneys who then conduct lengthy "discovery" and retain expert consultants can be drastically limited or even eliminated.

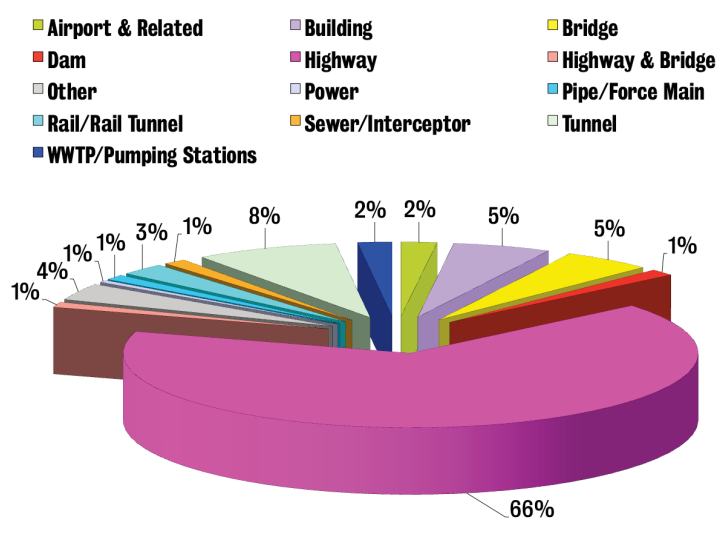
The DRB addresses potentially difficult problems early on with far less disruption to the project and other business activities of the parties.

Furthermore, resolving a real-time problem using a DRB is faster than employing an arbitration or litigation long after the problem arose. After receiving the documents the parties have provided and hearing testimony at the hearing, DRB members are usually prepared to suggest how the dispute can be satisfactorily resolved in a matter of days.

Cost of the DRB

The hourly rate for a DRB panelist can range from \$165 (University of Washington, 2010) to \$350.⁵ Caltrans (California Transportation) has used the DRB process on 296 projects involving

Table 1.



\$10.1 billion from 1989-2011. The DRBs on all of these projects were paid approximately \$10.1 million or 0.1% of construction costs with Caltrans and contractors splitting this cost equally.

The Florida Department of Transportation (FDOT) has used DRBs on 822 projects between 1994 to January 2012. Between 2002-2011, the DRB members were paid \$13.5 million on \$11.8 billion of construction work.⁶ Until 2011, FDOT paid 100% of DRB costs, but recently, for 2012 projects, it changed its procedures to require contractors to pay 50% of the costs.

In Milwaukee, Wisconsin, the Marquette Interchange South Leg and Core, a \$389 million project, involved DRB costs of \$43,072 shared equally by contractors and the state DOT.⁷ Boston's Central Artery Tunnel project had 46 contracts with multiple DRBs totaling \$8.4 billion with \$1.8 million paid by the owner and an equal amount paid by contractors.⁸ These examples involve huge, highly complex, public construction projects. The cost of a DRB on much smaller projects would be far less.

The cost of a regular DRB site visit on a FDOT project has generally ranged from \$3,000 to \$4,000,⁹ but has cost as much as \$17,500 on some Metropolitan Transit Authority East Side Access projects in New York City.¹⁰ On some projects, the hearing was held during a regular site visit. On other projects, an additional visit was needed for the hearing. The overall costs were much less than the tens of thousands in legal expenses that would have been necessary to pursue a mediated solution, an arbitrated decision, or a court judgment. Thus, the wisdom of using a DRB in construction contracting seems to be a virtual "no brainer."

Where DRBs Have Been Used

From 1974 to Feb. 3, 2012, DRBs have been used on 2,340 projects worldwide, totalling over \$166.1 billion worth of contract work.¹¹ Countries outside the United States where DRBs have been used include Australia, Brazil, China, Chile, Canada, Great Britain, India, and New Zealand.¹²

DRBs have been used in every sector of construction, but mostly on highway projects. The graph in Table I provides a breakdown of DRB use by project type.

As of Feb. 3, 2012, DRBs have been used on 2,173 construction projects in the United States.¹³ The map on the facing page shows the states where DRBs have been used. Florida and California have used DRBs the most. FDOT and Caltrans have used DRBs on all of their larger projects. Florida has set up "regional DRBs" for projects under \$10 million.¹⁴

In 2005, no South American projects used a DRB. That has changed. Recently there have been projects in Chile and Brazil that used DRBs.

There is also an increase in the use of DRBs in Australia, New Zealand, and Canada.

The increase in use of DRBs shows clear recognition of their value. This conclusion is not just based on anecdotal reports. DRBs have shown impressive results. The Dispute Resolution Board Foundation (DRBF) has been keeping records on DRB usage since its inception in 1996. I have updated the DRBF database since 2010 and it shows that out of 2,753 disputes brought before DRB panels, 88% were satisfactorily resolved; only 327 (or 12%) went on to other dispute resolution methodologies (such as mediation, litigation, or arbitration).¹⁵

Conclusion

A DRB gives owners and contractors the greatest amount of control over their construction dollars when a dispute arises. Dispute resolution costs increase exponentially when the contracting parties are unable to resolve the dispute themselves and they turn the dispute over to lawyers for the purpose of having the dispute resolved by a third person. Moreover, even with a court-rendered judgment, the losing party may not comply. It could file an appeal, which could drag out the conclusion of the dispute for years.

A number of public sector owners, particularly transportation departments, have recognized the unique benefits of DRBs in preventing, and if necessary, resolving disputes contemporaneously with work on the project. This process provides the greatest opportunity for win-win solutions and the conditions for the contracting parties to maintain their relationship.



We are beginning to see DRBs on complex projects that do not involve highway construction (e.g., New York City's East Side Access project, \$7.2 billion; and San Francisco's Public Utilities Authority's Water System Improvement Program, \$4.6 billion). We are also beginning to see DRBs being used on private construction of mixed use (hotel/apartment/condominium) buildings.

There is no guarantee that all disputes on a

project with a DRB will be resolved by the DRB's recommendations.¹⁶ But by and large, DRBs have motivated owners and contractors to resolve disputes on their own, and when they cannot do so, to seek the DRB's assistance.

Basically, DRBs encourage owners and contractors to work together towards successful completion of their projects without interference by any outside decision makers. ■

ENDNOTES

¹ The exception is public works projects where changes and exceptions can void a bid.

² S. Pinnell, "Partnering and the Management of Construction Disputes," 54(1), *Disp. Resol. J.*, 16-22 (Feb.-April 1999). See J. E. Diekmann *et al.*, DPI—Dispute Potential Index, A Study into the Predictability of Contract Disputes (Construction Industry Institute, January 1994).

³ I have read over 500 recommendations since 2001 and have only seen one dissenting opinion and in that case the recommendation was non-binding.

⁴ K.M.J. Harmon, "Dispute Review Boards: Elements of a Convincing Recommendation," 130(4) *J. Prof. Issues in Engr'g Educ. & Prac.*, 289-95 (2004).

⁵ K.M.J. Harmon, (2011). "To Be or

Not to Be—That is the Question: Is a DRB Right for Your Project," 3(1) *J. Prof. Issues in Engr'g Educ. & Prac.*, 10-16 (2011).

⁶ Personal communication, Zach Wiginton, State Construction Office, Florida Department of Transportation.

⁷ G. C. Whited & J.J. Dohlby, "DRB Enhances Partnering on the Marquette Interchange: A Case Study," 3(2) *J. Legal Aff. & Disp. Resol. in Eng' and Constr.*, 86-92 (2011).

⁸ K.M.J. Harmon, "A Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project," 1(1) *J. Prof. Issues in Engr'g Educ. & Prac.* 18-31 (2009).

⁹ All FDOT panel members live in Florida. Therefore, they have minimal travel and lodging costs.

¹⁰ Most members of the MTA's East Side Access panel do not live in New York City. Therefore, they are reimbursed for travel costs, lodging, and meals.

¹¹ DRB database, updated as of Feb. 3, 2012. For a copy, e-mail kharmon777@aol.com.

¹² *Id.*

¹³ *Id.*

¹⁴ In 2005, there were 1,256 projects using DRBs in 26 states, the District of Columbia, and Puerto Rico.

¹⁵ *Id.*

¹⁶ Harmon, *supra* n. 9. (At completion of the Central/Artery Tunnel project, a significant number of disputes were languishing.)