



Forum

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DRB Evaluation of Delays on Large Complex Projects



By Thomas J. Burke, PE

One of the less obvious benefits of a DRB is its ability to ensure that adequate documentation will be available to properly analyze future claims. This is particularly true in the case of delay claims on a large, complex project. The author describes an improved methodology for analyzing complex delays which would be feasible if a DRB or other independent party was overseeing the preparation and updating of CPM schedule forecasts and the recording of actual schedule events.

INTRODUCTION

Schedule delays on large complex projects can produce large complex disputes and massive cost overruns. Many methodologies are available for determining the responsibility and the resulting costs for such delays.

Delay claims may be evaluated during a project by predicting the future impacts of delay events or after project completion by forensically evaluating the actual impacts of delay events. The predictive approach resolves issues now but may not be accurate. The forensic approach deals with actual delays but leaves issues unresolved until completion. Which approach should be used?

Each methodology has strengths and weaknesses. The favored approach is usually based on the purpose for which the evaluation is being made and the information which is available for the evaluation.

When delay impacts are being evaluated to determine the time dependent costs of a proposed change order, a predictive methodology must be used because the actual impacts have not yet materialized. When, on the other

hand, delay impacts are being evaluated to settle delay claims after project completion, the actual impacts provide the best evidence for establishing the damages associated with claimed delay events.

Unfortunately, the most appropriate methodology with respect to the purpose of the evaluation will not be possible if the information required to support that methodology is not available when the analysis is performed.

For example, predicting future impacts of change orders during a project requires a functioning CPM schedule which has been updated to reflect actual “as built” data, and which calculates a modeled “as planned” schedule to complete. If the project CPM schedule has not been properly maintained, it cannot be used to evaluate change order impacts or delay claims.

Evaluating delay damages based on actual delay impacts involves a retrospective forensic approach. The forensic approach requires that the “as built” schedule be maintained at a level of detail which will reveal the delay events, the causal links to the consequences of those delay events, the duration

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President's Page

I'm writing this message sitting on a balcony looking at a lovely beach in Taraunga, New Zealand. We came here from Sydney, Australia a truly beautiful city. The DRBF has some fantastic members in this Australian and New Zealand corner of the world. Or as they remind me the centre is here and it is 'we' who are in the 'corners.' It is easy to understand this statement. More on this visit in the Forum. I may not be able to get it into this issue as the visit is only about half over.

Now back to the mission immediately in front of the DRBF. In fact it is the very same mission for which we were founded, only now there is tremendous increase in the magnitude and urgency of the mission. Let's pick up on a few points from the most recent President's Letter so as to get a feel for what is ahead of us. I'm using the USA as the example because I'm more familiar with the programs and numbers but I'm finding similar conditions and programs the world over.

The US has doubled in fifty plus years. In 1950 there were 150,000,000 people. At the beginning of 2009 the estimate was 305,000,000 people. The Interstate Highway Program was just getting underway when I was coming into the workforce as a young engineer. It was projected to take twelve years and cost \$25 billion dollars. A program of then unimaginable cost and scope! Now fifty years later it is not complete and costs are presently over \$425 billion.

That brings us to our current state of affairs. We are looking at a Stimulus Package to "get the economy moving." A major chunk of these funds will go into construction for State and Federal projects. We hear phrases like "jump start," "shovel ready," "prime the pump," etc. A recent article said a goal was to commit \$65 billion dollars to construction in the first 180 days. Is the money needed? Can it be put to good use? It surely can but there is a great danger.

Take a look at the facts of the US Interstate Program. It has grown from the estimated \$25 billion project to \$425 billion spent. Not in twelve years but over fifty years and not completed. Measure that against the \$65 billion in 180 days. That equates to 15% of the fifty years Interstate total in just six months. Or another way to look at the overall picture the Interstate averaged \$8.5 billion a year. We intend to commit \$65 billion in six months! That is a very big WOW!

Yes we can use the funds to good purpose. As we all are aware much of our infrastructure is in disrepair. The American Society of Civil Engineers recently gave the infrastructure a report card grade of 'D-' with several categories receiving an 'F.' Everything needs repairs, upgrading, and modernization. We are not a static society (or a static world). Think we in the US have doubled our population in fifty years. Just the wear and tear of a 100% increase in population surely strains all systems.

Think of the rate of contracting to achieve \$65 billion in six months. These contracts will be tendered and awarded at a rate not previously attempted in history. With all the haste there will also be an increase in waste. Currently it is estimated \$5 billion dollars per year is spent on litigation of all forms of construction. What will this cost grow to be with this accelerated rate of construction? I venture to project it won't be a straight line increase but some sort of geometric accelerated curve.

Dispute Boards have demonstrated their ability (97%) to avoid litigation. They keep dollars intended for construction actually building projects. In the last issue of the Forum this President's Page promoted a program of:

1. Spreading the DRBF message
2. Training more individuals to administer the DB process

To this we are adding:

3. Active promotion for the inclusion of DB clauses into these stimulus generated contracts.

Sincerely,



Visiting with DRBF members in Australia.

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June 19 and July 17, 2009 by conference call

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June 5 and July 3, 2009 by conference call

The Potential Use of Dispute Review Boards (DRBs) Outside the Construction Industry

By Kurt Dettman, Kendall Reed and Eric Kerness

Introduction

Members of the DRBF are well aware of the significant contribution that DRBs have made in the construction industry toward the prevention and resolution of disputes and claims. This article will briefly analyze why DRBs work well to resolve almost all the disputes that come before them, and explore whether their use can be expanded beyond the construction industry to other commercial sectors.

What are the Key Features of a DRB?

The authors assume that most readers are familiar with how a DRB is established and implemented, so they summarize here only the key features of a DRB:

- The three members of the DRB are appointed for their extensive expertise in the type of project on which the DRB is established.
- The DRB members must not have conflicts of interest and function as objective, neutral third parties under a Three Party Agreement with the owner and contractor.
- The DRB is appointed at the beginning of the project, visits the project on a periodic basis depending on the pace of construction, and is kept apprised of the project's progress between site visits.
- At the periodic site visits the DRB explores with the parties all open issues and urges the parties to resolve disputes that may eventually become formal claims.

- The DRB hears claims as part of an informal hearing process where the parties themselves (as opposed to legal representatives) present their positions.
- The DRB issues clear, understandable and detailed findings and recommendations that analyze the parties' arguments, the contract documents and project records, and the supporting information presented at the hearing.
- Because the DRB findings and recommendations are non-binding, the parties are free to accept them, reject them—or keep negotiating based on the parties' respective risk exposure based on the DRB's analysis.

What Makes DRB's Effective?¹

There are several factors that make DRBs effective, including the following:

- The parties are committed to the process
- DRB members are respected industry professionals
- DRB members are neutral and objective
- DRB members are chosen by consensus and costs are shared equally so that both parties have an investment, both managerial and monetary, in the process
- The DRB process starts at the beginning of the project and is in place throughout the lifecycle of the project
- As a result of its involvement in the project the DRB becomes familiar

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The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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with the players, the issues and the project's history

- The DRB meetings allow periodic, open communication among all project participants that helps avoid issues becoming disputes
- The DRB meetings also promote the involvement of all stakeholders and senior decision makers
- The relatively informal hearing process permits the parties themselves (as opposed to their lawyers) an opportunity to present their sides of the dispute
- The hearing process is thorough, but focused—it is, therefore, much less expensive than arbitration or litigation
- The findings and recommendations are detailed so that the parties have the benefit of the DRB's evaluation of the dispute in all of its aspects
- The DRB makes its findings and recommendations within the four corners of the contract documents and based on the information presented by the parties
- The DRB findings and recommendations give the parties a basis on which to assess risk exposure and make better informed business judgments
- The findings and recommendations are non-binding, leaving ultimate control of the outcome to the parties

Can DRBs Be Used Outside The Construction Industry?

There is absolutely no reason why DRBs cannot be used in other commercial fields.

The principles and philosophy of the DRB process apply equally to any commercial endeavor that has the following characteristics:

- A long term business relationship that lasts several years where issues may come up periodically, such as a long term manufacturing or commercial lease
- A business transaction requiring multiple steps, such as a manufacturing project requiring R&D, testing, production and marketing
- A commercial endeavor that requires particular expertise and that may give rise to professional differences of opinion where outside expert opinions might assist the parties
- A commercial field that has customarily used arbitration to settle disputes, and could comfortably use the DRB process as a less formal, non-binding substitute with the same expert underpinnings as the arbitration process²
- A commercial project involving stakeholders from different cultures, with differing nationalities or differing business backgrounds

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¹ A 2003 national survey of construction industry professionals (111 respondents) who had worked on construction dispute resolution, in aggregate, on 1,423 projects dealing with 1,695 disputes, found that 54% stated DRBs were appropriate for all types of construction projects; 35% stated DRBs reduced the bid price; and 99% believed that DRBs improved communications on a project. A study by the Florida Department of Transportation concluded that contracts lasting longer than one year with DRBs had less cost and time overruns than comparable contracts without DRBs. (Statistics courtesy of the DRBF).

² See Dettman K, and Miers, C., *The Use of "Adjudication DRBs" Where Parties Are Subject to Adjudication or Arbitration Processes*, DRBF Forum (November 2007).

Examples of these types of projects where the DRB concept could be used are as follows:

- A land development project that involves a property owner, financing institutions, public entities that control infrastructure upgrades, a variety of prime contractors doing residential, commercial and light industrial subparts, and other stakeholders such as regulators or utilities.
- A new aircraft development project that involves research and development, multiple joint venturers (that may be from different countries), multiple financing institutions (that also may be a variety of national or international banks), diverse manufacturing subcontractors and locations, multiple sales groups, and multiple distribution channels, all of which may take several years from start (R&D) to finish (production).
- A public private partnership for a build-operate-maintain toll road that involves multiple parties (owner, concessionaire, financing institutions, constructors) and multiple phases such as design development/ permitting, construction, operation, capital maintenance and “hand back” requirements. Here, there could be two types of DRBs, one to handle the finance side, and one to handle the project delivery side.
- An owner controlled insurance program with multiple types of coverage, primary and excess layers, multiple carriers, and quota share arrangements.
- A privatization project where an owner contracts with a private entity and delegates its role of designing, building, and inspecting its projects.

Summary

A DRB is a non-adversarial project management technique that features a pro-active, real time, dispute avoidance and resolution approach during the course of a project. DRBs have a proven track record in the avoidance and resolution of disputes – returning control of the timing, the costs and the process of dispute resolution back to the owner and the contractor, where it has always properly belonged. The principles and processes employed by DRBs can be exported into other commercial arenas that have characteristics similar to the construction industry.□

About the Authors:

Kurt Dettman is the principal of Constructive Dispute Resolutions, an ADR practice specializing in all aspects of dispute avoidance and resolution in the construction industry. He has written extensively about DRBs and conducts trainings on DRB practice and administration. He can be reached by email at kdettman@c-adr.com.

Kendall Reed is a lawyer, mediator, and arbitrator located in Los Angeles. He is a Fellow of the Chartered Institute of Arbitrators and has his LL.M in ADR Studies from Pepperdine Law School. He is a frequent speaker on ADR subjects and has written on the subject of DRBs, as well as a number of other ADR issues. He is affiliated with Alternative Resolution Centers (ARC). He can be reached at ken@kendallreed.com.

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DRBF Advocates for DRBs Tied to U.S. Stimulus Package

The U.S. Stimulus Package is about to pump billions into all forms of construction. DRBF Board of Directors President Jim Brady is encouraging all U.S. members to write to their state and federal officials to encourage leaders to ensure that these funds be spent wisely on construction, not wasted on litigation.

A suggested sample letter is posted in the member's section of the DRBF website (www.drb.org - click on member login, then scroll down to the bottom of the page). There is also a brief description of the 'hows and whys' of DBs which can be included in the mailing.

Any letters sent as part of this effort should be copied to the DRBF (please email to info@drb.org), and Mr. Brady will then send a follow-up letter on DRBF letterhead.

Members are urged to move quickly. The stimulus monies are starting to flow. The DRBF is committed to promoting the idea that as great a share as possible should go into building and rebuilding our infrastructure. □

The Dispute Resolution Board Foundation would like to thank affiliating organizations and sponsors for their support of the

**9th Annual
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May 16-17, 2009
London, UK**

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CALL FOR NOMINATIONS FOR THE AL MATHEWS AWARD

The Dispute Resolution Board Foundation presents the prestigious Al Mathews Award each year to one or more DRBF members who have given exemplary service in advancing the use of the dispute resolution board concepts and the DRBF.

Nominations are solicited from the membership and by the president of the Board of Directors. A framed proclamation and trophy will be presented to the recipient at the Dispute Resolution Board Foundation Annual Meeting and Conference October 3, 2009 in Houston, Texas.

SEND YOUR NOMINATION, INCLUDING AN EXPLANATION OF WHY THE NOMINEE IS DESERVING OF THE AWARD, TO:

Award Nominations/DRBF

19550 International Blvd. So Suite 314

Seattle, WA 98188 USA

Or e-mail to home@drb.org Re: Al Mathews Award Nomination

Entries should be postmarked no later than 7/15/07

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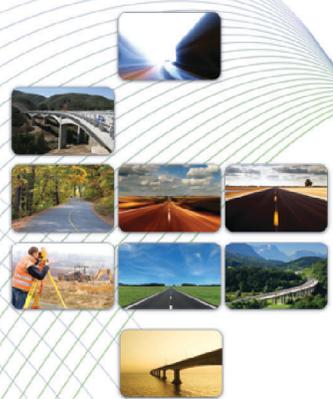
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Do you know someone who might be interested in joining the DRBF?

The DRBF attracts new members as the DRB process advances into new industries and regions throughout the world. Help us expand by sharing information with your colleagues.

Complete membership information, as well as conference and training details, can be found on the DRBF web site (drb.org) or contact the main office for details.



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Forum Editorial Deadline

Our readers love to hear DRB success stories, challenges facing the process, and the latest industry news and events. If you have new information about DRBs, DRBF members, or an article to share, please tell us! Contact Forum Editor Ann McGough by email at amcgough@drb.org.

Deadline for the May issue is

July 1, 2009

Ethics in Today's World of DRBs: Owner Bundling Hearings on Disputes Until the End of the Project



By Jim Phillips Ph. D.

The ethics question raised in the previous edition of the Forum involved an owner who, in response to the contractor's pattern of referring several disputes a week to the DRB and requesting that the Board hold a hearing on each one over several weeks, requests the DRB hold the entirety of the disputes until the end of the project and hold one long hearing. This phenomenon has apparently arisen on many projects due to the time consuming nature of DRB hearings and the parties desire to remain focused on prosecuting the construction project in a timely fashion, without becoming bogged down by the DRB hearing process.

This question raises a number of both contractual and ethical questions. As a general rule, most contract documents containing a DRB Specification also contain provisions that provide for a fixed time frame for either party to give notice to the other of a potential issue or a dispute. In addition, DRB Specifications also provide a fixed time frame for requesting the DRB to conduct a hearing after the owner and contractor have attempted to resolve the issues through a Potential Change Order (PCO) process or, if the issues involves a delay to the critical path, a Time Impact Analysis (TIA), or other process by which the parties may attempt to resolve a delay issue. Moreover, either or both of these processes are typically mandatory prior to a dispute being considered ripe for

DRB consideration and hearing.

In the question posed, unless the parties agreed to waive those types of provisions as referred to above, both parties may be in breach of the contract. Even if the PCO and TIA process were followed under the contract, the DRB Specification would not have been complied with if the parties waited until the end of the project to conduct a DRB hearing. As equally important, however, a major advantage for having informal efforts to resolve disputes, either an informal process between the parties or a DRB hearing, would have been lost. This advantage is the value of resolving disputes close in time to the events underlying them.

There is a distinct advantage to resolving disputes close in time to the events which are the basis of the disagreement. Chances are higher that the personnel involved will continue to be on the project and available for interviewing and questioning. The site conditions will be more similar to the time of the events giving rise to the dispute, without other project construction overtaking the area. Documentation is more readily available and memories are fresher. In summary, disputes are much easier to resolve the closer in time to the underlying activities that resolution is attempted. Accordingly, in my opinion, the DRB process works best when the DRB holds its hearing in a short time frame after the events occurred which give rise to the dispute.

The Foundation's Code of Ethics also

addresses this issue. Canon 4 provides that Board members shall conduct meetings and hearings in an “expeditious, diligent, orderly, and impartial manner”. As indicated above, many contract documents provide for fixed time frames for bringing disputes to the DRB for a recommendation. Once those deadlines are missed, the parties may be foreclosed from seeking DRB review. If one party does not agree to waive the notice requirements, the other party may rely on the contract’s penalties for the other’s contract breach.

In this case, if the contractor gave timely notice of the series of disputes under the contract, and if the owner refused to comply with the DRB Specification, the DRB should proceed with holding, perhaps, an *ex parte* hearing. The important point to be made here is that the DRB should stay in compliance with the terms of the contract at all times.

The more difficult case for the DRB is: what if both parties agree to the owner’s request to bundle all of the disputes into an extended hearing at the end of the project? What should the Board do in this case? Arguments can be made on each side of this question. Clearly, the parties may, by agreement, amend the terms of their contract to provide for an extended mega hearing at the end of the project. This could, however, result in a less than optimum DRB review for all of the reasons listed above.

Or, it may not make that much of a difference, depending on how close to project completion the disputes arise. If the DRB does wait to hold the hearings until closer to the project completion, many of the benefits to the DRB process, including open communications and the building of trust and cooperation, will have been lost. The DRB process is designed to foster better quality of

communications and the building of trust **during the life of the project, not just at its conclusion.**

If the DRB apprises the parties that it can do its job easier and provide better quality of service if disputes are heard in real time, and the parties choose to postpone the hearings until the end, the DRB should comply with the contract and the parties’ wishes. After all, the DRB is constituted to assist the parties in resolving disputes in a fashion that does not interfere with the work on the project. As long as all of the parties understand the tradeoffs involved, the DRB will have done its part to assist the parties in a way that makes sense to them.

NEXT ETHICS CHALLENGE

Assume you are sitting on a DRB and one of the Board members insists on using a fairness standard to resolve the disputes being referred for hearings. This fairness standard for this Board member is outside the prescriptions of the contract documents and irrespective of the facts being presented. After attempting to persuade him/her to comply with the contract’s requirements, he/she decides that he/she will just write minority opinions on all DRB recommendations.

What should the Board do?

Ethics Commentary or Question?

Please contact:

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DRBF Ethics Committee Chair

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DRBF EurAsia – The Beginning...

By Alina Valentina Oprea, DRBF Country Representative for Romania

Foreword

People started to use FIDIC conditions of contract in Romania in around the middle of the '90s. Then, the use of dispute boards within these contracts expanded in Romania and in the surrounding region: in that period began, in Romania, big infrastructure projects (especially in road construction) financed by IBRD, EBRD, EIB – rehabilitation of over 2,500 km of national roads using, initially, conditions of contracts FIDIC 4th edition, then FIDIC 1999 (having foreseen dispute boards). Immediately after, the European Union granted funds, through ISPA and PHARE, to the countries in Central and Eastern Europe for big infrastructure projects (roads, railways, environment, cross border program, etc.). The conditions of contract were FIDIC 1999, and dispute boards – dispute adjudication boards - were implemented.

Then, things accelerated in this view: before, but especially after 2003, more and more training courses regarding claims and disputes were organized in the region – they proved to be insufficient, and more of them, over the initial planning, were organized. By chance, people in Romania found that in Berlin, Germany, was to be held the DRBF Annual International Conference. Besides the DRBF members and sympathizers, a little group of Romanian people attended, surprisingly finding that there are a lot of interesting actions related to dispute boards.

The next DRBF Annual International Conference was held in a location not so easy to reach by people in Romania, but the May 2006 DRBF conference from Budapest, Hungary, proved to be a “Romanian conference”: many participants from Romania, and the main theme was about using dispute boards in Romania! It was very clear that the interest in dispute boards in Romania was starting to be huge!

That was an important moment for the dispute

boards in the region: the dispute board concept was better understood and appreciated, many people became DRBF members, and DRBF country representatives were nominated or received new energy.

In the countries of the region, the FIDIC 1999 conditions of contracts started to be translated in the national languages, including the dispute board provisions. The first remarkable result of these actions was that, starting in July 2008, the FIDIC 1999 conditions of contract were translated into Romanian, together with a set of particular conditions meant to ensure the interface with the Romanian Law, which became mandatory conditions of contract in Romania – the use of dispute boards included! A lot of FIDIC and dispute boards sympathizers in Romania contributed to this – Romanian Ministry of Public Finances, ARIC (the Romanian Association of Consultant Engineers) public authorities, contractors, engineers and dedicated individuals.

The DRBF International Conference in May 2007 was organized in Bucharest, Romania, with a record audience – the biggest number of participants ever. More and more people understood the advantages of using dispute boards in solving disputes, and people started feeling that the DRBF is present in Romania.

The Beginning

The adepts of dispute board concept decided to form a group to promote the concept in Romania and in the region – the problems were more or less similar in all the Eastern European countries. The best solution was found in forming a DRBF chapter for this region.

The next step was that FIDIC and dispute boards training courses increased in Romania, and the dispute boards advantages became even more known; the concept attracted even more people.

The other side of the story started to develop,

also, as the dispute board concept gained new sympathizers. A new tendency occurred, *against* using of FIDIC conditions of contract and dispute boards for solving the disputes within the construction contracts. *Both* tendencies had fans and enemies...

This led to a bigger need to make properly known the dispute board concept, through presentations made by DRBF members and by pupils of Mr. Gwyn Owen (in the frame of the dispute boards mentoring scheme, 2006-2007, which it was presented in the previous editions of the DRBF Forum), training courses of FIDIC 1999 and dispute boards, which were held in Romanian language, in order to overpass the language barrier and to spread the word to as many people as possible. The result was that the dispute board concept got more and more fans.

The DRBF group for this region realized that as big this group is, as easier will be to promote the dispute board concept. It was decided that the group will be called DAB-DRB Eastern Europe. But, since people from countries of entire Europe and from Asia expressed their adhesions to this idea, the name turned into **DRBF EurAsia**.

In view of offering useful information and links for dispute board users and dispute board members, a web site for DRBF EurAsia has been created:

<http://dabdrb.googlepages.com>

On 28 July 2008, people in Romania, Europe and all over the world were told of the new web site and about the dispute board sympathizers group to whom they were anxious to join. Adhesions to the group started to come and they keep coming, first from Romania, then from United Kingdom, Germany, Italy, Turkey, Singapore, etc. Other people, from other countries expressed their willingness to send adhesions, as well, and we are 43 enthusiastic people now...

We are writing now the next pages of our story, and new people are awaited to join, since there is a huge appetite and huge need

for using dispute boards in this region, therefore correct information on dispute boards, through many voices, are more than welcome.

Let's promote together good and fair contractual relationship, as well as the use of dispute boards for preventing the problems in the contracts to develop into disputes and for solving the disputes, in view of creating a proper environment for developing the infrastructure!□

About the Author: Alina Oprea is DRBF Country Representative for Romania and the primary contact for DRBF EurAsia. She can be reached at Tel: +40724347817, Fax: +40318171677, Email: dabdrb@gmail.com.

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of the actual delay impacts and the critical nature of those impacts. A forensic evaluation may produce a schedule which looks like a CPM network, but it is an actual, not a modeled, analysis.

Because of the sophistication of owners and contractors involved with large industrial and government highway projects, the required information for such projects is often either available or able to be reconstructed from project records. In many cases, however, particularly in the field of commercial building projects, the required information is not available and delay analyses must rely on questionable assumptions and manufactured data.

The availability of data required to support both predictive and forensic analyses can be assured in the case of projects utilizing a Dispute Resolution Board (DRB), neutral adjudicator or other independent observers. A DRB can monitor the preparation and maintenance of contract schedules to ensure that the required information will be available when needed. If a DRB is functioning, the required

schedule data would be assured and the parties would be able to select the most appropriate methodology to analyze delays. This then leaves the question of which would be the most appropriate methodology, the predictive approach or the forensic approach.

THE PREDICTIVE APPROACH
The Predictive Model - Time Impact Analysis

A Time Impact Analysis is the classic example of a CPM modeled analysis. The term "Time Impact Analysis" is in such common usage that it has been applied to many different CPM techniques. We should therefore define a Time Impact Analysis as that term is used in this paper.

A Time Impact Analysis begins with a "snapshot" of the project status taken at the time of the events causing the delay. The "as built" schedule, up to that point in time, is extended into the future in two different ways, i.e.:

The "as planned" schedule is projected beyond the snapshot date to predict the

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completion date which would have been possible “but for” the delay events.

The delay events are then inserted into the “as planned schedule.” The schedule with inserted delays is then recalculated to produce the “impacted” completion date.

The difference between the “but for” completion date and the “impacted” completion date is the critical delay caused by the inserted delay events.

Advantages of the Predictive Approach

Although this methodology is subject to errors and manipulations, it is used nevertheless because it is the most acceptable way to forecast the delay impacts of events during an ongoing project. Contracting parties usually find that it is preferable to agree on an uncertain delay impact and get on with the project rather than arguing endlessly about matters which cannot be accurately predicted in any event.

Disadvantages of the Predictive Approach

A Time Impact Analysis compares the results of two computer-generated projections to identify the critical delay. The ability of the time impact methodology to accurately predict the “but for” and “impacted” completion dates is entirely dependent upon the sequences, relationships, and durations of the “as planned” schedule beyond the snapshot date.

Prospective errors in the “as planned” schedule, caused by incorrect logic, durations or manipulation, can invalidate the results of a Time Impact Analysis.

Retrospective errors in the “as built” schedule to date, caused by failing to properly update the sequencing and actual progress of the schedule, can also invalidate the results of a Time Impact Analysis.

The ability of the Predictive Approach to accurately forecast the “impacted” completion date is also dependent on the manner in which the delay events are inserted into the schedule.

THE FORENSIC APPROACH

The Forensic Controlling Activity Analysis

Delay claims which are being analyzed after a project is completed need not be based upon the rather theoretical and mathematical projections of a Time Impact Analysis. Once the project is complete, it is possible to review the “as built” schedule to determine what events actually did control the completion of the work and what actual delays occurred as a result of those events. In fact, the “best evidence rule” would insist that any uncertainty be resolved in favor of what actually happened.

Those events which actually did control the overall completion of the work are called “controlling activities” and a forensic “after the fact” analysis of those activity delays is called a Controlling Activity Analysis. The delays which occurred as a result of the controlling activities can be identified on the “as built” schedule and are based on real, not theoretical, dates. The party which was responsible for the controlling activity is therefore clearly responsible for the resulting delay.

Advantages of the Forensic Approach

The primary advantage of the forensic approach is the fact that the analysis is based on actual, rather than theoretical data. Data based on observed events is considerably more reliable, and less prone to manipulation, than data generated by a mathematical model.

Disadvantages of the Forensic Approach

A very simplistic approach to forensic scheduling compares the “as planned” with the “as built” schedules and concludes (wrongfully) that the difference represents the delays resulting from the claimed delay events. This “total time” approach is the scheduling equivalent of a “total cost” approach to cost claims, and is viewed by most courts with the same disfavor.

That simplistic analysis ignores causation, criticality and concurrency. A proper

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forensic analysis requires that additional steps be taken to identify the party responsible for each delay event (causation), the degree to which each delay event impacts the overall project schedule (criticality) and any overlapping delays by either party (concurrency).

The major disadvantage of a forensic approach performed at project completion lies in its inability to promptly resolve delay disputes between the parties. Simmering disputes will often poison the spirit of cooperation and partnering which are essential to every successful project.

Delaying the analysis until substantial completion can also result in the loss of important documents and critical witnesses to the delay events and impacts.

THE DILEMMA

There are significant advantages and disadvantages to each approach. The predictive approach resolves issues now but may not be accurate. The forensic approach deals with actual delays but leaves issues unresolved until completion.

A PROPOSAL

Use both approaches! As mentioned earlier, this dual approach would need a DRB or other neutral party to make sure that the information required to support both approaches would be available when needed. The dual approach would also require a DRB to ensure that the results of the predictive analysis are accepted by the parties to provisionally end the dispute, and yet be subject to the findings of a later forensic analysis to guard against the inaccuracies inherent in a predictive approach.

Projects with a DRB in place would be able to provide the environment for dual predictive/forensic evaluations throughout the life of the project.

THE DUAL APPROACH

Contract Scheduling and Delay Claims Specifications

In order to ensure that the necessary information is available for dual analysis, the DRB must make sure that the contract documents include specification language for establishing and maintaining a CPM based contract schedule with a level of detail and a frequency of updating which will support Time Impact Analyses. The level of detail should be sufficient to capture events which are likely causes of delay and activities which could become controlling.

These provisions should also establish procedures for asserting and evaluating delay claims which are consistent with the dual evaluation methodology. For example, contracts will often require that delay claims (requests for extension in time) be based on a demonstration of impacts to the CPM schedule critical path. While this may be entirely appropriate to the predictive evaluation of change order delays, such requirements will essentially preclude a controlling activity analysis, as suggested herein, which is based on actual rather than modeled data, and does not, therefore, calculate a CPM based critical path.

Setting out the required scheduling methodologies can be a good example of a situation where more is not necessarily better. There has been a tendency among specification writers, since computerized scheduling became widely available over 25 years ago, to require the greatest level of detail and sophistication which the latest computer technology can handle. Schedules produced under these conditions may not be useful tools for construction and project management. In fact, overly detailed schedules can cause a project team to lose control of the sequences and resources which the CPM schedule was intended to manage.

Undisputed Delay Impacts

When the parties are able to agree on recognized delay events and the resulting impacts to the project critical path, appropriate

extensions in time should be established by change order and the “as planned” schedule should be adjusted accordingly. The time-dependent cost consequences of such changes should be reflected in the change order pricing and the entire issue need never come to the attention of the DRB except as an adjustment to the “as planned” schedule.

Disputed Delay Events and Impacts

Initial Notice of Delay

Disputed delay events should be periodically identified, briefed and organized into logical fragnets for presentation to the DRB. The identification should include the activity which was delayed and the actual start and, if available, the actual finish date of the delay. A brief description should explain what caused the delay, which party should be held responsible and what critical path activities are likely to be impacted. The fragnets should represent the delay relationships which are proposed for insertion into the schedule as part of a Time Impact Analysis.

The DRB should review this initial information and issue a preliminary evaluation regarding whether or not an excusable delay may have occurred, which party may have been responsible for the delay and whether the delay could potentially impact the project critical path. If the DRB concludes that sufficient grounds exist to possibly support a valid delay claim, it will direct that a Time Impact Analysis be prepared for its evaluation. If the DRB is not convinced that the matter warrants further investigation, it may request additional clarifications or advise the claimant that its delay claim, as presented, lacks merit.

In any event, the initial information presented by the parties should be recorded and preserved for possible reevaluation in the future.

Time Impact Analysis

When directed by the DRB, and in accordance with previously agreed procedures, the claimant prepares a “But For” schedule by recalculating an updated as built schedule and an “adjusted as planned” schedule to

predict project completion “But For” the alleged delay events.

The claimant also prepares an “Impacted” schedule by inserting the delay event fragnet into the “as planned” schedule and recalculating the “Impacted” completion date. The difference between the “But For” and “Impacted” completion dates represents the delay duration which will be tentatively attributed to the analyzed delay event. The parties are provided an opportunity to explain or challenge the Time Impact Analysis.

The DRB issues an advisory which denies or tentatively awards delay days to the prevailing party based upon its evaluation of the material presented. The parties are then encouraged to negotiate a settlement of delay damages. Failing that, the tentatively awarded delay days will be “banked” subject to confirmation by a forensic analysis at the time of substantial completion.

Forensic Analysis

When substantial completion has either occurred or is no longer subject to significant delays, the parties will be free to challenge the “banked” delay days by preparing a “controlling activity” forensic delay analysis.

The “as built” schedule is updated to reflect actual completion dates, sequences and activity relationships. A target v. actual schedule format is prepared using the adjusted as planned schedule as the target and the “as built” schedule as the actual. That schedule format will show an “as planned” bar and an “as built” bar on the same line for each activity. A calculated critical path will not be identified on that schedule because the as built durations are actual days and are not the result of a mathematical calculation. The actual critical path, and the near critical paths, however, can be identified by observation. It is also possible then, by observation, to identify the delayed activities which actually extended the critical and near critical paths. Those activities are called “controlling activities.”

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At this point it becomes possible to focus on those controlling activities so that the exercise no longer needs to address the hundreds or thousands of individual schedule activities in a large complex project. The controlling activity delays usually number less than 50.

A chart of the controlling activity delays describes the start and finish dates for each controlling delay. Owner delays as well as contractor delays are included on this chart. By this mechanism, overlapping delays by the same party can be identified to ensure that they are not counted more than once. Concurrent delays between the parties can also be identified and evaluated.

A spreadsheet is then prepared listing the controlling delays, the activities which were impacted by each delay and any offsetting concurrent or overlapping delays. The total delay days associated with the activity, less any offsetting delay days, equal the excusable delay days for that activity. The excusable delay days which were directly caused by the other party are labeled as compensable delays.

The excusable delay days for each activity identified by this forensic analysis may then be compared to the excusable delay days forecasted by the earlier predictive analyses.

FINAL SETTLEMENT

The Challenge

Differences between the predictive and forensic evaluations may form the basis of a challenge to the delay days which have been banked by the Time Impact Analysis. The party wishing to assert a challenge would evaluate the reasons for the different results and propose a revised delay favoring what actually took place as revealed by the forensic analysis. The other party then has an opportunity to respond to the challenge and offer its position on the issue.

The Settlement Hearing

The settlement hearing might actually be a series of hearings depending upon the

number of delays which are being addressed. The DRB renders an advisory opinion on each claimed delay and on the overall damages. The parties are then encouraged again to negotiate a settlement based on the advisory opinion of the DRB.

CONCLUSION

The advantages of this dual approach include:

1. Mandatory data collection and independent advisories
2. Timely evaluation while facts and witnesses are still fresh.
3. Tentative resolution of disputes to promote partnering.
4. Promptly facing the consequences of actions which foster delays.
5. Dealing with the inherent inaccuracies of computerized forecasts.
6. Adjusting the final results to reflect what actually happened.

Despite the obvious effort and sophistication required by this dual evaluation, the results still include a significant degree of uncertainty. In the final analysis this approach simply provides the necessary tools and independent oversight for the DRB and contracting parties to deal fairly and responsibly with each other. No form of advisory dispute resolution can hope to overcome the problems of parties which lack the will and courage to forge a reasonable settlement. □

About the Author: Tom Burke is a Professional Engineer and an Arbitrator. Mr. Burke graduated from the U.S. Naval Academy and served in diesel and nuclear submarines. Following his naval service he worked on the construction, start up and operation of power plants, including 5 years in New York as the project manager for a large nuclear station and 8 years in Saudi Arabia and Paris building power and desalination plants, airports and housing developments. Since returning to the States in 1986, he has provided engineering, construction management, and dispute resolution services to sureties, attorneys, owners, and contractors. He has been a member of the DRBF for 6 years. He can be reached by email at TJBurke3@cs.com.

Training Workshop Calendar

May 15, 2009

**Dispute Resolution in Multicultural Environments
In conjunction with the 9th International Conference on May 16-17
London, United Kingdom**

May 29, 2009

**Administration and Practice Workshop
In conjunction with the Northwest Regional Conference
Seattle, Washington USA**

June 8-9, 2009

**International Contracts Course
Presented by DRBF, FIDIC, and ECV
Brussels, Belgium**

June 19-20, 2009

**Dispute Board Workshop
Presented by DRBF and ICC Thailand
Bangkok, Thailand**

October 1-2, 2009

**Continuing Legal Education Course
Administration & Practice and Charing Workshops
In conjunction with the DRBF Annual Meeting & Conference on Oct. 3-4
Houston, Texas USA**

October 30, 2009

**Dispute Boards Training Workshop
In conjunction with the Regional Conference on Oct. 31
Bucharest, Romania**

**Visit drb.org for details, registration,
and new training announcements**



DRBF Region 1 Upcoming Conferences

May 29, 2009

Northwest User's Conference & Training Workshop Radisson Gateway Hotel, Seattle, Washington

Join the DRBF in Seattle, Washington for the Northwest Regional Conference, an annual event of DRB users and practitioners in the Pacific Northwest who gather to discuss best practices, ethics, challenges and solutions. The morning kicks off with the popular DRBF Administration and Practice Workshop. After lunch, the afternoon conference will offer interactive discussions on practical issues and challenges facing the DRB community.

The complete program and registration form are available on the DRBF web site. Registration fees are:

DRBF Administration & Practice Workshop (morning session) \$250

NW Conference (afternoon session) \$150

Both NW Conference & Training (full day) \$350

All conference and workshop materials are included with each session. To register, visit the Calendar section of the DRBF website and click on 'Registration.'

October 3-4, 2009

13th Annual Meeting and Conference Woodlands Resort, Houston, Texas

The DRBF's Annual Meeting and Conference offers lively and engaging presentations and discussions on the current and future state of DRBs. This year's event will be held in Houston, Texas, a hotbed of activity for the promotion of the use of DRBs. The program will feature presentations and panel discussions from public and private owners and contractors who use DRBs, lessons learned, DRBs in vertical construction, and practice pointers on writing a DRB Recommendation. There will also be a look at Dispute Boards abroad, including the DRB program at the Panama Canal as well as an overview of FIDIC documents and Dispute Adjudication Boards.

There will be ample opportunity for networking, during the conference and at the Al Mathews Awards dinner. Participants can maximize their visit to Houston by registering for several training courses planned for Thursday, Oct. 1 and Friday, Oct. 2. New this year are two specialized events being offered in conjunction with the conference:

Continuing Legal Education Workshop - Friday, Oct. 2, 2009 from 9:00 AM to 4:00 PM

Co-sponsored by the Dispute Resolution Board Foundation and the American Bar Association Forum Committee on the Construction Industry, and hosted by Andrews Kurth LLP. The agenda will include topics such as what the DRB process is and how it fits in the ADR/litigation continuum, use of the DRB process in the US and abroad, recommended practices and procedures, the lawyer's role in the process, ethical considerations, and much more!

DRBs in Vertical Construction Wine & Cheese Reception - Friday, Oct. 2, 2009 from 3:30 to 5:30 PM

Enjoy a sampling of wine and cheese while networking with the international DRB providers who have introduced this dispute resolution process to the largely untapped Vertical Construction market. This event will be a prelude to two presentations on Saturday afternoon wherein the existing and potential use of DRBs in building construction will be discussed extensively.

Visit the Meetings & Conferences page of the DRBF website for updated information regarding conferences and training workshops.

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There are many ways to expand your involvement in the DRBF. Join a committee or become active in local efforts through a regional chapter or by contacting your regional or country representative. The DRB movement is growing rapidly, and we need energetic, enthusiastic and knowledgeable members to help us advance the cause. With a variety of committees, you are sure to find something that suits your interests and talents.

Complete contact information for all committee chairs and regional or country representatives is available on the DRBF web site:

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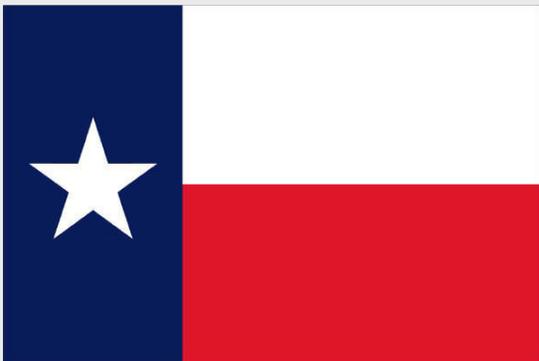


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Houston, Texas**

This year's DRBF Annual Meeting and Conference will have a decidedly Texan flair! Nestled in a serene, natural environment just outside Houston, Woodlands Resort offers spectacular golfing and resort amenities as well as world class conference facilities. Saturday night's gala awards dinner will feature a distinctively Texan menu, with BBQ and other specialties from the area.

Hope to see y'all there!