



Forum

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AUGUST 2009

DRBs Using Non-Binding Recommendations in the Public Sector

By James R. Haggins

“...a DRB is especially appropriate for those in the great majority whose focus is on performing a quality job, having a continuing cash flow, earning a decent profit, and maintaining a good reputation. I believe it is fair to say that quality work is never achieved in an adversarial relationship.”

As a frequent speaker on Dispute Resolution Boards, I’m proud to stand up in front of diverse audiences and celebrate its many successes. Some might say I am somewhat biased in favor of the DRB concept. Well, I am! I am biased in support of resolution boards in lieu of arbitration and litigation. I am biased in support of decision makers being urged, if not required, to make the decisions they are paid to make, instead of passing them on to third parties, whether the third party is a judge, a lawyer, a disinterested third party or a so-called neutral expert. I am biased in support of interest based bargaining in lieu of positional bargaining. I believe that when the parties leave the negotiating table, the result should be a win-win situation rather than a win-lose situation. Where there is an unhappy loser, the real result is renewed or continued confrontation between the parties.

To those few whose business strategy includes litigation as the linchpin, the DRB is clearly not for them. But a DRB is especially appropriate for those in the great majority whose focus is on performing a quality job, having a continuing cash flow, earning a decent profit, and maintaining a good reputation. I believe it is fair to say that quality work is never achieved in an adversarial relationship.

BACKGROUND

My efforts to promote dispute resolution boards began while working for the Washington Metropolitan Area Transit Authority in the U.S., often times referred to as the Washington Metro. In the early 1990s, litigation was taking an increasing toll on the Washington Metro’s resources, especially in the construction claims area. We were fast approaching several hundred million dollars in claims and the time required for these claims to be decided was lengthening. An Administrative Law Judge presided over construction disputes in a court-like environment called the Board of Contract Appeals. Also, the time and effort required of our people was mounting – not only the time needed by an attorney to prepare a case, but also the amount of management time needed for litigation support. The disruption to management was becoming unbearable. At one point there were nearly 350 docketed cases pending resolution before the Board of Contract Appeals and 70 Contracting Officer’s or Engineer’s Final Decisions were issued annually. The Board of Contract Appeals rulings were averaging five years and most contract disputes were never resolved until years after construction was completed. We began searching for ways to dispose of those cases which we knew could be resolved short of litigation and ways to minimize

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President's Page



In the last President's letter I discussed the DRBF mission, stressing the urgency of the task in front of the Foundation. In fact the same theme has run thru the entire last three President's Pages.

The Dispute Resolution Board Foundation's mission is:

- 1. Spread the DRBF process**
- 2. Train seasoned individuals to professionally administer**
- 3. Active promotion for the inclusion of a DB clause in all types of construction contracts.**

Yes, the US and the world are in an economic downturn but there should be no shortage of Dispute Board opportunities for trained practitioners. In the previous issues we had discussed the world governments response would be to "prime the pump." That is exactly what the program is and it is started in earnest. But it extends beyond the public arena. There are large public/private and strictly private projects. Here is a small sample:

- Water & Sanitary Infrastructure AWWA's annual state of the industry survey and the U.S. Environmental Protection Agency indicate the nation's total water infrastructure need is nearly \$335 billion through 2026.
- Transportation and Infrastructure Committee Chairman James Oberstar proposed a \$500 billion, six year authorization.
- Underground Projects Soon, you will be able to access a partial listing of upcoming projects in the members' section of the DRBF website (www.drbf.org; login and you will be automatically directed). There have never been more underground projects in design and coming to bid. These contracts are in abundance all across the country from Washington to Florida, from Southern California to the NYC area.
- NYC area alone has about \$30 billion in underground projects, only a small portion currently under construction.
- US Army Corps of Engineers Flood protection work in southeast Louisiana, back a \$3.5 billion "Option" which would improve city storm drainage as well as perimeter defenses.
- Nuclear Renaissance Currently on the drawing board to keep pace with electrical demand: four to six nuclear facilities operating by 2016, another 10 by 2020 and another 30 in 2030. Even a small nuclear plant is a multi-billion dollar construction project. These projects are right in my own backyard. The Southern Co. is in the early stages of preparing to build two new units at its Plant Vogtle nuclear facility in Waynesboro, Georgia. In addition, Duke Power is to build two nuclear plants and SCE&G and SCANA plan to build two nuclear plants in South Carolina.
- Other Energy Projects – these in total will dwarf the nuclear expenditures. There are wind, solar, and geothermal projects. But coal fire plants will continue to be the major source of electric power. Over twenty new coal-burning process plants are to be constructed.

Here is a quote from a recent ENR article: With increased bidding "low price bids are a recipe for disaster. The low bid looks great to the owner, but they'll pay the price in the long run." Dispute Boards have demonstrated their ability to avoid litigation. Keep dollars intended for construction actually building projects.

Public Works contracts are being 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 per year will be spent on litigation of all forms of construction. This cost will grow; with this accelerated rate of construction it won't be a straight line increase but some sort of geometric accelerated curve.

There have been several articles already about the quality of plans and specification deteriorating and fraud incidences increasing. The Foundation has been requesting Federal, State and local agencies to include DB clauses in any contract over \$10 million, and we are having some success. We suggest you as individuals or as companies do the same. A sample letter can be found in the member's section of the DRBF website. Where and to whom to write is just a click away on the internet. Then when there is a project in your geographic area or your area of expertise send the agency your resume. Self promoting is perfectly acceptable. The constructors and engineering journals indicate this same process of pump priming is occurring around the world.

Sincerely,

**DISPUTE
RESOLUTION
BOARD FOUNDATION
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R. M. Matyas
A.A. Mathews
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The members of the Executive Board of Directors are:

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Gwyn Owen	Daniel Meyer
William Baker	Robert Rubin
James Donaldson	Robert J. Smith
Jack Norton	Joe Sperry
Volker Jurowich	Jack Woolf

In recent months, the Executive Committee has acted on the following issues: revised bylaws, established a budget and focus for the Marketing Committee, identified locations for future conferences and workshops, and more. Visit the member's section of the DRBF website for details!

Executive Board of Directors Meeting Schedule:

September 18, 2009 by conference call
October 2, 2009 in Houston, Texas, US

Region 1 Board of Directors

The members of the Region 1 Board of Directors are:

John Norton, President
Kerry Lawrence, President Elect
Roger Brown
Douglas Holen
Blasdel Reardon

Region 1 Board of Directors Meeting Schedule:

September 18, 2009 by conference call

Region 2 Board of Directors

The members of the Region 2 Board of Directors are:

Volker Jurowich, President
Nicholas Gould, President Elect
Richard Appuhn
James Perry
Paul Taggart

Region 2 Board of Directors Meeting Schedule:

September 4, 2009 by conference call

Letter to the DRBF

The following letter was submitted to the DRBF Forum in response to the article "The Potential Use of Dispute Review Boards (DRBs) Outside the Construction Industry" by Kurt Dettman, Kendall Reed, and Erick Kerness; Vol. 13, Issue 2, p. 4 (May 2009).

It was interesting to read this article arguing for the use of Dispute Boards in commercial arenas other than the construction industry. Those DRBF members not already acquainted with the Dispute Board Rules of the International Chamber of Commerce will find them relevant to the article. Those rules are designed to serve for contracts in the construction industry, but also for any commercial contract involving long term relationships or very complex relationships, or both. For example, anecdotal evidence indicates that the rules have been used already on long term licensing agreements.

The DRBF could play a major role in the promotion of use of Dispute Boards outside the construction industry because DRBF members have the experience in the use of the technique in the construction industry to "sell" the technique for use in other commercial arenas. One way in which the DRBF could do this is by collaboration with the U.S. Council for International Business (the USA member of the International Chamber of Commerce), headquartered in New York City but active in training sessions throughout the USA.

For those readers interested to learn more about the ICC Dispute Board Rules, they are available free at www.iccwbo.org.

Gordon Jaynes

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The *Forum* is published quarterly by the Dispute Resolution Board Foundation (DRBF). Any opinions expressed are those of the authors and do not necessarily represent the opinions of the DRBF.

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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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 amcough@drb.org.



Deadline for the
November issue is

October 1, 2009



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Other News

Galloway Elected to AAA Board of Directors

DRBF member Dr. Patricia D. Galloway was elected to the American Arbitration Association's (AAA) Board of Directors on May 7, 2009. Dr. Galloway is Chief Executive Officer of Pegasus Global Holdings. She serves as Vice Chairman of the National Science Board and is a past president of the American Society of Civil Engineers.

AAA is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. More information is available at www.adr.org.

The Moles Elects Alger President

DRBF member Robert E. (Bob) Alger, President and CEO of The Lane Construction Company, has been elected to serve as President of The Moles for 2009/2010.

Bob has served as President of the ASCE Construction Institute, is the incoming Treasurer of the Construction Industry Roundtable, and is a member of the Board of The Beavers.

More information about The Moles is available at www.themoles.info.

Panama Project Awarded; DAB to be Appointed

The Panama Canal Authority (ACP) recently announced that Consortium Grupo Unidos por el Canal will design and build the waterway's new set of locks, the most anticipated project of the Panama Canal Expansion Program.

Grupo Unidos por el Canal, composed of Sacyr Vallehermoso S.A., Impregilo S.p.A., Jan De Nul n.v. and Constructora Urbana, S.A., was one of three world-renowned consortia vying for the largest and most important contract of the Canal's expansion.

The ACP revealed that Grupo Unidos por el Canal submitted the "best value" proposal for the new set of locks contract during a public event held July 8. The event, broadcast live on Panamanian television and the ACP Web site, was attended by Panamanian President Ricardo Martinelli and many high-ranking government officials. The winning consortium garnered the highest total points for its combined technical and price scores. The base price of US \$3,118,880,001.00 submitted by Grupo Unidos por el Canal did not exceed the ACP's owner's allocated price of US \$3,481,000,000.00.

The conditions of contract for the design and build of the third set of locks call for the formation of a standing Dispute Board of three members (FIDIC clause 20 and Appendix), which is expected to be named soon.

For more information, please refer to the ACP's Website: www.pancanal.com.

ICC Dispute Board Member Selection

By Gordon L. Jaynes

DRBF members will be aware that the International Chamber of Commerce (ICC) may appoint Dispute Board members for contracts in which the parties have adopted the ICC Dispute Board Rules. What DRBF members may not know are the details of how selection is made by the ICC: this note aims to clarify that matter, thanks to the kind assistance of the ICC Dispute Board Centre.

The ICC DB Rules can be found at the ICC website, www.iccwbo.org and at www.iccdisputeboards.org. To quote from the original foreword to the rules: “DBs have become a standard dispute resolution mechanism for contractual disputes arising in the course of mid- or long-term contracts. ICC offers the international business community a set of documents providing a comprehensive and flexible framework for establishing and operating DBs in a wide range of contracts in different industries.” Thus, the rules are suitable for many construction contracts but also are intended for use in other industries featuring mid- to long-term contracts.

Unless the contract parties have agreed otherwise, within the ICC framework a DB is established in accordance with Article 7 of the ICC DB Rules. That article provides that if the parties fail to appoint DB members by the prescribed times, the ICC Dispute Board Centre will appoint them upon the request of any party. (The ICC DB Rules cater to multiparty as well as bilateral contracts.)

Article 7(8) of the rules states: “When appointing a DB Member, the Centre shall consider the prospective DB Member’s qualifications relevant to the

circumstances, availability, nationality and relevant language skills, as well as any observations, comments or requests made by the Parties.”

But precisely how is the selection made? Who makes the appointments and how do they decide whom to appoint? These are matters of interest to all DRBF members. After meeting her at the 2009 DRBF International Conference in London, the author of this note had an email exchange on these questions with Ms. Calliope Sudborough, Deputy Manager, ICC Dispute Resolution Services, which encompasses the ICC Dispute Board Centre. Below are relevant excerpts from that email exchange, published with ICC’s consent.

“ICC Dispute Board appointments are made by the staff of the ICC Dispute Board Centre in Paris only. The staff of this Centre are currently the Director for ICC Dispute Resolution Services, the Deputy Director for ICC Dispute Resolution Services, myself (Deputy Manager), a lawyer (Mathilde Vital Durand), and the newly-appointed Manager, Hannah Tümpel.

“The ICC Dispute Board Centre does not have a roster or list of names from which it picks a particular appointee. Rather, it makes a specific search in response to each request. For this search, the Dispute Board Centre refers to its own contacts including, if it chooses to do so, the Standing Committee of the ICC International Centre for Expertise and the ICC National Committees. Their suggestions are not binding upon the Dispute Board Centre in Paris. The staff members of the Dispute Board Centre scour each CV to determine whether the candidate has the appropriate background, experience,

language skills, and independence with respect to the Parties. The ultimate decision rests with our department, under the direction of Emmanuel Jolivet and, ultimately, Jason Fry.” [Readers of the *Forum* may recognise that both gentlemen have other roles with the ICC: Mr. Jolivet is not only Deputy Director of the ICC Dispute Resolution Services but also General Counsel, ICC International Court of Arbitration; Mr. Fry is not only Director of the ICC Dispute Resolution Services but also Secretary General of the ICC international Court of Arbitration.]

“As you can see, it is helpful for us to become acquainted with members of professions likely to be required for Dispute Boards, so that the Dispute Board Centre can consider them for requests on the basis of first-hand knowledge. We are happy to receive CVs but there is no certainty that the Dispute Board Centre will be able to appoint any individual to a Dispute Board, as appointments depend upon the circumstances of the request we receive from the party or parties.

“The Standing Committee is a group of eleven experts from different fields who have an advisory role in relation to the ICC International Centre for Expertise and, if requested, the ICC Dispute Board Centre. The current members and terms of office can be found at the following

website:
www.iccwbo.org/court/expertise/id4595/index.html.
 Details about ICC National Committees can be found



at www.iccwbo.org.

“Generally, it is the practice of ICC National Committees to suggest candidates for appointments to Dispute Boards only from the country of the National Committee; the same is true of National Committee proposals for appointments of arbitrators. Most National Committees have individual as well as corporate members, and DRBF Members interested in the possibility of being suggested by a National Committee should consider contacting the National Committee of the country of which they are a citizen and becoming actively involved in the National Committee’s activities.”

Author Gordon Jaynes can be reached at glj4law@aol.com.

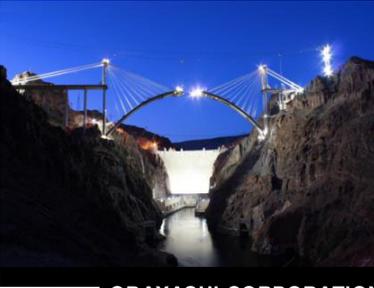
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DRBF International Conference London Report

The 9th Annual International Conference was held in London on the 16th and 17th of May. This is not the first time that a delegation has visited London, as one of the very first International Conferences was held at a hotel near Heathrow. That was relatively a small affair, by contrast the 9th Annual Conference was a full-blooded international conference and was an outstanding success. 142 delegates attended representing 30 different countries.

The workshop was held on Friday 15th of May, with an outstanding delegation of 82 people. As far as I know this represents the largest ever turnout to a DRBF workshop. At the end of the Friday workshop early registration for the conference began, and a welcome cocktail reception was sponsored by Probyn Miers.

The conference itself was spread across Saturday and Sunday morning. The Gala Dinner was held at the splendid Honourable Society of Lincoln's Inn. The cocktail reception, which preceded dinner, was hosted by my firm, Fenwick Elliott LLP and also Navigant Consulting.

The keynote address was provided Douglas Oakervee, the Chairman of Crossrail. He dealt with London's largest projects including Crossrail, Olympics 2012 and the Thames Estuary Airport. Douglas was introduced by Volker Jurowich, the President of the DRBF Region 2 Board, and Douglas's opening address was very well received. I then opened the conference, and James Brady, President of the DRBF Executive Board, provided a short worldwide report.

The conference was in three main sections. The first dealt with Dispute Boards worldwide, and Volker Jurowich led that session. Gilberto José Vaz the Country Rep for Brazil spoke about Brazil, while Alina Oprea spoke of her area Romania and Graham Easton then talked about Australia and New Zealand.

A second session dealt with operating Dispute Board's in civil law countries. James Perry, another Director of the DRBF Region 2 Board, was the session chairman. Paul Gélinas covered civil law and common asking the question as to whether there was a meaningful difference. This was followed by ideas for optimising the Dispute Board process in Brazil by Júlio César Bueno and then Axel Jaeger, Chairman of FIDIC Contracts Committee, considered FIDIC contracts and civil law jurisdictions. Marc Frilet the country representative for France looked at maximising benefits whilst minimising the costs for Dispute Boards in developing countries and then finally Emhemmed Ghula considered Dispute Boards in North Africa and the Near East.

The third and final part was held on Sunday morning, dealing with practical applications of the Dispute Board process. On Sunday, four sessions were led by a chairperson, allowing delegates to rotate around all four sessions. This format was again very popular and has been repeated from previous years. Gordon Jaynes and Dr Toshihiko Omoto led Session A dealing with the dispute avoidance role of Dispute Boards. Some frequently asked questions were considered and answered by Dick Shadbolt and Dick Appuhn in Session B. The question as to whether *ad hoc* dispute boards were a sensible solution was debated by Paul Taggart, Derrick Griffith and Axel Jaeger, and the final Session D considered the enforceability of Dispute Board decisions, and was chaired Edward Corbett and Chris Seppala.

London provided an excellent setting for the International Conference, in line with the now well-trodden high standards for these international DRBF's events.

I look forward to seeing you all next year in Istanbul.



Nicholas Gould
International Conference Chairman, 2009



Gala dinner at Lincoln's Inn

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to the DRBF**

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**Do you know
someone
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 can be found on the DRBF web site (drb.org) or contact the main office for details.

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS APRIL THROUGH JUNE 2009

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Reigate, Surrey UK

Ahmed Benbarka
Tunis, TUNISIA

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So. Nevada Water Auth.
Henderson, NV USA

Francois Bogacz
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Robert J. Bourg
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Robert Werth
Werth Consult
Essen, GERMANY

DRBF Represented at Oil and Gas Energy Leadership Conference

By Blase Reardon

As part of the DRBF's goal of expanding use of DRB's beyond selected public and semi public construction, I was asked to represent DRBF at this event as a way of finding new and private opportunities for the use of DRB's. I will focus my comments on those items, which are opportunities for the DRBF philosophy and growth in the use of DRB's both in the North America and abroad.

There were approximately 180 attendees (mostly US, some Canadian, and some from Kuwait) representing explorers, producers, transporters, distributors, financial investors, consultants, lawyers, and insurers, for this industry group. Most were between ages 40-55, represented both major and smaller firms, seemed very intelligent, were predominantly risk takers, and virtually all presentations were well received.

A speaker from a gas producer opined that natural gas would lead the big changes coming in US energy policy. He and a subsequent speaker agreed that there are four nuclear power plants now under construction in the US and that 15 more will be constructed during the next 15 years following the French model of recycling the waste locally and storing the base contaminant on site Vs shipping it across the US to Yucca Mtn. or similar place. Meanwhile 2011 will be the turnaround year for the world economy as capital investment is in short supply except for very disciplined and analytical firms. A very articulate investment banker/professor who formerly worked in the natural gas business described how more private capital money from pension

funds, trusts/foundations, and sovereign wealth sources will be very useful for gas exploration/production in very promising fields within the central US and west/central Canada. As a result, but yet to be finalized as to location will be the construction of numerous gas pipelines including some major long distance projects. Finally, private investors referred to previously are "a much more skeptical lot" wanting to assure themselves that their investments will be better managed. (I took this to include construction expenditures by the investees.)

Two speakers reinforced each others' positions that chemical plants and oil refineries will decline substantially in the US in favor of constructing new overseas locations, especially in the middle east where these plants can be adjacent to oil production sources, fueled with natural gas which is so cheap relative to oil, and be operated with lower labor costs. Many existing US refineries and chemical plants will be radically altered and expanded, while up to 50% will be shut down. One speaker forecast foreign oil refinery construction at \$5-10 billion over the next 5-7 years, virtually all outside the US.

With regard to solar and wind power, these energy sources will grow in volume and frequency with many small facilities, but will not ever account for more than 15-20% of energy in North America.

US consumption of LNG will continue to increase, but we are woefully lacking in offshore terminals to unload these ships at sea instead of bringing them into already busy harbors.

In conclusion, I have these thoughts:

1. The DRBF and its representatives in the North America should focus on uses of DRB's in energy transmission (gas and electricity) facilities, selected specialty chemical plants, and nuclear power plant construction. In DRBF Region 2, huge refineries and chemical plants are the most promising opportunities for use of DRB's especially in the Middle East and possibly Central America.
2. My badge reading "Dispute Resolution Board Foundation" attracted lots of comments, and questions as others saw DRB referring to an improved more sensible way of doing business.
3. Rather than attend this conference in the immediate future years, I suggest that DRBF be represented at similar leadership conferences for other industries where the owners (public and private) are long-term construction project owners who have a keen sense to build projects without acrimonious disputes. Some of the "industries" which come to mind involve medical, selected manufacturing, R&D, utilities, and education. If we want to break through the mega-project impression that many have when thinking of DRB's, then we as DRBF officers/members need to be proactively looking for more construction opportunities by getting a fix on each major construction using "industry."

I cannot end this report without a word of caution. Many private owners, while admiring the goals of the DRBF will question the need for using DRB's on their own huge construction projects. In numerous discussions since this conference with one major utility which is embarking upon more than \$1 billion in new

construction, the DRB concept seemingly received widespread support from staff constructors and inside legal counsel. Yet a senior executive rejected the use of DRB's on upcoming projects because "we haven't had any major unfavorable construction disputes so far." Broadening the use of DRB's to large private owners will not be an easy sell.

Author Blase Reardon can be reached at reardon@bostonsolv.com.

Member to Member - Ideas & Advice

DRB MEMBERS AND WHAT OWNERS LOOK FOR WHEN SELECTING THEM:

There is not a perfect person for a DRB. There are specific traits that help assure owners of a fair hearing.

1. Experience - Project type, scheduling, specifications, etc.
2. Successful and respected by peers in both the construction and engineering fields.
3. Common Sense - A knack for seeing things as they are and doing things as they ought to be done.
4. Problem Solver - Not a problem maker.
5. Partnering - Buys into the concept.
6. No Conflict of Interest - or ever have the perception of a conflict.
7. Not an Advocate - An advocate cannot be fair, thoughtful, or truthful. An advocate will not fully examine both position papers.
8. People Skills - Handle issues without rancor or disrespect.

If a Member has these traits, then it does not matter if his career was with an owner or contractor, because any recommendation would be the same.

**Submitted by:
Jimmy Lairscey, P.E.
DRBF Member**

Jimmy worked for the Florida Department of Transportation for 40 years, where he established their first DRB project in 1995. Today, all FDOT project have DRBs. He retired in 2000 and now runs his own engineering firm, JBL Engineering.

(continued from page 1)

future disputes. The dispute resolution board process provided the solution.

The Washington Metro's early efforts concentrated on a combined Three-Member DRB with a separate Partnering process. There was a need to both resolve disputes fairly and quickly as well as improve contracting relationships. We were seeking to move from the traditional adversarial relationship between contractor and government to a more collaborative ethic and contract "partnership" where trust, cooperation, teamwork and the successful attainment of mutual goals are the hallmarks. This new relationship was fostered by the partnering process.

Over the years, many factors have led to the unfortunate adversarial relationship that commonly exists between the public and private sectors. First, there seemed to be a shortage of incentives to form a close bond with the contractor. As a result, both parties were discouraged from functioning as part of a joint team. In addition, many government project managers believe it was necessary to distance themselves from a contractor to avoid any appearance of impropriety and to preserve total objectivity. Some project managers actually maintain that the lack of trust is, in fact, BENEFICIAL to the public sector. Under this reasoning, the performance of a contract should be carried out through an adversarial relationship that ultimately ferrets out truth and justice, much the same as the current US judiciary system. When we think of ourselves as antagonists battling to perform and administer a contract, we naturally set up two opposing management teams.

The public sector's team develops its own position setting one-sided goals and objectives, regardless of the effect they will have on the contractor. Contractors engage in the same process with the inevitable result: an adversarial relationship which leads to increased costs for the taxpayer, declining profits for the contractor, delays to the schedule, and a lack of quality with respect to the work.

Obviously, an adversarial relationship results in a much more difficult way of communicat-

ing and establishing trust. It is, therefore, not surprising that claims go unresolved and litigation increases. It is also not surprising that many cases, when litigated, become quite heated, leaving both parties with tremendous feelings of animosity and betrayal regardless of the outcome.

It doesn't take long to realize that there must be a better way of doing business, avoiding disputes and building cooperative relationships. Partnering offered us that hope for a solution.

Partnering can be described as the creation of a relationship between owner and contractor that promotes achievement of mutual and beneficial goals. Again, like Dispute Resolution Boards, it involves a drastic change in traditional mindset. When we speak of Partnering, we are not referring to a contractual agreement between the parties. Instead it is a change in attitude to foster a nurturing environment that involves risk sharing. The ultimate goal is the elimination of the "us" against "them" thinking and the formation of a "we" mentality.

The results from using Partnering and DRBs proved very beneficial in efforts to resolve disputes fairly and expediently. Where the principles of a Three-Member DRB providing non-binding and/or advisory recommendations have been utilized, we experienced better cost control, reduction in schedule growth, a significant reduction in paperwork, and successful attainment of our valued engineering objectives. However, most importantly, NONE of the contracts that embraced the principles of the DRB using non-binding recommendations and Partnering have resulted in litigation. Also, other positive by-products have been realized – no late deliveries, no fatal accidents, a significant reduction in worker injuries and loss work day cases, improved quality work and a reduction in the amount of punch list work. I do not think these results are coincidental. I firmly believe that this success is directly attributable to the use of the principles of the Dispute Resolution Board through non-binding recommendations and the Partnering process.

The Three-Member DRB process provided the parties with an opportunity to present their factual data in summarized form to 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 contract. The agreement between the Washington Metro, its contractor and the DRB members required a written recommendation. The recommendation was non-binding as is the customary practice in the U.S. on government contracts. On the Washington Metro, either party had the right to accept or reject the DRB recommendation. A rejected recommendation would automatically require a Contracting Officer's Final Decision. A rejected Contracting Officer's Decision would trigger the appeals process administered by a government Board of Contract Appeals – an administrative law court. It's worth noting the DRB and partnering contract provisions strongly encourage contractor participation – it does not mandate a contractor to seek dispute relief through a non-binding and/or advisory DRB recommendation.

The major assumption inherent in the DRB process was if the key decision makers, who have knowledge of broader organizational goals and interests and who have the authority to settle the dispute, are presented with the relevant facts of the dispute and the probabilities of how it might be argued in the Board of Appeals, they will be better prepared, able, and willing to negotiate a settlement on the basis of the DRB's non-binding and/or advisory recommendation, rather than opt for years of expensive and time-consuming appeals and potential litigation. The opportunity for the parties to negotiate a fair and equitable settlement and to create a win-win solution may be the most important attribute of a DRB non-binding recommendation. It should be the parties involved in the dispute that get to decide what is fair and equitable in contrast to a neutral third party having power to make a binding decision that may result in a win-lose situation; potentially causing other problems down the road.

Early efforts with the DRB process proved

quite successful – in particular on complex underground construction where Washington Metro mandated that construction contracts over US \$5 million have a DRB and Partnering provision. Since that time, the Washington Metro experience with DRB and Partnering has flourished. DRB with Partnering has been part of numerous construction contracts totaling US \$1.5 billion. Nearly two decades since DRB and Partnering, began there have been only six DRB traditional hearings and one informal hearing. The Board of Contract Appeals was discontinued within five years of including DRB and Partnering provisions in major construction contracts.

DISPUTE RESOLUTION BOARDS

There are some initial principles to consider when discussing Dispute Boards, whether it's a Review, Resolution or Adjudication Board. First, Boards are *not* a replacement for traditional fact finding and negotiations. Fact finding and negotiations have been used successfully to resolve numerous contract disputes. This is the method that owners and contractors should attempt first before calling on third parties.

Owners and their engineer consultants need to train their managers to make responsible decisions on major projects involving hundreds of millions of dollars. Managers should be held accountable for resolving disputes themselves where good sense and logic say disputes should be resolved. Project managers should not be allowed to hide behind their lawyers and auditors and send resolvable disputes to litigation or to third parties for decisions merely because it may be easier for them to do so. Owners and their engineer consultants should be mindful of the documentation necessary to support a favorable dispute resolution. The DRB gives project managers another extremely valuable tool to use in resolving disputes themselves.

OBSTACLES TO THE DRB PROCESS

In the early stages, Washington Metro recognized that if a DRB was to be adopted, the mindset created by the adversarial litigation culture had to change. We had created the problem ourselves by making it "easier" to follow the established litigious pattern of

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dispute resolution than to seek innovative solutions to disputes through less familiar means. For DRBs to make significant inroads in reducing the litigation burden, it must become part of the way project managers approach disputes. This could only occur when project managers understood the concepts behind the principles of DRB and Partnering and felt that their efforts to resolve disputes would be supported.

Project managers may also be reluctant to use the DRBs because they fear criticism, both from external sources and from within their organizations. For example, the government's contract claims system includes oversight of decisions by watchdog agencies. Within the Washington Metro, we had the Independent Office of the Auditor General, the Riders Advisory Group and the agency's Governing Board. Criticism can also come from the investigative arm of the local news media and so-called "whistle blowers" in an agency who may feel that the negotiated settlement was not in the best interests of the government.

Washington Metro was fortunate that in an early use of the DRB process, the contracting officer was quite pleased with the fairness and clarity of the DRB's written recommendation and how it related to the factual records and contract provisions. It is worth noting that in the cases where we have utilized a DRB, Washington Metro has never been criticized by any external source.

INCREASING THE SUCCESS OF DISPUTE RESOLUTION BOARDS

No organization can effectively implement a new way of thinking without the complete support of top management. Persistence by a champion at a high management level who truly believes and wants to share the value of the DRB process is needed within the organization. The participation of a champion sends the important message of support throughout the organization.

Quarterly DRB meetings are essential and invaluable; they improve communications between the parties and aid in avoiding disputes. They are also useful in giving staff

guidance and direction on early dispute issues. Used appropriately, the DRB can be helpful as a "sounding board" allowing potential paths to resolution of issues to be brainstormed and allowing the parties to explore the strengths or weaknesses of their positions prior to convening a formal hearing. The technical expertise that DRBs bring to the table can certainly add value in resolving highly technical and complex disputes that dominate today's construction industry. Foremost, the dispute resolution board must always be perceived as a neutral party.

WHY USE NON-BINDING RECOMMENDATIONS?

At present time, U.S. Federal agencies and those receiving federal funding do not have authority to use binding recommendations. In the absence of a U.S. Federal statute specially authorizing the use of binding dispute resolution board recommendation, agencies may not submit a dispute to a binding recommendation. Notwithstanding Federal statute, the use of non-binding recommendation can be very advantageous in the fair and equitable resolution of disputes. Non-binding recommendations clearly work and making the process binding might bring a myriad of problems, not the least of which is that it effectively becomes an arbitration process. There is no informality about arbitration, which is the intended purpose of Dispute Resolution Boards.

Another important factor in deciding to use a non-binding recommendation is an assessment of whether the parties are capable of negotiated settlement with the recommendation of the Dispute Board and without the added influence of an arbitrator or the courts. A binding recommendation may be an all-or-nothing decision – a risk both parties must bear, while a non-binding recommendation offers the parties a greater flexibility to pursue their perception of fairness. In addition, a non-binding recommendation is more likely to maintain a favorable working relationship between the parties, something that should never be taken lightly. A Partnering relationship demands the will to resolve disputes. Clearly, the best dispute resolution is dispute prevention.

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CONCLUSION

Public and private sectors are rapidly recognizing the need to use innovative approaches to resolve and prevent disputes. The principles and best practices offered through The Dispute Resolution Board Foundation in its efforts to foster common sense dispute resolution worldwide are commendable. Relying exclusively upon traditional negotiations and the judicial process is not working in today’s litigious world. Partnering holds the promise for an effective means of avoiding disputes, but where and when they occur, the Dispute Resolution Board lends itself to quicker and more effective resolution of disputes. Public sector experience with non-binding recommendation has proven successful and there are no signs on the horizon

that the U.S. construction community wants to switch to a binding recommendation. I strongly believe the DRB success rate today is largely attributable to the non-binding recommendation that allows the parties the chance to work in partnership toward a fair and equitable solution that is a win-win for both sides. □

About the Author: James R. Haggins is a Principal of Construction Management Consulting Services, LLC and former Assistant General Manager for the Washington Metropolitan Area Transit Authority. He has 38 years of engineering and construction experience; 22 years building Metrorail extensions in Washington and 16 years building nuclear power plants. He can be reached by email at jrhaggins@aol.com.

WMATA Case Study

In the mid 1990s, Washington Metro awarded three major tunnel contracts in the center city area. All three contractors were experienced companies and had successfully completed similar tunnels contracts on time and within budget. Two of the tunnel firms had their main headquarters in the U.S. and the other was an international firm with its main headquarters in Europe. The scope and performance duration for each tunnel contract was similar and work began within months of each other. Each of the tunnel contracts had contract provisions for DRB and Partnering to aid in dispute avoidance and resolution. The provisions allowed the parties no more than 30 days to resolve a dispute after reaching an impasse at the lowest level within the organization – in most instances this was the owner’s resident engineer and the contractor’s project manager. A dispute ladder allowed the parties to escalate dispute decision making after 10 days up the chain of command until it reached the highest organizational level. If not resolved, the dispute could be referred to the DRB for its non-binding recommendation. There were many disputed issues over the 3 ½ years of tunnel construction, but only three disputes were presented to the DRB. These disputes involved significant sums of time and money. The DRB hearings averaged three days with each party presenting its position on a single day and rebuttals were heard on the final day of the hearings. The Board was allowed 20 work days after the hearings ended to complete and release its non-binding recommendation to the parties. Regardless of the DRB’s non-binding recommendation the parties always accepted the recommendation and viewed the outcome as their best opportunity to convince a neutral third party on the validity of their position. The DRB’s non-binding recommendation was always considered fair and equitable. Of the tunnel contractors, one company did not fully embrace the DRB concept and elected to pursue its claim for extra cost in court. The contractor filed its initial claim in the U.S. District Court system in the late 1990s after all construction had been completed. The claim sought extra costs equal to the value of the original contract price. The U.S. District Court process required the parties to seek mediation prior to the Court setting a trial date. Mediation was attempted and failed. Trial began in early 2001, approximately four years after tunnel construction was completed. The trial lasted 1 ½ months. A unanimous verdict was issued in favor of the Washington Metro. The contractor sought appeals first at the U.S. Court of Appeals and finally at the U.S. Supreme Court – the highest court in the land. The appeals lasted another 2 years. The U.S. Supreme Court denied briefs and oral arguments – in essence the contractor was never granted extra cost.

In electing not to use the DRB non-binding recommendation process the parties were forced into years of costly mediation and litigation. Certainly, the use of the DRB would have saved the parties litigation expense and hours of staff and management time. Clearly, the involvement of the DRB and its non-binding recommendation would have better served the parties. □

Ethics in Today's World of DRBs:

Board Member Attempting to Apply Fairness Standards To DRB Decisions and Recommendations



By Jim Phillips Ph. D.

The ethics question raised in the previous edition of the Forum involved a Board member who was attempting to apply a fairness standard in the process of formulating DRB recommendations for the disputes brought before the DRB. Those fairness standards were outside the language and provisions of the contract specifications, and after the other Board members tried to persuade him/her that these fairness standards were not a contractual basis for making recommendations, he/she announced that he/she would be writing minority opinions on all further DRB recommendations.

This question has come up several times in my own experience, and from speaking with other Foundation members, I know it comes up for others as well. I believe that all DRB members, sooner or later, are faced with situations where the contract language either fails to address the dispute, or if it does, it produces a harsh or "unfair" result. For a Board member who has followed the construction project closely from the beginning, and understands a party's logic for performance in certain ways, this often times leads the member to want to compensate a party in a "fair" or equitable fashion outside of the four corners of the contract language. This desire to compensate or level the playing field must be carefully weighed with another competing consideration. Namely, the

scope of the DRB's authority to recommend any resolution and the potential damage that would occur if, in the name of fairness, the Board ventured beyond that authority.

A common example of how a Board may wish to mete out recommendations based on fairness principles is when both parties, either fail to perform a contract requirement completely, or perform in an incomplete fashion. I have heard both owners and contractors point the finger at the other and claim, "the other party did not perform, so why should we"? Or, in a notice requirement situation where one party fails to meet a time line (30 days) and the other claims that because of that, they can take as much time as they want to respond without prejudice. In each example, it is easy for the Board to opine that neither party complied with the contract, therefore the Board is free to craft its own remedy based on principles of fairness.

While understandable, such a response could open the door to the loss of the DRB's credibility by all parties. Moreover, once a Board steps off the four corners of the contract language, it may be impossible to return. If this were to happen, the Board most likely would expose itself to heightened criticism and second guessing by the parties. An examination of Canon Five of the DRB Foundation's Code of Ethics gives us some guidance.

Canon Five provides that the DRB impartially consider all disputes referred

for consideration. It further provides that "[r]eports shall be based solely on the provisions of the contract documents and the facts of the disputes." This command language must be interpreted as limiting the DRB to the language of the contract in crafting its recommendations. This may, and usually is, easier said than done.

In the example of the notice requirement above, if a contractor fails to meet a 30 day notice requirement, irrespective of the owner's failure to respond according to the terms of the contract, the DRB should recommend that the contractor failed to exercise his rights under the contract. To do otherwise would be to send a message that either party could "game" the DRB process by trying to manipulate the other into failing to comply with contract requirements.

However, if we take this scenario one step further, the proper course becomes more complex.

In the 30 day notice example above, assuming the contractor is required to give notice of a delay or an inconsistent site condition, and this initial delay or change develops into a cumulative analysis by the DRB of the parties' efforts to provide each other documentation and responses over time in accordance to the contract specifications, the Board's duties become more intricate. However, I would have to say that the DRB has to maintain consistency and abide by the contract requirements to the extent possible. This also brings into another consideration, that is that the Board compose its recommendations in a way that the parties can understand why the Board took the action it did.

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Section 3.7 of the Foundation’s Practices and Procedures discusses several points relevant to this discussion. It suggests that the recommendations should be “straightforward” and easy to understand. It also discusses the importance of the members reaching an agreement on the interpretation of the pertinent contract documents.” This step, I would argue, is critical to the DRB’s ability to issue a recommendation that both parties can understand and therefore, be more likely to accept. In situations where the parties failed to follow the contract, the temptation to turn to fairness standards becomes higher. In these cases, a thorough and exhaustive discussion among Board members to sort through contract compliance issues becomes more critical. In the scenario as presented,

this may not have occurred as one member insists on applying a fairness standard and then decides to begin writing minority recommendations.

Section 3.7.3 of the Foundation’s Practices and Procedures addresses the issue of minority recommendations. According to this section, DRB’s goal is “always to produce a unanimous report.” This section goes on to provide that dissenting opinions “may undermine the entire DRB process on the project, especially, the aspect of resolving issues before they become disputes.” However, the section goes on to say that if a unanimous conclusion can not be reached, dissenting member may, with input from other DRB members, prepare a minority view.

In our scenario under discussion, one

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DRB member wants to base all recommendations on fairness principles and decides to write wholesale minority recommendations, apparently for the remainder of the project. This is a very difficult situation which requires careful consideration as it potentially touches on the resignation of a Board member.

Section 3.8 of the Foundation's Practices and Procedures provides for the resignation of a Board member in certain circumstances, most of which involve a request for a resignation by one of the parties. While that circumstance is beyond the scope of this discussion, a continuous series of recommendations with a minority view may lead a party to request the resignation of that Board member. While I will reserve a full discussion of Section 3.8 for a future column, there is one point I would like to make.

Section 3.8 does provide that if the DRB concludes that "one of its members is an obstacle to the dispute resolution process, the member in question should resign for the benefit of the project". This raises a host of issues that will be the subject of my next column in the Forum. Briefly, I would have to say that this is a very slippery slope as it involves the very core of the integrity of the DRB process.

The issue of basing DRB recommendations on fairness principles is one that comes up often on projects with DRBs, given these projects' complexities. As we have discussed, however, if the DRB leaves the four corners of the contract language in an effort to achieve fairness for the parties, the result can diminish the integrity of the Board's presence on the project. Once the DRB leaves the contract language, it very possibly opens the door for the DRB to keep seeking, and the parties to keep requesting, "fair" solutions to future disputes. This outcome

would, in my opinion, severely undermine the integrity of the DRB process and open the DRB to even more criticism from the industry. While issuing recommendations based on fairness principles may seem easier and the right thing to do, the DRB owes it to the parties to comply with the terms and conditions of the contract specifications.

NEXT ETHICS CHALLENGE

Assume the facts of the previous scenario and that the other two Board members, one of whom is the chair, is faced with a Board member who continues to write minority opinions in all DRB recommendations, based on fairness principles. What should the other Board members do?

What should the other Board members do?

Ethics Commentary or Question?

Please contact:

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Dispute Resolution Board Foundation 13th Annual Meeting & Conference October 3-4, 2009 in Houston, Texas “Bridging the Gulf with Dispute Boards”

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. Maximize your visit to Houston by registering for several training courses planned for Oct. 1 and 2.

NEW! 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 conference presentations wherein the existing and potential use of DRBs in building construction will be discussed extensively.

Registration and Reservations

The DRBF offers secure online registration through our website, www.drb.org. Click on the Events tab and select “Meetings & Conferences” from the drop down menu. Once there, click on any of the red links to view the invitation and enter the registration site. Payment can be made online using a credit card, or select “pay offline” and send a check or bank transfer to the DRBF office in Seattle. Any questions about registration should be directed to Ann McGough at amcgough@drb.org or call Steve Fox in the DRBF office at 888-523-5208 or 206-878-3336.

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

Using Dispute Boards to Corral Construction Disputes

What lawyers, project owners, contractors and design professionals need to know about Dispute Boards in Texas and beyond.

October 2, 2009

9am - 4pm

Andrews Kurth, Houston, Texas

The use of Dispute Boards for dispute avoidance and resolution on construction projects, especially infrastructure projects, has grown rapidly in the U.S. and internationally. Agencies such as Florida DOT, CalTrans, Colorado DOT, BART, Port of Seattle, City of San Francisco, University of Washington and numerous other agencies and school districts have adopted DRBs as their preferred means for dispute avoidance and resolution on their projects. With DRBs now used or planned by DART, the Henry B. Gonzalez Convention Center, TxDOT and a large Texas hospital facility, project owners, construction professionals and their legal counsel all need to understand how Dispute Boards can change the owner-contractor dynamic. Lawyers dealing with international construction or commerce will learn about Dispute Boards under the FIDIC contract documents and the International Chamber of Commerce Dispute Board Rules.

Agenda topics include:

- Overview of the DB Process in North America and Internationally
- Discussion of Texas HB 3913
- Drafting the DB Clause and Agreements (FIDIC/ICC and U.S. DRB)
- Case Studies: Henry B. Gonzalez Convention Center DRB and Drafting a DB Process for a Hospital Project
- Selecting and Training DB Members and DB Users
- Presenting to a DRB
- DRB Recommendation/DAB Adjudication: An Interactive Exercise
- Panel Discussion: Pros and Cons of DRBs and Perspectives on the DRB Process

This program is jointly sponsored by the Dispute Resolution Board Foundation, the American Bar Association Forum Committee on the Construction Industry and the American Arbitration Association. This CLE program is being hosted by Andrews Kurth LLP.

Registration

Visit the calendar of events section of the DRBF website to access complete event details and register online. Fees are \$180 for general admission, \$90 for government employees.



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FORUM COMMITTEE ON THE CONSTRUCTION INDUSTRY



DRBF Region 2 Upcoming Conferences

September 9, 2009 UK Member's Meeting London, United Kingdom

Join the DRBF from 2-6 pm at CMS Cameron McKenna in London, UK for the UK Member's Meeting, and annual gathering of Dispute Board users and practitioners in the UK. Topics to be addressed include:

- What is a Dispute?
- Dispute Prevention Techniques
- Dispute Avoidance by Project Management
- How the Courts Can Assist with Dispute Avoidance
- Tender and Contract Documents
- The Role of Dispute Boards in Dispute Avoidance

The meeting concludes with a drinks reception sponsored by CMS Cameron McKenna.

October 30-31, 2009 DRBF Regional Conference and Training Workshop Bucharest, Romania

Join dispute resolution professionals from throughout the EurAsian region for training on dispute prevention techniques and to share ideas and best practices for the use of Dispute Boards from both regional and international experts. Conference concludes with a gala dinner with Romanian flavor.

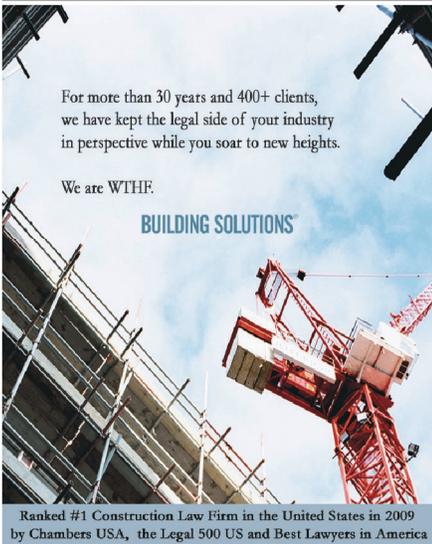
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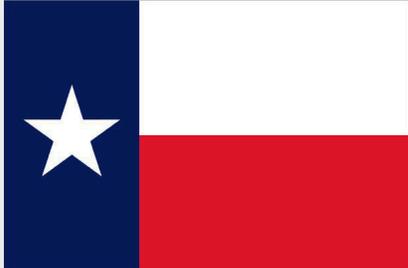
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Dispute Resolution Board Foundation
19550 International Blvd. So., Suite 314
Seattle, WA 98188

FOUNDATION FORUM

Register Today!

**DRBF 13th Annual Meeting and Conference
October 3-4, 2009
Woodlands Resort
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!