

NOTES FOR DISCUSSION

Tripartite Agreement Issues

1. Fee Structure

The role of a DRB can be broken down into 3 essential elements:

- (a) Keeping informed on progress/issues/matters relating to the delivery of the project. This usually involves reviewing documents such as:
 - minutes of various meetings,
 - reports, eg. monthly report, and
 - special information from sitebut can also involve the preparation of DRB minutes and agenda, etc.
- (b) Participation in periodic DRB meetings and site inspections, usually monthly or two-monthly.
- (c) Referrals/dispute determinations. These could involve review of documents, presentations, preparation and drafting, etc. It also could involve off-site work relating to special requests from the parties made jointly.

It is normal to agree both an hourly rate per member and a daily rate per member and these are then used depending on the appropriateness. For example, hourly rate would be most appropriate for work done in category (a), while a daily rate may be more appropriate for category (b); and both rates might be necessary to cover different types of work done in category (c). In any event, the basis for invoicing for services will be agreed between the parties, usually at the first DRB meeting.

The costs for (a) and (b) are usually referred to as the Base Costs, because these costs are regular and ongoing and cover the minimum costs incurred by the DRB. There may be advantages in agreeing to pay these Base Costs as a monthly retainer arrangement. This would facilitate the budgeting of the DRB costs.

Expenses such as travel, accommodation, taxi, etc. are normally invoiced at cost.

On long-term projects, for example periods greater than 2 years, it is common to include an escalation provision (usually tied to an index, eg. the construction index).

Whilst it may be convenient for DRB members to adopt the same daily and hourly rates, this is not essential and the individual member's rates are generally fixed at the time when the member is nominated. The adopted rates are set out in an Annexure to the DRB Agreement.

2. Responsibility for Payment of DRB Fees

There are two questions to consider here:

- (i) How are the DRB fees shared between the Principal and the Contractor?
- (ii) How is invoicing done, and payment administered?

In practice, these questions will be discussed between parties and the DRB at the outset and the agreed terms will be set out in the final DRB Agreement.

In relation to the question of proportionate share of the DRB fees, the most usual practice is for these to be shared 50:50 between Contractor and Principal. This sharing reinforces the perception and reality of complete independence of DRB members.

However, there have been cases where the "Base Cost" part of the fees is borne 100% by the Principal, but in all known cases the "Referral Cost" part for dispute recommendations has been shared 50:50. The reason given for the Principal accepting 100% of the Base Costs usually related to particular assumptions made during the formulation of the contract and the related commercial terms.

In relation to the question of invoicing for DRB fees and administration of the payment, the most common practice is for the DRB member to invoice the full amount to the Contractor who pays and then claims the Principal's share as part of the monthly progress claim.

An alternative to this arrangement is for the DRB member to invoice each party separately for their respective share of the DRB fee.

Irrespective of which course is agreed between the parties at the outset, the member's invoices will be based on the rates agreed and set out in the Annexure to the Agreement and will be accompanied by information sufficient to allow the Principal and the Contractor to verify each invoice.

3. Payment Terms

It is usual for the DRB members' fees to be invoiced monthly and it is usual for invoicing to occur around the end of the month so that there is alignment with the Contractor's accounting systems. Nevertheless, the specific arrangement will be agreed between the parties at the outset.

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