To Be or Not to Be—That Is the Question:
Is a DRB Right for Your Project?

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Abstract: Dispute review boards (DRBs) have been used on a wide variety of projects both in the United States and abroad. However, this alternative dispute resolution¹ methodology has been around for over 3 decades and as of 2006 has been used on over 1,434 projects according to the Dispute Resolution Board Foundation; therefore, now is the time to consider whether the benefits of a DRB outweigh its potential downside. Some DRBs are successful in that all issues have been resolved prior to the close of the project, while others have failed and caused the issues to travel the continuum to litigation and/or arbitration. The writer’s first experience with a DRB was one that failed and the issues continued to both arbitration and litigation at great expense to both the owner and the contractor. The purpose of this paper is to explore the questions that need to be asked to determine whether or not a DRB is right for your project. It will outline the history and development of a DRB as well as its use in the United States and abroad. It will evaluate the advantages and disadvantages of using a DRB to permit a deliberate decision on whether or not a DRB is right for your project.

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Introduction

The construction industry is a leading economic indicator with construction spending in February 2010 that estimated at $846.2 billion (U.S. Census Bureau News 2010). The construction industry touches every part of our lives, from the homes we live in to the roads, bridges, and tunnels we drive on. It encompasses hospitals, malls, theaters, power plants, wastewater treatment plants, oil drilling platforms, airports, hotels, apartments, nuclear generating facilities, water and sewer lines, and more. As of the most current yearly statistics in 2008, it employed approximately 7.2 million people in 884,300 construction companies (U.S. Bureau of Labor Statistics 2010). Considering these impressive numbers, it behooves this industry to look for innovative ways to reduce inefficiency and waste created by conflicts and disputes which is reported to cost over $11 billion a year (Michel 1998). Weeks (1992) noted that if conflict resolution is to be effective, all the parties need to believe they received something of value from the process (p. 26). Unresolved conflict takes time and energy away from other business pursuits and often results in a conflict spiral wherein the disputants continually engage in increasingly contentious, heavier tactics (Pruit and Kim 2004). The Dispute review board (DRB) is an alternative dispute resolution methodology, but is it right for your project? Does a DRB help to reduce time and money on projects? What are its advantages and disadvantages?

What are its costs and benefits? Does a DRB add value to the project? These are important questions particularly in these difficult economic times.

History of the DRB

In 1972, the U.S. National Committee on Tunneling Technology Standing Subcommittee No. 4 conducted a study and made recommendations for improving U.S. tunneling contracting methods. Aside from certain recommendations, this report also described the harmful effects of delays, claims, disputes, and litigation on the construction process (National Academy of Sciences 1974). In 1978, in a follow up report entitled Better Management of Major Underground Construction Projects, the National Academy of Sciences detailed 34 separate recommendations to enhance the construction of underground projects. Chief among those recommendations was an innovative methodology for resolving disputes contemporaneously with their occurrence and the implementation of a “professional review board to assist in the settlement of construction claims and disputes” (p. 76). The recommendations detailed an independent board consisting of three to five members “professional, qualified, well-respected experts in their particular discipline who possess demonstrated characteristics of integrity and justice” (p. 76). This report also suggested that the review board have the power to make binding decisions on liability but not costs, if so agreed by the contractor (National Academy of Sciences 1978, p. 76).

The first DRB was the second bore of the Eisenhower Tunnel at Loveland Pass, Colorado (Harmon 2009). The project was started in May 1975 and opened to traffic on December 21, 1979. It was valued at approximately $106 million (Harmon 2009). In the contract documents for the second bore, the Colorado Depart-
ment of Highways required a review board to make nonbinding recommendations concerning disputes that arose during the course of the project. This development was a result of the financial disaster encountered on the first bore which commenced in 1968 (contract award November 1967, first bore in 1968) with a contract value set at approximately $50 million and an anticipated completion in 1971 (Harmon 2009). However, due to project delays and conflicts, it was 2 years late, opened to traffic on March 8, 1973 at a cost of $108 million (Harmon 2009; Mathews 1997). The project owner, the Colorado Department of Highways, determined that differing site condition disputes were likely because of the unique and complex geological aspects of the project. The Colorado Department of Highways aimed to avoid the problems encountered on the first bore (Bramble and Cipollini 1995; Zuckerman 1999). Although the contract for the second bore did not require organization of the DRB until it was needed, the parties agreed to organize the board at the beginning of the project. The project had four disputes heard by the DRB and all were resolved prior to the contract closeout and without litigation (Bramble and Cipollini 1995; Mathews 1997). Because of the success with the second bore project, the Colorado Department of Highways used DRBs on the electrical and finish work on the tunnel as well as on two later tunnel contracts and two large bridge projects.

As the first-ever DRB, the Eisenhower Tunnel DRB had to determine its role in the project because the contract documents did not delineate it. This difficulty has been eliminated in many current contract documents (e.g., University of Washington, Florida DOT, Boston Central Artery/Tunnels project, California DOT, New York City Metropolitan Transportation Authority, etc.), which specify the DRB's role by defining the processes needed for the selection of members, the role of the DRB, the processes the DRB may use, and payment for services.

Since its inception in 1975, DRBs have been used on over 2,150 projects including tunnels, highways, bridges, airports, buildings, schools, hospitals, baseball stadiums, subways, and others both in the United States and abroad (Dispute Resolution Board Foundation 2010) but the question of whether it is the right alternative dispute resolution (ADR) methodology for your project, whether it should be included as one of many ADR options in your contract, or whether the disadvantages outweigh the advantages needs to be carefully considered.

**DRB Process and Panel**

On projects that have DRBs, the contract often contains a DRB provision which outlines the roles and responsibilities of a DRB. A DRB can also be added by change order if agreed to by the contractual parties, but as of this date, the writer knows of no such project using a DRB that has been added by change order. The DRB contract section generally contains the selection and term of panel, disputes governed by the DRB, rules of operation, the dispute review process, etc. It will also include third party agreements the panel executes as well as any requirement for consolidation or bifurcation of disputes.

**DRB Process**

The DRB is set up at the start of the project and is given a set of contract documents. They visit the job periodically as detailed in the specifications or as agreed to by the contractual parties. These jobsite visits occur whether or not any unresolved disputes are present. As a result of the regular site visits, panelists become familiar with the parties and project. In between site visits, the panel receives updates via meeting minutes, RFI logs, change order logs, project schedules, and/or selected correspondence. The information provided to the panel is generally discussed during the first meeting and agreed to by both the panel and contractual parties.

There are, of course, variations to the standard DRB process, such as if it is comprised of (1) just one person; (2) or all attorneys; (3) members not chosen jointly by the contractor and owner; (4) members who are biased toward the party that appointed them; (5) or if the board is empanelled only if a dispute is unresolved; (6) or serve as arbitration panels issuing final and binding decisions as to disputes under a certain dollar amount, and issuing only recommendations as to disputes exceeding that dollar amount; (7) is set up by region rather than by project; and (8) is set up after construction is substantially completed (Rubin 2006). These variations may have their uses; however, this discussion is beyond the scope of this paper.

A great advantage of a standard DRB is the way the process is framed, so if an unresolved issue is brought before the DRB, the contractual parties do not need to educate the DRB on the workings of the project, the conditions of the work, or virtually any other project or industry specific information other than the conditions and events around which the conflict revolves. This saves enormous amounts of time and money when compared to arbitration, litigation, or even mediation where third party fact finders need to be educated on almost every aspect of the contract, project, and dynamics of the parties' relationship. So if a dispute does occur, the cost to resolve it may be minimal as compared with other methodologies. Nevertheless, rarely is the DRB the only mechanism for resolving a dispute. Most contracts have a stepped dispute resolution process where the dispute is first attempted to be resolved by field staff, then upper management, then a possible additional step for non-project-involved executives to get together to resolve the dispute. Finally, it may be brought before the DRB. The advantage to a stepped dispute resolution process is that the dispute can be resolved at the lowest level: in the field. However, if the dispute travels along this continuum, then there is a chance that the parties' positions can become hardened especially when there is an extended amount of time between when the dispute is first discussed on the field level to when it finally gets to the DRB. In some contracts, this duration can be between 10–12 months, as it was in the Central Artery/Tunnel project (Harmon 2009).

Disputes that arise in tort for injunctive relief—relating to terminations by the owner, a determination of insurance coverage, and labor agreements or safety issues—should not be heard by DRB since they involve legal rather than technical issues. The advantage in specifically outlining the authority of the panel and the disputes it is permitted to hear is that the interpretation of sophisticated legal issues are best left to experienced construction attorneys. Even if an experienced construction attorney is a member of the panel, the restrictions on what should and should not be brought to the DRB should be detailed. Because not all DRB contract provisions contain restrictions on what can and cannot be brought to the board, the DRB itself determines what it will hear. Moreover, DRBs can overstep their authority and decide it will hear issues as noted above if its responsibilities are not clearly defined. Clearly defining the authority of the DRB in the contract may assuage but not necessarily eliminate this problem. If the DRB oversteps its authority and that action is not contemporaneously objected to by either owner or contractor, then this stretc-
Panel Selection, Authority, and Responsibilities

As with any ADR mechanism, the DRB depends on the quality and qualifications of the neutrals involved; therefore, it is vital that both parties take the choosing of the panel very seriously and take whatever steps are necessary to assure their confidence in the panel’s experience, expertise, and standing in the industry. The advantage of jointly choosing/agreeing to panel member is that the joint participation in its formation allows the party to bestow the panel an implied authority. They are experienced, you have agreed to their selection, and you professionally respect their opinions, so the implied authority of the panel can be a factor in reducing disputes (Cox 2000).

Individuals who are not familiar with the DRB process though they may have experience pertinent to the project may be biased toward the party that put their name forward as a panelist. These individuals become advocates for their appointing party’s position. The bias of a DRB member, whether real or perceived, undermines the confidence placed in the DRB (McSpeddon 1995). As noted in a 2003 decision, stated, in part:

“Although contractual provisions governing the DRB process suggest that all DRB members must be neutral, pragmatically it is recognized that the two party-appointed members as a matter of appearance are considered biased in favor the party who appointed them. The selection process, like tripartite arbitration, necessarily implies by appearance that two of the members may function as advocates. Therefore, the established selection process as to the third member is designed to bring objective balance to the panel.” (Sehulster Tunnels/Pre-Con versus Taylor Brothers/Obayashi 2003).

In a perfect world, if one party loses confidence in a panelist, that panelist should resign, though seldom does this happen. Some panelists who are appointed believe that they are hired for the duration of the project, no matter what. As noted in one court decision, a DRB is not vested with tenure over the life of the project (Los Angeles County Metropolitan Transportation Authority versus Shea-Kiewit-Kenny 1997). It stands to reason that if either party loses confidence in the DRB as a whole or any of its individual members, it is likely that party will not give the DRB recommendation the consideration it may deserve (Los Angeles County Metropolitan Authority versus Shea-Kiewit-Kenny 1997). In such a case, the purpose of the DRB will be compromised and its effectiveness negated (Technical Committee on Contracting Practices of the Underground Technology Council 1991). Frankly, who would accept the recommendation of an individual that they suspect of bias or do not professionally and/or personally respect? It is a waste of both time and money to have this panelist remain.

Distrust is costly and inefficient, unpleasant, humiliating, and just plain lousy. One way to circumvent this issue is to place in the contract a provision to allow for the removal of a panelist with or without cause. However, if a panelist is removed, the replacement panelist will have to be brought fully up to speed on the project, lacking the project’s living history. The remaining panelists will have this historical knowledge so the effects may be minor.

Because of the experience requirement of the panels, it is likely that the proposed panel members are both professionally and personally known by some members of the contractual parties. This is not unusual inasmuch as the construction industry is a small society where the theory of six degrees of separation might actually be smaller then the six steps (six degrees of separation refers to the idea that everyone is at most six steps away from any other person on Earth, so that a chain of, “a friend of a

Composition and Selection of the DRB Panel

The mechanism for setting up a DRB is contained in the contract between the owner and contractor. It details the requirements of the panel and spells out the methodology for choosing a panel. In most cases, the DRB comprises a panel of three experienced construction or engineering individuals jointly selected by the owner and the contractor. One panel member is proposed by the owner and the second by the contractor, with each party approving the other party’s candidate. The third panelist may be selected by the first two members, but may also be nominated by mutual agreement of the contractual parties and the chosen DRB panelists. The third member generally acts as chairperson for all DRB activities. This member’s qualifications may supplement those of the first two DRB members. Moreover, it is suggested that panel members should be “team players,” open minded and “totally committed to the successful operation of the DRB” (Shadbolt 1999 p. 108) with no employment or consulting ties with the contractual parties. The result of the selection process is expected to be a neutral panel of respected construction industry personnel that is acceptable to both the contractor and owner whose experience and insight is sought after by the parties when an unresolved disagreement arises.
friend" statements can be made to connect any two people in six steps or fewer). While the existence of a secondary relationship per se does not necessarily mean that the process will be adversely affected, it is problematic and an appearance of bias could undermine the process. To mitigate the problems that could develop as a result of this perception of bias, each party may nominate several candidates from which the other party can choose. The two appointed members could nominate several candidates for the role of chairperson, from which both the contractor and the owner can choose. In addition, the DRB contract provisions note that expert communication concerning a project, submitted claim or dispute is prohibited. To do so would undermine the appearance of neutrality, a cornerstone of the DRB process. Any communication transmitted to the DRB, generally the chairman, is to simultaneously be transmitted in the same manner to the opposing party.

Individuals who have sat on DRBs, as well as other members in the industry have a prejudice against having attorneys sit as DRB members or be involved in the process at all (Appel 2001). The often mentioned fear at the DRBF annual meeting is that attorneys will bring more formality to the process and legalize it having it then suffer the same fate as arbitration. The "no attorney" rule can also be an advantage since, the parties, not legal counsel, control the process. But having no attorney rule can also be a disadvantage since many construction disputes concern contract interpretations. A DRB membership comprised of construction industry experts, not judges, not lawyers, and not professional arbitrators will not have a deep learning of construction law. This may play an important role in the recommendation. If the recommendation goes against state or federal precedent, it may not be accepted by both parties. That being said, business decisions, in general, seldom involve legal precedent. The basic question is what type of panel makes up is important to you and the project? Will an attorney on the panel be helpful, remembering that the majority of construction attorneys have a deep background in various types of construction and some have been or are engineers and/or contractors. So while they hold the title of "esquire" that may not be a limitation but a great advantage.

The DRB has no other role under the contract other than to make recommendations concerning the disposition of a dispute, they are not consultants to the project, nor should they act in that manner. The disadvantage in having a panel of experts is the tendency of some to offer or request opinions and advice as to how the project is run and/or being constructed. Information or advice on construction management or means and method should not be petitioned nor should they be offered. The great advantage is that a panel of industry experts will not have to be educated on what a geotechnical report is or an understanding of it, how elements shown on the contract drawings will not work in the field, or any other type of construction or scheduling issue.

Another issue, which is not discussed in literature, is the age and health of the proposed panelists. This is a very real issue. The duration of the project as well as the panelists' age and health should be considered together. The site visit is more than a visit to a site office it is also a "field trip" to view the actual progress of construction. In addition, you should speak with those in the industry who may have recently had the proposed panelists as arbitrators, mediators, or as DRB members.

Unresolved Dispute—Hearing

The presentations are encouraged to be made as soon as it is apparent that the parties have reached a stalemate in their negotiations but before the parties' position become inextricably fixed. The advantage of this procedure is that it allows the parties to have their dispute determined rapidly (if somewhat roughly), without the dispute escalating and becoming a disruptive influence on the progress of the project. Therefore, when the parties agree that no further productive discussions can take place between themselves, they bring the dispute before the DRB and request the panel's recommendations as to how the particular dispute should be resolved. At the hearing itself, there is a strong bias against having counsel present or even present. This is a debate that has been discussed for years at the annual meeting of the Dispute Resolution Board Foundation with many members vehemently opposed to counsel being involved in the DRB process. Also, the contract under which the DRB is appointed may specify that the board's decision is to be either a nonbinding recommendation or interim binding for the duration of the project.

Prior to the actual hearing, the parties develop a written document that speaks to the issue(s) at hand and details each party's position and rebuttal. Depending on the DRB procedures in the contract, both sides may or may not get an advanced copy of the documents, position papers, damage calculations, etc., that is being brought to the DRB, or they may receive this information a few days before the hearing, making analysis of the documents and preparation of a rebuttal case difficult. One party can be denied right to a fair hearing due to inadequate notice of revisions to a claim. Also, the panel is very liberal in admission of evidence. This can be both an advantage as well as a disadvantage depending on where you are sitting.

At the hearing, oral testimony is made by the actual project participants with firsthand knowledge of the unresolved issue. It typically entails significantly less preparation than even mediation and foregoes discovery and large document exchange. Occasionally, an expert is brought in if the contractual parties do not have the expertise to discuss the issue to the satisfaction of the panel. Moreover, all this goes on while the project is still moving forward, so project staff must work two jobs, so to speak: managing the project and advancing the work while also preparing for a presentation at the hearing.

The benefit to the parties in having the field personnel present their position is the reduced costs as opposed to consultants or attorneys presenting their position. Generally, the field personnel have established credibility because they have first hand knowledge of the issue. Nevertheless, having field staff present their "case" is sometimes problematic since many are not used to preparing and/or presenting their case in a manner which is clear, concise, organized, and pithy (though some would argue attorneys are not pithy either!)

Additionally, parties may scale down their presentation to address only essential elements of their issues and proof of damages but in doing so may overlook some essential information such as the type of dispute condition; e.g., technical, contract interpretation, delay/disruption, etc., and what outcome they seek. Also, they may omit information such as what specifications, drawings, standards, shop drawings, and other technical documents to support their position.

Further disadvantages to having site personnel communicate their position concerning the dispute concern the act of presenting itself. There are numerous studies which show that the greatest fear is not of death but rather of public speaking. It is extremely painful, then, watching someone who is paralyzed with fear of public speaking struggle to get a point across. The DRB process is formulated so that the parties are familiar with the panel via the
regularly scheduled meetings, but the fear of "saying something wrong" can still be present. Additionally, no matter how informal the process is meant to be, as a contractor, you are bringing a matter before a panel that has the "power" to determine whether or not your position has merit. Money and sometimes also time extensions are on the line so an inarticulate presentation can be problematic.

The panel may or may not ask questions or challenge the statements by the presenter and/or witnesses—there is no cross examination allowed. To some, this can be a disadvantage since purposes of cross-examination are to elicit favorable facts from the witness, or to impeach the credibility of the testifying witness to lessen the weight of unfavorable testimony. Cross examination frequently produces critical evidence, especially if a witness contradicts previous testimony. So without the right to cross examine a witness, the ability to impeach a witness or to less unfavorable testimony is not available. However, others consider the fact that witnesses cannot be cross examined an advantage since being a witness will be less stressful, there is generally less preparation required of the witness. Also, the panel is seeking the "truth" and as Mark Twain so aptly noted, "if you tell the truth, you don't have to remember anything."

There is also no discovery, which a British colleague described as the favorite indoor sport of American lawyers! Having no discovery can be both an advantage as well as a disadvantage. With the "no discovery" rule, the parties have no right to seek production of the opposing party's documents or to depose key employees before the hearing. The disadvantage is that even though discovery is time consuming and expensive, it exposes the strengths and weaknesses of each side's case. It also allows each party to further analyze the claims for damages. The advantage of having no discovery is that time and expenses are eliminated. There is no one rummaging around in your files trying to build their case. Further in construction, both sides generally have 90–95% of the relevant documents such as correspondence, e-mails, transmittals, contracts, and the like which are needed to support their position. Therefore, conducting discovery on a current project may not yield any benefits.

**Recommendation**

After a presentation is made by both parties and all documentation has been submitted as well as all queries answered, then the panel closes the hearing, discusses the issue(s) in a closed session, and within a certain number of days defined by the specification or by agreement of the parties, the DRB issues a nonbinding written recommendation as to the panel's opinion on the disposition of the conflict. This recommendation is either accepted or rejected, either resolving the dispute or allowing it to go forward to litigation or arbitration. Generally, a hearing and recommendation by the DRB is a condition precedent to either litigation or arbitration.

There are some contracts which allow DRB recommendation to be temporarily binding pending a final determination of the dispute by a court or arbitration panel per the FIDIC, World Bank, and ICC Dispute Board Rules. However, in a standard DRB, the recommendation is nonbinding. There are advantages and disadvantages to whichever position is decided upon. Nonbinding recommendations can seem less intimidating to the parties and can result in lower costs in relation to the DRB hearing, while interim binding decisions be ominous, but can provide greater certainty for both parties and induce early settlement. Also, the recommen-

tation could be admissible or inadmissible in a trial or arbitration. The admissibility or nonadmissibility is defined in the contract.

The recommendation may give the contractual parties a view on how the dispute may be perceived by other third party fact finders such as an arbitration panel, judge, or jury (Harmon 2004). Nevertheless, at times the contract is considered one sided in that it strongly favors one of the contracting party, the owner, over the other, the contractor. There is a fear that the recommendation of the DRB will disregard the contract, with some concluding that a contracting party entering into a contract which is actually (extremely) unbalanced deserves equal protection. A DRB may interpret the contract not on what was written but what was intended to be written or it may seek to foist upon the parties a contract that they never made. Subjective intent of the parties is irrelevant if the intent can be determined from what actual words were used in the contract. There is the concept of fairness and equity which may be contrary to the contract requirements, thus the recommendation may be biased against the drafter of the contract in an effort to bring fairness and equity to the table. This goes right past bad and zooms solidly into offensive. Classical contract doctrine maintains that decision makers look only to the “four corners of the document” in identifying the content of the contractual relationship between the parties. Though the DRB is charged with this responsibility, it may not fulfill this responsibility.

Another issue can be the format of the recommendation itself; it could appear to be wrong, unsupported, poorly reasoned, lacking clarity or sufficient detail for application, etc. It also can be written with a manifest disregard for the law if counsel is neither present at the hearings nor sitting as a DRB member or unfamiliar with the law in the particular venue of the project. It is unlikely that the "losing" party will accept this recommendation if this is present. While these may not be an issue for a nonbinding recommendation, it could be with an interim binding recommendation or if the recommendation is admissible in another forum it may carry more weight then the losing party desires and somewhat "threatening" when going to arbitration or litigation; after all, here are three experienced industry professionals, chosen jointly, who made a recommendation based on their knowledge of the industry and the project itself. Nevertheless, DRB decision does not have the status of a court judgment and because the rules of evidence are not applied at the hearing, cross examination is not allowed, and discovery is not permitted, these concerns may be mitigated when a binding decision maker considers these arguments.

**Costs**

**Contract Drafting Costs**

One obstacle to the DRB process is that transactional lawyers may have little experience either with the nuts and bolts of construction conflict or with binding dispute resolution mechanisms so they may not appreciate the advantages a DRB can bring to a project. Furthermore, a DRB is not inexpensive. The first cost is the initial set up costs. Counsel will have to incorporate the DRB into the contract, draft the third party agreement, and determine what procedures are warranted for choosing and removing DRB panelists. Although there are published rules, agreements, etc., some will desire to tailor those rules and procedures to the specific project and that requires counsel's time and—if using outside
counsel—fees. However, once the DRB provisions have been drafted to an owner or agency’s satisfaction, these costs need not be repeated.

**Initial DRB Costs**

A panel comprised of three experienced industry individuals does not come cheap. Hourly rates for one panelist range from $165.00 to $350.00. After being empanelled, they receive a full set of contract documents (agreement, drawings, specifications, special conditions, etc.) which they review prior to the first meeting which incurs fees. There are both direct and indirect costs of gathering these documents, having copies made and shipping. While these are not significant, they will be incurred.

**Monthly DRB Costs**

The DRB also receive monthly updates, meeting minutes, change order logs, RFI logs, schedules, and the like. Reviewing these documents also incurs costs. There are also the indirect costs of gathering these documents and forwarding them to the DRB. To keep these costs contained, some owners put a maximum monthly time limit on the panels' time charges for reviewing documents outside of a hearing.

**Site Visit Costs**

The periodic site visits also cause dollars to be expended, first are the travel and hourly fees of the panel themselves. Some contracting parties anticipate a partial four hour day, so the minimum cost for a panel to be present at a non-hearing can range from $2,000.00 to $9,000.00, plus expenses. The University of Washington anticipates the cost of a DRB panel’s monthly visits for a 2-year project to be approximately $47,520.00 plus travel time and expenses (University of Washington 2010). The costs are shared equally between parties to avoid any perception of allegiance to either party. The owner and contractor sometimes directly send the parties their share of the panel’s costs, or in the case of Florida DOT, the cost of the panel is physically paid by the contractor but FDOT issues a change order to the contractor for the entire amount. Additionally, there are indirect costs of project personnel preparing to meet with the DRB, gathering any pertinent documents the panel desires to review outside of the document sent in the nonsite visit months.

**Hearing Costs**

If a hearing is held, the cost depends on the time required for review of the parties’ prehearing documents, the hearing itself, and the time required for the DRB to deliberate and prepare the written recommendations(s) with supporting rationale. There are also their indirect costs of the project staff to gather documents, draft narratives, provide supporting documentation, review the opposing party’s submissions, and prepare the presentation.

**Summary**

For smaller projects, the DRB can be cost prohibitive. Moreover, if disputes do not occur on the project and the DRB was not called upon to render any recommendations due to unresolved disputes, these costs are a job expense that reduce the contractor’s profit and increase the owner’s costs without benefiting the project.

However, if the contracting parties believe that no dispute will “ever” occur on the project, the fees paid to the panel can appear as an added cost to the project from both the contractor’s and owner’s perspectives. This thinking is akin with a newly married couple never believing that they will divorce! Conflicts on projects do happen, they sometimes happen frequently, and if they cannot be resolved contemporaneously, they may adversely impact the progress of the project as well as the individuals involved in the project. Resolving a dispute via the DRB process may save the contractual parties both time and money.

**Conclusions**

Since there are very few construction companies and virtually no owners who have not tasted the bitterness of litigation, exploring new options for ADR methodologies is a laudable task. Having a DRB has many advantages but also has disadvantages; many of the advantages can also be seen as disadvantages, the double edged sword. Is it any wonder so many contracts and owners feel stuck between a rock and a hard place when attempting to determine what dispute resolution mechanism is appropriate for them, trying to figure out whether to give that same old thing another shot or to throw in all their chips and start from scratch? Some object to the use of a DRB because it is not “the ways things were done” but one can find errors with old fashioned ways of doing things. There is never an easy answer to all of this. Somehow, juggling flaming swords while maintaining the proper posture needed to keep a hook stop our heads, we must follow a complex blend of opposing bits of advice. Keep it together, while ripping it apart. Follow the rules and use the standard ADR methodologies, yet at the same time, rewrite the rules. Maintain consistency, without forgetting to try something new which might be better. So, before establishing a DRB process, owners should consider whether or not the advantages of the DRB outweigh disadvantages. Assess specific needs and goals to decide whether a DRB is the right choice for your project. The DRB process is flexible, informal, and private while allowing the disputants to control their destiny. It holds out a realistic promise of a reduction in the dispute cycle with little risk and relatively minor costs and time.

But some may argue that having a DRB provision in the contract encourages contractor claims because of the benefits they gain, including confidentiality, reduced costs, and quicker resolution, contractors may be more likely to assert claims against the owner under a DRB scheme than if they were forced to file a lawsuit or go to arbitration. It could be argued that contractors may be encouraged to challenge even the most minor owner decisions or issues.

Thirty years ago, I heard this same argument for including change order provisions in a contract: that it would encourage change orders. I do not believe that any experienced construction industry person holds this opinion today. The other side of the coin to the “it will encourage claims” argument is that some believe that the mere presence of a DRB may be a deterrent to marginal, frivolous, or specious claims, and to protracted, intentional delays because of the potential for the claims and delays to be both unsuccessful and embarrassing (Barnett 1997; Silberman and Battelle 1997).

While DRBs can provide numerous benefits to both contracts and owners, it is not without cost. There is the cost initially to
include the DRB process in the contract documents, empanelling the DRB, regular site visits, monthly document reviews, and finally, the hearing and recommendation themselves. Moreover, if there are no unresolved disputes, the fees paid to the DRB can be seen as not adding any value to the project.

Nevertheless, the primary advantage of a DRB is not just speed, or economy, or neutral expertise, but rather the contractual party's ability to design the process to suit their needs. While a DRB cannot guarantee a resolution of disputes, it could prevent a drain on internal resources that might have been better focused on managing the project or gaining new business. Despite the benefits, a DRB is not a panacea for all of the ills associated with other ADR methodologies or binding dispute resolution mechanisms. If not implemented with careful consideration and planning, the process may not live up to expectations. Both the advantages and disadvantages should be considered before adopting a DRB program.

List of Cases


Endnotes

1Alternative Dispute Resolution (ADR) is defined as methods to resolve a dispute other than litigation such as negotiation, mediation, arbitration, mini trials, etc.

2The hourly rate for DRB Members on University of Washington projects is currently $165/hour (University of Washington 2010).

3The San Antonio Hospital DRB is going to pay up to $350/hour for its members, plus reasonable travel expenses.

References


