



# Forum

SPECIAL EDITION REPRINT

FEBRUARY 2009

## The Role of Dispute Review Boards in Dispute Prevention

By Kurt Dettman and Eric Kerness

### Introduction

The traditional role of the Dispute Review Board (DRB) is to conduct hearings and issue findings and recommendations on the resolution of disputes. The article explores an expanded role for the DRB in *preventing* disputes, as well as assisting parties in *resolving* disputes.

### Background

Most project specifications require some sort of notice of claim and negotiation process to address disputes between project participants. The DRB typically is established to hear and make recommendations on issues that the parties have been unable to resolve through a negotiation process. Likewise, most DRB Three-Party Agreements and DRB operating procedures focus on the manner in which disputes will be brought to the DRB and the process by which they will be heard and non-binding recommendations issued. Thus, the DRB normally acts as a “back-stop” to resolve disputes after the parties have gone through a contract-required process.

This traditional DRB process has been quite successful at preventing parties from resorting to arbitration and litigation<sup>1</sup>. However, although less antagonistic and costly than arbitration or litigation, even the formal DRB process can cost the parties effort and resources that could be better spent advancing the project than battling about time and money.

### An Expanded Role for the DRB

Under the traditional DRB process, the DRB regularly visits the project, receives project updates, and stays abreast of project developments. In doing so, the DRB has the opportunity to implement “proactive monitoring” of the project. This expanded role can be used in the

following manner to assist in preventing disputes from morphing into formal claims going to the DRB.

First, in setting the regular DRB meeting agenda, the DRB can require the parties to walk through the salient project vital signs, such as actual work vs. planned work, technical/engineering challenges, schedule updates (or lack thereof), and other issues that may impede and impact the progress of the project. By specifically addressing such key project issues, the DRB will ensure the parties are openly and forthrightly discussing issues that may actually be a simmering dispute or may be headed in that direction if not resolved.

Second, the DRB can encourage senior people from the owner and contractor organizations to attend DRB meetings. Thus, the front line project staffs of both the owner and the contractor are required, in effect, to give a project status report to their senior managements. This often has the ameliorative effect that the senior managers hear about and can immediately act on information about the status of the project that they might not otherwise be privy to under standard reporting relationships. In addition, by directly listening to their respective staff reports they are getting an “unvarnished” version of what is happening (or not) on the project. In a similar vein, the DRB can encourage the parties to have in attendance other project players, such as the design engineer, important supervisors, and outside funding or monitoring agencies. The more involvement by all project stakeholders, the more likely that key issues will be brought out and addressed in a timely manner.

Third, by asking pointed questions the DRB can elicit from the project staffs what issues concern them and what they are doing to resolve them. Likewise, by

<sup>1</sup>The DRBF has found that 98% of disputes that go to a DRB are resolved without resort to arbitration or court processes.

methodically going through potential change logs, request information logs, submittal logs, and schedule updates the DRB often can “smoke out” issues that may lead to potential disputes if not promptly addressed by the parties. In doing so, the DRB can encourage the parties to develop an action plan (and schedule) to address open issues. The DRB then can ask that it be kept up to date on the action plan when receiving regular project updates.

**The Use of Advisory Opinions As A Dispute Avoidance Technique**

Many projects are now implementing the use of the DRB advisory opinion process. This process involves the parties bringing an issue to the DRB before it becomes a formal dispute. Typically, the issue is addressed at a regular site meeting with the parties presenting the issue and their respective positions via one or two page papers with key documentary back-up. The DRB listens to the parties, asks questions, and confers privately on the issue. The DRB then returns to give the parties an oral report on how the DRB views the merits of the issue based on the parties’ presentations. There is no record kept and the parties do not have to accept or reject the DRB’s feedback—instead, the parties can use it to continue their negotiations. If the dispute is not resolved, the parties can still go through the formal DRB process and the dispute is heard afresh by the DRB.

The advantage of the advisory opinion process is that it is very informal, does not cost the parties much in time or effort, and can be done in “real time” at regular quarterly DRB meetings. The important thing to note here is that the advisory opinion process can take place during the parties’ negotiation process, before they have adopted “official” positions. Thus, the advisory opinion process also promotes communication and cooperation on the project and is consistent with partnering principles that most projects adopt. Finally, if the parties use the DRB’s advisory opinion feedback to resolve an issue during the negotiation process, the parties will avoid the formality and cost of a full-blown DRB hearing.

**A Cautionary Note**

Because the DRB is established at the beginning of the project and is in place throughout the project,

it can observe and interact with the project and the project participants as the project unfolds. This is in contrast with other dispute resolution techniques such as mediation and arbitration where the mediator or arbitrator is brought after the fact and has to learn in a truncated manner what happened on the project, sometimes years later. Thus, the DRB has the unique opportunity to learn about and focus on issues as they arise in “real time,” and that is what makes the DRB process especially effective in being able to resolve disputes.

Balanced against these considerations, however, is the fact that the DRB is not intended to act as, nor is it set up to be, a shadow management organization. The DRB is not requested to--nor should it--offer day to day management advice to the project participants. The DRB must maintain its objectivity in order to fulfill its role of providing the parties with expert, neutral recommendations on disputes that are presented to it though the contact required process. The roles of management of the project cannot be mixed with the role of neutral DRB member. So, although the DRB can be proactive in questioning parties about addressing open issues, it must in the final analysis let the parties decide how to address those open issues. All the DRB can do is assist the parties in recognizing and talking about key project issues with the objective of the parties being able to resolve them early.

**Summary**

In summary, DRBs can be used more expansively to help the project participants avoid, as well as resolve, disputes. This can be done through the use of “proactive monitoring” and advisory opinions. The DRB in doing so, however, must always keep intact its role as neutral board members.□

**The Authors:** Kurt Dettman is DRBF New England Regional Representative and the principal of Constructive Dispute Resolutions, a consulting firm offering services in all aspects of construction industry ADR. He can be reached at [kdettman@c-adrc.com](mailto:kdettman@c-adrc.com). DRBF Regional Representative at Large **Eric Kerness** is the principal of Kerness Consulting, a consulting firm that provides counsel and dispute resolution services to owners. He can be reached at [Eric@kerness.com](mailto:Eric@kerness.com).

**The Forum is published quarterly by the Dispute Resolution Board Foundation, a not-for-profit, worldwide volunteer organization of over 600 construction industry professionals interested in promoting the avoidance and resolution of construction disputes through a Dispute Board process. For more information, visit [www.drb.org](http://www.drb.org).**