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Mediators as Settlement Process Chaperones: A New Approach To Resolving Complex, Multi-Party Disputes

By Kurt L. Dettman and Martin J. Harty [1]

Introduction

The $14.7 Billion Central Artery/Tunnel Project in Boston--the "Big Dig"-- was a laboratory for experimenting with new approaches to Alternative Dispute Resolution (ADR). The Big Dig has been called one of the largest, most technically difficult and challenging infrastructure projects ever undertaken in the United States. The engineering and construction challenges also produced equally large challenges for handling the disputes and claims that arose from the dozens of prime contracts and hundreds of subcontracts that were used over the 15 years of continuous heavy construction.

In addition to the use of Partnering and Dispute Review Boards,[2] the Big Dig also implemented an innovative approach to mediation, using what the authors refer to as "chaperoned" settlement negotiations. "Chaperoned" settlement negotiations involved the use of two to three mediators, working as a team, to mediate starting at the beginning of the negotiation process and concluding with a global resolution of all claims. This article will explore the elements of successful "chaperoned" settlement negotiations, the principles of which can be used on any complex, large dollar, multi-party dispute.

Background

The typical Big Dig contract was in excess of $300 Million in value and several years in duration. Many of the major contract packages produced claims that involved tens of millions of dollars, with hundreds of individual issues ranging from contract interpretation questions, to delay, disruption, and acceleration claims, to subcontractor pass-through claims. Often the contractor sought recovery on a modified total cost basis because the contractors claimed that the projects were so complicated that discrete delay events and costs could not be readily identified. The complex nature of the disputes also required the parties to turn to various experts and consultants, particularly accounting, productivity and scheduling experts. Finally, there was the "political" dimension to the Big Dig--the substantial cost growth on the Project led to increased and intense public and regulatory scrutiny of all actions taken by the Project.

The Negotiation/Mediation Framework

Given the sheer size and complexity of these disputes, Project management concluded the traditional ADR approach of bringing in a mediator at the end of a lengthy negotiation process that had reached an impasse for a one or two day "grand finale" settlement negotiation would simply not work. Instead, Project[3] management decided to set up a global negotiation framework that included the following elements:

- An agreed upon schedule and format for the submission, analysis and negotiation of claims
- Designated and dedicated negotiation teams comprised of subject matter analysts and experts
- A mediation panel of typically three members that was involved in the process from beginning to end
- A "steering committee" of senior executives to monitor negotiation progress and address "commercial" positions and outcomes

As is typical on a construction project, the framework was embodied in a negotiated contract modification[4] that included: the scope of the negotiations, the types of claim submissions,

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[2] The authors are writing a comprehensive article about the Big Dig ADR program which is expected to be published in Fall 2008.

[3] The awarding authority for the Big Dig contracts was the Commonwealth of Massachusetts acting through the Massachusetts Highway Department. The Project was managed by the Massachusetts Turnpike Authority.

[4] The Project contracts called for a step elevation process of: negotiation, an Engineer's Final Determination, a non-binding Dispute Review Board process, and ultimately a court action if the claim was not resolved after the DRB findings and recommendations. The contract modifications essentially "froze" the contractual ADR process, which would come back into effect if the mediation failed.

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the expected level of detail and back up documentation for submissions, the sharing of information, the use of experts, and target dates for submission, analysis and response to claims. The parties also executed a companion mediation agreement that established the mediation process and ground rules for a non-binding, evaluative mediation process involving mediation panels that would be activated at the beginning of the negotiation process covered by the contract modification.

The Negotiation Teams

One of the key issues for an effective negotiation process was to ensure that both parties fielded negotiation teams that had the right mix of skill sets and adequate numbers to support an intensive negotiation process that typically lasted from 12 to 18 months. The concern on the part of the owner was that the contractor would not dedicate adequate resources to prepare detailed claim submissions and research and answer factual questions. It was essential that both parties have sufficient information and knowledge to effectively negotiate on the merits of claims. Therefore, the owner insisted on establishing teams with "one to one" ratios (for example, scheduler to scheduler, estimator to estimator, auditor to auditor, etc.). Likewise, each team had to designate a team leader to manage the day to day negotiations and to be the point of contact for the two teams to report back to through their management structures.

The Use of Co-Mediators

In late 2000, Project officials and one of the Project's management consultants approached the Armed Services Board of Contract Appeals (ASBCA) to mediate certain complex cost issues arising out of Defense Contract Audit Agency audits of the parties' cost reimbursement contract. The parties asked the ASBCA to provide mediation services because of its expertise in resolving disputes concerning government cost accounting issues.[5]

The ASBCA's initial recommendation to use co-mediators was prompted by the owner's desire to use evaluative mediation and the ASBCA Chairman's view that the intense public interest surrounding the Big Dig warranted the use of more than a single mediator. Ultimately, on almost all of the mediations the parties agreed to a panel of three mediators, comprised of two judges from the ASBCA supplemented by a "private sector" mediator selected by the contractor.

The use of co-mediators was not without risk. Differences in mediator styles had to be taken into account. However, if the mediators could work effectively together, the result would be a powerful tool for assessing the strength and weaknesses of a party's position and ultimately validating the overall reasonableness of a settlement. For example, when each mediator independently arrived at the same assessment of the relative strengths and weaknesses of a party's position, the communication of the combined assessment tends to validate in unmistakable terms the risks a party faces on the issue. In most of the co-mediations there was general agreement among the mediators on the issues and the overall merit/damages assessment. However, if it turned out that the mediators were not unanimous on an issue, the communication of that divergence would still be valuable to the parties to make the point that reasonable, neutral parties hearing the same information could come to different conclusions, from which they could measure their risks on that particular issue.

It also was important to the success of a co-mediation that the mediators acted in concert and shared information that might come to one of them alone--or, if one acted alone, the mediator did so with the knowledge of the others. Coordination was particularly important when parties were exchanging complex settlement offers that depended on the integration of many elements to be acceptable as a global resolution.

By the terms of the mediation agreements, the mediators agreed that they would assess the reasonableness of any settlement reached based on the information presented during the mediation. If the mediators agreed that the settlement was reasonable, the mediators executed a statement stating their view that the overall settlement was reasonable. The assessment was not intended to "bless" the particular settlement amount or terms. Instead, the mediators' assessment was a representation that the particular settlement was within a "zone of reasonableness". The assessment was designed to provide assurances to all concerned that they were exercising their settlement discretion in a sensible fashion.

The Use of a Senior Management "Steering Committee"

One aspect of the Big Dig mediation processes that led to the improved level of coordination was the parties' use of a senior management "steering committee" to advance the negotiation process and interact with the mediators at a "commercial" level. The steering group was composed of a designated senior official from each side and a few key senior staff members from each side. In the case of the Project, it retained independent auditors and claim review consultants to aid it in the claim evaluation process. The consultants' senior principals participated in the Steering Committee process.

The Steering Committee served a number of functions. First, it monitored the progress of the negotiation teams by receiving periodic updates on the status of claim submissions, information exchange, negotiation progress, and the like. Thus, the Steering Committee functioned as a clearinghouse for the exchange, evaluation, and development of the position papers and responses to them. Second, while the negotiation teams concentrated on technical and analytical issues, the Steering Committee could inject commercial considerations into the process in order to keep things moving forward to develop merit based positions. Third, the Steering Committee met on a regular schedule with the aim of understanding and discussing the merits of the various claim elements and, if possible, resolving issues without mediator assistance. Finally, the Steering Committee also directed and controlled the development of the presentations made in the mediation sessions. Throughout the mediation process the mediators provide an evaluative assessment of the strength and weaknesses of each party's positions on issues brought to the mediators during ex parte sessions with each party's senior representative or its Steering Committee.

The "Chaperoned" Settlement Process

The scope of the Big Dig project, as well as the range of issues in dispute, created the need for an organized approach to the mediation process itself. The parties worked with the mediators and with each other to make the mediation process manageable. At the beginning of the mediation process "Big

[5] The ASBCA agreed to provide the services on a reimbursable basis, with the sponsorship of the Federal Highway Administration, U.S. Department of Transportation, in accordance with the Economy Act, 31 U.S.C. § 1535.

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Dig Schools" were held to provide an overview to the mediators of the parties involved, the nature and size of the claims, and the process and schedule the parties intended for the negotiations. This allowed the mediators to then help the parties fashion a mediation process that would support the goal of eventual settlement. The mediators assisted the parties both on "process" issues (for example, the content and timing of information exchanges) and on "substantive" issues (for example, what contractual issues such as notice would be addressed by the mediators).

The parties coordinated with each other to provide voluminous background materials to the mediators in a way that captured each side's position on each of the key areas of dispute. Schedules for submission of position papers, exchange of information, submission of expert reports, and briefings to the mediators were agreed upon to keep the mediation process moving forward. Importantly, rather than what in some cases is the practice to provide confidential submissions to the mediators only, both the mediators and the parties felt it was important to openly exchange all mediation submissions and attachments with one another so neither party would be "blindsided" by any issues during the mediation session.

The complexity of the issues and the amounts in controversy required multiple mediation sessions to elaborate the issues and assist the parties in working to a resolution. Mediation sessions were typically conducted in person over two- to three-day blocks of time, at which time pre-determined topics would be presented and discussed. The parties agreed to blocks of "preparation time" between each in-person session, typically allowing for two- to four-week gaps between sessions in order to accomplish further analysis of positions, further information exchanges, preparation of position papers, and consultations with each party's management as needed. At the in-person sessions, it was not unusual to have 20 or 30 participants in the mediation room, ranging from key decision makers to superintendents on the job to expert witnesses. With a group that large, part of the challenge for the mediators was to make certain everyone had their say, but to keep the process moving along at the same time.

Standard mediation practice calls for a representative with full settlement authority to be present during the proceedings. The Big Dig's mediation agreements provided that each party was required to designate a senior representative with the authority to resolve all matters at issue. However, the agreements also provided that in the case of the owner, no settlement agreement could be final and binding unless it was ratified by the Massachusetts Turnpike Authority Board of Directors and, to the extent the Project sought federal participation in any payment, by the Federal Highway Administration (FHWA). [6]

The contractor's representatives, on the other hand, might or might not have complete authority depending on the circumstances. A joint venture's representative, for example, might have to consult other venture partners if settlement authority dollar floors had to be lowered. The authors' experience was that the stakes were sufficiently high for the contractors to send senior people within the organization, which included corporate officers as well as individual stakeholders from joint venture partners. These participants either had the authority to negotiate a settlement on the spot, or had the confidence of the ultimate decision makers within their organization that if they recommended a settlement, their recommendation would be given great weight and in all likelihood be approved.

Given the time and effort put into each of these mediations, spanning many months or even years. the value of having the Steering Committees and decision makers at the table cannot be underestimated. Without this group closely participating in the process to observe the development of positions, to hear presentations, and to have frank exchanges with both the mediators and the other side, it is unlikely that many of the mediations would have succeeded. Further, from a negotiation standpoint, significant concessions on one side would only come with the knowledge that their opponent had the same knowledge base and authority to make concessions as well.

Conclusion

The experience of the Big Dig project indicates that the "chaperoned" settlement approach has promise for use in mediations of public sector disputes, particularly at the state and local level, when the disputes are complex, involve large sums of money, and are subject to significant public scrutiny. The availability of a thorough and thoughtful process for airing the issues in dispute and an expert assessment of the strengths and weaknesses of each parties' position, coupled with the mediators' evaluation of the overall reasonableness of the settlement, can provide the confidence the parties—particularly the public sector representatives—need to satisfy themselves that the business decision to settle is a sensible one in the circumstances.

[6] Representatives of the FHA were entitled to be present during the mediation process and to receive copies of the mediation submissions.

The Boston Chicken Problem

by Barry Goldman

Boston Chicken was a Wall Street darling in the '90s. On the day of its initial public offering in November of 1993 its share price went from $10 to $23. In December of 1996 it hit $41½. But in October of '98 share price fell to $.50 and the company went into Chapter 11. Why?

Evidently the revenue numbers that got investors so excited weren 't coming from selling chicken; they were coming from selling *franchises*. Even if you have a great concept and great media buzz, even with fancy financing and even fancier accounting, somewhere underneath it all somebody has to be selling some chicken or the business model just will not work.

This is also a problem for the mediation business. The concept, we all agree, is wonderful. The buzz is exciting. The field is growing enormously. But it turns out there ain't many of us selling much chicken.

This is all explained in a paper by Harvard economist Urska Velikonja called *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice* available at http://works.bepress.com/urska_velikonja/1/.

I highly recommend the full article, but I'll just quote from the abstract:

> The article presents data that the supply of willing mediators by far exceeds the demand for their services, and suggests possible economic explanations for the excess entry, including overoptimism and the lack of formal barriers to entry. Excess entry is socially suboptimal: many aspirant mediators spend money pursuing what is likely an illusory career and forgo other career options, even though they were never going to be able to make money as mediators. The article also presents data that income distribution is uneven in the market for private mediation and suggests that the market is a winner-take-all market.... The analysis has important implications for aspirant mediators and for the design of mediation training programs.... Mediation training programs ought to be redesigned to convey to aspirant mediators the realities of mediation practice.

In other words, much of the growth we're seeing in the field is coming from training, not from mediating cases.

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This was brought home just this week when I received notification of an opportunity to serve as a mediator for the Key Bridge Foundation. Actually, I received more than one notice of this opportunity. One of my sources listed it under Job of the Month. Here is the announcement:

> The U.S. Department of Justice Americans with Disabilities Act (ADA) Mediation Program is looking for experienced mediators who are familiar with mediating "under the umbrella of the law"…. In 1994, the Department of Justice established the ADA Mediation Program. [T]he ADA Mediation Program now operates under a contract with the Key Bridge Foundation.
>
> The ADA Mediation Program would like to identify potential mediators from specific regions of the country who will, after successfully completing the Department of Justice's ADA mediation training, be added to the ADA Mediation Roster.
>
> To be considered for the U.S. Department of Justice ADA Mediation Program's mediator roster, you must submit a completed application. Formal mediator training and experience serving as a mediator are basic requirements for admission to the roster. Prior experience resolving civil rights disputes is highly desirable. Additionally, your application must demonstrate that you have the experience, skills, abilities, and knowledge to help parties communicate better, analyze risks, and explore options for mutual satisfaction within the parameters of the ADA.

Nice, right? Maybe. But let's look a little further. The Key Bridge Foundation website http://www.keybridge.org/ has a few additional facts to add. They are these:

- Since 1994, KBF Center for Mediation has handled nearly 1000 ADA complaints.
- KBF Center for Mediation manages a national roster of over five hundred professional mediators who have received training on the requirements of the ADA.

If I'm doing the math right, that's an average of something less than two mediations per mediator over 14 years, or not quite one case every seven years.

That's fine for the Key Bridge Foundation, but from the point of view of the mediator, that ain't sellin' no chicken.

New and Innovative ADR Processes May Revolutionize Large Construction Project Disputes

by Peter G. Merrill

Peter G. Merrill is the President and CEO of Construction Dispute Resolution Services, LLC, a National/International Construction ADR Provider with ADR Specialists located in every state of the US and in selected foreign countries.

Large construction projects generally have two main objectives: to be completed on time and within budget. Secondary goals are for the general contractor and all other parties involved in the construction to make a profit and for the owner to end up with a properly constructed building, road, bridge, etc. that will accomplish what it was designed to do.

It is virtually impossible to complete a large construction project without any disputes developing between any of the parties. Those who plan ahead will most likely be less adversely affected by the disputes that might develop. Although Dispute Review Boards (DRB) have been around for many years, they traditionally only offer recommendations or advisory opinions upon which the parties should be able to resolve their dispute through discussions based on those recommendations or advisory opinions. If the parties can not resolve their dispute after considering the recommendations or advisory opinions of the DRB, they will need to proceed on to an outside arbitration or to litigation, whichever is specified in the construction contract, to reach a final and binding resolution to the dispute.

According to the Rand Corporation, the average large construction litigation case takes approximately 2 ½ years to complete including appeals. During that time, the parties often continue working on the project but may perform differently because of the pending dispute. If the dispute is between two major parties in the construction project, a project may have to shut down until the dispute is settled. The comfort level of the parties working together will diminish and the project will begin to see a different level of cooperation between the disputing parties. Regardless of the nature of the dispute, the project most likely will be adversely affected and will most likely run behind schedule and might run over budget due to the effects of the dispute.

The majority of the large construction disputes provide a mechanism for the parties involved in the construction project to write change orders or to file claims related to unforeseen issues that develop during the construction project. Those change orders and/or claims are usually held to the end of the project before they are addressed by the parties. This process often requires the contractor to "foot the bill" or pay for the issues in the change orders or claims until the end of the construction project. If there were a process available to the contractor and project owner whereby they could have the change order or claim reviewed as it developed, with current knowledge available of the issues, a proper resolution or agreement to the terms and conditions of the change order or claim could be reached which would be more meaningful and more fair and equitable to the parties involved.

When a major sports event is scheduled to be run, a medical emergency crew, trained to handle medical emergencies, usually stands by just in case someone is injured. Response time can mean life or death in some instances. A construction project can utilize the same planning ideas. If you have construction-knowledgeable specialists available in the event that there is a construction dispute, the same emergency treatment can be rendered by those construction experts to minimize the injuries to the construction project. Better yet would be to have a team of construction experts meeting on a regular basis to not only handle any disputes, but to help in the prevention of any disputes. That team of construction experts is known either as a Dispute Review Board (DRB) if they meet on a regular basis or as a Construction Settlement Panel if the construction specialists are utilized on an "On Call" basis only as their services are requested.

A DRB is traditionally comprised of three construction-knowledgeable individuals who have been mutually selected by the project owner (Owner) and the general contractor (GC). DRBs have been utilized by the construction industry across the world for many years. A DRB usually meets on a regular basis;

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every month, two months, quarterly or as specified in the DRB Agreement. The DRB will review the progress of the project and will try to anticipate any possible future disputes or will handle any disputes that have developed since their last meeting. All DRBs issue "Recommendations" or "Advisory Opinions" specifying how the DRB feels the issue should be handled by the parties to prevent or settle the dispute. Each party to the dispute has an opportunity to present their case to the DRB for their consideration. As the DRB has the success of the project in mind and acts as a neutral body without representing any of the parties, it renders its recommendations or advisory opinions as to how the dispute should be handled for the betterment of the project to keep the project on time and within budget.

As mentioned earlier, if the parties can come to an agreement through discussions based around the recommendation or advisory opinion, the dispute will come to an end. If the parties do not come to an agreement, the dispute will need to be referred to an outside arbitration or to litigation. Arbitration and especially litigation can take several months to reach a final and binding decision from the arbitrator, judge and/or jury. It can easily take years for a dispute to come to a final settlement. Many parties, especially small subcontractors and similar small companies, go out of business waiting for a dispute to settle.

It would certainly be in the interest of the success of the project to have the dispute handled as quickly as possible. It would be even better if all disputes could be handled quickly and inexpensively by construction-knowledgeable neutrals. A traditional DRB that only offers advisory opinions can accomplish this only if the parties ultimately agree on how to handle the dispute as a result of the DRB recommendation or an advisory opinion.

Instead of using a traditional DRB, an Extended Dispute Review Board (EDRB) can provide full Alternative Dispute Resolution (ADR) including mediation and binding arbitration, which would insure that all disputes can be handled and settled entirely "In-House". In addition, an EDRB can provide its services to all parties involved in the construction project including not only the Project Owner and the General Contractor, but all subcontractors, sub-subcontractors, material suppliers, service providers, etc. Traditional DRBs usually are very effective in helping to prevent or settle disputes between the Project Owner and the General Contractor; however, any disputes between any other two parties would be outside of the DRB responsibilities and would require those disputes to go on to outside arbitration or litigation. All major parties to the construction project under an EDRB can be required to agree to utilize the three-step dispute resolution process including recommendations and advisory opinions, mediation and if necessary, binding arbitration to settle all disputes. All disputes will be handled "In-House" without the use of the court system. Depending on the complexity of the dispute and the preparation time that a party might need to make a proper presentation to the EDRB, a typical dispute can be completely settled in 30 – 60 – 90 days. If a dispute is of a critical nature, the parties may mutually choose to skip the advisory opinion and/or mediation processes and proceed directly to binding arbitration to reach an expeditious final settlement to the dispute. A major benefit of an EDRB is its flexibility which allows to parties to select the best process to settle their dispute. Construction Dispute Resolution Services, LLC (CDRS) who conceived and developed the EDRB process generally does not recommend that the DRB issue binding arbitration awards as it is important that the DRB remain totally neutral and continues to have the respect and confidence of the parties. DRBs should only be involved in final and binding decisions if the disputed issues are minor in nature and it is mutually agreed by the parties that the DRB issue a final and binding arbitration award. Arbitrators are usually called up from the Construction Settlement Panel to arbitrate any disputes.

The Construction Settlement Panel (CSP) has also been recently conceived and developed by CDRS to assist a DRB or an EDRB and to lessen the fixed costs of a DRB or EDRB. On major construction projects it is not unusual to see several DRBs each with its own specialization such as an Electrical DRB, Structural DRB, Underground DRB, Mechanical DRB, HVAC DRB, etc. On the "Big Dig" artery project in Boston, there were 47 different DRBs utilized through out the construction project. These DRBs each met on a regular basis to review the progress of the project and to render recommendations or advisory opinions as necessary to prevent or settle a dispute specifically related to the DRB's area of expertise. The use of the 47 DRBs had fixed costs while some of the DRBs sometimes met as scheduled without really having any important issues to handle. In an effort to provide the same expertise supplied by the many DRBs, without the fixed costs related to those multiple DRBs, the CSP was developed. The CSP is comprised of several construction-knowledgeable individuals, each with their own special expertise, however, the CSP is available only on request and they do not meet on a regular basis as is the case with DRBs. As an example, there may have been an "HVAC – DRB" that met on a regular basis whether or not there were HVAC issues to handle. If those same individuals were on the CSP rather than the DRB, they would be called upon by a General DRB who might need their expertise if an HVAC related dispute was submitted to the General DRB to be handled. The expense of those HVAC CSP Members would only be incurred when there was a dispute to be handled related to HVAC matters rather than as incurred through the regular DRB meetings. CSP Members would serve as a panel of readily-available construction specialists at the request of a General DRB. It would not be unusual to see both construction-knowledgeable specialists and construction mediators or arbitrators (ADR Specialists) on a CSP. (ADR – Alternative Dispute Resolution – is any method used to settle disputes without utilizing the court system.)

The members of a CSP would all have been individually selected by the Owner and the GC and all required paperwork including the "CSP Member Agreement" would have been executed that would specify the expertise of the CSP Member and his/her required fees and related expenses for his/her professional services. Keep in mind that all parties participating on the construction project would also have executed the EDRB Agreements including an Agreement to Mediate, an Agreement to Arbitrate and related agreements, addendums and other required documents.

The flexibility of the EDRB program supported by a CSP allows any number of possible combinations of EDRBs with CSP support. The most popular scenario is to set up one, two or three General EDRBs depending on the size and complexity of the construction project. If those EDRBs found that they were constantly calling on the same CSP Members, it might be advisable for a new EDRB to be established comprised of those CSP Members who were being called upon on a regular basis. CSP members must rearrange their schedules to accommodate the requests of the EDRB. If they were scheduled to meet as a DRB or EDRB on a regular basis, scheduling would not be a problem as they could plan far in advance for their meetings rather than trying to juggle their schedule to accommodate the requests of the EDRB.

On more complex construction projects, it might be necessary to set up several specialized EDRBs whose members were not experienced in ADR but who could call on CSP Members with ADR experience to mediate or arbitrate a dispute if the recommendation or advisory opinion rendered by the DRB was not accepted by the parties to the dispute. In another scenario, there could be several specialized DRBs and one or two ADR-DRBs established to handle the mediation or arbitration requirements of the project. As you can see, the possibilities of DRBs or EDRBs is limitless and each construction project must consider which combination of DRBs, EDRBs and a CSP to utilize. Keep in mind that there is only one CSP required for each project that can support as many General DRBs or EDRBs as is required by the project. Keep in mind that new DRBs can be formed at any time and additional members may be added to the CSP if there is a special expertise required of a CSP member who is not currently on the CSP. It will take a few days longer to complete the paperwork to have the member join the CSP.

A common misconception is that all DRBs or EDRBs are comprised only of construction-knowledgeable individuals. It would not be unusual to see a "Financial Oversight EDRB" comprised of a forensic accountant and two other individuals with construction estimating or construction accounting background whose responsibilities would be to analyze all invoices, change orders, claims, addendums, etc. that might be in dispute. The likelihood of overcharges, kick-backs, payments under the table, graft, corruption, etc. would be minimal if there was a DRB with the responsibility of reviewing the questionable financial matters of the project. As mentioned earlier in this article, the EDRB possibilities are

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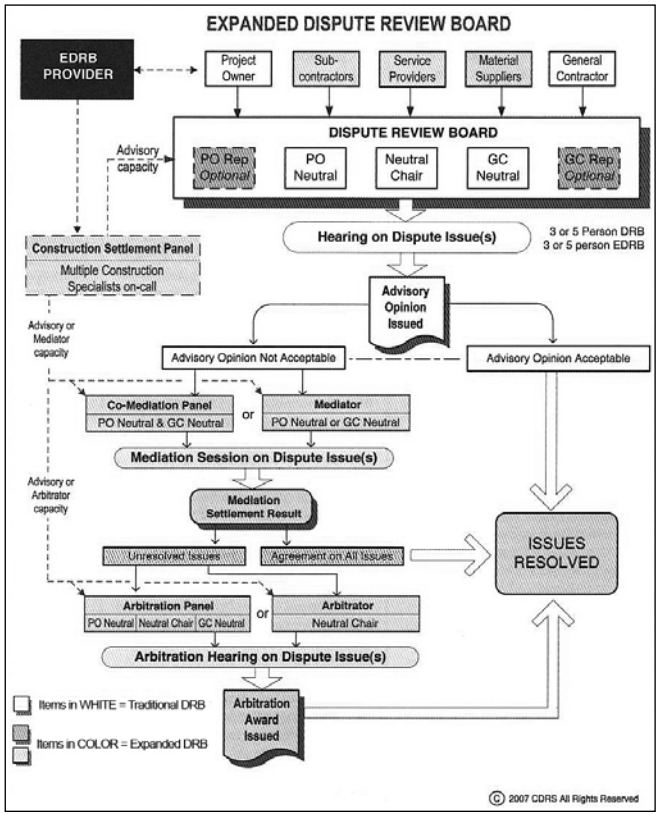
limited only to the imaginations of the major parties, especially the Project Owner who formulates and specifies the initial DRB or EDRB program.

On major projects where the Owner and the GC have worked well together before or on other projects where few if any disputes were encountered or are expected, only a CSP may be set up whose members would be called upon only as requested by the parties. There would be a small administrative charge to set up the CSP but there would be no fixed reoccurring expenses as would by experienced if there were one or more DRBs or EDRBs operating on the construction project. By pre-signing the members to the CSP and having pre-signed other related documents such as Agreements to Mediate or Arbitrate, a member of the CSP could conceivably be on the jobsite the next day to render his/her services in rendering a neutral advisory opinion or recommendation or to serve as a mediator or arbitrator. "Time is Money". How quickly disputes can be settled may very well determine whether the project will come in on time and within budget.



As most Project Owners are not experienced with the formulation of a DRB or EDRB program, it is recommended that the Project Owner work with a National and/or International DRB provider firm such as Construction Dispute Resolution Services, LLC. That provider should be able to analyze the complexity and requirements of the construction project and should be able to recommend several possibilities for combinations of DRBs, EDRBs and a CSP to properly address the potential disputes of the construction project.

A DRB provider can also coordinate all administrative aspects of the DRB or EDRB program. A typical DRB is formed by an Owner, such as a municipality, putting out a Request for Proposal (RFP) for the public to respond if they would like to get RFPs from individuals who would like to serve on their DRB program. The Owner would have to review those RFPs, select the Members along with the GC and would individually contract with each DRB Member for their services. Those DRB members would then have to make all of their own travel arrangements and would submit their expenses as individuals to the proper party for payment. A DRB provider, such as CDRS, can provide a National and/or International Panel of DRB Members who have all been properly trained in the DRB and EDRB process and possess a special expertise that might be required for that construction project. In addition, the provider could handle the execution of all required documents including the DRB Member Agreements, Party Participation Agreements, Agreements to Mediate, Agreements to Arbitrate, all CSP Member Agreements and other required documents and forms. At the end of each month, the provider would bill the appropriate party(s) for all three of the DRB, EDRB Members and for all fees and expenses of CSP Members rather than looking to each DRB, EDRB or CSP Member to submit their expenses as individuals. There is always a good amount of additional administrative functions required for each of the meetings of the EDRB that could be handled by the DRB provider. Hiring an ADR provider to design and administer the DRB, EDRB or CSP program to prevent and settle disputes is no different than hiring an architect to design a building and oversee its construction.

On large construction projects, bidders usually build in a "Litigation Contingency" into their administrative costs to cover the costs of any potential future disputes. It is purely a guess as to the future costs of litigations that might be required for dispute resolution. If the EDRB is established prior to the project going out to bid, which is the normal process, the estimated costs of the EDRB would be available through the EDRB provider similar to the bid estimates for the other aspects of the construction project. If the established DRBs or EDRBs did not need any special meetings, other than their regularly scheduled meetings, the costs related to the EDRB program would be available at the time of the bid. Contractors would not need to allow for a litigation contingency other than for possible extra DRB or EDRB meetings. The costs for any special EDRB meetings, if required, are usually shared equally by the parties involved in the dispute.

This article is titled "A Comprehensive Overview on Large Construction Project Disputes". Let's talk about some other major considerations involved in construction disputes. If you were injured or became sick, you would go to a doctor or a hospital for the best treatment. You would not go to a judge or a jury to decide how to administer to your injury or illness. A doctor knows how you are built, how your parts fit and work together and he/she should know how to remedy your medical problem. If he/she does not possess the depth of knowledge required to treat your medical problem, he/she will most likely refer you to a specialist who is completely knowledgeable as to you medical problem. Likewise, a construction-specialist knows how the project should be built and the best ways to correct or remedy a problem or a dispute. If you bring a construction dispute before an arbitrator, judge or jury who are not familiar with construction, the parties, usually with the assistance of their attorneys make a presentation to convince the arbitrator, judge or jury as to which party is correct in their position. The best and most convincing presentation usually is the prevailing party (winner), not necessarily recognizing which party was right or wrong. As a result, CDRS highly recommends that all parties to a construction project utilize construction-knowledgeable individuals to decide how to prevent or settle a construction dispute. CDRS also recommends the use of attorneys on DRBs, where appropriate. An attorney, with construction litigation or construction ADR experience can be a very effective DRB or EDRB chair and will be able to conduct the affairs of the DRB in a professional and organized manner.

Although there are fixed and variable costs related to the implementation of the DRB, EDRB and CSP programs, the direct costs of just one outside arbitration or litigation can be many thousands of dollars and the indirect costs of a project delay or similar occurrence, while waiting for a dispute to be settled, would be impossible to estimate. If there were several major disputes that went on to outside settlement through arbitration or litigation, the project would most likely experience unnecessary delays and additional non-budgeted expenses. The existence of an EDRB program can also give the parties a "peace of mind" as to success of the project relating to the proper handling of construction disputes. The EDRB program offers a type of insurance that virtually guarantees the parties that they will never be involved in lengthy and costly litigations that can fester for many months or even years before they are settled.

Additional information, including many of the required agreements, forms and documents concerning the DRB, EDRB and CSP programs is available on the CDRS website: www.constructiondisputes-cdrs.com or you can call CDRS toll-free at 888-930-0011.

Reprinted from the ABA Construction Litigation Committee of the ABA "Construct!" magazine - being printed with the permission of the author Peter G. Merrill.

Upcoming Mediation Trainings

General Civil

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 2.411(F)(2)(a):

Detroit: **Sept. 6 – Nov. 8 (Saturday mornings)**
Training sponsored by Wayne Mediation Center
Contact: Howard Lischeron, 313-561-3500, http://www.mediation-wayne.org/mt/training.aspx

Lansing: **October 8-10, 29-30**
Training sponsored by Resolution Services Center of Central Michigan
Contact: Karen Beauregard, 517-485-2274, drccm.beauregard@tds.net

Plymouth: **October 15-17, November 7-8**
February 5-7, 20-21, 2009
Trainings sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Domestic Relations Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 3.216(G)(1)(b):

Ann Arbor: **August 4-8**

Bloomfield Hills: **October 13, November 1-2, 8-9**
Trainings sponsored by Mediation Training & Consultation Institute
Register online at www.learn2mediate.com or call 1-734-663-1155

M E M O R A N D U M

To: WMC Mediators
From: Howard Lischeron
Re: Child Protection Mediation Training
Date: July 22, 2008

I am happy to announce that one of the most important interventions that we, as mediators, can bring to the community is about to be re-launched in Wayne County.

The Juvenile Court, along with other institutions such as the Department of Human Services, has agreed to resume sending us cases to mediate the long-term and/or permanent placement of children who are, or are about to be, wards of the State. In prior studies, it has been proven that such cases that are mediated result in permanent placement of these children more than 12 months sooner than those cases not facilitated by mediation. The logistics for such referrals has been worked out, and we have started to receive these cases once again.

We are pleased to offer an opportunity for specialized training in mediating these crucial cases. Because of the complex and delicate nature of such cases, we will accept for training only those mediators who have at least 20 hours of mediating complex cases. We also ask that you commit to mediating at least 12 cases during the year following the training. Enrollment will be limited to 20 mediators.

The dates and times for training will be Thursday and Friday, September 11 and 12, from 9:00 a.m.–5:30 p.m., and Saturday September 13, from 9:00 a.m.–1:00 p.m. The trainers will be our own Susan Butterwick and Kathy Lame from Charlevoix, assisted by two additional subject matter experts on domestic violence and legal issues. It will take place in Dearborn, at a location to be determined. There is no fee for this training.

Please fill out and return to me by August 8, 2008, the enclosed application form if you wish to participate in this training. Those selected for training will be notified by August 18, 2008.

HAL/m
Enclosure

Child Protection Mediation Training Application

(The information in this application will be shared with the trainers hired by WMC to offer this training.)

Name:_____

Address:_____ Phone:_____

E-Mail: _____

1. Please describe previous mediation trainings you have attended, including the 40-hour initial training.

   _____
   _____
   _____
   _____

2. Please indicate the approximate number of hours of experience you have as a mediator: _____

3. Please describe the type(s) of cases you have mediated.

   _____
   _____
   _____
   _____

4. Please describe any relevant experience you have had with child welfare, aging or elder care issues or other related experience. Knowing the experience level of the participants assists the trainers with training design.

   _____
   _____
   _____
   _____

Applicant Signature _____ Date_____

Please return this application by August 8, 2008, to:
Howard A. Lischeron, Wayne Mediation Center Fax (313) 561-3500

The ADR Quarterly

State Bar of Michigan
306 Townsend St.
Lansing, MI 48933

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The ADR Quarterly is published by the ADR Section of the State Bar of Michigan. The views expressed by contributing authors do not necessarily reflect the views of the ADR Section Council. The ADR Quarterly seeks to explore various viewpoints in the developing field of dispute resolution.

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517-263-2832

http://www.michbar.org/adr/newsletter.cfm

COMMENTS FROM THE CHAIR

Richard L. (Tony) Braun

COME JOIN US FOR SOME BRAIN STIMULATION AND FUN AT THE ADR SECTION ANNUAL MEETING AT THE RIVERFRONT SHERATON IN DOWNTOWN DETROIT ON SEPTEMBER 5-6 !

The substantive presentation (7 hours CLE credit) is pretty heavy-duty: understanding how the brain works can help lead the way in assiting parties to appreciate the benefits of interest-based resolution. Then we get to relax with our annual awards dinner, networking reception, afternoon visits to the Detroit Cultural Center, and a dinner cruise on the Detroit River. This will be a glorious opportunity for our ADR Section members to get to know each other even better and to get involved with one of our Action Teams in helping to expand the reach of ADR. We would invite you to take a look at our webpage at **www.michbar.org**, ADR Section, to peruse the various Action Team Reports and/or the ADR Section's Annual Report to see what grabs you the most....and we would invite you to climb onboard to share your energy with us in 2008- 2009! So go ahead....fill out the application to join us at this year's Annual Meeting. We're going to have some fun!