

Dispute Resolution Boards: Commercial Construction Can Gain from Use of DRBs  
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**Dispute Resolution Boards (DRBs)** have proven exceptionally successful in preventing or resolving construction disputes, perhaps more than other methods, yet are almost unknown on commercial building projects. Contact with a dozen of the largest building contractors from the AGC of Colorado found none experienced with DRBs and only a few familiar with the practice. Despite limited use in Colorado, the state nonetheless holds the distinction of the first-ever DRB (Eisenhower Tunnel in 1975) and the largest single DRB project to date (T-Rex at \$1.67 billion).

Dispute boards are used commonly on larger public projects and consequently have been embraced by many state and local agencies for highway and tunnel construction. Motivated by a backlog of 58 potential arbitration cases involving \$49 million in claims, the Colorado Department of Transportation (CDOT) introduced a program in 2008 requiring standing DRBs for projects over \$15 million and other complex projects. It also provides on-demand boards for projects with active claims not otherwise covered. Since implementation, only thirteen claims have resulted in DRB hearings; twelve were resolved, one not resolved. All other claims were prevented by the new DRB program.<sup>1</sup>

Dispute Resolution Boards have proven even more effective on building projects, though their use is much narrower. The University of Washington has perhaps the largest program in the country that uses DRBs in vertical construction. Since 1993, boards have been required on all projects over \$10 million. More than 60 buildings have been completed totaling \$4 billion in construction costs with incredible results - not a single claim has gone beyond the board level.<sup>2</sup>

**DRB Programs** vary significantly but contain many common elements. Early in the project, three construction experts are chosen as members of a standing Dispute Resolution Board. The owner and contractor each select one member with approval rights over the other's nomination. The two approved members in turn choose the third, who may then serve as the board chair. Members then commit to strict neutrality throughout the project and agree to other provisions through a three-party agreement between owner, contractor and board.

Members are provided all essential construction documents to become familiar with the project and are kept apprised of job progress via meeting minutes and project schedules. They visit the site periodically to witness the construction and learn of potential problems. The Board helps resolve disagreements through advisory opinions after meeting informally at the site. A significant benefit of a DRB is the contemporaneous resolution of disagreements during the progress of work without awaiting project completion.

**DRB Hearings** - Disputes not resolved informally can lead to a hearing conducted by the board. Parties pre-submit documents detailing the nature of the dispute and the remedy sought. At the hearing, each side presents verbal testimony. The DRB may allow experts to testify and may ask questions of the participants. After closing the hearing, the board writes a non-binding recommendation for the settlement of the dispute, addressing the merit of the claim (substantiation or denial), the quantum (dollar amount), or both.

Each party must then accept or reject the recommendation. If both accept, the dispute is resolved and any resulting adjustment is acknowledged by change order. If either rejects the recommendation, the

parties are free to elevate the claim according to their agreement, perhaps to arbitration or litigation. The board recommendation is often admissible as evidence in the subsequent proceeding and may weigh heavily on the outcome as a reasoned opinion of neutral professionals thoroughly familiar with the project.

### **Limited legal involvement**

Attorney participation on dispute boards is often allowed but may be limited to a single member of a board.

Some users believe that the presence of attorneys can lead to longer, more formal and more adversarial proceedings with more litigation-like procedures.<sup>3</sup>

Legal advocacy during a hearing is also limited as

[a]ttorneys are encouraged not to attend hearings and, if they do attend, they are rarely permitted to make presentations or participate in the proceedings.<sup>4</sup>

### **High Success Rate**

In dispute resolution, a measure of success for any method is its ability to resolve problems fully without resorting to another method. Using this scale, DRBs may have the highest success rate of any non-binding process where parties maintain control of the outcome.

The "...resolution rate is over 98 percent to date. Several unique factors account for this remarkable statistic. A DRB provides the parties with an impartial forum and an informed and rational basis for resolution of their dispute.<sup>5</sup>

### **Economical compared to arbitration/litigation**

DRB costs are a function of the time spent by members attending an initial planning meeting and periodic jobsite visits, as well as meetings and hearings to resolve disputes. Costs vary based on the rate of reimbursement and the frequency and duration of meetings.

Total cost for a three-member DRB range from about .05% of final construction contract cost for a relatively disputes-free project, to about .25% for so-called "difficult" projects with a number of DRB hearings, for an overall average of about .15% of final construction contract costs. These percentages typically apply to projects whose costs range from \$50 million to \$100 million.<sup>6</sup>

The decision to utilize a DRB is an investment in the stability and continuity of the project and lower legal expenses. While there are associated costs, benefits may offset the likelihood of project disruptions and deterioration of relations at the site.

### **Summary**

No single dispute form has been universally accepted as providing swift, inexpensive and reliable resolution, so owners and contractors welcome a method that resolves issues efficiently and allows work to proceed. Dispute Resolution Boards have been widely embraced on heavy and highway construction projects yet sparingly in building work. It is unclear why some areas are ahead of others in recognizing and adopting DRBs; what is clear is that they have proven remarkably successful. Dispute Resolution Boards may also prove the best form of protection to certain commercial building programs.

## Notes

- 1 - [http://www.coloradodot.info/business/designsupport/construction-specifications/2005-construction-specs/dispute\\_review\\_board/drb\\_recommendations](http://www.coloradodot.info/business/designsupport/construction-specifications/2005-construction-specs/dispute_review_board/drb_recommendations) accessed 020711
- 2 – *The DRB Program at the University of Washington* – Doug Holen presentation to Houston CLE in 2009
- 3 - *DRBs and Other Standing Neutrals* – Randy Hafer, CPR Construction Advisory 2010
- 4 - <http://www.drb.org/FAQ.htm> accessed 020711
- 5 - DRBF training manual *Early-Stage Dispute Resolution for Construction Projects* Sec 1, Chap 3, Page 1
- 6 - Hafer