

A NEW ROLE FOR PROJECT CONTROLS PROFESSIONALS
ON DISPUTE BOARDS

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Abstract

Dispute Resolution Boards (DRBs) came into the U.S. construction industry in the 1970s. Yet many in the industry are not familiar with these Boards or the DRB process. The paper discusses the history, effectiveness and cost of this alternative dispute resolution (ADR) process. The paper summarizes the typical DRB process. Project controls professionals (schedulers, estimators, cost control professionals) have long participated in the DRB process by assisting clients with preparation for or presentations at dispute hearings. Traditionally, Dispute Boards have been made up of an owner, a contractor, and a design professional or specialty consultant depending upon the nature of the project. The paper explores whether project controls professionals – specifically AACE certified members - can help make Dispute Boards more effective. The paper identifies ways that AACE certified members can add value to the DRB process and help contribute to dispute resolution on many projects as members of Dispute Resolution Boards.

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Introduction

The construction industry has long been known as slow and resistant to change in almost all respects. And "...construction industry disputes are common and the monetary amounts in dispute are frequently quite high. Additionally, disputes in the construction industry are often quite complex, thus making it difficult to present issues clearly to non-technical triers of fact. Until the late 1970s, the traditional dispute resolution process involved negotiation and some form of administrative appeal, possibly mediation, followed by either arbitration or litigation. This traditional process has, however, proven to be too lengthy and too costly for both parties."¹ As a result, the industry has developed a number of forms of alternative dispute resolution (ADR) – methods designed to resolve construction claims and disputes faster and at lower cost.

One of these ADR methods is the use of Dispute Resolution Boards (DRBs) – originally referred to as Dispute Review Boards. A DRB has been described as:

“...a board of impartial professionals formed at the beginning of a project to follow construction progress, encourage dispute avoidance and assist in the resolution of disputes – and who remain actively involved for the duration of a project.”²

DRBs have been known, discussed and used in the U.S. construction industry since the 1970s. The concept behind DRBs is to provide an extralegal forum³ where owners and contractors present unresolved disputes on projects to a group of carefully selected and experienced professionals and receive recommendations concerning resolution of issues. DRBs are sanctioned and implemented either by contract (not law) or agreed to through contract modification after award of the contract. The intent of DRBs is to provide a

¹ Adam K. Bult, David W. Halligan, Jonathan Pray, and James G. Zack, Jr., Delivering Dispute Free Projects: Part III – Alternative Dispute Resolution, Navigant Construction Forum, Boulder, CO, 2014.

² Dispute Review Board Manual, The Dispute Resolution Board Foundation, Charlotte, NC, 2007.

³ “Extralegal” is defined by the Merriam-Webster Dictionary as “not regulated or sanctioned by law”.

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method to resolve project disputes without resort to formal arbitration or litigation in less time and at a lower cost to both parties.

This paper discusses the history of DRBs in the U.S.; describes the DRB process and the various forms of DRBs; summarizes the perceived benefits and concerns with the use of DRBs; and, provides statistical information on the use and success of process for the period of 1975 to 2017. The paper then focuses on the DRB members – the quality of individuals sought to sit on DRB panels. The paper explores the issue of whether well experienced project controls professionals can add value to the DRB process. Finally, the paper outlines some recommended steps to become a DRB member for those project controls professionals wishing to step into this new role.

It should be noted that this paper deals only with the use of DRBs in the U.S. and does not explore any of any of these issues in the context of DRBs or Dispute Adjudication Boards (DABs) internationally.

Brief History of DRBs in the U.S.

The first reported use of a “dispute board” in the U.S. arose from the Boundary Dam Project in Spokane, Washington in the 1960s. The owner and contractor became involved in a major dispute. The owner had recently been involved in litigation on a previous project and sought to avoid another court case. The owner and the contractor mutually agreed to appoint a four member panel to hear the dispute and provide a recommendation to both parties. This early dispute board was referred to as a “joint consulting board”. A hearing was held where both parties presented their positions on the issues in dispute. The dispute board offered their recommendation. Each party had the opportunity to accept or reject this recommendation. The result was that the project was completed without litigation.⁴

⁴ R.M. Matyas, A.A. Matthews, R.J. Smith and P.E. Sperry, Construction Dispute Review Manual, McGraw-Hill, New York, 1996.

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In 1972 the U.S. National Committee on Tunneling Technology authored a study on contracting practices used throughout the world. In 1974 the Committee issued a report entitled Better Contracting for Underground Construction.⁵ This report offered 17 recommendations, amongst which was the employment of DRBs to resolve claims and disputes – in the form that is in common use today.

The first known use of a modern DRB was on the second bore of the Eisenhower Tunnel on Interstate 70 through the Rocky Mountains in Colorado. The first bore of this project, constructed between 1968 to 1974, resulted in major claims and legal disputes. The Colorado Department of Highways⁶, anxious to avoid the debacle they went through on the first bore, decided to employ a DRB on the second bore. “The experience on the second bore was positive, with all disputes being resolved amicably and with no litigation.”⁷ Initially, DRBs in the U.S. were, more or less, used only on tunneling projects – perhaps because the earliest recommendation for DRBs was from the U.S. National Committee on Tunneling Technology. However, as of April 2017, 2,817 projects employing DRBs have registered with the Dispute Review Board Foundation. The types of project have widened and now include airports, bridges, dams, highways, power plants, pipes and force mains, rail and subways, and water and wastewater facilities with a value of \$277.5 billion.⁸

DRB Process

Following the typical DRB process in the U.S. project owners include a DRB specification in the contract documents. Most often, owners use the Guide Specification for Dispute Resolution Board⁹ and the DRB Three Party Agreement offered by the Dispute Resolution

⁵ Better Contracting for Underground Construction: A Report of a Study Conducted by Standing Subcommittee No. 4 – Contracting Practices of the U.S. National Committee on Tunneling Technology, National Academy of Sciences, Washington, D.C., 1974.

⁶ Renamed in 1991 as the Colorado Department of Transportation.

⁷ Jessie B. Grove and Richard Appuhn, *Comparative Experience With Dispute Boards in the United States and Abroad*, The Construction Lawyer, American Bar Association, Chicago, IL, Summer 2012.

⁸ This database of projects may be downloaded at <http://www.drb.org/publications-data/drb-database/>.

⁹ R.M. Matyas, A.A. Matthews, et. al., *ibid*.

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Board Foundation. After award of the contract, and typically prior to the Notice to Proceed (NTP), both the owner and the contractor submit their nominees to the DRB along with each nominee's Disclosure Statements. The owner has the right of veto over the contractor's candidate and the contractor has the same right concerning the owner's candidate. Once both candidates are appointed the two seated members propose a third candidate to both the owner and the contractor, both of whom have a right of veto. The third member of the DRB is often seated as the Chair of the panel.

At the first meeting of the DRB the rules, procedures, schedules for normal project review meetings are jointly agreed to by the DRB and all parties to the contract. After NTP issuance the DRB receives all project documents such as the contract documents, baseline schedules, monthly schedule updates, narratives, payment applications, etc. Depending upon the size, nature, and complexity of the project the DRB meets on site with the owner and the contractor on a routine, pre-agreed upon basis – monthly or quarterly in the author's experience. No member of the DRB is permitted to meet privately with either the owner or contractor.

Any claims filed by the owner or the contractor must follow the provisions of the contract. If the contractor's claim is denied by the owner or their representative or an owner's claim disputed by the contractor, either party may request a DRB hearing on the dispute. In most situations with which the author is familiar, a DRB dispute hearing is convened on a single issue. Prior to the hearing both parties provide their position statements along with all supporting documents on the dispute to the DRB and exchange their statements with one another. The DRB hearing is held, most often without any attorney participation in the hearing itself, where both parties present their positions on the dispute. The DRB then convenes privately to review all information and prepares their recommendation¹⁰; most often within 2 – 3 weeks, unless a longer period of time is agreed to by the parties. Both parties have 2 weeks in which to review the recommendation and advise the DRB and the other party whether they accept or reject the recommendation. As most DRB recommendations deal with claim entitlement and causation, not damages, if both parties

¹⁰ DRBs employed in the U.S almost universally issue "recommendations" as opposed to the international DAB process where adjudicators issue "decisions" that are binding on an interim basis.

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accept the recommendation they meet to negotiate settlement using the accepted DRB recommendation as the basis of the negotiation. In the event that one or both parties reject the recommendation the issue reverts to the contract's Disputes clause. If the issue does go into arbitration or litigation, the DRB Guide Specification provides that the DRB recommendation "...will be admissible as evidence to the extent permitted by law..." This provision is controversial within the legal profession so, as a result, is often stricken from the DRB specification.¹¹

Forms of DRBs

There are several forms that DRBs may take. Following is a summary review of these different forms.

- Traditional 3 Person Panel on the Project – This is process described above and, in the author's experience, is the most widely used form of DRB in the U.S.
- One Person DRB – Some owners, in an effort to save cost, have employed a single individual. While this approach does save money and make it easier to schedule dispute hearings, there is a risk that the single member will become distracted on a point not directly relevant to the issue in dispute, thus rendering their recommendation unreliable. With a 3 person panel, it is unlikely that all three would fall into this trap.
- Single Dispute DRB – This model is most often employed when no standing DRB panel was used on the project but there is a single issue in dispute that the owner and contractor are unable to resolve by negotiation. If the owner and the contractor can at least agree that they do not want to take the dispute to arbitration or litigation, they may empanel a DRB by change order or contract modification. The scope of work for this type of DRB is confined to the single issue. The author personally participated in this type of DRB some years back. While it was effective in that the DRB offered a

¹¹ Christopher T. Horner II, *Should Dispute Review Board Recommendations be Considered in Subsequent Proceedings?*, *The Construction Lawyer*, American Bar Association, Chicago, IL, Summer 2012.

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recommendation that both parties accepted, the hearing was more difficult insofar as none of the DRB members had been involved in the project and, as a result the prehearing briefs took much longer to prepare, and the hearing was protracted while the parties “taught” the history of the project and the disputed issue to the panel.

- End of Project DRB – This type of DRB is similar to the single dispute DRB discussed above but it hears on all disputes remaining unresolved at the end of the project. While it has proven effective in the author’s experience, it has the same downside as the single dispute DRB in that the DRB members have no knowledge of or familiarity with the project and how it proceeded. Thus, the time and cost of this type of DRB will increase.
- Extended DRB – The Extended DRB (EDRB) has been described in the following manner.

“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 prevent or settle disputes between the Project Owner and the General Contractor; however, any disputes between any other two parties would be outside the DRB responsibilities and would require those disputes to go on to outside arbitration or litigation. All parties to the construction project under an EDRB are required to agree to utilize the three step dispute resolution process including advisory opinions, mediation and if necessary, binding arbitration to settle all disputes. 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 [the] parties the select the best process to settle their dispute.”¹²

Benefits of DRBs¹³

Based on the author’s personal experience with DRBs and discussion with other construction claims practitioners, the benefits of utilizing DRBs on a project, for both owners and contractors, are summarized below.

- Enhanced Owner Reputation Reduces Bid Costs – Owners that employ DRBs enjoy a better reputation in the industry. An owner that gains a reputation of working with contractors and resolving changes and delay issues on the project in a businesslike manner is likely to receive lower bids. Contractors do not feel the need to add a contingency to deal with protracted and costly disputes.
- Informal & Non-Adversarial Process – As DRBs are informal processes conducted by three respected professionals selected by the owner and contractor, and in the absence attorneys, the process is less likely to become adversarial. If adversity over unresolved issues is mitigated or alleviated, then the relationships on the site are likely enhanced leading to settlement of all issues.

¹² Peter G. Merrill, Plain Talk About Large Construction Disputes, Construction Dispute Resolution Services, LLC, 2008.

¹³ See R.M. Matyas, A.A. Matthews, et. al., *ibid*; Kathleen M.J. Harmon, *Case Study As to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project*, Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, American Society of Civil Engineers, February 2009; Dispute Review Board Manual, 2007 Ed., *ibid*; Effective Use of Dispute Boards in Construction Contracts, The Dispute Review Board Foundation, Society of Construction Law, October, 2009; Randy Hafer, Dispute Review Boards and Other Standing Neutrals – Achieving “Real Time” Resolution and Prevention of Disputes, International Institute for Conflict Prevention & Resolution, New York, NY, 2010.

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- Prevent Unresolved Issues from Ripening into Disputes – The intent of the DRB process is to resolve disputed issues on the project, not allow them to fester until the end of the project. In the DRB process issues are handled on a discrete basis. The process is designed to make it easier to resolve disputes as they are handled one at a time.
- Project Relationships Maintained and Improved – As disputed issues are resolved between the parties then they are more likely to maintain their business relationship. This should help the project progress more smoothly as the parties find themselves working together successfully.
- Onsite Project Communication Improved – A benefit of the routine update meetings with the owner, the contractor, and the DRB members should improve communications on the project. Issues are brought to the fore earlier than is normal on typical, adversarial projects. Discussions of issues may lead to an earlier resolution which improves communications on the job. Additionally, many DRB agreements allow the parties to seek advisory opinions from the DRB even in the absence of a dispute hearing which also enhances project communications.
- Disputed Changes, Delays and Other Claims Resolved Promptly – The DRB process is designed to handle disputed issues within a very short time after an issue arises and one or the other party refers the issue to the DRB. Experience shows that DRBs are effective in this regard. Further, experience also shows that the closer to the event an issue is dealt with, the more likely it is to be resolved at a lower cost.
- Avoids Complex End of Job Claims – All too often owners and contractors are unable or unwilling to resolve issues while construction is proceeding. The result is at the end of the work all unresolved issues are bundled into a single end of the job delay, damage, and disruption claim. Frequently, damages included in such claims are based on a total cost or modified total cost basis and a total time claim rather than a discrete and segregated cause and effect basis. Such claims are complex, hard to

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analyze, and most often lead to arbitration or litigation. DRBs offer both parties an opportunity to avoid such a situation and resolve all issues on the site.

- Reduces Time & Cost of Dispute Resolution – One attorney the author has worked with over the years is fond of commenting that “During the 19th century, polo was the sport of kings. By the end of the 20th century, litigation was the sport of kings!” Arbitration and litigation are lengthy and very expensive – win, lose or draw! The author is personally aware of one arbitration that continued for nearly 17 years from the demand for arbitration until the tribunal issued the award. And, a major construction claims lawsuit in Southern California was filed in 1995 with the final court decision issued in 2014 – 19 years later.¹⁴ Additionally, some studies indicate that the cost of litigation (i.e., discovery, expert witnesses, court costs, trial preparation costs, attorney fees, etc.) can cost between 10% and 20% of the claimed damages.¹⁵ And, the author has been involved in more than one claim where the budget for the author’s client was in the range of \$30 - \$40 million. It is likely that the claim budget on the other side was approximately equal. DRBs are substantially less expensive and much faster.

Concerns About DRBs¹⁶

Notwithstanding the perceived benefits articulated above, a number of commentators have expressed concerns with the use of DRBs. These concerns are summarized below.

- DRBs Do Not Add Value – Some argue that the cost of a standing or traditional DRB does not add any value to the constructed project. However, in a 2010 paper the International Institute for Conflict Prevention & Resolution reported that the cost for a traditional three member panel on a project ranged from .05% of final construction

¹⁴ *Tutor-Saliba-Perini J.V. v. Lost Angeles County Metropolitan Transportation Authority*, Court of Appeals of California, Second District, Division Seven, Nos. B232372, B237037, June 16, 2014.

¹⁵ Chartered Institute of Arbitrators, CI Arb Costs of International Arbitration Survey 2011, London, UK. See also, Randy Hafer, *ibid*.

¹⁶ See R.M. Matyas, A.A. Matthews, et. al., *ibid*; Kathleen M.J. Harmon, *ibid*; Dispute Review Board Manual, 2007 Ed., *ibid*; Effective Use of Dispute Boards in Construction Contracts, *ibid*; Randy Hafer, *ibid*.

cost for a relatively dispute free project to .25% for a more challenged project with the average cost of .15%.¹⁷ The author believes that this cost is far lower than that of an arbitration or litigation matter. As a result, RBs do “add value” to the project through the avoidance of arbitration and litigation costs.

- DRBs Ignore Contract Language – Based on the author’s experience with DRBs this concern is unfounded. First, the Three Party Agreement executed by all DRB members mandates that their recommendations be made within the four corners of the contract and the applicable laws of the jurisdiction named in the contract itself. Second, seasoned professionals selected to serve as DRB members are unlikely to ignore facts, contracts, and the law when drafting their recommendations.
- Process Promotes Disputes – Some commentators suggest that the DRB process actually promotes disputes. That is, they contend, the existence of a DRB induces some to refuse to settle issues in negotiation, thus pushing many issues to the DRB in hopes that they can obtain a better settlement using this venue. The author’s experience is exactly the opposite as the existence of a DRB on a project reduces disputes. The author has been involved with projects that had a traditional DRB. Most of these projects never held a single dispute hearing. The reason seems to have been that while preparing the DRB hearing briefs both parties were compelled to take a more realistic look at their own claim or defense. In so doing, one or both parties determined that their position was not as strong as previously thought or, in the alternative, found a way to resolve the issue in negotiations. Thus, the issue was removed from a dispute hearing and settled by negotiation or dropped all together by the claimant.
- DRB Members May be Unqualified – If by “qualified” commentators mean “admitted to the bar” such as judges and virtually all arbitrators are, then they seem to misunderstand the DRB process. Members of a DRB are highly qualified and experienced in the construction industry, familiar with the type of project being built,

¹⁷ Randy Hafer, *ibid.*

and are rarely practicing attorneys. Further, DRBS do not issue legally binding decisions on the issues presented. Finally, as each member of the DRB is subject to review of their experience and background by the party nominating them and subject to veto by the other party, it appears unlikely that any DRB members would be “unqualified”.

- Members May be Biased – Some posit the idea that as the contractor picks one member and the owner picks one, then these two members “represent their party” when serving on the panel. However, DRB members are personally held to a standard of neutrality and impartiality. The DRBF Code of Ethical Conduct¹⁸ and The DRBF Code of Ethics and Practice Guidelines for DRB Members¹⁹ govern the conduct of DRB members and strongly reinforce the requirements of neutrality and impartiality. And, again, referring to the selection process for DRB members, if either the owner or the contractor is concerned about the potential bias of a nominated member, they can and should reject the individual.
- DRBs Introduce Acrimony and Promote Posturing – Some commentators have suggested that a contract requirement mandating all unresolved issues on the project must go through the DRB process prior to taking legal action simply allows either party to take unsupported or unreasonable positions to get through the process and proceed to arbitration or litigation. Given the lengthy time and inordinately high cost of either legal forum the author believes this concern is irrational. Further, as will be shown in the statistical analysis below, DRBs have a solid track record of resolving issues on the project and few go on to further legal action.
- Lack Legal Procedures and Standards – This statement is accurate insofar as it goes. However, DRBs are like negotiation and mediation, as they are oriented at ascertaining facts. That is, what event arose, when, who caused or brought about the event, how did the event impact the project, and is the claimant entitled to a contract

¹⁸The DRBF Code of Ethical Conduct, Dispute Resolution Board Foundation, March 2018, <http://www.drb.org>.

¹⁹ Dispute Review Board Foundation, *ibid*.

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adjustment under the terms of the contract. Such fact finding is conducted informally and without cross examination by the other party. However, DRB members may question individuals offering statements to the panel. As for the argument that DRBs do not allow discovery, as is common in U.S. arbitration or litigation, both parties have the opportunity to provide all documents they believe are relevant to the issue with their prehearing brief. These prehearing briefs are submitted to the DRB and shared with the other party. Thus, it appears that the lack of discovery is not an impediment to the operation of a DRB and remains fully under the control of the parties themselves.

- Claim Review and Not Dispute Resolution – This concern seems to center on the idea that the parties may go entirely through the DRB process, receive a reasoned recommendation from the panel, and end up with no resolution of the issue if either party rejects the recommendation. It is true, this can and has happened – although not as often as many imagine. Having said this, one may express the same concern over the mediation process as mediation may have the same outcome. And, in litigation, there is almost always the opportunity to appeal the outcome of a case. Thus, if the concern is the lack of “finality” concerning the issue, then the DRB process does not stand alone. The author’s experience with DRBs is that DRBs deal with entitlement issues and not damages. That is, the DRB will issue a reasoned recommendation on what happened, who was responsible, and whether they are entitled to a contract modification under the terms of the contract. The author has been involved in DRBs where the client was less than happy with the DRB’s recommendation but was still able use the recommendation as the basis for negotiating settlement of the damages (time and money) successfully.
- Process Favors Contractors – A number of owners the author has consulted with over the years have complained that DRBs “...always seem to side with the contractor...” In the author’s experience, contractors tend to bring forward disputes to DRB hearings when that they are confident they can prevail. Accordingly, contractors are more inclined to drop claims rather than push them into the DRB process when it appears likely they will not prevail. It is also the author’s experience that contractors

frequently have better documentation of events than owners, thus increasing their chances of receiving a favorable recommendation. Finally, owners are all too often reluctant to negotiate resolution of issues when it appears that they are at fault (i.e., defective specifications, owner caused delays, constructive suspension situations, etc.). As one government official the author met recently when discussing their win/loss record with DRBs commented in this regard – “How come every time I get stabbed in the back, my fingerprints are all over the knife?” Given these factors it is only logical that when contractors submit such disputes to a DRB they are more likely to prevail.

- Limitations on Scope of Authority – Another concern with the DRB process noted by some commentators is that contract documents may limit the scope of review authority of the DRB. As an example, the author was involved in a Public Private Partnership project that included a DRB in the contract documents. The contract document contained the following language.

“Developer and Contractor hereby agree to select a Disputes Review Board (“Disputes Board”) as described in Section 30.4, to resolve Unit Price Adjustment Disputes and Legal Action Request Disputes.”

The term “Legal Action Request Disputes” was discussed later in the contract in the following manner.

“Subject to the conditions set forth in this Section 12.3, if Contractor reasonably believes a Utility or an irrigation facility owner will not undertake or permit performance of a Utility Related Action in a timely manner and Contractor has requested Developer to take legal action, Developer shall either have ... prosecute eminent domain proceedings (subject to satisfaction of provisions similar to those in Section 11.1.4(b).U or shall take other legal steps deemed appropriate by Developer. Developer's obligation hereunder is subject to Developer, in its Sole Discretion, being satisfied that the property acquisition is necessary, and

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that Contractor has made diligent efforts to obtain the owner's cooperation but has not been able to obtain such cooperation.”

While the initial language incorporating a DRB into the contract seemed, on its face, to be promising the language of the contract limited the DRB’s authority to disputes over United Price Adjustments and Legal Action Requests. This limiting language excluded DRB dispute hearings on changes, constructive changes, differing site conditions, and acceleration claims. This language also excludes dispute hearings over delays or suspensions of work unless they are brought about by property acquisition issues. In short, the potential benefits of the DRB process were extremely limited.

Current DRB Track Record

The Dispute Review Board Foundation maintains a database of projects using DRBs including the following information.²⁰ It needs be noted that this database is based on voluntary self-reporting from owners and contractors. As a result, there may be other unreported projects using DRBs.

Project Name

Project Location

Year Project Started and Completed or Is Expected to Complete

Owner and Contractor Names

Contract Value

% Complete as of Last Report

Number of Disputes Heard

Number of Disputes Settled

Number of Disputes Going on to Other Dispute Resolution Methods

A synopsis of the current database (dated April 2017) follows.

²⁰ This database of projects may be downloaded at <http://www.drb.org/publications-data/drb-database/>.

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Number of projects employing DRBs = 2,813

Total contract value of projects = US\$277,547,000,000

Number of disputes heard = 3,249

Number of disputes settled = 2,627 (80.9%)

Number of disputes moved to follow on dispute resolution = 478 (14.7%)²¹

Number of Advisory Opinions issued = 142

Another slice at the data included in the current database offers the following view concerning the success of DRBs.

Projects with no dispute hearings = 1,532 (54.5% of projects using DRBs)

Values of these projects = US\$101,071,000,000

Projects with largest numbers of disputes heard = 23²²

Disputes heard = 711

Disputes settled = 625 (87.9%)

Number of disputes moved to follow on dispute resolution = 46 (6.5%)²³

When discussing the number of projects that had no DRB dispute hearings one experienced DRB member offered the following comment.

“The best DRB panels will not have any ‘formal hearings’. That is the first misnomer regarding DRBs often made is that it is a hearing focused institution when it is not. The reality is that DRBs should be proactive and help the project to avoid even “formal hearings”. How? By having members on the panel that through their knowledge and experience are

²¹ It is speculated that the remaining 144 disputes were either resolved following the issuance of the DRB Advisory Opinions, are in settlement negotiations between the owner and the contractor as of the date the database was last updated or were dropped by the claimant.

²² These projects each had between 20 and 50 disputes heard.

²³ It is speculated that the remaining 13 disputes were either dropped, resolved between the parties or are in settlement negotiations.

able to foretell what the issues on that specific project most probably could be.”²⁴

The author believes that these numbers are significant. A large number of projects worth nearly US\$280 billion have or are currently employing DRBs. And a significant percentage of the disputes referred to DRB hearings (approximately 81%) were resolved through this process without resort to arbitration or litigation.

Qualities of DRB Members

The selection process has been described previously. Let’s review what qualities owners and contractors look for when selecting individuals to sit on DRB panels. One author described a DRB panel in the following manner.

“DBs consist of professionals – usually DB members are engineers, with years of practical experience and great technical knowledge in the fields they are appointed, therefore the appointment and use of DBs constitute a guarantee of practical and experienced approach to project’s problems, aimed at resolving them during [the] construction period or to at least minimize them.”²⁵

A literature review indicates that the following are the desired qualities of DRB members.²⁶

²⁴ E-mail dated August 13, 2018 from Ferdinand Fourie a member of the Dispute Resolution Board Foundation and a DRB panel member.

²⁵ G. di Folco, Dispute Boards – The Contractor’s Perspective, Techno Engineering, <http://www.technoeng.ro>, November 1, 2012.

²⁶ Nicholas Gould, Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members, Society of Construction Law, December 2006; Randy, Hafer, *ibid*; Deborah Bovarmick Mastin, *Dispute Review Boards to the Rescue*, Under Construction, American Bar Association, November 2013; Richard Appuhn and Ferdinand Fourie, Success of Dispute Boards for Avoidance and Resolution of Disputes on Complex Projects, 2018 AACE Transactions, AACE International, Morgantown, WV; Dispute Review Board Manual, *ibid*.

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- Experienced and technically qualified in the work of the project including the type of construction, methods of construction, type of project delivery method, and types of disputes likely to arise on a project of this type so they can bring value to the project as a trusted advisor and a resource for both the owner and the contractor.
- Possess the interest, training, and temperament to help facilitate the parties through a number of disputed issues.
- Conversant with the terms and provisions of the contract documents and experienced in interpreting contract provisions.
- Experienced in analyzing and resolving construction disputes and the various forms and functions of ADR techniques.
- Possesses good communication and interaction skills with others (i.e., other DRB members and owner and contractor personnel presenting to DRBs).
- Skilled in writing clear, concise, logical, and well reasoned reports.
- Impartial and independent with no conflicts of interest and must disclose anything that may be of concern to either or both the owner or the contractor. DRB members should not have any financial ties to any party to the contract; be employed directly or indirectly in any aspect of the project; have been a full time employee of any of the parties; or have a close professional or personal relationship with any key members of any party, either directly or indirectly.
- Be and remain available to meet on a routine basis for all project update meetings as well as available to meet for dispute hearings on short notice.
- Have taken formal DRB training and be dedicated to the objectives and principles of the DRB process.

Can Project Controls Professionals Add Value to the DRB Process?

Although many commentators on the DRB process have mentioned that DRB panel members are, or should be, “engineers” the author does not believe this to be the case. In the author’s experience architects, construction managers, contractors, owners, and on occasion, attorneys have been seated as members of a DRB. The author believes that a DRB member need not be an engineer to meet the qualities outlined above. Traditionally, AACE certified professionals have participated in DRBs on behalf of their employers or clients in preparing for or even presenting at DRB meetings and/or hearings. However, the author contends that many AACE certified project controls professionals have the qualities desired of panel members and can, therefore, add value to many DRBs. More specifically, the author believes that the following AACE certified professionals should be considered as DRB members:

- Certified Estimating Professionals (CEP)
- Certified Forensic Claims Consultants (CFCC)
- Planning and Scheduling Professionals (PSP).

Obviously not all these individuals have the necessary experience and other qualifications set forth above. However, many of these certified professionals do possess the technical skills needed to aid owners and contractors in resolving disputed issues on projects; provided that, they also have the requisite experience with the type of project, the project delivery method, the types of disputes likely to arise, and experience in analyzing claims. As stated in one recent paper:

“The various disciplines represented in the AACE International membership are potential DB members. Specific expertise as planners, cost engineers and claims and disputes resolution experts provide an excellent background for being an effective dispute adjudicator. Complex disputes arise on construction contracts where events that involve employer or contractor liabilities cause delay to the project. The Parties are often constrained to

reschedule agreed construction sequences or accelerate the work. Those skills become indispensable.”²⁷

In an e-mail exchange with one of the authors of the above cited paper offered the following lengthy comments concerning AACE certified professionals being selected as DRB panel members were provided.

“To quantify damages, one first has to understand what the damages are and what was the cause for the damages. For instance, a delay event: The evaluator must know who contributed what delays and if there are concurrency of delays. Similarly, with productivity loss, the evaluator will have to carefully evaluate which party contributed what part of the productivity impacts and why. This knowledge of the root cause of the situation is the most valuable in opening the door to evaluating entitlement. The first task (and often the most important) of a DRB is to establish the root cause for the situation. The AACE members are uniquely equipped and experienced to identify and differentiate the root causes to the contributing parties and, therefore, of utmost value as a DRB member.”

...

“The most important role of a proficient DRB panel is to ask the right questions during the monthly regular meetings. Thus, before the work starts on it review those elements that from their experience would be an issue and lead to claims and discord. Often there is a conflict between the specifications and notes on the drawings. A proficient panel will pick up on it and ask the team to interpret it for them. The owner and contractor’s team (as this is now in the minutes of the DRB meeting) will then be encouraged to sit down, clarify the situation (that often leads to better solutions as they are working together) and report back to the DRB at the next month’s meeting. The same for schedule conflicts and other project

²⁷ Richard Appuhn and Ferdinand Fourie, *ibid.*

issues. A person with an AACE background and experience in the relevant type of project is very suitable to make this contribution.”

...

“... the focus of a DRB is not to decide on entitlement or damages, but to help the owner and contractor to timely recognize problems and to act expeditiously to resolve it and make the necessary adjustments to their contract. AACE members ability to interpret schedules, cost reports, specifications, construction methods, project characteristics, etc. puts them in a unique category to contribute substantially to the DRB process.”

...

“... a thorough knowledge and experience of the type of work, what can go wrong and how it could impact the work is invaluable. Therefore, in addition to technical knowledge of the type of work, schedule and cost analysis experience is of utmost importance. Those are often characteristics of members of the AACE. A panel member that can analyze a project schedule, ask the project team relevant questions (often uncomfortable) and help them to identify the impacts that will most probably result, is very helpful to the project.”²⁸

As has been discussed previously in this paper, the real value of a DRB lies not in the dispute hearings, but in helping the parties clearly identify the real cause of a potential dispute or issue on the project during the regular project update meetings. The skills, experience, and tools used by certified AACE professionals are well suited to the identification of root causes of disputed issues. Once the actual cause of the potential disputes is identified the parties can confer after the DRB update meeting to resolve the issue themselves. The author is firmly convinced that AACE certified practitioners can and will add real value to the DRB process, for the benefit of the project and all parties involved.

²⁸ E-mail dated August 13, 2018 from Ferdinand Fourie a member of the Dispute Resolution Board Foundation and an active DRB panel member.

Steps to Becoming a DRB Member

Before concluding this paper, it seems appropriate to provide some ideas on how certified AACE members can become DRB members. The Dispute Resolution Board Foundation published a short paper concerning this issue. The paper is entitled Ten Steps to Becoming a Dispute Board Member.²⁹ These ten steps are summarized below.

1. Passion – Have a passion for helping owners and contractors resolve issues using the DRB process.
2. Training – Take the training offered by the Dispute Resolution Board Foundation to fully understand the DRB process.
3. Personal Profile – Elevate your profile in the industry as an individual who helps both owners and contractors resolve issues on the jobsite, not in the courtroom. Become known as an effective communicator.
4. Marketing Dispute Boards – Work with clients to persuade them to employ DRBs on their projects.
5. Independence and Impartiality – Build a reputation in the industry of being an independent and impartial analyst of disputed issues and an honest broker of settling such issues.
6. Industry Experience – Demonstrate well rounded experience in the industry as a design professional, construction manager and/or owner.
7. Know Your Industry Sector – Know and understand the industry sector that you want to become a DRB member in (i.e., infrastructure, commercial, power, etc.).

²⁹ Steven Callaghan and Rob Finlay, DRBF Forum, Volume 21, Issue 3, September/October 2017.

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8. Dispute Resolution Board Foundation Involvement – Join and become an active member of the Foundation so as to be able to interface with and build a network of other DRB members.

9. Nomination by Dispute Board Nominees – In the traditional DRB process each party nominates a DRB member, subject to the objection of the other party. Once the first two DRB members are approved, they nominate the third member, who is subject to the veto of both the owner and the contractor. These two DRB members are urged to nominate a third member who is known in the industry and has both experience in dispute resolution and has complementary skills to the first two members but has not served on a DRB panel. The above recommended steps may bring an AACE member to the attention of the first two members.

10. Right Time, Right Place – As the authors point out in their article – “... there is still an element of luck in obtaining an appointment, being in the right place at the right time and being available to respond to opportunities, often on short notice.”

Conclusion

The use of DRBs has grown substantially since their introduction into the U.S. construction industry in 1975. DRBs are now widely used across the entire industry. As demonstrated by the current reported information more than 2,800 projects worth some US\$277.5 billion have used or are currently using DRBs. Eighty one percent of the 3,200 plus disputes referred to a DRB hearing were resolved to settlement. Only 15% of these disputes were moved on to some other form of dispute resolution.³⁰ The author believes this track record proves the value of the DRB process in resolving disputed issues on the project and avoiding lengthy and costly legal proceedings especially since the average cost of a DRB is approximately 0.15% of the cost of construction.

³⁰ It is presumed that the remaining 4% of these disputes were either dropped or are in settlement negotiations.

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The success of DRBs, in the author's opinion, is due in large part to the employment of experienced, skilled construction industry practitioners serving on the DRB panels. The author believes that many certified AACE professionals have exactly the qualities necessary to be effective DRB members. As a result, AACE certified professionals are well suited to be members of DRBs and can add value to the DRB process.