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Contractors' Guide
To the Bottom Line

Dispute Review Boards: An ADR Technique That Works

BY STUART SOBEL

An experienced consumer of construction services understands that the initial contract price is not nearly as important as the final price when the job is complete. It takes a cooperative effort among all project participants to translate an owner's vision through the design of architects and engineers and, then, through the work of contractors, general contractors, specialty contractors and suppliers.

While the expected result requires great precision, the process of sharing the vision can be quite imprecise, leading to misunderstandings and disappointed expectations—most often through increased costs, compromised design and delivery delays. As a result, absent precautions, the price and as-built schedule coming out of the project may bear little resemblance to the price and as-planned schedule going in.

Disputes are endemic to the collaborative nature of construction. It seems prudent to anticipate the disputes, even where the precise nature of the dispute is unknowable, and create a structure for proactively addressing and resolving them when they do arise. Traditional dispute resolution, whether arbitration or litigation, when invoked at the end of the project, takes place too late to save it or get it back on track. Instead, proactive onsite real-time dispute resolution is warranted to protect working relationships, cash flows and schedule progress.



Arbitration has become the preferred alternative dispute resolution forum for resolving construction disputes because it is private, streamlined and presided over by experienced construction professionals.

However, just as with litigation, arbitration only comes into play after a dispute has ripened. The arbitration process usually extracts a considerable toll on the project participants through damaged relationships and expenses. The parties involved are very unlikely to continue doing business together in the future. In addition, discovery in arbitration proceedings is now wider, longer and more expensive, and its growing resemblance to litigation has become unmistakable. Thus,

despite its reputation as a cheaper alternative to litigation, arbitration has become more expensive as the process permits more litigation-like discovery, with attendant administrative costs and arbitrators' fees.

Neutral Party

Instead, consider the scenario where an independent person or board, respected by all project participants, is designated in the operative construction contracts to stay abreast of the design and construction and to attend and observe all pertinent meetings (owner/architect/contractor meetings, change order meetings and even important contractor/subcontractor meetings). Through this process, the dispute resolution

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neutral or, where there is more than one, the Dispute Resolution/Review Board (DRB), can quickly understand the nature and genesis of disputes that are blossoming—before they slow or stop the construction progress.

The neutral or the board can, depending on the authority vested in them by the contractual arrangement, render interim decisions that control until the construction is finished. Challenges to the board's interim decisions may then be presented in a more traditional forum, or they can be deemed final and binding, preventing the need to resort to traditional dispute resolution.

The cost of the neutral or board of neutrals is an added upfront expense. However, for major construction projects with multiyear build-outs and total costs in the hundreds of millions of dollars, it's a small component of the total cost. Even for smaller projects, the cost of a DRB, incurred and amortized over the duration of the project, pales in comparison to the cost of formal after-the-fact traditional dispute resolution.

Flexible Structure

Being a creature of agreement, through the operative contract documents, DRBs can be structured in any manner the parties want. DRBs typically comprise industry

professionals whose specialized knowledge is invaluable in resolving disputes. The parties may consider including a lawyer on the panel so that process management is not lost in the effort to bring to bear technical knowledge, insight and skill in resolving the dispute.

A multi-level process can be built in to allow for a high-level settlement conference or mediation, facilitated by the onsite neutral, before the matter is presented for resolution to the DRB. Or, the process can be stepped, with higher-level executives being required to attend when the jobsite managers are unable to resolve issues.

Executives who are familiar with the costs of disputes in terms of lost productivity and legal fees often can blast through the logjam and keep the project moving.


At the DRB hearings, the parties themselves, without lawyers, should present the dispute for resolution through the testimony of lay and expert witnesses. Lawyers should certainly advise and prepare the witnesses so that their presentations are focused and persuasive, but they do not have to be charged with conducting the questioning or presenting the arguments at the actual hearings.

Expedited Resolutions, Minimal Acrimony

DRBs are gaining favor in the construction industry for the

same reasons arbitration has been preferred to litigation. Their mere presence seems to assist in preventing the very disputes they were created to resolve. Moreover, where disputes cannot be avoided, resolving them in real time limits disruption to the project and generally reflects the industry and project realities.

The use of knowledgeable expert panels rather than an after-the-fact arbitration or a lay jury or judge without specific industry knowledge provides a measure of confidence that resolutions will be educated, sensible and fair, as well as prompt and efficient.

The use of DRBs also serves to minimize the acrimony that occurs through more conventional dispute resolution. It should be considered for major construction projects, beyond public-private partnerships and infrastructure. Commercial, residential, sports venue and industrial developers and their contractors can all benefit from this alternate dispute resolution technique, which can be tailored to address the specific nuances of projects. 

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