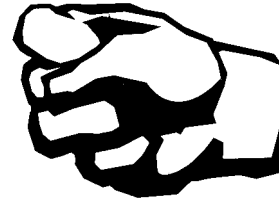
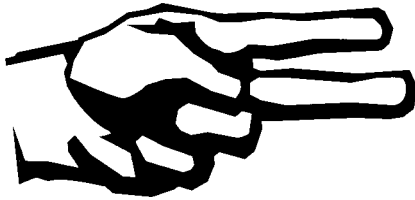
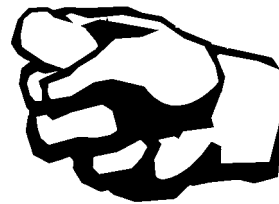


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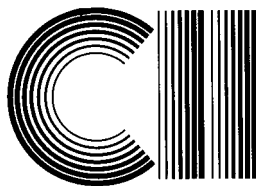
DISPUTES REVIEW BOARDS



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Prevention and Resolution of Disputes Using Disputes Review Boards

*Prepared by the
Construction Industry Institute
Dispute Prevention and Resolution Research Team*

Implementation Resource 23-2

June 1996

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The University of Texas at Austin.

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Executive Summary

The CII Dispute Prevention and Resolution Research Team identified Dispute Review Boards (DRBs) as a successful technique that has been used in the public works sector of the engineering and construction industry for many years. Typically, a DRB is made up of three members: one selected by the owner, who is acceptable to the contractor; one selected by the contractor, who is acceptable to the owner; and one jointly selected by the first two members, who is acceptable to both the owner and the contractor. The board meets at the jobsite on a regular basis for the duration of the project to keep informed of progress, problems, and disagreements, and to make non-binding recommendations for the resolution of disputes.

Since DRBs provide timely on-site dispute resolution on public works projects, the research team focused its research on observing DRBs in action to determine why they are effective and to test DRB implementation in the private commercial and industrial sectors of the industry.

The research indicated three key reasons for the success of DRBs:

1. The provisions for establishing a DRB are included in the contract and the board is organized shortly

after contract award. It is active throughout the construction period, with or without disputes. This early and continuing involvement permits board members to observe problems at the time they occur.

2. This ongoing involvement, in turn, allows board members to grasp issues and facilitate timely resolution.
3. The most critical element for a successful DRB is the selection of respected construction experts as board members who can be trusted to consider objectively all sides of an issue and to serve both parties equally and impartially.

The comprehensive field work done to study DRB operations confirmed that they can be successfully implemented in the private commercial sector of the industry. DRBs also promote prevention as well as resolution of disputes. The fact that a DRB meets at the site on a regular basis motivates owner and contractor project managers to solve problems and resolve disagreements in the normal course of business. For disputes that cannot be resolved by the project managers, the DRB is a fail-safe mechanism to facilitate an equitable and timely resolution.

Introduction

The Dispute Prevention and Resolution Research Team

The research team was formed to:

- Review the causes and consider the administrative cost of claims in the engineering and construction industry.
- Recommend procedures for claims avoidance.
- Investigate alternatives for early, equitable settlement of claims.

Objectives of the Investigation

The third item above is the subject of this publication. Specifically, the research team set out to achieve the following specific objectives:

- To study the functioning of dispute review boards (DRBs) in the field in order to identify the factors that contribute to their success or failure.
- To determine whether DRBs can be successfully implemented in the private commercial and industrial sector of the industry, and:
 - i. If the conclusion is negative, state why DRBs cannot be used.
 - ii. If the conclusion is positive, develop practical guidelines for implementing DRBs in the private commercial and industrial sector of the industry.

Methodology

The methodology adopted to achieve the objectives included the following activities:

- A literature search and broad-based field interviews to develop a thorough knowledge of the subject.
- A period spent trying to identify pilot projects on which DRBs could be implemented and studied.
- A questionnaire-based survey of CII member companies to gather information on dispute resolution practices and perceptions regarding alternative dispute resolution (ADR) procedures.
- A 15-month period spent monitoring the function of a DRB throughout the construction of a major commercial building in order to develop insights for DRB implementation.
- A number of visits to functioning DRBs to observe their operational dynamics and note the different approaches used in implementing the concept.

1: Introduction

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Overview

The initial investigation found dispute review boards to be a successful ADR technique used in the public works sector of the engineering and construction industry since 1975. In fact, experience gained over the years had resulted in the publishing of a set of guidelines for the implementation and use of DRBs. This classic DRB methodology is described in detail and a checklist is provided for assessing compliance (see Table 1, p. 12).

It was originally envisioned that during the field investigations, DRBs would be implemented and observed during all phases of the construction process on four or five private commercial or industrial type projects. Considerable time was spent trying to identify pilot projects, but yielded only one, the construction of an office complex by AT&T in Alpharetta, Georgia. The quest for pilot projects provided insights into attitudes toward change in the dispute prevention and resolution process—primarily that implementation of change begins with owners, their project managers and their lawyers, and requires management support at all levels. This finding led to a questionnaire survey of CII member companies on dispute resolution practices

and perceptions regarding ADR procedures. The results of this survey relating to DRBs are given.

The monitoring of the DRB on the one pilot project throughout the 15-month construction period provided specific information regarding DRB operation on a private commercial project and resulted in a significant listing of lessons learned. Also, a number of visits to regular DRB meetings on other active projects were made. These provided further experience and insights for the implementation of DRBs on private commercial and industrial projects.

Historical Development of DRBs

Dispute review boards are one of the techniques associated with the use of standing neutrals to serve the parties to the contract and assist with the resolution of disputes throughout the construction process. The concept grew from a 1974 publication that included the following specific recommendation:

Disputes - Provide a process for addressing disputes in their early stages before they affect the progress of the work, create adversarial positions, and lead to litigation.

.....

The key phrases in the above recommendation are “in their early stages” and “before they...lead to litigation.” In order to satisfy these requirements, dispute review boards exhibit two unique characteristics:

1. The standing neutrals who comprise the board are acknowledged experts in the type of construction involved. They are appointed at the start of the project and are kept informed of progress, problems, and disagreements through regular on-site meetings. In addition, they are available to assist in resolving disputes at short notice.
2. The board conducts most of its activities on the job site and makes recommendations to encourage resolution and settlement at the project level. Those responsible for the dispute are involved in its resolution.

DRBs also are effective from a psychological point of view. Knowing that the experts are trustworthy, are familiar with the project, and will recommend a fair settlement reduces the posturing and gamesmanship that occurs in conventional dispute resolution processes. If a dispute develops, neither party will be inclined to engage in a battle of wits that might possibly prevail in courts, but could hardly deceive an experienced board.

A DRB was first used on the Eisenhower Tunnel project in Colorado in 1975. The concept has matured and grown under the sponsorship of the Technical Committee on Contracting Practices of the Underground Technology Research Council (UTRC) of the American Society of Civil Engineers. This group has promoted the use of DRBs on various projects and monitored the results achieved. The results are impressive: \$3.2 billion of contracts from 1975 to 1991 involved 81 disputes, which were heard by DRBs with none taken to litigation.

Implementation Approach

The research team adapted the lessons learned from the UTRC to meet the contracting challenges faced by CII member companies.

The knowledge gained during the CII study was discussed in depth at the research team meetings. This made it possible for team members to review the work in progress and use their observations, knowledge, and experience to provide input. The final conclusions and implementation guidelines developed are a product of the investigation as well as the knowledge, experience, and unique perspectives of the research team members.

Implementation

Background

DRBs have a successful track record in the public works sector of the engineering and construction industry. This experience resulted in the development of a workable DRB model by the UTRC that can be adapted and applied to private commercial and industrial projects. Specific attention should be given to the unique relationships, management practices, and contracting strategies used by the parties to the construction process.

Classic DRB Methodology

The UTRC has published a definitive set of guidelines for the implementation and use of DRBs. The document reflects the experience gained since 1975 and includes a set of suggested specifications to be used when implementing a DRB. The concept appears deceptively simple, but the UTRC and its technical committee have nurtured and refined the concept over the years, as is reflected in the following statement taken from the introduction to the specifications:

“These specifications represent the latest product in a continuing evolutionary process. It is cautioned that apparently minor revisions to

certain sensitive elements of the specifications can seriously dilute the effectiveness of the dispute resolution process.”

The suggested specifications are presented in Appendix B.

The guidelines published by the UTRC constitute what has come to be accepted as the classic DRB methodology. This will be described under the following headings:

Contract Requirements: The changes or additions that must be made in order that a DRB may be instituted on a given project.

Member Qualifications: The qualifications desired of DRB members.

Member Selection: The procedures for selecting and appointing members to a DRB.

Operating Procedures: The normal operating procedures followed by a DRB.

Conduct of Hearings: The procedures followed by the parties in the event that a dispute is brought to the board.

2: Implementation

Timing and Sequence of Events: The sequence of events and time limitations placed on the board in making its recommendations.

Limitations of Authority: The limitations placed on the parties to insure the proper operation of the board.

Subsequent Proceedings: The limitations placed on the use of DRB rulings in any proceeding that may follow a board ruling.

Costs: The procedures used to compensate board members.

Contract Requirements

The provisions required to implement a DRB must be included in the contract documents and noted in the instructions to bidders. These provisions must be coordinated with other provisions in the contract relating to the resolution of disputes between owner and contractor.

The inclusion of a dispute resolution clause in the contract has been cited as an important pre-construction ADR technique. In the opinion of one owner organization:

“There is no better way for an owner to signal the contracting industry the intention to deal fairly with the

contractor than to include a DRB in the contract documents. The board provides ongoing insulation from unfair treatment; this is reflected in the lower bid prices enjoyed by the owner.”

Member Qualifications

The success of a DRB depends, as with every other ADR technique, on the qualifications and experience of the neutrals involved. Both owner and contractor must have a high regard for the members selected and believe that they will serve the parties equally and impartially. DRB members must have relevant technical expertise and be able to exercise sound judgment when considering engineering, construction, and contract administration matters. They must never show partiality or have a conflict of interest.

The professional standing, knowledge, and status of the board members and their ongoing involvement with the project is the basis for the trust needed between the owner and contractor to accept board recommendations as fair and reasonable. These same qualities also are the basis for the fact that the presence of the board encourages the project participants to resolve disagreements on their own and to display competence in the presence of those for whom they have a high regard.

Member Selection

The member selection process used to appoint members to a DRB is such that both owner and contractor are involved, but neither controls the process. Four steps are involved:

1. The owner and contractor each nominate one individual whom they believe satisfies the requirements for board membership.
2. These nominees are discussed and, if mutually approved, the individuals are appointed as the first two members of the board.
3. The first two members meet and select a third member whose appointment is approved by both the owner and the contractor. It is intended that the third member complements the experience of the first two and provides leadership for the board's activities, normally acting as chairperson for all board activities.
4. The owner, the contractor, and each board member enter into a three-party agreement that describes the scope of work, the responsibilities of the parties, limitations on liability and other aspects. A copy of the agreement as proposed by the UTRC is given as Appendix C.

Two additional features of the member selection process developed by the UTRC merit attention. First, member selection is intended to progress quickly so that this process is completed within eight weeks of notice to proceed. Second, it is not intended that an appointment be permanent. The three-party agreement provides for termination, and if at any time the board believes that the process might work better with other board members, the appointee in question should step aside. This necessity would arise if the board senses that either the owner or contractor has lost trust in their impartiality or judgment.

Operating Procedures

The member appointment procedures make it clear that the board is to be organized soon after the award of the contract and certainly before disputes arise. The board remains active throughout the duration of the contract and terminates its activity only after final completion and payment.

The board formulates its own rules of operation under the guidance of the chairperson. These must follow the provisions of the contract and should not deviate from the proven principles developed by the UTRC. The rules of operation will detail the procedures needed to fulfill the board's three main functions: keeping abreast of construction developments and progress, conducting hearings, and making prompt recommendations.

2: Implementation

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Keeping abreast of construction developments and progress requires that members receive and study regular written progress reports and other relevant data. It also requires that board members visit the construction site at regular intervals to meet with project participants, inspect all active segments of the work, and receive formal briefings from the project participants on the status of the work. The project participants and the board will agree on the frequency of the visits depending on the progress of the work.

Hearings arise when either owner or contractor submits a written declaration of dispute to the board. The hearings are conducted on the job site during normal, scheduled visits or at other times as agreed.

Conduct of Hearings

Either owner or contractor may request that the board convene a hearing to review and consider a dispute. The request is normally in writing and is made when either of the parties feels that honest negotiations have broken down.

The board may request written documentation and statements of position in advance of the hearing. Project participants are strongly encouraged to prepare a single compilation of background documents and exhibits. Both owner and contractor should be adequately represented

at all hearings. Successive rebuttal, questioning, and requests for clarification are permitted under the direction of the chairperson. Outside technical consultants may present expert opinions, but their participation should be limited. Attendance by legal counsel generally is discouraged.

The board meets to formulate its recommendations after the hearings are concluded. Deliberations are held in private, and individual views are kept confidential. The final recommendations are made to the project participants and are presented in writing with a full explanation. The board's recommendations are admissible as evidence in any subsequent proceedings if agreement is not reached.

Timing and Sequence of Events

The fact that board members are appointed at the beginning of the project, are kept informed of progress, problems, and disagreements, and are available on a regular basis makes it possible to conduct hearings quickly and efficiently. The DRB process is detailed in Figure 1, which shows the following:

1. Either owner or contractor may refer disputes to the board. Disputes may arise from the formal objection and review process or from either party appealing any disagreement, claim, or controversy at any time.

2: Implementation

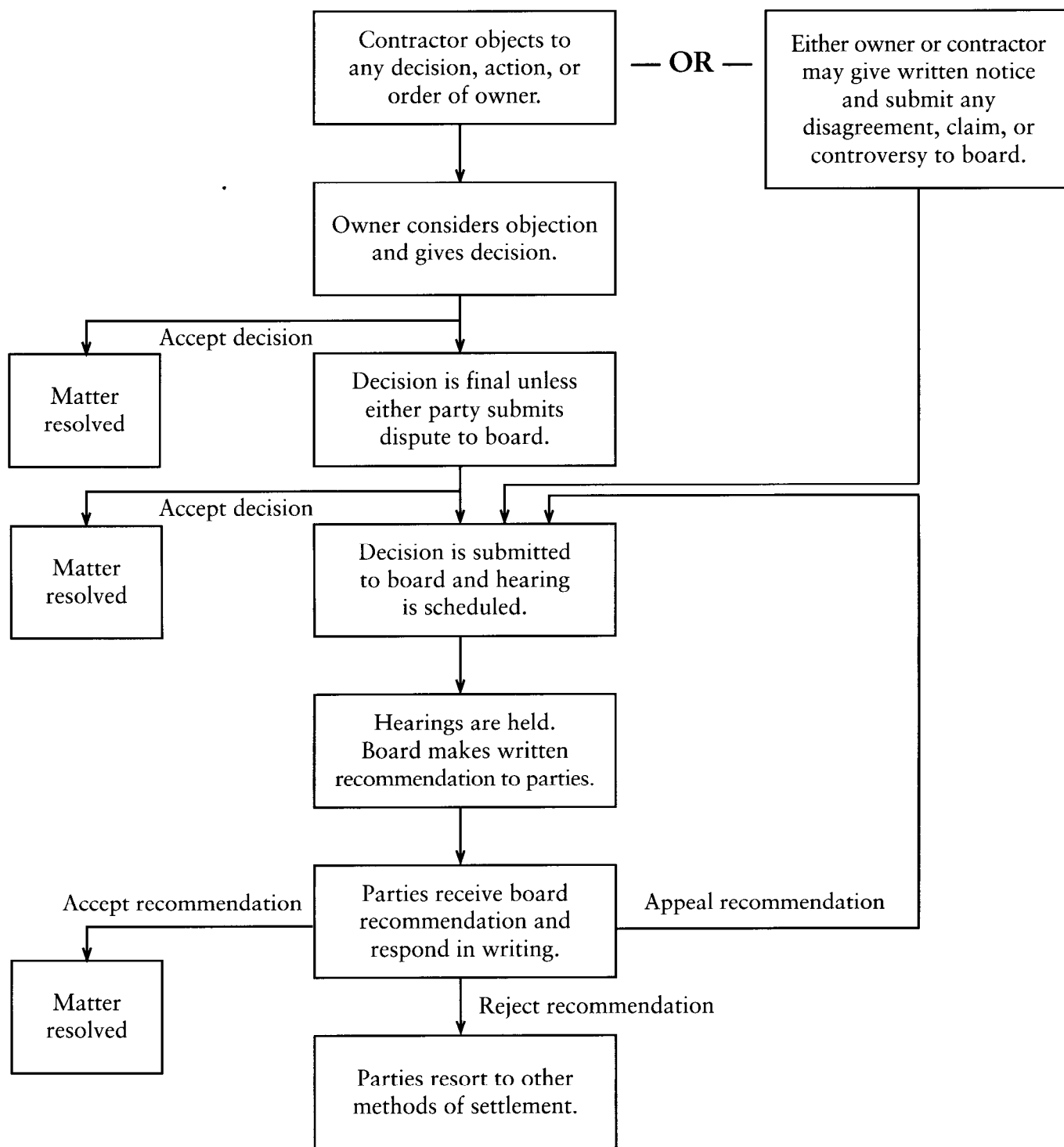


Figure 1. DRB Process, which is intended to be fair, formal, and efficient.

2: Implementation

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- 2. The process is intended to be documented with written submittals being made to the board and written recommendations being made by the board.
- 3. The process is intended to be quick and efficient with short time limits set for each step.

The trade-off between flexibility, formality and speed is summarized by the UTRC as follows:

“Disputes shall be considered as quickly as possible taking into consideration the particular circumstances and the time required to prepare detailed documentation. Steps may be omitted as agreed to by both parties and time periods may be shortened in order to hasten resolution.”

Limitations of Authority

The DRB and its members have wide authority to hear and make recommendations on disputes. However, the board should not reduce the project participants’ responsibility to perform the work and settle disagreements on their own. Boards “do not supplant the owner’s existing dispute settlement methods” and they “do not usurp the owner’s authority to direct the work as provided in the contract.”

Board members are independent agents and are not employees of either the owner or the contractor. They do not give advice on the conduct of the work and are not to act as consultants in any way. Their role is to provide an independent assessment on the merits of a dispute. The board should primarily “consider matters involving interpretation of the contract documents, delays, accelerations of the work, scheduling, extra work, differing site conditions, design changes, and the like.”

Subsequent Proceedings

The written, but nonbinding, recommendations made by the board when it hears a dispute are clearly a valuable part of project documentation. They are made by an informed and experienced panel of experts at or near the time that the events occurred and are of great benefit since board members have first-hand knowledge of actual field conditions.

The recommendations and the reasoning supporting the recommendations could be of value in any subsequent dispute resolution procedure. Neither the DRB contract provisions nor the three-party agreement should limit the involvement of board members or their recommendations in any subsequent proceedings.