

Spring 2006

# cause & effect

news from CPMI® on construction claims analysis and resolution



**“X” MARKS THE SPOT IN 2006** for Capital Project Management's 10th anniversary. We owe our continuing success in large part to the trust our early clients placed in us. Throughout our growth and evolution in the industry, we've always maintained the same business philosophy. We're committed to providing our clients with the same attention to detail and senior expertise we'd expect for ourselves. Each of our principals works hands-on with our customers, and that's the way we, and they, like it.

Many thanks to the customers and professional associates that have helped us get where we are today. We wish you all the best as we face the next decade together.



## The ABCs of DRBs

What they are and how well they work

*By Frank Brennan, P.E.*

**F**OR A HOST OF REASONS, disputes have become increasingly prevalent in the construction industry. When they affect deadlines, productivity and costs, they must be dealt with promptly to keep the project on schedule and the budget on target. One approach to resolution, which has been evolving since its inception almost 30 years ago, is the use of a *Dispute Review Board (DRB)*.

### **The evolution of resolution**

Over the years, the construction industry has resolved claims and disputes through a variety of methods. For a long time, informal negotiations and rulings by the architect or engineer were sufficient to resolve most disputes at the job level. As contracts became more complex, competition increased, and the demands of government agencies, environmental regulations and public

(continued on page 2)

interest groups encumbered the construction process, a growing number of disputes were resolved through litigation.

By 1966, arbitration had become the preferred means of resolution. This alternative to litigation provided an objective arbitrator (or arbitrators) with expertise in the field of construction to hear the dispute. Then, as now, arbitration proved less expensive than a court proceeding and took less time to resolve the problem. Over the next decade, most standard contracts (i.e., American Institute of Architects, Associated General Contractors, and National Society of Professional Engineers) contained arbitration clauses. Even so, both litigation and arbitration added substantial cost and time to a disputed project. The industry needed a good, workable alternative.

### **DRBs enter the scene**

In 1975, the Dispute Review Board process was used for the first time during construction of the second bore of the Eisenhower Tunnel project, just outside of Denver, Colorado. With relatively few disputes, which were quickly resolved, the underground industry (below-surface construction, which at the time primarily consisted of mined tunneling) deemed the DRB process a success. DRBs have since grown popular for all types of construction.

The Dispute Review Board generally comprises three impartial professionals who are experienced in the specific type of construction proposed. Ideally, project participants agree upfront to employ the board's assistance in avoiding and resolving disputes as the construction project progresses. Unlike arbitration findings, a DRB's recommendations are normally non-binding.

### **Ingredients for an effective DRB**

Typically, the owner decides to provide for an alternative method to resolve disputes and has the requisite DRB provisions incorporated directly into the bidding documents and the Owner-Contractor Agreement. The DRB provisions essentially consist of two contract documents: the *DRB Specifications* and the *DRB Three-Party Agreement*. Several sources of model DRB provisions are available.<sup>1</sup>

The *DRB Specification* addresses the qualifications and experience of the board members; operations and procedures for dispute resolution; admissibility as evidence of board recommendations in subsequent proceedings; and the basis of compensation. The *Three-Party Agreement* addresses the responsibilities of the parties; legal relations; member replacement; and termination of the agreement.

Involved parties reap maximum benefits from a DRB if it is implemented from the very start of a

project — after the contract is executed and before construction begins. Many times, however, despite the fact that a DRB is specified in contract documents and timing is outlined in the standard Three-Party Agreement, the DRB provision is left inactive until normal resolution of a dispute or claim is unsuccessful. By this point, parties are already experiencing friction. Since nominating, approving and empanelling the board takes time, appropriate instructions must be included in both the IFB and the contract specifications, and the selection process must proceed accordingly so that the DRB is approved and in place before construction begins or problems arise.

Another key to successful use of a DRB is the board's ability to secure the trust of all parties through their knowledge, understanding and impartiality. If the parties lose faith in the board, they may refuse its recommendations or challenge its jurisdiction, which can prolong resolution indefinitely. Board members must be careful not to advocate for the party that nominated them. To help prevent this kind of bias, the specification can provide that each party nominates one DRB member who must be approved by the other party. These first two DRB members can then suggest the third board member, subject to the approval of both parties.



One more element crucial to the DRB's success is the role of the parties' counsel during the hearing. Often, owners and contractors, as well as DRB members, either bar attorneys from participation in hearing presentations or allow them full, direct participation. The practical and recommended approach is to permit counsel to attend and confer with the client without directly participating in the hearing.

### **Variations in the process**

DRBs continue to evolve and incorporate the strengths of other dispute resolution techniques. Several variations have been employed with limited success. Typically, they are adaptations of either the structure or the procedure under which the DRB operates. Some of the more common variations are discussed here.

### ***Regional DRB***

DRBs that are employed by an agency or authority are sometimes referred to as Regional DRBs. A single party, usually the owner, selects the board members. Since the board is not selected for a specific project, it does not meet regularly for site visits and project updates. The Regional DRB mobilizes only after an issue is identified and the dispute is ready to be heard.

### ***DRBAA (After Award)***

If contract documents do not provide for the immediate implementation of a DRB process, the parties may do so by change order. Typically, parties seek this approach only after they have developed a backlog of disputes. Utilizing the DRB in this manner sacrifices key advantages, such as the board members' familiarity with the

project and the cooperation that is established before relationships become adversarial.

### ***DRBAC (After Construction)***

Utilizing a DRB at the end of construction to hear a laundry list of claims amounts to little more than an informal non-binding arbitration panel. Once again, all the unique benefits of the DRB are lost and more problems are created by soured relationships and firmly entrenched positions.

### ***Informal Hearings***

This process usually involves brief discussions (with no formal oral or written presentations) among the parties in dispute and the DRB, immediately following or prior to a site visit by the board. After the discussions are held, the DRB typically confers privately and then reassembles to provide recommendations and entertain questions. All recommendations made by the board in these informal hearings are non-binding. If the dispute is not resolved, the parties can elect to bring the issue back to the DRB formally.

### ***Do DRBs really work?***

The Dispute Resolution Board Foundation (DRBF), founded in 1996, includes construction professionals from all kinds of industries. The organization publishes a newsletter that provides the latest information

# Computer Technology: Adapt or Die?



Computer technology has had a profound impact on the construction industry — from e-commerce activities, like online bidding and purchasing, to sophisticated software systems designed to streamline project management, cost accounting and everything in between.

The volume of electronic information generated by construction projects has dramatically increased over the last several years. Parties involved in construction litigation must grapple with complex new issues, particularly in the discovery process. Disputing parties find themselves facing questions about how their electronic data was distributed and revised, and how securely it was stored until the project was completed.

Today, claims can be presented using software that identifies resources and uses multiple calendars to quantify delays during various project phases. A zero-float activity path can no longer be utilized at face value to identify the longest path through a project. Delay claims often include multiple issues of secondary critical paths, concurrent delays, and allegations of cumulative impact. CPM scheduling experts lament that new software can lead to abuses and deceptive schedule analyses.

So, what does computer technology really mean to contractors? Promises of increased efficiency, greater accountability and better organization, of course! Yet contractors incur more overhead expenses implementing systems and may end up exposed to greater financial and legal risks. What choice do they have but to adapt?

*Stay tuned to "cause & effect" as CPMI explores this topic in future issues.*

on the use of DRBs.<sup>2</sup> Its records (which date back to 1988) show that through 2002, 97.9% of disputes on contracts employing DRBs were settled without litigation. Although the vast majority of projects included in this database relate to civil infrastructure projects, the numbers for other types of construction are rising. Clearly, DRBs can be extraordinarily successful in many situations.

## DRBs for the future

Multiple party relationships on today's complex construction projects can create challenges for current model DRBs. What happens when disputes and claims arise out of services provided by third parties, like the designer or the subcontractor? Although it is not unusual for subcontracts to reference, and therefore incorporate, the terms and conditions of the prime contract, the applicability of the provisions that specify dispute resolution mechanisms is not absolute. The Three-Party Agreement centers on the relationship among owner, contractor and DRB, and presently does not provide for subcontractor

input. Furthermore, agreements between owner and designer almost never link to the duties and obligations of the owner and the contractor. Modifying the current DRB provisions to be both applicable and enforceable for third parties may present a significant hurdle.

Ultimately, the DRB process can be extremely effective in mitigating delays and claims on a wide variety of projects. If it can adapt to the ever-changing construction industry and still retain the fundamental concepts of early implementation and judicious selection of neutral DRB members, it can be an effective technique well into the future. ■

*We welcome your comments. Please contact Frank Brennan at [fbrennan@cpmiteam.com](mailto:fbrennan@cpmiteam.com) or call 973-276-0540.*



**Francis J. Brennan, P.E.** is a founding shareholder and the Executive Vice President of CPMI with more than 35 years of experience in design, construction and dispute resolution of complex construction engagements. He is a nationally recognized testifying expert, and has served as an arbitrator, mediator, hearing officer and Dispute Review Board member on many cases.

<sup>1</sup> These models can be obtained by contacting organizations such as the American Society of Civil Engineers, the Dispute Resolution Board Foundation, the American Arbitration Association, and the International Chamber of Commerce.

<sup>2</sup> Dispute Resolution Board Foundation, 6100 Southcenter Boulevard #115, Seattle, Washington 98188, 206-248-6156, [www.drb.org](http://www.drb.org).

# Eight *Don'ts* with DRBs

## (Or how to avoid the DRB from hell)

By Robert A. Rubin, Past President, Dispute Resolution Board Foundation

**D**ispute Review Boards have an unprecedented record of success, yet in some cases, they've proved disastrous. Since the DRB is a relatively new process and solely a creature of contract, the designation carries no well-established, industry-wide definition. Consequently, some contractual alternative dispute resolution procedures have been labeled DRBs that weren't. A host of poor decisions have yielded less-than-satisfactory results that have tarnished the DRB's reputation as a highly effective process. This article describes some of the don'ts with DRBs.

### **1. Don't wait to form a DRB until the project is underway and disputes have already arisen.**

Having a DRB in place from the outset creates an incentive for parties to resolve issues themselves or not to allow issues to become disputes in the first place. People don't like to appear foolish or to be judged by their peers. The DRB is most effective when board members can see the physical construction from the start and develop relationships and credibility with key project personnel as the job progresses.

### **2. Don't limit DRB members' fees, reimbursable expenses and the geographic area from which members can be drawn.**

Such limitations are penny-wise and pound-foolish. Avoiding a single dispute or resolving a dispute quickly can save the parties thousands of dollars in attorney's fees and litigation expenses, not to mention costs associated with manpower diverted from the project. The DRB's success is directly related to the caliber of its members and the confidence they engender in the parties. Cost limitations that deter the most qualified individuals from serving as DRB members are simply self-defeating.

### **3. Don't remove DRB members without cause.**

Parties sometimes hedge against the possibility of an errant DRB member by specifying that each party is entitled to remove its designated member *without cause*. Invariably, a party against whom one or more adverse recommendations have been made will seek to change its DRB designee, hoping to improve future outcomes. This compromises the continuity of the DRB — its familiarity with the project, the trust it has created with the parties, and the working relationship among its members. Additional disputes often arise over approval of successor DRB members

and all this leads to greater dissension. The right to remove a DRB member *for cause* should always be provided for, however.

### **4. Don't impose procedural obstacles to access the DRB.**

Some contracts specify a lengthy procedural process precedent to a party's right to have a dispute heard by the DRB. The faster a dispute can be resolved, the lower the cost of resolution and the less impact pendency will have on the parties and project performance. Parties should be given the right to access the DRB early in the dispute process.

### **5. Don't give parties the right to be represented by counsel at DRB hearings.**

Lawyers *can* play a valuable role in the DRB process, but a limited one. The proper role of counsel entails participation in:

- Drafting DRB specifications and Three-Party Agreements
- Counseling parties on the legal implications of the contract documents
- Assisting parties in drafting written submissions to the DRB
- Assisting parties in preparing presentations at DRB hearings
- Observing DRB hearings and counseling the parties
- Helping parties decide whether to adopt DRB recommendations or to pursue further remedies like arbitration or litigation

Counsel should *not* make presentations or cross-examine witnesses at DRB hearings. A lawyer's direct participation changes the essential character of the hearing and exacerbates the adversarial relationship that inevitably develops among parties. Adversarial proceedings, although crucial to fully protect the rights of parties in *binding* dispute resolution, are very time consuming. DRBs issue recommendations only and not final, binding decisions. Thus, expediency outweighs full constitutional protections. Speedy resolution, even at the possible sacrifice of complete correctness of result, is an important attribute of the DRB process.

### **6. Don't appoint lawyers who lack adequate construction experience to serve as DRB members.**

Experienced construction lawyers serving as DRB members add value to the process by instructing other members on the legal implications of

contract provisions; by exercising their experience in conducting hearings; and by applying their expertise in drafting recommendations. Since the DRB's recommendations are non-binding, its effectiveness depends entirely upon the parties' trust in its members. Lawyers lacking adequate construction experience aren't likely to elicit the confidence needed.

### **7. Don't impose limitations on the DRB's jurisdiction.**

Some parties have attempted to limit the types of disputes that can be heard by the DRB, such as claims for wrongful termination of contract. This creates more problems than it solves. Disputes over whether the DRB has the jurisdiction to *consider* a dispute actually have ended in court. DRBs should be given jurisdiction to consider all disputes arising out of or in connection with the construction contract.

### **8. Don't create hybrid DRBs.**

Sometimes DRBs are used to issue final, binding decisions on disputes under a certain dollar amount and to provide only recommendations on disputes exceeding it. This creates particular problems for DRB members who lack legal training. Parties subject to binding results require greater procedural protections under the law; and therefore, trained arbitrators should make binding decisions and not DRBs.

Some owners are fearful of relinquishing their traditional authority to a neutral DRB. They would rather "tilt the table" in their favor by committing the "don'ts" described above. With that said, here's one more: *Don't* adopt the DRB process *at all* if you don't believe it will add significant value to the process. Or you just may end up with the DRB from hell. ■



**Robert A. Rubin, P.E., Esq.**

is Senior Counsel to Seyfarth Shaw LLP and heads the Construction Practice Group for the firm's New York City office.

He is a past president of the

American College of Construction Lawyers, an adjunct professor at Columbia University, and a frequent arbitrator and mediator of construction disputes. Mr. Rubin has served on numerous DRBs.



## Capital Project Management, Inc.

1777 Sentry Parkway West  
Abington Hall, Suite 100  
Blue Bell, PA 19422-2210

### For more information

Visit our Web site at  
**www.cpmiteam.com**  
or contact us at:

#### PENNSYLVANIA OFFICE

Capital Project Management, Inc.  
1777 Sentry Parkway West  
Abington Hall, Suite 100  
Blue Bell, PA 19422-2210  
Tel: 888-260-2626  
Fax: 267-464-0400

#### NEW JERSEY OFFICE

Capital Project Management, Inc.  
9 Law Drive  
Second Floor  
Fairfield, NJ 07004-3233  
Tel: 888-812-2727  
Fax: 973-276-0545

## Upcoming Events

**April 20-21, 2006**

### Practising Law Institute

#### “Handling Construction Risks 2006, Allocate Now or Litigate Later”

Michael D’Onofrio, P.E., CPMT President, presents “Demystifying Scheduling” in this two-day seminar in New York City. D’Onofrio is joined by other faculty, including David Buoncristiani from Thelen Reid & Priest LLP.

**April 23-26, 2006**

### PMI College of Scheduling

#### “Scheduling: The Next Generation”

Jon M. Wickwire, Esq., Mark J. Groff, Esq., and Thomas D. Fertitta join CPMT principal Mark Boe, P.E. in Orlando, Florida for his presentation, “2005 CPM Case Law —Year in Review and One Slice In Time: Two Competing Perspectives for Analyzing Project Delay.”

**May 18-19, 2006**

### ABA Forum on the Construction Industry Annual Meeting

#### “Swimming with the Sharks: Litigating the Construction Case and More”

Please visit the CPMT exhibit during this annual meeting in San Diego, California.

**June 5, 2006 – Las Vegas, NV**

**September 18, 2006 – Boston, MA**

**November 13, 2006 – Miami, FL**

### One-day training presented by CMAA and Wickwire Gavin, P.C. in conjunction with the PMI College of Scheduling

#### “Construction Scheduling Revealed: Preparing and Assessing Construction Schedules and Delay Claims”

This intensive program focuses on the development and maintenance of construction scheduling specifications. CPMT principal Mark Boe, P.E. instructs with Jon M. Wickwire, Esq., Mark J. Groff, Esq., and Thomas D. Fertitta.

**August 10, 2006**

### CMAA

#### “CMs TalkLive! Webinar”

#### Baseline Scheduling – Part 1

CPMT principal Mark Boe, P.E. presents guidelines and best practices for Baseline Schedules.

**October 5, 2006**

### CMAA

#### “CMs TalkLive! Webinar”

#### Baseline Scheduling – Part 2

Presented by CPMT principal Mark Boe, P.E.

**For further details and the  
latest information, please visit our  
Web site at [www.cpmiteam.com](http://www.cpmiteam.com) and  
click on “Upcoming Events.”**