What type of construction project does your client want? If your clients are like my former clients, which were large local governments building massive infrastructure projects; they want a project that is completed within budget, on time, without aggravation, and without lingering claims and disputes. And if you are like me, you hope that your advice adds value, allowing your client to build smarter, more efficiently and within budget.

Unexpected “stuff” happens on construction projects. Over the last several decades, owners, designers and contractors have experimented with a variety of project delivery methods in an effort to reduce the claims and the adverse impact arising from unplanned or unexpected events that occur during the progress of the work. In the continuing search for a smoothly run project, systems such as design-build, construction manager at risk, construction manager not at risk, co-location (“The Big Room”) and integrated project delivery have been employed, all with varied success. But well-implemented Dispute Review Boards (aka Dispute Resolution Boards, Dispute Boards, Dispute Avoidance Boards or DRBs) offer the best opportunity to minimize disputes and mitigate adverse impacts to projects.

History of DRBs

DRBs were first used in the United States in the early 1970s. Initially, a dispute board was implemented in the second bore of the Eisenhower Tunnel on an interstate highway project in Colorado. That DRB acted as an expedited arbitration panel and was so successful that the use of dispute boards spread throughout the tunneling sector of the public construction industry. From there, the use of dispute boards became common practice in highway construction across the nation and eventually came into use in “vertical,” or architectural, construction projects as well. Since 1975, several thousand projects in the United States have used DRBs.

While these projects initially included reactive adjudicative boards whose primary objective was to provide rough justice on an expedited and inexpensive basis, the growing trend and better practice in the United States is toward proactive DRBs whose primary purpose is to mitigate and to avoid disputes altogether.

The University of Washington, an early adopter of DRBs in vertical construction projects, reports that during the past 20 years, it has used DRBs to
complete approximately 60 projects having an aggregate value of $6 billion. During that time, it experienced only two formal dispute hearings and four informal dispute hearings, no arbitration, and no litigation in its capital development program. Such anecdotal evidence from satisfied owners is a strong motivator to other owners to use DRBs on their planned projects.

**How Do DRBs Work?**

At first blush, a DRB looks like an arbitration panel: three industry professionals selected by the parties (typically, the owner and the contractor) for their experience, independence and commitment to the project (not to any party to the contract). In addition, they are usually trained as mediators or arbitrators who have disclosed their prior relationships to both parties.

But first impressions can be deceiving. Although a DRB can convert to an arbitration panel (typically non-binding) if the project problems encountered prove to be intractable, a well-run DRB operates before major disputes occur by motivating the parties, collaborating, and mitigating the adverse impacts of unplanned events that occur during the progress of the project.

DRBs serve as support to your project management team; they facilitate communication among the owner (e.g., a government entity), designer and contractor to allow them to address unplanned events before someone makes an expensive move without coordinating the efforts of the parties involved. In fact, there is a growing trend in Australia, New Zealand and the United States to call DRBs “Dispute Avoidance Boards” or “Dispute Avoidance Panels.” Dispute Review Board input is best introduced before a dispute arises, and thus before any money has been spent to address unplanned events; otherwise, it is just an expedited arbitration process.

**Why Do Owners Use DRBs?**

Owners implement DRBs to (1) avoid claims, particularly massive claims at the end of jobs; (2) minimize impacts on the project schedule due to unforeseen conditions or unanticipated late changes in the scope of the work; and (3) maintain predictability regarding the use of available funds. Including a DRB in the contract also helps to attract and increase competition. Some of the internationally owned, large-infrastructure contractors are hesitant to bid on a project that does not include a DRB.

Often, when a staff member of an owner has direct experience litigating a prior construction project, that staff person will encourage the owner to include a DRB in subsequent projects. Whether the owner won or lost the prior litigation is
immaterial; the staff is eager to avoid further litigation. In order to advocate for the inclusion of a DRB in the contract terms and conditions, a public owner’s staff person must be comfortable that the DRB is within the boundaries of best construction practices and that it would be a prudent expenditure of public dollars.

There are a number of qualities that DRBs offer that are attractive to owners:

1) Affect Future Behavior: Unlike mediation, arbitration, conciliation, litigation, standing neutral and early case evaluation services, DRBs offer the opportunity to impact future behavior on a project. Neither mediation nor arbitration offers the parties this benefit because these processes evaluate past behavior; in contrast, DRBs offer options for future action.

2) Elicit Cooperation: Unlike traditional "partnering" arrangements, DRBs can convert into arbitration panels, either binding or nonbinding, and so are more effective than traditional partnering programs in eliciting cooperation among the parties and resolving the disputes.

3) Allow Participation of All Stakeholders: Stakeholders who are indirect parties to the construction contract can participate in DRB meetings. These participants can include subcontractors, tenants and lenders. Participation by these stakeholders in the DRB process enables consensus to be reached with all interested parties in a single forum. Particularly in renovation projects, affected parties appreciate the opportunities to hear and to be heard before decisions are reached that affect their business operations. (For example, will the recovery schedule involve night work or closing a section of the building for a limited time?)

4) Validate Owner’s Decision: In the context of a hierarchical bureaucracy (which can impose oversight by elected officials, administrative supervisors, auditors, outside funding agencies and boards), a DRB offers independent, neutral and competent validation of decisions by the owner’s staff to pay for extra work during the progress of the project. An owner’s representative that has considered the input of a DRB is less likely to be accused of unnecessarily capitulating to a contractor’s demands.

5) Offer More Collegial Projects: Projects with DRBs have a job-site ambience that is more collegial and less adversarial than traditional projects. No owner wants to have the job that the contractor hates to work on.

6) Eradicate Surprise Claims: Surprise claims are almost eliminated. Job conditions are discussed regularly, and a contractor’s failure to raise a significant job condition at DRB meetings can lead to a waiver or abandonment of claims arising from prior impacts that it failed to disclose to the owner.
The Mechanics

A DRB is formed by contract. The DRB Foundation has sample specification and panel member engagement forms online (www.drb.org). ConsensusDocs recently issued a DRB Addendum with Documents 200.4 and 200.5 (www.consensusdocs.org).

Typically, a DRB panel consists of three members, although smaller projects (often costing less than $10 million) may have a single panelist. Ideally, all DRB panelists are jointly selected by the owner and the contractor; however, when necessary, each party can select a single panelist who then immediately becomes neutral, and those two party-selected panelists select the third panel member. The agreement should provide that panelists may not be called to testify in any subsequent arbitration and litigation proceeding.

Each panelist is individually engaged by contract at an hourly or daily rate. Sometimes the cost of regular meetings is shared between the owner and the contractor, but often the owner pays all costs of regular meetings and splits only the costs of dispute hearings, should any be needed. Another option is to include an allowance in the contract for the DRB costs.

Effective DRBs meet monthly as a supplement to the regular project executive meetings; it is not necessary that a separate meeting be scheduled for regular DRB meetings (as distinguished from formal dispute hearings). Half-day meetings can be sufficient, especially for smaller projects. Depending upon the project duration and the amount of activity going on, DRBs may meet quarterly but should not meet less often than that.

Conversations that take place during these monthly meetings are often deemed confidential settlement negotiations to encourage an open exchange of information and ideas from all participants so that an optimal plan going forward can be agreed upon. At its regular periodic meetings, a DRB may be requested to offer informal oral “advisory” opinions. All affected stakeholders should be invited to attend these monthly meetings, including major subcontractors and tenants.

Postponing or canceling regular DRB meetings until a “dispute” arises is counterproductive and squanders the opportunity for the board to facilitate avoidance or mitigation of adverse impacts to the project.

The initial meeting should convene before construction commences and include a joint training session for all affected project team members — the owner’s staff, the designer’s project group, the construction manager’s team, the general contractor’s project administrators and representatives of major subcontractors should all be in attendance. The training can be conducted by the
DRB members or by an outside trainer who is familiar with best practices of DRB operations.

Most projects with DRBs do not need to hold a formal hearing. The written recommendation of the DRB may be binding or nonbinding. The trend in the United States is for written recommendations of the DRB to be nonbinding. The contract may provide that written DRB recommendations are admissible as reports of jointly selected experts or that the recommendations are inadmissible in subsequent arbitration or litigation proceedings. My preference is for nonbinding, admissible recommendations.

**Panel Selection**

Panelists are selected for their personal and professional qualities. They must be sufficiently experienced in the type of work required by the contract so that they bring value to the table as trusted mentors and technical resources for the project team (usually engineers and sometimes construction lawyers). Additionally, they should possess the interest, training and temperament to facilitate a project with humor and calm professionalism. I prefer prospective DRB panel members who are trained mediators and arbitrators, as well as trained and experienced DRB members. Facilitative skills are valuable for the regular meetings, and in the event that a formal hearing is needed, administrative management skills are crucial for DRB members.

The DRB works well only when the parties trust the panel. It is critical that panelists maintain impartiality and neutrality. Ex parte communications are strictly prohibited, including written, electronic and verbal communications. Similarly, and as distinguished from a mediation process, private caucuses with a single party are also prohibited. Prior to selection, prospective panelists should disclose past and current relationships that could give rise to a perceived conflict of interest or that could indicate a lack of neutrality.

**What Does a DRB Cost?**

The cost of the DRB depends on the frequency of the meetings and the length of the project. While the compensation of a DRB varies from project to project, fees in the neighborhood of $2,000 per day per member are not uncommon. Other costs are insignificant; project records are provided to panel members electronically. A DRB holding no formal hearings might cost approximately $75,000 per year. On smaller projects, half-day meetings may be sufficient, at a lower cost.
While it is common for the costs to be shared equally between the parties, some owners prefer to pay the entire cost of regular DRB meetings, with only dispute hearing costs shared by the contractor. The cost of a formal hearing approximates the cost of an arbitration proceeding, but without discovery.

The Florida Department of Transportation calculates that it spends less than 0.1 percent of a project’s cost on its DRB and saves millions of dollars in attorney fees, consultant fees and lost staff productivity by using DRBs.

**My First DRB: Flawed Structure, Poor Implementation**

As an assistant county attorney for Miami-Dade County, I wrote my first DRB contract provisions about 10 years ago in connection with a new performing arts center project costing roughly $450 million. The county staff was generally familiar with the concept of DRBs, but no one within the county, including me, had any actual direct experience with dispute boards. I found some model dispute board contract provisions online, modified them, and made some poor choices in drafting the contract.

Essentially, my underlying assumptions were mistaken. I had assumed that a “stepped” process, similar to the standard partnering protocol, would be helpful. I wrote into the contract a process that required a demand for compensation or performance to be formally presented to the other party and rejected before an issue could be discussed with the board. Then the issue had to be addressed by the project executives and mediated before it could be considered by the DRB. Only then could the board address the dispute for the first time.

I could not have been more wrong in my initial assumptions. The stepped structure turned out to be burdensome and ineffective. By the time mediation commenced on an asserted claim, the parties had already assumed entrenched adversarial positions. Each and every mediation ended in an impasse. The dispute presented to the DRB was always stale and festering, having been a source of irritation to both parties for months before the DRB first heard about it. No “real-time” intervention by the DRB was possible because the process design prevented it.

The attorneys choreographed all presentations to the DRB and filtered information furnished to the DRB members. Massive submissions to the board, filling several binders, were offered before each monthly meeting. Paid consultants, who had no direct contact with the project but who had formed conclusions from the project records, made elaborate presentations, rather than the actual field personnel with personal knowledge. Each monthly DRB meeting contained a formal hearing and became, in effect, a monthly arbitration for work.
activities completed long ago. These arbitrations diverted attention of the project team from the current issues of the project. The DRB found itself looking backward at the job and had little time opportunity to impact future events.

There was one important element of that DRB that worked well: the board members were trained and experienced and had the appropriate demeanor and technical skills to evaluate project situations. Unfortunately, it took us so long to agree on the panel members that they were not impaneled until months after the contract was awarded. By the time the DRB met for its initial introduction to the project, the entire preconstruction phase had passed, the underground structures were in place, and the building was above the first story. Any opportunity to get ahead of issues with the DRB’s assistance was squandered. The process was so painful that the parties later agreed to delete the DRB.

After that experience, I began to educate myself about best practices in the operation of dispute boards.

**My Second Project: Current Issues, Not Yesterday’s History**

My second project using a DRB was a completion project for an international terminal expansion at Miami International Airport North Terminal, which had a construction value of just under $2 billion. Initially, the project had been developed by a tenant airline, but the project stalled. The county took over the completion of the project and procured a new construction manager while the terminal remained open and fully operational. Numerous unknown existing conditions lurked both above and below ground. Yet, the North Terminal project finished with no claims, no mediations, no arbitrations and no litigation.

For this project, the DRB did not have a “stepped” process. The project team, including the owner, designer and contractor, established the agenda for the DRB meetings, which mirrored the current weekly project meeting agenda. Eventually, the project executives arranged to meet in advance of a scheduled DRB meeting and worked out their issues so that they could advise the DRB that there were no pending disputes and that the project was progressing satisfactorily. DRB members acted as a sounding board for proposed solutions to accommodate or work around unexpected difficulties encountered on-site.

The DRB was maintained as a project management tool, not reserved as a weapon of mass destruction. The airport specification provided that attorneys were not required to attend DRB meetings. From the start through completion, no attorney representing either the owner or the construction manager ever attended a DRB meeting. No formal dispute hearings were ever requested or held.
In 2011, the project won the Gold Award from the Construction Owners Association of America for exemplary contract administration. Coincidentally, at the same time, the county was building a new South Terminal with the same construction manager. Although it was a smaller terminal (under $1 billion) and a greenfield project (that is, lacking any constraints from prior construction projects), the South Terminal experienced massive claims with ensuing litigation.

**Parting Thoughts**

The use of DRBs has dramatically reduced the cost of thousands of projects over the past 30 years across the United States and internationally. Dispute Review Boards facilitate claims mitigation and allow your clients to avoid disputes. In short, effective DRBs lead to every lawyer’s goal: a successful project and a satisfied client.

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