

American Association of Port Authorities Facilities Engineering Conference

Dispute Review Boards Could They Help Your Project ?



Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

Learning Objectives

- Understand the DRB process and history.
- Understand the requirements for making the DRB process an effective tool.

DISPUTE REVIEW BOARDS

Presentation Agenda

1. What is a DRB and DRB History
2. Setting up the DRB
3. DRB Meetings
4. DRB Hearings
5. DRB Key Guidelines

WHAT IS A DISPUTE REVIEW BOARD? (DRB)

What is a DRB?

- The DRB process is included in construction contracts to assist participants in **avoiding and resolving disputes**.
- A DRB is typically composed of a panel of three **respected and impartial professionals** who are experienced in the specific type of construction included in the contract.
- Utilization of the DRB process **from the very start of the project** maximizes its benefit and value.

What is a DRB?

- The DRB encourages the resolution of disputes at the project level.
- The DRB assists the parties by facilitating a harmonious atmosphere and by **encouraging prompt solutions to project problems.**
- A **real-time** ADR process for the resolution of issues and claims, **controlled by the owner and the contractor.**

What is a DRB?

A Dispute Review Board has the ability to “**look forward**” in a collaborative way to help the parties minimize impacts of unplanned events that will affect the job tomorrow, rather than "looking back" to assess blame for yesterday (distinguishing DRBs from mediation and arbitration, which only look back).

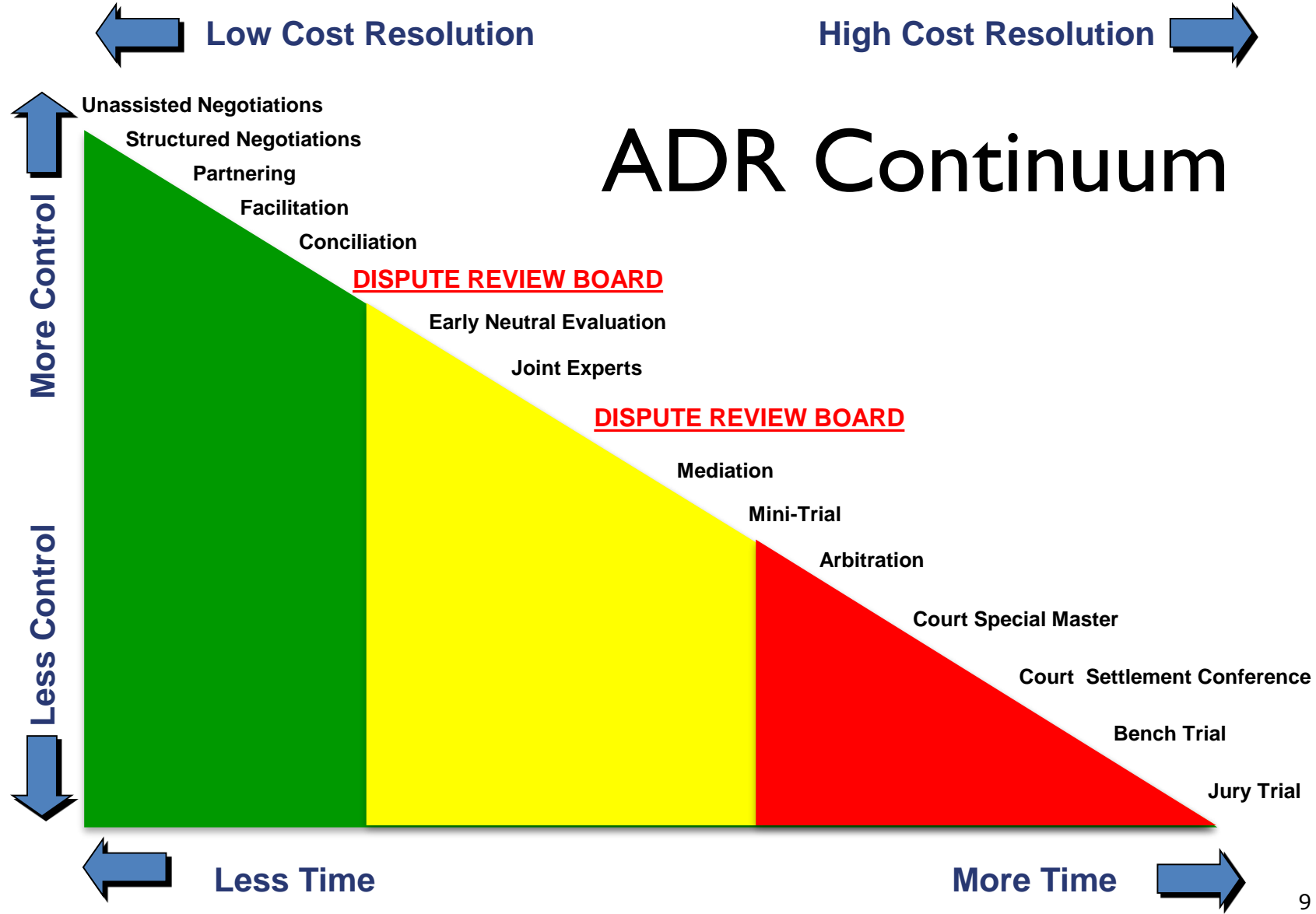
Other Benefits of the DRB Process

A DRB recommendation is helpful for:

Owners because it provides a basis and record for making decisions.

Contractors because it provides an early opportunity to resolve disputes that may impact project schedule or cash flow.

ADR Continuum



History of DRBs

- First DRB used on the second bore of the I-70 Eisenhower Tunnel in Colorado in 1976
- First International Dispute Board, El Cajón Dam, Honduras in 1981
- 1996 Dispute Resolution Board Foundation established; DRB Manual published
- By 2014 over 2,700 projects worth US \$225 billion have used a DRB
- Worldwide, roughly 100 DRB contracts using DRBs start every year, worth over US \$5 billion per year.

Application to Types of Projects

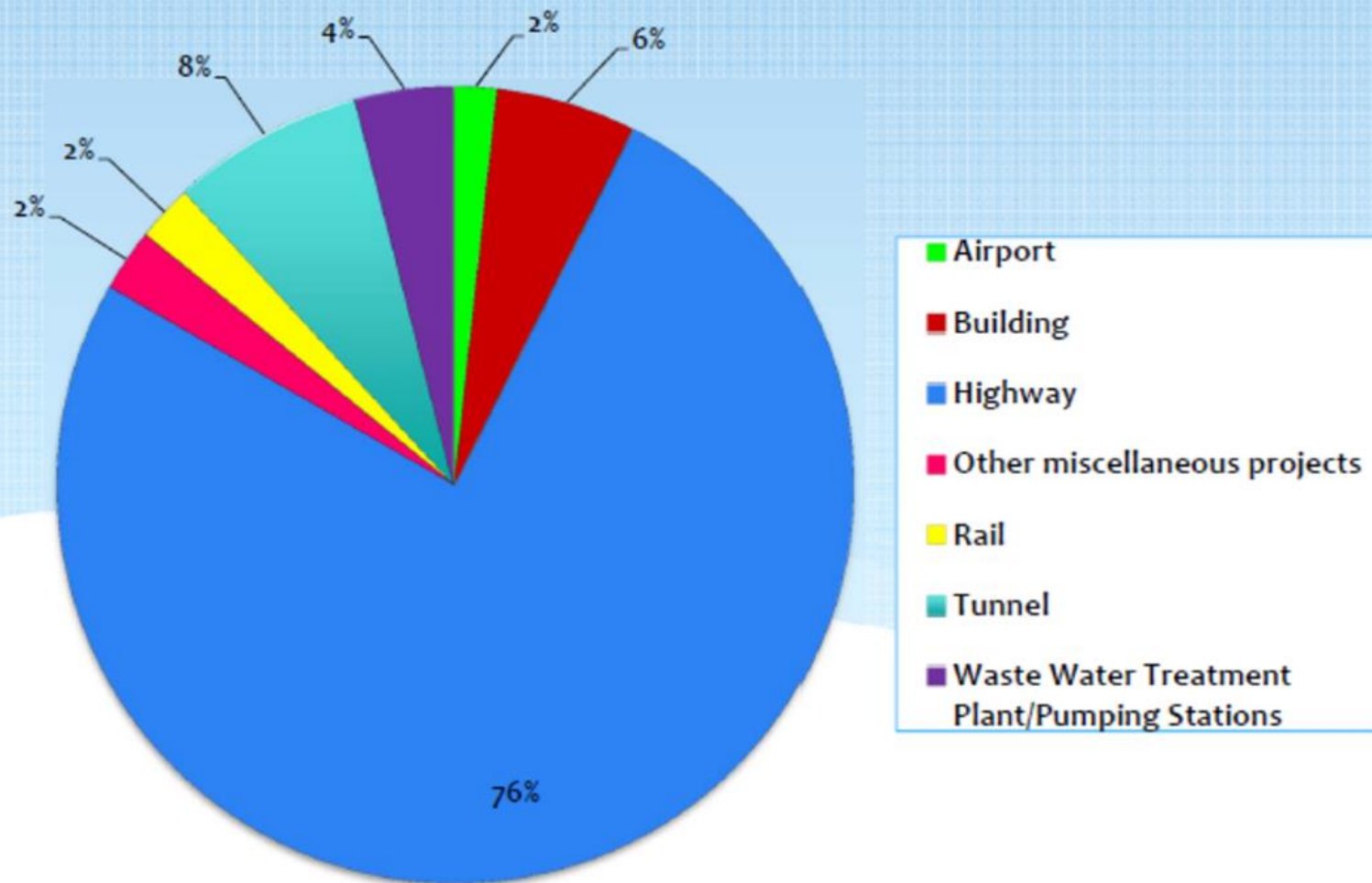
- Public and Private Projects
 - Airports
 - Ports
 - Bridges
 - Power plants
 - Buildings
 - Underground
 - Dams
 - Universities
 - Energy
 - Highways



What do these projects have in common?

- Lengthy duration
- Complex site and/or construction methods
- High risk

DRBs in the US



Recent Large Projects Examples

- Panama Canal Expansion
- 2016 Rio Olympics
- SR 99 Tunnel Project – Seattle
- Marmary Tunnel project in Istanbul, Turkey
- Gerald Desmond Bridge in Long Beach, CA

Port Projects

- Port of Sydney, Australia
- Numerous projects for the Port of Seattle, WA
- Port of Ehoala in Madagascar

What users say about the DB process

“When we set off to construct a new port for Rio Tinto on the Southeast tip of Madagascar neither the employer, the engineer, nor the contractor had experienced a Dispute Board before. We did however appreciate that the whole concept of the Dispute Board is one that encourages the contract parties to work together to resolve issues as quickly and painlessly as possible.

Because of this we never had to use the Board for a formal dispute, but it was comforting to know that we had access to some very highly qualified experts should one develop.”

**Chris Beaumont, General Manager Construction,
Port of Ehoala, Madagascar**

DRB Endorsements

Federal Highway Administration



Florida Department of Transportation
Office of Inspector General

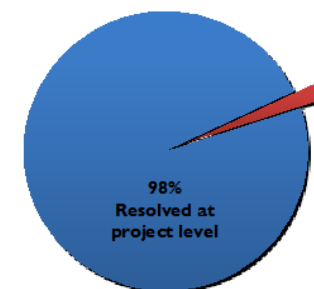


Washington Metropolitan Area Transit
Authority, Department of Capital
Projects Management



DRB Track Record

- The DRB process has experienced a very high rate of success in resolving disputes without arbitration or litigation.
- University of Washington has used DRBs for over 20 years on 60 "vertical" projects valued at \$6 Billion with only
 - 2 formal DRB hearings
 - 6 informal hearings
 - No arbitration or litigation**
- Resolution rate to date: **Over 98%** of matters going to the DRB do not go on to later arbitration or litigation.



Successes

Since the revised Dispute, DRB and Claim Spec was added to CDOT Contracts in January 2008:

Contracts awarded: 845 totaling almost \$2.6 billion

Standing DRBs: 17

Standing DRB Hearings: 5

On-Demand DRB Hearings: 20 (6 on 2 projects)

DRB Recommendations Rejected:

CDOT – 1

Contractor – 5

As of December 2014, only one claim has reached the Chief Engineer and it was settled after arbitration was being started.

Dispute Resolution Board Foundation (DRBF)

- Established in 1996 to promote use of the DRB process and serve as clearing house for DRB information for owners, contractors and DRB members.
- The DRBF publishes the “DRBF Practices and Procedures Manual” which offers a thorough review of the DRB concept for owners, designers and contractors to employ the process more effectively.

Dispute Resolution Board Foundation (DRBF)

- Provides in-depth DRB training for owners, contractors and DRB members.
- DRBF publishes a quarterly newsletter and hosts educational conferences worldwide.
- Non-profit organization with over 800 members in more than 60 countries.

SETTING UP THE DRB

Types of DRBs

Standing Dispute Review Board

- A board of impartial professionals **formed at the beginning of the project** to follow construction progress, **encourage dispute avoidance**, and assist in the resolution of disputes for the duration of the project.
- Three members.
- This is the traditional DRB and is most common.

Types of DRBs

On Demand Dispute Review Board – Often called an Ad Hoc Board

- A Board that is formed to hear a dispute when there is no Standing DRB.
- The number of DRB members varies depending on the size of the dispute.
- In some cases, this is known as a “gate keeper” DRB since a dispute cannot proceed to further resolution until it has been heard by a DRB.

DRB Member Selection

An **essential element** in the DRB process is that **all parties are completely satisfied with each Board member**. They should be:

- Experienced and technically qualified.
- Impartial with no conflicts of interest.
- Trained in the DRB process.

Criteria: Technical Experience

Parties must evaluate qualifications for the specific project as to experience with:

- Type of construction.
- Specific construction methods.
- Types of foreseeable disputes.

Criteria: Other Skills

- Experienced with interpretation of contract documents.
- Experienced in resolution of construction disputes.
- Ability to analyze disputes and write reports in a clear, concise, and logical manner.
- Complement skill sets of other DRB members.

Criteria: Neutrality/Availability

- Completely objective, neutral, impartial.
- Free from conflict of interest for the duration of the project.
- Available to fulfill duties as required.

Criteria: Training/Role

- Training, experience, and understanding of the DRB process and DRB role.
- Dedicated to the objectives and principles of the DRB process including the **DRBF Canon of Ethics** and duty to make full disclosure.
- Demonstrated ability to manage people and processes.

DRB MEETINGS

DRB Meetings with the Parties

- Meetings are used to bring the DRB members up to speed on the project.
- Meetings should be held as often as necessary depending upon the work in progress and issues at hand.
- Meeting frequency may vary depending on the type of project.
- The contract often spells out meeting frequency.
- A site visit **should be** part of the meeting.

Why Are Regular Meetings Important?

- Ensures that the DRB really knows the project people, events and issues.
- Promotes open communications.
- Maintains and fosters good working relationships.
- Encourages senior management attention.
- Ferrets out problems – actual or potential.
- **Provides opportunity to head off disputes.**

DRB HEARINGS

Hearing Attendees

Participation should include:

- **Decision makers** from each of the parties.
- Those with first-hand knowledge of the facts of the dispute, such as inspectors, superintendents and foremen who observed the actual work.
- Consider attendance of others who may have to review the DRB report later.
- Parties **disclose in advance** all participants and their roles at the hearing.

Hearing Attendees

- If attendance is contested, DRB determines who may participate in the hearing, and who may attend as observers.
- **Attorney participation:**
Participation of attorneys is discouraged.
- **Expert participation:**
Sometimes this is addressed in the contract.

Hearing Format

DRB hearing is not a judicial process:

- Oaths are not administered.
- Legal rules of evidence are not observed.
- Cross-examination is not permitted.
- Format of the hearing is established by DRB operating procedures; details worked out with DRB Chair before the hearing.
- DRB decides all procedural issues, including recesses, adjournments and continuation of hearings.

The DRB Report

The report typically includes:

- Concise summary of the issues in dispute and the relief requested.
- The two opposing positions.
- The chronology of major events/circumstances.
- References to contract documents and records.
- Detailed analysis/rationale.
- Recommendation.

The DRB Report

- The DRB should make every effort to prepare a unanimous report.
- If DRB cannot prepare a unanimous report, a separate minority report will be submitted. The contract usually addresses the signing of the minority report.
- **Caution!** Because the DRB process is not **mediation**, the DRB cannot compromise its findings and recommendations or substitute its own idea of fairness for terms of the contract in an effort to resolve the dispute.

Report Acceptance

Primary goals of DRB's supporting rationale:

- Show parties that their arguments were carefully considered.
- Provide an unbiased analysis and recommendation by neutral, project-knowledgeable industry professionals.
- DRB gives the parties a reasoned preview of what might happen in later proceedings.
- Acceptance of DRB's recommendation is entirely voluntary.

Subsequent Legal Proceedings

- Contract typically provides the **DRB's report may be admitted into evidence in any subsequent legal proceedings.**
- **Admissibility of the recommendation enhances DRB effectiveness.**
- If admissibility is permitted, it should be limited to the DRB's report.

Subsequent Legal Proceedings

- DRB members should not participate in any subsequent arbitration or litigation proceedings.
- This rule protects the confidential, deliberative, and collaborative nature of DRB decision making.

KEY DRB GUIDELINES

Key Guidelines – Using the DRB

- **Parties should not default on their normal responsibilities** to cooperatively and fairly settle their differences by indiscriminately assigning them to the DRB. The DRB should be the last resort.
- Use the DRB to help **AVOID** disputes.

Key Guidelines: DRB Recommendation

- Remember that the DRB cannot change the contract.
- The DRB will base its recommendation upon the contract between the parties.
- DRB must operate within the “four corners” of the contract documents, the facts, and the circumstances of the dispute.

Key Guidelines – DRB Recommendation

- Requesting actions that are contrary to the contract will not be successful.
- Rejection of the recommendation **should be for good reasons**, not just a tactical move.
- Just because one or both parties reject the Recommendation, **does not mean that the Parties should stop trying to resolve the dispute.**

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Thank you.



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DRBF – www.drb.org