
Checklist 9: Drafting Dispute Review Board Provisions

Dispute review boards (DRBs) are a specialized form of alternative dispute resolution (ADR) developed for use on large construction projects. DRBs have been used on both public and private projects ranging from subway tunnels to airport terminals. In the event a DRB is used on a project, this checklist should be helpful when considering how to adapt the DRB process to fit the project.

1. **Nature of Dispute Review Boards.** The conventional DRB is a three-person board of construction industry experts who periodically visit the project site, attend regularly scheduled status meetings, conduct hearings on disputes between the parties, and issue nonbinding written recommendations concerning resolution of such disputes. Ordinarily, the owner and contractor each appoint one member subject to approval of the nonappointing party, and the two party-appointed members appoint a third member subject to approval of the owner and the contractor. The third member usually serves as the chairperson. All DRB members are to be neutral and impartial. The American Society of Civil Engineers (ASCE) developed this traditional form of DRB and related model DRB contract provisions. DRBs have been used on more than a thousand projects in North America beginning in the late 1970s. The key features of the traditional DRB process include the following:

- _____ (a) **Technical expertise of DRB.** The most commonly used model DRB provisions require that DRB members be experienced with the type of construction involved with the project.
- _____ (b) **Project familiarity.** In addition to possessing technical expertise, DRB members develop project familiarity by reviewing project documents, making scheduled site visits, and attending periodic progress meetings. Unlike most other forms of dispute resolution, DRB members typically learn about the project and develop familiarity *before* a dispute arises.
- _____ (c) **Real-time dispute resolution.** DRBs are intended to hear disputes as they arise over the course of the project. This

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is meant to reduce the friction that often develops between owner and contractor when disputes remain unresolved or are left unaddressed until the end of the project. This real-time dispute resolution feature also allows parties to focus on technical issues while events are fresh, rather than attempt to reconstruct them years later as often occurs in litigation and arbitration.

- _____ (d) **Condition precedent to litigation.** A dispute ordinarily must be submitted to the DRB before a party may commence litigation or binding arbitration.
 - _____ (e) **Nonbinding recommendations and their admissibility into evidence.** DRB recommendations are not binding on a party unless the recommendations are accepted or a party fails to reject the recommendations within the contractually specified time period. If the dispute remains unresolved, the most commonly used model DRB provisions provide that DRB recommendations are admissible into evidence whether the ultimate adjudicator is a judge, jury, or arbitrator. This provides a coercive element to DRB recommendations.
 - _____ (f) **Comparison with other forms of ADR.** Courts in various contexts have characterized the DRB process as either a form of mediation or form of binding arbitration. However, the DRB process has unique features that distinguish it from both mediation and arbitration. For example, unlike mediation and arbitration, DRB members develop first-hand familiarity with the project prior to hearing disputes.
- _____ 2. **Creation of a DRB and Enforcement of DRB Provisions.**
- _____ (a) **DRB specifications and three-party agreement.** A DRB is created by adding DRB specifications to the construction contract and having a separate “Three-Party Agreement” executed among the owner, contractor, and DRB members. The DRB specifications and the Three-Party Agreement, collectively referred to as “DRB provisions,” should be read together and should be consistent with each other.
 - _____ (b) **Enforcement of DRB provisions.** A number of legal disputes can arise out of DRB provisions. The Three-Party Agreement usually has a forum selection clause specifying that any disputes “arising out of” the Three-Party Agreement are to be resolved in a designated court and provides that the DRB members consent to personal jurisdiction. It is not uncommon for an owner or contractor to seek to enforce DRB provisions through a declaratory relief action, a claim for specific performance, or an action or motion under the Federal Arbitration Act or a state arbitration code (for example, petition to com-

pel submission of a dispute to the DRB). The applicability of arbitration statutes may itself be the subject of disagreement between the parties given the differences between arbitration and the DRB process.

- ___ 3. **Model DRB Provisions.** Drafting DRB provisions need not be a made-from-scratch endeavor. There are two basic sources of sample DRB provisions: (1) model DRB provisions prepared by organizations like the Disputes Resolution Board Foundation, the ASCE, the American Arbitration Association, and the International Chamber of Commerce; and (2) DRB provisions from prior projects. Some organizations make model DRB provisions and related guidance available on their websites. See, e.g., the Dispute Resolution Board Foundation website at http://www.drb.org/manual_access.htm; American Arbitration Association website at <http://www.adr.org/index2.1.jsp>. A number of publications discuss differences between available model DRB provisions and serve as a useful resource when drafting DRB provisions.
- ___ 4. **Drafting Issues.** The drafting issues discussed here are among those that warrant consideration when preparing DRB provisions.
 - ___ (a) **Admissibility of DRB recommendations.** The parties should evaluate whether to modify model DRB provisions to specify that DRB recommendations shall *not* be admissible into evidence. Conventional wisdom holds that a party is more likely to accept unfavorable DRB recommendations or otherwise settle a dispute knowing that unfavorable recommendations would be admissible in subsequent proceedings. On the other hand, the admissibility of DRB recommendations may cause DRB proceedings to become more adversarial, with parties “lawyering up” for DRB hearings. Similarly, a party who believes that the DRB is disposed in its favor may rush to have the DRB hear disputes, not for purposes of attempting to resolve the disputes, but to gain an advantage in litigation. This sort of strategic conduct may be inconsistent with the spirit of the DRB process. Parties should consider these potential trade-offs.
 - ___ (b) **Right to remove DRB members and standards for removal.** At times, a DRB member may lose the respect or confidence of the owner or the contractor. In these circumstances, the owner or contractor may seek to remove one or more members of the DRB to restore confidence in the board. Because a DRB’s recommendations are not binding on the parties, it is important that both the owner and the contractor trust and respect the DRB. Otherwise, the DRB’s recommendations are less likely to be accepted by the parties and the DRB’s effectiveness will suffer. Model DRB provisions vary when it

comes to removal of DRB members, however, and should be modified as appropriate.

____ (i) **Contractual right to remove DRB members.** Differences exist among model DRB provisions when it comes to the express right to remove a DRB member. Some model provisions provide that a party-appointed member may be removed only by the party who appointed that member, provide no express right to remove the appointee of the other party, and allow removal of the chairperson only with the concurrence of the two party-appointed members. The parties should consider modifying model provisions to permit the owner or the contractor to remove any of the three DRB members. Doing so permits replacement of any of the DRB members so that mutual confidence in the DRB can be more easily restored.

____ (ii) **Standard for removal of DRB members (“for-cause” versus “at-will”).** Some model DRB provisions permit a party to remove its appointee “for cause,” while others permit removal “for or without cause.” Both of these standards have advantages and disadvantages. The for-cause standard reinforces that DRB members should not be removed blithely, because DRB members build up project familiarity—one of the features of the DRB process that allows for efficient consideration of disputes. When DRB provisions have a for-cause standard, however, the other party may seek to block removal of a DRB member, leading to collateral litigation over the right to remove a DRB member.¹ For this reason, parties may want to ensure that the DRB provisions provide that a party may remove not only its appointee but any of the DRB members “for or without” cause. The risk of this approach is that it can lead to strategic behavior when it comes to replacing DRB members, and replacement of members results in the board’s loss of historical knowledge of the project. Of course, if there is a loss of confidence in the DRB, adverse DRB recommendations invariably will be rejected, so it may be better to allow for removal of DRB members without having to show “cause.”

____ (c) **DRB qualifications—attorney or retired judge.** None of the model DRB provisions require that a DRB member have any

legal training. Instead, DRB members must have technical expertise or experience. A misconception exists that DRBs do not deal with legal issues. In fact, DRBs deal with a host of legal issues. DRBs address contract interpretation questions and elements of claims (for example, differing site condition claims, delay claims, defective specifications, etc.). The parties should consider whether one member of the panel, possibly the chairperson, should be an experienced construction lawyer or retired judge familiar with construction law.

____ (d) **Binding effect of DRB recommendations.** Several drafting points related to the binding effect of DRB recommendations should be considered.

____ (i) **Extending the time to respond.** Although recommendations issued by a traditional DRB are not automatically binding, the recommendations can become binding in the event that a party does not reject the recommendations within the contractually specified time limits. Consider whether the time period for a response should be longer than specified in the model provisions. Many model DRB provisions allow only 14 days to respond to DRB recommendations. Absent a response, the DRB recommendations are deemed to have been accepted by the nonresponding party. Many public agencies cannot accept DRB recommendations that obligate them to increase the contract value without obtaining approval of the agency's board, and the board may not be able to meet within the 14-day window for responding to the recommendations. As a result, the public agency must protect itself by rejecting the DRB recommendations or ask for agreed-upon extensions to respond to the recommendations.

____ (ii) **Hybrid DRBs that issue binding recommendations.** Some owners have modified the conventional DRB process to provide that DRB recommendations are to be automatically binding on certain types of disputes, or disputes below a certain dollar value. This fundamentally changes the role of the DRB and the dynamics of a hearing because the DRB essentially functions as a binding arbitration panel. When a DRB's decisions are to be binding based on a certain dollar threshold, one or the other party may disagree about how to aggregate or disaggregate the value of the claims for purposes of

applying the threshold. Careful drafting is required to minimize disputes over whether a “hybrid” DRB is to act in its capacity to issue binding or nonbinding recommendations. The preferred practice is to not authorize DRBs to issue recommendations that are automatically binding.

- ____ (e) **Limitations on the DRB’s jurisdiction and other jurisdictional issues.** Most model DRB provisions do not limit the types of disputes the DRB may consider. This may come as a surprise to a public or even private owner, who simply uses “off-the-shelf” model DRB provisions. Parties should carefully consider whether any express limitations should be placed on the DRB’s jurisdiction or the type of disputes that may be heard by the DRB. Even though limiting the DRB’s jurisdiction may give rise to disputes over the scope of jurisdiction, it is advisable to consider the “jurisdictional” issues identified here when drafting DRB provisions and modify form agreements as appropriate.

- ____ (i) **Subject matter carve-outs.** Consideration should be given to whether certain issues should be carved out from the DRB’s jurisdiction, including disputes concerning: (a) terminations for cause, (b) project labor agreements, (c) owner-controlled insurance programs, (d) certain statutory claims (for example, prevailing wage claims, violations of a state’s false claims act), and (e) other issues that an owner may or may not want to have heard by a DRB (for example, owner’s right to direct removal of contractor personnel for safety violations). Drafting clear carve-outs from a DRB’s jurisdiction can be easier said than done. For instance, consider an exclusion from jurisdiction for violations of a state’s false claims act. If a contractor asserts a differing site condition claim and the owner believes the claim constitutes a “false claim,” an issue may arise as to whether the DRB can consider the contractor’s differing site condition claim or whether the DRB is only precluded from considering the owner’s affirmative claim for violation of the false claims act.

- ____ (ii) **Dollar limitation on DRB’s jurisdiction.** Some owners have modified DRB provisions to limit the jurisdiction of the DRB or alter the role of the DRB, depending on the dollar value of the claim. For example, an owner might limit the DRB’s jurisdic-

tion to claims with dollar values below \$1 million. Or DRB recommendations, as discussed earlier, might be binding only on claims below a threshold amount. Disputes can arise over (a) how the value of claims are determined, (b) the authority of the DRB to recommend an award in excess of any limitation on its jurisdiction, (c) how a claim is defined and the aggregation or disaggregation of claims for purpose of any dollar limits on jurisdiction, (d) the value (if any) of time only claims (that is, claims seeking an extension of contract completion dates or milestone dates), and (e) who resolves these disputes. Clear drafting can minimize, but may not eliminate, disagreements on such matters.

- ____ (iii) **Exhaustion of contractual claim procedures.** Parties sometimes disagree over whether contractual claim procedures must be completed prior to a DRB hearing. The DRB provisions should clearly indicate whether there are any preconditions to initiating a DRB hearing and whether the DRB has jurisdiction to consider whether those preconditions have been satisfied or excused.
- ____ (iv) **Jurisdiction to conduct a hearing in the absence of a party.** Most model DRB provisions do not expressly address whether a DRB may conduct a hearing in the absence of a party. This may create uncertainty about how to proceed should a party refuse to attend a DRB hearing. Model DRB provisions can be clarified in either of two ways. First, model provisions can be modified to make clear that the DRB provisions are “self-executing,” in that the DRB may conduct a hearing in the absence of a party, provided adequate notice of the hearing has been given to the party. This has the advantage of not requiring court intervention. Second, model provisions can be modified to require that a court order first be obtained on the propriety of conducting a DRB hearing, when a party refuses to attend. There is no perfect solution to this problem. By not expressly addressing this issue in the DRB provisions, however, the resolution of such standoffs becomes less predictable.
- ____ (v) **Duration of DRB’s operation.** Most model DRB provisions provide that the DRB is to continue to

function until the contractor receives final payment. In addition to excluding from the DRB's jurisdiction disputes over termination, drafters of DRB provisions should consider whether the DRB should automatically cease to function where the owner terminates the contract or the contractor. A DRB is designed to ensure prompt resolution of disputes without litigation, to help maintain positive relations between owner and contractor, and to facilitate successful completion of the project. A default termination often signifies a complete breakdown in relations between owner and contractor and frequently yields high-stakes litigation. The propriety of the termination becomes an issue of overriding concern. Thus, it may be advisable, depending on the project, to provide that the DRB is to cease to function upon termination of the contract or the contractor.²

- (vi) **DRB jurisdiction over subcontractors and subcontractor claims.** The traditional DRB only considers subcontractor "pass-through claims" that are asserted by the general contractor against the owner. Some owners have expanded the DRB's jurisdiction to disputes between subcontractors and contractors and between subcontractors and owners. This has been accomplished in a variety of ways, such as specifying in the prime contract that the DRB provisions are to "flow down" to the subcontracts and that subcontractor claims are to be submitted to the DRB. Before expanding the DRB's jurisdiction in this manner, careful consideration needs to be given to how this is to be accomplished. Applying the doctrine of unconscionability, at least one California case has held that the DRB process, as structured and applied to subcontractors who had no role in selecting DRB members, was "presumptively biased and unenforceable as a condition precedent to [a] subcontractor pursuing litigation."³ An earlier decision of the Southern District of New York, without discussing issues of unconscionability, stayed a subcontractor's claims, holding that the subcontract required that the subcontractor submit claims to the DRB before initiating litigation.⁴

____ (vii) **Who decides the scope of the DRB's jurisdiction?**

If a dispute arises between the owner and the contractor over the scope or nature of the DRB's jurisdiction, one party may seek to present the issue to the DRB and another party may seek to have the matter adjudicated by a court. The outcome will depend on the law of the local jurisdiction and the language of the contract. Because DRBs are creatures of contract, drafters of DRB provisions can expressly address this issue or leave it indeterminate, recognizing that doing so may invite collateral litigation over who decides the scope of the DRB's jurisdiction.

Notes

1. See, e.g., *Los Angeles County Metro. Transp. Auth. v. Shea-Kiewit-Kenny*, 59 Cal. App. 4th 676 (1997).
2. See *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, No. CIVS03-949 LKK/GGH, 2006WL 902561, at *9 (E.D. Cal., Apr. 5, 2006) (public owner not required to submit termination dispute to DRB because DRB provisions provided "following termination, the DRB would cease to function").
3. *Schulster Tunnels/Pre-Con v. Traylor Bros. Inc./Obayashi Corp.*, 111 Cal. App. 4th 1328, 1332 (2003).
4. *BAE Automated Sys., Inc. v. Morse Diesel Int'l., Inc.*, No. 01 Civ. 0217 (SAS), 2001 U.S. Dist. LEXIS 6682, at *1 (S.D.N.Y. May 21, 2001).

