Plain Talk About
Large Construction Project Disputes

by

Peter G. Merrill

It is virtually impossible to complete a large construction project without any disputes developing between any of the parties. Those who plan ahead will most likely be less adversely affected by the disputes that might develop. Although Dispute Review Boards (DRB) have been around for many years, they traditionally only offer advisory opinions upon which the parties should be able to resolve their dispute through discussions based on those advisory opinions. If the parties can not resolve their dispute after considering the advisory opinion of the DRB, they would need to proceed on to an outside arbitration or to litigation, whichever is specified in the construction contract, or Dispute Review Board Agreement, to reach a final and binding resolution to the dispute.

According to the Rand Corporation, the average construction litigation case takes approximately 2 ½ years to complete including appeals. During that time, the parties often continue working on the project but may perform differently because of the pending dispute. If the dispute is between two major parties in the construction project, a project may have to shut down until the dispute is settled. The comfort level of the parties working together will diminish and the project will begin to see a different level of cooperation between the disputing parties. Regardless of the nature of the dispute, the project most likely will be adversely affected and will most likely run behind schedule and might run over budget due to the effects of the dispute.

When a major sports event is scheduled to be run, a medical emergency crew, trained to handle medical emergencies, usually stands by just in case someone is injured. Response time can mean life or death in some instances. A construction project can utilize the same planning ideas. If you have construction-knowledgeable specialists available in the event that there is a construction dispute, the same emergency treatment can be rendered by those construction experts to minimize the injuries to the construction project. Better yet would be to have a team of construction experts meeting on a regular basis to not only handle any disputes, but to help in the prevention of any disputes. That team of construction experts is known as a Dispute Review Board (DRB).

DRBs have been utilized by the construction industry across the world for many years. A DRB usually meets on a regular basis; every month, two months, quarterly or as specified in the DRB Agreement. The DRB will review the progress of the project and will try to anticipate any possible future disputes or will handle any disputes that have developed since their last meeting. All DRBs issue an "Advisory Opinion" specifying how the DRB feels the issue should be handled by the parties to prevent or settle the dispute. Each party to the dispute has an opportunity to present their case to the DRB for their consideration. As the DRB has the success of the project in mind and acts as neutrals without representing any of the parties, it renders its advisory opinion as to how the dispute should be handled for the betterment of the project to keep the project on time and within budget.

As mentioned earlier, if the parties can come to an agreement through discussions based around the

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advisory opinion, the dispute will come to an end. If the parties do not come to an agreement, the dispute will need to be referred to an outside arbitration or to litigation. Arbitration and especially litigation can take several months to reach a final and binding decision from the arbitrator, judge and/or jury. It can easily take years for a dispute to come to a final settlement. Many parties, especially small subcontractors and similar small companies go out of business waiting for a dispute to settle.

It would certainly be in the interest of the success of the project to have the dispute handled as quickly as possible. It would be even better if all disputes could be handled quickly and inexpensively by construction-knowledgeable neutrals. A traditional DRB that only offers advisory opinions can accomplish this only if the parties agree on how to handle the dispute as a result of an advisory opinion.

Instead of using a traditional DRB, an Extended Dispute Review Board (EDRB) can provide full Alternative Dispute Resolution (ADR) including mediation and binding arbitration, which would insure that all disputes can be handled and settled entirely "In-House". In addition, an EDRB can provide its services to all parties involved in the construction project including not only the Project Owner and the General Contractor, but all subcontractors, sub-subcontractors, material suppliers, service providers, etc. Traditional DRBs usually are very effective in helping to prevent or settle disputes between the Project Owner and the General Contractor; however, any disputes between any other two parties would be outside of the DRB responsibilities and would require those disputes to go on to outside arbitration or litigation. All parties to the construction project under an EDRB are required to agree to utilize the three-step dispute resolution process including advisory opinions, mediation and if necessary, binding arbitration to settle all disputes. Depending on the complexity of the dispute and the preparation time that a party might need to make a proper presentation to the EDRB, a typical dispute can be completely settled in 30 – 60 – 90 days. If a dispute is of a critical nature, the parties may mutually choose to skip the advisory opinion and/or mediation processes and proceed directly to binding arbitration to reach an expeditious final settlement to the dispute. A major benefit of an EDRB is its flexibility which allows to parties to select the best process to settle their dispute.

A recent development designed to assist a DRB or an EDRB and to lessen the costs of a DRB or EDRB is a Construction Settlement Panel (CSP). On major construction projects it is not unusual to see several DRBs each with its own specialization. On the "Big Dig" artery project in Boston, there were 49 different DRBs utilized through out the construction project. These DRBs each met on a regular basis to review the progress of the project and to render advisory opinions as necessary to prevent or handle a dispute. The use of the 49 DRBs was quite costly and several of the DRBs sometimes met as scheduled without really having any important issues to handle. In an effort to provide the same expertise supplied by the many DRBs, without the high costs related to those multiple DRBs, the CSP was developed. The CSP is comprised of several construction-knowledgeable individuals, each with their own special expertise that was supplied by the multiple DRBs, however, the CSP is available only on request and they do not meet on a regular basis as did the DRBs. As an example, there may have been an "HVAC – DRB" that met on a regular basis whether or not there were HVAC issues to handle. If those same individuals were on the CSP rather than the DRB, they could be called upon by a General DRB who might need their expertise if an HVAC related dispute was submitted to the General DRB to be handled. The expense of those HVAC CSP Members would only be incurred when there was a dispute to be handled related to HVAC matters rather than as incurred through the regular DRB meetings. CSP Members would serve as a panel of construction specialists at the request of a General DRB. It would not be unusual to see both construction-knowledgeable specialists and construction ADR specialists on a CSP.

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The members of a CSP would all have been individually selected by the Project Owner and the General Contractor and all required paperwork including the "CSP Member Agreement" would have been executed that would specify the expertise of the CSP Member and his/her required fees for his/her professional services. Keep in mind that all parties participating on the construction project would also have executed the EDRB Agreements including an Agreement to Mediate and an Agreement to Arbitrate and related agreements, addendums and other required documents.

The flexibility of the EDRB program supported by a CSP allows any number of possible combinations of EDRBs. The most popular scenario is to set up one, two or three General EDRBs depending on the size and complexity of the construction project. If those EDRBs found that they were constantly calling on the same CSP Members, it might be advisable for a new EDRB to be established including those CSP Members who were being called upon on a regular basis. CSP members must rearrange their schedules to accommodate the requests of the EDRB. If they were scheduled to meet on a regular basis, scheduling would not be a problem as they could plan far in advance for their meetings rather than trying to juggle their schedule to accommodate the requests of the EDRB.

On more complex construction projects, it might be necessary to set up several specialized EDRBs whose members were not experienced in ADR but who could call on CSP Members with ADR experience to mediate or arbitrate a dispute if the advisory opinion rendered by the DRB was not accepted by the parties to the dispute. In another scenario, there could be several specialized DRBs and one or two ADR DRBs established to handle the mediation or arbitration requirements of the project.

A common misconception is that all DRBs or EDRBs are comprised of construction-technical individuals. It would not be unusual to see a "Financial Oversight EDRB" comprised of a forensic accountant and two other individuals with construction estimating or construction accounting background whose responsibilities would be to analyze all invoices, change orders, addendums, etc. The likelihood of overcharges, kick-backs, payments under the table, graft, corruption, etc. would be minimal if there was a DRB with the responsibility of reviewing the financial matters of the project. As mentioned earlier in this article, the EDRB possibilities are limited only to the imaginations of the major parties, especially the Project Owner who formulates the initial DRB or EDRB program.

As most Project Owners are not experienced with the formulation of a DRB or EDRB program, it is recommended that the Project Owner work with a National and/or International DRB provider firm such as Construction Dispute Resolution Services, LLC (CDRS). That provider should be able to analyze the complexity and requirements of the construction project and should be able to recommend several possibilities for combinations of DRBs, EDRBs and a CSP to properly address the potential disputes of the construction project.

A DRB provider can also coordinate all administrative aspects of the DRB or EDRB program. A typical DRB is formed by an Owner, such as a municipality, putting out a Request for Proposal (RFP) for the public to respond if they would like to get RFPs from individuals who would like to serve on their DRB program. The Owner would have to review those RFPs, select the Members along with the General Contractor and would individually contract with each DRB Member for their services. Those DRB members would then have to make all of their own travel arrangements and would submit their expenses as individuals to the proper party for payment. A DRB provider, such as CDRS, can provide a National and/or International Panel of DRB Members who have all been properly trained in the DRB and EDRB process. In addition, the provider could handle the execution of all required documents including the DRB Member Agreements, Party Participation Agreements, Agreements to Mediate, Agreements to Arbitrate, all CSP

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member agreements and other required documents and forms. At the end of each month, the provider would bill the appropriate party for all three of the DRB, EDRB Members and for all fees and expenses of CSP Members rather than looking to each DRB, EDRB or CSP Member to submit their expenses as individuals. There is always a good amount of additional administrative functions required for each of the meetings of the EDRB that could be handled by the DRB provider.

On large construction projects, bidders usually build in a "Litigation Contingency" into their bids to cover the costs of any future disputes. It is purely a guess as to the future costs of litigations that might be required for dispute resolution. If the EDRB is established prior to the project going out to bid, which is the normal process, the cost of the EDRB would be available through the EDRB provider similar to the bid estimates for the other aspects of the construction project. If the established EDRBs did not need any special meetings, the costs related to EDRB program would be available at the time of the bid and contractors would not need to allow for a litigation contingency. The costs for any special EDRB meetings, if required, are usually shared equally by the parties involved in the dispute.

This article is titled "Plain Talk about Large Construction Project Disputes". Let's talk about some other plain facts about construction disputes. If you were injured or became sick, you would go to a doctor or a hospital for the best treatment. You would not go to a judge or a jury to decide how to administer to your injury or illness. A doctor knows how you are built and how to remedy your medical problem. Likewise, a construction-specialist knows how the project should be built and the best ways to correct a problem or a dispute. If you bring a construction dispute before an arbitrator, judge or jury who are not familiar with construction, the parties, usually with the assistance of their attorneys make a presentation to convince the arbitrator, judge or jury as to which party is correct in their position. The best and most convincing presentation usually is the winner, not necessarily which presentation was right or wrong. As a result, CDRS highly recommends that all parties to a construction project utilize construction-knowledgeable individuals to decide how to prevent or settle a construction dispute. CDRS also recommends the use of attorneys on DRBs. An attorney, with construction litigation or construction ADR experience can be a very effective DRB chair and will be able to conduct the affairs of the DRB in a professional and organized manner.

Although there are fixed and variable costs related to the implementation of the DRB or EDRB program, the direct costs of just one outside arbitration or litigation can be many thousands of dollars and the indirect costs of a project delay or similar occurrence, while waiting for a dispute to be settled, would be impossible to estimate. If there were several major disputes that went on to outside settlement through arbitration or litigation, the project would most likely experience unnecessary delays and additional non-budgeted expenses. The existence of an EDRB program can also give the parties a "peace of mind" as to success of the project relating to the proper handling of construction disputes. The EDRB program offers a type of insurance that virtually guarantees the parties that they will never be involved in lengthy and costly litigations that can fester for many months or even years before they are settled.

Additional information, including many of the required agreements, forms and documents concerning the DRB, EDRB and CSP programs is available on the CDRS website: www.constructiondisputes-cdrs.com or you can call CDRS toll-free at 888-930-0011.

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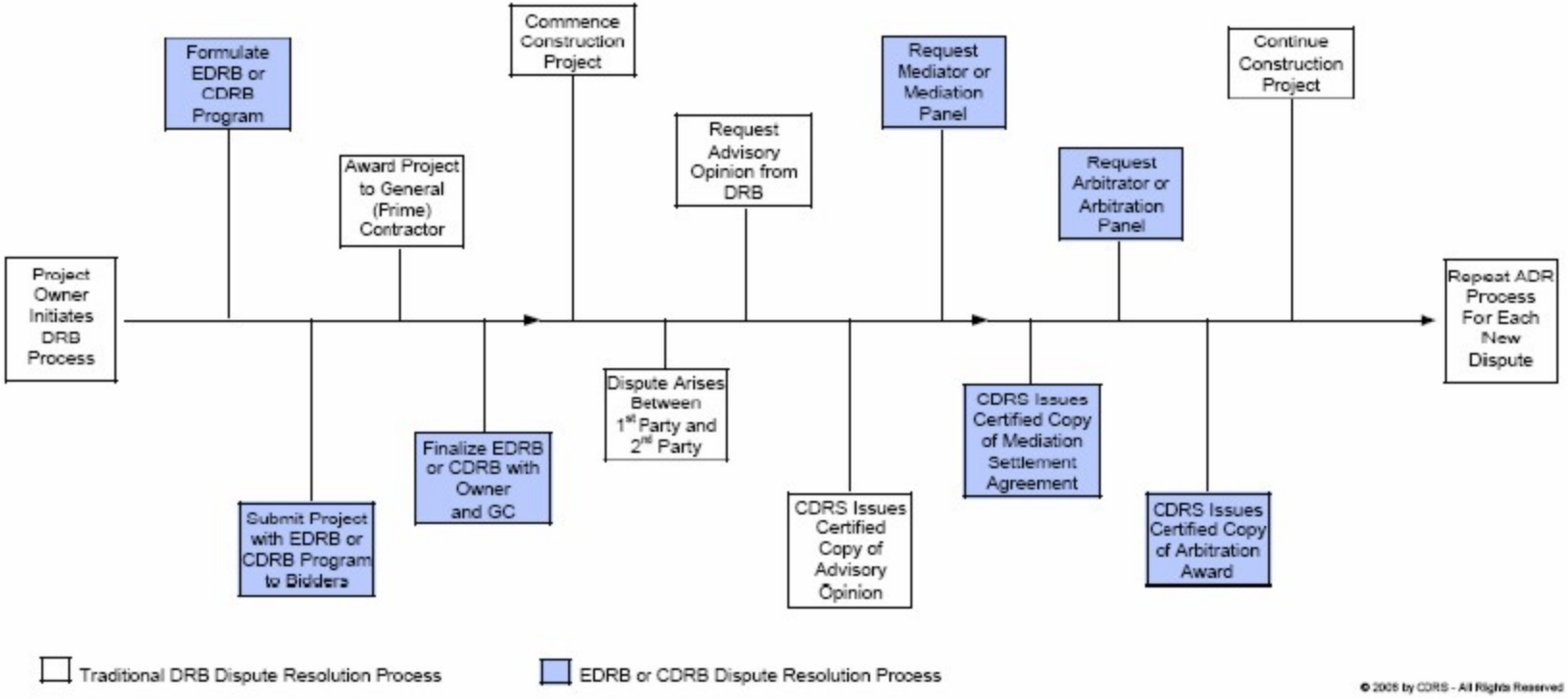

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