

Expanded Dispute Review Boards and Construction Settlement Panels May Revolutionize the Construction Industry Dispute Resolution Process

By Peter G. Merrill

All construction projects have two primary goals: to complete the construction project on time and within budget. Secondary goals include having the general contractor and all subcontractors make a profit and for the project owner to end up with the building, road, bridge, tunnel, etc. that is built to specifications that will function as it was designed to do.

On larger construction projects, it is virtually impossible for the entire project to be completed without any disputes developing between the General Contractor (GC) and the Project Owner (Owner), between the GC and Subcontractors (SC), between the SC and Sub-subcontractors (SSC), between the GC or SC and a major supplier or service provider and so on between all of the parties working on the construction project including the architects and designers. How quickly those disputes are handled and how much money will have to be spent on the dispute settlement process may very well determine if the parties to the construction project can make a bottom line profit at the end of the construction project. The fairness and reasonableness of the decision of the judge and/or jury or arbitrator is also important to the bottom line of the parties involved in the construction project.

Many large construction disputes are settled through the use of a three-person panel (tribunal) utilizing the arbitration process whereby three construction-knowledgeable individuals render a final and binding arbitration award that completely settles the dispute and is generally not subject to appeal. Those three construction-knowledgeable individuals are mutually selected by the parties in dispute, based on their depth of knowledge related to the issues in dispute. Based on that theory, the Dispute Review Board (DRB) was created. The DRB process is similar in that the Owner and the GC select three individuals to render advisory opinions or recommendations to not only settle a dispute but also to assist the parties in avoiding disputes before they actually occur.

As mentioned above, the DRB only offers advisory opinions that hopefully will give both parties an indication of what a Tribunal Arbitration Panel would render if the dispute came before them. In most cases, that advisory opinion or recommendation of the DRB does help the parties to come to a satisfactory resolution to their dispute. The DRB does not offer any other form of Alternative Dispute Resolution (ADR) such as mediation or binding arbitration.

If the advisory opinion or recommendation of the DRB is not accepted by the parties, they will need to proceed to litigation or whatever dispute resolution process is specified in the construction contract to settle disputes. In addition, the DRB traditionally only services the Owner and the GC. If a dispute develops between the GC and a major SC, or between any other two parties to the construction project, they cannot utilize the DRB to assist them in handling their dispute.

With this in mind, Construction Dispute Resolution Services, LLC, has developed an “Expanded DRB” (EDRB) that is supported by a “Construction Settlement Panel” (CSP). See Flow Chart at the end of this article. This new process offers the regular services of a DRB but offers those services to as many major participants in the construction project that the Owner and the GC choose to include in the process. In addition, full ADR services including mediation, binding mediation and arbitration are also offered that in effect create a totally (in-house) adjudication process that offers full settlement options without the use of the courts. The major benefit of this program is the speed and low cost that the parties will experience in settling their disputes. In addition, the disputes will be settled by construction-knowledgeable ADR Specialists as opposed to going before a judge or jury that usually has a limited knowledge on construction issues if any knowledge of construction at all. The settlement should be more fair and equitable for the parties based on the construction knowledge and expertise of the ADR Specialists as opposed to which party makes the best presentation to a judge and/or jury.

On the Central Artery/Tunnel Project in Boston, there were 47 separate DRBs in operation each with a special expertise. The DRBs were quite valuable in preventing and settling disputes, however, the EDRB model developed by CDRS utilizes far fewer DRBs supported by one Construction Settlement Panel. Instead of many DRBs with a special expertise, a few general DRBs would be utilized with construction-knowledgeable individuals who have an overall expertise concerning the type of project being constructed such as a bridge, road, railroad, airport, hotel, shopping center, etc. If a dispute came before that DRB related to a mechanical problem, the DRB would call up one or more mechanical specialists, who were already selected to be available on the CSP. These CSP Specialists would serve as neutral advisors to the DRB. Also on the CSP would be pre-selected mediators or arbitrators, who would be called on if the parties could not settle their dispute based on the advisory opinion or recommendation of the DRB supported by the CSP. If the dispute went on to binding mediation or binding arbitration, the dispute would be completely

settled in-house by these construction-knowledgeable ADR Specialists, who are serving on the CSP.

Keep in mind that construction-knowledgeable ADR Specialists, who are selected to serve on a traditional Tribunal Arbitration Panel, are usually selected by the parties after a dispute has developed and the parties are totally familiar with the issues in dispute. In selecting the members of a DRB, they are selected prior to the commencement of the construction project so there is no way for the parties to know the nature of future disputes or the specialization that might be required of a DRB member as they are selected before construction has commenced.

DRBs meet on a regular basis such as monthly, bi-monthly, quarterly, etc. They meet whether or not there are any disputes to be handled. Remember that the DRB, in reviewing the process and status of the construction project, might recognize a dispute that might occur in the future and can render assistance in avoiding or preventing that dispute from occurring. DRBs regularly conduct jobsite visits prior to their formal meeting so as to be up-to-date on the actual progress of the project.

The EDRB model calls for as many general DRBs as may be required on the construction project that would be supported by one Construction Settlement Panel with as many construction-knowledgeable experts and ADR Specialists as might be required. Their services (CSP) would be utilized only when their services were requested by the EDRB. Those EDRBs would number far fewer than the number of DRBs that would normally be utilized on a large construction project similar to the Central Artery/Tunnel Project. The EDRB model also calls for there to be a threshold selected for participation in the services of the EDRB and CSP. As an example, on a multi-million dollar project, all SCs and SSCs who had a construction contract in excess of \$250,000 would be required to agree to utilize the EDRB process to settle disputes on this construction project. The EDRB model allows the parties to bypass the DRB hearing. They can immediately request the services of a mediator or even an arbitrator or three arbitrators on larger disputes if the dispute is of great importance and must be handled in the most expeditious manner so as to not delay or cause other problems with the construction project.

A typical CSP will have architects, designers, mediators, arbitrators, electrical, mechanical, structural, HVAC, tele-communications and any other construction-knowledgeable specialists that might be required to assist the parties or the EDRBs with dispute resolution. CSP members are paid a small fee to agree to

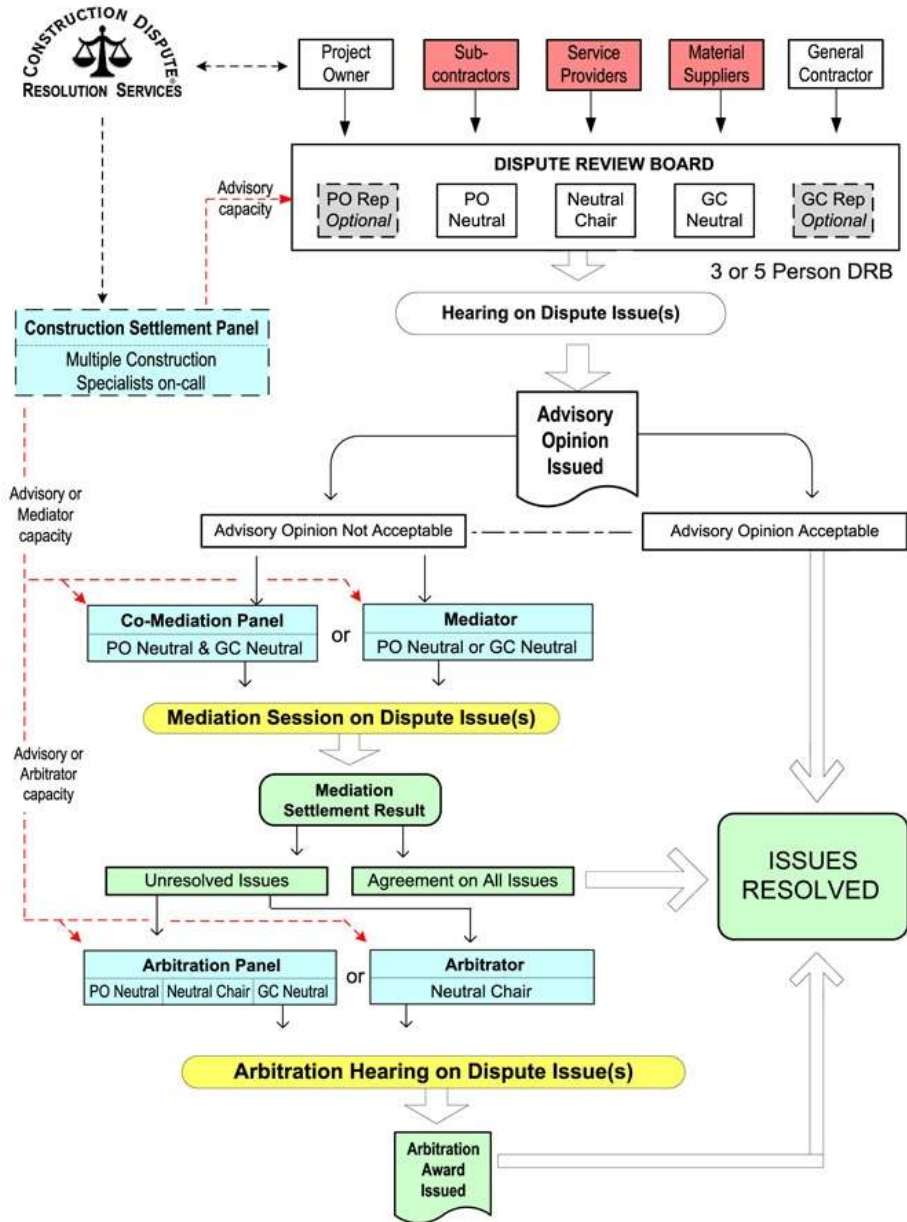
serve on the CSP and may never be called upon by the EDRBs or the parties to the construction project. If their services are requested, the parties will not have to go through a selection process to agree on a specialist as they will have already agreed to have them serve on the CSP. This pre-selection provides a more expeditious settlement of disputes.

DRBs are utilized internationally. The World Bank has routinely mandated that international construction projects utilize the DRB system to assist the parties in avoiding and settling disputes. Last year, the annual international meeting of the Dispute Resolution Board Foundation was held in London, England; in prior years it was held in Bucharest and South Africa. The International Chamber of Commerce has their own set of DRB Rules and Procedures that is used by many international DRBs. There are other DRB Rules and Procedures available through other International ADR Provider organizations. In Europe and around the world, DRBs are known as Dispute Boards (DB), Dispute Adjudication Boards (DAB), and other similar names. It might interest you to know that Price Waterhouse Coopers accounting firm conducted a survey in 2006 whereby over 92% of those involved in international construction projects preferred binding arbitration to having to utilize The Hague or other international courts to settle construction disputes. I think that says something very positive about the advantages of binding arbitration over litigation on the international construction scene.

Having a construction expertise is vital to serving on a DRB, EDRB or CSP. Having ADR training such as mediation and especially arbitration training would make that construction expert to be a more qualified person to serve on an EDRB. CDRS requires all of their ADR Specialists to attend their two-day Arbitration Training Course and their one-day DRB Training Course in order to become a member of the CDRS Arbitration Panel and the CDRS DRB Panel. Those training courses are also open to the rest of the ADR community on a limited basis. ACR Members will receive a special discount if they attend the courses. Further information on those training courses that are being conducted on October 15, 16 and 17, 2009 in Albuquerque, New Mexico can be found on the CDRS website www.constructiondisputes-cdrs.com or by calling CDRS at 888-930-0011.

As you can see, this new dispute resolution process opens up many opportunities to the ADR industry to become involved in the settling of construction disputes both nationally and internationally. It also offers a private dispute resolution process to the parties involved in the construction dispute on a totally in-house basis avoiding the lengthy and costly litigation process.

CDRS EXPANDED OR COMPREHENSIVE DISPUTE REVIEW BOARD OPTIONS FLOW CHART



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| Traditional DRB | Additional Party Options | ADR Process Results |
| Construction Settlement Panel | ADR Process Options | DRB Member Options |

The Author: Peter G. Merrill is the President and CEO of Construction Dispute Resolution Services, LLC, one of the largest construction ADR providers in the USA with Construction ADR Specialists located in all 50 states, Washington DC and in several foreign countries. He serves on the Executive Board of Directors of the National Association of Home Builders and is a member of the Board of Directors of the New Mexico Mediation Association.