

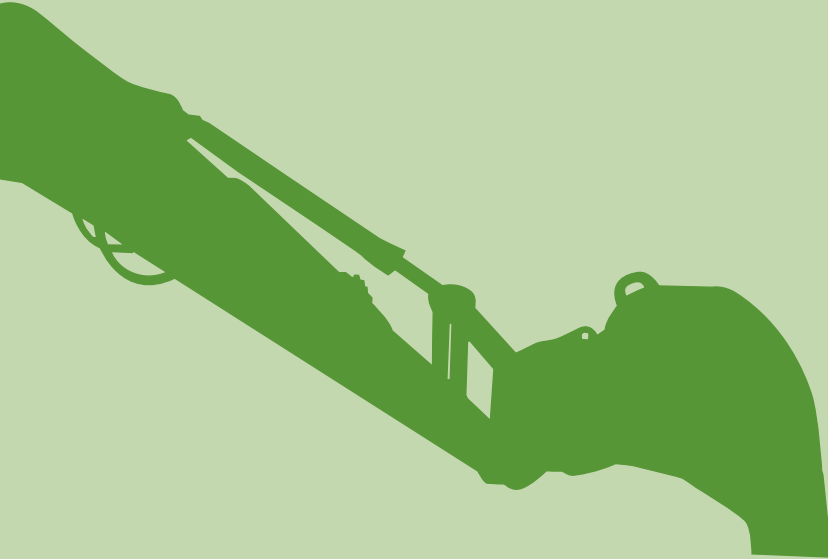


Construction Dispute Review Boards + Settlement Panels:

About the Author

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Save Time, Money, + Headaches



When a dispute review board assists the parties in preventing a dispute from happening, there is a definite savings not only in direct dollars and time, but also in the mental pressures that would have occurred if the issue had developed into a dispute.

BY PETER G. MERRILL

This article was adapted from Construction Dispute Resolution Services, LLC's article for the Lorman newsletter, Construction Update, August 2006.

IT IS VIRTUALLY IMPOSSIBLE TO COMPLETE a large construction project without having any disputes develop between the parties. Dispute review boards (DRBs) can provide the processes and mechanisms to not only help to settle these disputes but also can provide a method to prevent the dispute from ever happening.

DRBs have been used by the construction industry for many years. They have been primarily used by the horizontal construction industry on projects such as roads, railroads, bridges, dams, tunnels, etc. It is only in the last few years that DRBs have been used by the vertical construction industry and are available for projects such as commercial buildings, apartment buildings, condominiums, apartment buildings, manufacturing facilities, shopping centers, department stores, schools, universities, airports, etc.

The first DRB in the United

States was utilized in the construction of the Eisenhower Tunnel in Colorado. A more recent use of the DRB process is the "Big Dig" project in Boston, Massachusetts, where 49 different specialized DRBs were employed. Many state highway departments regularly use DRBs for their road construction projects.

Disputes can be very expensive not only due to the high costs directly related to the dispute settlement processes, such as arbitration or litigation, but also because of the delays and possible shutdown of the project while disputes are being settled. Although there are several different models of DRBs, if the board provides for alternative dispute resolution (ADR—mediation and binding arbitration), the project is virtually guaranteed that it should not experience any lengthy delays and should never be shut down because of any construction-related disputes. The costs of settling disputes through a DRB should

be minimal as opposed to seeking outside arbitration or litigation to settle the dispute. The disputes handled by a DRB are settled "in house" and are much faster than having the dispute handled through outside arbitration or by going to court while using the litigation process. As the project continues on, the DRB becomes more familiar with it and can be more valuable in issuing their opinions. It is well known that a construction-related dispute handled by a construction-knowledgeable mediator and/or arbitrator will yield a more "fair and equitable" mediation settlement agreement or arbitration award than a verdict that



was issued by a judge or jury without construction knowledge.

A DRB is generally comprised of three neutral individuals who are selected by the parties to the construction contract, usually the project owner (owner) and the prime or general contractor (GC). The owner will stipulate in the specifications for bidding the project that there will be a DRB (or multiple DRBs) used to try to prevent or handle all disputes relative to the project. The project bidders will all include the estimated costs related to the DRB in their bids as the bid is treated the same as any other line item in the bid. Both the owner and the GC understand that if the services of the DRB are requested more often than estimated, there would be a change order written between the parties to reflect the additional costs. If a DRB is not specified, it is not unusual for a GC to put a "litigation contingency" line item in their bid to cover the possible costs of dispute resolution.

The project owner should contact a DRB service provider early in the project's formation so that the composition and responsibilities of the DRB and their related costs can be computed and added into the bid by the project bidders. A litigation contingency is not necessary to be included in the bid if a DRB that offers ADR services is to be used.

After the GC has been awarded the

bid, the owner and the GC each select a neutral individual to serve on the DRB, and the parties together mutually select an individual to serve as the DRB chair. Some DRBs allow the two neutrals selected by the parties to recommend a third neutral to serve as the DRB chair. The ultimate approval of the DRB chair comes only with the mutual agreement of the parties. The neutral members of the DRB may be selected from a panel of qualified DRB members provided by a DRB service provider or they may be selected from within the construction industry as the parties so choose. Those three neutral individuals will serve as the DRB, from the beginning of the project until the very end of the project, to issue "advisory opinions" and if required, to also serve as mediators and arbitrators. Expanded DRBs sometimes allow for five member DRBs with an owner representative and GC representative serving on the DRB for advisory opinions only. The representatives provide information only to the DRB and are not involved in any mediations or arbitrations.

It is critical for the DRB members to have prior expertise—construction law or construction ADR experience—in the type of construction involved in the project. Although most projects have only one DRB, it is not uncommon to see multiple DRBs on larger construction projects, each

with their own specialization. On larger projects with multiple DRBs, it is also not uncommon for all but one of the DRBs to be comprised of three neutral individuals, each who have a required construction specialization. Those specialized DRBs only offer advisory opinions related to their specialized field. The other DRB is comprised of three neutral individuals all who have general construction knowledge and also specialize in mediation and arbitration—commonly called the ADR DRB. Any disputes that require mediation and arbitration are handled by that specialized ADR DRB after the specialized DRB has issued its opinion and the parties find that they cannot come to an agreement after

reviewing the advisory opinion. The ADR DRB offers expeditious and inexpensive mediation or arbitration services.

The first meeting of the DRB usually takes place well before the commencement of the construction project and will continue to meet until the DRB members are familiar with all of the aspects of the project. After the project begins, each DRB will usually meet on a regularly scheduled basis—once each month, once each quarter, etc.—and will make jobsite visits, depending on the requirements of the project. They will review any issues that are potential disputes or actual disputes and will issue opinions in the prevention or settlement of all disputes. The opinion issued by the DRB should be a fair and equitable opinion keeping in mind what is best for the overall project. The parties should be able to use that opinion to reach an agreement on how to handle the issue in question. If the DRB is authorized to only issue opinions and is not authorized to provide ADR services (if the parties cannot come to an agreement after they have received and reviewed the opinion), they will need to proceed to outside arbitration or litigation to settle the dispute, which could be a lengthy and costly process. If the DRB is authorized to provide ADR services (if the parties cannot come to an agreement after they have received and reviewed the opinion), the dispute will then go on to

Expanded and Comprehensive Dispute Review Board Process Flow Chart

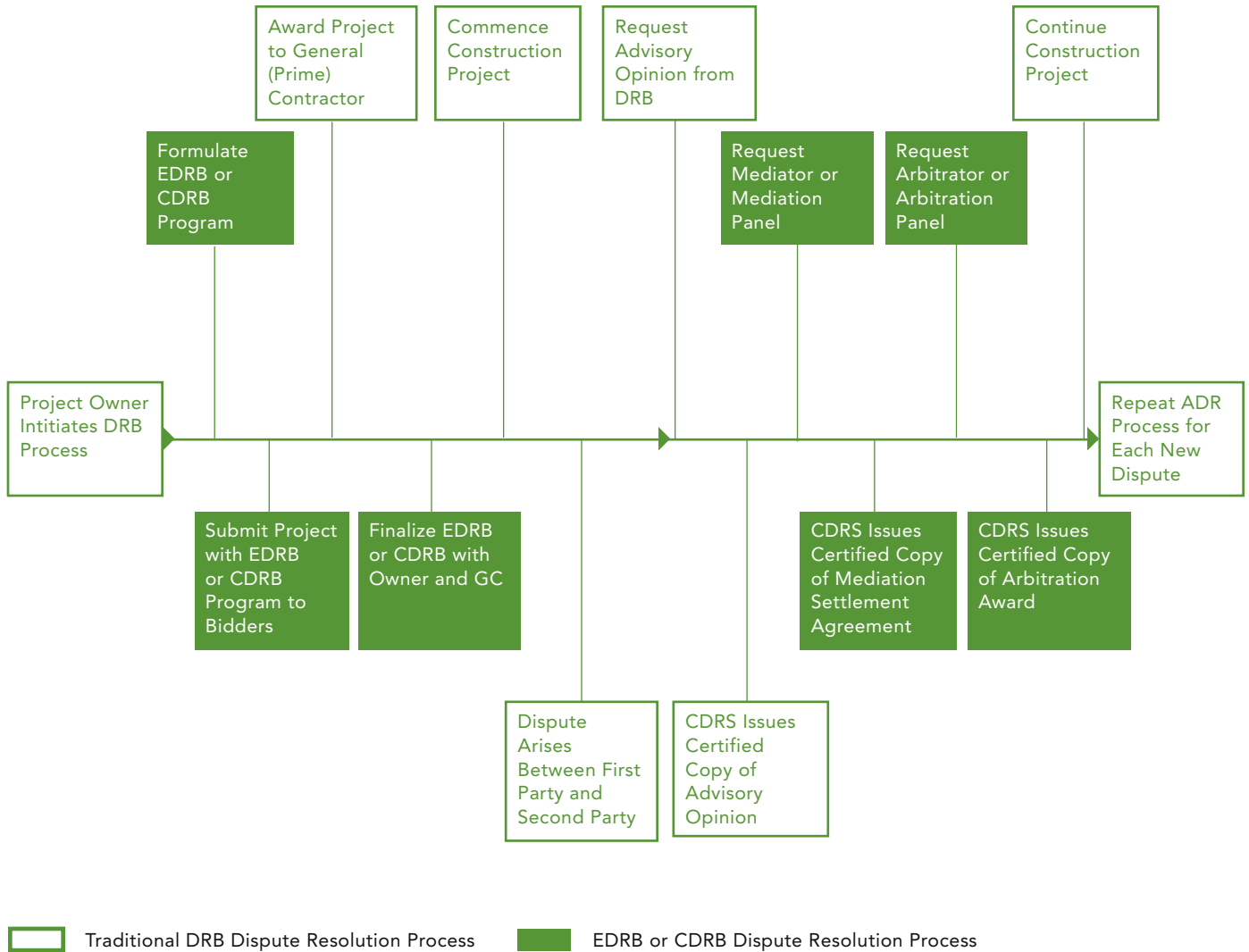


Figure 1.

mediation and/or binding arbitration, to be provided by the DRB, as specified in the DRB agreement.

Comprehensive DRB

The traditional DRB involves only the owner and the GC. While it certainly serves an important role in handling disputes between the parties, it still allows for there to be many disputes between other individuals or entities involved in the project. If a dispute develops between the GC and a subcontractor, material supplier, service provider, etc., it can cause the project

to be delayed or shut down, resulting in additional expenses. The comprehensive DRB (CDRB) involves and protects the entire project and all of its involved parties from costly and lengthy adjudication processes. It incorporates all of the expanded DRB possibilities and provides a mechanism to prevent and settle all project disputes that develop between any two or more individuals or entities involved in the project. All project participants will be required to be involved in the DRB process. Those project participants are obligated to settle their disputes in-house

through the DRB and no one should be able to force any participant into outside arbitration or litigation because of the pre-existing DRB agreement.

DRBs can be put together by the parties on their own; however, it is advisable to consult a professional DRB service provider who can assist the owner in the formulation and composition of the DRB and provide estimated related costs to be given to the project bidders. A DRB service provider can also assist in the selection of the DRB neutrals from their established and trained DRB panel. A DRB service

Expanded or Comprehensive Dispute Review Board Options Flow Chart

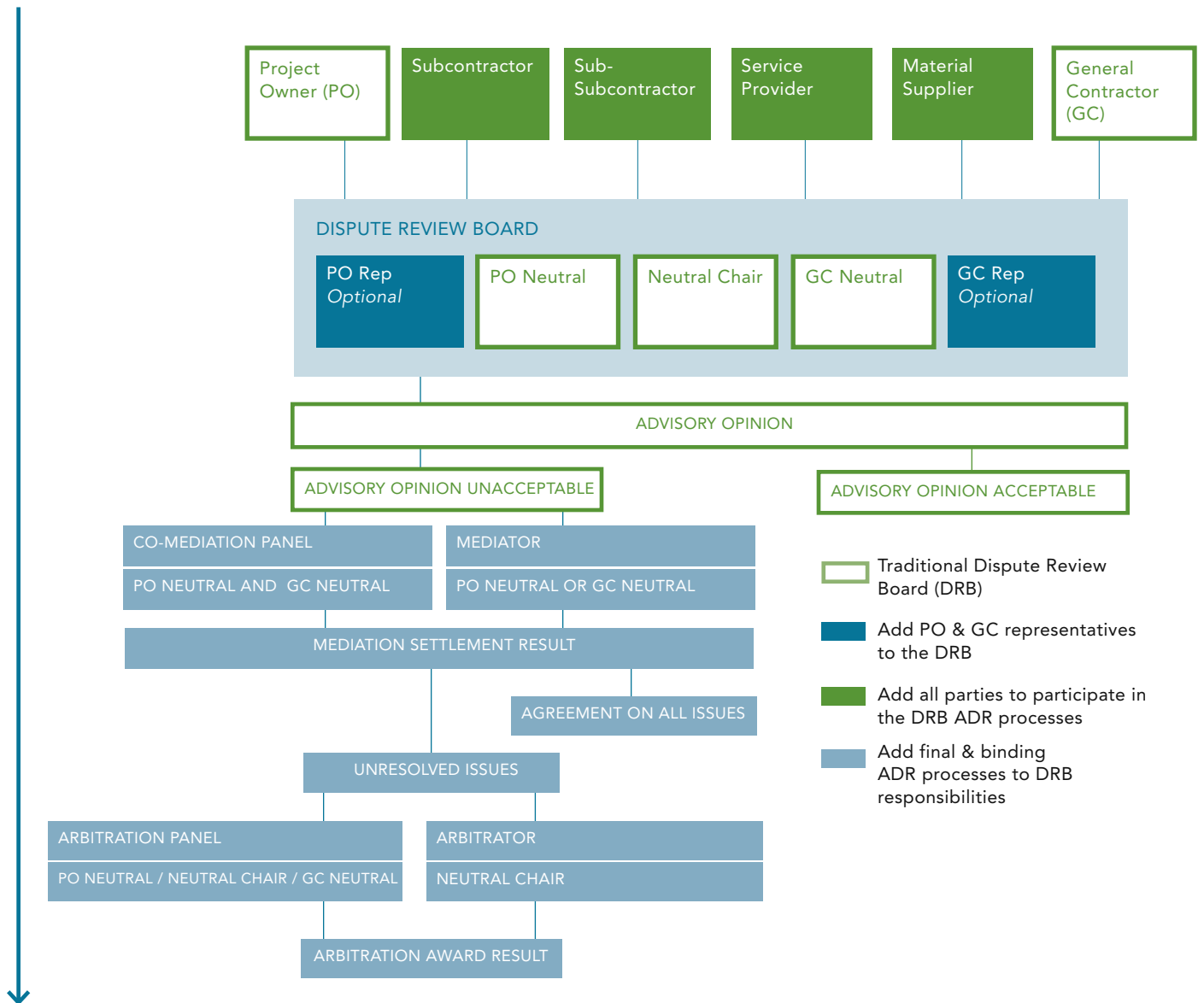
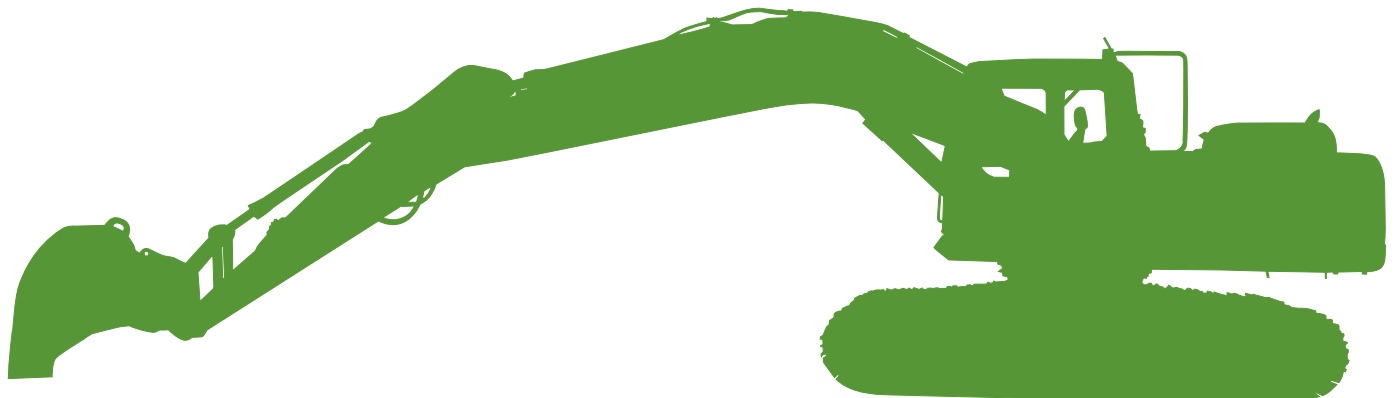


Figure 2.



provider should also handle the complete coordination of the DRB activities, including the regularly scheduled meetings, jobsite visits, and all of the applicable paperwork including the issuance of the official advisory opinion, mediation settlement agreement, arbitration award, DRB member agreements, and mediation agreements and/or arbitration agreements, if applicable. If all of the DRB members are selected from within one DRB service provider's panel, the service provider should be able to issue one monthly invoice (rather than three individual invoices) for the services and expenses of the DRB and its members, which will greatly simplify the responsibilities of the parties in the administration of the DRB.

Construction Settlement Panel

As there is a fixed cost to the regular meetings and jobsite visits of DRBs, some projects may consider using a construction settlement panel (CSP) instead of a DRB. The selection process is similar to the selection process of a DRB, however, the CSP only meets at the request of the parties. They do not meet on a regular basis.

A CSP may have more than three neutrals selected to be members of the CSP due to the expertise of the CSP member. Most of the CSP members are usually selected for their technical construction knowledge with the remainder being selected for their construction law or ADR knowledge and experience. The parties can select neutrals they would like to handle their issue or dispute from this established CSP. The members of the CSP should be available on short notice for a DRB meeting to issue an opinion, conduct a mediation or arbitration, or help in other ways to prevent or settle a dispute. There are no fixed and recurring costs for the CSP, other than the original administrative set-up costs, until the services of the CSP are requested. If the CSP has been properly formulated, it is possible for the parties to forego the advisory opinion and request mediation and/or binding arbitration if the parties feel that the matter is important enough and they need a final and binding resolution to the dispute in an expeditious manner. All required paperwork, including mediation agreements and arbitration agreements, must be completed before the project

begins, so there will not be any additional paperwork delays at the beginning of the mediation or arbitration.

Keep in mind that each DRB and CSP is custom designed for each construction project. Although there are some costs related to both a DRB and a CSP, with the proper application of these in-house dispute resolution processes, the costs that would have been incurred by the parties if they had no pre-arranged dispute resolution process, would be a great deal more. Having no pre-arranged dispute resolution process may even cause unnecessary delays in the construction project and much higher expenses along with increased mental anguish if the parties were faced with settling their disputes through an outside adjudication process. When the DRB assists the parties in preventing a dispute from happening, there is a definite savings not only in direct dollars and time, but also in the mental pressures that would have occurred if the issue had developed into a dispute. **CM**

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