

CONSTRUCTION CLAIMS MONTHLY

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AVOID LITIGATION WITH CREATIVE TOOLS FOR DISPUTE RESOLUTION — AND PREVENTION

By Peter G. Merrill, CDRS President and CEO

With the ever-increasing cost and time required to settle disputes on large construction projects through the courts, you may be looking for an alternative. Finding better dispute resolution methods is particularly important because unresolved disputes can slow down or even stop a job. We'll explore some old and new tools that can help prevent these catastrophic consequences.

ADR helps you skip the trip to court

To avoid litigation, disputing parties must mutually agree to use Alternative Dispute Resolution (ADR). This includes mediation (which is non-binding), and binding mediation or binding arbitration (which are both binding and final). Binding mediation is typically used to settle smaller disputes, and binding arbitration for larger ones. Parties may agree to utilize ADR to settle disputes prior to signing a construction contract or after a dispute develops, even if the construction contract doesn't mandate its use. Keep in mind that two parties can agree to virtually anything that isn't contrary to law (e.g., you can use rock-paper-scissors, but don't take two pistols, step 50 paces and then turn and shoot).

DRBs offer preventative power

While ADR is important for resolving disputes without going before a judge, it's even better if you can prevent a major dispute from developing in the first place. That's where Dispute Review Boards (DRB) come in.

continued on page 95

IN THIS ISSUE ...

Temporary Certificate Of Occupancy Still Counts For Repose Statute. A federal court in Massachusetts barred an insurance company from pursuing certain claims because it considered that the statute of repose can be calculated based on a temporary certificate of occupancy. (Page 90)

Surety Must Pay Performance Bond And Attorneys Fees Despite Lack Of Default Declaration. The Supreme Court of Washington ruled that when a party covered by an A311 performance bond fails to perform, the obligee doesn't need to make a formal declaration of default before the work is substantially completed for the surety to be liable. (Page 90)

Failure To Strictly Follow Notice Provision Bars Delay Claims, Despite Automatic Default Statute. A U.S. District court in Louisiana ruled that a subcontractor's claims for delay damages could not proceed to trial because it failed to file timely written notice of its claims, as mandated by the contract. (Page 92)

Lack Of Contract Acceptance Invalidates Mediation Clause. A federal court in Illinois found that a contract's clause requiring mediation before a party could initiate any other legal actions didn't apply because the contract wasn't accepted. (Page 92)

Claims-Only Indemnity Clause Makes Irrelevant Injury's Cause. A federal court in Oklahoma ruled that an indemnity agreement made a contractor liable for an injury and not entitled to a trial to determine if its work had caused it. (Page 93)

Bid-Related Documents Possessed By New Hire May Constitute Trade Secrets. The California Court of Appeal ruled that a construction company may have misappropriated trade secrets when it employed a project manager who had retained copies of project binders on bids and proposals from his former employer. (Page 93)

RFP Sets No Threshold For Past Performance Value Despite Form's Appearance. The U.S. Comptroller General denied a protest alleging that the winning bidder shouldn't have been given consideration for relevant past performance when its submitted projects were all under \$1 million. (Page 94)

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and construct buildings at a Coast Guard facility. Sergent's bid was slightly higher than KIC's, but was given preference for its past performance record.

The RFP listed seven relevant past performance sub-factors, one of which was relevant *experience*, which it stated implied "comparability of dollar value." The form included a section for this subfactor where bidders had to list projects underneath a heading that included the words "\$ 1mil- \$ 5mil."

However, the Comptroller General noted that the RFP didn't set any concrete guidelines for relevant *past performance* other than stating that "the source selection authority shall determine the relevance of similar past performance information."

KIC apparently thought that the form for relevant experience implied that only jobs of at least \$1 million would count for relevant past performance. None of the past contracts Sergent submitted with its bid were worth that amount. However, the Comptroller General said KIC's interpretation was incorrect. It also noted that the individual line items in the RFP were similar in scope to projects Sergent had performed.

Editor's note: Whenever an RFP allows for "factors" other than simply low bid, substantial latitude is permitted to the awarding agency. Bid protests that challenge the agency's reasonableness in applying those factors don't often meet with success. ❖

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Large construction projects have utilized DRBs for years for both preventing and settling disputes. A DRB almost always consists of three individuals who meet on a regular basis. The members are neutral construction-knowledgeable individuals mutually selected prior to project commencement by the major parties (e.g., project owner and general contractor). DRBs keep up-to-date through weekly or regular project updates and routinely make jobsite visits prior to DRB meetings.

DRBs may help you prevent or resolve disputes by:

- Providing advice or more formal advisory opinions and recommendations on how to handle construction matters before they develop into a dispute.
- Rendering a neutral advisory opinion or recommendation that the parties can use as a starting point for settling a dispute.

On larger projects, it's not unusual to see multiple DRBs, each with specialized expertise. The "Big Dig" artery project in Boston utilized 49 different specialized DRBs.

Since 1982, more than 1,300 projects in North America have used DRBs, according to the non-profit Dispute Resolution Board Foundation (DRBF). The DRBF also reported that based on 2005 data, 99 percent of completed North American projects using DRBs required no arbitration or litigation.

Major DRB drawback is cost

The main disadvantage to DRBs is the fixed costs involved. This is particularly a problem for small projects,

as well as for very complex ones that involve many specializations. A Federal Highway Administration fact sheet (access at: www.fhwa.dot.gov/construction/fs02009.cfm) suggests one-member DRBs as an alternative for small projects. The International Chamber of Commerce offers one-member as well as three-member DRBs.

DRB possibilities are limited only by parties' imagination

It's important to understand how creative you can be in using DRBs and similar dispute-resolution tools. For example, a common misconception is that DRBs are composed solely of construction-technical individuals. However, it's possible to have a "Financial Oversight DRB" consisting of a forensic accountant and two other individuals possessing construction estimating or construction accounting backgrounds and charged with the responsibility to analyze all invoices, change orders, addenda, etc. The likelihood of overcharges, kick-backs, graft, corruption, etc. would be minimal with a DRB reviewing the project's financial matters.

You can combine elements of DRB and ADR

Another creative strategy is to combine DRBs with binding ADR services when needed. In the past, DRBs issued only non-binding opinions and recommendations. Now, you can tailor-make dispute prevention and settlement processes by combining an ADR provider's individual component services (or choosing packaged services) to suit your needs.

continued on back page

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For instance, Construction Dispute Resolution Services (CDRS) has developed two combination ADR processes: the "Expanded Dispute Review Board" (EDRB) and the "Construction Settlement Panel" (CSP):

1. The EDRB adds final and binding resolution to construction disputes by offering ADR to the parties in conjunction with DRB duties. By doing so, they help guarantee that disputes are settled "in-house" with final and binding resolution. In addition, the EDRB can be offered to or mandated on other parties to the dispute, such as subcontractors and suppliers.

2. The CSP addresses the problem of fixed costs associated with DRBs in that it provides a panel of experts available on an "on-call" basis for smaller construction projects where a permanent DRB may be unnecessary. Rather than having several specialized DRBs, a project may use one or more general DRBs that can call on the members of the supporting CSP to assist them in handling a dispute. Each CSP member is mutually selected and approved by the primary parties in the project. CSPs have no size limit and may also contain experienced construction mediators and arbitrators in addition to their construction-knowledgeable technical members.

Here's a concrete example of how you can use the CSP concept: Instead of retaining a specialized DRB or DRB members equipped to handle HVAC problems, you may choose to have one or more HVAC specialists on the CSP whom the general DRB calls if an HVAC-related dispute develops.

To keep the DRB neutral, it's not unusual for all mediations and arbitrations to be handled by an ADR specialist from the CSP or by a special ADR DRB, leaving the general DRB to issue recommendations and advisory opinions only. If you decide to use a CSP in place of a DRB, you'll have to weigh the CSP's lower cost against the regularity of having a DRB always available and engaged in the project.

Prepare beforehand so help is available when you need it

Whichever dispute resolution/prevention tool you use, it's important for all parties to pre-sign mediation and arbitration agreements specifying the associated fees and costs.

These agreements help you avoid the need later on to spend time on the administrative issues required to issue advisory opinions, or to conduct mediations or arbitrations. With these documents in place, parties can easily request services by filling out a "Request for Dispute Resolution

Services." A specialist can be at the site the next day if the dispute is of major importance, as all the required paperwork has been completed.

Editor's Note: Seek more information

To learn more about DRBs, go to the Dispute Resolution Board Foundation's website at www.drb.org. In particular, you can download an overview of the DRB concept at www.drb.org/manual/Section_1_QuickPrint_12-06.pdf. This short manual addresses many of the concerns that owners and contractors sometimes have when introduced to the DRB concept.

To learn more about CDRS's EDRB and CSP ideas, visit www.constructiondisputes-cdrs.com, call 888-930-0011, or contact Peter G. Merrill, CDRS President and CEO at petermerrill@cdrsllc.com.

There are also a number of other national, statewide and regional organizations that offer ADR-type services. National ADR providers include JAMS (www.jamsadr.com), National Mediation Services, CPR (www.cpradr.org), American Arbitration Association (www.adr.org); and The National Arbitration Forum (www.arb-forum.com). ❖

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