

A close-up photograph of a hand holding a pen, writing on a document. The pen is positioned over a blue horizontal line on the paper. The background is slightly blurred, showing the texture of the paper and the skin of the hand. The overall tone is professional and focused.

BY PETER G. MERRILL

New ADR System
DISPUTE RESOL

The construction industry is always on the lookout for the most comprehensive and complete construction contracts, as well as the best dispute resolution processes.

For many years, the U.S. construction industry primarily has utilized the American Institute of Architects (AIA) contract documents as industry standard contracts for large construction projects. Although the AIA revised its contracts in 2007, the documents have come under fire for not being neutral enough and not offering a wide enough selection of dispute resolution processes. As a result, several construction trade organizations and associations, including Associated Builders and Contractors, Associated General Contractors, American Subcontractors Association, Construction Owners Association of America, Mechanical Contractors Association of America, National Electrical Contractors Association and others, joined forces to create a series of contract documents called ConsensusDOCS.

Using the best possible contract documents certainly works to the advantage of all parties to a construction project. But, in conjunction with a good set of contract documents, an efficient, expeditious and inexpensive dispute resolution process must be used.

TRADITIONAL DRBs

For several years, the Dispute Review Board (DRB) has been used across the world to prevent and assist in settling construction-related disputes. A DRB traditionally is comprised of three neutral construction-knowledgeable individuals—one selected by the owner, one by the general contractor and the third, the DRB chair, by the two selected DRB members. The DRB meets regularly at a time agreed upon by both parties. The DRB also might conduct a

jobsite visit prior to the meeting.

Multiple DRBs can be used on larger projects. For example, the “Big Dig” Central Artery/Tunnel Project in Boston required 47 different DRBs during the life of the construction project.

The primary role of the DRB is to listen to the owner’s and general contractor’s positions on issues that might become a dispute in the future or on issues that already are in dispute. After listening to the parties, the DRB renders either a DRB advisory opinion or recommendation that the parties can utilize in coming to a final resolution.

Although DRBs are considered an effective Alternative Dispute Resolution (ADR) process, they also present three major concerns. First, a DRB traditionally offers its services only to the two major

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May Revolutionize CONSTRUCTION DISPUTE RESOLUTION PROCESS

parties to a construction project: the owner and the general contractor. Disputes, however, can develop between other parties involved in the project (e.g., the general contractor and a subcontractor, the general contractor and a service provider, or a subcontractor and a material supplier). For these scenarios, the services of the DRB generally are not available.

The second major concern of the traditional DRB process is that it usually is necessary to form several DRBs with specialized construction expertise. DRBs that meet on a regular basis add a fixed expense to the cost of the project whether or not the services of a DRB are required. On smaller projects, the DRB members may hold only a general expertise rather than the extensive knowledge necessary to assist the parties in settling a specialized construction dispute.

The third major concern of the traditional DRB is that it issues only advisory opinions or recommendations and does not offer options for a final and binding resolution to the dispute, such as mediation, binding mediation or binding arbitration.

With arbitration, either one arbitrator or a three-person arbitration panel hears the parties and renders a final and binding arbitration award. In certain circumstances, the arbitrator issues a non-binding arbitration award that the parties use as a starting point to reach agreement or complete settlement of their dispute. (A traditional DRB was conceived to provide this same non-binding advisory opinion or recommendation.) If the parties cannot come to an agreement, they must look to the next specified process to come to a final and binding resolution, which typically involves costly and lengthy outside arbitration or litigation.

NEW OPTIONS

The Expanded DRB (EDRB) and the Construction Settlement Panel (CSP) can provide these services to all parties—or to the parties the project owner designates, including subcontractors, material suppliers and service providers—and issue a final and binding resolution to all disputes. The EDRB process allows the owner and

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possibly the general contractor to decide which other parties involved in the construction project can utilize the services of an EDRB and a CSP. This decision may be based on a certain dollar contract amount or on the importance of the other party to the overall project.

The CSP is designed to support an EDRB, or to operate on its own, and provides its services only when requested. The CSP is comprised of individuals who have specific construction expertise, a construction law background or a construction-related ADR background. The owner and general contractor jointly select the members of a CSP. With the support of a CSP, the EDRB members are selected for their overall experience related to the type of construction the project requires.

For example, if a dispute is related to a specific HVAC issue, the EDRB will call on one, two or three CSP members' help. The CSP members assist the EDRB as non-voting members, only offering their expertise and guidance to the EDRB through an advisory opinion or recommendation. Regardless of the number of EDRBs, there is only one CSP organized on each construction project.

If the parties cannot come to an agreement after considering the advisory opinion or recommendation of the EDRB, a member of the CSP with ADR experience can be called on to serve as a mediator or an arbitrator. This new ADR system allows the parties to go directly to binding mediation or arbitration through the services of the CSP. The parties have the

flexibility to choose which ADR process will yield them the most fair and equitable resolution in the most expeditious and inexpensive manner. The EDRB chair is responsible for working with the disputing parties in selecting a CSP member if requested or required.

With a properly formatted and staffed CSP, the number of specialized EDRBs should be kept to a minimum, which lowers the fixed costs related to multiple DRBs. On smaller construction projects, especially when the owner and general contractor have worked well together in the past, it may be advisable to only set up a CSP. If a dispute develops, CSP members can be called on to render their services in the issuance of an advisory opinion or to serve as a mediator or arbitrator. The project incurs only a small administrative charge to set up and administer the CSP.

Putting together a CSP or one or more EDRBs is like providing the construction project with an insurance policy that all disputes can be handled properly in an expeditious and inexpensive manner by knowledgeable construction specialists. If the parties find they regularly call on the services of CSP members, they can elect to set up an EDRB to control costs. Regularly scheduled EDRB meetings generally cost less than the costs incurred by CSP members who must make last-minute accommodations at the requests of the parties.

This new, comprehensive ADR system gives a construction project the best of all worlds by providing advisory opinions or recommendations, mediation or arbitration to all of the parties involved in the construction project, without ever having to participate in lengthy and costly litigation. Working in conjunction with either the new AIA 2007 contracts or ConsensusDOCS, this new ADR system should go a long way toward helping a construction project reach completion on time and within budget, and with minimal interruption and aggravation.

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