

## **Dispute Resolution Board and Adjudication Benefits and Reasons**

The State of Texas and its political subdivisions, especially school districts, are struggling to complete their construction projects on time and under budget. Local government and school construction in Texas is booming. Alas, the Texas Association of School Boards unfortunately reports, so are construction costs. TASB Risk Management, Texas Lone Star Magazine, Vol. 19, No. 4 (May 2001). A significant part of those costs are due to construction disputes and delays. This is especially true of disputes involving subcontractors, which can spread disruption and delay throughout a project. The use of Dispute Resolution Boards for owner - general contractor disputes and adjudication for disputes with subcontractors have a proven record of reducing or eliminating project disputes and the costs, delays, litigation and arbitration those disputes generate.

Dispute Resolution Boards have proven phenomenally effective in assisting governments and the prime contractors on major construction projects throughout the world to be completed on or ahead of schedule and at or under budget. DRBs have been credited with an ultimate **97.6%** success rate. Given the extraordinary record of DRBs, coupled with their endorsement by major public owners, such as the States of Florida, California and Washington, the DRB process should be made more easily available to Texas governments and the construction industry. DRBs have been so successful that the World Bank will not currently lend money for any project over U.S.D. \$ 1,000,000.00 unless a Dispute Resolution Board or Dispute Adjudication Board are required by the contract!

Adjudication has been credited with saving, then reviving the British subcontracting industry. It was adopted after over 81% of Britain's subcontractors became bankrupt, often because of project related disputes that became economically impossible to resolve. The traditional techniques of litigation and arbitration were recognized as too slow, expensive and inefficient for continued use. The construction industry and the government united to create adjudication as the solution. Today, virtually all disputes in construction are resolved within 28 days by adjudication. Everyone is appropriately paid or credited within one month, and project delays and disputes eliminated. Construction litigation and arbitration have virtually disappeared!

DRBs were first used about 25 years ago on the Eisenhower Tunnel Project in Colorado. Since then they have been used on over 800 projects, primarily those involving public infrastructure construction. Many public owners in this country such as Dallas Area Rapid Transit, the Washington Metropolitan Area Transit Authority, the Massachusetts Turnpike Authority, and the Departments of Transportation in Florida, California and Washington have used DRBs extensively. Some Florida officials have claimed a 17% savings on the cost of every mile of road built when a DRB is used and a New Mexico agency has asserted a \$ 5,000,000.00 savings on one highway interchange. The international equivalent of the DRB is known as the Dispute Adjudication Board and it has been included in the standard conditions of contract of FIDIC (Federation International des Ingenieurs Conseils), the World Bank, and the Asian Development Bank.

### **DRB Background**

The DRB is usually established shortly after execution of the contract documents and before performance of work on the site begins. It is designed to prevent disputes rather than attempt to decide blame or liability years after the project is completed, such as in litigation or arbitration.

A DRB has two basic responsibilities. The first is to become familiar with the project during construction. This process begins with the Board's review of the plans and specifications, followed by periodic visits to the project. These visits are usually made on a regular basis.

During these visits, in addition to viewing the construction work in progress, the DRB members meet with the owner's and contractor's staff at the job site to discuss the progress of the work, as well as potential issues on the horizon. These activities on the part of the DRB play a useful role in preventing disputes from arising because the parties are encouraged to clearly and objectively state their positions. They also provide the DRB with valuable background information should it need to hear a dispute.

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The DRB's second major responsibility is conducting hearings on any disputes referred to it. At a hearing, which usually is held at the construction site, owner and contractor representatives who have first-hand knowledge of the issues, are given the opportunity to present facts, documents, and the rationale in support of their respective positions. The DRB members have the significant advantage of having personal knowledge of the project and the progress of the work. Formal recording of the hearing and participation by lawyers are both relatively rare. Following the hearing the DRB issues a written recommendation or a decision, setting forth its analysis and opinion. This serves as the basis for the parties informed negotiation of the issues. If one or both parties reject the recommendation, the issue can proceed to the next stage of dispute resolution under the terms of their agreement.

In practice, however, it is very rare for a party to reject the DRB's recommendation and undertake further ADR proceedings. This is primarily because the parties' needs have been met by having an informed decision from neutral decision makers whose opinions they respect. If nothing else, DRBs are about trust in the judgment of its members.

### **DRB Panel and Selection Procedures**

The owner and the contractor each nominate a member to the board. Each must approve the other's nominee. Then the two party-appointed members of the DRB nominate the third member, who must also be approved by both the owner and the contractor.

The principal criteria for selecting the members of a DRB are experience and neutrality. Experience includes having the technical and professional background necessary to understand the disciplines involved in the construction contract. It also includes experience with interpreting contract documents and resolving disputes. Normally the contracting parties seek a range of skill sets, e.g., design, construction, and contract management skills.

There are a number of presumptively disqualifying relationships that will preclude a potential DRB candidate from serving on the board. Some of these are having ownership or employment ties with a party to the contract or close business or personal relationships with entities involved with the contract.

Reasons for rejecting a nominee are not required to be provided. If a nominee is not accepted, the nominating party must submit another nomination within two weeks. Next, the two nominees accepted by the parties select the third nominee. They have two weeks to make their decision. Their selection is subject to approval by the owner and contractor.

After all the DRB nominees are confirmed, the parties will execute a Three-Party Agreement and schedule the first on-site meeting.

### **DRB Operations**

In general, the DRB works with the contracting parties on such pre-hearing matters as scheduling the time and place for a hearing, and establishing a procedure and schedule for pre-hearing submissions, such as reference documents and statements of position.

Each party's contentions and supporting arguments are usually submitted in writing in a pre-hearing statement of position. Thus, at a DRB hearing the claiming party makes a presentation of the facts as it sees them, providing relevant exhibits and documents. This is followed by the presentation of the responding party. This sequence may be repeated several times until the issues have been fully presented to the DRB. The board may ask questions during the presentations or reserve questions until the presentations have been completed. An authorized representative of each party must be present at the hearing. Lawyers and third-party consultants who lack firsthand factual knowledge of the dispute may participate only with prior notice, subject to the discretion of the DRB.

The DRB's written recommendation is due 21 days after the conclusion of the hearing, unless the parties otherwise agree. The DRB is not bound by judicial forum rules of evidence or by the prevailing burden of proof standards, even though in practice DRBs frequently look to these sources for guidance.

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## Three-Party Agreement

The Three-Party Agreement is the contractual mechanism establishing the rights and responsibilities of the contracting parties and the members of the DRB. It details the "scope of work" for the board, which may develop its own routine operating and hearing procedures, subject to approval by the owner and contractor.

The owner and contractor have responsibilities to the DRB, which are also set forth in the Three-Party Agreement. For example, the parties must provide the board with plans and specifications, periodic reports and other information about the project.

The Three-Party Agreement mandates that all board members act impartially and independently. Board members do not advocate for parties.

The neutral role of DRB members is supported by provisions on immunity and indemnification. The contract gives DRB members quasi-judicial immunity for their actions or decisions associated with the hearing and making recommendations with respect to disputes.

Obligations with respect to compensation and expenses are contained in the Three-Party Agreement. The owner and contractor share equally the fees and expenses of the board.

## Adjudication Background

The adjudication process is usually established by the execution of the original contract documents, or an addendum, but before performance of work on the site begins. It is designed to immediately address and resolve disputes between the general contractor (or owner) and subcontractors. This is much more cost effective than attempting to decide blame or liability many years after the project is completed, such as done by traditional litigation or arbitration. Adjudication produces a reasonable construction decision within 28 days, rather than seeking to divine and bestow on the parties the "gold plated" elegance of a perfect arbitral award or court judgment some time in the indefinable future.

## What Is Adjudication?

It is easier to say what it is not. It is not litigation, nor arbitration, nor mediation. Adjudication is effectively a private temporary "Legal System" agreed by the parties. It can best be explained as:

**A new layer of dispute management designed for and applicable to the Commercial Construction industry. It neither displaces nor replaces litigation or arbitration or negotiation. Instead it is an option available at the unilateral choice of either party to a construction contract to call for an independent impartial outsider (the Adjudicator) who will in 28-days fairly decide and determine the rights of the parties according to their contract. That decision must be complied with. It is binding until any eventual modification or change is finally decided in arbitration or court.**

## Key Points

- Adjudication does not replace the parties existing dispute resolution system.
- It is a new method.
- It is an option. It is not a pre-condition to arbitration/litigation, nor does it prevent parties mediating or reaching a conclusion of their own, IF they both agree.
- It does not require both parties to agree. It is triggered by one party as a contractual right. It must be included in the contract.
- The procedure merely has to be fair.
- The period of 28-days can be extended by agreement.
- The decision is binding (temporary finality).
- The decision is enforceable in the Courts if disobeyed.

# **Dispute Resolution Board and Adjudication Benefits and Reasons**

## **Basic Points**

An Adjudicator can be called for and has “Threshold Jurisdiction” when there is:

- (1) A Construction Contract containing an Adjudication provision, and
- (2) A Dispute, and where
- (3) The Dispute is under or related to that Construction Contract.

## **Typical Issues**

- 1 Has a change or variation arisen?
- 2 If a change or variation has arisen, what is its value?
- 3 What is the value of a “changed condition”?
- 4 Was the Contract changed or varied?
- 5 Is a particular item a term of the Contract?
- 6 Was a term of the Contract breached?
- 7 What is the loss arising out of a breach of contract?
- 8 Of competing causes of loss, which one caused the loss?
- 9 Is the Contract delayed or late?
- 10 Is an extension of time applicable?
- 11 Is the extension of time payable/non payable?
- 12 Are liquidated damages payable?
- 13 Is the Work defective?
- 14 Is the value of a change or variation payable?
- 15 Is insurance payable?
- 16 Have required notices been given?
- 17 Are required notices applicable?
- 18 What is the meaning of a particular term in the Contract?
- 19 What is the meaning of a particular word in the Contract?
- 20 Was the Contract properly agreed?
- 21 When did the Contract reach practical completion?
- 22 When is the contract “Due” Date?
- 23 When is the “Final Date for Payment”?
- 24 What is the value of Work, if properly done?
- 25 Is the Contractor proceeding regularly and diligently?
- 26 Is this item an interim or provisional sum?
- 27 When was possession of the Work or the premises?
- 28 What is the proper “Critical Path” calculation?
- 29 Is the particular “Critical Path” a term of the Contract?
- 30 Has SMM been complied with?
- 31 Are these ground conditions unforeseeable?

# **Dispute Resolution Board and Adjudication Benefits and Reasons**

## **Who Will Be The Adjudicator**

The first vital ingredient is that the Adjudicator is a person who has considerable experience in the Construction industry. Second, but just as important, the Adjudicator must understand the principles of the laws of contract and negligence. It is vital to remember that the work of the Adjudicator is to apply the Contract. At the heart of every Adjudication is the principle that:

**DECIDED FACT + DECIDED LAW = DECISION AS TO RIGHTS.**

For very large construction projects the most effective management of disputes is from the use of a Dispute Resolution Board. For smaller contracts and subcontract disputes an Adjudicator Nominating Body, such as National Mediation Arbitration, appoints the Adjudicator from a panel or list of qualified people. Crucially the Adjudicator will have no conflict of interest, no actual or apparent bias, will be objective, detached and impartial.

In the U.S. and Texas National Mediation is an Adjudicator Nominating Body, which has British trained Americans available to serve as Adjudicators. It also periodically trains new Adjudicators and has members who are leaders in the Adjudication field. National will provide the language for inclusion in Standard Form Contracts and can act as the appointing body.

## **The Adjudication Process**

- Once an Adjudicator is appointed, he will investigate and determine the dispute within 28 days
- Payment of any decided amount must be made within 7 days from the Adjudication decision.
- The Adjudicator is not restricted to traditional arbitration or court mechanisms, but will independently read the relevant contract provisions and can investigate the Work.
- If he believes it necessary, he can interview parties or witnesses, or even hold a more formal hearing. Lawyers may participate, but are NOT necessary.
- A decision stating and explaining what must be done will then be issued within 28 days.
- The parties must comply with that decision within one week and continue to honor it until the project is completed.
- After project completion, any party may bring claims in court or arbitration without being prejudiced by the Adjudicators' decision. Almost no one ever does!!
- While a decision may not be the most elegantly written or contain finely parsed explanations of the minutia of the law, the parties usually accept it as a "common sense" determination of what is commercially fair and reasonable.
- In short, Adjudication returns the parties to the days of "common sense" decisions made by people who understand construction.
- Best of all, parties who are owed money, or a credit on their project, can now obtain it from the decision of a construction professional within one month of starting an Adjudication.

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## Dispute Adjudication Legislation Benefits (H. B. 3492)

### **VOLUNTARY PROCESS WITH 99.67% SETTLEMENT RATE**

**No Interruption of Construction – Work Continues**

#### **Adjudication and Dispute Adjudication Board Results**

<b>Adjudicated Matters - Experiences:</b>	<b>3,000+</b>
<b>Initial Decision Acceptance Rate:</b>	<b>98.2%</b>
<b>Appeals for Review:</b>	<b>55</b>
<b>Decisions Reversed:</b>	<b>10</b>
<b>Final Decision Acceptance Rate:</b>	<b><u>99.67%</u></b>

#### **Adjudication and Dispute Adjudication Board Use**

##### **Amounts at Issue and Values**

<b>Less than \$ 15,000</b>	<b>- 12.22%</b>
<b>\$ 15,001 to 75,000</b>	<b>- 32.22%</b>
<b>\$ 75,001 to 150,000</b>	<b>- 24.44%</b>
<b>\$ 150,001 to 750,000</b>	<b>- 17.78%</b>

**Approximately 74% of Adjudicators are Construction Industry Professionals!**

**This legislation establishes:**

- 1.) The process is voluntary.**
- 2.) An easy method for use and adoption into construction contracts.**
- 3.) Qualifications for the Adjudicators.**
- 4.) The Adjudicators are independent “Neutrals.”**
- 5.) The Adjudication Decision is temporarily binding. Litigation or arbitration may be pursued after the project is completed.**

## **Dispute Resolution Board and Adjudication Benefits and Reasons**

### **Benefits of Using Dispute Resolution Boards**

- HIGH RESOLUTION RATE**
- DRBF Statistical Database 1988 thru September, 2001*
- Total # projects:                    920**
- Total value:                    \$US 73.4 Billion**
- Formal Recommendations:   1125**
- Acceptance rate:                    97.6%**

**Approximately 80% of Board Members are industry professionals!**

### **Adjudication and Dispute Adjudication Board Results**

- 3,000+ Adjudications**
- Decision Acceptance rate - 98.2%**
- 55 appeals for Court Review**
- 10 decisions have been vacated**
- Ultimate Acceptance – Enforcement Rate - 99.67%**

### **Adjudication and Dispute Adjudication Board Uses**

- Amounts at Issue and Values**
- Less than \$ 10,000            12.22%**
- \$15,001 to 75,000    32.22%**
- \$75,001 to 150,000        24.44%**
- \$150,001 to 750,000      17.78%**

**Approximately 74% of Adjudicators are industry professionals!**