

MY TURN

Trends in Dispute Resolution

The prime method of disputes resolution in heavy and underground construction is the Disputes Review Board (DRB) process. Trends among project owners and disputes resolution organizations strongly suggest education, testing and/or certification of potential members is growing. Other recent experiences have also contributed to this narrative addressing the concerns of the industry.

The majority of claims in heavy and underground construction are the result of differing site conditions. Effective and consistent application of principles, for assessment of entitlement based on DSC principles, is crucial.

Project owners have been actively requesting DRB practice workshops offered by the DRB Foundation. They appear to be taking a more active role in the issues surrounding differing site condition disputes and the geotechnical reports provided by their consultants as indicated by their interest in the courses "Differing Site Conditions" and "Preparation of Geotechnical Baseline Reports," sponsored by the American Society of Civil Engineers.

The American Arbitration Association is also actively committed to providing continuing education to its panelists on a variety of topics.

The Decision

A common problem regarding disputes resolution decisions is the dissatisfaction of one or both parties with the decision and how it does not reflect the facts presented. Often, the complaint is directed at quality of the narrative and not the decision itself.

The Selection Process

An unfortunate recent experience focuses on an issue normally not a problem. I believe this case is a good example of how to avoid problems in the selection process.

In this case, two DRB members had been selected on behalf of the owner and contractor; the third to be selected by the first two. The chronology developed as the owner's DRB member:

- During the first contact insisted the contractor's DRB member was selected for specific reasons only

and suggested limiting this individual's competence within those limits.

- Insisted the third member should have experience in construction project management.
- Insisted on objecting to all the qualifications of the contractor's nominees.
- Insisted his objections to the contractor's nominees didn't apply to his nominees.
- He verbally disparaged one of the contractor's DRB nominees while refusing to provide a proper basis for objections in writing.
- Relied only on gossip to disqualify contractor's proposed DRB member's nominees.

Throughout the process, the contractor's DRB nominee attempted to come to an agreement about mutual terms of reference without any response from the owner's DRB member.

In the end, the owner dismissed both selected DRB members because the process was not progressing after two months. It is my opinion this decision was in the best interests of the parties since the owner's selected member would have been a detriment to the project, disputes resolution and to the DRB process.

The lesson is fundamental rules and a checklist for the selection could have eliminated such difficulties.

Anything not in writing should not even be considered in the selection process. Furthermore, it is my opinion this topic merits inclusion in the DRB practice workshops.

Education and Certification

It is natural for experienced professionals, based on their unique education and experience in engineering, geology, underground construction and differing site conditions, to have varying perspectives when considering:

- Relevant facts
- Applicable principles
- Developing a complete, consistent and infallible recommendation for adjudication.

It is self-evident that training is useful,

even mandatory, to reassure consistent evaluation of evidence, application of principles and a well-founded opinion.

A number of public owners have been the greatest consumers of various training and workshops offered on the topic of DRBs, differing site conditions and geotechnical baseline reports. More to the point, some state agencies now require that potential DRB nominees have taken the DRB Practice Workshops. The British have rigorous training, testing and interviews before they are certified. The interview consists of candidates giving an explanation of the foundation for the decision made in a test case. This impresses me immensely, since it allows candidates to be evaluated on their thinking and judgment. It is my opinion this is an exemplary system that should be a model for the DRB process, training and certification.

In the United States, some states have recognized the need for a minimal requirement and insisted on the practice workshop being a precursor for anyone to serve on their DRBs.

It is my opinion that:

- Topics with the most common type of disputes (DSCs) should be addressed more extensively.
- Training topics should include entitlement for a DSC, owner's presentation of geotechnical site conditions and systematic evaluation of anticipated and encountered conditions.
- New training should address improving the preparation of decision narratives that satisfy parties at least in facts considered, evaluation logic and conclusions, if not necessarily the decision.

Basic workshops should provide a checklist to follow for selecting members in difficult situations.

Certification is inevitable and the demand for one-man boards will increase.

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