



NACWA
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SAVING MONEY & REDUCING RISK in DESIGN & CONSTRUCTION

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Facts & Figures

According to a 2006 study:

- U.S. construction industry is \$1.1 trillion
- Disputes beyond the project level occur in 10%-30% of projects
- Estimated total cost of construction disputes - \$4-12 billion per year



Principal Causes of Construction Disputes

❑ Picking the Wrong Partner

- Owners should thoroughly investigate capabilities of proposed contractor
 - Experience and expertise
 - Financial resources
 - Claims history
 - Require statement of qualifications and experience, key person resumes, financial statements
 - Consider pre-qualification



Principal Causes of Construction Disputes

☐ Picking the Wrong Partner

- Contractors should also check out the owner
 - Financing in place
 - Permits
 - Right-of-ways
 - Contracting approach
 - Experienced staff or new to construction
 - Track record re: payment, claims, etc.



From the Trenches

In the end, the right party on the other side of the contract will have at least as much to do with the success of a project as artful contract drafting, or anything we lawyers can do after things hit the fan.



Principal Causes of Construction Disputes

□ Ambiguous, Incomplete or Uncoordinated Contract Documents

- Contract documents will control preparation of contractor's estimate and plan for performing the work, the design and construction of the work, and the resolution of claims and disputes
- **At least 2/3 of all construction contract disputes result from conflicts, omissions, ambiguities and/or broad generalities in the contract documents**



Principal Causes of Construction Disputes

- ❑ **Ambiguous, Incomplete or Uncoordinated Contract Documents**
 - Clearly define the project and spell out work scope
 - Clearly and thoroughly describe the parties' rights and obligations in an understandable manner – not everyone reading them will be a lawyer or an engineer
 - Coordinate all pieces of the contract documents
 - Allocate/address all known risks – an unallocated risk is a dispute in the making



From the Trenches

A relatively modest investment in a good set of contract documents at the front-end will produce big time savings during construction.



Principal Causes of Construction Disputes

- **Unrealistic Risk Allocation**
 - “Equitable Risk Allocation” – Allocate to party most able to control it
 - Exculpatory/risk shifting provisions (no-damage-for-delay, site conditions disclaimers, etc.):
 - Perceived protection/benefit is often illusory
 - Many court-created exceptions
 - Often lead to more, not fewer, claims, and the associated litigation is often more expensive



Principal Causes of Construction Disputes

☐ Lack of Trust

- Assemble the project team early, and meet often
- Provide a clear contact for decisions and approvals



Principal Causes of Construction Disputes

❑ Failure to Resolve Problems in Real Time

Disputes Resolution Continuum

Prevention

On-site Early
Intervention

External
Non-binding

External
Binding

Cost, Time, Aggravation,
Less Control of Outcome

A thick red arrow originates from the left side of the diagram, below the 'Prevention' stage, and points towards the right, ending under the 'External Binding' stage. The arrow passes through the 'On-site Early Intervention' and 'External Non-binding' stages. A red rectangular box is superimposed over the arrow, containing the text 'Cost, Time, Aggravation, Less Control of Outcome' in white.



The Solution: Multi-Tiered Disputes Resolution Approach

- Contractually agreed prevention and collaborative processes
 - Equitable risk allocation
 - Partnering
- Contractually agreed early, on-site intervention
 - Negotiation – multi-step
 - Standing neutral; IDM
 - DRB



The Solution: Multi-Tiered Disputes Resolution Approach

- Contractually agreed external non-binding processes
 - Mediation/facilitated negotiation
 - Neutral or expert evaluation
 - Mini-trial
- Contractually agreed external binding processes
 - Arbitration
 - Private judge
 - Binding DRB
 - Litigation



The Solution: Multi-Tiered Disputes Resolution Approach

Both the new AIA documents and the ConsensusDocs follow this approach

The 2007 AIA A201

- Claims referred to Initial Decision Maker (IDM)
- An initial decision is a prerequisite to mediation
- If mediation is not demanded within required time, initial decision becomes binding
- Mediation is a prerequisite to binding dispute resolution
- Parties can select arbitration or litigation for binding resolution



The Solution: Multi-Tiered Disputes Resolution Approach

Both the new AIA documents and the
ConsensusDocs follow this approach

ConsensusDocs

- “Direct Discussion” – first between parties’ representatives, then between senior executives – all within relatively short time limits
- “Mitigation” – parties select Project Neutral or Dispute Review Board (DRB)
- Mediation (if parties do not select a “mitigation” procedure)
- Binding Dispute Resolution – parties select arbitration or litigation



From the Trenches

“Give Peace a Chance.”

Contractually mandate multiple attempts to resolve a dispute within reasonable but achievable deadlines.



On-Site, Early Resolution Dispute Review Boards (DRB's)

□ What is a DRB?

- Neutral panel – typically three professionals experienced in the type of construction at issue
- Jointly selected by the parties at the time of contracting
- Provided contract documents and other relevant project information, and periodically visit the site during construction
- Available throughout the project to assist in prompt resolution of disputes
- Provide a non-binding recommendation for resolution of a dispute (usually admissible in subsequent litigation)



On-Site, Early Resolution Dispute Review Boards (DRB's)

□ Why use a DRB?

- Real-time, on-site disputes management
- Proven success
- Can limit conflict and disputes, and preserve profits, relationships and reputations
- Can be adapted to all major areas of construction –
Once the province of underground construction, now being used on highway and heavy civil projects, wastewater, medical, manufacturing, airports, power plants, sports complexes and office buildings



On-Site, Early Resolution Dispute Review Boards (DRB's)

- ❑ Properly used, DRB's can:**
 - Provide an informal and non-adversarial process**
 - Prevent many disputes that might otherwise develop**
 - Preserve relationships**
 - Enhance communication**
 - Address problems in real-time, while construction continues**
 - Avoid “end-of-job” claims**
 - Reduce bids**
 - Provide useful support and credibility for claim resolution or settlement**



On-Site, Early Resolution Dispute Review Boards (DRB's)

❑ Success Rate

- Per the DRB Foundation:
 - Through 2006, estimated that over 2000 projects with a total value of more than \$100 billion had used some type of DRB
 - One study of DRB's on over \$10 billion in Florida DOT projects concluded that DRB's resulted in net cost growth savings of about 2.7% of construction costs and net time growth savings of 15.1%



On-Site, Early Resolution Dispute Review Boards (DRB's)

❑ Success Rate

- Recognized as one of the most efficient and effective means of preventing and resolving disputes on a construction project
- Per the DRB Foundation (from a database of over 1200 projects since 1975):
 - 60% of projects with a DRB had no disputes
 - 98% of disputes referred to a DRB result in no subsequent litigation or arbitration
 - Worldwide use of DRB's growing in excess of 15% per year



On-Site, Early Resolution Dispute Review Boards (DRB's)

❑ Costs – Direct & Indirect

- DRB members usually bill by the hour
- Contracts require that expenses be reasonable and well-documented
- Per the DRB Foundation: Total cost for the DRB ranges from about .05% of final construction contract cost for a relatively disputes free project, to about .25% for so-called “difficult” projects with a number of DRB hearings – for an average of about .15% of final construction contract cost



On-Site, Early Resolution Dispute Review Boards (DRB's)

□ The DRB Agreement

- Qualifications for members of the DRB
- Member selection process
- Termination and replacement of members
- DRB operation during construction
- Procedures for referring disputes to the DRB and for conducting hearings
- Procedures for “advisory” opinions



On-Site, Early Resolution Dispute Review Boards (DRB's)

❑ Common Issues

- Admissibility of recommendation
- Scope of DRB authority – everything or just technical issues?
- When to activate the DRB process
- Binding/Non-binding
- Should attorneys serve on DRB's? Participate in the process?



Last Word From the Trenches

***Most cases (80-90%) eventually settle.
Why wait until the court house
steps?***