



WATER DESIGN-BUILD COUNCIL  
AN ASSOCIATION OF LEADING DESIGN BUILDERS

## GUIDELINES FOR BEST PRACTICES

# Dispute-Resolution Processes

Collaborative procurement and project-delivery processes contribute to a contracting environment that reduces conflicts among the owner and design-builder or the owner, design engineer, and CMAR contractor (CMAR). Problems can and sometimes do occur! However, it is important for all parties to know how to avoid such problems and, if necessary, how to resolve them. This document presents best practices guidelines for avoiding issues that may arise with a project using a design-build delivery method—and if necessary, resolving them.

### Conflicts During Procurement

A competitive procurement process can lead to a number of potential problems, most of which will not appear until after the contract is awarded. The following examples are preventive actions that owners can pursue to reduce the likelihood of a conflict arising out of procurement.

Ensure that the RFP clearly defines the owner's requirements.

- Use the progressive design-build approach when the owner's requirements are evolving—if the owner has the authority to do so.
- Define objective selection criteria and select an impartial selection panel.
- Provide a stipend sufficient for proposers to devote adequate resources to evaluating and responding to the owner's requirements.
- Use proprietary meetings with the shortlisted proposers to create an environment in which a proposer can confidentially suggest ideas.
- Allocate contractual risks equitably.
- Craft a formal agreement for resolving disagreements arising from the procurement process, and hold all key members of the design-build or CMAR team accountable to comply.

### Conflicts During Contract Performance

After the contract is awarded, the respective parties should identify areas where disputes may arise and develop measures to prevent them. The following examples are actions that

owners can pursue to reduce the likelihood of a conflict materialized during the performance of a contract.

- Hold meet-and-confer sessions for the design-builder or CMAR team to submit the design, schedule, and other deliverables to the owner.
- Specify how the owner will fulfill its contractual responsibilities, particularly with respect to turnaround times for reviewing project deliverables.
- Ensure that the individuals representing each party have the skill and temperament to collaborate on solving problems.
- Involve key members of the design-build or CMAR team (particularly the designer) in all project meetings.
- Make sure that the change-order process is well defined and understood by all parties and that related issues can be raised and resolved in a timely manner.
- Early on, develop a process within the design-build or CMAR team for resolving design-related issues.
- Involve and regularly inform third-party stakeholders such as subcontractors or vendors

### Non-Binding Dispute-Resolution Processes

If a dispute arises during the contract execution process, the first recourse should generally be *non-binding alternative dispute resolution (ADR)*. Non-binding ADR processes are relatively informal, and frequently use a individual (with a neutral position to the project) to assist all of the involved

parties in settling the identified dispute. The most commonly used *non-binding ADR processes* for design-build and CMAR projects include the following actions.

- **Partnering.** A Partnering process uses a facilitator to create and maintain a cooperative relationship among all parties on the design-build project. Partnering has been used for decades and is particularly well-suited for resolving conflicts that arise during design-build and CMAR projects, because a cooperative philosophy is a major component of collaborative delivery methods.
- **Stepped negotiations.** The Stepped Negotiations Process is used when parties attempt to resolve their problems at the project level—generally by starting with the project managers, and then raising attention to the dispute to increasingly senior representatives, if necessary. Parties will meet and negotiate within a reasonably short period of time, and the representatives need to be objective and open to compromise.
- **Mediation.** Mediation involves using a neutral and industry-knowledgeable individual, with no ties to the project (the mediator) to help the parties reach agreement. Sessions with the mediator, who has authority to resolve the dispute, are confidential and only attended by a representative from each party. As with stepped negotiations, successful mediation depends on the parties' being objective and flexible; and willing to meet and negotiate within a short period of time. An additional factor, of course, is the mediator's skill.
- **Mini-trial.** As a resolution process, a mini-trial combines both features of the stepped negotiation and the mediation process. A mini-trial is a structured settlement procedure where each of the parties present or summarize, their key positions to a panel of judges—typically senior representatives of each party, along with a neutral third party with functions similar to that of a mediator. Either the three judges reach a decision, or the two representatives work with the neutral to find a compromise.
- **Dispute review boards (DRBs).** Parties working on large, civil construction projects have relied on the use of DRBs for decades. The DRB is a panel of three neutral, experienced construction experts. Created at the beginning of the project, before any disputes arise, the DRB meets with the parties on a regular basis to stay abreast of the project's progress. The goal of these meetings is for the panel to be ready and available to provide a recommendation, should a dispute arise.

Disputes are presented to the DRB in a summary fashion, often without the involvement of attorneys, after which the panel will provide a written recommendation for resolving the dispute. The DRB process is very flexible, and often DRB panels are used for informal, advisory opinions on potential disputes, without submitting a formal request for a hearing.

- **Other uses of neutrals.** There are other non-binding processes for resolving design-build and CMAR disputes; all involve one or more neutral individuals, who are selected at the beginning of the project. In these processes, sometimes referred to as early neutral evaluation, the neutrals—who may be called standing mediators, standing arbitrators, or adjudicators—offer insight into the merits of claims, suggest reasonable settlement ranges, and provide an objective view of the merits of proceeding forward.

## Considerations in Using Non-Binding Alternative Dispute Resolution

Non-binding ADR processes offer the following examples as benefits that can be achieved.

- The non-binding nature of the process allows each party to present its positions in a simplified, cost-effective, manner—often without involving attorneys.
- Non-binding ADR does not consume the time of key personnel, and the parties themselves resolve the case.
- A neutral third party can provide an objective evaluation of the strengths and weaknesses of each party's position to help reach a resolution.
- Non-binding ADR processes facilitate flexible and creative outcomes, which might or might not involve a monetary solution.

It should be remembered, however, that a non-binding ADR is not appropriate for every circumstance, and both sides of the parties should consider the following questions before embarking on such a process.

- Are the respective parties involved in the dispute truly interested in settling?
- Are the parties or their representatives willing to disclose sufficient facts to get the dispute settled?
- Do the respective parties need more information to assess their position for a settlement?
- Are the parties willing to accept the objectivity of the neutral individual involved in the process?

## Binding Dispute-Resolution Processes

In a binding dispute-resolution process, the neutral individual or mediator makes a decision that is final and binding upon all involved parties, which is subject to certain rights of appeal. The neutral is often a court, jury, or arbitrator. The most commonly used binding dispute-resolution processes for design-build and CMAR projects are arbitration and litigation.

**Arbitration:** In this process, the parties must agree to enter into arbitration, and once they agree, they are free to make their own rules. Often this includes answering one or more of the following questions.

- Which administrative agency (e.g., American Arbitration Association, International Chamber of Commerce), if any, will administer the arbitration
- What are the rules of the arbitration, including the number of arbitrators who will decide the dispute?
- What is the extent, if appropriate, of pre-arbitration discovery for each of the parties?
- What is the time and location of the hearing, and in what format will the award take?
- Whether or not there are other parties who may join the hearing?

**Litigation:** Unlike arbitration, litigation does not require that all parties agree to initiate the process. The dispute-resolution mechanism of last resort, litigation has the following characteristics:

- Procedures are prescribed by applicable state and federal laws and regulations, with the parties having little control over the process once it starts

- Some issues, such as the waiver of a jury trial and the forum for the proceedings, can be established within the project contract.

## Contrasting Litigation and Arbitration

Arbitration is generally preferable to litigation for resolving design-build and CMAR disputes because of the following examples.

- Arbitration is often a more expedient and cost-effective process, particularly given the limited discovery of data and motions that can be applied.
- A panel of three arbitrators that takes into consideration business issues has a greater likelihood of reaching a compromise, whereas judges are more likely to base their decisions solely on the law.
- Arbitration panels are frequently better informed and more technically capable fact-finders than a judge and jury would be.

Some parties actually prefer litigation, for two reasons.

- Arbitration awards are subject to very limited appeal rights; usually when a decision is reached, it truly is final.
- Courts are much more likely than arbitrators to follow judicial precedent and the terms of the contract, because they face the risk of appeal if they do not.



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