

Dispute Review Board Specification

1. GENERAL

- A. This section specifies requirements for establishing and operating a three-person Dispute Review Board (DRB) to assist in and facilitate the avoidance of disputes and to provide timely and impartial recommendations related to disputes if they arise.
- B. A Dispute Review Board Agreement (DRB Agreement) is appended to this section.
- C. The provisions of the Specification take precedence over the language in the DRB Agreement.
- D. All disputes referred to the DRB shall be subject to the dispute resolution process herein described as a condition precedent to initiating a subsequent dispute resolution process such as arbitration or litigation.

Note to Specifiers: Other provisions of the Prime Contract, especially articles of the General Conditions related to “Disputes” and “Claims” must be coordinated with this section to avoid conflicts and ambiguities.

2. DISPUTES ELIGIBLE FOR CONSIDERATION BY THE DRB

Except as expressly otherwise provided, all disputes that are actionable under the provisions of the Contract between the Owner and the Contractor are eligible to be referred to the DRB.

3. DRB QUALIFICATIONS

- A. DRB members shall meet the following qualifications:
 - 1. Be experienced in the interpretation of contract documents and the resolution of construction industry disputes.
 - 2. Be experienced in the type of construction to be performed on this Project.
 - 3. Be familiar with the current DRBF Manual, and agree to be bound by the DRBF Code of Ethical Conduct.
 - 4. [Add any other requirements specific to the project.]
- B. The following definitions apply for the purpose of setting forth experience and disclosure requirements.
 - 1. Parties directly involved: The Owner and the Contractor on this Project (Contractor includes all joint-venture partners individually).
 - 2. Party indirectly involved: The construction manager, designers, architects, engineers, or other professional service firms or consultants, subcontractors of any tier, and suppliers on this Project.
 - 3. Financial ties: any ownership interest, loans, receivables or payables, except for those relating to DRB services.

C. Eligibility:

1. Direct Employment:

- a. Persons who have had material and significant prior involvement in the Project are prohibited from serving as DRB members.
- b. Current employees of any of the Parties directly or indirectly involved are prohibited from serving as DRB members.
- c. Prospective DRB members who were past employees of one of the Parties directly involved must disclose and obtain permission from the other Party prior to appointment.
- d. Previous direct employment by one of the Parties indirectly involved must be disclosed.

2. Consulting Assignments:

- a. Individuals who are currently employed in a consulting capacity on this or other projects by any of the Parties directly involved are prohibited from serving as DRB members.
- b. Individuals who are currently employed in a consulting capacity on this or other projects by one of the Parties indirectly involved must be disclosed.
- c. Individuals who have previously been employed in a consulting capacity, or in any such capacity previously through firms of which they are a current full-time employee, by any Party directly or indirectly involved must be disclosed.

3. Financial Ties:

- a. Individuals with current financial ties to any of the Parties directly involved are prohibited from serving as DRB members.
- b. The nature and extent of current financial ties to any of the Parties indirectly involved must be disclosed.
- c. Previous financial ties with any Party, directly or indirectly involved, must be disclosed.

4. Close Personal or Professional Relationships:

Individuals with close personal or professional relationships with a key member of any Party directly or indirectly involved may serve as DRB members upon disclosure of the nature and extent of the relationship.

5. Current and Previous DRBs with the Parties:

All past and current service as a DRB member on other projects where any of the Parties directly involved in this Project was/is also involved must be disclosed.

D. Ongoing Responsibilities:

1. Disclosure is a continuing obligation of all DRB members throughout the life of the Project. DRB members must disclose any fact or circumstance that arises during the course of the Project that could reasonably be considered as likely to affect the DRB member's ongoing independence or impartiality.

2. A DRB member shall disclose any discussion contemplating the creation of an agreement or making an agreement with any Party regarding employment or fee-based consulting services.
3. If a DRB member is selected to serve on a DRB on another project where one of the Parties directly involved in this Contract is also a Party directly involved in that project, that selection must be disclosed to the other Party of this Contract as soon as it is known.

4. ESTABLISHMENT OF THE DRB

Note to Specifiers: This section is modeled on joint selection of DRB members as discussed in Chapter 12 of the DRBF Practices and Procedures Manual (DRBF Manual). If one of the other methods discussed in that Section are to be used, modify Article 4 below accordingly.

- A. Within forty-five (45) days after award of the Contract, the Owner and the Contractor shall meet to discuss and establish the qualifications upon which prospective DRB nominees are to be evaluated and the process/timing to jointly select prospective nominees.
- B. To the extent known, the Owner and the Contractor shall provide to the prospective DRB nominees a list of the joint venture partners, construction manager, designers, architects, engineers, professional service firms, consultants, key subcontractors, and suppliers involved, or likely to be involved in the Project. In addition, prospective DRB nominees shall be provided with a summary description of the work, and a copy of the DRB Specification and form of proposed Dispute Review Board Agreement.
- C. Prospective DRB members shall provide to both Parties the following in addition to full name and contact information:
 1. Resume indicating experience qualifying the person as a DRB member.
 2. Resume indicating past DRB participation and experience, if any.
 3. Disclosure statement describing, to the extent known and in compliance with any confidentiality restrictions:
 - a. as to each DRB assignment separately, the name and location of the project, dates of DRB service (including Chair experience), name of owner, name of contractor, and approximate contract value;
 - b. the proposed DRB member's past, present, and anticipated relationships (including any such relationships through the nominee's full-time employer), if any, to the Project, and with all Parties directly and indirectly involved in the Contract; and
 - c. any close professional or personal relationships with key members of all Parties directly and indirectly involved in the Contract.
- D. The Owner and the Contractor shall then have twenty one (21) days to solicit and receive this information from DRB nominees, and another fourteen (14) days to review and to jointly agree on the final selection of the three members to serve on the DRB. In the event that all three members are not selected from the initial pool of nominees, the process shall be repeated. The Parties shall promptly notify the DRB members of their appointment.

Note to Specifiers: Consider whether to include a provision identifying a specific entity, e.g., the DRBF, that would identify DRBF-trained DRB members in the event that the Parties are unable to reach agreement. See Chapter 12 of the DRBF Manual.

- E. The Parties may select the Chair from the three selected members, or the Parties may ask the three DRB members to select one member to serve as the Chair.
- F. Individual DRB members may be terminated only by agreement of both the Owner and the Contractor. If a DRB member is terminated, or resigns, the member shall be replaced by joint selection, following the original appointment process.
- G. The Owner, the Contractor and the DRB shall execute the DRB Agreement at the first DRB meeting, however the effective date of the DRB Agreement shall be the date the three members are appointed by the Parties.
- H. Within fourteen (14) days after appointment of the DRB, the DRB shall develop Operating Procedures consistent with the requirements of this Specification. The Owner and Contractor must approve the Operating Procedures and any changes thereto.

5. DISPUTE AVOIDANCE PROCESS

Note to Specifiers: Identify regular meeting frequency, depending on the type or work and construction involved.

- A. The DRB will visit the Project site and meet with representatives of the Parties at periodic intervals and at other times requested by the Parties. In advance of site visits, the DRB Chair will prepare an agenda for Party approval. After the site visit, the DRB Chair will prepare a brief summary of the DRB meeting and site visit; the Parties will be given an opportunity to comment on the DRB Chair's summary.
- B. Regular meetings shall consist of an informal discussion, including:
 - 1. A report on the current status of:
 - a. Design
 - b. Permits and Real Estate, as appropriate
 - c. Schedule
 - d. Status of Project
 - e. Cost and Payments
 - f. Submittals and RFIs
 - g. Quality
 - h. Safety
 - i. Change notices and changes to date or in progress
 - 2. Review of potential areas of dispute.
 - 3. Field observation of the work in progress. The field observation shall be attended by jobsite and senior personnel of the Owner and Contractor with contemporaneous knowledge of the work and the Project.

C. Advisory Opinion

1. As an aid to dispute avoidance and resolution, when mutually agreed by the Owner and the Contractor, the DRB may, at its discretion, provide an Advisory Opinion on any issue.
2. Advisory Opinions are not intended to replace the hearing process specified herein, nor does their use waive the requirements of the Contract, but they may be implemented as part of the good-faith negotiations conducted between the Parties.
3. The process for Advisory Opinions may include the following:
 - a. The Advisory Opinion may be requested through telephone, facsimile, or e-mail communication with the DRB Chair. The Chair shall coordinate the date for the Advisory Opinion meeting with the Parties and the other DRB members.
 - b. The Parties will provide a brief written summary of the issue and positions, together with any key documents. Advisory Opinion meetings will consist of discussion involving the Parties and the DRB.
 - c. The DRB will provide initial impressions and guidance orally. No written Advisory Opinion will be made unless requested by the Parties and agreed to by the DRB.
4. Advisory Opinions rendered by the DRB shall not be admissible in any subsequent proceedings.

6. DISPUTE RESOLUTION PROCESS

A. Prior Good-Faith Negotiation:

1. The Owner and the Contractor shall enter into good-faith negotiations to resolve a dispute before referring such dispute to the DRB for an opinion.
2. These good-faith negotiations shall be founded on the principle of full and timely disclosure of each Party's position, including the exchange of pertinent supporting records, analyses, expert reports, and similar documentation, and shall proceed without delay following the identification of a dispute. Such good-faith negotiations may involve the solicitation and rendering of a DRB Advisory Opinion as described herein. The DRB may make inquiry of the parties as to the extent and nature of such good-faith negotiations.

B. Hearing Dispute Referral:

1. A dispute may be referred to the DRB by either the Owner or the Contractor in accordance with steps and timing required by the Contract. The dispute referral shall be made in writing to the DRB Chair with a copy simultaneously provided to the other Board members and the other Party.
2. Within seven (7) days after the dispute referral, the Parties shall submit to the DRB a joint statement of the scope of the dispute and the relief requested. If the Parties are unable to agree on the wording of the joint statement of dispute, each Party shall submit its position, for resolution by the DRB.
3. Within seven (7) days after receipt of the Parties submission on the joint dispute statement, the DRB Chair shall confer with the Parties to confirm the scope of the

dispute and the relief sought; to discuss whether and to what extent the parties will be using experts (and setting a schedule for disclosure of experts and exchange of reports); to set the order of, and due dates for, delivering and exchanging pre-hearing submittals; to establish a date, time, and location for holding the DRB hearing; and to address any other matters relating to the hearing process that the DRB or Parties wish to raise. Hearings shall be convened at the next periodic DRB meeting, unless the Parties agree otherwise.

4. The number of copies, distribution requirements, and time for submittal/exchange of the pre-hearing papers and other matters will be established by the DRB and communicated to the Parties by the Chair.

C. Pre-Hearing Submittal:

1. On or before the date(s) set by the DRB, the Owner and the Contractor shall each prepare a pre-hearing submittal and transmit it to all three members of the DRB and the other Party. The pre-hearing submittal shall include a position paper with such backup information as is referenced therein.
2. In order to minimize duplication and repetitiveness, backup and support information shall be included in a Common Reference Document (CRD), jointly prepared by the Parties. This document shall be tabbed, indexed, and the pages consecutively numbered for easy reference.
3. Position papers shall, at a minimum, contain the joint statement of dispute, the relief requested, and the basis and justification for the Party's position, with reference to contract documents and other supporting information in the CRD for each element of the dispute.
5. When the scope of the hearing includes time and quantum, the referring Party shall include a schedule impact analysis (for time-related issues) and full cost details (for quantum-related issues). This requirement does not apply if the report is to be made for entitlement alone or for entitlement with only guidelines for quantum.
3. By a date set by the DRB Chair, the parties shall submit to the DB, with a concurrent copy sent to the other party, any presentation materials that they propose to use at the hearing (for example, power points, enlarged copies of documents, summaries, chronologies, etc.). Presentation materials shall be consistent with the position papers and CRD.
4. Rebuttal papers may be required by the DRB under the following circumstances:
 - a. If requested by both Parties, or
 - b. When deemed by the Board beneficial for the hearing of disputed issues.

D. DRB Hearings:

1. The Parties shall arrange for hearing facilities, at or near the site.
2. Attendance:
 - a. By a date set by the DRB Chair, the Parties shall exchange and submit to the DRB a list of the participants and other attendees that each Party plans to have at the hearing.
 - b. The list should provide information in accordance the following:

- (1) Name, title, and professional affiliation.
 - (2) Identification of the role of the person.
 - (3) Brief summary of the matters that the person will address, or whether they will attend only as an observer.
 - c. Prior to the submission of this list, the Parties should attempt to agree on the attendees and participants at the hearing. If the Parties cannot agree, the issue shall be submitted to the DRB for a final determination by the date set by the DRB Chair for submission of participant/attendee lists.
 - d. Legal counsel shall not participate in the hearing unless otherwise approved by the DRB. Legal counsel representing the Parties are permitted to attend DRB hearings, provided that prior permission is obtained from the other Party.
 - (1) Legal counsel are not permitted to:
 - (a) Examine directly or by cross-examination any witness,
 - (b) Object to any question asked or factual statement made during the hearings,
 - (c) Make or argue legal issues unless called upon by the DRB, or
 - (d) Make statements of fact for or on behalf of a Party or witness.
 - (2) Attorneys shall at all times comply with instructions of the DRB Chair.
 - e. Subcontractor Claims:
 - (1) At DRB hearings involving claims by a subcontractor or supplier against the Contractor which are actionable by the Contractor against the Owner, the Contractor shall require and ensure that each subcontractor involved in the dispute shall have present an authorized representative with actual knowledge of the facts underlying the subcontractor claims.
 - (2) Subcontractor claims against the Contractor which are not actionable against the Owner are outside the DRB's jurisdiction and will not be heard.
3. The conduct of the hearing shall be established by the DRB generally consistent with the following guidelines:
- a. The DRB shall at all times exercise control over the hearing. The object shall be to ensure that each Party is given a full opportunity to present its position, while at the same time ensuring that the hearing proceeds in an orderly fashion, expeditiously, and in a manner, as determined by the DRB, best suited to convey all information necessary to render the DRB report.
 - b. The Party that referred the dispute to the DRB shall present its position first, followed by the other Party.
 - c. Both Parties shall be allowed successive rebuttals, assuring a full and adequate opportunity to present their position, and to rebut the opposing Party's position, until, in the DRB's opinion, all aspects of the dispute have been fully covered.

- d. The DRB may at any time ask questions, request clarifications, or ask for additional information.
- e. Either Party may request that the DRB direct a question to, or request a clarification from the other Party. The DRB shall determine at what point in the proceedings such requests may be made and if they will be granted. In general, the DRB will not allow one Party to be questioned directly by the other Party.
- f. In difficult or complex cases, additional hearing days may be necessary to facilitate full consideration and understanding of the dispute.
- g. The DRB, in its discretion, may allow introduction of arguments, exhibits, handouts, or documentary evidence that were not included in that Party's pre-hearing position paper(s) and have not been previously submitted to the other Party. In such cases the other Party will be granted time to review and prepare a rebuttal to the new material.
- h. The DRB may request additional information or documentation before, during and after the hearing. The DB Chair shall advise the parties when the hearing is closed.

E. Failure to Prepare a Pre-Hearing Submittal or Attend a DRB Hearing:

- 1. In the event that either Party fails to deliver a pre-hearing submittal by the date established by the DRB, the DRB shall determine whether the hearing shall proceed as originally scheduled, or whether additional time shall be provided and a new date established. On the final date and time established for the hearing, the DRB shall proceed with the hearing utilizing the information that has been submitted.
- 2. In the event that some or all of the representatives of either Party fail to appear at the appointed time of a DRB hearing, the DRB shall decide whether or not to proceed with the hearing. If the DRB decides to continue with the hearing, it shall take place as if all Party representatives were in attendance, and the DRB shall consider all evidence brought before it including hearing testimony from those Party representatives that are present.

F. Use of Outside Experts:

- 1. A Party intending to offer an outside expert's analysis at the hearing shall disclose such intention in writing to the other Party and to the DRB no less than thirty (30) days prior to the due date for delivering the pre-hearing submittal. The expert's name, qualifications, and a general statement of the aspect of the dispute that will be covered by his or her testimony shall be included in the disclosure.
- 2. Upon receipt of the above disclosure, the other Party shall be provided adequate time to secure the services of an outside expert of its own. All experts shall be disclosed to both Parties.
- 3. The cost for securing outside expert services shall be borne by the Party securing such services.
- 4. Any expert reports prepared by either Party that a Party intends to rely on at the hearing shall be included in the Party's position paper.

G. DRB Report:

1. The DRB's recommendations for resolution of a dispute shall be formalized in a written report with format as determined by the DRB and signed by all Board members. The report should consist of a concise description of the dispute, appropriate statements of each Party's position, findings as to the facts of the dispute, discussion and rationale for the recommendation(s), and the recommendation(s). The report shall be submitted simultaneously to the Parties, as soon as reasonable after completion of the hearing.
2. If the DRB cannot arrive at a unanimous report, it shall prepare minority findings and recommendation(s), which, together with the majority findings and recommendation(s) shall comprise the DRB report. The report shall identify the issues of disagreement, along with the supporting rationale for the minority opinion(s). The identity of the dissenting DRB member shall not be included in the report.
3. Clarification:
 - a. Either Party may request clarification of a report within ten (10) days following receipt of the report. Clarification may include submission of any additional information that was not otherwise obtainable during the hearing process. Within a reasonable period of time, the DRB shall provide written clarification to both Parties.
 - b. Requests for clarification shall be submitted in writing simultaneously to the DRB and to the other Party.
 - c. Only one request for clarification per dispute from each Party will be allowed.
4. Acceptance:
 - a. The DRB's report is not binding on either the Owner of the Contractor.
 - b. The Owner and the Contractor shall submit their written acceptance or rejection of the DRB recommendation(s) simultaneously to the other Party and to the DRB within thirty (30) days of receipt of the report or following receipt of responses to requests for clarification.
 - c. Failure by either Party to accept or reject within the specified period shall be construed as acceptance of the recommendation(s) by that Party.
 - d. Acceptance by the Owner of a recommendation on entitlement only, or on entitlement with guidelines for quantum, does not obligate the Owner to any particular quantum amount.
5. Admissibility/Participation:
 - a. The DRB report shall be admissible in any subsequent dispute resolution proceedings between the Parties. DRB members' hearing and deliberation notes shall be inadmissible and not subject to discovery.
 - b. DRB members shall not participate, or be required to participate, in subsequent dispute resolution proceedings.

7. COMPENSATION

- A. The Owner and the Contractor shall each bear their respective in-house costs and costs of providing those DRB-related services for which such responsibility has been allocated herein.
- B. The Owner and the Contractor shall equally bear the cost of the DRB's services in accordance with and as otherwise set forth in the Contract.

END OF SECTION