**Model DRB Specification**

#### **Dispute Review Board Specification**

1. GENERAL
   * 1. 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.
     2. To implement this DRB Specification, a Dispute Review Board Agreement (“DRB Agreement”) shall be entered into among the Owner, Contractor and DRB.
     3. The provisions of the DRB Specification take precedence over the language in the DRB Agreement; if there is a discrepancy between the two documents, the DRB Specification shall govern.
     4. All disputes referred to the DRB shall be subject to the dispute resolution process herein described as a condition precedent to initiating a subsequent legal process.

*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 in usage of those terms. This model specification uses the term “disputes”.*

1. 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 (the “Contract”) are eligible to be referred to the DRB.

1. DRB QUALIFICATIONS
   1. 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 the Project.
      3. Be familiar with the DRBF’s current *Dispute Board Manual: A Guide to Best Practices and Procedures*, completed adequate DRB training, and agree to be bound by the DRBF Code of Ethical Conduct.
      4. [Add any other requirements specific to the Project.]
   2. The following definitions apply for the purpose of setting forth experience and disclosure requirements.
      1. The Owner and the Contractor on the Project (Contractor includes all joint-venture partners individually) are defined collectively for purposes of this Specification as the Parties or Parties directly involved and each individually as a Party or Party directly involved.
      2. Party indirectly involved: The program/construction manager; designers, architects; engineers; other professional service firms or consultants; subcontractors of any tier; and suppliers on the Project.
      3. Financial ties: any ownership interest, loans, receivables or payables, except for those relating to DRB services.
   3. Eligibility:
      1. Direct Employment:
         1. Persons who have had significant and material prior involvement in the Project are prohibited from serving as DRB members.
         2. Current employees of any of the Parties directly or indirectly involved are prohibited from serving as DRB members.
         3. Past employment by one of the Parties directly involved must be disclosed and permission received from the other Party prior to appointment.
         4. Previous direct employment by one of the Parties indirectly involved must be disclosed.
      2. Consulting Assignments:
         1. Individuals who are currently employed in a consulting capacity on this or other projects by any of the Parties directly involved must be disclosed.
         2. Individuals who are currently employed in a consulting capacity on this or other projects by one of the Parties indirectly involved must be disclosed.
         3. 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:
         1. Individuals with current financial ties to any of the Parties directly involved are prohibited from serving as DRB members.
         2. The nature and extent of current financial ties to any of the Parties indirectly involved must be disclosed.
         3. Previous financial ties with any Party directly or indirectly involved must be disclosed.
      4. Close Personal or Professional Relationships:
         1. Individuals with close personal or professional relationships with a key member of any Party directly or indirectly involved may serve as DRB members, but the nature and extent of the relationship must be disclosed.
      5. Current and Previous DRBs with the Parties:
         1. All past and current service as a DRB member on other projects where any of the Parties directly involved was/is also involved must be disclosed.
   4. Ongoing Responsibilities:
      1. Disclosure is a continuing obligation of all DRB members throughout the life of the Project. DRB members shall as soon as it is known 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 as soon as it is known.
      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 shall be disclosed to the other Party of this Contract as soon as it is known.
2. 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 Dispute Board Manual: A Guide to Best Practices and Procedures. If one of the other methods discussed in that Section are to be used, modify Article 4 below accordingly.*

* 1. Within thirty (30) 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.
  2. To the extent known, the Owner and the Contractor shall provide to prospective DRB nominees a list of the joint venture partners, program/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 proposed form of DRB Agreement.
  3. Prospective DRB members shall provide to both Parties the following:
     1. Full name, contact information, and current employer (including self-employment, if applicable).
     2. Resume indicating experience qualifying the person as a DRB member for the subject project.
     3. Resume indicating past DRB participation and experience (including experience serving as a DRB Chair).
     4. Signed and dated disclosure statement showing (to the extent known and in compliance with any confidentiality restrictions) that the DRB member meets the requirements of Section 3 above.
  4. 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. This time period may be extended by mutual agreement of the Parties to permit joint interviews to be conducted. 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 and schedule the DRB kick-off meeting as soon as practicable.

*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.*

* + 1. The Parties may ask the three DRB members to select one member to serve as the Chair or select the Chair from the three selected members.
    2. 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 within thirty (30) days, following the original member appointment process.
    3. The Owner, the Contractor and the DRB shall execute the DRB Agreement no later than the first DRB meeting, however the effective date of the DRB Agreement shall be the date the three members are notified of their appointment.
    4. Within fourteen (14) days after appointment of the DRB, the DRB shall develop Operating Procedures addressing all elements of DRB operations stipulated in the DRBF Model Operating Procedures that are consistent with and not otherwise covered by this Specification. The Owner and Contractor must approve the Operating Procedures and any changes thereto; provided, however, the Operating Procedures shall not be considered a Contract Document, as defined in the Contract.

1. DISPUTE AVOIDANCE PROCESS

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

* 1. The DRB shall 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 shall prepare an agenda for Party approval. After the site visit, the DRB Chair shall prepare a brief summary of the DRB meeting and site visit; the Parties shall be given an opportunity to comment on the DRB Chair’s summary; and the DRB meeting summary shall be approved at the next succeeding DRB meeting.
  2. Regular meetings shall consist of an informal roundtable discussion with representatives of the Parties, including:
     1. A report on the current status of:
* Design
* Permits and real estate acquisition, as appropriate
* Status of Project
* Schedule
* Cost and Payments
* Change notices and changes to date or in progress
* Submittals and RFIs
* Quality
* Safety
  + 1. Review of potential areas of dispute or disputes in process. The Owner or the Contractor may ask the DRB at a meeting to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that could become a dispute. Neither the Owner, the Contractor, nor the DRB shall be bound in any future dispute resolution process by any discussion during this informal assistance process.
    2. Field observation of the work in progress. The field observation shall be attended by the DRB and jobsite/senior personnel of the Owner and Contractor with contemporaneous knowledge of the work and the Project.
    3. Advisory Opinion Process
       1. As an aid to dispute avoidance, when mutually agreed by the Owner and the Contractor, the DRB may, at its discretion, provide an advisory opinion on any issue that would be eligible to be submitted to the DRB if it became a dispute.
       2. Advisory opinions are not intended to replace the hearing process specified herein, nor does their use waive or modify the requirements of the Contract.
       3. The process for advisory opinions may include the following:
          1. The advisory opinion may be requested through 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.
          2. The Parties shall provide and exchange a brief written summary of the issue and positions, together with any key documents. Advisory opinion meetings shall consist of discussion involving the Parties and the DRB.
          3. After the meeting, the DRB shall provide its advisory opinion written or orally as requested by both Parties and agreed to by the DRB.
       4. Advisory opinions rendered by the DRB shall not be admissible in any subsequent proceedings.

1. DISPUTE RESOLUTION PROCESS
   1. Prior Negotiation:
      1. To the extent permitted by the Contract, the Owner and the Contractor shall enter into negotiations to resolve a dispute before referring such dispute to the DRB for a recommendation. The DRB may make inquiry of the Parties as to the extent and nature of such negotiations.
      2. Such negotiations may involve the solicitation of DRB informal assistance or an advisory opinion as described above.
   2. 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 DRB 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 (the “Joint Statement”). If the Parties cannot agree on the wording of the Joint Statement, each Party shall submit its position, for resolution by the DRB.
      3. Within seven (7) days after receipt of the Parties’ submission of the Joint Statement, the DRB Chair shall confer with the Parties, by conference call, on the following topics: (i) confirm the scope of the dispute and the relief sought; (ii) discuss whether and to what extent the Parties plan to use experts (and setting a schedule for disclosure of experts and exchange of reports); (iii) set the order of, and due dates for, delivering and exchanging pre-hearing submittals; (iv) establish a date, time, and location for holding the DRB hearing; and (v) address any other matters relating to the hearing process that the DRB or Parties wish to raise.
      4. Hearings shall be convened at the next periodic DRB meeting, unless the Parties agree otherwise. The number of copies, distribution requirements, and time for submittal/exchange of the pre-hearing papers/submissions and other matters leading up to the hearing shall be established by the DRB and communicated to the Parties by the Chair.
   3. 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 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 prior to the submission of position papers. 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 and relief requested, and the basis and justification for the Party’s position, with reference to the Contract, Contract Documents, and other supporting information in the CRD for each element of the dispute.
      4. The scope of the hearing may be limited to entitlement only. If the DRB recommends entitlement and the Parties accept it, the Parties shall endeavor to resolve by negotiation any related time and quantum issues. If they are unable to do so, the Parties may follow the pre-hearing process to bring to the DRB for hearing any unresolved time and quantum issues.
      5. When the scope of the hearing includes time and quantum issues, the referring Party shall include a schedule impact analysis (for time-related issues) and full cost details (for quantum-related issues).
      6. By a date set by the DRB Chair, the Parties shall submit to the DRB, 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 the CRD.
      7. Rebuttal papers may be required by the DRB if requested by both Parties or when deemed beneficial by the DRB for the hearing of disputes.
   4. DRB Hearings:
      1. The Parties shall arrange for hearing facilities, at or near the Project site. The hearing location should be able to accommodate the number of participants and provide logistical support needed during the hearing.
      2. Attendance:
         1. 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.
         2. The list should provide the following information:
   * Name, title, and professional affiliation.
   * Identification of the role of the person at the hearing (participant or observer).
   * Brief summary of the matters that the person is anticipated to address if they are a participant.
     1. Prior to the submission of this list, the Parties should attempt to agree on the attendees and participant/observer roles 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.
     2. Legal counsel representing the Parties are permitted to attend DRB hearings, provided that prior permission is obtained from the other Party. Legal counsel shall not participate in the hearing unless requested by the Parties and approved in advance of the hearing by the DRB.

Legal counsel are not permitted to:

* + Examine directly or by cross-examination any witness,
  + Object to any question asked or factual statement made during the hearing,
  + Make or argue legal issues unless called upon by the DRB, or
  + Make statements of fact for or on behalf of a Party or witness.

The legal Rules of Evidence shall not apply in the DRB hearing process.

* + 1. Subcontractor Claims:
       1. At DRB hearings involving claims by a subcontractor or supplier against the Contractor that are actionable by the Contractor against the Owner under the Contract, 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 that are not actionable against the Owner are outside the DRB’s jurisdiction and shall not be heard.
    2. The conduct of the hearing shall be established by the DRB, generally consistent with the following guidelines:
       1. The DRB shall at all times exercise control over the hearing. The goal is 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 recommendation.
       2. The Party that referred the dispute to the DRB shall present its position first, followed by the other Party. Both Parties shall be allowed successive rebuttals, assuring a full and adequate opportunity to present their positions and to rebut the opposing Party’s position, until, in the DRB’s opinion, all aspects of the dispute have been fully covered.
       3. The DRB may at any time ask questions, request clarifications, or ask for additional information. Either Party may request that the DRB direct a question to, or request a clarification from the other Party. The DRB shall not allow one Party to be questioned directly by the other Party, unless the DRB determines that it is appropriate to do so and the Parties agree.
       4. Except for good cause shown, the DRB shall not allow introduction of arguments, exhibits, handouts, or documentary evidence that were not included in that Party’s pre-hearing position paper(s)/submittals and have not been previously submitted to the other Party. In the rare instances it is permitted, the other Party shall be granted time to review and prepare a rebuttal to the new material.
       5. The DRB may request additional information or documentation before, during and after the hearing. The DRB Chair shall advise the Parties when the hearing is closed.
  1. 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.
  2. Use of Experts:
     1. A Party intending to offer an expert’s opinion 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 shall be covered by his or her testimony shall be included in the disclosure.
     2. The cost for securing outside expert services shall be borne by the Party securing such services.
     3. 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 papers.
  3. DRB Recommendation:
     1. The DRB’s recommendation for resolution of a dispute shall be formalized in a written report signed by all DRB members. The report should consist of a concise description of the dispute and relief requested; appropriate summaries of each Party’s position; findings as to the facts of the dispute; citation to applicable parts of the Contract, Contract Documents, project records, and Party submissions; analysis and rationale for the recommendation; and the recommendation. The report shall be submitted simultaneously to the Parties within thirty (30) days after the DRB closes the hearing, unless extended by agreement of the Parties.
     2. If the DRB cannot arrive at a unanimous recommendation, 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 and all members of the DRB shall sign the report.
     3. Clarification:
        1. Either Party may request clarification of the DRB report within ten (10) days following receipt of the report. Requests for clarification shall be submitted in writing simultaneously to the DRB and to the other Party. Requests for clarification shall be limited to seeking feedback from the DRB to assist the requesting Party in understanding the DRB’s analysis and recommendation, not to re-argue the dispute.
        2. Within ten (10) days after receipt of the request for clarification, the DRB shall provide to both Parties a written response to the request.
        3. Only one request for clarification per dispute from each Party shall be allowed.
  4. Acceptance:
     1. The DRB’s recommendation shall not be binding on either the Owner of the Contractor.
     2. The Owner and the Contractor shall submit their written acceptance or rejection of the DRB recommendation simultaneously to the other Party and to the DRB within thirty (30) days of the later of (i) receipt of the report or (ii) receipt of responses to requests for clarification.
     3. Failure by either Party to accept or reject within the specified period shall be deemed to be acceptance of the recommendation by that Party.
     4. Acceptance by the Owner of a recommendation on entitlement only, or on entitlement with guidelines for quantum and/or time, shall not obligate the Owner to any particular quantum or time amount.
  5. Admissibility/Participation:
     1. The DRB report shall be admissible in any subsequent dispute resolution proceedings between the Parties. The DRB members’ hearing and deliberation notes shall not be (i) admissible or (ii) subject to discovery.
     2. DRB members shall not participate, or be required to participate, in subsequent dispute resolution or legal proceedings.

1. COMPENSATION
   1. 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 in the DRB Agreement.
   2. The Owner and the Contractor shall equally bear the cost of the DRB’s services and expenses related to the DRB process specified herein.

### END OF SECTION