

## **Part 2 Dispute Avoidance Board**

### **2.1 OVERVIEW**

- (a) In March 2015, the Australian Chapter of the international Dispute Resolution Board Foundation (DRBF), known locally as DRBF Region 3 Inc., published guideline provisions for the appointment of a Dispute Avoidance Board based on the Dispute Board procedure adopted worldwide for the avoidance and resolution of disputes under construction, engineering and infrastructure contracts.
- (b) The following provisions for a Dispute Avoidance Board are published by DBRF Region 3 Inc. on its website ([www.drbf.org.au](http://www.drbf.org.au)).

### **2.2 APPLICATION**

When the parties to a Construction Contract identified in Item A in the Schedule to this Part 2, ("the Contract") including General Conditions AS 11000-2015 ("the General Conditions") have agreed pursuant to sub-clause 45.15 of the General Conditions to manage and avoid Issues becoming Disputes and to resolve Disputes arising out of or in connection with the subject matter of the Contract by way of a Dispute Avoidance Board, the provisions of this Part 2 shall apply.

### **2.3 DISPUTE AVOIDANCE BOARD**

A Dispute Avoidance Board is a three member panel of independent, experienced professionals, two of whom are appointed by the Principal and the Contractor respectively and a third appointed by the two party nominees in accordance with this Part 2.

### **2.4 INTRODUCTION**

The following provisions may need to be adjusted to fully reflect the terms of the Contract and the DAB Agreement.

#### **2.4.1 Summary**

- (a) A Dispute Avoidance Board will be established to assist in the avoidance of Issues becoming Disputes and to assist in the resolution of Disputes in connection with or arising out of performance of the work under this Contract.
- (b) The primary role of the Dispute Avoidance Board is to avoid or prevent Issues becoming Disputes and to facilitate the Principal and the Contractor resolving their own Issues.
- (c) In the event a Dispute arises, either the Principal or the Contractor may refer the Dispute to the Dispute Avoidance Board in accordance with the procedures outlined below.
- (d) Promptly thereafter, the Dispute Avoidance Board will impartially consider the Dispute referred to it.
- (e) The Dispute Avoidance Board will provide a written recommendation for resolution of the Dispute to the Principal and the Contractor.

- (f) The recommendation of the Dispute Avoidance Board should carry great weight for the Principal and the Contractor and, depending on the election of the parties, the recommendation may be binding or interim binding.

#### 2.4.2 Definitions

In this Part 2, the following defined terms are used:

- (a) **Project** means the works to be constructed in accordance with the Contract.
- (b) **Dispute** means a claim, variation order, direction, request or other controversy that remains unresolved following good faith negotiations between the authorised representatives of the Principal and Contractor and for which a Notice has been given under the Contract.
- (c) **Dispute Avoidance Board** or the **Board** means the three independent individuals appointed in accordance with clause 2.3 of this Part 2 to consider and recommend resolution of Issues or Disputes.
- (d) **Dispute Avoidance Board Agreement** or **DAB Agreement** means the agreement between the Principal, the Contractor and the three Board members, adopting the form and content of Attachment A.
- (e) **Issue** means an unresolved matter arising under the Project that is not yet a Dispute.

#### 2.5 SCOPE

- (a) This Part 2 describes the purpose, procedure, function and features of the Dispute Avoidance Board.
- (b) A DAB Agreement will be entered into between the Principal, the Contractor and the three Board members and will formalise the creation of the Board to establish the scope of the Board's services, and the rights and obligations of the parties. In the event of a conflict between this Part 2 and the DAB Agreement, the DAB Agreement shall prevail.

##### 2.5.1 Purpose

The Board, as an independent body made up of neutral Board members, will assist in the avoidance or prevention of Issues becoming Disputes and will assist in and facilitate the timely and equitable resolution of Issues and Disputes between the Principal and the Contractor in an effort to avoid acrimony, uncertainty, delay and more formal means of dispute resolution.

##### 2.5.2 Continuance of Work

During the processes of avoidance and resolution of Issues and Disputes by the Board, the Contractor shall diligently continue with the work under the Project.

##### 2.5.3 Tenure of the Board

- (a) The Board will be established after all parties have executed the DAB Agreement. It is intended that the DAB Agreement will be executed concurrently with, or as soon as possible after, the signing of the Contract.

- (b) The Board will be dissolved as at the date of Final Payment by the Principal to the Contractor or the date of the Final Certificate, whichever is the later, unless the Board has been earlier terminated or dissolved by mutual agreement of the Principal and the Contractor.

## **2.6 MEMBERSHIP OF THE BOARD**

### **2.6.1 General**

- (a) The Dispute Avoidance Board will consist of one member nominated by the Principal and approved by the Contractor, one member nominated by the Contractor and approved by the Principal and a third member nominated by the first two Board members and approved by both the Principal and the Contractor.
- (b) The members of the Board shall agree on which member shall act as Chair of the Board.

### **2.6.2 Criteria**

- (a) Experience
  - (i) It is desirable that all Board members be experienced in the type of construction required in the Contract, interpretation of Project documents and resolution of construction Issues or Disputes.
  - (ii) It is desirable that there is a complementary mix of skills and experience amongst the Board members.
- (b) Neutrality
  - (i) It is imperative that the Board members be neutral, act impartially and be free of any actual or perceived conflict of interest.
  - (ii) The concepts of neutrality, impartiality and freedom from any actual or perceived conflict of interest must have regard to the member's current, primary or full time employer and any member's relationship with either party to the Contract or any other entity, such as a subcontractor, design professional consultant, having a role in the Project.
- (c) Prohibitions and disqualifying relationships for prospective Board members and sitting Board members will include:
  - (i) An ownership interest in any entity involved in the Contract, or a financial interest in the Project except for payment for services on the Dispute Avoidance Board;
  - (ii) Previous employment by, or financial ties to, any party involved in the Project within a period of two years prior to award of the Contract, except for fee-based consulting services on other projects;
  - (iii) A close professional or personal relationship with any key member of any entity involved in the Project which, in the reasonable judgement of either party, could suggest partiality;
  - (iv) Prior involvement in the Project of a nature which could compromise that member's ability to participate impartially in the Board's activities

- (v) Employment, including fee-based consulting services, by any entity involved in the Project except with the express approval of both parties; or
- (vi) Discussion concerning or the making of an arrangement or agreement with any entity involved in the Project regarding employment after the Project is completed.

### **2.6.3 Disclosure Statement and Fee Proposal**

- (a) As a part of the selection process, the first two prospective Board members will be required to submit complete disclosure statements and a fee proposal for the approval of both the Principal and the Contractor.
- (b) Each disclosure statement shall include a resume of experience, together with a declaration describing all past, present, anticipated and planned future relationships, including indirect relationships through the prospective Board members' primary or full-time employer, involved in the Project and with all parties involved in the Contract, including subcontractors, design professionals and consultants.
- (c) Disclosure of close professional or personal relationships with all key members of all parties involved in the Project shall be included.
- (d) The third Board member will be required to submit such a disclosure statement and fee proposal to the first two Board members and to the Principal and Contractor as a part of his or her selection and evaluation process.

### **2.6.4 Selection Process**

- (a) Nomination and approval of first two Board members
  - (i) The Principal and the Contractor shall each nominate a proposed Board member and convey the nominee's name, disclosure statement and fee proposal to the other party at least two weeks prior to the proposed date of execution of the Contract.
  - (ii) If the nominee is not rejected within one week after receipt of the disclosure statement, the nominee will be deemed approved.
  - (iii) No reasons for rejection need be stated.
  - (iv) In the event of rejection, the nominating party shall submit another nomination within one week of receipt of the notice of rejection.
  - (v) This process will be repeated until two mutually accepted Board members are named.
- (b) Nomination and approval of third Board member
  - (i) Upon approval of the first two Board members, the Principal and Contractor will instruct the first two Board members to select the third member. The first two Board members will endeavour to nominate a third member who meets all the criteria listed above.
  - (ii) The third member shall be nominated within one week after the first two Board members are instructed to proceed with this selection. The

nominee's name, disclosure statement and fee proposal will be conveyed to the Principal and the Contractor, who will either accept or reject the nominee within one week. In the event of rejection, the first two Board members will be requested to submit another nomination within one week of receipt of the notice of rejection.

### **2.6.5 DAB Agreement**

All three Board members and the authorised representatives of the Principal and the Contractor shall execute the DAB Agreement within one week after the selection and approval of the third member and, preferably, in conjunction with or shortly after the signing of the Contract.

## **2.7 OPERATION**

### **2.7.1 General**

The DAB Agreement contains draft Operating Procedures consistent with this Contract and any amendments to the Operating Procedures will be agreed by the Board, the Principal and the Contractor as a task under the DAB Agreement.

### **2.7.2 Project Documents, Reports and Information**

- (a) The Principal will provide a full set of Project Documents to each Board member.
- (b) The Board members will be kept informed of construction activity and other developments by means of timely transmittal of relevant information prepared by the Principal and the Contractor in the normal course of the Works including but not limited to periodic progress reports and minutes of progress meetings.

### **2.7.3 Periodic Meetings and Visits**

- (a) The Board shall visit the Project site and meet with representatives of the Principal and the Contractor at no less frequently than three monthly intervals and at times of significant Project milestones.
- (b) The frequency and scheduling of these visits shall be as agreed among the Principal, the Contractor and the Board members, depending on the progress of the work. In case of failure to agree, the Board shall schedule the visits.
- (c) Each meeting of the Dispute Avoidance Board shall consist of a site inspection and field observation of the Work, followed by the DAB meeting itself. The site inspection shall cover all active segments of the Works, including any areas which involve an Issue or a Dispute. In such site inspection, the Board shall be accompanied by representatives of both the Principal and Contractor.
- (d) The DAB meeting will be attended by senior executive personnel (both off-site and on-site) of the Principal and the Contractor.
- (e) The draft DAB meeting agenda will generally include the following:
  - (i) Opening remarks by the Chair, including noting the "Without Prejudice" nature of the meeting;
  - (ii) Declarations of new Interests and Associations (if any);

- (iii) Approval of previous DAB meeting minutes;
- (iv) Actions arising from previous DAB meeting minutes;
- (v) Either a joint presentation by the Principal and the Contractor or separate presentations by the Principal and the Contractor covering:
  - A. Work accomplished since the last meeting;
  - B. The current status of the work schedule and schedule for future work,
  - C. Anticipated or potential Issues and proposed solutions; and
  - D. Status of current and potential Issues, Disputes, claims and other controversies.
- (vi) Such other items as the parties may wish to discuss with the Board; and
- (vii) Scheduled dates for future Board meetings.
- (f) The DAB Chair shall prepare agendas for and minutes of regular meetings and circulate them for comment, revisions and/or approval by all meeting attendees.
- (g) The Principal will, at its expense, provide administrative services, such as conference facilities and secretarial support (if required).

## **2.8 DISPUTES**

### **2.8.1 General**

- (a) The Principal and the Contractor will co-operate to ensure that the Board is able to consider Issues or Disputes promptly, taking into consideration the particular circumstances and the time required to prepare appropriate documentation.
- (b) The dispute resolution procedures and time periods set out in the DAB Agreement may only be modified by mutual agreement with the Principal, the Contractor and the Board members.

### **2.8.2 Prerequisites to Recommendation**

A Dispute may be referred to the Board for consideration and Recommendation in accordance with the General Conditions when either party believes that bilateral negotiations are unlikely to succeed or have reached an impasse and/or the Project provides for a prior decision by the Superintendent and that decision by the Superintendent has been issued.

### **2.8.3 Requesting a Recommendation**

- (a) Either party may refer a Dispute to the Board for a Recommendation. Requests for a Board Recommendation (“Notice of Referral”) shall be submitted in writing to the Chair of the Dispute Avoidance Board and shall state the Dispute in connection with or arising out of any claims and other controversies arising out of performance of the work under the Contract.

- (b) The Notice of Referral shall state clearly and in full detail of the Dispute to be considered by the Board.
- (c) A copy of the Notice of Referral shall be simultaneously provided to the other party.
- (d) After receiving the Notice of Referral and conferring with both parties, the Board Chair will establish a submissions schedule to give adequate time for the other party to respond to the requesting party's Notice of Referral and for the Board members to review all relevant material prior to any Hearing or Recommendation.

#### **2.8.4 Scheduling a Hearing**

- (a) The DAB Agreement empowers the Board to schedule a hearing in relation to a Dispute ("Hearing"). A Hearing is not compulsory.
- (b) Upon receipt of a request for a Recommendation, and upon determining that a Hearing is appropriate, or if both parties agree, the Chair will schedule a Hearing date.

#### **2.8.5 Written Submissions**

- (a) Within seven days after the referral of a Dispute to the Board, or within such other time as the Board may consider reasonable in the circumstances, the party who gave the Notice of Referral must, in addition to any particulars provided by that party in the relevant Notice of Referral to the Board, give the other party and the Board a written statement of the Dispute referred to the Board any agreed statement of facts and a written submission (which may include witness statements) on the dispute in support of that party's contentions.
- (b) Within fourteen days after the first statement is served, or such other time as the Board may consider reasonable in the circumstances, the other party must give the first party and the Board a written response to the first party's submissions.
- (c) If the Board considers it appropriate, the first party may reply in writing to the second party's response within the time allowed by the Board.
- (d) If the Board decides further information or documentation is required for its Recommendation in relation to the Dispute, the Board may direct one or more parties to provide such further submissions, information or documents as the Board may require.
- (e) The Board must disclose to both parties all submissions, further submissions, information and documents received.
- (f) Any failure by a party to make a written submission will not terminate or discontinue the Board's Recommendation making process.

#### **2.8.6 Hearing**

- (a) Either party may, in writing, request the Board to call for a Hearing of the parties. Any such request shall include a summary of the matters the party considers should be included in the Hearing.

- (b) If neither party requests the Board to call a Hearing, the Chair of the Board may nevertheless call a Hearing if the Board determines that it is appropriate.
- (c) Unless the parties agree otherwise, the Hearing will be held on site.
- (d) At least five days before the Hearing, the Board must inform the parties in writing of the date, venue and agenda for the Hearing.
- (e) The parties must appear at the Hearing and may make submissions on the subject matters of the Hearing.
- (f) If a party fails to appear at the Hearing of which that party had been notified, the Board and the other party may nevertheless proceed with the Hearing and the absence of one party will not terminate or discontinue the Recommendation making process.
- (g) The parties may be accompanied at a Hearing by legal or other advisers and will be bound by any procedural directions that may be given by the Board in relation to the Hearing both before and during the Hearing.
- (h) The Hearing must be held in private.
- (i) If agreed between the parties, transcripts of the Hearing may be taken and made available to the Board and the parties.

### **2.8.7 Board's Deliberations**

After the Hearing is concluded, the Board will confer to formulate its Recommendation. All Board deliberations shall be conducted in private with all individual view kept strictly confidential from disclosure to the Principal or the Contractor.

### **2.8.8 Recommendation**

- (a) As soon as possible after receipt of the submissions or after any Hearing and, in any event not later than 30 Business Days after completion of submissions and any Hearing relating to the referral of a Dispute to the Board, the Board must:
  - (i) make a Recommendation in relation to the Dispute between the parties; and
  - (ii) notify the parties of that Recommendation.
- (b) The Recommendation of the Board must:
  - (i) be in writing, stating the Board's Recommendation and giving reasons;
  - (ii) be made on the basis of the submissions (if any) of the parties, the Hearing (if any) and the Board's own expertise; and
  - (iii) be made in accordance with the Contract.
- (c) If the Board's Recommendation contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a material mistake in the description of any person, matter or thing, or a defect in form, the Board must correct the Recommendation.



### **2.8.9 Acceptance or Rejection**

- (a) Within two weeks of receiving the Board's Recommendation, or such other time as may be specified by the Board, both the Principal and the Contractor shall provide written notice to the other and to the Board of acceptance or rejection of the Board's Recommendation.
- (b) The failure of either party to respond within the specified period will be deemed an acceptance of the Board's Recommendation.
- (c) If either party rejects the Board's Recommendation, then the dispute resolution procedures of the Contract will apply.
- (d) If, with the aid of the Board's Recommendation, the Principal and the Contractor are able to resolve the Dispute, the Principal will properly process any required Project changes.

## **2.9 PAYMENT**

### **2.9.1 Payment and Expenses**

- (a) The payment of fees and expenses to the Board members will be in accordance with the schedule to the DAB Agreement.
- (b) The Principal will pay all fees and expenses of the three Board members for attendance at the periodic meetings of the Board.
- (c) The fees and expenses of all three Board members for additional meetings, for the review of Issues and Disputes and for the making of a Recommendation in accordance with the DAB Agreement shall be shared equally by the Principal and the Contractor.
- (d) If the Board desires additional services, such as legal or other expert, accounting, data, research and the like, the Principal and the Contractor must agree in advance and the costs will be shared by the parties as mutually agreed.
- (e) Each party shall be responsible for its own costs during the DAB process, including staff time for preparatory work and attendance at meetings, consultants and counsel fees and any other costs.