# DRBF Model Ad Hoc DRB Agreement (2023 Update/BOD Approved April 2023)

*Note to Specifiers: This Ad Hoc DRB model agreement may not be entirely applicable or enforceable in certain jurisdictions.*

*Note to Contract Drafters: The Parties will need to agree on a DRB selection process. The DRBF recommends a joint selection process for all members of the DRB, including: agreeing on qualifications appropriate to the Disputes; having prospective DRB members provide disclosures regarding any potential conflicts of interest; and conducting joint due diligence to ensure that all candidates meet qualifications and conflicts requirements.*

#### **Ad Hoc Dispute Review Board Agreement**

## PARTIES

* 1. [FILL IN NAME] (“Owner”).
  2. [FILL IN NAME] (“Contractor”).
  3. Dispute Review Board (“DRB”) consisting of three members, one of whom shall serve as Chair of the DRB as designated by the Parties:

1. [FILL IN NAME] [FILL IN NAME] (Chair)
2. [FILL IN NAME]
3. [FILL IN NAME]

## CONTRACT/PENDING DISPUTES

* 1. The Contractor has entered into a Contract with the Owner (“Contract”) for [PROJECT NAME] (“Project”).
  2. This DRB Agreement shall be considered an amendment to the Contract to permit use of a DRB in lieu of the Contract’s arbitration provision [OR DESCRIBE OTHER DISPUTE RESOLUTION PROVISION].
  3. The Owner and the Contractor have the following pending disputes [DESCRIBE DISPUTES, INCLUDING WHETHER THEY INCLUDE ENTITLEMENT, TIME, AND/OR QUANTUM] (the “Disputes”).
  4. The Owner and the Contractor agree to have the DRB address the Disputes as provided herein and in Attachment 1 (“DRB Process”).
  5. The use of the DRB Process is without prejudice to any rights and responsibilities that the Parties otherwise have under the Contract and does not change the terms of the Contract except as expressly provided herein.
  6. If the Parties are unable to resolve the Disputes based on the DRB Process, then [DESCRIBE NEXT STEPS AFTER CONCLUSION OF DRB PROCESS].
  7. During the pendency of the DRB Process, the Contractor shall continue work, and the Owner shall continue making payments, as and to the extent required by the Contract.

## DRB SCOPE OF WORK

* 1. The DRB shall conduct the following dispute resolution activities:
     1. Plan, schedule and conduct a hearing process in the manner, timing, and location set by the DRB, in consultation with the Parties. The hearing process shall be administered as set forth in Attachment 1.
     2. Convene internal meetings as needed to review and discuss the DRB process, the Disputes, and to formulate a report as described in Section 3.1.3 below.
     3. Deliberate following the hearing and issue a timely written report to the Owner and the Contractor, including recommendations and the supporting analysis and rationale for all recommendations.
     4. When requested and deemed appropriate by the DRB, provide timely written responses to requests for clarification made by either the Owner or the Contractor.
  2. The DRB shall perform any other DRB services needed to achieve the purpose of this Agreement.
  3. The Chair of the DRB shall confer with the Parties and the other DRB members in administering the DRB process as set forth herein, including implementation actions and associated timing/deadlines.

## RESPONSIBILITIES OF THE PARTIES

* 1. DRB Responsibilities:
     1. Maintain impartiality and avoid conflicts of interest by continuing to meet the eligibility and disclosure requirements for DRB members, as set forth in the DRB Specification. Promptly advise all Parties upon becoming aware of any development that could be perceived as a conflict of interest and promptly resolve any such issues.
     2. Advise the other DRB members, the Owner, and the Contractor when unable to continue serving as a DRB member.
     3. Neither the DRB Members individually, nor the DRB collectively, shall:
        1. Give advice regarding design or construction means or methods.
        2. Discuss issues with the Owner or the Contractor, such as the conduct of the work and the resolution of construction problems, that could possibly be construed as compromising the DRB’s ability to impartially resolve future disputes.
        3. Express an individual or collective opinion of merit, in whole or in part, for any potential or other dispute at any time prior to the issuance of a report, except in the case of informal assistance or an advisory opinion.
        4. Meet or communicate with either the Owner or the Contractor in the absence of the other, except as required when performing the duties of the Chair or conducting a meeting or hearing which the Owner or Contractor refuses to attend.
     4. Consider the facts and circumstances forming the basis of a referred dispute independently and impartially, and evaluate the merits based on careful consideration of the information submitted by the Parties, all Contract requirements, and applicable law/regulations. In doing so, the DRB shall not:
        1. Ignore or undermine the provisions of the Contract, disregard or alter any requirements of the Contract, or alter the allocation of risk specified therein.
        2. Supplant or otherwise interfere with the respective rights, authority, duties, and obligations of either the Owner or Contractor as set forth in the Contract or Contract Documents (as defined in the Contract).
        3. Participate in negotiations with the Owner and Contractor, nor perform conciliation or mediation services in connection with any issue or dispute.
     5. Make every effort to reach unanimous recommendations. If this cannot be accomplished, include written minority recommendations and supporting rationale within the full DRB report, but do not identify the dissenting member.
     6. Individually and collectively agree to be bound by the Dispute Resolution Board Foundation’s Code of Ethical Conduct as set forth in the current edition of the DRBF’s *Dispute Board Manual: A Guide to Best Practices and Procedures*.
  2. Owner Responsibilities:
     1. Except for participation in the DRB’s activities as provided in this Agreement, do not solicit advice or consultation from the DRB or individual DRB members.
     2. Furnish, or request the Contractor to furnish, to each DRB member documents necessary for the DRB to conduct its operations.
     3. Coordinate DRB operations in cooperation with the Contractor.
     4. Provide any necessary support services.
     5. Cooperate with the Contractor and the DRB to facilitate timely resolution of disputes.
  3. Contractor Responsibilities:
     1. Except for participation in the DRB’s activities as provided in the Contract and this Agreement, do not solicit advice or consultation from the DRB or individual DRB members.
     2. Furnish to each DRB member and to the Owner copies of pertinent documents, other than those furnished by the Owner, as may be requested.
     3. Cooperate with the Owner and the DRB to facilitate timely resolution of disputes.

## TIME FOR BEGINNING AND COMPLETION OF DRB ACTIVITIES

* 1. The DRB shall begin its activities as of the effective date of this Agreement.
  2. This Agreement shall survive the termination, resignation or death of any DRB member.
  3. The DRB’s jurisdiction under this Agreement shall terminate by mutual agreement of the Owner and the Contractor.
  4. Individual DRB members may be terminated by mutual agreement of the Owner and Contractor. In the event a member is terminated, he/she shall be replaced in the same manner as the original appointment.
  5. In the event a DRB member is terminated, the member shall be compensated for services performed up to the effective date of the termination.
  6. In the event a DRB member resigns, the member shall give the Parties at least thirty (30) days written notice to both Parties; shall be compensated for services up to the effective date of the resignation; and shall cooperate with the Parties in transitioning off the DRB.

## PAYMENT

*Note to Specifiers: This payment provision should be modified to reflect the allowable rates, travel time compensation, allowable expenses, etc., as contemplated by the DRB Specification. Specific terms for compensation and expense reimbursement should be filled in in the blanks set forth below.*

* 1. Compensation for services rendered by DRB members shall be as follows: [FILL IN DETAILS].
  2. Reimbursement of DRB members’ expenses shall be as follows: [FILL IN DETAILS].
  3. Payments made to the DRB members shall constitute full compensation for services rendered, work performed, travel time, and all expenses, materials, and incidentals necessary to serve on the DRB.
  4. No payment shall be made to DRB members in the form of bonus, commission, or consideration of any nature other than that specified for performance and service provided under this Agreement.
  5. DRB members shall individually submit invoices for work completed to the Contractor:
     1. Not more often than once per month.
     2. Based on the agreed compensation rates and expense reimbursement guidelines as set forth herein.
     3. Accompanied by a description of activities performed during the invoice period, and an itemization of allowable expenses incurred (together with copies of original bills, receipts, and other expense back-up).
  6. The Contractor shall pay acceptable invoices within thirty (30) days of their receipt.
  7. The Contractor shall be reimbursed for the Owner’s portion of the DRB costs in accordance with payment provisions specified in the Contract.

## CONFIDENTIALITY AND RECORDKEEPING

*Note to Specifiers: Insert number of years of the Project jurisdiction’s record retention requirement.*

* 1. No DRB member shall divulge information that has been acquired during DRB activities without obtaining prior written approval from the Owner and the Contractor.
  2. DRB members shall maintain cost records pertaining to this Agreement for inspection by the Owner or the Contractor for a period of [X] years following termination of this Agreement.

## ASSIGNMENT

* 1. No Party to this Agreement shall assign any duty established under this Agreement.

## TERMINATION/REPLACEMENT

* 1. This Agreement may be terminated by mutual agreement of the Owner and Contractor at any time upon not less than thirty (30) days written notice to the DRB.
  2. If a DRB member resigns, is unable to serve, or is terminated, the member shall be replaced within thirty (30) days in the same manner the member was originally selected. This Agreement shall be amended to indicate the member replacement.

## LEGAL RELATIONS

* 1. The Owner and the Contractor acknowledge that each DRB member, in the performance of their duties on the DRB, is acting in the capacity of an independent agent and not as an employee of the Owner or the Contractor.
  2. The Owner and the Contractor acknowledge that each DRB member is acting in a capacity intended to assist the Parties in avoiding disputes or facilitating the timely resolution of disputes. Accordingly, the Owner and Contractor agree and acknowledge that, to the fullest extent permitted by law, each DRB member shall be accorded quasi-judicial immunity for any actions or recommendations associated with DRB activities, and shall not be required to participate, appear or testify in any other legal proceedings between the Parties.
  3. To the fullest extent permitted by law, the Owner and the Contractor shall indemnify and hold harmless each DRB member from (i) any personal or professional liability arising from or related to DRB activities under this Agreement, and (ii) any claims, losses, demands, costs, and damages (including reasonable attorney fees) for bodily injury, property damage, or economic loss arising out of or related to DRB members carrying out DRB activities under this Agreement. The foregoing indemnity and hold harmless agreement is a joint and several obligation of the Owner and the Contractor.

## DISPUTES REGARDING THIS AGREEMENT

* 1. Disputes among the Parties arising out of this Agreement that cannot be resolved by negotiation, and actions to enforce any right or obligation under this Agreement, shall be initiated in the [Court Name] Court of the [Jurisdiction].
  2. All questions shall be resolved by application of [Jurisdiction] law, without reference to the jurisdiction’s choice of law rules.
  3. The DRB members hereby consent to the personal jurisdiction of the Court of the [Jurisdiction].

## FUNDING AGENCY REVIEW

13.1. The [Agency funding the Project] has the right to attend DRB regular meetings and site visits and DRB hearings, but not to attend private DRB deliberations.

## DRB AGREEMENT EFFECTIVE DATE

This Agreement shall be effective as of the following date: [INSERT DATE DRB WAS APPOINTED].

**DRB MEMBERS**

By:

(Signature) (Name)

By:

(Signature) (Name)

By:

(Signature) (Name)

**CONTRACTOR OWNER**

By: By:

(Signature) (Signature)

By: By:

(Name) (Name)

Title: Title:

Attachment 1

DRB Hearing Process

* 1. Hearing Scope
     1. The Disputes described in Ad Hoc DRB Agreement Section 2.3 shall be the scope of the hearing in the DRB Process.
     2. Within seven (7) days after the effective date of the DRB Agreement, the DRB Chair shall hold a conference call with the Parties addressing the following topics: (i) order of, and due dates for, delivering and exchanging pre-hearing submittals; (ii) use of experts (including a schedule for disclosure of experts and exchange of reports); (iii) date, time, and location for holding the DRB hearing; (iv) participants, witnesses, and observers at the hearing; and (v) any other matters relating to the hearing process that the DRB Chair or the Parties wish to raise; the DRB Chair shall confirm via email the steps and schedule agreed upon.
  2. Pre-Hearing Submittals
     1. On or before the date(s) set by the DRB Chair, 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 for each Party 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 a listing of the Disputes together with 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 Disputes.
     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 related to the Disputes.
     5. 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.
     6. 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). The responding Party shall address such submissions and, if it so chooses, provide its own time and/or quantum analysis.
     7. 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.
  3. 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 shall not be 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.
    1. The legal Rules of Evidence shall not apply in the DRB hearing process.
    2. 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.
    3. 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 Disputes 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 Disputes 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 Report
     1. The DRB’s recommendation for resolution of the Disputes shall be formalized in a written report signed by all DRB members. The report should consist of a concise description of the Disputes and relief requested; appropriate summaries of each Party’s position; findings as to the facts of the Disputes; 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.
  4. 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 Disputes.
     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 from each Party shall be allowed.
  5. 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 time and/or quantum, shall not obligate the Owner to any particular time or quantum amount.
  6. Admissibility/Participation
     1. The DRB report [shall be] [shall not be] admissible in any subsequent dispute resolution or legal 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 any subsequent dispute resolution or legal proceedings.

END