# DRBF Model Dispute Resolution Advisor (DRA) Operating Procedures (2023 Update/BOD Approved April 2023)

*Note to Specifiers: The DRA Specification should provide for the DRA to draft the Operating Procedures to be consistent with the final form of the DRA Specification and DRA Agreement for the Project. Cross references to those documents should be added if needed.*

# GENERAL

* 1. These Operating Procedures are issued to provide details of the process to be followed by the Parties and the Dispute Resolution Advisor (“DRA”) pursuant to the DRA Specification and DRA Agreement (collectively, the “DRA Contract Documents”). To the extent there is any inconsistency between the Operating Procedures and the DRA Contract Documents, the DRA Contract Documents govern.
  2. The DRA will operate in an informal, flexible manner to implement its responsibilities under the DRA Contract Documents. The DRA and the Parties will endeavor to be as effective and efficient as possible in administering the DRA process.
  3. The DRA will be independent and impartial in all of its actions.
  4. The Operating Procedures may be changed with approval of the Parties and the DRA.
  5. The DRA is responsible to confer and reach agreement with the Parties in administering the Operating Procedures.

# COMMUNICATIONS

* 1. Each Party will identify a single designated representative (“Party Representative”) to interact with the DRA. All communications with the DRA will be made through the Party Representatives. Each Party Representative will be responsible for communicating with other members of their respective Project team members regarding DRA matters and communications.
  2. The DRA and Party Representatives will regularly confer to determine schedules and arrangements for DRA conference calls, meetings, site visits, hearings, and any other DRA proceedings.
  3. Communications, papers, and other documents generated by either Party will be sent directly to the DRA with confirmation that a copy has been sent to the other Party. Generally, communications and submissions will be made by email and electronic means, however the DRA may ask for hard copies as well.
  4. There will be no *ex-parte* communication between a DRA member and any Party, other than those conducted by the DRA with the Party Representatives for scheduling and/or routine administrative purposes. The DRA and the Parties will maintain the confidentiality of the information and documents furnished to the DRA.

# PROJECT DOCUMENTS TO BE FURNISHED TO THE DRA

* 1. Prior to the kick-off meeting with the DRA, the Parties will provide the DRA with a conformed set of the Contract, Plans, and Specifications for the Project and the approved Baseline Schedule (and any updates that have been submitted by the time of DRA appointment). The DRA may ask for other documents as needed to get background information on the project scope and status.
  2. Generally, the Parties will each month provide to the DRA regularly generated copies of the following documents: Schedule Updates; Progress Meeting Minutes; Logs of RFIs, Submittals, Change Notices, Change Orders, and Payment Requisitions; and other progress reports kept in the ordinary course. The DRA may request other documents as needed for the DRA to understand issues raised by the Parties.
  3. The DRA and the Party Representatives will confer and confirm the means and timing of document updates to the DRA. These documents may be in electronic form or hard copies, as determined by the DRA.

# DRA MEETINGS

* 1. The DRA kick-off meeting will be scheduled by the DRA as soon as practicable after the DRA is appointed. The DRA will work with the Party Representatives to establish an agenda and to provide the DRA with advance copies of pertinent project documents so that the DRA can become familiar with the Project scope, budget and schedule and be briefed on the status of the Project as of the time the DRA is on-boarded.
  2. Subsequent DRA meetings will be scheduled every three months. At each DRA meeting the DRA and the Parties will schedule the next two DRA meetings in advance. If the Parties require an adjustment to the DRA meeting schedule, the Chair will schedule a new date satisfactory to the Parties and the DRA.
  3. The DRA will confer with the Party Representatives to prepare a draft agenda for each DRA meeting; the agenda will include the items listed in the DRA Specification, as well as any items specific to the project or the issues at hand. The draft agenda will be forwarded to the Parties at least seven (7) days prior to each regular meeting for review and comments. The DRA will then take such comments into consideration, finalize the agenda, and distribute it to the Parties prior to the meeting.
  4. The DRA will confer with the Party Representatives on who should attend DRA meetings and how information will be presented to the DRA at the meeting. It is preferred that the Parties confer in advance of the DRA meeting and prepare a joint project update to the DRA, tracking to the meeting agenda.
  5. The Parties may agree to have the DRA meetings coincide with regularly scheduled Progress Meetings. If that is done, the DRA will attend the Progress Meeting as an observer, and then hold the DRA meeting immediately after the Progress Meeting.
  6. The Party Representatives will ensure that appropriate Project team members with knowledge of the Project attend the DRA meetings. Each DRA meeting will consist of a roundtable discussion of the agenda items. The DRA meeting will include a site visit for the DRA to get a firsthand look at the work being performed on the Project. The DRA will be accompanied by representatives of both Parties during all DRA site visits.
  7. After each DRA meeting, the DRA will prepare a high level summary of the issues and action items covered at the DRA meeting. The DRA meeting summary will be reviewed by the Parties, corrected as necessary, and approved at the next DRA meeting.

# INFORMAL ASSISTANCE AND ADVISORY OPINIONS

* 1. The DRA may make inquiry of the Parties as to the extent and nature of any negotiations regarding a pending dispute. Such negotiations may involve the Parties’ solicitation of DRA informal assistance or an advisory opinion.
  2. The Owner and the Contractor may ask the DRA to provide informal assistance by discussing and attempting to resolve any issue or disagreement that could become a dispute. Neither the Owner, the Contractor, nor the DRA will be bound in any future dispute resolution process by any discussion during this informal assistance process. The informal assistance provided by the DRA will be done jointly with the Owner and Contractor and will not include settlement negotiations or mediation.
  3. The Owner and Contractor may ask the DRA to provide an advisory opinion on an issue that could become a dispute under the Contract. The Parties will make a joint submission to the DRA specifying the scope of the advisory opinion sought. The DRA will determine if the issue is properly the subject of an advisory opinion and so advise the Parties.
     1. If the DRA agrees to provide an advisory opinion, the DRA will hold a conference call with the Party Representatives to establish a plan and schedule for submissions and the date and location of the advisory opinion meeting. Unless otherwise agreed, the advisory opinion meeting will occur as part of the next scheduled DRA meeting.
     2. The claiming Party will submit a position statement consisting of not more than five (5) pages with a brief discussion of its positions in bullet point format, together with any needed back up information or documents. The responding party will submit a corresponding brief response. Rebuttal points will be discussed at the Advisory Opinion meeting. The Parties will be expected to confer and agree on a joint set of supporting documents to be submitted with the claiming Party’s position statement. The format and content of submissions and supporting documents will be tailored to the type of issue presented, in consultation with the DRA.
     3. At the advisory opinion meeting, each Party will present its position and answer questions from the DRA. After hearing from the Parties, the DRA will then give his/her advisory opinion verbally or in writing (as the Parties and the DRA agree). In order to promote understanding of the DRA’s advisory opinion, the Parties may ask clarifying questions of the DRA before the advisory opinion meeting is ended.
     4. If the dispute remains unresolved, the Parties may continue with the Contract dispute process without prejudice to their positions on the issue.
     5. The DRA will not be bound by its advisory opinion if the issue results in a dispute under the DRA hearing process.

# DRA HEARINGS

* 1. The DRA will process properly referred and eligible disputes meeting the timeframes specified in the Contract.
  2. The referring Party will notify the responding Party and the DRA that they wish to have the DRA hear a dispute. Within seven (7) days after the dispute referral, the Parties will confer and submit to the DRA a Joint Statement of Dispute.
  3. The Joint Statement of Dispute typically will be a few sentences describing the issue(s) in dispute; the proposed scope of the hearing; and the relief requested from the DRA (for example, entitlement only; entitlement, plus cost guidelines; entitlement, time, and cost; etc.). If the Parties cannot agree on a Joint Statement, they will in the same timeframe submit their respective statements for the DRA’s determination.
  4. If the Parties agree initially to present entitlement only, they may also agree on a process and timeline for follow-on negotiations regarding time and cost (if entitlement is found and accepted), with the right to refer the dispute back to the DRA for a hearing on any unresolved time and cost issues. If the Parties agree to this process, at the time of any subsequent referral to the DRA, the DRA will confer with the Party Representatives to set a plan and timeline for those proceedings consistent with these Operating Procedures.
  5. Within seven (7) days after receipt of the proposed Joint Statement of Dispute, the DRA will schedule a conference with the Party Representatives to agree on:  
     1. Joint Statement of Dispute, including scope of the hearing and relief requested (any unresolved scope issues will be determined by the DRA).
     2. Date for the hearing.
     3. Sequence, form and content of position papers (including rebuttals).
     4. Preparation and exchange of expert reports (if used).
     5. Preparation of Common Reference Documents.
     6. Schedule for submission of position papers and any other documents.
     7. Date for submission of hearing participants/observers list.
     8. Date for submission of hearing presentations.
     9. Logistics of the hearing, including location and the manner in which pre-hearing documents will be submitted and exchanged.
  6. The DRA confirm to the Party Representatives the schedule of actions and submissions leading up to the hearing. The DRA may schedule other planning conferences, from time to time, to ensure that hearing preparations are proceeding effectively and efficiently.
  7. Approximately seven (7) days prior to the hearing, the DRA will hold a conference call with the Party Representatives to confirm that all submissions are in order, go over final logistics of the hearing, and address any issues of concern that the Parties have regarding the hearing.

# PREPARATION FOR A HEARING

* 1. The DRA will determine the time and location of the DRA hearing, with due consideration to the needs and preferences of the Parties. Normally, hearings will be conducted at or near the project site.
  2. The Parties will provide administrative services such as conference facilities and support services, as needed for the hearing.
  3. The DRA will schedule the order of submissions as follows: The referring Party will submit its position statement first. The responding Party will submit its position statement with its responses. Each Party will be permitted to submit a short rebuttal paper focusing on those points that warrant further explanation. Generally, the goal is to make the submission process as efficient as possible by ensuring focus only on the issues relevant to the dispute.
  4. The Parties will jointly prepare a set of Common Reference Documents (“CRD”) containing all documents that the Parties want the DRA to consider for the dispute. The Parties should avoid repetition of documents and submission of voluminous documents where extracts would suffice. The CRD will be organized and tabbed in a manner that permits access and reference to the documents in all submissions, accompanied by a summary document listing the contents of the CRD. The CRD will be agreed upon prior to submission of the referring Party’s position statement. The CRD can be supplemented by agreement of the Parties and the DRA, if needed.
  5. Each Party’s position paper will be structured to be a stand-alone document that includes the Joint Statement of Dispute; states the Party’s position on each element of the dispute; clearly defines the contractual justification for the stated position; identifies relevant facts and documents; and provides the reasoning as to why each believes the other Party’s position is not factually or contractually correct. Each position statement must also include or refer to supporting CRD documents.
  6. When the scope of the hearing includes subcontractor or supplier claims, the position papers must include any necessary information and documents from the subcontractor or supplier.
  7. When the scope of the hearing includes time and cost issues, the referring Party will include (a) a schedule impact analysis (for time-related issues) and (b) full cost details (for cost-related issues). The other Party’s response will include its counter-analysis and support, if any.
  8. All position papers must be simultaneously delivered to the DRA members and the other Party on the schedule established by the DRA Chair.
  9. Once position papers and rebuttal papers have been submitted, the Parties may not submit new information or documents regarding the dispute, absent good cause shown, and with the DRA’s permission and allowance of sufficient time for the other Party to respond.
  10. On a date set by the DRA, the Parties will exchange and submit to the DRA a list of the participants and other attendees that each Party plans to have at the hearing. The Parties are encouraged to limit the number of persons at the hearing to the necessary minimum, preferably those directly involved in the Project; those with direct knowledge of the issues in dispute; or those whose presence is needed because they will be reviewing the DRA’s recommendation. The list of attendees should include:
      1. Name, title and professional affiliation.
      2. Role of the person at the hearing (observer or participant).
      3. Brief summary of matters that any participant is anticipated to address.
  11. On a date set by the DRA, the Parties will submit and exchange any presentation materials they intend to use at the hearing. The Parties are encouraged to use summaries, charts, chronologies, and visual aids that will assist the DRA in understanding the information and documents to be presented. If a Party uses a PowerPoint presentation, the slides will be numbered and the DRA will be given a copy in a format that permits notetaking. The presentation materials must be consistent with the position papers and rebuttals previously submitted.

# CONDUCT OF THE DRA HEARING

* 1. At any hearing that includes subcontractor or supplier claims, the Contractor must require that each subcontractor (including lower tier subcontractors) or supplier involved in the dispute have present at the hearing an authorized representative with actual knowledge of the facts underlying its claim. The subcontractor or supplier representative should be prepared to answer questions by the DRA, if any, and may assist in the presentation.
  2. The Parties’ legal counsel may attend DRA hearings as an observer, provided that prior permission is obtained from the other Party. Legal counsel will not participate in the hearing unless requested by the Parties and approved in advance of the hearing by the DRA; if such participation is requested and approved, it will be limited to providing input on legal issues relating to the dispute.
  3. The legal Rules of Evidence will not apply in the hearing process. There will be no testimony under oath or any cross-examination by the other Party. There will be no audio or video recording of the hearing.
  4. Except for good cause shown as determined by the DRA, no Party will be allowed to present information, documents, etc., at the hearing that was not included in the pre-hearing submissions or otherwise provided to the other Party pre-hearing. In those rare instances where supplemental or new information is permitted, the hearing will be held open until the other Party has had an adequate opportunity to respond.
  5. Each Party will be allowed to present its position uninterrupted by the other Party. The Claimant will make its presentation first, followed by the Respondent. After both Parties have made their presentations, the DRA will hear rebuttals in turn.
  6. The DRA may ask questions (a) during presentations where clarification is sought in order to understand the information or documents being presented, or (b) after the presentations and during the rebuttals. After completion of both presentations, the Parties may ask the DRA for permission to ask the other Party questions for purposes of clarifying (not arguing with) information that has been presented.
  7. The DRA will ensure that the Parties have ample opportunity to fully present their respective positions and to rebut the opposing positions.
  8. Once the Parties are satisfied that they have presented their positions completely and the DRA has no further questions, the DRA will advise whether the hearing is closed at that time, or whether the DRA wants any additional submittals. If additional submittals are requested, the DRA will set a submission schedule, and once the additional submittals are received, the DRA will advise the Parties when the hearing is closed.
  9. If a Party fails to submit its pre-hearing papers, the DRA will determine whether the hearing will go forward as scheduled or will be re-scheduled. If a Party fails to attend a hearing, the DRA will determine whether the hearing will go forward as scheduled or will be re-scheduled. If the DRA decides to proceed in either case, that Party’s submissions to date will be considered as that Party’s entire position, and the DRA will proceed to hear the attending Party’s presentation and issue a report based on the information and documents that the DRA has received.

# DRA DELIBERATIONS AND REPORT

* 1. Following the close of the hearing, the DRA will consider the Party’s submissions and issue a recommendation to the Parties within thirty (30) days. Additional time may be allowed if both Parties agree.
  2. The report will 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.
  3. Within thirty (30) days of receiving the DRA’s report, both Parties must respond to the DRA in writing, signifying that the dispute is either resolved or remains unresolved. Failure by either Party to provide written acceptance or rejection of the DRA’s recommendation within the thirty (30) days will be deemed to be acceptance of the recommendation by that Party.
  4. The DRA will consider a request for clarification of, or correction to, any elements of the DRA report (as distinguished from further argument or re-argument), provided it is submitted in writing within ten (10) days of receipt of the DRA report. Each Party may make only one request for clarification for any one DRA report. The DRA will respond, in writing, within ten (10) days of receipt of a request for clarification. If a request for clarification or correction is submitted, the 30-day time period for the Parties to advise on acceptance or rejection of the report will be measured from when the Parties receive the DRA’s response.
  5. The Parties may request a de-brief with the DRA within the thirty (30) day period for deciding on acceptance or rejection of the DRA’s report. Upon such request, the DRA will promptly schedule a conference call with the DRA and Party representatives. The Parties may not use the de-brief to re-argue the dispute.

*Note to Specifiers: If the Project adopts the Rider for Virtual Proceedings, add a reference to it as a separate Section 10 and make it applicable to both meetings and hearings.*

END