**DRBF Model DRB Specification (2023 Update/BOD Approved April 2023)**

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

1. GENERAL
   * 1. This section specifies requirements for establishing and operating a three-person Dispute Review Board (“DRB”) (a) to assist in and facilitate the avoidance of disputes and (b) to provide timely 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 described herein as a condition precedent to initiating a subsequent legal process.
     5. 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.

*Note to Specifiers: Other provisions of the Prime Contract, especially articles related to “Change Orders,” “Disputes,” and “Claims,” must be coordinated with this section to ensure that the contract-required process preceding the formal DRB dispute resolution process is coordinated both in terms of terminology and steps/timelines. This model DRB specification uses the term “disputes,” but that may need to be changed to avoid conflicts and ambiguities between terms used in the Prime Contract and this model specification.*

1. DISPUTES ELIGIBLE FOR CONSIDERATION BY THE DRB

2.1. Except as expressly otherwise provided herein, 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 ESTABLISHMENT; DRB QUALIFICATIONS; DRB DISCLOSURES; DRB TERMINATION/REPLACEMENT

*Note to Specifiers: This section is modeled on joint selection of DRB members as discussed in Chapter 12 of the DRBF’s publication “Dispute Board Manual: A Guide to Best Practices and Procedure.” Specifiers should be aware that the Manual also describes other acceptable methods for selection. The DRB specification should include specific minimum qualifications or limitations, to ensure both parties begin the selection process with the most appropriate candidates. If one of the other methods discussed in that manual section are to be used, modify Article 4 below accordingly.*

* 1. The Parties shall use the following process and timeline to jointly select the DRB:
     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 will be evaluated, the process/timing to jointly select prospective nominees, and the documents to be provided to the DRB pursuant to Section 3.1.2.1.
     2. Within the twenty one (21) days after the initial meeting of the Parties on DRB selection as provided in Section 3.1.1:
        1. The Parties shall each provide to prospective DRB nominees a list of parties that will be involved in the project, including the Owner and Contractor on the Project (and any joint venture partners), as well as program/construction managers, designers, architects, engineers, other professional service firms or consultants, first tier subcontractors, and major suppliers involved or likely to be involved on the Project (“Major Participants”). In addition, prospective DRB nominees shall be provided with a summary description of the Project, a copy of the DRB Specification, and the form of DRB Agreement.
        2. The Parties shall each obtain from the candidates the following information:
           1. Full name, contact information, and current employer (including self-employment, if applicable);
           2. Resume indicating the person meets the qualifications in Section 3.2, including experience qualifying the person as a DRB member for the subject project and past DRB-related experience (including experience serving as a DRB Chair); and
           3. Disclosure statements meeting the requirements of Section 3.3.
     3. Within the fourteen (14) days after receipt and exchange of information from the prospective DRB members, the Parties shall confer and agree on the three members of the DRB and designation of the Chair. 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.
     4. The Parties shall promptly notify the DRB members of their appointment and schedule the DRB kick-off meeting as soon as practicable. The Owner, the Contractor and the DRB shall execute the DRB Agreement no later than the first DRB meeting, provided however, the effective date of the DRB Agreement shall be the date the three DRB members were notified of their appointment.
     5. Within fourteen (14) days after receipt of notice of appointment of the DRB, the DRB shall develop and submit to the Parties proposed DRB Operating Procedures addressing all elements of DRB operations that are consistent with and not otherwise covered in detail 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. The Operating Procedures are intended to be flexible to suit the needs of the Project and its DRB process, and may be amended from time to time by agreement of the Parties and the DRB.
  2. 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 experienced in the type of delivery method being used for the Project;
     4. Be familiar with the DRBF’s current *Dispute Board Manual: A Guide to Best Practices and Procedures*, have completed appropriate DRBF training, and agree to be bound by the [DRBF Code of Ethical Conduct](https://www.drb.org/code-of-ethical-conduct); and
     5. [Add any other requirements specific to the Project.]
  3. DRB members shall abide by the following disclosure requirements:
     1. Each prospective DRB member shall submit a signed and dated statement disclosing any past or present personal, professional, consulting, or financial relationship with any major participants involved in the Project, including the nature and extent of such relationships.
     2. For purposes of this Specification, a significant relationship and/or financial tie includes when a person has or had material involvement in the Project, is a current consultant or employee of any of the major participants, or has any ownership interest, loans, receivables, or payables, other than those relating to DRB services, with any major participants.
     3. If the nature and extent of such relationship and/or financial ties is significant from the Parties’ perspective, then that person shall be prohibited from serving as a DRB member.
     4. 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.
     5. 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.
     6. 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.
  4. Individual DRB members may be terminated as follows:
     1. By mutual agreement of the Parties, upon thirty (30) days’ notice to the DRB member.
     2. Any terminated DRB member shall promptly be replaced following the procedures set forth in Section 3.1.
  5. If a DRB member resigns or is otherwise not capable of performing continued DRB services, the Parties shall select a replacement member following the procedures set forth in Section 3.1.

1. DISPUTE AVOIDANCE PROCESS

*Note to Specifiers: Identify regular DRB meeting frequency, depending on the type or work and construction involved. The DRBF recommended quarterly (every three months) meeting cycle is included in this model specification. These periodic in-person meetings may be supplemented by virtual meetings as requested by the Parties or the DRB (see DRBF Rider for Virtual Proceedings model document).*

* 1. The DRB shall meet with Party representatives and visit the Project site every three months (or as otherwise agreed by the Parties) and at other times as requested by the Parties. Both Parties shall be represented at all DRB meetings and on the site visit.
  2. In advance of DRB meetings, the DRB Chair shall prepare an agenda in consultation with the Parties and the other DRB members. After the DRB meeting, the DRB Chair shall prepare a brief summary of the DRB meeting and site visit, highlighting the topics discussed and any action items. 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.
  3. Regular meetings shall consist of an informal roundtable discussion with representatives of the Parties, including the following topics:
     1. A report on the current status of:
* Status of Project
* Overall schedule
* Design
* Construction
* Permits, environmental, and real estate acquisition, as appropriate
* Utilities and railroads, as appropriate
* Cost and Payments
* Change notices and change orders
* Potential or pending disputes
* Submittals and RFIs
* Quality
* Safety
* Testing and Commissioning (if applicable)
  + 1. At the regular DRB meeting the Parties and the DRB shall review potential areas of dispute or disputes in process. The Owner or the Contractor may ask the DRB at a meeting to provide informal assistance by discussing with the Parties options to resolve any issue or disagreement that could become a dispute. Any such informal assistance by the DRB shall not be in the nature of mediation or settlement negotiations, and neither the Owner, the Contractor, nor the DRB shall be bound in any future dispute resolution process by any discussion during the informal assistance process.
    2. In conjunction with the DRB meeting, the DRB shall conduct a field observation of the work in progress, focusing on key issues the Parties have identified. 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. On a monthly basis, the Parties shall furnish electronically to the DRB copies of or access to regularly produced Project documents, including at a minimum:
* General monthly reports (if applicable)
* Contractor’s schedule update submittal and Owner’s response
* Progress meeting minutes or summaries
* Logs listing payment status, submittals, RFIs, change notices, and change orders
* Other regularly prepared documents requested by the DRB to assist it in addressing issues expressly raised before the DRB
  + 1. 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 shall include the following:
          1. The advisory opinion may be requested through an e-mail communication with the DRB Chair confirming that both Parties agree to the request. The Chair shall coordinate the date for an advisory opinion meeting with the Parties and the other DRB members; generally, the advisory opinion meeting should occur at the next scheduled DRB meeting.
          2. The Parties shall provide and exchange a brief (i.e., no longer than five single-sided pages) written summary of the issue and positions, together with any key documents. The Parties may, at the discretion of the DRB, provide brief presentation materials; if so, they shall be shared in advance of the meeting.
          3. Advisory opinion meetings shall consist of discussion involving the Parties and the DRB. After the meeting, the DRB shall promptly provide its advisory opinion written or orally, as requested by both Parties and agreed to by the DRB. In either form, the advisory opinion shall include (a) appropriate caveats on the nature of the advisory opinion; (b) the main reasons relied upon by the DRB for its opinion; and (c) its recommendation based on what the Parties presented.
       4. Neither the Parties nor the DRB shall be bound by advisory opinion positions taken or the recommendation made in any later hearing on the issue in dispute. Advisory opinions made by the DRB shall not be used or 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 Parties’ solicitation of DRB informal assistance or an advisory opinion as described above.
   2. Dispute Hearing 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 jointly prepared 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 in consultation with the Parties.
      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, if used); (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. The agreed upon steps and timing leading up to the DRB hearing shall promptly be communicated to the Parties by the Chair.
      4. Hearings shall be convened at the next periodic DRB meeting, unless the Parties agree otherwise.
      5. 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 cost issues within a time period agreed upon between the Parties. If they are unable to do so by the established deadline, the Parties shall follow the pre-hearing process set forth in Sections 5.2.1 to 5.2.4 to bring to the DRB for hearing any unresolved time and cost issues.
   3. Pre-Hearing Submittals:
      1. Within thirty (30) days after the Section 5.2.3 conference, the referring Party bringing the dispute shall submit its pre-hearing position papers containing the factual, contractual and legal basis for its position on the dispute. Within thirty (30) days after receipt of the referring Party’s pre-hearing position papers, the responding Party shall submit its response to the referring Party’s position. Within ten (10) days after receipt of the response, the referring Party shall submit to the DRB its rebuttal points, and within ten (10) days after receipt of the referring Party’s rebuttal points, the responding Party shall submit to the DRB its rebuttal points.
      2. All submissions to the DRB shall be simultaneously copied to the other Party. The timing of the submissions specified herein may be adjusted by agreement of the Parties and the DRB, keeping in mind the overall goal of the DRB process to promote efficient and timely resolution of disputes.
      3. In order to minimize duplication and repetition, backup and support information shall be included in a set of Common Reference Documents (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.
      4. Position papers shall, at a minimum, contain the Joint Statement of dispute and relief requested; the basis and justification for the Party’s position, with reference to the Contract, Contract Documents, and any relevant pre-referral correspondence or documentation on the matter; and any other supporting information in the CRD for each element of the dispute.
      5. When the scope of the hearing includes time and cost issues, the referring Party shall include a schedule impact analysis (for time-related issues) and full cost details (for cost-related issues).
   4. DRB Hearings:
      1. The Parties shall arrange for hearing facilities at or near the Project site. The hearing location shall be able to accommodate the number of participants and provide logistical support needed during the hearing.
      2. By a date a few days in advance of the hearing, as set by the DRB Chair, the Parties shall simultaneously submit to the DRB, with a copy to the other Party, any presentation materials that they propose to use at the hearing (e.g., power points, enlarged copies of documents, summaries, chronologies, etc.). Presentation materials shall be consistent with the scope and content of the Parties' position papers and the CRD.
      3. 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 shall 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 shall 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/observer lists.
     1. Legal counsel representing the Parties are permitted to attend DRB hearings as observers, 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 presenter.

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

* + 1. Subcontractor or Supplier 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 or supplier involved in the dispute shall have present an authorized representative with actual knowledge of the facts underlying the dispute.
       2. Subcontractor or supplier 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 and efficient fashion, 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 during presentations 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 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.
       6. 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 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 at the time of the Section 5.2.3 pre-hearing conference with the Chair. The Chair may require any Party relying on an expert opinion to disclose in writing the expert’s name, qualifications, and a general statement of the aspect of the dispute that will be covered by his or her testimony.
     2. The cost for securing outside expert services shall be borne by the Party securing such services.
     3. Any expert report that a Party intends to rely on at the hearing shall be included in the Party’s pre-hearing submittals.
  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 shall consist of (a) a concise description of the dispute and relief requested; (b) appropriate summaries of each Party’s position; (c) findings as to the facts and circumstances of the dispute; (d) citation to applicable parts of the Contract, Contract Documents, project records, and Party submissions; (e) analysis and rationale supporting the recommendation; and (f) the recommendation. The report shall be submitted simultaneously to the Parties within thirty (30) days after the DRB Chair 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 (a) seeking feedback from the DRB to assist the requesting Party in understanding the DRB’s analysis and recommendation or (b) bringing to the DRB’s attention any factual or calculation errors in the report. A request for clarification shall not be used 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. Either Party may also request an informal de-brief with the DRB after receipt of the DRB report but prior to time within which the Parties must submit their written acceptance or rejection of the DRB recommendation as per Section 5.8.2. The purpose of the informal de-brief is to better understand the DRB’s reasoning underlying the DRB’s recommendation. Both Parties shall have the option to attend the de-brief, which shall be done using a telephonic or virtual platform. As with the request for clarification, the de-brief shall not be used by the Parties to re-argue the dispute.
  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 the DRB response to any request 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 shall not obligate the Owner to any particular time or cost 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 any 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. These costs shall be administered via the DRB Agreement.

### END OF SECTION