# Dispute Review Board Rules/Operating Procedures (Rev: 29 April 2021)

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

# GENERAL

* 1. These Operating Procedures are issued to define the process to be followed by the Parties and the Dispute Review Board (DRB) pursuant to the DRB Specification and DRB Agreement (collectively, the “DRB Contract Documents”). To the extent there is any inconsistency between the Operating Procedures and the DRB Contract Documents, the DRB Contract Documents govern.
  2. The DRB will operate in an informal, flexible manner to implement its responsibilities under the DRB-related Contract Documents. The DRB and the Parties will endeavor to be as efficient as possible in administering the DRB process.
  3. The DRB will to be impartial, unbiased and neutral in all of its actions.
  4. These Operating Procedures may be changed with approval of the Parties and the DRB.

# COMMUNICATIONS

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

# PROJECT DOCUMENTS TO BE FURNISHED TO THE DRB

* 1. Prior to the kick-off meeting with the DRB, the Parties will provide each DRB member with a conformed set of the Contract, Plans, and Specifications for the Project (these may be in electronic form or hard copies, as determined by the DRB Chair).
  2. Generally, the Parties will provide to the DRB regularly generated copies of the following documents: Baseline Project Schedule; Schedule Updates; Progress Meeting Minutes; Logs of RFIs, Submittals, Change Orders, and Payment Requisitions; and other progress reports kept in the ordinary course. Other documents may be requested by the DRB on a case by case basis.
  3. The DRB Chair and the Party Representatives will confer and confirm the means and frequency of document updates to the DRB; at a minimum, such documents will be provided before the DRB kick-off meeting and thereafter prior to each DRB meeting.

# DRB MEETINGS

* 1. The DRB kick-off meeting will be scheduled by the DRB Chair as soon as practicable after the DRB is appointed. The DRB Chair will work with the Party Representatives to establish an agenda and to provide the DRB with advance copies of pertinent project documents so that the DRB can become familiar with the Project scope, budget and schedule and be briefed on the status of the Project as of the time the DRB is on-boarded.
  2. Subsequent DRB meetings will be scheduled as agreed with the Parties, but must take place no less frequently than as specified in the Contract. The DRB and the Parties will schedule the next two DRB meetings in advance. If the Parties require an adjustment to the DRB meeting schedule, the Chair will schedule a new date satisfactory to the Parties and the DRB.
  3. The DRB Chair will confer with the Party Representatives to prepare a draft agenda for each DRB meeting; the agenda will include the items listed in the DRB Specification, as well as any items specific to the project or the issues at hand. This draft agenda will be forwarded to the Parties and to the DRB members at least ten (10) days prior to each regular meeting for review and comments. The DRB Chair will then take such comments into consideration, finalize the agenda, and distribute it to the DRB members and to the Parties prior to the meeting.
  4. The DRB Chair will confer with the Party Representatives on who should attend DRB meetings and how information will be presented to the DRB at the meeting. It is preferred that the Parties confer in advance of the DRB meeting and prepare a joint project update to the DRB, tracking to the meeting agenda.
  5. The Parties may agree to have the DRB meetings coincide with regularly scheduled Progress Meetings. If that is done, the DRB should attend the Progress Meeting as observers, and then hold the DRB meeting immediately after the Progress Meeting.
  6. Each DRB meeting will consist of a round table discussion of the agenda items. The DRB meeting will include a site visit for the DRB to get a firsthand look at the work being performed on the Project. The DRB should be accompanied by representatives of both Parties during any DRB site visits.
  7. After each DRB meeting, the DRB Chair will prepare a high level summary of the issues addressed at the DRB meeting. The DRB meeting summary will be reviewed by the Parties and the DRB members, corrected as necessary, and approved at the next DRB meeting.

# DISPUTE NEGOTIATIONS AND ADVISORY OPINIONS

* 1. The DRB 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 DRB informal assistance or an advisory opinion.
  2. The Owner or the Contractor may ask the DRB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that could become a dispute. Neither the Owner, the Contractor, nor the DRB will be bound in any future dispute resolution process by any discussion during this informal assistance process.
  3. The Parties may jointly request that the DRB provide an advisory opinion on an issue that could become a dispute under the Contract. The Parties will make a joint submission to the DRB specifying the scope of the advisory opinion sought. The DRB will determine if the issue is properly the subject of an advisory opinion and so advise the Parties.
     1. If the DRB agrees to provide an advisory opinion, the Chair 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 DRB meeting.
     2. Generally, the Parties will simultaneously submit and exchange position statements consisting of not more than two (2) pages with a brief discussion of their positions in bullet point format, together with any needed back up information or documents. The format and content of submissions can be tailored to the type of issue presented.
     3. At the advisory opinion meeting, each Party will present its position and answer questions asked by the DRB. After hearing from the Parties, the DRB will caucus and then give its advisory opinion verbally or in writing (as the Parties and the DRB agree). In order to promote understanding of the DRB’s advisory opinion, the Parties may ask clarifying questions of the DRB 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 DRB will not be bound by its advisory opinion if the issue results in a dispute under the DRB process.

# DRB HEARINGS

* 1. Eligible disputes must be referred to the DRB within the timeframes specified in the Contract. The DRB will process properly referred and eligible disputes within the timeframes specified in the Contract.
  2. The referring Party will notify the other Party and the DRB Chair that they wish to have the DRB hear a dispute. Within seven (7) days after the dispute referral, the Parties will confer and submit to the DRB 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 DRB (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 positions for the DRB’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 back to the DRB for hearing any unresolved time and cost issues. If the Parties agree to this process, at the time of any subsequent referral to the DRB, the DRB Chair 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 Joint Statement of Dispute, the DRB Chair will schedule a conference with the Party Representatives and the DRB members 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 DRB)
     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 list
     8. Date for submission of hearing presentations
     9. Logistics of the hearing, including location and the manner in which documents will be submitted and exchanged
  6. The DRB Chair will confirm to the Party Representatives and DRB the schedule of actions and submissions leading up to the hearing. The DRB Chair 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 DRB Chair will hold a conference ~~call~~ with the Party Representatives to go over final logistics of the hearing, confirm that all submissions are in order, and address any issues of concern that the Parties have regarding the hearing.

# PREPARATION FOR A HEARING

* 1. The DRB will determine the time and location of the DRB 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 DRB Chair will confer with the Parties on whether the position statements (and rebuttals, if requested) will be serial (Claimant submits first, followed by Respondent) or simultaneous (Claimant Respondent submit at same time); generally, the goal is to make the submission process as efficient as possible by ensuring focus on the issues in dispute.
  4. The Parties should jointly prepare a set of Common Reference Documents (“CRD”) containing all documents that the Parties want the DRB to consider for the dispute. The Parties should avoid repetition of documents and submission of voluminous documents where extracts would suffice. The CRD should 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.
  5. Each Party’s position paper should 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; and provides the reasoning as to why each believes the other Party’s position is not contractually or factually correct. The position paper must also include supporting CRD exhibits referred to in the position paper text or that will be used at the hearing.
  6. When the scope of the hearing includes subcontractor claims, the position papers should include any necessary information and documents from the subcontractor and should be identified as such.
  7. When the scope of the hearing includes time and quantum issues, the referring Party should include (a) a schedule impact analysis (for time-related issues) and (b) full cost details (for quantum-related issues). The other Party’s response should include its counter-analysis, if any.
  8. Position papers must be simultaneously delivered to the DRB members and the other Party on a schedule to be established by the DRB. The DRB will also establish a schedule for rebuttal papers, if any.
  9. Once position papers and/or rebuttal papers have been submitted, the Parties may not introduce new information or documents regarding the dispute, absent good cause shown and with the DRB’s permission.
  10. On a date set by the DRB, the Parties will exchange and submit to the DRB 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 DRB’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 DRB, 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 DRB in understanding the information and documents to be presented. If a Party uses a PowerPoint presentation, the slides should be numbered and the DRB should be given a copy in a format that permits notetaking. The presentation materials should be consistent with the position papers and/or rebuttals previously submitted.

# CONDUCT OF THE DRB HEARING

* 1. At any hearing that includes Subcontractor claims, the Contractor must require that each Subcontractor (including lower tier Subcontractors or any Supplier) involved in the dispute have present at the hearing an authorized representative with actual knowledge of the facts underlying the subcontractor claim. The subcontractor’s representative should be prepared to answer questions by the DRB, if any, and may assist in the presentation.
  2. The Parties’ legal counsel may attend DRB 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 DRB; 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, 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 DRB will hear rebuttals in turn.
  6. The DRB may ask questions (a) during presentations where clarification is sought in order to follow 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 DRB for permission to ask the other Party questions for purposes of clarifying (not arguing with) information that has been presented.
  7. The Chair 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 arguments completely and the DRB has no further questions, the DRB Chair will advise whether the hearing is closed at that time, or whether the DRB wants any additional submittals. If additional submittals are requested, the DRB will set a submission schedule, and once the additional submittals are received, the Chair will advise the Parties when the hearing is closed.
  9. If a Party fails to submit its pre-hearing papers, the DRB will determine whether the hearing will go forward as scheduled or will be re-scheduled. If a Party fails to attend a hearing, the DRB will determine whether the hearing will go forward as scheduled or will be re-scheduled. If the DRB decides to proceed in either case, that Party’s submissions to date will be considered as that Party’s entire position, and the DRB will proceed to hear the attending Party’s presentation and issue a report based on the information and documents that the DRB has received.

# DRB DELIBERATIONS AND REPORT

* 1. Following the close of the hearing, the DRB will confer to review 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. If a unanimous recommendation cannot be reached, the dissenting DRB member’s recommendation, along with the supporting rationale, will be included as a minority opinion in the DRB’s report, however, the dissenting DRB member will not be identified.
  3. 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.
  4. Within 30 days of receiving the DRB’s report, both Parties must respond to the DRB in writing, signifying that the dispute is either resolved or remains unresolved. Failure by either Party to provide written acceptance or rejection the DRB’s recommendation within the 30 days, shall be deemed to be acceptance of the recommendation by that Party.
  5. The DRB will consider a request for clarification of any elements of the DRB report (as distinguished from further argument or re-argument), provided it is submitted in writing within ten (10) days of receipt of the DRB report. Each Party may make only one request for clarification for any one DRB report. The DRB will respond, in writing, within ten (10) days of receipt of a request for clarification. If a request for clarification 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 DRB’s response.

*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