



Construction Policy Bulletin

CPB 10-5 Changes to the Dispute Review Board Process

References: <i>Standard Special Provisions</i>	Section 5, "Dispute Review Board"
<i>Amendments to the 2006 Standard Specifications</i>	Section 5-1.146, "Potential Claims and Dispute Resolution" Section 5-1.15, "Dispute Resolution" Section 9-1.07E(3), "Performance Failure Withholds" Section 9-1.08D, "Final Payment and Claims"
<i>Construction Manual</i>	Section 5-404, "Alternative Dispute Resolution Process" Section 5-404B, "Dispute Review Board"
Construction Policy Bulletin	CPB 6-2 "Informal Dispute Review Process"

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Approved:


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Background

A dispute review board (DRB) is a neutral three-member board that assists the Department of Transportation (Caltrans) and contractors in resolving construction disputes. Since 1994, dispute review boards have helped mitigate damages and avoid costly litigious methods of dispute resolution.

Once formed, a DRB functions as an independent third party. It hears disputes at meetings, renders recommendations, and issues written reports on disputes between Caltrans and the contractor without prejudice toward either.

Existing Procedure

Contract special provisions may specify optional or mandatory use of a DRB on contracts with bids over \$10 million and 100 or more working days.

In accordance with Construction Policy Bulletin 06-2, "Informal Dispute Review Board Process," a contract change order may also implement an informal DRB hearing process for going contracts with established DRBs.

One DRB member is nominated by the contractor and approved by Caltrans. Another DRB member is nominated by Caltrans and approved by the contractor. The DRB chairperson is nominated by the two

approved DRB members and then approved by both Caltrans and the contractor. The Division of Construction's field coordinator authorizes the district to approve the DRB chairperson.

Caltrans and the contractor share direct DRB costs equally and pay their own internal DRB costs independently. The contract establishes the terms and rates of DRB pay, including the hourly rate of pay for pre-authorized work performed off the jobsite and daily rates when time spent per onsite meeting is less than or greater than four hours. The contractor uses DRB members' submitted invoices to make direct payments to the members for participation in authorized meetings. Caltrans approves payment of submitted extra work bills for its share of the cost.

Rejecting a DRB recommendation requires approval from the chief, Division of Construction. Also, failure to provide written response to a DRB's recommendation within 30 days of receiving it indicates conclusively that the party failing to respond accepts the DRB's recommendation.

New Procedure

Caltrans has changed the name "Dispute Review Board" to "Dispute Resolution Board" and the Division of Construction "DRB coordinator" position to "alternative dispute resolution engineer" (ADR engineer).

Complete revised forms CEM-6202 "Dispute Resolution Board Establishment Report," and CEM-6204, "Dispute Resolution Board Dispute Meeting Report," and submit them to the ADR engineer within 30 days of each event. Immediately discontinue using the old forms CEM-6202, "Dispute Review Board (DRB) Establishment Report"; CEM-6203, "Dispute Review Board (DRB) Update Report"; CEM-6204, "Dispute Review Board (DRB) Issue Report"; and CEM-6205, "Dispute Review Board (DRB) Completion Report."

Amendments to the 2006 Standard Specifications have added Sections 5-1.146, "Potential Claims and Dispute Resolution"; 5-1.15, "Dispute Resolution"; 5-1.15A, "General"; and 5-1.15C, "Dispute Resolution Board." DRB obligations have been consolidated into a revised three-party *Dispute Resolution Board Agreement*. The *Dispute Resolution Board Agreement* has been removed from the specifications and is posted on the Division of Construction's DRB website:

http://www.dot.ca.gov/hq/construc/dispute_resolution/drbinfo.htm

The parties, Caltrans and the contractor, must jointly establish the DRB within 45 days of contract approval. Submit the Caltrans candidate's name, disclosure statement, and résumé to the contractor at the preconstruction conference. Ask the contractor to submit its candidate for DRB member at the preconstruction conference and to approve the Caltrans' candidate within seven days of receipt. Approve or reject the contractor's candidate within seven days of receipt.

DRB Member Selection Process

DRB candidates may be selected from the prequalified list on the DRB website.

Use the following procedure to select the best DRB candidate for the project from the prequalified list:

1. Review the list of names, associated summaries of experience, résumé links, and geographic work location information on the website to find the most qualified candidate for the particular project. Or nominate a person not on the list who meets the minimum qualifications as those on the list as discussed below.

2. Select a candidate with the knowledge and work history that best matches the type of project.
3. Select a candidate who has dispute resolution experience in the anticipated areas of dispute.
4. Contact the Division of Construction's field coordinator for concurrence with the candidate's selection.
5. Contact the candidate, and determine the candidate's desire and availability to serve.
6. Ensure that the selected candidate has no potential conflict of interest.
7. Require the candidate to provide a disclosure statement and resume, and submit both to the contractor for approval.

A DRB candidate who is not on the prequalified list may be selected, as long as the candidate has ten years' experience in or directly related to public works heavy highway construction projects with or on behalf of federal, state (particularly Caltrans), or local government agencies. This experience may be any combination of the following:

1. Supervisor, manager, or executive in public works heavy highway construction contracts with emphasis in resolving disputes arising out of those contracts.
2. Attorney representing parties in litigating or arbitrating public-work heavy highway construction contract claims.
3. Judge or arbitrator adjudicating or otherwise resolving public work heavy highway construction contract claims.

When candidates are not on the Caltrans prequalified list, request a statement of qualifications, their Dispute Resolution Board Foundation training certificate, and three professional references attesting to their experience and suitability to be a DRB member or chairperson. Send the information to the ADR engineer who carefully reviews the documents for proper qualifications, compares them to the statement of qualifications and résumé, and investigates potential conflicts of interest.

The ADR engineer contacts the candidate's references to substantiate the claims of professional experience and suitability to be a DRB member or chairperson. If the ADR engineer confirms that the candidate meet the minimum qualifications for a DRB member, the ADR engineer adds the candidate's name to the prequalified list.

Once approved by the contractor, notify the Caltrans-nominated candidate that he or she has been selected to be a DRB member. Inform other DRB member candidates who were contacted by Caltrans but not selected that they are no longer being considered for the contract.

The contractor submits its DRB candidate's disclosure statement and résumé to the resident engineer for approval. If the candidate is not on the prequalified list, verify the candidate's experience, and request a copy of the candidate's Dispute Resolution Board Foundation training certificate. Approve or reject the candidate with seven days.

Once nominated and approved by the parties, the two DRB members nominate the third DRB member candidate. The third DRB member candidate submits a disclosure statement and résumé to the DRB, Caltrans, and the contractor who must approve that candidate. Before the approval, contact the Division of Construction's field coordinator for concurrence.

If Caltrans, the contractor, or the DRB members reach an impasse on any candidate, both Caltrans and the contractor select three names from the current list of arbitrators certified by the Public Works

Contract Arbitration Committee who are willing to serve as DRB members. Each remaining DRB vacancy is selected from these six names by a blind draw.

The chairperson may be any of the three members, or, in the case of impasse, the last member nominated will be the chairperson. The Division of Construction's field coordinator does not need to concur.

DRB Member Replacement

With 15 days' notice, a DRB member may be replaced, or the member may voluntarily resign. If Caltrans wants to replace the Caltrans-nominated DRB member, the district submits its recommendation to the division's field coordinator for approval before sending a letter to notify the member. Caltrans or the contractor may terminate the service of a member who fails to comply fully with all required employment and financial disclosure conditions of the DRB membership.

When the need arises, a replacement member is nominated and approved using the appropriate contractual selection process. If the previous member was the chairperson, the new board must agree on a new chairperson. In the case of an impasse, the two original DRB members will select the chairperson by blind draw. Caltrans, the contractor, and all three DRB members sign a revised three-party Dispute Resolution Board Agreement. The replacement process begins immediately upon receiving a notice of termination and is completed within 15 days.

DRB Operation

When contractually required or implemented, Caltrans requires use of the DRB as part of the administrative dispute resolution and claims process. Either Caltrans or the contractor can refer a dispute to the DRB, which will fairly and impartially review, hear, and provide written recommendations to the parties to help resolve the dispute. The contractor must exhaust the DRB process before filing a claim or the contractor is barred from filing the claim in arbitration.

The parties and the DRB comply with the contract provisions and the Dispute Resolution Board Agreement and help develop the DRB operating procedures. The resident engineer ensures that DRB operating procedures are fair and comply with the contract and the DRB agreement. Both parties and the DRB sign the DRB agreement and approve acceptable DRB operating procedures at the first DRB meeting.

The DRB agreement provides for both informal and traditional dispute processes. The informal dispute process is an optional process included in Section 5-1.15C, "Dispute Resolution Board," of the *Amendments to the 2006 Standard Specifications* and is intended for small, uncomplicated disputes. Use the informal process when both parties and the DRB agree it is the appropriate process. No additional time will be added to the traditional dispute process if the informal process is used.

The traditional dispute process specifies formal timeframes and resolves all project disputes not resolved informally. This process, similar to the same as the existing dispute meeting process, is mandatory if the contractor wishes to pursue the dispute further.

The resident engineers reminds the contractor of its obligation to refer disputes to the DRB within 21 days of when it receives the resident engineer's response to the supplemental potential claim record.

When an original partnering agreement includes facilitated dispute resolution as part of its dispute resolution plan, the contractor receives an additional 20 days (a total of 41 days), to refer a dispute to the DRB.

After a dispute meeting, the DRB makes every effort to reach a unanimous decision, but the process allows a final majority recommendation with a minority opinion. The resident engineer and the contractor must respond to a DRB recommendation within 30 days.

The Division of Construction's field coordinator must approve rejected DRB recommendations. The district requests approval from the field coordinator to reject the DRB recommendation when the resident engineer, the construction engineer, construction manager, and deputy district director of construction support its rejection. Field coordinators provide concurrence in writing to both the deputy district director of construction and the ADR engineer.

DRB Member Payment

Pay half the cost, in full-day increments, of each DRB member's participation without markups at the rate specified in Section 5-1.15C, "Dispute Resolution Board" of the *Amendments to the 2006 Standard Specifications*. The daily rate is full compensation for meeting time, onsite time, travel time, travel expenses, transportation, lodging, and incidentals for each day or part of a day that the DRB member attends an authorized DRB meeting. Authorized DRB meetings include the initial startup, scheduled progress, and ad hoc dispute meetings. Caltrans and the contractor must authorize all additional DRB payments for offsite project work or services before they are incurred.

The contractor submits extra work bills for reimbursement of Caltrans' portion of the DRB member costs. Evidence of full payment to each DRB member, in the form of a canceled check or bank statement, is required to substantiate payment. Caltrans and the contractor pay their own costs to prepare for and participate in DRB meetings. Caltrans provides administrative services, such as conference facilities, to the DRB. The resident engineer ensures that the facility is adequate for the number of participants and has appropriate accommodations for each party's presentations.

If a contractor does not make a good-faith effort to comply with the requirements to establish the DRB or to attend progress meetings, withhold a percentage of the estimated value of the work performed during each estimate period that the contractor does not comply in accordance with Section 9-1.07E(3), "Performance Failure Withholds," of the *Amendments to the 2006 Standard Specifications*.

The next revision of Section 5-404, "Alternative Dispute Resolution Process," of the *Construction Manual* will incorporate this procedure. Changes to the specifications will be in the *Amendments to the 2006 Standard Specifications*.

If you have questions or comments about this bulletin, please contact Andy Alvarado, Division of Construction, at andy_alvarado@dot.ca.gov or (916) 653-8633.

Attachments:

1. *Amendments to the 2006 Standard Specifications*, added Sections 5-1.15, "Dispute Resolution"; 5-1.15A, "General"; and 5-1.15C, "Dispute Resolution Board"
2. *Amendments to the 2006 Standard Specifications*, Revised Section 9-1.07E(3), "Performance Failure Withholds"
3. Revised forms CEM-6202 and CEM-6204
4. Table 5-4.2, "Dispute Resolution Board Process"