

DISPUTE RESOLUTION BOARD Agreement

(REV 03/01/2019)

Project Name: _____
Contract No. _____

THIS Dispute Resolution Board Agreement (Agreement) made and entered into this _____ day of _____, _____, between the State of California, acting through the California Department of Transportation and the Director of Transportation (Department) and _____ (Contractor) and the Dispute Resolution Board (DRB), consisting of the following members (DRB Members):

(DRB Member)

(DRB Member)

(DRB Member - Chair)

RECITALS

WHEREAS, the Department and the Contractor, hereinafter called the "parties," have executed a contract for the project referenced above (Contract) and are now engaged in the construction on the State Highway project (Project) referenced above; and

WHEREAS, the Standard Specifications for the above referenced Contract provide for the establishment and operation of the DRB to assist in resolving disputes; and

WHEREAS, the DRB is composed of three members, one selected by the Department, one selected by the Contractor, and the third member selected by the other two members and approved by the parties; and

NOW THEREFORE, in consideration of the terms, conditions, covenants, and performance contained herein, or attached and incorporated and made a part hereof, the Department, the Contractor, and the DRB Members hereto agree as follows:

SECTION I: DESCRIPTION OF WORK

A. To assist in the avoidance and timely resolution of disputes between the parties, the Contract provides for the establishment and the operation of the DRB.

B. The DRB Members agree, that notwithstanding any other provision in this Agreement, the DRB Members shall abide by the five Canons of the Dispute Resolution Board Foundation's Code of Ethics as provided below:

Canon 1 – Disclosure

Board members must disclose, before their appointment, any interest, past or present relationship or association that could reasonably be considered by a party as likely to affect that member's independence or impartiality. This obligation of disclosure is a continuing obligation throughout the term of the Dispute Board.

Canon 2 – Conflicts of Interest

Board members must avoid any actual or potential conflict of interest. If, during the term of the Dispute Board, a Board member becomes aware of any fact or circumstance that might reasonably be considered by a party to affect that Board member's capacity to act independently, impartially and without bias, the Board member must inform the other Board members and the contracting parties.

Canon 3 – Confidentiality

Board members must ensure that all information disclosed to the Dispute Board remains confidential. Board members must not disclose such confidential information to others unless approved by the contracting parties or compelled by law to do so. Board members must not use such information for any purpose beyond the activities of the Dispute Board and the Project.

Canon 4 – Board Conduct and Communications

The Dispute Board must conduct all Board activities in an expeditious, diligent and impartial manner. Board members must act honestly, with integrity and without bias. There must be no unilateral communications between a Board member and a contracting party or between a contracting party and the Dispute Board, except as provided in the Operating Procedures adopted by the Board.

Canon 5 – Board Procedures

All Dispute Board meetings and hearings must be conducted in accordance with the applicable rules and Operating Procedures, and in a manner that provides procedural fairness to the contracting parties. Dispute Board recommendations and decisions should be made expeditiously on the basis of the provisions of the contract, applicable statutes and regulations, the information provided to the Board, and the facts and circumstances as submitted by the contracting parties.

C. The DRB shall perform the services necessary to participate in the DRB's actions as designated in Section III, Scope of Work. The Department and the Contractor shall perform all actions necessary to assist the DRB in performing its Scope of Work.

SECTION II: DRB QUALIFICATIONS

A. DRB Members shall be knowledgeable in the type of construction and Contract Documents anticipated by the Contract and shall have completed training through the Dispute Resolution Board Foundation. DRB Members shall have substantial experience in or directly related to public works heavy highway construction projects with or on behalf of federal, state or local government agencies. Experience shall be a minimum of 10 years in any combination of the following:

1. Supervisor, manager, engineer or executive in public works heavy highway construction contracts with emphasis in resolution of disputes arising out of said contracts.

2. Attorney representing parties in litigating or arbitrating public works heavy highway construction contract claims.

3. Judge or arbitrator adjudicating or otherwise resolving public works heavy highway construction contract claims.

B. No DRB Member shall have prior direct involvement in this Contract. No DRB Member shall have a financial interest in this Contract or parties thereto, including but not limited to the Contractor, subcontractors, suppliers, consultants, and legal and business services, within a period 6 months prior to award and during this Contract. Exceptions to above are compensation for services on this or other DRBs, as a Dispute Resolution Advisor (DRA), or retirement payments or pensions received from a party that are not tied to, dependent on or affected by the net worth of the party.

C. DRB Members shall, at all times during the term of this Agreement, fully disclose all direct or indirect professional or personal relationships with all key members of the Contract.

D. DRB Members shall ensure that they have availability to perform the services under this Agreement at all times, including attending DRB progress meetings, holding timely

informal and traditional dispute meetings when requested by the parties, and issuing timely recommendations on disputes.

SECTION III: SCOPE OF WORK

The scope of work of the DRB includes, but is not limited to, the following:

A. Operating Procedures

1. The DRB shall establish Operating Procedures that will govern the conduct of its business and reporting procedures in conformance with the requirements of the Contract and the terms of this Agreement. The Operating Procedures shall be implemented upon approval of the parties no later than the initial DRB progress meeting.

2. The DRB Chair shall schedule progress and dispute meetings and any other DRB activities. The Chair shall submit the following documents to the parties and to the ADR Engineer, Division of Construction, MS 44, P.O. Box 942874, Sacramento, CA 94274:

- CEM 6202 – DRB Establishment Report (Due once the Board is established)
- CEM 6204 – DRB Dispute Meeting Report (Due within 35 days of dispute meeting)
- CEM 6210 – Alternative Dispute Resolution – Progress Meeting Report (Due within 10 days of progress meeting)

3. During progress or dispute meetings, DRB Members shall refrain from expressing opinions on the merits of statements on matters under dispute or potential dispute. Opinions of DRB Members expressed in private sessions shall be kept strictly confidential. Individual DRB Members shall not meet with, or discuss Contract issues with individual parties. Discussions regarding the project between the DRB Members and the parties shall be in the presence of all three members and both parties. Individual DRB Members shall not undertake independent investigations of any kind pertaining to disputes or potential disputes.

B. Progress Meetings

1. DRB Members shall visit the project site and meet with representatives of the parties to keep abreast of construction activities and to develop familiarity with the work in progress. Scheduled progress meetings shall be held at or near the project site. The DRB shall meet at least once at the start of the project, and at least once every 3 months thereafter. The frequency, exact time, and duration of additional site visits and progress meetings shall be as recommended by the DRB and approved by the parties consistent with the construction activities or matters under consideration. Scheduled progress meetings

may be waived, if the parties are in agreement, when the only work remaining is plant establishment work.

2. Each meeting shall consist of a round table discussion and a field inspection of the work being performed on the Contract. Each meeting and field inspection shall be attended by representatives of both parties. The agenda shall generally be as follows:

a) Meeting opened by the DRB Chair.

b) Remarks by the Department's representative.

c) A description by the Contractor's representative of work accomplished since the last meeting; the current schedule status of the work; and a forecast for the coming period.

3. An outline by the Department's representative of the status of the work as the Department views it.

4. An outline by the Contractor's representative of potential problems and a description of proposed solutions.

5. A brief description by the Contractor's and the Department's representative of potential claims and disputes that have surfaced since the last meeting.

6. A summary by the Department's representative, the Contractor's representative, or the DRB of the status of past potential claims and disputes.

7. The DRB Chair will prepare a summary of DRB progress meetings and circulate them for revision and approval by all concerned within 10 days of the meeting.

C. Dispute Meeting: General

1. The term "dispute meeting" as used in this subsection shall refer to both the informal and traditional dispute meeting processes, unless otherwise noted.

2. Either the Department or the Contractor may request a dispute meeting with the DRB. The requesting party shall simultaneously notify the other party of each dispute meeting request. Upon being notified of the need for a dispute meeting, the DRB shall review and consider the dispute. The DRB shall determine the time of the dispute meeting with due consideration for the needs and preferences of the parties, while recognizing the importance of a speedy resolution to the dispute.

3. Dispute meetings shall be conducted at any location that would be convenient and provide required facilities and access to necessary documentation.

4. No dispute meeting shall take place later than 30 days prior to acceptance of the Contract.

5. Only the following persons will be permitted to attend and present at the dispute meeting: the Department's Construction Engineer, Resident Engineer, Structure Representative, or Senior Bridge Engineer; the Contractor's or subcontractor's Superintendent or Project Manager; or any other person who is an employee, or consultant, of a Party and who also has direct knowledge of the dispute and direct involvement in the project.

6. The following persons will not be permitted to attend the dispute meeting: attorneys, claims consultants, or technical experts who do not meet the criteria of Paragraph 5 above.

7. The DRB may request that the parties provide technical services necessary for the DRB to adequately review the disputes presented, including audit, geotechnical, schedule analysis and other services. The parties' technical staff may supply those services as appropriate.

8. At the dispute meeting the DRB may ask questions, seek clarification, and request further clarification of data presented by either of the parties as may be necessary to assist in making a fully informed recommendation. However, the DRB shall refrain from expressing opinions on the merits of statements on matters under dispute during the parties' presentations.

9. The claimant shall discuss the dispute, followed by the other party. Each party shall then be allowed one or more rebuttals at the meeting until all aspects of the dispute are thoroughly covered. Each party will be given ample time to fully present its position, make rebuttals, provide relevant documents, and respond to DRB questions and requests.

10. There shall be no testimony under oath or cross-examination during DRB dispute meetings. There shall be no reporting or recording of the procedures by a shorthand reporter or by electronic means. Documents and verbal statements shall be received by the DRB in conformance with the Operating Procedures.

11. Failure to attend a dispute meeting by either of the parties shall be conclusively considered by the DRB as indication that the non-attending party considers all written documents and correspondence submitted as their entire and complete argument, and the DRB will proceed with the dispute meeting with the attending party presenting its position.

12. After dispute meetings are concluded, the DRB shall meet in private and reach a recommendation supported by two or more members. The DRB shall not in its recommendations ignore or re-write the terms of the Contract or propose what the DRB believes is a compromise outcome of the dispute.

13. The DRB shall make every effort to reach a unanimous recommendation; if the DRB is not unanimous in any part of the recommendation, the dissenting member may write a minority recommendation, but the identity of the dissenter will not be identified in the report.

D. Traditional Dispute Meeting: Procedure

The following procedure shall be used for the traditional dispute meeting:

1. Within 21 days after receiving the Department's written response to the Contractor's supplemental potential claim record, the Contractor shall refer the dispute to the DRB if the Contractor wishes to further pursue the dispute. When facilitated dispute resolution is included in the partnering charter, the referral shall be within 41 days. The Contractor shall make the referral in writing to the DRB, simultaneously copied to the Department. The written dispute referral shall describe the disputed matter in individual discrete segments, so that it will be clear to both parties and the DRB what discrete elements of the dispute have been resolved, and which remain unresolved, and shall include an estimate of the cost of the affected work and impacts, if any, on project completion.

2. The parties shall each be afforded an opportunity to be present and to be heard by the DRB, and to offer evidence. Either party furnishing written evidence or documentation to the DRB must furnish copies of such information to the DRB Chair a minimum of 15 days prior to the date the DRB is scheduled to convene the meeting for the dispute. A copy of all evidence and documentation shall be simultaneously submitted to the other party.

3. Either party shall produce such additional evidence as the DRB may deem necessary to reach an understanding and a determination of the dispute. The party furnishing additional evidence shall furnish copies of such additional evidence to the other party at the same time the evidence is provided to the DRB. The DRB shall not consider evidence not furnished in conformance with the terms specified herein.

4. Upon receipt by the DRB of a written referral of a dispute, the DRB shall convene to review and consider the dispute. The dispute meeting shall be held no earlier than 30 days and no later than 60 days after receipt of the written referral unless otherwise agreed to by all parties.

5. The DRB may request clarifying information of either party within 10 days after the dispute meeting. Requested information, shall be specific to this Contract and shall be submitted to the DRB within 10 days of the DRB request.

6. The DRB shall furnish a written report to the parties with its conclusion(s) and recommendation(s). The DRB shall complete its report, including minority recommendation, if any, and submit it to the parties within 30 days of the dispute meeting, except that time extensions may be granted at the request of the DRB with the written concurrence of the parties. The report shall summarize the facts considered, the specific Contract documents/provisions relied upon, statute or regulation viewed by the DRB as pertinent to the dispute, and the DRB's interpretation and reasoning in arriving at its conclusion(s) and recommendation(s) and, if requested, recommend guidelines for determining adjustments. The DRB's written recommendation shall stand on its own, without attachments or appendices. The DRB Chair shall furnish a copy of the written

report to the ADR Engineer, Division of Construction, MS 44, P.O. Box 942874, Sacramento, CA 94274.

7. Within 30 days after receiving the DRB's report, the parties shall respond to the DRB in writing (with a copy sent simultaneously to the other party) signifying that the dispute is either resolved or remains unresolved. The response shall be specific as to the reason(s) why the dispute remains unresolved. Failure to provide the written response within the time specified, shall conclusively indicate that the party(s) failing to respond accepts the DRB recommendation.

8. Either party may request clarification of elements of the DRB's report from the DRB prior to responding to the report. The DRB shall consider any clarification request only if submitted within 10 days of receipt of the DRB's report, and if submitted simultaneously in writing to both the DRB and the other party. Each party may submit only one request for clarification for any individual DRB report. The DRB shall respond, in writing, to requests for clarification within 10 days of receipt of such requests.

9. Either party may seek a reconsideration of the DRB's recommendation. The DRB shall only grant reconsideration based upon submission of new evidence and if the request is submitted within the 30 day time limit specified for response to the DRB's written report. Each party may submit only one request for reconsideration regarding an individual DRB recommendation. The DRB shall respond, in writing, to requests for reconsideration within 10 days of receipt of such requests.

10. If the parties are able to resolve their dispute with the aid of the DRB's report, the Department and the Contractor shall promptly accept and implement the resolution. If the parties cannot agree on the time or payment adjustment within 60 days of the acceptance by both parties of the recommendation, either party may request that the DRB recommend an adjustment.

E. Informal Dispute Meeting

An informal dispute meeting shall be convened only if the parties and the DRB agree that this dispute resolution process is appropriate to resolve the dispute. The following procedure shall be used for the informal dispute meeting:

1. The parties shall furnish the DRB with a one page position paper and any pertinent documents requested by the DRB that are or may become necessary for the DRB to perform its function. The party furnishing documents shall furnish such documents to the other party at the same time the document is provided to the DRB.

2. After the dispute meeting has concluded, the DRB Members shall deliberate in private the same day until a response to the parties is reached or as otherwise agreed to by the parties.

3. The DRB then verbally delivers its recommendation with findings, including minority recommendation, if any, to the parties.

4. After the verbal recommendation is presented, the parties may ask for clarifications.

5. Within 5 business days of the informal dispute meeting, the DRB must write a one page report that includes the recommendation on the dispute. The report must be sent to the parties and to the ADR Engineer, Division of Construction, MS 44, P.O. Box 942874, Sacramento, CA 94274.

6. Occasionally the DRB may be unable to formulate a recommendation based on the information given at a dispute meeting. However, the DRB may provide the parties with feedback on strengths and weaknesses of their respective positions, to assist the parties in reaching resolution.

7. If the parties are able to resolve their dispute with the aid of the DRB's recommendation, the Department and the Contractor shall promptly accept and implement the resolution as agreed to by the parties.

8. The parties will notify the DRB Members within 5 business days if the dispute remains unresolved.

9. The DRB will not be bound by its verbal or written recommendation in the event that a dispute is later heard by the DRB in a traditional dispute meeting.

10. Unless the dispute is resolved, use of the informal dispute meeting does not relieve the parties of their responsibilities under Section 5-1.43E(3), "Dispute Resolution Board," of the Standard Specifications or subsection, "Traditional Dispute Meeting," of this Agreement. There will be no extension of time allowed for the process to permit the use of the informal dispute meeting, unless otherwise agreed to by the parties.

SECTION IV: TIME FOR BEGINNING AND COMPLETION

DRB Members shall not begin work under the terms of this Agreement until authorized in writing by the Department. Once established, the DRB shall be in operation until the Department notifies the DRB Members that the Contract is accepted. If the Contract is terminated in accordance with Section 8.1.13 "Contractor's Control Termination" of the Standard Specifications, the DRB will be dissolved.

SECTION V: PAYMENT

Each DRB Member shall be compensated at an agreed rate of \$2,000 per day for time spent per meeting, either at start of project, or a scheduled progress or a dispute meeting. A member serving on more than one DRB or DRA for the Department, regardless of the number of meetings per day, shall not be paid more than the agreed rate per day. The agreed rate shall be considered full compensation for onsite time, travel expenses,

transportation, lodging, time for travel and incidentals for each day, or portion thereof that the DRB Member is at an authorized DRB meeting. No additional compensation will be made for time spent by DRB Member to review and research activities outside the DRB meetings unless that time, such as time spent evaluating and preparing recommendations on specific issues presented to the DRB, has been specifically agreed to in advance by the parties. Time away from the project, which has been specifically agreed to in advance by the parties, will be compensated at an agreed rate of \$200 per hour. The agreed amount of \$200 per hour shall include all incidentals. The Department will provide administrative services such as conference facilities to the DRB.

A. Payment Processing

1. The Contractor shall make direct payments to each DRB Member for their participation in authorized meetings and approved hourly rate charges, from invoices submitted by each DRB Member, and technical services.

2. DRB Members may submit invoices to the Contractor for partial payment for work performed and services rendered for their participation in authorized meetings not more often than once per month during the progress of the work. The invoices shall be in a format approved by the parties and accompanied by a general description of activities performed during that billing period. Invoiced payment for hours worked away from the project are limited to those hours specifically agreed to by the parties in advance.

B. Inspection of Costs Records

DRB Members and the Contractor shall keep available for inspection by representatives of the Department and the United States federal government, for a period of 3 years after final payment, the cost records and accounts pertaining to this Agreement. If any litigation, claim, or audit arising out of, in connection with, or related to this Contract is initiated before the expiration of the 3-year period, the cost records and accounts shall be retained until such litigation, claim, or audit involving the records is completed.

SECTION VI: ASSIGNMENT OF TASKS OF WORK

DRB Members shall not assign the work of this Agreement.

SECTION VII: REPLACEMENT OF A DRB MEMBER

A. Service of a DRB Member may end at any time with not less than 15 days' notice as follows:

1. Upon resignation of a member.
2. The Department may replace its selected member.
3. The Contractor may replace its selected member.

4. The parties' selected members may replace the 3rd member.

5. The parties may replace any member who fails to comply with specified employment contemplated in this agreement or financial disclosure conditions of DRB Membership.

B. When a member of the DRB is replaced, the replacement member shall be selected in the same manner as the replaced member was selected. The selection of a replacement DRB Member will begin promptly upon determination of the need for replacement and shall be completed within 15 days. Changes in either of the DRB Members chosen by the 2 parties will not require re-selection of the third member, unless both parties agree to such re-selection in writing. The Dispute Resolution Board Agreement shall be amended to reflect the change of a DRB Member.

C. Each party shall document the need for replacement and substantiate the replacement request in writing to the other party and DRB Members.

SECTION VIII: LEGAL RELATIONS

A. The parties hereto mutually understand and agree that each DRB Member in the performance of duties is acting in the capacity of an independent agent and not as an employee of either party.

B. No party to this Agreement shall bear a greater responsibility for damages or personal injury than is normally provided by Federal or State of California Law.

C. The parties shall not call any of the DRB Members, who served on this Contract, as a witness in any arbitration or other proceedings that may arise from the Contract.

D. DRB Members shall have no claim against the Department or the Contractor, or both, from claimed harm arising out of or resulting from the DRB's services in connection with this Agreement.

E. Notwithstanding the provisions of this Contract that require the Contractor to indemnify and hold harmless the Department, the parties shall jointly indemnify and hold harmless the DRB Members from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees, arising out of and resulting from the performance of services under this Agreement. .

SECTION IX: CONFIDENTIALITY

The parties hereto mutually understand and agree that all documents and records provided by the parties in reference to issues brought before the DRB, which documents and records are marked "Confidential - for use by the DRB only," shall be kept in confidence and used only for the purpose of resolution of subject disputes, and for assisting in development of DRB findings and recommendations; that such documents and records will not be utilized or revealed to others, except to officials of the parties who are authorized to act on the

subject disputes, for any purposes, during the life of this Agreement. Upon termination of this Agreement, said confidential documents and records, and all copies thereof, shall be returned to the parties who furnished them to the DRB. However, the parties understand that such documents may be subsequently discoverable and admissible in court or arbitration proceedings unless a protective order has been obtained by the party seeking further confidentiality.

SECTION X: DISPUTES

Disputes between the parties arising out of the work or other terms of this Agreement, which cannot be resolved by negotiation and mutual concurrence between the parties, or through the administrative process provided in the Contract, shall be resolved by arbitration as provided in Section 9-1.22, "Arbitration," of the Standard Specifications. Disputes between the DRB and either party, which cannot be resolved by negotiation and mutual concurrence, shall be resolved in the appropriate forum.

SECTION XI: VENUE, APPLICABLE LAW, AND PERSONAL JURISDICTION

In the event that any party deems it necessary to institute arbitration proceedings to enforce any right or obligation under this Agreement, the parties hereto agree that such action shall be initiated in the Office of Administrative Hearings of the State of California. The parties hereto agree that all questions shall be resolved by arbitration by application of California law and that the parties to such arbitration shall have the right of appeal from such decisions to the Superior Court in conformance with the laws of the State of California. Venue for the arbitration shall be Sacramento or any other location as agreed to by the parties.

SECTION XII: FEDERAL REVIEW AND REQUIREMENTS

A. On Federal-Aid contracts, the Federal Highway Administration shall have the right to review the work of the DRB in progress, except for private meetings or deliberations of the DRB that do not become part of the project records.

B. Other Federal requirements in this agreement shall only apply to Federal-Aid contracts.

SECTION XIII: CERTIFICATION OF Contractor, DRB & Department

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

SIGNATURES TO FOLLOW

DRB MEMBER

By: _____
[insert name]

Title: _____

DRB MEMBER

By: _____
[insert name]

Title: _____

DRB CHAIR

By: _____
[insert name]

Title: _____

CONTRACTOR [insert name]

By: _____
[insert name]

Title: _____

CALIFORNIA DEPARTMENT
OF TRANSPORTATION

By: _____
[insert name]

Title: _____