

DISPUTE RESOLUTION ADVISOR Agreement

(REV December 2021)

Project Name: _____

Contract No. _____

THIS Dispute Resolution Advisor Agreement (Agreement) 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 Advisor, hereinafter called the "DRA."

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 provides for the establishment and operation of the DRA to assist in resolving disputes; and

WHEREAS, the DRA is composed of one person, chosen by the Contractor and the Department;

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 DRA 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 DRA.

B. The DRA agrees, that notwithstanding any other provision in this Agreement, the DRA 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 Advisor

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

SECTION II: DRA QUALIFICATIONS

A. The DRA shall be knowledgeable in the type of construction and Contract Documents anticipated by the contract and shall have completed training provided by the Department. The DRA 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. The DRA shall have served on Dispute Resolution Boards (DRB) with the Department – a minimum of 3 as a member or 2 as Chair. 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 DRA shall have prior direct involvement in this contract. No DRA 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 DRAs and DRBs 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. The DRA 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. The DRA shall ensure that they have availability to perform the services under this Agreement at all times, including attending DRA 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 DRA includes, but is not limited to, the following:

A. Operating Procedures

1. The DRA 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 DRA progress meeting.

2. The DRA shall schedule progress and dispute meetings and any other DRA activities. The DRA shall submit the following documents to the ADR Engineer at ADR.Engineer@dot.ca.gov:

- CEM 6206 – DRA Establishment Report (Due once the DRA is established)
- CEM 6207 – DRA Dispute Meeting Report (Due within 10 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, the DRA shall refrain from expressing opinions on the merits of statements on matters under dispute or potential dispute. Opinions of the DRA expressed in private sessions shall be kept strictly confidential. The DRA shall not meet with, or discuss Contract issues with individual parties. Discussions regarding the project between the DRA and the parties shall be in the presence of the DRA and both parties. The DRA shall not undertake independent investigations of any kind pertaining to disputes or potential disputes.

B. Progress Meetings

1. The DRA shall meet in person or remotely with representatives of the parties to keep abreast of construction activities and to develop familiarity with the work in progress. Scheduled in person progress meetings shall be held at or near the project site. The DRA 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 progress meetings shall be as recommended by the DRA 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 shall be attended by representatives of both parties. The agenda shall generally be as follows:

- a) Meeting opened by the DRA.
- 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 DRA of the status of past potential claims and disputes.

7. The DRA will prepare a summary of DRA 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 DRA. 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 DRA shall review and consider the dispute. The DRA 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 remotely or 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 DRA may request that the parties provide technical services necessary for the DRA 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 DRA 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 DRA 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 DRA questions and requests.

10. There shall be no testimony under oath or cross-examination during DRA 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 DRA in conformance with the Operating Procedures.

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

12. The DRA shall not in its recommendations ignore or re-write the terms of the Contract or propose what the DRA believes is a compromise outcome of the dispute.

D. Traditional Dispute Meeting: Procedure

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

1. Within 5 business days after receiving the Department's written response to the Contractor's supplemental potential claim record, the Contractor shall refer the dispute to the DRA if the Contractor wishes to further pursue the dispute. The Contractor shall make the referral in writing to the DRA, 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 DRA 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 present and to be heard by the DRA, and to offer evidence. Either party furnishing written evidence or documentation to the DRA must furnish copies of such information a minimum of 10 days prior to the date the DRA 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 DRA 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 DRA. The DRA shall not consider evidence not furnished in conformance with the terms specified herein.

4. Upon receipt by the DRA of a written referral of a dispute, the DRA shall convene to review and consider the dispute. The dispute meeting shall be held no later than 25 days after receipt of the written referral unless otherwise agreed to by all parties.

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

6. The DRA shall furnish a written report to the parties with its conclusion(s) and recommendation(s). The DRA shall complete its report and submit it to the parties within 10 days of the dispute meeting, except that time extensions may be granted at the request of the DRA with the written concurrence of the parties. The report shall summarize the facts considered, the specific Contract provisions relied upon, statute or regulation viewed by the DRA as pertinent to the dispute, and the DRA's interpretation and reasoning in arriving at its conclusion(s) and recommendation(s) and, if requested, recommend guidelines for determining compensation. The DRA's written opinion shall stand on its own, without attachments or appendices. The DRA shall furnish a copy of the written report to the ADR Engineer at ADR.Engineer@dot.ca.gov.

7. Within 10 days after receiving the DRA's report, the parties shall respond to the DRA 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 DRA recommendation.

8. Either party may request clarification of elements of the DRA's report from the DRA prior to responding to the report. The DRA shall consider any clarification request only if submitted within 5 business days of receipt of the DRA's report, and if submitted simultaneously in writing to both the DRA and the other party. Each party may submit only one request for clarification for any individual DRA report. The DRA shall respond, in writing, to requests for clarification within 5 business days of receipt of such requests.

9. Either party may seek a reconsideration of the DRA's recommendation. The DRA shall only grant reconsideration based upon submission of new evidence -- evidence which came to light after the dispute meeting -- and if the request is submitted within the 10 day time limit specified for response to the DRA's written report. Each party may submit only one request for reconsideration regarding an individual DRA recommendation.

10. If the parties are able to resolve their dispute with the aid of the DRA'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 30 days of the

acceptance by both parties of the recommendation, either party may request that the DRA recommend an adjustment.

E. Informal Dispute Meeting

An informal dispute meeting shall be convened only if the parties and the DRA 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 DRA with a one page position paper and any pertinent documents requested by the DRA that are or may become necessary for the DRA 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 DRA.

2. After the dispute meeting has concluded, the DRA 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 DRA then verbally delivers its recommendation with findings 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 DRA must write a one page report that includes the recommendation and the parties' response (Accept/Reject) regarding the dispute. The report must be sent to the parties and to the ADR Engineer at ADR.Engineer@dot.ca.gov.

6. Occasionally the DRA may be unable to formulate a recommendation based on the information given at a dispute meeting. However, the DRA 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 DRA's opinion, the Department and the Contractor shall promptly accept and implement the resolution as agreed to by the parties.

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

9. 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

The DRA shall not begin work under the terms of this Agreement until authorized in writing by the Department. Once established, the DRA shall be in operation until the Department notifies the DRA 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 DRA will be dissolved.

SECTION V: PAYMENT

For in person meetings, the DRA shall be compensated at an agreed rate of \$2,000 per day for time spent per meeting, either at the start of the project, or a scheduled progress or a dispute meeting. 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 DRA is at an authorized DRA meeting.

For remote meetings, the DRA shall be compensated at an agreed rate of \$200 per hour for actual meeting time. Preauthorized hours must be documented on form CEM-6214 "DISPUTE RESOLUTION CHARGEABLE HOURS AUTHORIZATION."

No additional compensation will be made for time spent by the DRA to review and research activities outside the DRA meetings unless that time, (such as time spent evaluating and preparing recommendations on specific issues presented to the DRA), 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 DRA.

A. Payment Processing

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

2. The DRA 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

The DRA and the Contractor shall keep available for inspection by representatives of the Department and the United States, 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

The DRA shall not assign the work of this AGREEMENT.

SECTION VII: REPLACEMENT OF DRA

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

1. Upon resignation.

2. The Department or the Contractor may replace a DRA for failing to fully comply with required employment or financial disclosure conditions of the DRA as described in the Contract and this Agreement.

B. When the DRA is replaced, the replacement shall be appointed in the same manner as the original advisor was appointed. The selection of a replacement DRA must start upon determination of the need for replacement and must be completed within 15 days. The Dispute Resolution Advisor Agreement must be amended to reflect the change of the DRA.

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

SECTION VIII: LEGAL RELATIONS

A. The parties hereto mutually understand and agree that the DRA 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 the DRA, who served on this Contract, as a witness in arbitration or other proceedings that may arise from the Contract.

D. The DRA shall have no claim against the Department or the Contractor, or both, from claimed harm arising out of or resulting from the DRA'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 DRA from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees, arising out of and resulting from the services of the DRA 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 DRA, which documents and records are marked "Confidential - for use by the DRA only," shall be kept in confidence and used only for the purpose of resolution of subject disputes, and for assisting in development of DRA 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 DRA. 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 contractual administrative processes in Sections 5-1.43, "Potential Claims and Dispute Resolution," and 9-1.17D, "Final Payment and Claims," shall be resolved by arbitration as provided in Section 9-1.22, "Arbitration," of the Standard Specifications. Disputes between the DRA and the parties that 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 DRA in progress, except for private meetings or deliberations of the DRA 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, DRA, & Department

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

SIGNATURES TO FOLLOW

DRA

By: _____
[insert name]

Title: _____

CONTRACTOR

CALIFORNIA DEPARTMENT
OF TRANSPORTATION

By: _____
[insert name]

By: _____
[insert name]

Title: _____

Title: _____