

DISPUTE RESOLUTION BOARD

Operating Procedures

Note: These Operating Procedures are recommended, but may be modified to meet the requirements for a particular project, subject to the terms of the Contract and the DRB Agreement.

Note: These Operating Procedures can also be used for projects with Dispute Resolution Advisors; they should be modified to be consistent with the Contract and the DRA Agreement.

GENERAL

1. These Operating Procedures define the process to be followed by the Contractor, the Department, and the Dispute Resolution Board (DRB) in avoiding and resolving construction disputes. The Contractor and the Department will each be referred to as a “Party” or, collectively, the “Parties”.
2. The DRB will operate in an informal, flexible manner using the process outlined in the Contract and DRB Agreement, supplemented by these Operating Procedures. Nothing herein supersedes or modifies the Contract or the DRB Agreement. These Operating Procedures are subject to change, with the approval of both Parties and the DRB.
3. The DRB will be impartial, unbiased and neutral in all its activities relating to the Contract, the DRB Agreement, and these Operating Procedures.

COMMUNICATIONS

1. There will be no ex-parte communication between a DRB member and either Party or their Subcontractors or Suppliers on any matter related to the Contract, other than those made by the DRB Chairperson for routine scheduling and/or administrative purposes.
2. The Department and the Contractor each will identify a single designated representative to interact with the DRB Chairperson. It will be the responsibility of the designated representatives to further communicate with their respective organizations on all DRB activities. All communications with the DRB will be made through the DRB Chairperson, who will coordinate with the other DRB members. Communications will be

made by e-mails among the DRB Chairperson and the designated representatives, except for specifically designated documents that can be sent by other means as the DRB Chairperson and the Parties agree.

3. Correspondence, position papers, and other documents generated by either the Department or Contractor will be sent directly to the DRB Chairman with confirmation that a copy has been sent to the other Party. If requested by the Chairperson, designated documents may be sent directly to the individual DRB members. E-mailing position papers and other documents will be allowed with the approval of the Parties and the DRB Chairperson.

DOCUMENTS TO BE FURNISHED TO THE DRB AND THE PARTIES

1. After the DRB has been appointed, the Department will provide each DRB member with a conformed set of Plans and Specifications, the approved Baseline Schedule, and any schedule updates that have been submitted at the time of DRB appointment. The DRB Chairperson may request that the Parties submit additional information that the DRB needs to gain a basic understanding of the project for the initial DRB progress meeting.
2. On a monthly basis, the Department will provide the DRB members regularly generated project documents, including progress meeting minutes/reports, monthly schedule updates, and logs (RFIs, Submittals, CCO, NCRs). Other information may be requested by the DRB on a case by case basis. The Parties and the DRB Chairperson will agree on the most efficient way to get the monthly updates to the DRB.
3. The DRB Chairperson will be responsible for filing with the Department's ADR Engineer the reports required by Sections III(A)(2) and III(D)(6) of the Agreement, with copies to the Parties.

DRB PROGRESS MEETINGS

1. The DRB Chairperson and the Parties will determine the frequency, timing, and arrangements for DRB progress meetings and site visits.
2. An initial DRB progress meeting will be scheduled by the DRB Chairperson at the beginning of the project. Subsequent DRB progress meetings will be scheduled as agreed with the Parties, but must take place not less than every 3 months. The DRB and the Parties will schedule the next two progress meetings in advance (subject to the time remaining in the Contract). If the Parties require an adjustment to the schedule for a DRB progress meeting, the Parties and the DRB will agree on an adjusted meeting date. If the DRB and the Parties agree, DRB

progress meetings may be waived when the only work remaining is plant establishment.

3. The DRB Chairperson will prepare a draft agenda for the initial DRB meeting and for each DRB progress meeting. The DRB Chairperson will circulate a draft agenda to the DRB members and the Parties at least fourteen (14) days prior to each DRB progress meeting for review and comment. The agenda and format of the DRB progress meeting shall generally be as described in Section III(B)(2) of the DRB Agreement. The DRB Chairperson will take Party comments into consideration in finalizing and distributing the agenda to the DRB and the Parties prior to the DRB progress meeting.
4. Each DRB progress meeting will consist of a round table discussion and a site visit for the DRB to get a firsthand look at the work being performed under the Contract. Each meeting and site visit must be attended by representatives of both Parties. During progress meetings the DRB members will not express any opinions on the merits of any potential or actual disputes.
5. The DRB Chairperson will prepare a summary of the initial DRB meeting and all DRB progress meetings, and distribute them to the Parties and the DRB members within ten (10) days after each DRB progress meeting. The summary will be reviewed, corrected as necessary, and approved at the next DRB progress meeting.

DISPUTE MEETINGS--GENERAL

1. Disputes must be referred to the DRB, and the DRB must hear such disputes, within the process and timeframes specified in the Contract and DRB Agreement.
2. The DRB will usually make recommendations on dispute entitlement only. The Parties may also request that the DRB make recommendations on contract adjustments (time and money); if such a request is made, it should be included in the joint dispute statement the Parties prepare at the start of the traditional dispute meeting process and addressed in the Parties' position papers and presentation materials.
3. Either Party may request that a dispute be heard in accordance with the Contract and DRB Agreement provisions for informal dispute meetings. Before a dispute can be heard informally, both Parties and the DRB must agree that the dispute is sufficiently small and uncomplicated such that the informal dispute meeting process is appropriate. The use of the informal dispute meeting process does not affect the steps and timing of the traditional dispute meeting process.

4. No traditional dispute meeting will be held within 30 days of contract acceptance as determined by the latest approved CPM schedule update.
5. The Department will provide administrative services such as conference facilities and administrative support services, if needed, for any dispute meeting.
6. If the DRB needs technical services in connection with a dispute, it will so inform the Parties sufficiently prior to the traditional dispute meeting date so that the Parties can advise the DRB whether the Parties agree to supply the DRB with the requested technical services. If the Parties agree to provide the requested technical services, the technical services will be provided in a timely manner to support the schedule set for the traditional dispute meeting. Both Parties will be given an opportunity to comment on any information or advice given to the DRB as part of such technical services.

PREPARATION FOR A TRADITIONAL DISPUTE MEETING

1. Within ten (10) days of receipt of a request for a traditional dispute meeting, the DRB Chairperson will schedule a telephone conference call with the Parties to cover the following topics:
 - a. Timing and location of the traditional dispute meeting.
 - b. Preparation and timing of a brief joint statement of the issues in dispute and the relief requested.
 - c. Preparation and timing of Common Reference Documents.
 - d. Preparation, format, and timing of positions papers and rebuttals (if the latter is requested by the Parties).
 - e. Preparation and timing of (i) presentation materials for the traditional dispute meeting and (ii) the list of attendees/presenters at the traditional dispute meeting
 - f. Any other matters relating to preparation for the traditional dispute meeting that need to be covered at that time.

The timing of all the steps specified in this section will be set by the DRB in consultation with the Parties and confirmed by the DRB Chairperson via e-mail to the Parties; provided, however, all documents and other information to be used in the traditional dispute meeting must be submitted to the DRB no later than fifteen (15) days before the traditional dispute meeting.

2. All documents and information submitted as part of the DRB process must be copied simultaneously to the other Party and the DRB.

3. The DRB will determine the timing and location of the traditional dispute meetings, with due consideration to the needs and preferences of the Parties. Normally, traditional dispute meetings will be conducted at or near the project site or at a Department facility.
4. The Parties will jointly agree on and submit to the DRB a brief statement of the dispute and the relief requested from the DRB, preferably no more than one or two paragraphs. If there is disagreement on the issues in dispute and/or the relief requested, the Parties will identify the area(s) of disagreement in their submissions to the DRB.
5. The Parties will jointly agree on a set of documents that they both will rely on for position papers and presentations at the traditional dispute meeting, referred to as Common Reference Documents (CRD). The CRD will be logically grouped and tabbed for easy reference. Any disagreements about the content of the CRD should be brought to the attention of the DRB Chairperson prior to submission of the claimant's position paper; the DRB will make a determination on any contested documents. The claimant's position paper must include the Common Reference Documents. Both Parties' position papers should specifically reference the parts of the CRD relied upon for each of their arguments.
6. The claimant will submit its position paper, followed by the respondent's position paper, followed by one round of rebuttals (if the Parties have requested them).
7. Each Party's position paper should be structured to be a standalone document that reflects the previously submitted joint statement of issues in dispute and relief requested; summarizes the dispute background, including resolved and unresolved segments of the dispute; states the Party's position on entitlement; includes an estimate of the cost of the affected work and impacts to the work completion date; identifies the contractual and factual justification for the Party's position; and states the reasoning why each Party contends that the other Party's position is not contractually or factually correct. If the dispute presented to the DRB involves a Subcontractor or Supplier, the Contractor's position paper must include the basis for the Contractor making the claim on behalf of the Subcontractor or Supplier.
8. Once position papers and rebuttal papers (if applicable) have been submitted, the Parties may **not** submit new information or documents regarding the dispute, unless requested by the DRB. If the DRB requests additional information and documents before the traditional dispute meeting, the Parties will timely submit and exchange such information and documents to support the schedule set for the traditional dispute meeting. The DRB will not consider evidence not furnished in this manner.

9. Not less than fifteen (15) days before the traditional dispute meeting, the Parties must submit to each other and the DRB (a) any presentation materials they intend to use at the dispute meeting and (b) a list of all persons who will attend the dispute meeting and their role at the dispute meeting (observer or presenter). The Parties should propose for attendance at the dispute meeting only those persons identified in DRB Agreement Section III.C.5. If there any disagreements on who will attend the traditional dispute meeting and his/her role at the traditional dispute meeting, the DRB will make a determination on who will attend and his/her role.

CONDUCT OF THE INFORMAL DISPUTE MEETING

1. The informal dispute meeting process will be held only if both Parties and the DRB agree, and there is sufficient time to accommodate it within the traditional dispute meeting timelines.
2. The DRB Chairperson, in consultation with the Parties, will establish a timeline for the informal dispute meeting process. The presumption is that the informal dispute meeting will be held at the next regularly scheduled DRB progress meeting, but the schedule can be set by agreement of the DRB and the Parties.
3. Not later than seven (7) days before the informal dispute meeting, each party must furnish to the other party and the DRB a one to two-page brief discussion of their position - in bullet point form – together with key supporting documents. The parties are encouraged to confer, prior to submission of their summaries, on the relevant documents in order to be as efficient as possible at the informal dispute meeting.
4. At the informal dispute meeting, each party will present its position and answer questions from the DRB. The DRB will then confer in private and on the same day give its recommendation verbally. The parties may then ask clarifying questions about the DRB's recommendation.
5. Within ten (10) days after the informal dispute meeting the Parties will advise the DRB whether the dispute is resolved and, if it is not, within fifteen (15) days after the informal dispute meeting the DRB will issue a one page report with its recommendation.
6. If the dispute remains unresolved, the Parties will continue with the traditional dispute meeting process.
7. The Parties and the DRB will not be bound by the informal recommendation if a dispute is later heard in a traditional dispute meeting.

CONDUCT OF THE TRADITIONAL DISPUTE MEETING

1. Not later than seven (7) days before the dispute meeting, the DRB Chairperson will hold a telephone conference call to agree on the final details for the dispute meeting, including the following topics:
 - a. Logistics and facilities for the traditional dispute meeting location.
 - b. Format of the traditional dispute meeting, including use of presentation materials.
 - c. Attendees and roles at the traditional dispute meeting.
 - d. Any other issues of concern or questions that the Parties may have about the traditional dispute meeting.
2. Only the following persons will be permitted to attend and present at the traditional 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 agent of a Party and who also has direct knowledge of the dispute and/or direct involvement in the project.
3. 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 2 above.
4. At any traditional dispute meeting that includes Subcontractor or Supplier disputes that are actionable against the Department, the Contractor must require that each Subcontractor (including lower tier Subcontractors or any Supplier) involved in the dispute have present at the traditional dispute meeting an authorized representative with actual knowledge of the facts underlying the Subcontractor or Supplier claim.
5. The Parties are encouraged to limit the number of persons at the traditional dispute meeting to the necessary minimum needed to present relevant information to the DRB.
6. Each Party will be allowed to present its position uninterrupted by the other Party. The Claimant will make its presentation first and after both Parties have made their presentations the DRB will hear rebuttals in turn.
7. The DRB may ask questions at any time. A Party may ask clarifying questions of the other Party, with the permission of the DRB Chairperson.
8. There will be no testimony under oath or any cross-examination by the other Party. The rules of evidence will not apply. There will be no stenographic, audio or video recording of the traditional dispute meeting.

9. The DRB Chairperson will ensure that all Parties have ample opportunity to fully present their respective positions and to rebut the opposing positions. The Parties at all times will follow the DRB Chairperson's directions in managing the DRB process in a respectful and professional manner.
10. Once the Parties are satisfied that they have presented their positions completely and the DRB has no further questions, the traditional dispute meeting will be closed and the DRB will consider no further information or documents.
11. If the DRB needs additional information or documents, it will submit its request to the Parties within ten (10) days after the traditional dispute meeting ends, and the Parties will respond to such request within ten (10) days of the DRB request. If the DRB requests such additional information or documents, the traditional dispute meeting will be closed when the DRB Chairperson confirms receipt of the additional information or documents.
12. If a Party fails to attend a traditional dispute meeting, that party's written documents and correspondence will be considered as that party's entire position and the DRB will proceed with the traditional dispute meeting with the attending Party making its presentation.

DRB DELIBERATIONS AND RECOMMENDATIONS

1. Following the close of the traditional dispute meeting, the DRB will confer to review the information and documents that have been presented and will submit a written recommendations report to the Parties within thirty (30) days after the close of the traditional dispute meeting (unless extended by agreement of the Parties).
2. If a unanimous report cannot be reached, the dissenting member's recommendation, along with the supporting rationale, will be included as a minority opinion in the written report; however, all three DRB members will sign the report without identification of the dissenting member.
3. All findings, conclusions, and recommendations will be included in the report based on facts, circumstances and documents as presented by the Parties, the DRB's interpretation of the Contract and the Contract Documents, and applicable statutes or regulations (if any).
4. Within thirty (30) days of receiving the DRB's report, both Parties must respond to the DRB in writing (with a copy to the other Party), advising that the dispute is either resolved or remains unresolved and the reasons why. The Parties should be aware that a failure to timely respond will be deemed to be that Party's acceptance of the DRB's report.

5. The DRB will consider a request for clarification of any elements of the DRB report (as distinguished from further 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 requests for clarification. If requested by the DRB, time extensions may be granted, in which case the thirty (30) day deadline for the Parties' response as specified in Paragraph 4 above will be extended accordingly.
6. Either Party may seek a reconsideration of a DRB report, but only if new evidence not available at the time of the traditional dispute meeting is submitted and the request is made within the thirty (30) day time limit specified for Party responses to the DRB's report.
7. If the Parties have requested a recommendation initially on entitlement only and cannot agree on a contract adjustment (time and/or money), then either Party may request the DRB to provide recommendations on such adjustments. If the Parties have not in their position papers or presentations given the DRB adequate information or documents for the DRB to make a recommendation on a contract adjustment, the DRB may establish the steps and timing of submitting and presenting any needed additional information or documents (which may include additional position papers and holding a traditional dispute meeting) and will issue its supplemental report as provided above.
8. If the DRB's report is accepted, or the Parties otherwise resolve the dispute, the Parties will notify the DRB by e-mail when appropriate contract modification documents have been processed in accordance with the Contract.

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