

# ***WisDOT Dispute Resolution Procedures - Informal Dispute Review Board*** ***(Third-Party Advisory Opinion)***

## **1.0 GENERAL**

### **1.1 Definitions**

Definitions are as defined in *WisDOT Dispute Resolution Procedures / Formal Dispute Review Board* except as follows:

**Agreement:** The Informal Dispute Review Board Three-Party Agreement – Appendix A.

### **1.2 Informal Review Overview**

An informal review may be provided by the Bureau and subsequently by a member of the Statewide Standing Dispute Review Board (DRB) roster.

If after attaining and considering the Bureau's recommendation concerning a pending or active dispute, the parties still do not agree on entitlement, either party may request an informal review by a member of the Statewide Standing DRB roster.

Use of such an informal review may expedite the settlement process and is certainly less costly and less time consuming than a formal DRB hearing. Where informal reviews have been used, their success in promoting resolution of the dispute has led to wide endorsement of this approach. When considering referral of an issue for informal review, the parties should thoroughly consider and discuss the issue with each other. The parties should recognize that if the issues are more complex than can be realistically dealt with by the informal nature of the informal review process, an informal review may be ineffective.

In making this determination, the disputing parties should take into consideration the complexity of the issues, whether experts may be necessary, and/or the length and complexity of the presentations. A DRB informal review does not require acceptance or rejection by the parties. The DRB's preliminary views on the issue form a basis for the parties to negotiate a settlement without further assistance from the DRB. Informal reviews are based only upon information available at the time, are subject to change based upon further data, and are not to be used or referred to in future hearings on the issue.

If the issue is not resolved after the informal review and a subsequent dispute hearing is held, no reference to the advisory opinion is allowed. All positions, evidence, and other relevant data are resubmitted at the hearing. If the dispute is later taken before a formal DRB, the DRB is not bound by the advisory opinion.

Advisory opinions are typically limited to entitlement issues and not quantum. The DRB may provide advice on the method to use in determining quantum without specifically determining quantum.

### **1.3 Availability**

Per subsection 104.3.6 of the Standard Specifications, after the contractor has provided the department a 5-Day Written Statement and the department has responded with a 5-Day Written Response, an informal review may be utilized in the dispute resolution process when mutually agreed upon by both the contractor and department.

## **2.0 OPERATION**

### **2.1 General**

In general, the DRB will operate in accordance with these guidelines. However, it is not desirable to adopt hard-and-fast rules for the functioning of the informal review. The entire procedure shall be kept flexible to adapt to changing situations. The DRB may initiate, with the department's and contractor's concurrence, new procedures or modifications to existing procedures whenever this is deemed appropriate and beneficial in resolving the dispute.

### **2.2 Request Informal Opinion**

When both disputing parties have decided that an advisory opinion would be beneficial in resolving an issue or dispute, the project manager shall contact the regional construction oversight engineer for concurrence. If the regional construction oversight engineer agrees that the issue warrants an advisory opinion, a DRB will be engaged by the Bureau of Project Development to hear the issues and render an opinion.

## 2.3 DRB Selection

The regional construction oversight engineer will select a single member DRB from the Statewide Standing DRB member roster. (See *WisDOT Dispute Resolution Procedures / Formal Dispute Review Board*, Section 2.0).

## 2.4 Agreement

The regional construction oversight engineer will execute the Agreement to engage a DRB selected from the statewide standing roster of DRB members.

## 2.5 Meeting Procedures

When a DRB has been retained, the DRB in conference with both parties and Bureau will set a date for presentations. The department shall provide to the DRB, a set of plans, specifications, and pertinent project correspondence. The department shall provide to the DRB and contractor, its 5-Day Written Response, and any other supporting documents pertinent to the dispute. Provide one copy to the DRB and 3 copies to the contractor.

The contractor shall provide to the DRB and department, its 5-Day Written Statement and supporting documents pertinent to the dispute. Provide one copy to the DRB and 3 copies to the department.

The disputing parties may further supplement the 5-Day Written Statements by each preparing a short summary of its position and submitting it to the DRB and the other disputing party prior to the meeting. Normally the disputing parties do not submit comprehensive position papers. Provide one copy to the DRB and 3 copies to the other disputing party.

All submittals shall be provided to the appropriate parties 7 calendar days prior to the meeting. At the meeting each party is given ample time to present its position, make rebuttals, provide key contract documents, and respond to the DRB's questions and requests.

The time required for these meetings varies widely, depending on the scope and complexity of the issue(s), but they are often short, thirty minutes to a couple hours or so.

## 2.6 Findings and Recommendations

The DRB may verbally render an opinion at the meeting or soon thereafter.

After the meeting, the DRB shall write the opinion, including the rationale, to ensure clarity. This shall be typed and is not usually a lengthy document. Copies are provided to the disputing parties and Bureau.

In some circumstances, after hearing the parties' presentations, the DRB may determine that the dispute is too complex to issue an advisory opinion. In such cases, they should immediately advise the parties and suggest engaging the claim process.

Occasionally the DRB, after deliberation, is unable to formulate an opinion and so advises the parties. Nonetheless, this opportunity for the parties to state their positions in a clear, uninterrupted fashion, and with subsequent questions from the neutral, is often a useful step in resolving disputes.

Advisory opinions are often sufficient to enable the parties to promptly resolve the dispute without a DRB hearing.

## 2.6 Clarification

After the advisory opinion is rendered, either party may ask for clarification. If the DRB determines clarification is appropriate and will help resolve the dispute, the DRB will provide clarification.

## 3.0 PAYMENT

The department shall bear the costs and expenses of the informal DRB. DRB members shall be compensated and reimbursed expenses as prescribed in the Agreement executed by the department, contractor, and DRB member.

The department will provide, at no cost to the contractor, administrative services such as coordination of the informal DRB and meeting facilities when state owned facilities are utilized. If other facilities and amenities are desired by both parties, these costs shall be equally shared by both parties.

The following payment procedures will be used:

1. The DRB member shall submit invoices to the regional construction oversight engineer for review.

2. After the regional engineer has reviewed and approved the invoices, the invoices will be forwarded to the project manager.
3. The project manager will review and then forward the DRB invoice(s) along with any non-state facility or amenity charges to the contractor.
4. The contractor shall pay the department approved invoices.
5. The contractor will then submit the invoices and documentation verifying payment to the project manager for payment.
6. The department will execute a change order to pay the entire DRB invoiced amount and 50 percent of non-state facility and/or amenity invoices.

There will be no markups applied to expenses connected with the DRB, either by the DRB members or by the contractor when requesting payment of the State's share of expenses.

Department's payment to contractor for accepted work will be made as follows:

**Pay Item:** Dispute Review Board

**Pay Unit:** Dollar

These procedures and the Agreement (Appendix A) contain all of the provisions for compensation and expenses of the DRB.

## Appendix A - Informal Dispute Review Board Three-Party Agreement

### A. PARTIES

Department: \_\_\_\_\_

Contractor: \_\_\_\_\_

Dispute Review Board (DRB) Member: \_\_\_\_\_

### B. DEFINITIONS

Definitions are as defined in the *WisDOT Dispute Resolution Procedures / Formal Dispute Review Board*.

Exception:

**Agreement** The Informal Dispute Review Board Three-Party Agreement – Appendix A

### C. SITUATION

The department and contractor are now engaged in the construction of the \_\_\_\_\_ (project name)

under Contract No. \_\_\_\_\_, Project ID \_\_\_\_-\_\_\_\_-\_\_\_\_.

The contract provides for the establishment and operation of a third party review (Dispute Review Board) to assist in resolving disputes as defined therein.

### D. PURPOSE

The purpose of the DRB is to provide an independent and impartial review of disputes as are presented to it and to provide a non-binding advisory opinion concerning entitlement, and when requested, quantum based on the contract, applicable contract law, industry practices and the facts presented. It is not the purpose, or the responsibility, of the DRB to resolve the dispute. That responsibility remains with the department and the contractor. However, it is anticipated that the DRB's review and advisory opinion will assist in the resolution of the matter.

### E. SCOPE OF WORK

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

#### E.1 Project Site Visits

The DRB member may visit the project site to become familiar with the construction activities and work in progress. Visits shall be approved by the department.

#### E.2 Establish Procedures

Operating procedures will be in accordance with the attached *WisDOT Dispute Resolution Procedures / Informal Dispute Review Board* and this Agreement except as modified or altered by the mutual agreement of the department and the contractor.

#### E.3 Findings and Recommendations

It is expressly agreed the DRB member is to act impartially and independently in the consideration of facts and conditions surrounding any dispute. Prior to the deliberation of the DRB after the presentation, no DRB member shall express any opinion concerning the merits of any facet of the case.

Upon execution of this Agreement, the DRB shall schedule a meeting for presentations by the department and the contractor. If possible the DRB shall review, consider, and provide its findings and recommendation concerning the dispute at the meeting following presentations and questions.

The DRB's advisory opinion shall be provided in writing to both the department and contractor within 14 calendar days of completion of the presentations/meeting. The DRB shall set forth, as clearly as possible, the logic and reasoning behind its findings and recommendations. The findings and recommendations will address entitlement only, unless mutually agreed by both the department and contractor that the DRB address quantum as well.

If either the department or contractor request clarification to the DRB's findings and recommendations, the DRB may, if deemed by the DRB appropriate and beneficial to the resolution process, provide written clarification to both the department and contractor.

## F. OTHER

The DRB member(s) shall become familiar with pertinent contract documents and review pertinent reports and documents.

It is the express continuing responsibility of the DRB to notify the department and the contractor, and disclose immediately, any and all existing or potential conflicts of interest, and/or inappropriate contact with either the department or the contractor that may exist or develop during the term of this Agreement.

Except for providing the services required in the Agreement, the DRB shall refrain from giving any advice to either the department or the contractor concerning conduct of the work or the resolution of problems which might compromise the integrity of the DRB.

The DRB shall perform services not specifically listed herein to the extent necessary to achieve the purpose of this Agreement.

## G. CONTRACTOR RESPONSIBILITIES

Except for its participation in the DRB's activities as provided in the Informal Review Procedures, the contractor shall not solicit advice or consultation from the DRB or its member(s) on matters dealing with the conduct of the work or resolution of problems which might compromise the integrity of the DRB.

### G.1 The Contractor Shall:

- Have representatives at all presentations/meetings.
- Provide the DRB, a copy of the 5-Day Written Statement previously submitted to the department.
- Furnish the DRB and department pertinent contractor-prepared documents, such as progress schedules, to supplement the documents provided by the department. These may be included as an appendix to the contractor's 5-day Written Statement. Provide one copy to the DRB and three copies to the department.
- Provide all required submittals to the appropriate party 7 calendar days prior to the meeting.
- In cooperation with the department, coordinate the operation of the DRB.
- Be prohibited from amending either the basis of entitlement or the amount of any compensation or time stated for any and all issues presented in the contractor's 5-day Written Statement previously submitted to the department.
- Not be precluded from withdrawing or reducing the basis of entitlement and/or the amount of any compensation or time stated for any and all issues requested in the contractor's 5-Day Written Statement submittal to the Region.

### G.2 The Contractor May:

- Amend or append information to their 5-day Written Statement up to 7 calendar days prior to the DRB meeting. Provide one copy to each DRB member and three copies to the department.

## H. DEPARTMENT RESPONSIBILITIES

Except for its participation in the DRB's activities as provided in the contract and in this Agreement, the department shall not solicit advice or consultation from the DRB or its member(s) on matters dealing with the conduct of the work or resolution of problems which might compromise the integrity of the DRB.

### H.1 The Department Shall:

- Have representatives present at all presentations/meetings.
- Provide the DRB a copy of the 5-Day Written Response previously submitted to the contractor.
- Furnish the DRB one copy of all pertinent contract documents, including but not limited to the specifications, plans, addenda, minutes of progress meetings, change orders, and other documents pertinent to the performance of the contract and necessary for the DRB's work.
- In cooperation with the contractor, coordinate the operations of the DRB.
- Furnish the DRB and contractor pertinent department-prepared documents to supplement the documents provided by the contractor. These may be included as an appendix to the department's 5-Day Written Response. Provide one copy to each DRB and three copies to the contractor.
- Provide all required submittals to the appropriate party 7 calendar days prior to the meeting.
- Furnish conference facilities to the extent that department conference facilities are available at the time needed. If department facilities are not available, the department and contractor shall agree on a meeting location.

## H.2: The Department May:

- Amend or append information to their 5-Day Written Response up to 7 calendar days prior to the DRB meeting. Provide one copy to each DRB member and three copies to the contractor.

## I. TIME FOR BEGINNING AND COMPLETION

The DRB shall begin operation following execution of this Agreement and shall remain available until the department grants final acceptance to the contractor. The department and contractor may utilize the DRB in any subsequent disputes in accordance with subsection 104.3.6 (3) of the Standard Specifications. The DRB shall not begin work on any subsequent dispute unless requested and approved by the department.

The DRB shall not begin any work under the terms of this Agreement until authorized in writing by the department.

## J. MEASUREMENT AND PAYMENT

### J.1 Measurement

DRB members shall invoice the department in accordance with the following prescribed rates and expenses.

DRB member(s) listed under Section A of this Agreement will be compensated at an agreed hourly rate of \_\_\_\_\_ per hour.

The department shall bear the costs and expenses of the DRB. All hourly time charges shall be rounded to the nearest quarter hour.

Time spent on review and research activities outside the official DRB meeting (such as time spent evaluating and preparing recommendations on specific issues presented to the DRB) which has been specifically agreed to in advance by the department will be compensated at the agreed hourly rate. The agreed hourly rate shall include all incidental expenses including expenses for telephone, fax, postage, courier, printing, and computer services. If unusual circumstances develop where expenses would exceed that which would generally be anticipated and considered incidental, the DRB shall notify and provide a cost estimate to the department. The department will either grant or deny authorization for such expenditure.

DRB member travel will be reimbursed. Expenses shall be "usual, customary and reasonable" and be verifiable with receipts for major items. Mileage rates shall not exceed that allowed by the IRS. Meals and other miscellaneous travel expenses shall be billed as a daily per diem based on a 24-hour period and shall not exceed a limit of \$50 per day.

There will be no markups applied to expenses connected with the DRB, either by the DRB or by the contractor when requesting payment from the department.

The department will provide, at no cost to the contractor, administrative services such as coordination of DRB and conference facilities when state owned facilities are utilized. If state facilities are not available or other facilities and amenities are desired by both parties, these costs shall be equally shared by the contractor and department.

This Agreement contains all of the provisions for compensation and expenses of the DRB.

### J.2 Payment

The DRB submit invoices for payment for work completed and qualified expenses not more often than once per month during the progress of work. Such invoices shall be in a format approved by the department and accompanied by a general description of activities performed during that period. The value of work accomplished for payment shall be established from the billing rate and hours expended by the DRB member together with qualified expenses incurred. Satisfactorily submitted invoices shall be paid within 42 calendar days.

Payment will be processed as described in the *WisDOT Dispute Resolution Procedures / Informal Dispute Review Board*.

The cost records and accounts pertaining to this Agreement shall be kept available for inspection by representatives of the department or contractor for 5 years after final payment.

## K. TERMINATION OF AGREEMENT

This Agreement may be terminated by the department at any time upon written notice to the DRB.

The DRB member may withdraw from the DRB by providing 4 weeks written notice. This 4-week written notice may be reduced due to an emergency or occurrence beyond the control of the DRB member. Either the department or the contractor may remove any DRB member from the DRB at any time by providing notice and good cause thereof to the other party, and stating the reasons for the decision to remove the DRB member.

Should the need arise to appoint a replacement DRB, the replacement member shall be selected in a similar manner as the original DRB was selected.

**L. LEGAL RELATIONS**

The DRB, in the performance of his or her duties on the DRB, is acting in the capacity of an independent agent and not as an employee of either the department or the contractor.

The DRB member is acting in a capacity intended to facilitate resolution of disputes. Accordingly, the department and the contractor will agree that to the fullest extent permitted by law, the DRB member shall be accorded quasi-judicial immunity for any actions or decisions associated with the review and findings and recommendations of disputes referred to the DRB.

The DRB member may not be called as a witness by either the department or the contractor in subsequent proceedings on the dispute. Other than the findings and recommendations of the DRB, all records, proceedings and deliberations of the DRB are to be kept confidential to the fullest extent permitted by law. The DRB shall, upon completion of the project, turn all records of the DRB over to the department for storage and preservation in accordance with department policy and state law.

The findings and recommendations of the DRB concerning any dispute are non-binding, but admissible to the extent permitted by law in any subsequent dispute resolution proceeding or forum to establish entitlement and/or quantum.

**M. DISPUTES REGARDING THIS THREE-PARTY AGREEMENT**

Disputes among the parties arising out of this Agreement which cannot be resolved by negotiation and mutual concurrence among the parties, and actions to enforce any right or obligation under this Agreement shall be initiated or continued as prescribed in subsection 105.13 of the Standard Specifications.

**N. FUNDING AGENCY REVIEW**

The funding agencies for this project have the right to review the DRB's findings and recommendation and to attend DRB meetings and presentations, but not to participate in or attend private DRB deliberations.

**O. EFFECTIVE DATE**

This Agreement is effective as of \_\_\_\_\_.

DRB Member

\_\_\_\_\_

Date

\_\_\_\_\_

Contractor

Name

\_\_\_\_\_

Title

\_\_\_\_\_

Date

\_\_\_\_\_

Wisconsin Department of Transportation

Name

\_\_\_\_\_

Title

\_\_\_\_\_

Date

\_\_\_\_\_