

# Dispute Review Boards

## Dispute Review Boards as optional ADR Process

Alternative Dispute Resolution (ADR) typically refers to alternatives to court-based litigation.

Dispute Review Boards (DRBs) are viewed as a type of ADR process in every legal jurisdiction in which they are utilized.

In general, DRBs differ from other ADR processes\* in that a DRB is a suggested process that enables parties to engage in dispute avoidance as well as engage in dispute resolution.

\*NOTE: including NJDOT's current utilization of Non-Binding Mediation

## Dispute Review Boards as optional ADR Process

### Dispute Avoidance

The DRB is also available to orally provide a recommendation on issues, by meeting periodically (regular-quarterly meetings typical) with the parties and when the parties are unable to reach agreement on a dispute.

This offers the parties an opportunity to obtain a quick view of a potential DRB ruling, done after brief written and oral presentations and without the creation of voluminous documents.

This usually enables the parties to resolve issues before they become a formal dispute.

## Dispute Review Boards as optional ADR Process

### Dispute Resolution

The DRB performs its dispute resolution role by conducting formal conferences and providing the parties with reasoned recommendations or decisions related to their disputes.

The DRB process combines both the dispute avoidance and dispute resolution functions.

## Dispute Review Boards as optional ADR Process

DRBs also differ from other ADR processes because the DRB is typically decision to utilize a DRB in a Contract is made before construction begins and DRB appointed at the start of the project and engaged until completion.

Typically, a 3-member board with one member serves as Chair. All members are impartial and have complimentary skill sets.

This allows DRB members to develop a relationship built on confidence and trust with the parties, increasing the likelihood of the parties accepting the DRB's advisory opinions and decisions if formal disputes arise.

## Dispute Review Boards as optional ADR Process

The DRB also acquires detailed knowledge and information about the project because it is aware of events and actions as they unfold.

Site visits and regularly held (quarterly) project progress meetings provide ready access to the personnel doing the work.

This proactive involvement gives the DRB a deeper and more accurate understanding of the parties' positions as well as the facts and circumstances surrounding any particular dispute.

## Dispute Review Boards as optional ADR Process

DRBs are organized before there are any disputes. DRBs periodically review relevant documentation and regularly visit the site to keep up to date on material developments.

The DRB is intended to assist in avoiding disputes. The DRB reviews the status of outstanding issues and inquiries about any potential problems or disputes during periodic regular progress meetings.

DRB's hold Conferences for early recommendations to resolve claims while work continues.

## Dispute Review Boards as optional ADR Process

### **Major Differences between DRB and Mediation**

A mediator has no role in dispute prevention, since he/she is only appointed after a formal dispute arises.

Mediation is not conducted in real time but rather after the event, when positions have hardened and best-for-project outcomes may not be possible.

Typically, the mediation process is controlled by lawyers rather than project personnel and is likely to be adversarial since parties usually stake out an extreme position from which to negotiate.

A mediator has no prior knowledge about project details or evolution of the dispute.

A mediated outcome generally does not facilitate or inform the parties' future contract performance.

## Dispute Review Board- Implementation

A DRB is implemented on selected Projects, via Special Provisions, as an optional ADR process, to compliment the current steps of within Subsection 107.12.02 of the Contractual Claims Resolution Process

DRB is procured via the Construction Contract via a pay item

## Dispute Review Board- Implementation

### **Revised Contractual Claims Resolution Steps**

Pre-Step 1- Contractual Notice Submission Resolution;

**Pre-Step 1a- DRB Advisory Opinion;**

Step 1- Claim (107.12) Submittal- RE Written Decision;

~~Step 2- Review by Regional Claims Review Board;~~

**Step 2- Dispute Review Board Conference;**

~~Step 3- Review by Claims Committee;~~

Step 4- Non-Binding Mediation **(a final ADR option)**

## Dispute Review Board- General

The DRB provides independent, special expertise to facilitate resolution of claims and avoid disputes. The DRB avoids delays to the Work, minimizes the expense of settlement, avoids litigation, and promotes project communication and partnering.

The DRB will render non-binding recommendations or DRB Reports on issues and claims brought before it.

The DRB is a contractual process not an administrative process.

## Dispute Review Board- General

To ensure fairness, there must be no individual, ex-parte communication concerning the Project between the DRB and employees of the Contractor or the Department during the life of the Project.

Neither the Contractor nor the Department will request or accept ex-parte advice or consultation from the DRB or its members on matters concerning the Work or resolution of issues or claims.

Matters requiring the attention of the DRB that arise within the time period between DRB meetings will be directed to the DRB Chair.

## Dispute Review Board- General

During meetings, site visits, and conferences, no DRB member will express their individual opinion concerning the merit of any part of a claim or issue outside of the formal DRB processes of providing a Recommendation or a DRB Report.

DRB members do not represent nor advocate for the party that nominated them.

During the term of a DRB, if a DRB member becomes aware of any fact or circumstance that might reasonably be considered as a conflict of interest or likely to affect that Board member's independence or impartiality, the DRB member must disclose the matter all parties.

DRB members must ensure that information acquired during the term of the DRB remains confidential and must not be disclosed.

## Dispute Review Board- Procedures & Duties

Selecting the Chair:

The DRB Chair should supplement technical expertise and background of the Members selected by the Contractor and the Department.

It is recommended that the candidate for DRB Chair should have management and claims/dispute review experience.

# Dispute Review Board- Procedures & Duties

Selecting the Chair:

If time allows, the Chair should convene a separate meeting of the DRB, before the first jointly-held meeting with the Department and the Contractor, to review and discuss the following areas:

Review of contract procedure for bringing claims to the DRB and role of the DRB; the role of the Chair and DRB members; discuss the individual technical experience of the members and importance of impartiality and disclosures; and does the DRB need to issue its own Operating Procedures?

# Dispute Review Board- Procedures & Duties

## Virtual Meetings Environment

Agree to rules in advance including advances in virtual site visits; select virtual platforms (MS Teams, etc.) that require webcam, microphone, and monitor; discuss all logistics needed to support the virtual meeting process; always risk of network failures- have a backup plan (phone participation should be last resort); introduce speakers before they present; pre-exchange documents; share screen to share discussion of documents; be professional and dress appropriately.

## Dispute Review Board- Procedures & Duties

Pre-Construction Meeting Agenda- Some Possible Topics:

Project scope and schedule (project work status); Project organization and processes; Safety/Quality Plan; Potential project challenges; Designated contact for DRB and each of the parties and communication protocols; Frequency of regular progress/DRB meetings; Materials to be sent to DRB between meetings; Will there be requirements for special site visits; Invoicing procedures.

## Dispute Review Board- Procedures & Duties

### Regular Project Progress Meetings-

Ensures that the DRB members are aware of any relevant events and/or issues with the project that could expose early problems that lead to a claim/dispute. It also promotes open communications and “partnering.”

Meeting frequency may vary depending on the type of project or construction phase; should be held as often as necessary, depending upon the work progress, challenges, and issues raised.

Some Topics: Project critical path status/Schedule updates; newly raised and unresolved issues (claims/disputes); Change Orders and RFIs; project safety/quality; shop/working drawing submittals; minutes of progress meeting summaries; Field observations of the work.

## Dispute Review Board- Procedures & Duties

The DRB members will keep current on the progress of this project by:

- Making in-person or virtually conducted visits to the Project site at least on a quarterly basis.
- Maintaining access to current, provided Contract Documents and all relevant correspondences and communications of Project record.
- Conducting regular meetings with Contractor and Department personnel throughout active construction (DRB Progress Meetings).

## Dispute Review Board- Procedures & Duties

The DRB will be responsible for arranging and conducting meetings, conferences, and project visits.

If the DRB members are approved in time and the DRB Agreement has been executed, then the DRB members will attend the Pre-Construction meeting, either in-person or virtually conducted participation, to become familiar with the Project.

## Dispute Review Board- Procedures & Duties

The DRB will not maintain an official transcript of its conferences or deliberations.

The DRB members will perform their responsibilities, impartially and independently in considering the facts and conditions related to the matters under consideration and the provisions of the Contract and applicable laws and regulations.

The DRB members selected by the Department and the Contractor will not discuss the DRB conferences or deliberations with the Department and the Contractor independently before the DRB provides any Recommendation or DRB Report regarding a claim(s).

## Dispute Review Board- Progress Meetings

DRB Progress Meetings are intended to familiarize the DRB with the Project, provide the DRB with construction updates on Project progress, and for the Contractor and the Department to present issues that may be in initial contention and to seek Recommendations regarding such issues from the DRB.

The Contractor and the Department may have general discussions with the DRB regarding their positions on issues of initial contention, which may include requests for information, schedule updates, or other disagreements between the Contractor and the Department for which a DRB Conference has not been requested.

## Dispute Review Board- Progress Meetings

In most cases, the issue may be scheduled for presentation to the DRB as an item on the agenda at the next scheduled DRB Progress Meeting. If the issue is urgent, a separate meeting may be scheduled at a time and location convenient to the Contractor, the Department, and the DRB.

- The parties will make their presentations.
- The DRB determines who will present first.
- Each party will be allowed sufficient time:
  - To make a thorough oral presentation;
  - To provide the DRB with relevant documentation; and
  - To respond to the DRB's queries and requests.
- The Contractor and the Department will not have the opportunity to cross examine the other party at any point during or after their respective presentations.

## Dispute Review Board- Progress Meetings

The DRB members will, at their discretion, privately meet to discuss their assessment of the issue. The DRB will orally share with the Contractor and the Department its Recommendation, either that same day or scheduled at a time and location convenient to the Contractor, Department, and the DRB.

Recommendations will not be binding and do not require either party to accept or reject it.

If the issue is subsequently presented at a DRB Conference, the DRB will focus anew upon the facts as presented at that time without reference to any Recommendation.

## Dispute Review Board- Conferences

After the Department and the Contractor have attempted to negotiate a claim resolution, either may refer it to the DRB for a conference to review the claim (DRB Conference) by submitting a DRB Request as specified in Subpart 107.12.02, as amended above.

The DRB Conference will be scheduled within 30 days after holding the pre-DRB Conference call, or by extension mutually agreed to by the Contractor, Department, and the DRB.

DRB Conferences may be held in person at the job site upon mutual agreement by the Contractor, the Department, and the DRB or preferably held virtually, as determined by the DRB, the Contractor and the Department.

# Dispute Review Board- Conferences

## Virtual DRB Conferences

Upon referral of a claim, the DRB Chair should hold a conference call with parties to discuss: Issue(s) in claim/dispute; Scope, timing, and location of the Conference; Form, content, and timing of position papers and rebuttals.

Several days prior to the Conference, the Chair should hold a virtual Pre-Conference with parties to go over: Conference location (in-person and those virtual); exchange of presentation materials protocols; finalize format of Conference, attendee list, and agenda; establish timelines for position papers, rebuttals, and witness information; DRB members should plan for private communication channels (including, but not limited to, email, breakout room, etc.), to caucus during breaks, post conference meeting.

## Dispute Review Board- Conferences

The DRB will evaluate and provide its findings and suggestions for resolution of the claim in a written report (DRB Report) as to the merit (entitlement) only, merit with guidelines for quantum (damage amounts) if merit is found, merit with quantum amount if merit is found, or quantum amount only if merit were found in a previous report and the Contractor and Department could not agree on quantum.

The DRB will provide its DRB Conference Report (DRB Report) on entitlement within 20 days after the DRB Conference. The DRB may request additional time if both the Contractor and Department request that an evaluation of damages be provided in the DRB Report

## Dispute Review Board- Conferences

To encourage full disclosure and the free exchange of information and positions, the DRB will be treated like a settlement negotiation such that, except to the extent required by law, any oral and written communications in connection with the DRB will not be discoverable in any legal action regarding issues or claims submitted as part of the DRB.

This protection will not apply to any Project records or documents generated regarding the Project which do not enjoy some statutory or other immunity or privilege; however, this protection will apply to any summaries, analyses or other work product generated by the Parties, or their representatives, in furtherance of the DRB and after the date that the DRB Agreement is fully executed, whether generated at the direction of counsel or otherwise.

## Dispute Review Board- Conferences

At the DRB Conference, representatives of the Contractor and the Department will provide oral presentations to the DRB as well as in the presence of the other party. The DRB may request information of the Contractor or the Department in addition to that submitted for the DRB Conference. If either the Contractor or the Department fails to reasonably comply with such request, the DRB may render its DRB Report without the information.

If the DRB considers any additional information submitted as potentially new information that was not previously evaluated by the RE, the DRB may require that the claim revert back to Step I, for RE consideration, if the DRB considers that the information may alter the RE Step I decision toward resolution of the claim.

## Dispute Review Board- Conference Structure

The Chair will preside over the DRB Conference.

The Contractor will make an initial presentation of its case, followed by the Department. Parties should disclose all pertinent information that the DRB needs to make its recommendations.

The Department and the Contractor should each designate one person as the primary presenter, although other individuals may give portions of the presentations and answer questions as appropriate.

The DRB members will control the DRB Conference and guide the discussion of issues by questioning the presenters or focusing their presentations in order to expeditiously obtain all information that the DRB deems necessary to make its findings.

## Dispute Review Board- Conference Structure

Each party should submit and exchange in advance of the conference: Position Papers that concisely summarizes the issues of claim and relief requested and provides relevant factual information and contractual justification for its position.

Presentation materials should be consistent with Position Papers. PowerPoint presentation, visual aids or summaries are encouraged (ex. charts, graphs, photos, etc.)

Parties should jointly prepare a Common Reference Document (CRD) including: relevant portions of the contract documents, correspondence, reports, and other materials the parties believe the DRB should consider in resolving the claim; All documents shall be numbered and tabbed for ease of reference.

## Dispute Review Board- Conference Structure

DRB Participants include: Representatives from each of the parties with first-hand knowledge of the facts of the dispute, such as superintendents and inspectors who observed the actual work; Parties disclose in advance all persons attending and their roles; the DRB has the final determination of who may attend and who may present at the conference.

The Department and Contractor may agree to share documents, photos and/or videos; address quality/resolution of shared images but do not edit the images; determine who is responsible for document management before and during Conference; ensure all documents open properly and review for confidentiality; parties should explain significance of any photo/video, when taken and what it is showing; allow ample time for parties to review images and for discussion.

## Dispute Review Board- Conference Structure

Only one person, who has been recognized by the Chair, may speak at a time. The Contractor's and Department's presenters should address the DRB members, not each other. Except in summation, repetitious discussion is discouraged.

No questions or interruptions by either the Contractor or the Department will be allowed during the other party's presentation. Dialogue between the Contractor and the Department will be allowed only in exceptional situations and requires the approval of the Chair.

At its discretion, the DRB may permit questioning of one party by another party if it facilitates the clarification of an issue. The Chair will control and limit such questioning and response.

## Dispute Review Board- Conference Structure

DRB members may interrupt presentations when necessary to clarify a point or receive an explanation, which might be lost if left to a later time, or request pauses when presentations are too fast for adequate note taking.

The DRB members may ask questions during the presentations on the facts of the case, and solicit interpretation of the contract documents, but will avoid questions that could be construed as favoring one side.

The DRB may ask the Contractor or the Department or both for additional factual documentation.

## Dispute Review Board- Conference Structure

If presentations, documents, or exhibits are offered that contain information that was not included in the Position Papers, they will usually not be considered unless expressly permitted by the DRB.

If the DRB permits their inclusion, the DRB Conference will be extended as necessary for the other party to review the new information, to reconsider its position, and to present rebuttal.

If necessary, the DRB Conference will be adjourned and reconvened at a future date; however, the intent is to complete a DRB Conference in a single session.

The DRB may limit the presentation of documents or oral statements when it deems them to be irrelevant or redundant.

## Dispute Review Board- Conference Structure

The DRB will ensure that the Contractor and the Department have ample opportunity to present their positions, at which point the DRB Conference will be officially concluded, unless the DRB requests additional written material.

In that event, the DRB Conference will be continued until receipt by the DRB and the other party of the additional material, or at such other time as the DRB has no further questions.

The other party will be given an opportunity to review additional material and respond.

## Dispute Review Board- Deliberations

After the DRB Conference has concluded, the DRB will meet to formulate findings and suggestions for resolution of the claim.

All deliberations will be conducted in private and must remain confidential.

The DRB may request post-DRB Conference submittals including exhibits, job records, and written responses to DRB questions.

All such post-DRB Conference submittals and written answers sent to the DRB must be simultaneously sent to the other party.

## Dispute Review Board- Report

DRB will confirm that the parties have presented all information and documents necessary to have claims decided and relief requested; the DRB reviews any additional information to be submitted (if any) and then the DRB Chair advises parties when Conference is closed.

Within 20 days after the DRB Conference, the DRB shall issue a written report of its findings and non-binding suggestions regarding the resolution of a claim (DRB Report).

## Dispute Review Board- Report

DRB should agree on process/timing of report drafting to meet specification requirements; in most cases, the DRBs will convene at close of Conference to decide and write report; when dealing with complex issues, the DRB members may confer after the Conference to assess if any current consensus direction; the DRB Chair may prepare outline of analysis to assist in drafting; multiple drafts may circulate until final Report concurred; Contract specifications typically provide time period for DRB to submit report after Conference close but the DRB may notify parties if extension is needed for complex matters.

## Dispute Review Board- Report

If findings or suggestions or both on damages are sought by the Contractor or the Department, additional time to provide the DRB Report may be requested by the DRB.

The Department and Contractor will have 10 days to accept, reject, or request clarification of specific elements of the DRB Report. Unless the DRB requests a clarification, failure of either the Department or the Contractor to accept or reject the DRB Report after 10 days of receipt will be considered a rejection.

## Dispute Review Board- Report

The DRB will make every reasonable attempt to formulate a unanimous DRB Report. If the DRB does not agree unanimously, the position of the DRB will be by majority vote.

A minority or dissenting position may be prepared and included with the majority position in the DRB Report. The minority position will include information and rationale to aid the Contractor and the Department in fully understanding it.

The DRB may elect not to disclose the identity of the dissenting DRB member.

## Dispute Review Board- Report

The report typically includes:

A summary of each parties' positions on the claims and relief requested; a chronology of major events/circumstances and pertinent referenced contract documents and project records.

For the Recommendation, provide a detailed analysis and rationale for position; the DRB will make every effort to prepare a unanimous decision in report (or include if a dissenting position); the identification of the dissenting member does not need to be disclosed.

For the DRB's supporting rationale: Show that the arguments were carefully considered and the DRB applied objective and detailed analysis for the recommendation.

## Dispute Review Board- Report

The Chair must provide copies of the DRB Report via email to contact persons designated by the Contractor and the Department.

The DRB Report is the final step of the Department's Contractual Claim Resolution Process unless both parties agree to use non-binding mediation as specified in Subpart 107.12.02.

Acceptance of DRB's recommendation is non-binding. Specifications require that the parties indicate their acceptance or rejection of the decision within a specified time period and also provide that failure to reject is an acceptance.

The DRB is not bound by any offers of settlement or findings of entitlement made during Step I of the Contractual Claim Resolution Process or by any prior DRB recommendation.

## Dispute Review Boards as optional ADR Process

### **Additional considerations**

DRB recommendations in future legal proceedings

- New Jersey Contractual Liability Act applies
- DRB will be non-binding
  - Parties able to opt out at any time
  - Bar the use of DRB recommendations in any future legal proceedings
  - Bar any ex parte communications with parties and DRB
  - Sub-contractors and Design Consultants can participate in DRB process as non-parties