

# WisDOT Dispute Resolution Procedures - Formal Dispute Review Board

## 1.0 GENERAL

### 1.1 Definitions

<b>Agreement</b>	Formal Dispute Review Board Three-Party Agreement
<b>Bureau</b>	Bureau of Project Development
<b>Contract</b>	The construction contract between the prime contractor and Wisconsin Department of Transportation.
<b>Contractor</b>	Prime contractor
<b>Department</b>	Wisconsin Department of Transportation
<b>Dispute</b>	An issue, claim, change order request, or other controversy that remains unresolved following good faith negotiations between authorized representatives of the department and contractor.
<b>Dispute Review Board</b>	One or three neutral individuals mutually selected by the department and contractor to review disputes and render findings and recommendations based on the contract.
<b>DRB</b>	See Dispute Review Board.
<b>Project Manager</b>	Region project manager assigned to administer, oversee, and manage the project.
<b>Regional Construction Oversight Engineer</b>	Bureau of Project Development engineer assigned to the WisDOT region in which the claim or dispute originated.
<b>Standard Specifications</b>	State of Wisconsin Standard Specifications for Highway and Structure Construction – Edition in effect with contract.
<b>WTBA</b>	Wisconsin Transportation Builders Association

### 1.2 Formal and Informal DRB Review

These guidelines are provided for a formal DRB review process. However, the department and the contractor are encouraged to attempt to resolve emerging disputes as early as possible. Therefore, procedures for an informal review by the Bureau and/or a neutral third party are available in the *WisDOT Dispute Resolution Procedures - Informal Dispute Review Board* document. An informal review provides for an early review and recommendation from the Bureau and/or standing DRB member.

### 1.3 Formal DRB Review

#### 1.3.1 General

Any of the procedures for the formal DRB Review established by these guidelines, as well as the Informal Review by the Bureau and/or DRB member set forth in *WisDOT Dispute Resolution Procedures - Informal Dispute Review Board*, may be altered or modified by mutual agreement of the department and the contractor to better suit their needs in a particular dispute.

These guidelines describe the purpose, procedure, function, and features of the DRB. A Three-Party Agreement among the department, contractor, and DRB members will formalize creation of the DRB and establish the scope of its services and the rights and responsibilities of the department and the contractor. In the event of a conflict between these guidelines and the Three-Party Agreement, the latter governs. A suggested format for the Three-Party Agreement is attached as Appendix A.

#### 1.3.2 Purpose

The purpose of the DRB is to provide an independent and impartial review of the dispute and provide non-binding written findings and recommendations based on the contract, applicable contract law, industry practices, and the facts presented.

It is not the purpose, or responsibility, of the DRB to resolve the dispute. That responsibility remains with the department and the contractor. However, it is anticipated that the DRB review will assist the department and the contractor in resolving the dispute.

Creation of the DRB is not intended as a substitute for department or contractor responsibility to make a good-faith effort to settle the dispute. Indiscriminate referral of disputes to the DRB without prior attempts by the department and the contractor to resolve them shall be avoided.

### 1.3.3 Standard Specifications

Per subsection 105.13.6 of the Standard Specifications, a DRB will be established to assist in the analysis of disputes at the Bureau Level when mutually agreed upon by both the department and contractor.

Per subsection 105.13.7 of the Standard Specifications, a DRB will be established to assist in the analysis of disputes at the Panel Level if and when requested by either the department or contractor. Mutual agreement is not a prerequisite.

Utilization of the DRB does not relieve the contractor or department from complying with all contract terms and conditions, and does not waive any notice or timeliness requirements prescribed in Subsection 104.3 of the Standard Specifications. However, if a dispute is referred to the DRB, the claim submittal and review time frames prescribed in Subsection 105.13.6 and 105.13.7 of the Standard Specifications may be superseded by time frames established by the DRB, and agreed to in writing by both the department and the contractor.

Both the department and the contractor shall proceed diligently with the work and comply with all applicable contract provisions while the DRB considers a dispute.

### 1.3.4 Requesting DRB

Either party may request a DRB review in lieu of the Bureau review or the Review Panel.

A DRB review at the Bureau level must be mutually agreed upon. Requests for DRB review in lieu of Bureau review shall be submitted in writing to the other party within 14 calendar days of the request to appeal the claim to the bureau. The other party shall respond to the request within 14 calendar days. Contractor requests shall be submitted to the Bureau's regional construction oversight engineer assigned to the region in which the dispute has occurred. Department requests shall be submitted to the contractor's home office address. Requests shall be in writing and clearly state in full detail the specific issues of the dispute to be considered by DRB. Requests to refer the dispute to a DRB at the Bureau Level will be reviewed by the Bureau and if mutually agreed upon – the oversight engineer will engage the DRB process.

A DRB review at the Review Panel level does not require mutual agreement – either party may invoke a DRB review at the Review Panel level. Requests for DRB review in lieu of the Review Panel shall be submitted in writing to the other party within 14 calendar days of the request to appeal the claim to the review panel. Contractor requests shall be submitted to the Bureau's regional construction oversight engineer assigned to the region in which the dispute has occurred. Department requests shall be submitted to the contractor's home office address. Requests shall be in writing and clearly state in full detail the specific issues of the dispute to be considered by DRB. The regional construction oversight engineer will coordinate the DRB process.

### 1.3.5 Summary

It must be emphasized and firmly understood that individual DRB members are not the "representative of" or "advocate for" the party which selected them. The entire DRB will function as an objective, impartial, and independent body at all times. In order to avoid any suggestion of partiality, there should be no individual communication in regard to the project between DRB members and employees of the contractor or department during the life of the DRB. The parties shall direct any matters needing attention between members of the DRB to the chair of the DRB.

The regional construction oversight engineer will engage the DRB process. The DRB will impartially consider the dispute(s) referred to it. The DRB will provide non-binding written findings and recommendations to the department and the contractor.

Although the findings and recommendations of the DRB should carry great weight for both the department and the contractor, they are not binding on either the department or the contractor. However, the findings and recommendations are admissible in subsequent claim resolution proceedings.

## **2.0 MEMBERSHIP**

### **2.1 General**

The DRB will consist of either one or three members. If both parties cannot agree on the number of members for the DRB, a three member DRB shall be established.

### **2.2 Criteria**

#### 2.2.1 Experience

It is desirable that all DRB members be experienced with the construction process including design,

construction, contract administration, contract law, and resolution of construction disputes.

It is not necessary that the DRB members be intimately familiar with the specific type of construction involved in the dispute. The DRB may consult technical and legal experts if the need arises under the terms of Section 3.7 Special Services described below.

All DRB members shall have attended the one-day DRB panel member workshop offered by the Dispute Review Board Foundation, or its substantial equivalent in other training, or shall be a qualified DRB panel member in another state which has training as a prerequisite to qualification for service on DRB panels.

### 2.2.2 Neutrality

It is imperative that the DRB members be neutral, act impartially, and be free of any conflict of interest.

For purposes of this subsection 2.2 Criteria, the term "member" also includes the member's current primary or full-time employer, and "involved" means having a contractual relationship with either the department or the contractor, such as a subcontractor, architect, engineer, or construction manager.

### 2.2.3 Prohibitions: Disqualifying Relationships for Prospective Members

- An ownership interest in any entity involved in the construction contract, or a financial interest in the contract, except for payment for services on this Dispute Review Board;
- Previous employment by, or financial ties to, any party involved in the construction contract within a period of 6 months prior to award of the contract, except for fee-based consulting services on other projects;
- A close professional or personal relationship with any key member of any entity involved in the construction contract which, in the judgment of either the department or the contractor, could suggest partiality; or
- Prior involvement in the project of a nature that could compromise the prospective member's ability to participate impartially in the DRB's activities.

### 2.2.4 Prohibitions: Disqualifying Relationships for Members

- Employment, including fee-based consulting services, by any entity involved in the construction contract.
- Discussion concerning, or the making of, an agreement with any entity involved in the contract regarding employment after the contract is completed.

### 2.2.5 Disclosure Statement

As a part of the selection process, each prospective DRB member will be required to submit a complete disclosure statement for the approval of both the department and the contractor. Each statement shall include a resume of experience, together with a declaration describing all past, present, and anticipated or planned future relationships, including indirect relationships through the prospective member's primary or full-time employer, to this project and with the department or the contractor, or others involved in the contract, including subcontractors, suppliers, design professionals, and consultants. Disclosure of close professional or personal relationships with all key members of the department or the contractor or other parties involved in the construction contract shall be included.

## **2.3 Statewide Standing Roster**

The department and WTBA shall establish a statewide standing roster of prequalified DRB members. An electronic file of standing roster members will be maintained. This file will contain names of the pre-qualified members with addresses, email addresses, telephone numbers, resumes, and disclosure statements. When requested, the department will provide this information to the requester either electronically or in paper copy.

## **2.4 Selection Process**

The department and WTBA will meet on a regular basis to jointly establish and maintain a standing DRB roster of prequalified DRB members available to serve on a DRB.

When establishing a 3-member DRB for a particular project or dispute, the department and the contractor will each select 1 DRB member. The two selected DRB members shall then jointly select a chair for the DRB. The disputing parties may mutually place restrictions on the chair selection. Any restriction agreed upon by the disputing parties will be communicated to the DRB members charged with selecting chair.

When establishing a 1-member DRB for a particular project dispute, the department and contractor shall jointly select the DRB member.

After being selected, DRB member(s) must submit an updated disclosure statement to the department and contractor for review and approval. DRB members do not need to be on the Statewide Standing DRB Roster in order to be selected. However, if a DRB member (chair or non-chair) is selected from outside the standing roster, the proposed DRB member must meet all the aforementioned criteria and disclosure requirements and both disputing parties must approve the selection.

If a party disputes the qualification of a proposed DRB member (from the Statewide Standing DRB Roster or from outside the Roster), the disputing party shall identify what disqualifies the proposed neutral. The department and the contractor shall then jointly determine whether the candidate will be accepted on the DRB. If the candidate is rejected, the party responsible for the selection shall select another candidate and again seek approval from the other party(s).

## **2.5 Tenure of DRB**

Once a DRB is engaged on a project, the DRB will be deemed established for any subsequent disputes that may require a DRB in accordance with subsection 105.13 of the Standard Specifications.

The DRB will be dissolved as of the date of final payment to the contractor unless earlier terminated or dissolved by mutual agreement of the department and contractor.

## **2.6 Three-Party Agreement**

After DRB member selections have been made, the DRB member(s) and authorized representatives of the department and the contractor shall execute the Formal Dispute Review Board Three-Party Agreement (Appendix A)

## **3.0 OPERATION**

### **3.1 General**

Per subsection 105.13 of the Standard Specifications, when a claim has been elevated to the Bureau Level, the department and contractor may mutually agree to refer a dispute to a DRB; when a claim has been elevated to the Panel Level, either party may unilaterally refer the claim to a DRB.

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 DRB. The entire procedure shall be kept flexible to adapt to changing situations. The DRB shall initiate, with the department's and contractor's concurrence, new procedures or modifications to existing procedures whenever this is deemed beneficial and appropriate.

The department and the contractor will cooperate to ensure that the DRB considers disputes promptly, taking into consideration the particular circumstances and the time required to prepare appropriate documentation.

Procedures and time periods may be modified by mutual agreement of the disputing parties.

### **3.2 Contract Documents, Reports and Information**

The department will provide a set of plans and specifications to each DRB member. The department and contractor will provide the DRB requested reports, documents or other information needed to fully understand and review the dispute. The DRB may not request reports, documents, or other information that are not normally generated by the department or the contractor in the course of construction of the project.

### **3.3 Scheduling Review**

The regional construction oversight engineer and DRB chair shall schedule the hearing.

After conferring with both the department and the contractor, the DRB Chairperson will establish a submittal schedule so that adequate time is allowed for the each party to address the other party's statements and supporting documentation before the presentation.

### **3.4 Pre-presentation Requirements**

Concise written position statements shall be prepared by both the department and the contractor, with page number references to any supporting documentation. The position statement shall be submitted to each DRB member and to the other party. Submit one copy to each DRB member and 3 copies to the other disputing party at least 14 calendar days prior to the DRB hearing. Both parties will be allowed to amend or append information to their position statement up to 7 calendar days prior to the hearing. Any amendments or appendages shall be copied to the involved parties as prescribed for the position statement.

In large dollar amount disputes or disputes involving complex issues, the DRB may meet privately to review the

information provided, discuss the procedures to be followed in hearing the dispute and the method of presentation to be followed. The DRB may also call a pre-meeting conference to discuss procedures with both the department and the contractor.

At least 7 calendar days prior to the date scheduled for a hearing, each party must submit to the DRB Members and to the other party a list of the persons who will attend and/or represent them at the hearing.

### 3.5 Presentation

Unless otherwise agreed by the DRB, the department, and the contractor, the presentation will be conducted at the nearest department region office. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory.

The department and the contractor shall have representatives at all presentations. The DRB will establish which party will make its presentation first. The department and the contractor will be allowed successive rebuttals until all aspects are fully covered. The DRB members and the department and the contractor may ask questions, request clarification, or ask for additional data. All questions from the department or contractor shall be directed to the DRB; cross examination will not be allowed. In difficult or complex cases, additional presentations may be necessary in order to facilitate full consideration and understanding of all the evidence presented by both the department and the contractor. Both the department and the contractor shall be provided adequate opportunity to present their evidence, documentation, and testimony regarding all issues before the DRB.

Unless otherwise agreed by the department and the contractor, presentations will relate to issues of entitlement only. When the department and the contractor agree that the DRB will review or give guidance on issues of quantum as well as entitlement, both the department and the contractor will complete their presentations on entitlement before quantum is presented.

Normally, a formal transcript of the presentations will not be prepared. When requested by either the department or the contractor, the DRB may allow recordation and transcription by a court reporter with the cost to be allocated as agreed by the department and the contractor. Such transcript, when prepared, shall not constitute the official record of the DRB Review. The record prepared by the DRB shall be the official record of the DRB Review. The DRB may provide for audio or video recordings of the presentations for the use of the DRB only.

The department and the contractor may have their attorneys or other representatives in attendance at the presentations to counsel and advise them. When agreed by the department and the contractor, the representatives will be allowed to make brief opening and closing remarks to the DRB, but are not allowed to present project specific details. No other participation by attorneys at the presentations will be permitted except by mutual agreement of the department and the contractor.

If either the department or the contractor fails to appear before the DRB on the date scheduled for the presentations, without justifiable cause, the party that was absent will be liable for any and all additional costs attributable to the cancellation of the hearing.

### 3.6 Deliberations

After the presentation is concluded, the DRB will confer to formulate its findings and recommendations. All DRB deliberations shall be conducted in private, with all individual views kept strictly confidential from disclosure to others.

### 3.7 Special Services

If at any time in the DRB process, the DRB believes that assistance from a technical expert or specialist is necessary or would facilitate resolution of the dispute, the DRB may request permission to retain such services. The DRB will provide to the department and contractor a written request detailing the following:

- Services desired
- Benefit of services requested
- Proposed service provider
- Qualifications of proposed service provider; and
- Estimated fees for requested services

The department and contractor must mutually agree to such assistance and approve the proposed service provider.

### 3.8 Findings and Recommendations

The findings and recommendations of the DRB concerning any dispute are non-binding but admissible as described in Section 3.11 Admissibility and 3.12 Legal Relations.

It is not the responsibility of the DRB to resolve the dispute. The findings and recommendations of the DRB shall be based upon the contract, applicable contract law, industry practices, and the facts. The DRB must also evaluate whether the burden of proof has been met.

The DRB's findings and recommendations will be provided in writing to both the department and the contractor within 28 days of the completion of the presentations. In difficult or complex cases, and in consideration of the DRB's schedule, this time may be extended by mutual agreement of the DRB, the department, and the contractor. The DRB should set forth, as clearly as possible, the logic and reasoning behind its findings and recommendations. The findings and recommendations will address entitlement only; unless it is mutually agreed that the DRB will be asked to review or give guidance on issue of quantum as well. For relatively simple disputes, if both parties request and sufficient documentation is submitted, the DRB may also make a concurrent recommendation on monetary damages.

If the department and the contractor request the DRB to review issues of quantum and the exact value of the quantum cannot be determined expeditiously by the DRB, then quantum may be addressed in the DRB's findings and recommendations by providing guidelines to be used to determine quantum. The department and contractor will then subsequently make the final determination of quantum. If there is still disagreement between the department and the contractor, then this disagreement may then be submitted back to the DRB for a final analysis and finding.

If the three-member DRB is unable to reach unanimity in its findings and recommendations, the DRB will so advise the department and the contractor in the report of the DRB. A dissenting member may, at his/her discretion, prepare a minority report to be included with the DRB report.

### 3.9 Acceptance or Rejection

Within 14 calendar days of the date of the DRB's findings, the department and contractor shall either accept or reject the DRB's recommendation. If rejecting the recommendation, written notice shall be provided to the other party within the 14 calendar time allowance. Unless these timeframes are extended by mutual agreement, when a party does not provide notice within the established timeframes, this will constitute acceptance of the DRB recommendation.

If either party rejects the DRB recommendation, the department shall have 28 calendar days to confirm, overrule, or modify, in whole or in part, the DRB recommendation. Within 14 calendar days of the department's decision, the contractor shall either accept or reject the department's decision.

If the contractor rejects the department decision, the dispute will continue under the administrative claims process prescribed in Subsection 105.13. Subsequent claim submittal time frames and review time frames may be revised by mutual written agreement of the department and the contractor.

If, with the aid of the DRB's findings and recommendations, the department and the contractor are able to resolve their dispute, the department will promptly process any required contract changes.

### 3.10 Clarification and Reconsideration

Should the dispute remain unresolved because of a bona fide lack of understanding of the findings and recommendations or if evidence becomes available which was not available at the time of presentation, either the department or the contractor may within 14 calendar days following the date of the DRB's findings and recommendations, request in writing that the DRB clarify specified portions of its findings and recommendations or reconsider its recommendation. This request shall be submitted to the DRB and other party. The DRB will decide if it will provide further explanation or reconsider the matter pursuant to such request. If the DRB decides to provide further explanation or reconsider its findings and recommendations, the 14-day timeframe for acceptance or rejection and the 28-day timeframe for the department's decision shall be tolled until clarification or a new recommendation is received.

### 3.11 Admissibility

If the DRB's findings and recommendations do not resolve the dispute, the contract, the written findings, and recommendations including any minority report, and the qualifications of the DRB members, will be admissible as evidence to the extent permitted by law in any subsequent dispute resolution proceeding or forum to establish (a) that a DRB considered the dispute, (b) the qualifications of the DRB members, and (c) the DRB's

findings and recommendations that resulted from the process.

### 3.12 Legal Relations

Each DRB member, 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.

Each 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, each DRB member shall be accorded quasi-judicial immunity for any actions or decisions associated with the review and findings and recommendations of dispute(s) referred to the DRB. A DRB member(s) shall 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.

### 4.0 PAYMENT

DRB members shall be compensated as prescribed in the Agreement.

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

If the DRB desires special services such as legal, technical, or other expert assistance or testimony, or other consultation, accounting, data research, and the like, both the department and the contractor must agree to the special services. When both parties agree to special services, the procedures described in section 3.7 Special Services of this document will be followed.

The department will provide, at no cost to the contractor, administrative services such as coordination of the DRB and state owned conference facilities. If other facilities and/or amenities are desired by both parties, these facility and amenity expenses shall be shared equally by both parties.

The following payment procedures will be used:

1. The DRB members shall submit invoices to the regional construction oversight engineer for review.
2. After the regional construction oversight engineer has reviewed and approved the invoices, the invoices will be forwarded to the project manager for review and approval.
3. After the project manager has reviewed and approved the invoices, the invoices will be forwarded to the contractor for review and approval.
4. If the contractor approves the invoices, the contractor shall make payment of all approved invoices.
5. The contractor shall provide the project manager documentation verifying payment.
6. The department will then execute a change order to pay the contractor one-half of the contractor paid invoice.

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 department's share of DRB expenses. Regardless of the DRB recommendation, neither the department nor the contractor shall be entitled to reimbursement of DRB costs from the other party.

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 - Formal Dispute Review Board Three-Party Agreement**

**A. PARTIES**

Department \_\_\_\_\_

Contractor \_\_\_\_\_

Dispute Review Board (DRB) Member(s):

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

**B. DEFINITIONS**

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

**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 Dispute Review Board (DRB) 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 non-binding, written findings and recommendations 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 findings and recommendations 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(s) may visit the project site to become familiar with the construction activities and work in progress. Visits shall be mutually agreed upon among the DRB, the department, and the contractor.

**E.2 Establish Procedures**

Operating procedures will be in accordance with the attached *WisDOT Dispute Resolution Procedures / Formal Dispute Resolution 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 that all DRB members are 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 receipt by the DRB of a written Request for Review of a Dispute, either from the department (BPD) or contractor, the DRB shall schedule a time for presentations by the department and the contractor and review and consider the dispute, and thereafter issue written findings and recommendations to the department and the contractor.

The DRB's findings and recommendations will be provided in writing to both the department and contractor within 28 calendar days of completion of the presentations. 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 the contract documents and review pertinent reports and documents.

It is the express continuing responsibility of each member 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 and its individual members 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 as agreed upon by the department and the contractor.

## **G. CONTRACTOR RESPONSIBILITIES**

Except for its participation in the DRB's activities as provided in the contract and in this Agreement, 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.
- Provide a concisely written position statement to the DRB and department. Provide one copy to each DRB member and 3 copies to the department 14 calendar days prior to the DRB hearing.
- Furnish each DRB member with 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 position statement. Provide one copy to each DRB and three copies to the department 14 calendar days prior to the DRB hearing.
- 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 claimed in the contractor's written claim previously submitted to the region.
- 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 claimed in the contractor's written claim submittal to the region.
- Within 14 calendar days of receiving the DRB's findings and recommendations, provide written notice, to the department and DRB, of acceptance or rejection of the DRB's findings and recommendations.

### **G.2 The Contractor May:**

- Amend or append information to their position statement prior to the DRB hearing. Provide one copy to each DRB member and three copies to the department at least 7 days prior to the DRB hearing.
- Within 14 calendar days of receiving the DRB's findings and recommendations, request in writing, clarification to specific findings and recommendations. This request shall be presented to the DRB and a copy of the request shall be provided 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.

- Furnish each DRB member with one copy of all 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.
- Provide a concisely written position statement to the DRB and contractor. Provide one copy to each DRB member and 3 copies to the contractor 14 calendar days prior to the DRB hearing.
- In cooperation with the contractor, coordinate the operations of the DRB.
- Furnish each DRB member with pertinent department-prepared documents, to supplement the documents provided by the contractor. These may be included as an appendix to the department's position statement. Provide one copy to each DRB and three copies to the contractor 14 calendar days prior to the DRB hearing.
- 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.
- Within 14 calendar days of receiving the DRB's findings and recommendations, provide written notice, to the contractor and DRB, of acceptance or rejection of the DRB's findings and recommendations.

## H.2 The Department May:

- Amend or append information to their position statement prior to the DRB hearing. Provide one copy to each DRB member and three copies to the contractor at least 7 calendar days prior to the DRB hearing.
- Within 14 calendar days of receiving the DRB's findings and recommendations, request in writing, clarification to specific findings and recommendations. This request shall be presented to the DRB and a copy of the request shall be provided to the department.

## 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 105.13 of the Standard Specifications.

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

## J. MEASUREMENT AND PAYMENT

### J.1 Measurement

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

The agreed hourly rate for the DRB member(s) listed under Part A - Parties of the Agreement will be compensated at an agreed hourly rate of \_\_\_\_\_ per hour.

The department and the contractor shall bear the costs and expenses of the DRB equally. Each DRB member serving on the board shall be compensated at an agreed hourly rate. 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 and contractor 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 arise where expenses would exceed that which would generally be anticipated and considered incidental, the DRB shall notify and provide a cost estimate to the contractor and department. The contractor and 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.

If the DRB desires special services such as legal, technical, or other expert assistance or testimony, or other consultation, accounting, data research, and the like, both the department and the contractor must agree to and authorize the special services.

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 department's share of DRB expenses. Regardless of the DRB recommendation, neither the department nor the contractor shall be entitled to reimbursement of DRB costs from the other party.

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**

Each DRB member may 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 contractor, 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 business days.

Payment will be processed as described in the WisDOT Dispute Resolution Procedures / Formal 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 mutual agreement of the department and the contractor at any time upon written notice to the members of the DRB.

A 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 the remaining members of the DRB if any, and stating the reasons for the decision to remove the member.

Should the need arise to appoint a replacement DRB member, the replacement member shall be selected in a similar manner as the original member was selected. The selection of a replacement DRB member shall begin promptly upon notification of the necessity and shall be completed within 2 weeks. This Agreement will be amended to indicate changes in DRB membership.

## **L. LEGAL RELATIONS**

Each DRB member, 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.

Each 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, each 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. No DRB member may 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 findings and recommendations 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

\_\_\_\_\_