

## **PN 108 – 10/19/2012 DISPUTE RESOLUTION BOARD PROCESS**

The Department's Dispute Resolution Board Process is based upon the partnering approach to construction administration and must be followed by the Contractor in order to resolve disputes on the project.

### **Purpose**

The purpose of the Dispute Resolution Board (DRB) is to provide special expertise to assist in and facilitate the timely and equitable resolution of disputes and claims. The goal is to avoid delays to the contract work, minimize the expense of settlement, avoid litigation, and promote project partnering. The DRB will render non-binding recommendations on issues brought before them.

### **DRB Membership**

The DRB will consist of three members. One member is selected by the Department and approved by the Contractor and one member is selected by the Contractor and approved by the Department. These first two members will mutually select and agree on the third member who will complement the construction and contract administration experience of the first two members and act as the Chair for all DRB activities. All three members must meet the "Requirements of DRB Members" set forth below.

### **Requirements of DRB Members**

Members of the DRB shall have at least ten years of experience with the type of construction involved on this project, construction contract administration principles, and dispute resolution training.

Members of the DRB must not show or be perceived as showing partiality to either the Contractor or the Department. A DRB member shall not have any conflict of interest which could affect their ability to act in a disinterested and unbiased manner.

A person proposed as a member of the DRB shall submit a resume covering his/her applicable education and experience to the party appointing him/her. The resume shall include a list of all DRBs on which he/she currently serves and any projects on which he/she serves as a Dispute Resolution Advisor (DRA) along with meeting frequencies. A disclosure statement shall be submitted and include, but not limited by, any of the following categories of relationships or prior involvement in this project:

- A.** Any direct or indirect ownership or financial interest in the Contractor, consultant or consulting firm on the project, subcontractor or supplier on the project or any business of another DRB member.
- B.** Current employment by the Department, the Contractor, a consultant or consulting firm on the project, subcontractor or supplier on the project.
- C.** Within the one year period immediately prior to award of the contract: employment by the Department or the Contractor, a consultant or consulting firm on the project, any subcontractor or supplier on the project or any business of another DRB member.

- D. A close personal relationship with any key individual in any firm involved in the contract.
- E. A prior involvement in the project of a nature, which might be construed as compromising his/her ability to act impartially in carrying out the duties of the DRB.
- F. A contract as a consultant to the Department or the Contractor or any subcontractor or supplier on the project.

Category “A” and “B” relationships listed above shall disqualify a person from serving on the DRB for this project. The other categories listed above will be considered by the Department and the Contractor in arriving at their decision as to whether or not to accept a person as a member of the DRB. If a prospective DRB member discloses a relationship or prior involvement in this project listed in other than category “A” and “B” and is considered to be highly qualified and desirable as a DRB member, the Department and the Contractor may, by mutual agreement, approve that person to serve as a member on the DRB.

If a person submits a disclosure statement which fails to provide accurate and complete disclosure of a relationship described in A through F above the Department may disqualify that person from serving as a DRA or on a DRB on future Department projects.

Service as a member of other DRBs, as a DRA or as an arbitrator or mediator shall not be construed as employment and therefore will not preclude a person from membership on the DRB for this project.

### **DRB Establishment**

Every attempt shall be made by the Department and the Contractor to complete the selection of DRB members and execute the “Dispute Resolution Board Three-Party Agreement” prior to the date of the preconstruction conference. At a minimum, the following timeframes for establishment of the DRB must be followed.

Within twenty-one (21) calendar days of the signing of the contract, both the Department and Contractor shall each obtain a written commitment from their proposed member to serve as a DRB member along with the resume and disclosure statement. These commitments shall include a clause that requires the first two members to immediately pursue selection of the Chair. Within this same timeframe, the Department and Contractor must also give the other party notice of the person they have selected to serve as a DRB member. This notice shall be accompanied by the resume and disclosure statement.

Within fourteen (14) calendar days of receiving the notice of selection of a DRB member, the Department and the Contractor shall notify the other party in writing as to whether or not the person selected is acceptable. Failure to give this notice within the required timeframe shall be construed to be acceptance of that member.

If a person selected is not acceptable to the other party, the party who selected that person shall within seven (7) calendar days select another person and provide to the other party a notification accompanied by the resume and disclosure statement submitted by that person. Within seven (7)

calendar days written notification shall be given as to whether or not the person selected is acceptable. Failure to give this notice within the required timeframe shall be construed to be acceptance of that member.

Once the Department and the Contractor have agreed upon the first two members of the DRB they shall immediately notify those members of their approval. Within seven (7) calendar days of this notification, the Department and Contractor will each provide the first two members with a list of not less than two (2) potential members from which the Chair will be selected. Within seven (7) calendar days of receipt of the list of potential members, the first two members shall select the Chair ensuring that the Chair meets all the "Requirements of DRB Members" set forth above and give written notice to both the Department and Contractor accompanied by that person's resume and disclosure statement. In the event of an impasse in selection of the Chair, that member shall be selected by mutual agreement of the Department and Contractor.

Immediately after agreement is reached on all members of the DRB, the Department, Contractor, and the members of the DRB shall execute the "Dispute Resolution Board Three Party Agreement" as provided at the end of this proposal note. The execution of this agreement will not modify the requirements, terms, or conditions of the contract.

#### **DRB Member Termination**

If during the life of the contract, a DRB member's status changes in regards to category "A" or "B" categories set forth in the "Requirements for DRB Members" above he/she shall immediately disclose this in writing to both the Department and the Contractor. Upon receiving such notification, the Department or the Contractor may, within seven (7) calendar days, give notice that this DRB member is no longer acceptable. In no event, shall a DRB member participate in a hearing of a dispute or claim involving a firm by which he/she is employed.

Service of a member of the DRB may be terminated at any time with not less than thirty (30) calendar days notice as follows:

- A.** The Department may terminate the service of the Department appointed member.
- B.** The Contractor may terminate the service of the Contractor appointed member.
- C.** The Chair's service may be terminated only by agreement of the other two members.
- D.** Resignation of the member.

#### **DRB Member Replacement**

In the event that a vacancy on the DRB occurs, replacement members will be appointed in the same manner as the replaced member was appointed. The selection of a replacement DRB member shall be completed within thirty (30) days of the creation of the vacancy. The "Dispute Resolution Board Three Party Agreement" shall be amended to reflect the change of a DRB member.

#### **DRB Operation and Duties**

The DRB, with input from the Department and the Contractor, will establish its Operating Procedures for Dispute Resolution by adopting the "Dispute Resolution Board (DRB) Operating

Procedures for Dispute Resolution” which can be found on ODOT’s website at [http://www.dot.state.oh.us/CONTRACT/construction\\_policy.htm](http://www.dot.state.oh.us/CONTRACT/construction_policy.htm). These procedures may be tailored to each individual project.

The members of the DRB will keep current on the progress of this project by: 1) quarterly visits to the project, 2) keeping current files, 3) meetings with other DRB members, and 4) joint meetings with Department and Contractor personnel. The frequency of project visits and meetings and content of members’ files shall be as agreed upon among the Department, the Contractor, and members of the DRB.

The Chair shall be responsible for arranging and conducting meetings, hearings, mediation sessions, project visits, and drafting DRB recommendations on claims presented to the DRB.

The DRB will not maintain an official transcript of its hearings or deliberations. The DRB members shall perform their responsibilities impartially and independently considering the facts and conditions related to the matters under consideration and the provisions of the contract.

Should the Department and the Contractor mutually agree to terminate a “Dispute Resolution Board Three Party Agreement,” the existing “Resolution Review Board Three Party Agreement” will remain in force until replaced by another fully executed “Dispute Resolution Board Three Party Agreement.”

The DRB will exist for the life of this project only and will not review disputes or claims on any other project unless as otherwise agreed upon by the Department and the Contractor. If, after the Department has made final acceptance of the project, there are unresolved disputes and claims remaining, the “Dispute Resolution Board Three Party Agreement” shall remain active and in full force and effect until the project is otherwise administratively closed by the Department following final payment so that the DRB may continue in operation until all unresolved disputes and claims are resolved.

### **Disputes and Claims**

Disputes include disagreements, matters in question, and differences of opinion between the Department’s personnel and the Contractor. Claims are disputes that are not settled through Steps 1 and 2 of the Dispute Resolution Board Process

Disputes and claims by subcontractors and suppliers may be pursued by the Contractor on behalf of subcontractors or suppliers. Disputes and claims by subcontractors and suppliers against the Contractor will not be reviewed by the Department or DRB. Disputes and claims by subcontractors and suppliers against the Department but not supported by the Contractor will not be reviewed by the Department or the DRB. **Process**

Whenever an issue is elevated to a dispute, the parties shall exhaust the Dispute Resolution Board Process as set forth below prior to filing an action in the Ohio Court of Claims. The following procedures do not compromise the Contractor’s right to seek relief in the Ohio Court of Claims.

Failure to meet any of the timeframes outlined below or to request an extension may terminate further review of the dispute and may serve as a waiver of the Contractor's right to file a claim.

***Continuation of Work.***

Continue with all Work, including that which is in dispute. The Department will continue to pay for Work.

***Step 1 (On-Site Determination).***

The Engineer will meet with the Contractor's superintendent within two (2) working days of receipt of the Contractor's Written Early Notice set forth in 108.02.F.2. They will review all pertinent information and contract provisions and negotiate in an effort to reach a resolution according to the Contract Documents. The Engineer will issue a written decision of Step 1 within fourteen (14) calendar days of the meeting. If the dispute is not resolved, either abandon or escalate the dispute to Step 2.

***Step 2 (District Dispute Resolution Committee).***

Within seven (7) calendar days of receipt of the Step 1 decision submit a written request for a Step 2 meeting to the District Construction Administrator (DCA). The DCA will assign the dispute a dispute number. The dispute number will consist of the District number, followed by a hyphen, the project number, followed by a hyphen and then the number of disputes on this project that this dispute represents. Within fourteen (14) calendar days of receipt of the request for a Step 2 meeting, the Contractor shall submit the Dispute Documentation as follows:

1. Submit three (3) complete copies of the documentation of the dispute to the DCA.
2. Identify the dispute on a cover page by county, project number, Contractor name, subcontractor or supplier if involved in the dispute, and dispute number.
3. Clearly identify each item for which additional compensation and time extension requested.
4. Provide a detailed narrative of the disputed work or project circumstance at issue.
5. Include the dates of the disputed work and the date of early notice.
6. Reference the applicable provisions of the plans, specifications, proposal, or other contract documents in dispute. Include copies of the cited provisions in the Dispute Documentation.
7. Include the dollar amount of additional compensation and length of contract time extension being requested.
8. Supporting documents for the requested compensation stated in number six (6) above.
9. Provide a detailed schedule analysis for any dispute concerning additional contract time, actual or constructive acceleration, or delay damages. At a minimum, the schedule analysis must include the Schedule Update immediately preceding the occurrence of the circumstance alleged to have caused delay and must comport with accepted industry practices. Failure to submit the required schedule analysis will result in the denial of that portion of the Contractor's request.
10. Include copies of relevant correspondence and other pertinent documents.

Each District will establish a District Dispute Resolution Committee (DDRC) which will be responsible for hearing and deciding disputes at the Step 2 level. The DDRC will consist of the District Deputy Director, District Construction Administrator and the Planning & Engineering Administrator or designees (other than the project personnel involved).

To prepare for the DDRC meeting, the DCA will create a file on the dispute and assign a person to review and manage the dispute. This manager will advise the Dispute Resolution Coordinator in the Division of Construction Management on the status of the dispute.

Within fourteen (14) calendar days of receipt of the Contractor's Dispute Documentation the DDRC will meet with Contractor personnel authorized to resolve the dispute.. The DDRC will issue a written decision of Step 2 within fourteen (14) calendar days of the meeting. If the dispute is not resolved either abandon or appeal to the DRB as outlined below.

The Department's and Contractor's personnel shall not contact the DRB until a decision has been issued by the DDRC.

***Step 3 (Appeal to DRB).***

Within fourteen (14) calendar days of receipt of the Step 2 decision, the Contractor must submit a written *Notice of Intent to Appeal to the DRB* to the Chair of the DRB. This notice shall state the Contractor's request for a DRB hearing. The Contractor must also submit copies of this notice to the DCA and Deputy Director of the Division of Construction Management.

The dispute becomes a claim when the Chair of the DRB receives the *Notice of Intent to Appeal to the DRB*. The DRB will not consider a claim until the DDRC has properly reviewed the dispute and issued a decision.

The Operating Procedures for Dispute Resolution established by the DRB will set forth the Step 3 (Appeal to DRB) process in detail. At a minimum, these procedures will establish both the requirements and timeframes for documentation submissions by both the Contractor and Department, documentation exchange between the Contractor and Department, and the hearing procedures.

The Contractor shall submit its Claim Documentation in accordance with the DRB's Operating Procedures for Dispute Resolution. In addition to the documentation submitted at Step 2, the narrative shall be enhanced to include sufficient description and information to enable understanding by a third party who has no knowledge of the dispute or familiarity with the project. This documentation must also include a discussion of the efforts taken to partner the dispute. The DRB may also require additional information be included in the Contractor's Claim Documentation.

Certify the claim in writing and under oath using the following certification:

*I, (Name and Title of an Officer of the Contractor) certify that this claim is made in good faith, that all supporting data is accurate and complete to the best of my knowledge and belief, and that the claim amount accurately reflects the contract amendment for which (Contractor Company name) believes the Department is liable.*

(The Contractor)

By: \_\_\_\_\_  
(Name and Title)

Date of Execution: \_\_\_\_\_

Sign and date this claim certification and have the signature notarized pursuant to the laws of the State of Ohio. The date the DRB Chair receives the certified claim documentation is the date of the Department's Receipt of the Certified Claim for the purpose of the calculation of interest as defined in 108.02.G.4.

In accordance with the DRB's Operating Procedures for Dispute Resolution, the District will be instructed to submit its Claim Documentation in response to the Contractor's Claim Documentation. At a minimum, the District's Claim Documentation must include:

1. An overview of the project.
2. A narrative of the disputed work or project circumstance at issue with sufficient description and information to enable understanding by a third party who has no knowledge of the dispute or familiarity with the project.
3. The dates of the disputed work and the date of early notice.
4. Discuss the efforts taken to partner the dispute.
5. References to the applicable provisions of the plans, specifications, proposal, or other contract documents. Copies of the cited provisions shall be included in the claim document.
6. Response to each argument set forth by the Contractor.
7. Any counterclaims, accompanied by supporting documentation, the District wishes to assert.
8. Copies of relevant correspondence and other pertinent documents.

The DRB may also require additional information be included in the District's Claim Documentation.

In the event of multiple claims, the DRB may order that they be considered in a single hearing. The DRB may hold this hearing after the completion of the project or until such time that it is assured that all disputes on the project have been processed through Steps 1 and 2 of the Dispute Resolution Board Process and these issues are before the DRB.

The DRB will hear the entire claim. The DRB will hear oral presentations from both sides. The DRB may, on its own initiative, request information of the Contractor or the Department in addition to that submitted for the hearing. If either party fails to reasonably comply with such request, the DRB may render its recommendation without such information.

Upon completion of the hearing and consideration of any additional information submitted upon request, the DRB will render its written recommendation within fourteen (14) calendar days of the hearing.

The recommendation of the DRB shall be by majority vote. The recommendation shall be a well-reasoned decision which, at a minimum, shall include:

1. The claim number; the project number; county, route and section number; Contractor name; subcontractor or supplier's name, if involved in the dispute; and the commonly referenced name of the dispute on the cover sheet or the first page of the decision.
2. Sufficient description of the project and the claim to enable understanding by a third party who has no knowledge of the claim or familiarity with the project.
3. The value of the claim as determined by the Contractor, if applicable.
4. The value of the claim as determined by the Department, if applicable.
5. Finding of fact and a conclusion that provides clear direction to the parties.

The Chair must submit copies of the recommendation to the Contractor, DCA and Deputy Director of the Division of Construction Management

Within three (3) days of receipt of the recommendation, either party may request a meeting of the DRB to hear the DRB's explanation of the recommendation. Within seven (7) days of this request, the Chair shall conduct this meeting with both the Department and the Contractor.

Within twenty-one (21) calendar days of receipt of the recommendation, the Contractor must indicate its intentions in writing to the Department and the Chair in regards to the recommendation. Simultaneously, the Director or designee will determine the Department's intentions in regards to the recommendation. This determination will be issued in writing to the Contractor and the Chair within twenty-one (21) calendar days of receipt of the recommendation.

Either the Department or the Contractor may appeal a recommendation to the DRB for reconsideration. However, reconsideration will only be allowed when there is new evidence to present.

The recommendation of the DRB is the final step of the Department's Dispute Resolution Board Process and may not be appealed within the Department. The DRB is not bound by any offers of settlement or findings of entitlement made during Steps 1 and 2 of the Dispute Resolution Board Process.

***Interest on Claims.***

The Department will pay interest in accordance with ORC Section 5703.47 on any amount found due on a claim which is not paid within 30 days of the Claims Coordinator's Receipt of the Certified Claim.

***Binding Arbitration (Optional).***



In lieu of the DRB hearing the Contractor may request that the claim proceed through binding arbitration. The Department may agree to binding arbitration as defined by ORC 5525.23 in the manner in which this method is practiced by the Department and allowed by law. At its discretion, the Department may decline the Contractor's request.

ODOT's Dispute Resolution Coordinator will coordinate the agreement of the parties to the binding arbitration method and the selection of a neutral third party or technical expert. The fees of the neutral third party or technical expert will be shared equally. The Dispute Resolution Coordinator will obtain a written agreement, signed by both parties, that establishes the binding arbitration process. Subject to the requirements of ORC 5525.23, the neutral third party or technical expert will assume complete control of the claim upon execution of the binding arbitration agreement.

### ***Advisory Recommendation Process (Optional)***

#### **1. Objective**

To more fully allow the DRB to act in an advisory capacity to assist the Department and the Contractor in resolving selected disputes, the Advisory Recommendation Process may be used to provide the parties with a preliminary assessment of the merits of each party's position in the dispute based upon the information presented pursuant to this process. The process is meant to be expedient, shall be primarily oral, and will not prejudice a future formal DRB hearing of the dispute.

The Advisory Recommendation Process is not to be substituted for the good faith negotiation efforts. Rather, the Advisory Recommendation Process should be utilized when negotiations have reached a temporary impasse.

#### **2. Identification of Disputes**

A dispute may be identified as a candidate for an Advisory Recommendation by the Department, the Contractor, the DRB, or any combination of the above.

#### **3. Concurrence of Both Department and Contractor**

Both the Department and the Contractor must concur that the dispute is appropriate for the Advisory Recommendation Process; else, the dispute must proceed through the Dispute Resolution Board process as set forth in Proposal Note 108.

#### **4. Pre-meeting Submittals to the DRB**

The DRB will decide the nature of the submissions that it wishes the parties to make, on a case-by-case basis. At a minimum, the DRB will require submission of brief position papers (1 to 2 pages) to all parties. Include copies of relevant specification sections, plans, notes, drawings, and other pertinent Contract and /or Project related documentation. The submission will be made at

least fifteen (15) days prior to the next quarterly meeting unless the parties agree to alter the time frames.

#### 5. Scheduling of Advisory Recommendation Meetings

In most cases, the dispute will be scheduled for presentation to the DRB at the DRB's next regularly scheduled meeting. If the parties agree and the schedules permit, a dispute may be heard during the period between the regularly scheduled meetings, in which case, a meeting will be scheduled at a time and location convenient to the parties and the DRB.

#### 6. Conduct of Meetings

The Contractor will make its presentation first, followed by the Department. Each party will be allowed sufficient time to make a thorough oral presentation, make rebuttals, provide the DRB with relevant documentation and respond to the DRB's queries and requests.

After receiving all relevant information, the DRB members will, at their discretion, privately caucus to discuss their assessment of the dispute. Either that same day or the next, the DRB will orally share and discuss with the parties its assessment and recommendations with respect to the dispute. The Advisory Recommendation shall not be binding on either party or on the DRB and does not require either party to accept or reject it. The recommendation does not prejudice the opportunity for a Step 3 hearing if the dispute is not resolved. If the dispute is presented to the DRB formally at a later date, pursuant to the Proposal Note 108 process, the DRB will focus anew upon the facts of the dispute as presented at that time, without reference to the Advisory Recommendation meeting.

#### 7. Resolution

The Advisory Recommendation of the DRB will be used by the parties at any time after Step 1 of the Dispute Resolution Board Process. If the parties remain unable to resolve the dispute following the Advisory Recommendation Process, the dispute may proceed in accordance with the next level of Proposal Note 108 process and the requirements of the DRB approved *Operating Procedures*.

#### **Basis of Payment**

The Department will furnish the following item with an amount in the Proposal:

<b>Item</b>	<b>Unit</b>	<b>Description</b>
Special	Lump Sum	Department's Share of the Dispute Resolution Board

The fixed amount shown in the Proposal is included in the Total Bid Amount. This fixed amount is one hundred percent of the Department's estimate of the total cost of all quarterly meetings plus fifty percent of all costs anticipated for Appeals to the DRB and Advisory Recommendations.

The Department shall bear one hundred percent of all costs associated with the quarterly meetings. The Contractor and the Department shall bear fifty percent of all costs associated with Appeals to the DRB and Advisory Recommendations.

The payments due will be deducted from the item. If the Department's costs of the DRB exceed the fixed amount, the Department will continue to pay its share of the actual invoice costs of the DRB. The Department will not pay a percent mark-up on these costs. The Department will make partial payments according to C&MS 109.09. This item is exempt from the non-performance table found in C&MS 104.02.

### **DISPUTE RESOLUTION BOARD THREE PARTY AGREEMENT**

THIS THREE PARTY AGREEMENT, hereinafter called "**AGREEMENT**", made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, between the Ohio Department of Transportation, hereinafter called the "**DEPARTMENT**"; and \_\_\_\_\_, hereinafter called the "**CONTRACTOR**"; and the Dispute Resolution Board, hereinafter called the "**DRB**" and consisting of three members:

\_\_\_\_\_,  
**CONTRACTOR** Member

\_\_\_\_\_,  
**DEPARTMENT** Member

and \_\_\_\_\_  
**CHAIR**

WITNESSETH, that

WHEREAS, the **DEPARTMENT** is now engaged in the construction of project (XXX-XX); and

WHEREAS, the contract for project (XXX-XX) provides for the establishment and operation of the **DRB** to assist in resolving disputes and claims; and

WHEREAS, the **DRB** is composed of three members, one selected by the **DEPARTMENT**, one selected by the **CONTRACTOR**, and the **CHAIR** selected by the aforementioned two;

NOW THEREFORE, in consideration of the terms, conditions, covenant, and performance contained herein, or attached and incorporated and made part hereof, the parties hereto agree as follows:

#### **I DESCRIPTION OF WORK**

In order to assist in the resolution of disputes and claims between the **CONTRACTOR** and the **DEPARTMENT**, the **DEPARTMENT** has provided in the (XXX-XX) contract, for the establishment of the **DRB**. The purpose of this **DRB**, is to fairly and impartially consider disputes placed before it and provide recommendations for resolution of these disputes to both the **DEPARTMENT** and the **CONTRACTOR**. **DRB** members shall perform the services necessary to participate in the **DRB's** actions as designated in Section II, Scope of Work.

## **II SCOPE OF WORK**

The Scope of Work of the **DRB** includes, but is not limited to, the following items of work:

### **A. Operating Procedures for Dispute Resolution**

Upon execution of the **AGREEMENT**, the **DRB** shall establish Operating Procedures that will govern the conduct of its business based on the Dispute Resolution Board (DRB) Guidelines which can be found on ODOT's website at [http://www.dot.state.oh.us/CONTRACT/construction\\_policy.htm](http://www.dot.state.oh.us/CONTRACT/construction_policy.htm). The **DRB** may elect to adopt the "Dispute Resolution Board Operating Procedures for Dispute Resolution" which can be found on the same website in its entirety or a modified version thereof. At a minimum, these procedures will establish both the requirements and timeframes for documentation submissions by both the **CONTRACTOR** and **DEPARTMENT**, documentation exchange between the **CONTRACTOR** and **DEPARTMENT**, and the hearing procedures.

The members of the **DRB** will keep current on the progress of this project by: 1) quarterly visits to the project, 2) keeping current files, 3) meetings with other **DRB** members, and 4) meetings with **DEPARTMENT** and **CONTRACTOR** personnel. The frequency of project visits and meetings and content of members' files shall be as agreed upon among the **DEPARTMENT**, **CONTRACTOR**, and members of the **DRB**.

Upon receipt by the **DRB** of a written *Notice of Intent to Appeal to the DRB* of a dispute, from either the **CONTRACTOR** or the **DEPARTMENT**, the **DRB** shall convene to review and consider the appeal. The time and location of **DRB** meetings shall be determined by the **DRB** with reasonable notice to the **DEPARTMENT** and **CONTRACTOR**. Both the **DEPARTMENT** and **CONTRACTOR** shall be given the opportunity to present their evidence at these meetings. It is expressly understood that the **DRB** members are to act impartially and independently in the consideration of the contract provisions, and the facts and conditions surrounding any written appeal presented by the **DEPARTMENT** or the **CONTRACTOR**, and that the recommendations concerning any such appeal are advisory. The **DRB** recommendations, resulting from their consideration of a dispute or claim, shall be furnished to the **DEPARTMENT** and to the **CONTRACTOR** in accordance with the process set forth in the Dispute Resolution Board Process Proposal Note 108. The recommendations shall be based on the pertinent contract provisions and the facts and circumstances involved in the dispute.

Either the **DEPARTMENT** or the **CONTRACTOR** may appeal a recommendation to the **DRB** for reconsideration. However, reconsideration will only be allowed when there is new evidence to present.

#### B. **DRB** Member Replacement

Should the need arise to appoint a replacement **DRB** member, the replacement **DRB** member shall be appointed in the same manner as the original **DRB** members were appointed. The selection of a replacement **DRB** member shall begin promptly upon notification of the necessity for a replacement and shall be completed within 30 calendar days. The **AGREEMENT** shall be amended to indicate a change in **DRB** membership.

### **III**

#### **DEPARTMENT RESPONSIBILITIES**

The **DEPARTMENT** shall furnish the following services and items:

##### A. Contract Related Documents

The **DEPARTMENT** shall furnish the **DRB** three copies of the contract for project (XXX-XX) , change orders, written instructions issued by the **DEPARTMENT** to the **CONTRACTOR**, or other documents pertinent to the performance and therefore, necessary for the **DRB** to perform its responsibilities.

##### B. Coordination and Services

The **DEPARTMENT's** Engineer for the (XXX-XX) project will, in cooperation with the **CONTRACTOR**, coordinate the operations of the **DRB**. The **DEPARTMENT**, through the Engineer, will arrange or provide conference facilities at or near the contract site and provide secretarial and copying services.

##### C. Dispute Resolution Documents

1. The **DEPARTMENT** shall cooperate with the **CONTRACTOR** to jointly create a Common Support Document Appendix for each claim that is to be heard by the **DRB**. This Appendix shall include all reference documents (applicable plans sheets, specification references, sketches or drawings, etc.) common to both the **DEPARTMENT'S** and the **CONTRACTOR'S** dispute resolution submittal. The **DEPARTMENT** will be responsible for producing 5 copies of this document for the first claim (one copy for each **DRB** member, the **DEPARTMENT** and the **CONTRACTOR**). The **CONTRACTOR** will be responsible for producing 5 copies of this document for the second claim. The responsibility will continue to alternate with subsequent claims, if necessary.

2. The **DEPARTMENT** shall furnish to each **DRB** member, one copy of all pertinent documents not included in the Common Support Document Appendix, which are or may become necessary for the **DRB** to perform its responsibilities. Pertinent documents are any documents substantiating or justifying the **DEPARTMENT'S** position. A copy of such pertinent documents must also be furnished to the **CONTRACTOR**.

Except for its participation in the **DRB's** activities as provided in the contract and in this **AGREEMENT**, the **DEPARTMENT** will not solicit advice or consultation from the **DRB** or any of its members on matters dealing in any way with the project, the conduct of the work, or resolution of problems.

#### **IV CONTRACTOR RESPONSIBILITY**

The **CONTRACTOR** shall furnish the following items:

##### **A. Contract Related Documents**

The **CONTRACTOR** shall furnish each member of the **DRB** a copy of the progress schedule and updates and any other **CONTRACTOR**-generated documents pertinent to the performance and therefore, necessary for the **DRB** to perform its responsibilities.

##### **B. Dispute Resolution Documents**

3. 1. The **CONTRACTOR** shall cooperate with the **DEPARTMENT** to jointly create a Common Support Document Appendix for each claim that is heard by the **DRB**. This Appendix shall include all reference documents (applicable plans sheets, specifications, sketches or drawings, etc.) common to both the **CONTRACTOR'S** and the **DEPARTMENT'S** dispute resolution submittal. The **DEPARTMENT** will be responsible for producing 5 copies of this document for the first claim (one copy for each **DRB** member, the **DEPARTMENT** and the **CONTRACTOR**). The **CONTRACTOR** will be responsible for producing 5 copies of this document for the second claim. The responsibility will continue to alternate with subsequent claims, if necessary.

2. The **CONTRACTOR** shall furnish to each **DRB** member, one copy of all pertinent documents not included in the Common Support Document Appendix, which are or may become necessary for the **DRB** to perform its responsibilities. Pertinent documents are any documents which are used in the performance of the work or in justifying or substantiating the **CONTRACTOR's** position. A copy of such pertinent documents must also be furnished to the **DEPARTMENT**.

Except for its participation in the **DRB's** activities as provided in the contract and in this **AGREEMENT**, the **CONTRACTOR** will not solicit advice or consultation from the **DRB** or any of its members on matters dealing in any way with the project, the conduct of the work, or resolution of problems.

#### **V DURATION OF DRB**

The **DRB** will exist for the life of the (XXX-XX) project only and will not review disputes or claims on any other project unless as otherwise agreed upon by the **DEPARTMENT** and the

**CONTRACTOR.** If, after the **DEPARTMENT** has made final acceptance of the project, there are unresolved disputes and claims remaining, the **AGREEMENT** shall remain active and in full force and effect until the project is otherwise administratively closed by the **DEPARTMENT** following final payment so that the **DRB** may continue in operation until all unresolved disputes and claims are resolved.

## **VI COMPENSATION**

### **A. Compensation Allowed**

1. **DEPARTMENT** and **CONTRACTOR** Members' Fees  
**DEPARTMENT** and **CONTRACTOR** Members shall be compensated at an agreed rate of \$1,800 per day.
2. **CHAIR's** Fee  
The Chair shall be compensated at an agreed rate of \$2,200 per day.
3. Travel Time  
The DRB members shall be reimbursed at the rate of \$125 per hour for the time spent traveling to and from the meeting.
4. Transportation Costs  
The DRB members shall be paid for travel expenses incurred in accordance with the Ohio Office of Budget and Management Travel Policy as published on the State of Ohio website (<http://www.obm.ohio.gov/mppr/travel.asp>).
5. Review and Research away from the Project  
No additional compensation will be made for the time spent in review and research activities by the DRB members unless an estimate of that time is specifically agreed upon in advance and in writing by the Department and the Contractor. Such time that has been agreed to will be compensated at an agreed rate of \$225 per hour. The agreed \$225 per hour shall include all incidentals.

### **B. Payment**

1. Submission for Compensation  
The **DRB** members shall submit to the **CONTRACTOR**, monthly, each member's billable time and travel expenses, and required supporting documentation.
2. Member Compensation  
After review and verification by the **CONTRACTOR** and **DEPARTMENT** of the members' submission for compensation, the **CONTRACTOR** shall pay each member their earned fees.
3. **CONTRACTOR** Reimbursement

The **DEPARTMENT** will reimburse the **CONTRACTOR** for the **DEPARTMENT'S** share of actual invoice costs of the members under Lump Sum Item Special – Department's Share of Dispute Resolution Board. The Department will not pay a percent mark-up on these costs. The Department will make partial payments according to C&MS 109.09.

## **VII ASSIGNMENT OF TASKS OF WORK**

The **DRB** members shall not assign any of the work of this **AGREEMENT**.

## **VIII CONFLICT**

The members of the **DRB** agree individually that they do not have any direct or indirect ownership or financial interest in the **CONTRACTOR**, any consultant or consulting firm on the project, any subcontractor or supplier on the project or any business of another **DRB** member. The members of the **DRB** agree individually that they are not currently employed by the **DEPARTMENT**, the **CONTRACTOR**, or any consultants or consulting firms on the project. Service as a member of other **DRB's**, as a Dispute Resolution Advisor or as an arbitrator or mediator shall not be construed to be employment. The members of the **DRB**, the **DEPARTMENT**, and the **CONTRACTOR** agree that during the life of the contract, no unilateral discussion will be had or agreement will be made between any **DRB** member and any party to this **AGREEMENT** for employment after the contract is completed.

In the event that a **DRB** member's status changes in regards to the aforementioned areas of conflict, the members of the **DRB** agree individually to immediately disclose this in writing to both the **DEPARTMENT** and the **CONTRACTOR**. Upon receiving such notification, the **DEPARTMENT** or the **CONTRACTOR** may, within seven (7) calendar days, give notice that this **DRB** member is no longer acceptable. In no event, shall a **DRB** member participate in a hearing of a dispute or claim by the **DRB** involving a firm by which he/she is employed.

## **IX TERMINATION OF AGREEMENT**

The parties to this **AGREEMENT** mutually agree that this **AGREEMENT** may be terminated at any time upon not less than a thirty (30) calendar day written notice to the other parties. In the event the **AGREEMENT** is terminated Section 108.02.G of ODOT's Construction and Material Specifications (C&MS), Dispute Resolution and Administrative Claims Process that was in affect at the time of the bidding of this project will immediately become effective. All disputes in Step 1 or Step 2 of this PN109 Note will continue as in Step 1 or Step 2 as described by Section 108.02.G of ODOT's C&MS. Any claims in Step 3, to be heard by the **DRB**, will instead be heard by the Director's Claims Board.

**DRB** members may withdraw from the **DRB** by providing 30 day notice. **DRB** members may be terminated for cause only by their original appointing authority, therefore, the **DEPARTMENT**



may only terminate the **DEPARTMENT** appointed member, the **CONTRACTOR** may only terminate the **CONTRACTOR** appointed member, and the first two members must agree to terminate the **CHAIR**.

**X  
LEGAL RELATIONS**

The parties hereto mutually understand and agree that the **DRB** member in the performance of 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** and accordingly, no party to this **AGREEMENT** shall bear a greater responsibility for damages or personal injury than is normally provided by Federal and Ohio Law.

The parties expressly agree that each DRB member is acting in a capacity intended to facilitate resolution of disputes. The **DEPARTMENT** and the **CONTRACTOR** further agree that neither of them will seek nor require the testimony or production of documents and/or records from the DRB members in any administrative, judicial or other proceeding.

**XI  
FEDERAL REVIEW**

The Federal Highway Administration shall be informed of the work of the **DRB** and shall have the right to attend any meeting or hearing of the **DRB**.

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

**DRB MEMBER**

**DRB MEMBER**

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_

**CHAIR**

By: \_\_\_\_\_  
Title: \_\_\_\_\_

**CONTRACTOR**

**OHIO DEPARTMENT OF TRANSPORTATION**

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_

Approved as to Form Only this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

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Assistant Attorney General

**DESIGNER'S NOTE:**

For immediate use. This note should appear on all projects over \$20,000,000 and/or of a highly technical nature. In all cases consultation must be made with the Division of Construction Management Dispute Resolution Coordinator (614-466-3957) prior to a final determination.

Do not use PN 109 – Department's Share of the Dispute Resolution Advisor if this note is used.

The Dispute Resolution Board is a contract pay item as per this note. Provide an encumbered dollar value to be placed in the Proposal for the Item Special – Department's Share of the Dispute Resolution Board. In all cases consultation must be made with the Division of Construction Management Dispute Resolution Coordinator (614-466-3957) prior to a final determination of the dollar value. This amount should only be provided in the C2 Estimate and in the Special Considerations/Remarks Field on the Plan Package Submittal Form.

Any questions on this note should be directed to the Division of Construction Management Dispute Resolution Coordinator 614-466-3957.