

Section 3.4

DISPUTE REVIEW BOARD

3.4.1 Purpose

The purpose of this procedure is to provide for uniformity in the use of Dispute Review Boards (DRB).

3.4.2 Initiating Specifications

(A) Resident Level Responsibilities

All contracts should contain a special provision for either a contract specific Dispute Review Board (DRB) or a Regional DRB (RDRB). Conventional contracts over \$20 million should contain a special provision for a contract specific Dispute Review Board (DRB). The Resident Engineer (RE) also has the option to add a contract specific DRB to projects less than \$20 million, for complex projects, or for projects with a higher than normal probability of issues. For capacity only projects, a RDRB can be deemed sufficient based on the complexity of the project or a decreased probability of issues. Complex Design-Build contracts over \$50 million should contain a contract specific DRB, while smaller and/or less complex Design-Build contracts can utilize a RDRB. If there is no special provision for a contract specific DRB, then there should be one for a Regional DRB (RDRB).

3.4.3 Contract Specific DRB

3.4.3.1 Member Selection

(A) Resident Level Responsibilities

Projects with contract specific DRBs require the appointment of the three members. The process of appointing the three members should be completed early enough that the members can attend the pre-construction meeting.

The RE will select an appointee from the Florida Department of Transportation's (Department's) list of candidate members. The name of the proposed DRB member selected by the RE should be reviewed by the District Construction Engineer (DCE) prior to submitting to the Contractor for review. In selecting a member, keep in mind, we

are not looking for someone who will take our side, but someone knowledgeable of the type of work that will understand the issues that may come up and who is able to knowledgeably evaluate a dispute. The RE should review the resume and disclosure statement, other DRB workload (recommend 10 days per month or fewer that are committed to DRB meetings) and availability of the members of the proposed Department selection, the Contractor selected member and the proposed chairperson. Copies of these resumes should also be forwarded to the DCE.

When the Contractor submits its appointee, the RE should seek the advice of the DCE before approving the appointment. The RE and the DCE should carefully review the resume of the appointee and solicit references if unknown.

3.4.3.2 Three Party Agreement

(A) Resident Level Responsibilities

A contract specific DRB requires a ***DRB Three Party Agreement, Form No. 700-011-02*** be executed before the pre-construction meeting. This document is not included in contracts but is to be downloaded off the Forms and Procedures website. The Project Administrator (PA) should take the lead in getting this agreement executed. The DRB and Contractor should execute 2 copies of the agreement. The copies should then be sent to the DCE for execution. The agreement will be returned to the PE for distribution, one original retained by the Department, the other original to the Contractor, and one copy each to the DRB members.

(B) District Level Responsibilities

The DCE is responsible for executing the Three Party Agreement, unless delegated. In the case of delegation, documentation of such delegation should be maintained in files.

3.4.3.3 Meeting

(A) Resident Level Responsibilities

Meeting frequency should be determined on a project-by-project basis. Meetings should generally be held monthly at least for the first six months to acclimate the DRB, as problems often become apparent in the early part of a project. If the project is behind schedule, or the Contractor is submitting numerous ***Notices of Intent to Claim***, a monthly meeting is necessary. Projects that are running smoothly with few claims and on schedule should evaluate the meeting frequency. The RE and the Contractor must agree to changes to the frequency of meetings. This is not meant to be a unilateral

decision by the Department.

When possible, DRB meetings should be scheduled to coincide with regular periodic progress meetings. DRB meetings are scheduled well in advance. The RE must assure that these meetings occur when scheduled. The RE should not cancel a meeting without adequate notice. DRB members should be paid for a meeting canceled with less than 5 working days advance notice unless the Board initiates such cancellation.

On a contract specific DRB, all three members should attend each scheduled periodic meeting. In the event that one member of the Board is unable to attend a regular scheduled meeting, the Chairman should attempt to reschedule the meeting. Should rescheduling not be possible, the other two members may attend the meeting without the third member. Only the members attending should be compensated. No hearing will be conducted without all three members present.

The Department project staff will take minutes of the regular periodic meetings, including that portion devoted to DRB discussion.

(B) District Level Responsibilities

The District Construction Office is responsible for initiating a request to include the DRB special provision for a contract and should provide a projected quantity for meetings. The quantity should allow for the life of the contract. Generally, one meeting per month for the first six months and a meeting once every other month should be followed, unless circumstance dictates otherwise.

3.4.3.4 Use of the DRB

(A) Resident Level Responsibilities

On all matters that relate to DRBs, communicate only with the Chairman. All personnel on the project should understand that there should be no communication with any DRB member outside of a meeting. The only exception is communication between the parties and the DRB Chairman relating to scheduling meetings or administrative matters relating to a hearing.

On rare occasions, the Department or the Contractor may bring an issue that is unusually complex or request that a detailed analysis be developed. In this instance it may be appropriate for the DRB to request additional compensation. It is important that there be agreement among all parties as to what the expectations and compensation will be as it relates to the number of days the DRB members are to be compensated

and level of detail of the recommendation, prior to presenting the issue to the DRB.

The default of a Contractor does not terminate the contract. The DRB is still in existence and all parties have the same responsibilities as existed prior to a default.

If a Contractor refuses to participate in a hearing, they should be reminded that the hearing is a condition precedent to any other forum of resolution. The hearing should then take place absent the Contractor. The Department will not refuse to participate in a hearing unless determined appropriate after consultation with the State Construction Office and the Central Office Civil Litigation Section. The only exception would be if all parties agree that the issue is one over which the Department has no jurisdiction or the issue involves a third party which cannot come before the DRB.

3.4.3.5 Payment

(A) Resident Level Responsibilities

Costs associated with a contract specific DRB are reimbursed to the Contractor through an established pay item. The Contractor pays the members of the DRB and the Department reimburses the Contractor using this pay item. Invoices must be prepared by the DRB Chairman and submitted to the Contractor, with a copy sent to the Project Engineer showing the date and nature of the services provided and support and document the quantity for the estimate, particularly when the services provided were not in attendance at a regularly scheduled meeting. Normally the pay quantity for a meeting is 1.0, however, the pay quantity can be a fractional quantity. No payment is made until the Three Party Agreement is executed.

It is possible that a DRB meeting could occur after the Contractor has submitted a qualified acceptance letter. In that case, the PE will process another estimate to reimburse the Contractor for payments to the individual members.

3.4.4 Regional DRB

3.4.4.1 Member Selection

(A) Central Office Level Responsibilities

There are three regular members and two alternates designated for each RDRB for a period of one calendar year. The list of the members is available on the State Construction Office's web site.

3.4.4.2 Three Party Agreement

(A) Central Office Level Responsibilities

The Three Party Agreement for RDRB has been executed and is maintained in the State Construction Office.

3.4.4.3 Meeting Frequency

A RDRB does not have regular periodic meetings unless requested by the DCE. When a hearing is requested by the RE or the Contractor, a pre-hearing (orientation) meeting may be appropriate to acquaint the RDRB with the project and any issue to be heard.

(A) Resident Level Responsibilities

The RE initiates a request to the DCE that the RE, or the Contractor, intends to present a dispute to the RDRB.

(B) District Level Responsibilities

The DCE or designee shall schedule the RDRB meeting to hear the dispute submitted by the RE.

3.4.4.4 Payment

(A) Resident Level Responsibilities

RDRB is paid using a work order against a contingency pay-item or Contingency Supplemental Agreement. If the RDRB meets to hear issues on more than one project, the meeting should be paid for using contingency funds from only one project.

It is possible that a RDRB meeting could occur after the Contractor has submitted a qualified acceptance letter. In that case, since the project is still open in Transport, another estimate will be processed to reimburse the Contractor for payments to the individual members.

If the project has been closed out, as may be the case on a project that contains a Warranty/Guarantee specification, the project will need to be re-opened in CFM (Contract Funds Management) and an Estimate will need to be generated to reimburse the Contractor for payments made to individual members. * Note * All efforts should be made to ensure all payments are received by the Contractor prior to closing the project.

3.4.5 Request for Hearing

(A) Resident Level Responsibilities

Exemplar Operating Guidelines are posted on the State Construction Office website. The Department and the Contractor have the responsibility to resolve issues in a timely manner. On Partnered projects, there is a clearly defined escalation process. On other projects, the escalation process may not be clearly defined.

The Department does not have to wait for the Contractor to bring an issue to the DRB or RDRB. It is important that issues be escalated soon enough to mitigate impacts to the project. Once the project personnel recognize that a resolution, that is mutually agreeable to the Contractor and the Department, will not come about, or that the partnering process dictates, then the issue should be brought to the DRB or RDRB. The PA and the RE should consult with the DCE prior to requesting a hearing.

If the Department requests a hearing, the initial request should be for entitlement only. A request by either the Department or the Contractor for a hearing on quantum should be made only after a finding or recommendation on entitlement was issued and the Department and Contractor have made a sincere effort to resolve the quantum issue, or such is not otherwise reasonably possible. The Department should resist any effort made by the Contractor to have the entitlement and quantum issues heard by the DRB at the same hearing because it deprives both sides of an opportunity to arrive at a mutually agreeable solution.

3.4.6 Preparation for the Hearing

(A) Resident Level Responsibilities

The Department's position must be based on facts, plans, specifications, and contract documents. Send copies of the Department's position papers and rebuttals to the DCE for review prior to submitting to the DRB or RDRB.

The person(s) who will be representing the Department at the hearing should be familiar with how a hearing is conducted. A "dry run" should be conducted to make sure the Department's position is presented clearly.

Send copies of Contractor's position papers and rebuttals to the DCE for review.

3.4.7 During the Hearing

(A) Resident Level Responsibilities

Prior to the start of the hearing, request the DRB or RDRB to go over the Operating Guidelines

Keep in mind that neither party is to be permitted to present information that hasn't been previously given to the other party prior to the hearing without the other party's consent.

3.4.8 Recommendation of the Board

(A) Resident Level Responsibilities

The RE should discuss the recommendation with the DCE to determine whether to accept or reject the recommendation. The RE should accept or reject the recommendation in writing within the time period stated in the Specification. If the RE wants to reject the recommendation, the rejection has to be based on the DRB or RDRB disregarding or failing to recognize specifications and contract documents. If the recommendation does not provide sufficient information to indicate which facts or contract provisions were used to support the decision, request further information. Consultation with the State Construction Office and Central Office Civil Litigation Section will be necessary before the RE decides to reject any recommendation.

A copy of the Board's recommendation shall be sent to the State Construction Office.