

0080307DRB Prosecution of Work, Disputes Review Board
COMMENTS FROM INTERNAL/INDUSTRY REVIEW

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Comment: (7-29-10) **8-3.7.8 Basis of Payment:** A per hearing cost of \$8,000.00 has been established by the Department for providing compensation for all members of the Dispute Review Board for participation in an actual dispute hearing. The Board chairman will receive \$3,000.00 for participation in the hearing ~~with~~ while the remaining two members will receive \$2,500.00 each.

Response: (7-29-10) Spelling correction made.

Rammy Cone
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Comments: (8-11-10) Currently, it is not a requirement that a claim be certified prior to having a hearing, the thinking being that 99% of hearings are for entitlement only. The money has not even been finalized yet. I can understand that the money should not be paid to the contractor prior to certification but what difference does it make whether it is certified when the Board gets it? What is he certifying if there is no money? I thought that we decided that if you worked for FDOT or CEI you could not be on a Board, period, statewide, nada, no way. The way I read this it's the whole "district where the work is" argument again and adding that central office employees can't be on a Board. Am I reading this correctly? It sure could have been written a lot simpler in my opinion. 30 day limitation is pretty strict. Was this discussed this in the task team meeting? Special dispensation needs to be given (with respect to compensation) should there be a very complex issue, one involving multiple issues or very complex issues. Though it's not common, there have been hearings in other states that have lasted over a week, and involve much review and deliberation time.

Response: Addressing the various comments as follows

- The requirement currently in the specification section 4-3 requires requests for equitable adjustment to be certified and specification section 5-12 requires claims to be timely noticed, properly documented, and certified. This is what FDOT considers to meet the duly preserved requirements. Revised the language to give the DRB the determination of whether the issue has been duly preserved.
- Regarding membership on a DRB, intent is to allow former FDOT employees from the districts to serve on DRBs if the board is on a project not in the district in which they worked. Central Office former employees are prohibited for two years from serving on any board in the state.
- The 30 day timeframe in section 8-3.7.8 has been changed to match the timeframes of spec section 5-12.
- Regarding compensation for hearings, any additional days needed for a hearing will have to receive Contractor and FDOT approval in advance and will be compensated at the current regular DRB project meeting rate of \$3,300/day.

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Comments: (8-12-10) Text: 8-3.7.1 Purpose - Paragraph 4 states: The recommendation of the Board will not be binding on either the Department or the Contractor unless otherwise stated in the contract documents" In what instance would we ever want the Board's ruling to be binding? Also, is there an existing Special Provision in place that would address said circumstance. Also, 8-3.7.5 Conflict of Interest - what is the need for d, h, and i. Would not j. address those three cases?

Response: Recommendations from a Statewide DRB is binding on both the contractor and the Department. Regarding the conflict of interest, just covering the bases.

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Comments: (8-13-10) Section 8-3.7.8 Limitation for Referral of Disputes or Claims to the Board appears to conflict with Specification Section 5-12.2.1 Claims For Extra Work. The claim spec allows 90 days for projects under \$3 million and 180 days for project over \$3 million for the contractor to prepare and submit claims. The DRB requirement should not be less than these limits. It seems logical that the Department would first review the claim prior to referring it to the DRB. Since the claim spec allows 90 or 180 days to submit the claim, it would seem that the time for taking an issue to DRB would be that amount of time plus some reasonable review and preparation time.

Response: Have revised the spec to match the timeframe requirements of 5-12.

David Peters
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Comments: (8-16-10) Prosecution and Progress – Disputes Review Board: General: There are several places within the correction where the term disputes is included versus claims. Rather than enter "disputes or claims" everywhere, I would suggest that you simply define the term "disputes" to include disagreements, claims, or similar. Consider that by differentiating claims your board's name should be changed to "Disputes and Claims Review Board." A question? If the DRB dispositions a dispute or claim, does that preclude either the plaintiff or the defendant from seeking legal restitution should either disagree with the boards decision?

Response: Thanks for the comment but will leave the language as disputes or claims. Regarding your question of seeking restitution should either party disagree with the recommendation, both parties are tasked with either accepting or rejecting the Board's recommendation. The taking of a dispute or claim to a DRB is a condition precedent to initiating any other action to seek restitution.

Ken Zinck
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Comments: (8-31-10) "I have review the proposed spec changes and offer the following. From the Memo, the intent of the changes were "to establish a time limit for disputes to be brought before the board after final acceptance, to revise the compensation rate, and to establish a sharing arrangement for payment". The proposed language for the intent of the Memo was added successfully and I have no comments. However, other grammatical changes were also introduced which seems inconsistent throughout the three specs. For instance, 0080307DRB Prosecution and Progress – Disputes Review Board (8-3.7.1) disputes **and claims, and controversies.**

0080307RDRB Prosecution and Progress – Regional Disputes Review Board (8-3.7.1) disputes **and claims, and controversies**

0080308SDRB Prosecution and Progress – Statewide Disputes Review Board (8-3.8.1) disputes **and claims**

This is only one example. Sometimes "disputes" is being changed to "disputes or claims", sometimes it's change to "disputes and claims" and still other times it's left as "disputes". The grammatical changes should be reviewed for consistency throughout all three specs.

Response: Will review for consistency and edit accordingly.

Scott Presson

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Comments: (9-2-10) Text: 8-3.7.4 - Purpose - I recommend that language be added to the specification to state that it is not the purpose of the Dispute Review Board to consider case law, court rulings, or previous DRB rulings in their determinations. In the past, Contractor's have attempted to use these items in their positions which has resulted in confusion, delays in resolving issues, and more involvement in legal matters rather than actual conditions on the project.

Response: The DRB operating guidelines and Three Party Agreement are the locations for this information and are being reviewed/revised to address the changes to the DRB specs.

Greg Jones

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Comments: (9-2-10) Text: The specification provides "Referral to the Board is accomplished by providing a position paper outlining the nature and scope of the dispute or claim and describing the basis for entitlement to the dispute or claim. The term "providing" creates an ambiguity as to whom and how the position paper is provided. This requirement becomes significant with regard to the requirements of Paragraph 8-3.7.8 since a waiver can result from failure to timely refer. I suggest the following modification to paragraph 8-7.3.1 to clarify this situation: "Referral to the Board is accomplished by hand-delivering, or mailing by US Postal Service or other delivery service a position paper to a physical location designated by the Board for receipt of such communications. In the absence of a designated physical location the position paper may be delivered or mailed to any of the Board Members. Referral is effective the date of actual delivery or the date of submission to the US Postal Service or delivery service for delivery as shown by a

postmark or receipt. The position paper shall outline the nature and scope of the dispute or claim and describe the basis for entitlement to the dispute or claim."

Response: Thanks for the suggested language. The Three Party Agreement and Operating Guidelines addresses referral/submittal of the dispute or claim so will language as written in the submitted spec.
