

ORIGINATION FORM

Specification: 8-3.7

Subject: Disputes Review Board Specification – Project Specific Board

Origination date: 07/16/2010

Originator: David Sadler

Office/Phone: 414-5203

Problem statement: There have been instances of disputes wanting to be brought before a board that have not be duly preserved via the terms of the contract and others that were asked to be heard by a board well after final acceptance of the project. Also, the payment rate for boards has not been revised for several years so it is upwardly adjusted but with a contractor/Department payment sharing arrangement.

Proposed solution: Clarifying requirement that disputes brought before board must be duly preserved, establishing a time limit for disputes to be brought before the board after final acceptance, revised compensation rate and established a sharing arrangement for payment.

Information source: Proposed changes developed through work of DRB task team and Department personnel.

Recommended Usage Note: Same as currently applied.

Estimated fiscal impact, if implemented: Minimal.

Implementation of these changes, if and when approved, will begin with the January 2011 letting.



Florida Department of Transportation

CHARLIE CRIST
GOVERNOR

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STEPHANIE KOPELOUSOS
SECRETARY

MEMORANDUM

DATE: August 9, 2010

TO: Specification Review Distribution List

FROM: Rudy Powell, Jr., P.E., State Specifications Engineer

SUBJECT: Proposed Specification: 0080307DRB Prosecution and Progress – Disputes Review Board.

In accordance with Specification Development Procedures, we are sending you a copy of a proposed specification change.

This change was proposed by David Sadler to clarify the requirement that disputes brought before board must be duly preserved, 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.

Please share this proposal with others within your responsibility. Review comments are due within four weeks and should be sent to Mail Station 75 or to my attention via e-mail at ST986RP or rudy.powell@dot.state.fl.us. Comments received after **September 6, 2010** may not be considered. Your input is encouraged.

RP/cah
Attachment

PROSECUTION OF WORK - DISPUTES REVIEW BOARD.

(REV ~~11-19-027-28-10~~)-(FA ~~3-5-03~~)-(1-10)

ARTICLE 8-3 (Pages 81-83) is expanded by the following Subarticle:

8-3.7 Disputes Review Board: For this Contract, a Disputes Review Board will be established to assist in the resolution of disputes and claims arising out of the work on the Contract.

8-3.7.1. Purpose: The Board will provide special expertise to assist in and facilitate the timely and equitable resolution of disputes, *and* claims, ~~and controversies~~ between the Department and the Contractor in an effort to avoid construction delay and future claims.

It is not intended for the Department or the Contractor to default on their normal responsibility to cooperatively and fairly settle their differences by indiscriminately assigning them to the Board. It is intended that the Board encourage the Department and Contractor to resolve potential disputes without resorting to this alternative resolution procedure.

The Board will be used when normal Department-Contractor dispute resolution is unsuccessful. Either the Department or the Contractor may refer a dispute to the Board. Referral to the Board should be initiated as soon as it appears that the normal dispute resolution effort is not succeeding. *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. Only disputes or claims that have been duly preserved under the terms of the contract will be eligible to be heard by the Board. Requests for equitable adjustment must be certified as required by 4-3.2. Claims that are referred to the Board must be in compliance with 5-12.* It is a condition of this Contract that the parties shall use the Dispute Review Board. ~~The Department and the Contractor agree that t~~*The completed DRB hearing submission* of any unresolved dispute or claims ~~to the Board~~ is a condition precedent to the Department or the Contractor having the right to ~~proceed to~~*initiate arbitration, other alternative resolution procedures, or to file a lawsuit, or litigation as provided by law,* ~~of such unresolved dispute or claim. The Department's Claim Review Committee will not entertain any issues on this project.~~

The recommendations of the Board will not be binding on either the Department or the Contractor ~~as~~*unless* otherwise stated in the Contract.

The Board will fairly and impartially consider disputes *or claims* referred to it and will provide written recommendations to the Department and Contractor to assist in the resolution of these disputes *or claims*.

8-3.7.2. Continuance of Work During Dispute: During the course of the Disputes Review Board process, the Contractor will continue with the work as directed by the Engineer in a diligent manner and without delay or otherwise conform to the Engineer's decision or order, and will be governed by all applicable provisions of the Contract. Throughout any protested work, the Contractor will keep complete records of extra costs and time incurred. The Contractor will permit the Engineer and Board access to these and any other records needed for evaluating the dispute *and claims*.

8-3.7.3. Membership: The Disputes Review Board will consist of one member selected by the Department and approved by the Contractor, and one member selected by the Contractor and approved by the Department. The first two members will mutually select and

agree on the third member. Normally, the third member will act as Chairman for all Board activities.

8-3.7.4 ——— ~~It~~ **Qualification:** It is desirable that all Board members have at least ten years of experience with the type of construction involved in this project, in the interpretation of Contract Documents, and in contract dispute resolution. Board members must have attended the Dispute Resolution Board Foundation's Administration and Practices Workshop and must be on the Department's Lists of Candidate Members as provided on the Department's website. The goal in selecting the third member is to complement the construction experience of the first two members, to provide leadership for the Board's activities, and to provide expertise in the area of administering alternative contract resolution proceedings. It is imperative that Board members not show or be perceived as showing partiality to either the Contractor or the Department. A Board member shall not have any conflict of interest, which could affect their ability to act in a disinterested and unbiased manner.

8-3.7.5 Conflict of Interest: A person selected to the Board shall submit to the party appointing him/her a resume covering his/her applicable education and experience, a list of all DRBs, with meeting frequencies, on which he/she currently serves, and a disclosure statement covering, but not limited to, 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 awarded the project, the CEI consulting firm on the project, any subcontractor or supplier on the project or any business of another Board member.
- b. Current employment by the Department, the Contractor awarded the contract, or the CEI consulting firm on the project. Service as a Dispute Review Board Member shall not be construed to be employment.
- c. Current employment by any subcontractor or supplier on the project.
- d. Current employment by a consulting engineering firm that will be seeking future contracts for CEI services from the Department.
- e. Within the two year period immediately prior to award of the contract, employment by: *the Central Office of the Department; the Department's District or Turnpike in which the project is located; the Department, as a consultant in the District or Turnpike in which the project is located;* the Contractor awarded the contract, the CEI consulting firm on the project, any subcontractor or supplier on the project or any business of another Board member. Service as a Dispute Review Board Member shall not be construed to be employment.
- f. A close personal relationship with any key individual in any firm involved in the contract.
- g. 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 Board.
- h. A contract as a consultant to the Contractor awarded the contract.
- i. A contract as a consultant with any subcontractor or supplier on the project.
- j. Current full-time employment by a Department prequalified contractor or consultant.*

8-3.7.6 Disqualification: —Category “a”, “b”, “c”, “e”, and “h” relationships listed above in 8-3.7.5 shall disqualify a person from serving on the Board for this project. The other categories of relationships or prior involvement in this project listed above will be considered by the Contractor and the Department in arriving at their decision as to whether or not to accept a person as a member of the Board. ~~If a prospective Board member who discloses a relationship or prior involvement in this project listed in other than category “a” or “b” is considered to be highly qualified and desirable as a Board member, the Contractor and the Department, by mutual agreement, can approve that person to serve on the Board.~~

If during the life of the contract, a Board member is made aware that a firm of which he/she is an employee is involved in the contract as a subcontractor or supplier, he/she shall immediately give notice to the Department and the Contractor. Upon receiving such notification, the Department or the Contractor may, within ten (10) days, give notice that this Board member is no longer acceptable and a new Board member shall be selected and approved as provided above. In no event, shall a Board member participate in a hearing by the Board of dispute involving a firm by which he is employed.

The Department may disqualify a person from serving on future Disputes Review Boards for Department projects who submits a disclosure statement which fails to provide accurate and complete disclosure of a relationship that prohibits him/her from serving on the Board for this project or one of the possible conflicts of interest listed above.

8-3.7.7 Selection of Members: —Every attempt shall be made by the Department and the Contractor to complete the selection of Disputes Review Board members and execute the Three-Party Agreement prior to date of the preconstruction conference and, if applicable, the initial partnering workshop. The Department and the Contractor shall select their Board members and give the other party notice of the person they have selected to serve as a member of the Board. This notice shall be accompanied by the resume and disclosure statement submitted by that person.

Within ten (10) days of receiving the notice of selection of a Board member, the Department and the Contractor shall review the accompanying resume and disclosure statement, make such inquiries as each deems necessary and notify the other party in writing as to whether or not the person selected is acceptable. Failure to give this notice within the ten (10) days allowed shall be construed to be acceptance.

If a person selected is not acceptable to the other party, the party who selected that person shall within five (5) days select another person and provide to the other party to the contract a notification accompanied by a resume and disclosure statement.

Once the Contractor and the Department have agreed upon the first two members of the Board they shall immediately notify those members of their approval. Within one week of this notification, the first two members of the Board shall select the third member and give written notice to the Contractor and the Department accompanied by that person’s resume and disclosure statement.

Within ten (10) days of receiving the notice of selection of a third member of the Board, the Department and the Contractor shall review the accompanying resume and disclosure statement, make such inquiries as each deems necessary and notify the first two members in writing as to whether or not the person selected is acceptable. If a person selected is not acceptable to the Contractor or the Department the first two members of the Board shall immediately select another person and provide notification accompanied by a resume and

disclosure statement. Failure to give this notice within the ten (10) days allowed shall be construed to be acceptance.

If, (1) the Department or the Contractor fail to provide the other party notice of selection of a Board Member within the time specified, herein; (2) the first two members of the Board fail to provide notice to the parties of their selection of the third member of the Board within the times specified, herein; or (3) the parties are unable to agree on appointment of a Board member within 60 days after award of the contract, that member shall be appointed by mutual consent of the Department's State Construction Engineer and the President of the Florida Transportation Builders Association.

Immediately after agreement is reached on all members of the Board the Contractor, the Department and the members of the Board shall proceed with execution of a Three Party Agreement as provided on the Department's website. The execution of this agreement will not modify the requirements, terms or conditions of this Specification.

If during the life of the contract, a Board member has a discussion regarding employment or entered into any agreement for employment after completion of the contract with the Department, the Contractor or any subcontractor or supplier on the project, he/she shall immediately disclose this to the Contractor and the Department and shall be disqualified from serving on the Board.

Should the Department and the Contractor mutually agree to terminate a Disputes Review Board Three Party Agreement, the existing Disputes Review Board Three Party Agreement will remain in force until replaced by another a fully executed Disputes Review Board Three Party Agreement. If, after the Department has made final acceptance of the project, there are unresolved disputes and claims remaining, the Disputes Review 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 Board may continue in operation until all unresolved disputes and claims are resolved.

8-3.7.8 Limitation for Referral of Disputes or Claims to the Board: Any disputes or claims that were not resolved prior to Final Acceptance of the project pursuant to 5-11 must be referred to the Board within 30 calendar days after Final Acceptance. Only disputes or claims that have been duly preserved will be eligible to be heard by the Board. Failure to submit all disputes or claims to the Board within 30 calendar days after Final Acceptance constitutes an irrevocable waiver of the contractor's dispute or claim.

8-3.7.4. Basis of Payment: A per day cost of \$3,300.00 has been established by the Department to reimburse the Contractor for providing compensation to the three members of the Disputes Review Board. This amount will be paid to the Contractor for each day the Disputes Review Board is convened *for regular project meetings*. For each day of the meeting, the Contractor shall compensate each Disputes Review Board member a sum of \$1,100.00. Such payment will be full compensation to the Board member for salary and all travel expenses (air fare, rental or personal automobile, motel room, meals, etc.) related to membership on the Board. Do not pay prior to the execution of the Three Party Agreement.

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 while the remaining two members will receive \$2,500.00 each. The Department and the Contractor will equally provide compensation to the Board for participation in an actual dispute hearing. The Department will compensate the Contractor \$4,000.00 as its contribution to the

hearing cost. Such payment will be full and complete compensation to the Board members for all expenses related to the hearing. This includes travel, accommodations, meals, pre- and post-hearing work, review of position papers and any rebuttals, conducting the hearing, drafting and issuance of recommendations, readdressing any requests for clarification. It is not intended for hearings to last longer than a single day, however, in some cases they may. Any additional time and/or compensation for a hearing would only be allowed upon prior written approval of the Department and the Contractor. If an additional day(s) is granted for the hearing, it will be at \$3,300.00 per day, regular meeting rate, payment of which is equally split between the Department and the Contractor.

~~The Department will pay all other non-salary and non-travel expenses related to operation of the Board.~~ The Department will prepare and mail minutes and progress reports, will provide administrative services, such as conference facilities and secretarial services, and will bear the cost of these services.

If the Board desires special services, such as legal consultation, accounting, data research, and the like, both parties must agree, and the costs will be shared by them as mutually agreed.

Payment shall be made under:

Item No. 999- 20- Disputes Review Board *meeting* --per day.

Item No. 999- 20- Disputes Review Board hearing -per day