**DRBF REGION 3**

**DISPUTE BOARD PROCESS SUMMARY AND GUIDELINES**

**[Note: This Process Summary and Guidelines document is published by DRBF Region 3 Inc for the assistance and use by its Members and clients / users of the Dispute Board Process. By its nature it is general in its approach and would need to be adapted to suit the needs of and approach by a particular client or user.**

**There is a companion set of Pro Forma Dispute Board Clauses and Pro Forma Dispute Board Agreement published by DRBF Region 3 Inc]**

Dispute Board Process Summary and Guidelines

**1.1** Overview

(a) The Australasian Chapter of the Dispute Resolution Board Foundation (**DRBF**), known locally as DRBF Region 3 Inc, has published guideline provisions for the appointment of a Dispute Board, also known as a Dispute Avoidance Board (or DAB) based on the recommended procedure adopted by the DRBF worldwide for the avoidance and resolution of disputes under construction, engineering and infrastructure contracts.

(b) This document contains a Process Summary and Guidelines for the establishment of a Dispute Board (**Process Summary**).

(c) This Process Summary refers to the term “Dispute Avoidance Board”, although similar terms such as “Dispute Board” or “Dispute Resolution Board” may be used.

(d)The following provisions for a Dispute Avoidance Board are published by DRBF Region 3 Inc. on its website (www.drbf.org.au).

**1.2 Application**

When the parties (called **Principal** and **Contractor**) to a Construction Project Deed / Contract / Agreement (**Contract**) have agreed to manage and avoid Issues becoming Disputes and to resolve Disputes arising out of or in connection with the subject matter of the Contract by way of a Dispute Avoidance Board this Summary is applicable.

**1.3 Dispute Avoidance Board**

A Dispute Avoidance Board is generally a three-member panel of independent, experienced professionals, two of whom are generally nominated by the Principal and the Contractor respectively and a third nominated by the two party nominees in accordance with this Summary.

**1.4 Introduction**

This Summary will need to be adjusted to properly reflect the terms of the Contract and the DAB Agreement.

**1.4.1** Summary

1. A Dispute Avoidance Board will be established to assist in the avoidance of Issues becoming Disputes and to assist in the resolution of Disputes in connection with or arising out of performance of the work under the Contract.
2. The primary role of the Dispute Avoidance Board is to avoid or prevent Issues becoming Disputes and to facilitate with the Contract Parties in resolving Issues. As one of the techniques for avoiding or preventing Issues from becoming Disputes, either Contract Party may, with approval of the other Contract Party and the DAB, request an advisory opinion from the Dispute Avoidance Board, to assist them in resolving an Issue or a Dispute, in accordance with clause 1.7.4.
3. In the event a Dispute arises, either Contract Party may refer the Dispute to the Dispute Avoidance Board for a Decision in accordance with the procedure outlined in this Summary.
4. Promptly thereafter, the Dispute Avoidance Board will impartially consider the Dispute referred to it and make a Decision.
5. The Dispute Avoidance Board will provide a written decision (**Decision**) for resolution of the Dispute to the Contract Parties.
6. The Decision of the Dispute Avoidance Board should carry great weight for the Contract Parties and, depending on the election of the Contract Parties, the Decision may be accepted, may be Interim Binding, may be binding on the parties, may be rejected by a party and/or may be used by the parties as an aid to assist in resolution of the Dispute.

**1.4.2** Definitions

In this Summary, the following defined terms are used:

1. **Contract Parties** means the Principal and the Contractor
2. **Dispute** means any disputed claim, variation order, direction, request or other controversy between the Contract Parties that remains unresolved following good faith negotiations between the authorised representatives of the Contract Parties and for which a Notice has been given under the Contract.
3. **Dispute Avoidance Board** or **DAB** or the **Board** means the three independent individuals appointed in accordance with clause 1.3 of this Process Summary.
4. **Dispute Avoidance Board Agreement or DAB Agreement** means the agreement between the Principal, the Contractor and the three Board members, adopting the form and content referred to in this Process Summary.
5. **Interim Binding** means that a Decision of the DAB that is be binding until such time as either Contract Party issues a Notice of Dissatisfaction under clause 1.8.9.
6. **Issue** means an unresolved matter arising under the Project that is not yet a Dispute.
7. **Project** means the works to be constructed in accordance with the Contract.
8. **Works** means the works to be delivered by the Contractor under the Contract

**1.5 Scope**

1. This Summary describes the purpose, procedure, function and features of the Dispute Avoidance Board.
2. A DAB Agreement will be entered into between the Principal, the Contractor and the three Board members, generally at the same time as the Contract is signed and will formalise the creation of the Board to establish the scope of the Board’s functions, and the rights and obligations of the Contract Parties. In the event of any conflict between this Process Summary and the DAB Agreement, the DAB Agreement will prevail.

**1.5.1** Purpose

The Board, as an independent body made up of independent, experienced professionals as Board members, will assist in avoiding and/or preventing Issues from becoming Disputes and will assist in and facilitate the timely resolution of Issues and Disputes between the Principal and the Contractor with a view to maintaining good relationships between the Contract Parties, avoiding acrimony, uncertainty, delay and more formal means of dispute resolution.

**1.5.2** Continuance of Works

During the processes of avoidance and resolution of Issues and Disputes by the Board, the Contractor will diligently continue with the Project

**1.5.3** Tenure of the Board

1. The Board will be established by the Contract Parties and the members of the Board executing the DAB Agreement. It is intended that the DAB Agreement will be executed concurrently with, or as soon as possible after, the signing of the Contract. The process to create a DAB will need to commence before, and continue concurrently with, the tender process.
2. The Board will generally be terminated as at the date of Final Payment by the Principal to the Contractor or the date of the Final Certificate, whichever is the later, unless the Board has been earlier terminated by mutual agreement of the Principal and the Contractor.

**1.6 MEMBERSHIP OF THE BOARD**

**1.6.1** General

1. The Dispute Avoidance Board will usually consist of one member nominated by the Principal and approved by the Contractor, one member nominated by the Contractor and approved by the Principal and a third member nominated by the first two Board members and approved by both the Principal and the Contractor.
2. The members of the Board will agree on which member will act as Chair of the Board (**Chair**).
3. The Contract Parties may agree other methods of establishing the members of the Board.

**1.6.2** Criteria

1. Experience
2. It is desirable that all Board members should be experienced in the type of construction required by the Contract, the interpretation of Project documents and the resolution of construction Issues or Disputes.
3. It is desirable that there should be a complementary mix of skills and experience amongst the Board members.
4. Neutrality
5. It is imperative that the Board members be neutral, act impartially and be free of any actual or perceived conflict of interest.
6. The concepts of neutrality, impartiality and freedom from any actual or perceived conflict of interest must have regard to the member’s current, primary or full-time employer and any member’s present or past relationship with either Contract Party, or any other entity, such as a subcontractor or professional consultant having a role in the Project.
7. Prohibitions and disqualifying relationships for prospective members and sitting Board members will include:
8. An ownership interest in any entity involved in the Contract, or a financial interest in the Project except for payment for services on the Dispute Avoidance Board.
9. Previous employment by, or financial ties to, any party involved in the Project within a period of three years prior to award of the Contract, except for fee-based consultingservices on other projects.
10. A close professional or personal relationship with any key member of any entity involved in the Project which, in the reasonable judgement of either Contract Party, could suggest partiality;
11. Prior involvement in the Project of a nature which could compromise that member's ability to participate impartially in the Board's activities.
12. Employment, including fee-based consulting services, by any entity involved in the Project except with the express approval of both Contract Parties; or
13. Discussions concerning or the making of an arrangement or agreement with any entity involved in the Project regarding employment after the Project is completed.

**1.6.3** Disclosure Statement

1. As part of the selection process, the first two prospective Board members willbe required to submit complete disclosure statements and a fee proposal for the approval of both the Principal and the Contractor.
2. Each disclosure statement will include a resume of experience, together with a declaration describing all past, present, anticipated and planned future relationships with all persons or entities involved in the Contract Project including known major subcontractors, design professionals and consultants. This includes any indirect relationships that may exist through the prospective Board members’ primary or full-time employer.
3. Disclosure of close professional or personal relationships with all key members of all persons or entities involved in the Project must also be included.
4. The third Board member willbe required to submit such a disclosure statement and fee proposal to the first two Board members and to the Principal and Contractor as a part of his or her selection and evaluation process.

**1.6.4** Selection Process

(a) Nomination and approval of first two members

(i) Each Contract Party will nominate a proposed Board member and convey the nominee's name, disclosure statement and fee proposal to the other Contract Party at least four weeks prior to the proposed date of execution of the Contract.

If the nominee is not rejected by the other Contract Party within one week after receipt of the disclosure statement, the nominee will be deemed to have been approved.

No reasons for rejection need be stated.

In the event of rejection, the nominating party will submit another nomination within two weeks of receipt of the notice of rejection.

This process will be repeated until two mutually acceptable Board members are named.

(b) Nomination and approval of third Board member

(i) Upon approval of the first two Board members, the Principal and Contractor will instruct the first two Board members to nominate the third Board member. The first two Board members willendeavour to nominate a third member who meets all the criteria listed above.

(ii) The name and disclosure statement of the third member nominated by the first two Board members shall be provided to the Principal and the Contractor.

1. If the nominee is not rejected by either party within one week after receipt of the disclosure statement, the nominee will be deemed to have been approved.
2. No reasons for rejection need be stated.
3. In the event of rejection, the first two Board members will submit another nomination within two weeks of receipt of the notice of rejection.
4. This process will be repeated until a mutually acceptable third Board member is named.

**1.6.5** DAB Agreement

All three Board members and the authorised representatives of the Principal and the Contractor will execute the DAB Agreement within one week after the selection and approval of the third Board member and, preferably, in conjunction with or shortly after the signing of the Contract.

**1.7 OPERATION**

**1.7.1** General

Appendix 1 to the DAB Agreement contains draft Dispute Avoidance Procedures consistent with this Process Summary. These procedures will be discussed and confirmed (with or without amendments by the Board, the Principal and the Contractor.at the first meeting of the DAB.

**1.7.2 Project Documents, Reports and Information**

(a) The Principal will provide a full set of Project Documents to each Board member.

(b) The Board members will be kept informed of construction activity and other developments by means of timely transmittal of relevant information prepared by the Principal and the Contractor in the normal course of the Works including, but not limited to, periodic progress reports and minutes of progress meetings.

**1.7.3 Periodic Meetings and Visits**

(a) The Board will visit the Project site and meet with representatives of the Contract Parties at no less frequently than three monthly intervals and at times of significant Project milestones.

(b) The frequency and scheduling of these visits will be as agreed among the Principal, the Contractor and the Board members, depending on the progress of the work. In case of failure to agree, the Board will schedule the visits.

(c) Each meeting of the Dispute Avoidance Board will consist of a site inspection and field observation of the Works, followed by the DAB meeting itself. The site inspection will cover all active segments of the Works, including any areas which involve an actual or potential Issue or Dispute. In such site inspection, the Board will be accompanied by representatives of both Contract Parties.

(d) The DAB meeting will be attended by senior executive personnel (both off-site and on-site) of the Principal and the Contractor.

(e) The draft DAB meeting agenda willgenerally include the following:

(i) Opening remarks by the Chair, including noting the “In Confidence and Without Prejudice” nature of the meeting.

(ii) Declarations by Board members of any new Interests and Associations (if any).

(iii) Approval of previous DAB meeting minutes.

(iv) Actions arising from previous DAB meeting minutes.

(v) Either a joint presentation by the Principal and the Contractor or separate presentations by the Principal and the Contractor covering:

A. Works accomplished since the last meeting;

B. The current status of the work schedule and schedule for future work;

C. Anticipated or potential Issues and proposed solutions; and

D. Status of current and potential Issues, Disputes, claims and other controversies.

(vi) Such other items as the Contract Parties may wish to discuss with the Board.

(vii) Scheduled dates for future Board meetings.

(f) The Chair will prepare agendas for, and minutes of, regular meetings and circulate them for comment, revisions and/or approval by all meeting attendees.

(g) The Principal will, at its expense, provide administrative services, such as conference facilities and secretarial support (if required).

(h) Communications between the Contract Parties and the Dispute Avoidance Board for the purpose of attempting to avoid or prevent Issues are In Confidence and Without Prejudice communications and may not be adduced as evidence in any subsequent dispute resolution process under the Contract

1.7.4 Advisory Opinions

(a) Either Contract Party may request, with the approval of the Other Party and the Board, an In Confidence and Without Prejudice advisory opinion from the Board in respect of an Issue or a Dispute. Such a request may be made orally during a DAB meeting or in writing at such other time as either the Principal or the Contractor may determine.

(b) The DAB may suggest that the Contract Parties j request an advisory opinion.

(c) If a request for an advisory opinion is received, the DAB may discuss the request with the Contract Parties, including the questions to be answered by the DAB in the advisory opinion before providing its advisory opinion.

(d) The DAB may issue directions to the Contract Parties for the presentation of submissions, and the provision of documents, to the DAB by the Contract Parties in respect of the subject matter of the advisory opinion.

(e) Following receipt of the Contract Parties’ submissions and any documents provided to the DAB, the Board will confer to formulate its advisory opinion. All Board deliberations will be conducted in private with all individual views kept strictly confidential from disclosure to the Contract Parties..

(f) The Board will deliver its advisory opinion with reasons in writing, unless the Contract Parties and the Board jointly agree otherwise. The opinion will be “In Confidence and Without Prejudice” and advisory only and will not be binding on the Contract Parties (unless they agree otherwise). Nor will the advisory opinion be binding on the Board in the event that a Contract Party refers a Dispute involving the subject matter of the advisory opinion to the Board for a Decision.

(g) If, with the aid of the Board’s advisory opinion, the Contract Parties are able to resolve the Issue or Dispute, the Contract parties will take all such reasonable measures to promptly implement any agreement reached in resolving the Issue or Dispute.

**1.8 DISPUTES**

**1.8.1** General

(a) The Contract Parties willco-operate to ensure that the Board is able to consider Issues or Disputes promptly, taking into consideration the particular circumstances and the time required to prepare appropriate documentation.

(b) The dispute resolution procedures and time periods set out in the DAB Agreement may only be modified by mutual agreement of the Contract Parties and the Board members.

**1.8.2 Prerequisites to Decision**

A Dispute may be referred to the Board for consideration and Decision in accordance with the Contract when either Contract Party believes that bilateral negotiations are unlikely to succeed or have reached an impasse, and/or the Project provides for a prior decision by the Superintendent and that decision has been issued.

**1.8.3 Requesting a Decision**

(a) Either Contract party may refer a Dispute to the Board for a Decision. Requests for a Board Decision (**Notice of Referral**) will be submitted in writing to the Chair of the Dispute Avoidance Board.

(b) The Notice of Referral will state clearly and in full detail the Dispute which is to be determined by the Board.

(c) A copy of the Notice of Referral will also be simultaneously provided to the other Board members and to the other Contract Party.

(d) After receiving the Notice of Referral and after conferring with both Contract Parties, the Chair will establish a submissions schedule which gives adequate time for the other Contract Party to respond to the requesting party's Notice of Referral and adequate time for the Board members to review all relevant material before holding any Conference and/or before making a Decision.

**1.8.4 Scheduling a Conference**

(a) The DAB Agreement empowers either Contract Party or the Board to schedule a conference in relation to a Dispute (**Conference**). A Conference is not compulsory.

(b) Upon receipt of a request for a Conference, and upon determining that a Conference is appropriate, or if both Contract Parties agree, the Chair will schedule a date for the Conference.

**1.8.5 Written** **Submissions**

(a) Within an agreed period after the referral of a Dispute to the Board, or within such other time as the Board may consider reasonable in the circumstances, the Contract Party who gave the Notice of Referral must, in addition to any particulars provided by that party in the relevant Notice of Referral to the Board, give to the other Contract Party and the Board a written statement of the Dispute referred to the Board including any draft statement of agreed facts and a written submission (which may include witness statements) on the dispute in support of that party’s contentions.

(b) Within an agreed period after this statement is served, or such other time as the Board may consider reasonable in the circumstances, the other Contract Party must give the first Contract Party and the Board a written response to the first Contract Party’s submissions and a final draft of the statement of agreed facts.

(c) If the Board considers it appropriate, the first party may reply in writing to the second Contract Party’s response within the time allowed by the Board.

(d) If the Board decides further information or documentation is required for its Decision in relation to the Dispute, the Board may direct one or more Contract Parties to provide such further submissions, information or documents as the Board may require.

(e) The Board must disclose to both Contract Parties all submissions, further submissions, information and documents received.

(f) Any failure by a Contract Party to make a written submission will not terminate or discontinue the Board’s Decision-making process.

**1.8.6 Conference**

1. Either Contract Party may, in writing, request the Board to call a Conference with the Contract Parties. Any such request will include a summary of the matters that the requesting Contract Party considers should be included in the Conference.
2. If neither Contract Party requests the Board to call a Conference, the Chair of the Board may nevertheless call a Conference, if the Board determines that it is appropriate.
3. Any such Conference is not a hearing. No persons shall be called to give evidence and no cross examination of any persons shall be allowed.

(d) Unless the Contract Parties agree otherwise, the Conference will be held on site.

(e) At least five days before the Conference, the Board must inform the Contract Parties in writing of the date, venue and agenda for the Conference.

(f) The Contract Parties must appear at the Conference and may make submissions on the subject matters at the Conference.

(g) If a Contract Party fails to appear at the Conference of which that party had been notified, the Board and the other Contract Party may nevertheless proceed with the Conference and the absence of one Contract Party will not terminate or discontinue the Decision-making process.

(g) The Contract Parties may be accompanied at the Conference by legal or other advisers. The Contract Parties and their legal or other advisors will be bound by any procedural directions that may be given by the Board in relation to the Conference both before and during the Conference.

(h) The Conference must be held in private.

(i) If agreed between the Contract Parties, transcripts of the Conference may be taken and made available to the Board and the Contract Parties. The costs of providing any such transcript shall be borne equally by the Contract Parties.

**1.8.7 Board’s Deliberations**

After the receipt of the Contract Parties’ written submissions and the Conference (if any), has been concluded, the Board will confer to formulate its Decision. All Board deliberations will be conducted in private with all individual views kept strictly confidential from disclosure to the Principal or the Contractor.

**1.8.8 Decisions**

1. As soon as possible after receipt of the Contract Parties’ written submissions and/or after any Conference and, in any event, not later than [30] Business Days after receipt of the parties’ written submissions and/or any Conference relating to the referral of a Dispute to the Board, the Board must:
2. make a Decision in relation to the Dispute between the Contract Parties; and
3. notify the Contract Parties of that Decision.
4. The Decision of the Board must:
5. be in writing, stating the Board’s Decision and give reasons;
6. be made on the basis of the written submissions (if any) of the parties, the Conference (if any) and the Board’s own expertise; and
7. be made in accordance with the Contract.
8. If the Board’s Decision contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a material mistake in the description of any person, matter or thing, or a defect in form, the Board must correct the Decision.

**1.8.9 Acceptance** **or** **Rejection**

1. Within an agreed period (usually four weeks) of receiving the Board’s Decision, or such other time as may be specified by the Board, both the Principal and the Contractor will provide written notice to the other and to the Board of its acceptance or rejection of the Board’s Decision (the latter being a Notice of Dissatisfaction).

(b) The failure of either Contract Party to respond within the specified period will be deemed an acceptance of the Board’s Decision, and in which event the Board’s Decision will become final and binding on the Contract Parties.

(c) If either Contract Party rejects the Board’s Decision by issuing a Notice of Dissatisfaction, then the subsequent dispute resolution procedures of the Contract will apply.

(d) If, with the aid of the Board’s Decision, the Contract Parties are able to resolve the Dispute, the Contract Parties will take all such reasonable measures to promptly implement any agreement reached in resolving the Dispute.

**1.9 Payment**

**1.9.1** Payment and Expenses

1. The payment of fees and expenses of the Board members will be in accordance with the schedule to the DAB Agreement.
2. It is customary that the Principal and the Contractor will each pay 50% of the fees and expenses of the three Board members for attendance at the periodic meetings of the Board.

(c) The fees and expenses of all three Board members for additional meetings, for reviewing Issues and Disputes and for the making of a Decision in accordance with the DAB Agreement will be shared equally by the Principal and the Contractor.

(d) If the Board desires additional services, such as legal or other expert, accounting, data, research and the like, the Principal and the Contractor must agree in advance and the costs will be shared by the Contract Parties as mutually agreed.

(e) Each Contract Party will be responsible for its own costs during the DAB process, including staff time for preparatory work and attendance at meetings, consultants and counsel fees and any other costs.