Dispute Resolution Board (DRB) Agreement – C7835.TIC.DRB

Transport Infrastructure Contract

July 2023

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Three party agreement

Dated: <Insert date>

Parties

1. The State of Queensland represented by the Department of Transport and Main Roads (the Principal)
2. <Insert name of Contractor> <Insert ABN / ACN> <Insert Address> in the State of Queensland (the Contractor)
3. Members of the Dispute Resolution Board (collectively DRB Members), namely:

<Name, company name and address, ABN and mobile number of Member 1>

<Name, company name and address, ABN and mobile number of Member 2>

<Name, company name and address, ABN and mobile number of Member 3>

Background

1. The Principal and the Contractor have entered into a Contract for <Insert Contract name, number, description> (the Contract).
2. Both the Principal and the Contractor have agreed to the appointment of <Insert names of members 1, 2and 3> as the DRB Members.
3. Clause 47 of the General Condition of Contract of <Insert Contract number> provides for a Dispute resolution process through the establishment and the operation of a DRB to assist in resolving Disputes under the Contract.
4. This Agreement sets out the rights, obligations and duties of the DRB, the Principal and the Contractor in relation to the DRB and any Dispute(s).

# Definitions and interpretation

## Definitions

In this Agreement:

|  |  |
| --- | --- |
| Term | Definition |
| Agreement | this Agreement |
| Contract | the specific Contract identified in this Agreement |
| Direction | a written statement marked ‘Direction’ made by the DRB to all Parties |
| Dispute | the same meaning as under Clause 47 of the General Conditions of Contract |
| Parties | the Principal, Contractor and the DRB |
| Works | has the same meaning as under Clause 2 of the General Conditions of Contract |

## Interpretation

In this Agreement, headings and underlining are for convenience only and do not affect the interpretation of this Agreement and, unless the context otherwise requires:

1. words importing the singular include the plural and vice versa
2. words importing a gender include any gender
3. an expression importing a natural person includes any company, partnership, joint venture, association, corporation, or other body corporate and any governmental agency
4. a reference to a part, Clause or Party is a reference to a part and Clause of, and Party to, this Agreement, and
5. the Parties agree that if there is any inconsistency between the terms of this Agreement and the Contract, the terms of this Agreement shall prevail.

This Agreement is effective as at the date all Parties sign this document and shall continue for the duration of the process described in Clause 15 of this Agreement unless terminated earlier in accordance with clauses 10 or 11 of this Agreement.

# DRB formation

The Parties acknowledge that the DRB:

1. has been formed, and
2. shall perform its obligations.

# DRB obligations

## Impartiality

Each DRB Member agrees to consider fairly and impartially the Disputes referred to the DRB.

## Independence

Each DRB Member agrees to act independently in the consideration of facts and conditions relating to a Dispute.

## DRB duty

Each DRB Member agrees to act honestly when performing the duties and functions required by this Agreement.

## General duties

Each DRB Member agrees to carry out their obligations as a member of DRB:

1. with due care and diligence
2. in compliance with the Contract and in accordance with this Agreement, and
3. in compliance with all applicable laws, regulations and other statutory requirements.

## Dispute avoidance and prevention

Each DRB Member agrees to do all things and to take such action as may be practicable in accordance with this Agreement to assist the Principal and the Contractor in avoiding or preventing Disputes from arising under the Contract and if a Dispute cannot be avoided or prevented, to decide it in accordance with Clause 47 of the Contract and this Agreement

# Principal’s commitment and responsibilities

Except for its participation in the DRB’s activities as provided in the Contract and this Agreement, the Principal shall:

1. not solicit advice or consultation from the DRB or the DRB Members on matters dealing with the resolution of issues which may compromise the DRB's integrity
2. act in good faith towards each DRB Member and the DRB, and
3. comply with the reasonable requests and Directions of the DRB.

# Contractor’s commitment and responsibilities

Except for its participation in the DRB's activities as provided in the Contract and this Agreement, the Contractor shall:

1. not solicit advice or consultation from the DRB or the DRB Members on matters dealing with the resolution of Disputes which may compromise the DRB's integrity
2. act in good faith towards the DRB or the DRB Members, and
3. comply with the reasonable requests and any directions from the DRB.

# Confidentiality

In relation to all confidential information disclosed between the Parties during resolution of a Dispute, the DRB agrees:

1. to keep that information confidential
2. not to disclose that information, except to a Party, or representative of that Party, participating in the Dispute resolution if it is compelled by law to do so
3. not to use that information for a purpose other than the resolution of the Dispute, and
4. to be bound by this obligation of confidentiality whether or not such confidential information is, or later becomes, in the public domain.

Confidential information includes, but is not limited to, the documents and information as defined in Clause 8.9 of the General Conditions of Contract.

# Conflict of interest

The DRB Members shall be neutral, act impartially and be free of any conflict of interest.

For the purpose of this Clause, the term ‘DRB Member’ also includes that DRB Member’s current primary or full‑time employer and ‘involved’ means having a contractual relationship with either party to the Contract or any other entity, such as a subcontractor, design professional or consultant, having a role in the Works.

Prohibitions and disqualifying relationships for the DRB‑nominated third person include:

1. an ownership interest in any entity involved in the Contract or a financial interest in the project, except for payment for services under this Agreement
2. previous employment by, or financial ties to, any Party involved in the Works within a period of two years prior to award of the Contract, except for fee‑based consulting services on other projects
3. a close professional or personal relationship with any key member of any entity involved in the Works which, in the judgement of either Party, could suggest partiality
4. prior involvement in the Project of a nature which could compromise the DRB's ability to participate impartially in the DRB's activities
5. employment, including fee‑based consulting services, by any entity involved in the Works, except with the express approval of both the Principal and Contractor, and
6. discussion concerning or the making of an agreement with any entity involved in the Works regarding employment after the Works are completed.

If a DRB Member, during the term of appointment as a DRB Member, becomes aware of any circumstance that might reasonably be considered to affect the DRB Member's capacity to act independently, impartially and without bias, the DRB Member must inform the Principal and the Contractor and the other DRB Members.

# Liability

## Liability

Each DRB Member is not liable to either the Principal or the Contractor for any act or omission done in good faith and with due care and diligence.

## Due care and diligence

For the purpose of Clause 8.1 of this Agreement, the Parties agree that the DRB Members’ act shall have been done in good faith and with due care and diligence, unless a reasonable person in the position of the DRB Member would not have so acted or would not have made such an omission.

# Indemnity

## Indemnity

In signing this Agreement, the Principal and the Contractor each release each DRB Member from all claims including without limitation claims by third parties, the Principal or the Contractor may otherwise have for any act or omission done in good faith and with due care and diligence.

## Due care and diligence

For the purpose of Clause 9.1 of this Agreement, the Parties agree that the DRB Members’ act shall have been done in good faith and with due care and diligence unless a reasonable person in the position of the DRB Member would not have so acted or would not have made such an omission.

# Termination of Agreement

This Agreement may be terminated by mutual written agreement of the Principal and the Contractor. Should an agreement be reached between the Principal and the Contractor to terminate this Agreement, the DRB has no right of objection to the termination of this Agreement.

# DRB Members’ resignation

## DRB resignation

A DRB Member may resign from the DRB by providing four weeks’ written notice to all members of the DRB and to the Parties to this Agreement.

## DRB re‑appointment

A replacement DRB Member shall be appointed in accordance with the Contract, subsequent to a previous DRB Member resigning or being terminated from this Agreement. The Parties and DRB Members acknowledge that they, and the new DRB Member, shall enter into a replacement Agreement similar to this document as a condition of a valid re‑appointment under the terms of the Contract and the Agreement.

# Governing law

This Agreement must be governed by, and construed in accordance with, the laws of the State of Queensland and all Parties hereby submit to the jurisdiction of the courts of Queensland.

# Relationship of the Parties

This Agreement is not intended to create any partnership, agency or joint venture with respect to any one or more of the Parties.

# Notices

All notices must be in writing and sent to the addresses on Page 1 of this Agreement unless the Party has notified to another Party a change of address.

# The process

All Parties to this Agreement must comply with the document Principles of Process, which is attached to this Agreement.

Following the issue of a Notice of Dispute under Clause 47 of the Contract, and the matter has been referred to the DRB in accordance with the Contract, all Parties to this Agreement shall endeavour to meet or better the following timetable:

1. <Within X business days>, the Principal and the Contractor shall submit all of their respective documentation (including, but not limited to, their respective written submissions, expert reports (if any), relevant contractual correspondence exchanged between the Principal and the Contractor over the course of the Project, source documentation and data) to the DRB.
2. <Within Y business days>, the DRB shall have considered all documentation submitted to it by the Principal and the Contractor, including any documentation submitted to it in response to a Direction issued by the DRB.
3. <Within Z business days>, the Parties shall attend a further meeting to provide verbal responses to any questions asked by the DRB and to receive the DRB’s opinion with respect to the Contractor’s entitlement to the claims, including time. <Time assessment from DRB to be advised by the DRB upon initial review>
4. if the DRB’s opinion is that there exists an entitlement of claim, the DRB shall determine a fair and reasonable framework for calculating quantities and costs
5. if not previously agreed between the Contractor and the Principal, the DRB shall determine a fair and reasonable entitlement for extension of time for each Separable Portion as defined under the Contract, and
6. the intention is that the DRB works with the Principal and the Contractor so that the DRB’s determination for quantum of costs and time (where applicable) is accepted by both Parties.
7. <Within X weeks>, the DRB shall provide its final opinion (in writing) regarding the Dispute for both quantum of costs and time (where applicable).

The dates contained within this Clause 15 of this Agreement may be changed by mutual agreement between the Principal and the Contractor, and subject to advice from the DRB.

# Payment

<To be agreed>

Executed as a Deed

|  |  |
| --- | --- |
| Signed, sealed and delivered by a duly authorised delegate of the Director‑General, Department of Transport and Main Roads in the presence of: | Signature of officer |
|  |
| Signature of witness | Name of officer |
|  |  |
| Name of witness | Office held |
|  |  |

|  |  |
| --- | --- |
| Executed by [Contractor] in accordance with Section 127 of the Corporations Act2001 (Cth): | |
| Signature of Director | Signature of Director / Company Secretary (Please delete as applicable) |
|  |  |
| Name of Director | Name of Director / Company Secretary |
|  |  |

|  |  |
| --- | --- |
| Signed by [Member*1*] in the presence of: | |
| Signature of witness | Member |
|  |  |
| Name of witness | Name of Member |
|  |  |

|  |  |
| --- | --- |
| Signed by [Member 2] in the presence of: | |
| Signature of witness | Member |
|  |  |
| Name of witness | Name of Member |
|  |  |

|  |  |
| --- | --- |
| Signed by [Member 3] in the presence of: | |
| Signature of witness | Member |
|  |  |
| Name of witness | Name of Member |
|  |  |

Principles of process

# Prior good faith negotiation

In accordance with Clause 47 of the Contract:

1. The Principal and the Contractor shall enter into good faith negotiations to settle a Dispute before formally referring such a Dispute to the DRB.
2. These good faith negotiations shall be founded on the principle of full and timely disclosure of each Party’s position to the other Party, including the exchange of pertinent supporting records, analyses, expert reports and similar documentation, and shall proceed without delay following the inception of the Dispute. Such good faith negotiations may involve the solicitation and rendering of a DRB advisory opinion as described herein.
3. If one Party fails to meet or adhere to the time requirements set forth in Clause 48 of the Contract, the other Party may then formally refer the Dispute to the DRB.

# Failure to prepare a pre‑hearing submission or attend a DRB hearing

In the event that either Party fails to deliver a pre‑hearing submission by the date established by the DRB, or a minimum of 10 business days, whichever is lesser, the DRB shall, at its discretion, determine whether the hearing proceeds as originally scheduled or whether additional time shall be provided and a new date established. On the final date and time established for the hearing, the DRB shall proceed with the hearing, using the information that has been submitted.

In the event that some or all of the representatives of either Party fail to appear at the appointed time of a DRB hearing, the DRB shall proceed with the hearing. The hearing shall take place as if all Party representatives were in attendance and the DRB shall consider all evidence brought before it and hear testimony from those Party representatives that are present.

# Use of outside experts by the Principal or the Contractor

A Party intending to offer an outside expert’s analysis at the hearing, shall disclose such intention in writing to the other Party and to the DRB no less than 20 business days prior to the due date for delivering the pre‑hearing submission. The expert’s name and a general statement of the area of the Dispute that will be covered by his or her testimony shall be included in the disclosure.

Upon receipt of this disclosure, the other Party shall have the opportunity to secure the services of an outside expert to address or respond to those issues that may be raised by the other Party’s outside expert. The disclosure requirements shall be the same as that specified, except the time requirement is 10 business days.

The cost for securing outside expert services shall be borne by the Party securing such services.

# Use of outside experts by the DRB

Prior to arranging for outside experts, the DRB shall obtain prior approval from the Principal and the Contractor by providing:

1. a statement explaining why the expert assistance is needed
2. an estimate of the cost of the expert assistance
3. a disclosure statement, and
4. a confidentiality statement, consistent with agreement from the DRB, executed by the proposed expert.

The DRB Chair (if not specified, the DRB third member) shall include the cost of the outside expert in his or her regular invoice and provide a copy of the invoice. Invoices shall be in accordance with the requirements for DRB Member invoices.

The Contractor and the Principal shall equally bear the cost of the services of the outside expert employed by the DRB.

# Clarification

Either Party may request clarification of a report. Within a reasonable period of time, the DRB shall provide written clarification to both Parties.

Requests for clarification shall be submitted in writing simultaneously to the DRB and to the other Party.

Only one request for clarification per Dispute from each Party will be allowed.

# Reconsideration

Either Party may request reconsideration of a report when new information is obtained or developed that was not known at the time of the hearing or when, in the DRB’s opinion, a Party misunderstood or failed to consider pertinent facts of the Dispute. Within a reasonable period of time, the DRB shall provide written reconsideration to both Parties.

Requests for reconsideration shall be submitted in writing simultaneously to the DRB and to the other Party.

The DRB will not entertain requests for reconsideration that amount to a renewal of prior argument or additional argument based on facts available at the time of the hearing.

Only one request for reconsideration per Dispute from each Party will be allowed.

# Advisory opinions

An advisory opinion serves as a vehicle for potentially avoiding a DRB hearing. It is not intended to replace the Dispute resolution process specified herein but may be implemented as part of the good faith negotiations conducted between the Parties.

When mutually agreed by the Principal and the Contractor, the DRB may provide an advisory opinion on any Dispute.

# Compensation

<*to be agreed*>

# Review of DRB decisions

The DRB is to act in good faith, honestly and impartially in making any decisions, recommendations or determinations referred to it by the Parties; however, the principles of procedural fairness and natural justice will not apply to any non‑binding recommendations made by the DRB and judicial review is not available in such a case.

# Role of the DRB

The role of the DRB is to provide independent assistance in technical and administration aspects of the Contract in order to assist the Principal and the Contractor in firstly attempting to avoid or prevent and, if unable to avoid or prevent, to determine Disputes under Clause 47 of the Contract and this Agreement in a timely manner.

The Principal and the Contractor will furnish to each of the DRB Members all documents necessary for the DRB to perform its functions, including copies of all Contract documents plus periodic reports, such as progress reports, minutes of weekly or other project control meetings, site meetings or similar meetings and any other documents that would be helpful in informing the DRB Members of matters in relation to the Project.

The individual DRB Members are not the representative of the party which appointed that representative. The entire DRB must function as an objective, impartial and independent body at all times.

Communications between the Principal and the Contractor and the DRB for the purpose of attempting to avoid or prevent Disputes, and DRB meetings themselves, are on the basis that they are 'In Confidence and Without Prejudice' and may not be adduced as evidence in any dispute resolution process under Clause 47 of the Contract.

**11 Frequency of regular meetings and construction Site visits**

The frequency and scheduling of meetings and site visits necessary to keep the DRB properly informed of the project circumstances will generally be agreed between the DRB, the Principal and the Contractor.

In the case of a failure to agree between the DRB, the Principal and the Contractor, the DRB will schedule the meetings and visits as it sees fit.

The frequency of meetings of the DRB should generally be two or three monthly, but the meeting schedule may be influenced by work progress, unusual events and the number and complexity of potential Disputes.

The first Dispute Avoidance Board meeting should be held within one month of the date of this Agreement.

Schedule of Fees and Disbursements

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| No | Work Description / Scope | [Name of Member #1] | [Name of Member #2] | [Name of Member #3] |
|  | Monthly retainer  (including initial review of contract documentation, routine review of Project minutes and reports, preparation for DRB meetings and internal communications between DRB members) | $ | $ | $ |
|  | Daily fee for routine DRB meetings  (nominal frequency of 2 or 3 monthly intervals). This fee is in addition to the Monthly retainer of (1) above. | $ | $ | $ |
|  | Travel time for DRB Members  (this hourly fee is to be charged for travel from the DRB Members' home city to the site of the DRB meeting)  These fees are in addition to the monthly retainer and daily fee in (1) and (2) above. | $ | $ | $ |
|  | Hourly fee (this hourly fee is to be charged for advisory opinions, decisions relating to actual disputes and other activities which are not covered by the item 1 monthly retainer or the item 2 daily fee) | $ | $ | $ |
|  | Escalation provision  (Annual adjustment from the anniversary of date of DRB Agreement) | [x]% increase | [x]% increase | [x]% increase |
|  | Expenses  (reimbursed at cost, supported by receipts. For travel to Site, business class travel is agreed) | At cost | At cost | At cost |