ADR ROADS LESS TRAVELLED:
Alternative Dispute Resolution Strategies to Consider for Construction Disputes

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INTRODUCTION

There are a number of alternative dispute resolution methods that are not often used in Texas to end (or avoid) construction disputes. At times it seems ADR has fallen into a rut of failed mediations, and judicial or arbitral proceedings force parties to expend considerable time and resources to engage in discovery and motion practice, often waiting until the eve of trial to settle or fight it out. Discussed below are some not-so-common "ADR-worthy" dispute resolution methods to consider for construction industry clients and counsel who want to more thoroughly evaluate the parties' merits in a dispute, and more efficiently achieve resolution and peace.

MED-ARB & ARB-MED

Med-Arb and Arb-Med are ADR methods that have been around a long time. The idea is that, by having the Mediator also serve as Arbitrator, the parties may be more likely to settle knowing an arbitration decision will end their dispute if the mediation fails.

There are important ethical considerations a neutral must consider in order to serve in both roles of Mediator and Arbitrator. Before agreeing to also wear the hat of an Arbitrator, a Mediator must recognize confidential mediation caucuses will be *ex parte* communications not permitted in arbitration. The Mediator needs to be careful to obtain the parties' consent to allow such *ex parte* communications, with full disclosure of the inherent conflicts for serving in both roles. Even with the parties' consent to proceed, the contrasting differences between mediation and arbitration can cause many neutrals to shy away from agreeing to serve in both roles.[1]

The obvious difference between Med-Arb and Arb-Med is whether the arbitration step comes *after* or *before* the mediation step. If mediation comes first, the parties may resist discussing in private caucus the shortcomings of their positions out of fear their reactions may influence an adverse decision on their positions. Where arbitration comes first, the decision is rendered but held in abeyance during the subsequent mediation, only to be revealed if the parties fail to settle. The concern here is that the parties may believe Mediator is no longer impartial and is unduly influenced by the decision to push toward a settlement consistent with the decision.

[1] Appendix A is a sample form of agreement to have a Mediator also serve as Arbitrator.

As Mediator, a neutral must be careful to resist subconscious biases arising from the decision. The Mediator must not force settlement because of how the Mediator has decided the case. For this reason, the Mediator will probably want to defer making any ruling as Arbitrator until after taking time to anticipate, explore, and fully understand the parties' positions and facts relevant to all claims and defenses. By doing so, the Mediator can also avoid the awkward predicament of having to reveal a decision that is wrong because he or she overlooked a fact or theory that was not recognized until later in the mediation process.

Of course, mediation and arbitration are entirely different ADR process, which involve entirely distinct talents. Both processes require excellent listening and reasoning abilities. Beyond this, mediation requires the ability to calmly and steadily facilitate the parties' attention on the risk of uncertainty for an adverse outcome and the value of a settlement in light of the cost and time impositions of litigation. Arbitration, on the other hand, puts aside the question of whether the parties should settle. It requires careful consideration of the facts and legal bases for the parties' competing claims and defenses before rendering a written decision on the merits of their claims and defenses, as well as the ability to provide brief but sound reasoning for the decision. Nevertheless, with the right neutral, under the right circumstances, Med-Arb or Arb-Med may be a worthwhile ADR approach for some disputes.

MED+ARB

When parties in a dispute need someone to call the balls and strikes, but they and their Mediator cannot agree to the Mediator also serving as Arbitrator, they may want to consider using Med plus Arb ("Med+Arb"). In Med+Arb, the parties agree to use two (2) separate neutrals: a Mediator, and an Arbitrator. Here, the parties appoint an Arbitrator to make a decision to help the parties overcome impasse. The arbitration process is ancillary to the mediation process. The Arbitrator's decision can either be a final and binding determination, or a non-binding recommendation that is only advisory. If advisory, the parties can agree to make it admissible in future legal proceedings if they still fail to settle after receiving and considering the recommendation. The entire process should be uniquely tailored to the parties' needs and requirements under an agreement to use Med+Arb.

Med+Arb, like Arb-Med or Med-Arb, may be most helpful for parties who have a good business relationship or strong aversion to protracted litigation. Med+Arb is more fully explained in an article recently published by one of the authors in the AAA's Mediation Magazine.[2] The article explains the timing when parties may want to consider Med+Arb, and how a Mediator may assist parties to agree to use this ADR process. The article also includes a template for developing a Med+Arb agreement, a copy of which is also attached to this paper.[3]

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[2] Reed Sr., Richard L., *MED+ARB: A Different Concept for Combining Mediation and Arbitration*, American Arbitration Association Mediation Magazine, published at MED+ARB: A Different Concept for Combining Mediation and Arbitration - AAA Mediation Magazine (January 19, 2026).

[3] See Appendix B.

Key elements for the Med+Arb agreement include defining the scope of arbitration, establishing how the arbitration will be administered, including the process for arbitrator disclosures, appointment and compensation, the matter of confidentiality, and the process for sharing information with the Arbitrator on which to render a decision or award. The Med+Arb agreement should address how and when the dispute will be submitted for the Arbitrator's decision, whether it is binding or non-binding and advisory, and if advisory whether it is admissible in evidence in future proceedings. It is possible for the Med+Arb agreement to describe the Med+Arb process in a way that enables the Arbitrator to have it serve in place of or as a component of a Preliminary Hearing and Scheduling Order.

The most important thing to recognize about the value to Med+Arb is that it enables the parties and the Mediator to use arbitration to get to resolution without the ethical complications and other concerns that come with trying to have a Mediator also wear the hat of Arbitrator.

DISPUTE REVIEW BOARDS

A dispute review board ("DRB") is a panel of three (3) impartial party-appointed construction professionals who are kept abreast of Project issues and challenges to informally advise the Project Team over the course of the Project to avoid disputes. In the United States, DRBs will often include a mix of attorney and non-attorney construction professionals. When necessary, and if requested, the DRB can provide written recommendations on how the DRB believes the dispute should be resolved. A DRB's recommendations can be informal or issued in formal written form. They are usually nonbinding, but parties may agree to make them admissible in future litigation.

DRBs have been in use, primarily in tunneling and other large scale civil works construction projects for over 50 years. In Texas, except for large scale transportation projects, this ADR method has not taken root. DRBs are virtually unheard of for large scale vertical construction projects, like commercial building projects or professional sports stadiums.

The Dispute Resolution Board Foundation (DRBF) provides extensive training to its members on real-life examples of Project disputes. Well-trained DRB members have expertise to remain calm and neutral participants in periodic progress meetings to help the Project Team recognize and deal with issues that may lead to a dispute. For example, the DRB will encourage a Project Team to discuss the status of resolution of a pending design change issue rather than allowing it to linger and possibly lead to a scheduling delay and change order dispute. Similarly, a DRB can help the Project Team consider potentially ambiguous contract language to arrive at a reasonable interpretation that will avoid a costly dispute and keep the Project on track. For example, the DRB could help the Project Team their address questions about whether certain work is included in the Contractor's scope of work, or "NIC" - not in contract.

The best practice for use of a DRB is to involve the DRB in the Project from the beginning, by having the DRB help the Project Team establish ground rules up front for periodic status or progress meetings to discuss any issues or challenges facing the Project Team, document and maintain a record of the DRB meetings, log action items for follow up attention, and take advantage of the DRB members' experience and training to brainstorm problems and possible

solutions before issues rise to the level of a dispute. Direct interaction between the DRB members and non-attorney Project Team members during progress meetings facilitates dispute avoidance through early, candid discussion of issues that can affect Project cost and time.

The most significant mistake made in implementing a DRB is deciding to use DRB on only an "*ad hoc"* basis to hear a dispute that has already progressed to the point of needing the DRB's formal written recommendation. As the saying goes, by that time, "the horse is already out of the barn." This mistake is usually the result of a belief that DRBs are costly. However, numerous studies over a long period of time have demonstrated DRBs work well to resolve disputes early and cost effectively.[4] The study on the effectiveness of DRBs by Professors Renato Nazzini and Raquel Macedo Moreira of King's College London showed DRBs are an overwhelming success in avoiding construction disputes at significantly less than 1% of the total cost of the Project, far less than the typical 3 to 5% of Project cost for a performance bond.[5]

Over 70% of entity respondents in the King's College London study stated they proceeded in litigation or arbitration *less than 10% of the time* after considering a DRB's non-binding recommendation.[6] For those entity respondents who proceeded with subsequent litigation or arbitration after receiving a DRB's written decision, the King's College Study found 50% of them reported subsequent decisions were *never substantially different from the DRB decision*, and another 18% reported that substantial differences between the decision reached in subsequent proceedings and the DRB decision were *rare*.[7] In addition, from a time saving perspective, a Florida Department of Transport (FDOT) study showed that Projects using DRBs experienced on average 11.5 days of delay vs. 105.3 days of delay for Projects that did not use DRBs.[8] The DRBF's statistical database over the 40-year period from 1975 to 2015 showed that, for over 2800 projects having a combined value of $275 billion dollars, all project issues were resolved on those projects without any litigation or arbitration proceedings. Over the same 40-year period, DRBF survey results showed only 7% of potential disputes advanced to a DRB hearing after the parties considered the DRB's informal advice for avoiding those potential disputes. These statistics underscore the cost and time saving potential for DRBs.

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[4] *See* Jeremy Glover, *The Effectiveness of Dispute Boards: An Historical Overview,* The International Construction Law Review (2025).

[5] Professors Renato Nazzini and Raquel Macedo Moreira of King's College London, "2024 Dispute Boards International Survey: A Study on the Worldwide Use of Dispute Boards over the Past Six Years," published at https://www.kcl.ac.uk/law/assets/kcl-dpsl-2024-dispute-boards-international-survey-report-digital-aw.pdf, at 66. Based on 117 responses for Projects using DRBs, 50% experienced total DRB costs less than 0.5%, and another 29% experienced a total DRB costs less than 1.0%, of the Project cost. Nearly all other responses generally reported total DRB costs at less than 3.5% of the Project cost.)

[6] See King's College London Study at 55.

[7] See King's College London Study at 56.

[8] *Id*. Glover, Jeremy, *The Effectiveness of Dispute Boards: An Historical Overview,* The International Construction Law Review (2025), at 145.

A best practices guide that explains the DRB process and procedures is available on line at the Dispute Review Board Foundation website.[9] In addition, the Dispute Avoidance and Resolution Board Specifications, Operating Procedures, and Hearing Rules and Procedures are available at the AAA's website.[10] The DRBF and the AAA do not view themselves as competing organizations, rather, they work collaboratively to promote the use of DRBs.

The construction attorney's role in DRB proceedings usually involves two major forms of legal advice, helping clients to: (1) develop construction contract documents to implement a DRB process;[11] and (2) prepare the Project Team for its presentations to the DRB in progress meetings, or at more formal dispute hearings. Otherwise, attorneys usually remain observers in DRB proceedings, available to assist with DRB approval if needed.

The construction attorney who helps clients implement and support a DRB process should be recognized and appreciated as an ADR-savvy construction attorney who is a true problem solver, which may lead to more business from clients well served by the DRB process. It is the Owner, and Owner's counsel, who may be in the best position to promote implementation of a DRB early in the pre-planning stages of a Project, before the solicitation process commences. Attorneys for construction industry clients who are involved in or are pursuing a contract for the design and/or construction of any large scale Project should encourage their clients, and especially an Owner client, to consider use of a DRB. Above all, attorneys and clients who use DRBs on a Project should understand that DRBs do not replace or subvert other forms of ADR, they are simply another tool in the ADR toolbox.

SINGLE PROJECT-SPECIFIC NEUTRAL ADVISOR

Parties who do not want a DRB out of cost concerns can consider appointing a mutually acceptable neutral advisor to serve in a similar dispute avoidance role for the construction project that may not be of large scale. The parties should select a neutral who is known to and trusted by both the Owner and Contractor and agree to seek guidance from their neutral advisor on how best to resolve or avoid the dispute, prior to initiating any other ADR process. For the AIA contract forms, the neutral advisor could be appointed in place of the Initial Decision Maker.[12]

OTHER UNCOMMON ADR METHODS

The following discussion will briefly touch on other uncommon ADR methods that are worthy of consideration to resolve construction disputes.

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[9] https://www.drbf.org/dispute-board-manual.

[10] https://www.adr.org/media/5qzomxp0/construction_darb_specifications_rules_procedures.pdf .

[11] Appendix C provides sample clauses that can be tailored to use DRBF or AAA procedures to implement a DRB.

[12] Appendix D provides sample clauses that can be used to adapt the AIA A-133 (2019) Standard Form of Agreement Between Owner and Construction Manager as Constructor, where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, to designate a neutral advisor in lieu of an Initial Decision Maker for a Project, replacing Sections 12.1.1., 12.1.2, and 12.2.2 of the A-133 form.

Arbitration – Bracketed (High-Low)

In high-low arbitrations, the parties agree in advance that the final arbitration award will be adjusted to minimum/maximum limits. This process is described in JAMS Rule 32, as one of two arbitration options. If directed by the parties, JAMS will provide the Arbitrator with their agreed-upon maximum and minimum amounts of damages on each claim, or aggregate amounts for all claims. If the Arbitrator awards damages between the maximum and minimum amounts agreed upon, that becomes the final award. If the Arbitrator's award falls below the minimum or above the maximum, it is "corrected" to be that damage limit that is closest to the awarded amount, i.e., no less that the minimum and no more than the maximum, as applicable.

Arbitration - Baseball Style

The term "baseball arbitration" is derived from the Major League Baseball process for arbitrating salaries as between major league clubs and players, described on the MLB's website[13] as follows:

> If the club and an arbitration-eligible player have not agreed on a salary by a deadline (typically in mid-January), the club and player must exchange salary figures for the upcoming season.
>
> After the figures are exchanged, a hearing is scheduled (typically in February). Teams and players are still free to continue negotiating on a contract up until the hearing date. If no one-year or multi-year settlement can be reached by the hearing date, the case is brought before a panel of arbitrators. After hearing arguments from both sides, the panel selects either the player- or team-submitted salary figure (but not one in between) as the player's salary for the upcoming season.

Baseball arbitration can also work to arbitrate a construction dispute if the parties (usually those in a 2-party dispute) agree to adopt this ADR method. Typically, each party's proposed award of damages is provided to the Arbitrator(s) prior to hearing (although the parties could also agree to do so at the during or at the conclusion of the hearing). The Arbitrator(s) must enter the proposed award of the one party that its considered most appropriate. This ADR method is described by JAMS (formerly known as the Judicial Arbitration and Mediation Services organization) in its Rule 33. The Rule requires submission of monetary damage proposals at least seven (7) days prior to hearing. Parties are allowed to revise and exchange their proposals at any time prior to close of the hearing. The parties must agree to have JAMS submit their proposals to the Arbitrator. The party's proposed damage amount found to be most reasonable and appropriate under JAMS Rule 24(c)[14] is then rendered by the Arbitrator(s) without an accompanying written statement of reasons for the award that otherwise would have been required under JAMS Rule 24(h).

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[13] https://www.mlb.com/glossary/transactions/salary-arbitration.

[14] JAMS Rule 24(c) states: "(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy."

Mediation - AI-Assisted

Although artificial intelligence (AI) is the subject of a separate, more in-depth presentation to the 39th Annual Construction Law Conference, a brief discussion is warranted here about the use of AI in mediations. The American Arbitration Association (AAA) recently announced the arrival of the AI Arbitrator.[15] The AI Arbitrator is AAA's artificial intelligence tool for providing AI-driven awards in two-party cases submitted on the parties' briefs only. According to its frequently asked questions publication,[16] AAA's AI-Arbitrator decisions are informed through an AI system "trained on real AAA construction awards and refined through expert human calibration."[17]

The AI-generated "preliminary" decision must undergo an AI-selected human arbitrator's review to validate and finalize it before being entered.[18] The Rules include protections for human arbitrators against liability and exposure to being called as a witness.[19] The parties can agree that an AAA AI-generated decision is advisory and non-binding, enabling parties and the mediator to look into an "AI-crystal ball."[20] While the Rules do not expressly apply to mediations, it stands to reason parties could obtain an advisory AI-generated decision to aid the parties and their mediator in mediation.[21] In this fashion, an AAA AI-generated advisory decision could be used in much the same way the above-described Med+Arb process contemplates using an Arbitrator's non-binding decision. Alternatively, Mediators could use their own specially licensed, closed-loop AI software tools to obtain for consenting parties a non-binding AI-generated decision, provided it is done using an internal, confidential, closed-loop AI software system.

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[15] The AAA's AI Led Arbitration Rules are published at https://www.adr.org/media/e20hq04d/ai-led_arbitration_rules.pdf.

[16] *See* https://www.adr.org/media/1vva0v2y/ai-arbitrator-one-sheet-20251029-1.pdf.

[17] *See* AAA' publication of frequently asked questions, Question No. 3, at ai-arbitrator-one-sheet-20251029-1.pdf.

[18] *See* AI Led Arbitration Rules R-7 and R-8.

[19] *See* AI Led Arbitration Rule R-12. By proceeding under the Rules, the parties agree a human arbitrator "cannot be held liable for any action or omission connected to the arbitration." Although qualified immunity extends to *court-appointed* facilitators of an alternative dispute resolution procedure or system under Chapter 154.055 of the Texas Civil Practice And Remedies Code for acts other than wanton and willful disregard, arbitrators acting as human arbitrators under the Rules should consider whether the parties' actions in proceeding under the AI Led Arbitration Rules, or even a contractual agreement expressly adopting the Rules, passes muster to effectively hold them harmless from liability more specific, conspicuous exculpatory language covering their negligence under the express negligence doctrine. *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 510–11 (Tex. 1993); *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (Tex. 1987); see also *When the Extraordinary Becomes Ordinary - Is The Express Negligence Rule Under Attack In Texas __ Baylor Law Review ___ (2010)*.

[20] *See* AI Led Arbitration Rule R-13.

[21] Perhaps, in the future, the AAA will specially license Mediators to use the AI Arbitrator to assist in mediations.

Mediation - Guided Choice

Guided-Choice Mediation involves the parties' agreement to appoint a Mediator to work with them, independently and confidentially, to help the parties seek resolution of their dispute *before* they incur significant legal costs and become too mired in their positions. It is a unique approach to mediation fathered by Paul Lurie, Director of the Guided Choice Mediation Interest Group.[22] The key to success is the parties' early engagement of the Guided-Choice Mediator, who engages them in early exchanges of information, identifies factors that can lead to stalemate, and recommends a customized settlement process to manage the risk of impasse.[23] The Guided-Choice Mediator helps the parties create their own pre-mediation settlement process designed to prepare them to anticipate and avoid impasse through separate, confidential conferences with the Guided-Choice Mediator. Parties who choose to use this ADR method will obviously need to be comfortable with sharing the accompanying cost of the Guided-Choice Mediator's expanded role.

Mediation - Mediator Proposals

Mediator Proposals are generally considered when impasse appears to be unavoidable, at or near the end of the mediation process. If the parties agree to consider a Mediator Proposal, and the Mediator is willing to do so, the Mediator will give them proposed settlement terms that the Mediator believes the parties should seriously consider accepting in order to settle their dispute. The Mediator Proposal will often be separately transmitted to each of the parties with stated reasoning tailored to each party to influence its acceptance. Before a Mediator's proposal is issued, the Mediator obtains the parties' agreement that the Mediator must receive within a relatively short period of time all parties' written acceptance to avoid impasse. A party's failure to accept results in impasse and concludes further service by the Mediator, although some Mediators may try to persuade a non-accepting party to reconsider acceptance before declaring an impasse. Typically, however, the parties must agree the Mediator Proposal is not an opportunity to negotiate further. It is generally a "yes" or "no" proposition, in that any response other than a "yes" or "no" is considered a rejection of the proposal. The Mediator Proposal, by its "take or leave it" nature, is often effective at inducing acceptance after concerted negotiation because it provides finality to at least the essentials of the settlement.[24]

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[22] *See* Lurie, Paul M., Guided Choice Mediation | Early Dispute Resolution Using the Best Practices of Commercial Mediation and Arbitration.

[23] *See* Geisen, William G. "Guided Choice: Emerging ADR Trend" (2018), presented to Construction Lawyers Society of America, available at Guided Choice: Emerging ADR Trend - Construction Lawyers Society of America (February 2018).

[24] Before agreeing to issue a Mediator Proposal, the Mediator should consider ABA Formal Opinion 518 (October 25, 2025) ("The obligation to avoid misleading the parties about the lawyer-mediator's role also means that, in conducting the mediation, the lawyer should not state that the lawyer-mediator is acting to achieve a party's best interest *or that a proposed settlement is in a party's best interest*.") Based upon this Opinion, the best practice may be for the Mediator to include in a Mediator Proposal a statement that it does not constitute legal advice and only represents the Mediator's view of how the parties may best be able to achieve compromise despite containing terms that may not be in the best interest of one or more parties, particularly where the mediation involves one or more *pro se* parties. For an in-depth discussion of the practical implications of this Opinion, see Akshatha Achar, *The Mediator's Tightrope: ABA Formal*

Mediator Proposals are somewhat akin to an Arbitrator's non-binding recommendation in Med-Arb, Arb-Med, or Med+Arb. However, a Mediator may refuse to prepare a Mediator's Proposal, even if the parties want one if it appears obvious a Mediator Proposal is unlikely to achieve total acceptance. A Mediator may also refuse because Mediator Proposals, whether or not successful, can lead to grave disappointment in the Mediator.

Settlement Gap Evaluation of Blind (Confidential) Offers

This is a relatively simple process that basically involves the parties agreeing to separately present to a Neutral their confidential bottom-line offers to see if they can settle. It works best for a 2-party dispute. It can be implemented before, during, or after a mediation.

The Neutral does not need to know anything about the dispute. The Neutral just agrees to confidentially receive the bottom line offers (perhaps by separate emails), look at them, and inform the parties whether their bottom line offers have gotten close enough to split the difference and settle on the basis of the parties' written agreement.

It must be agreed in writing in advance that, if the median of the parties' bottom-line numbers falls outside of an amount that is based on a certain percentage of the settlement gap between their last offers, then the Neutral will just declare the parties have not settled. In that case, the Neutral keeps the numbers secret, and neither party ever knows what the other had offered as its bottom line offer. If, on the other hand, the Neutral finds the median of the parties two bottom line offers is at or below that percentage-based amount, then the Neutral will declare the case settled on a split the difference basis.

For example, if one party's last offer was to pay $1,000,000, and the other side's last offer was to accept no less than $1,500,000, the gap between these last two offers is $500,000. That is a big gap, leaving the parties uncertain as to the amount at which they might compromise between their last offers and settle. Now, suppose the parties (perhaps with the help of their Mediator), can agree they will settle if their blind bottom line offers gets them to within 20% of the $500,000 gap, or within $50,000. Each side gives its sealed bottom-line number to the Neutral (who can and probably should be someone, anyone, other than the Mediator). Let's say the paying party offers $1,300,000, and the other party agrees to accept $1,325,000. The difference between these two amounts is only $25,000. The parties have come with $50,000, or 20% of their prior settlement gap. So, the parties settle for median between their bottom line numbers, or $1,312,500. The Neutral declares the case has settled at that split-the-difference amount. On the other hand, if the paying party offers $1,300,000 and the other party's offer is to accept no less than $1,400,000, the difference is $100,000, which is more than the $50,000 amount that is 20% of their prior settlement gap. In that case, the Neutral declares the case has not settled, and both sides walk away to litigate,

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Opinion 518 posted by CPR International Institute for Conflict Prevention and Resolution at https://www.cpradr.org/news/the-mediators-tightrope-aba-formal-opinion-518 (October 28, 2025); *see also* Weinstein, Robyn, *Taking ABA Ethics Opinion 518 for a Test Drive*, American Arbitration Association Mediation Magazine, Taking ABA Ethics Opinion 518 for a Test Drive - AAA Mediation Magazine (January 7, 2026).

without ever knowing what the other side's bottom line number was. Each side only knows that its number did not come close enough to the other party's number to settle.

This process makes each party think very hard about what its true bottom line number is, and how much it is willing to compromise to try to come close enough to the other side's number to achieve a settlement. A party who really is not particularly interested in settling may hold to a bottom-line number that is really not much different than its last offer. A party who is more inclined to want to end the dispute is more likely to move further off its last offer to try to get within the agreed percentage of the gap. Each party will think very hard about what the other side's bottom line offer will be in order to anticipate how farther it must reach to get close enough to the other side's number to settle.

There are a couple of wrinkles to be ironed out for this process in advance, though. The Neutral needs to understand, and the parties need to agree how the case settles if one party is willing to accept a number that is even less than the paying party's offer. Or, said differently, what happens if the paying party's number overshoots or exceeds the other party's number?

Consider the above example scenario. The parties have agreed to settle if the median between their bottom line offers is at or below $50,000 or 20% of the gap between their last two offers. Let's say the paying party offers to pay $1,200,000, and the other party bottom line offer shows it is willing to accept $1,180,000, which is $20,000 less than what the paying party offered. Does the case settle for $1,200,000, $1,180,000, or $1,190,000? Obviously, the paying party would like the agreement to require settlement at no more than the amount of the other party's number, or $1,180,000. Conversely, the other party would like the agreement to require settlement for the amount of the paying party's bottom line offer, or $1,200,000. The obvious compromise is to split the difference even if the paying party's bottom line number overshoots the other party's bottom line number. This is something that must be considered in how the written agreement is presented and negotiated.

Mini Trials and Mock Trials

Mini Trials and Mock Trials are different. Mini Trials are an ADR method recognized under the Texas Civil Practice and Remedies Code.[25] In a Mini Trial, *both* parties present their positions to an impartial third party "to define the issues and develop a basis for realistic settlement negotiations."[26] The third party then renders an advisory opinion, unless the parties agree it will be binding. Parties involved in arbitration can also benefit from this concept by agreeing to enlist a separate panel of arbitrators to hear presentations of the case and promptly render an advisory opinion for them to consider prior to the hearing before the appointed arbitrator(s).

A Mock Trial is a trial tool used by one party to prepare its case for trial. Mock Trials involve one party's presentation of both sides of the case (or key issue in a case) to a private focus group of individuals selected to serve as mock jurors. Presentation may be limited to opening statements and closing arguments. A "mock" jury or focus group is often arranged for large cases with the

[25] *See* TCPRC, §154.024.

[26] Id.

assistance of professional jury consultants but can be arranged by counsel using other less costly means. Jurors can be divided into different groups to deliberate and monitor by video or other electronic means to record for their reactions to the evidence and arguments during the presentations. Mock jurors are then interviewed by the jury consultant or other arranger after the presentations to analyze the credibility and effectiveness of evidence and how it was presented. A party involved in a significant arbitration dispute can also benefit from the mock-trial concept by arranging to enlist a panel of mock arbitrators, instead of mock jurors, to confidentially hear presentations of both sides of the case and promptly render an advisory opinion. Obviously, Mock Trials or Mock Arbitrations are costly, but they can provide strategic insight to how the fact finder(s) may possibly react to the presentation in litigation of the evidence in general, or to a key issue or a key witness.[27]

Summary Jury Trials

Summary Jury Trials are recognized under the Texas Civil Practice and Remedies Code.[28] The process involves a one-day jury trial heard by 6 jurors selected from the Central Jury Room of the applicable court having jurisdiction. The jurors, who are most likely selected using what is likely a very limited *voir dire* examination, *may* render a non-binding verdict after hearing a limited presentation of the case (typically a 2 to 3 hour presentations per side). The parties are permitted to get a debriefing from the jurors on how they viewed the case, providing the parties a chance to hear how an actual jury may view it if the parties do not settle the case after considering the non-binding verdict.[29] The risk of using a Summary Jury Trial is that the process can reveal trial strategies, and an advisory verdict could cause a party to become even more anchored to its settlement position.

Moderated Settlement Conferences

Moderated Settlement Conferences for pending litigation are also recognized under the Texas Civil Practice and Remedies Code,[30] and are similar to Summary Jury Trials, except that the case is presented in a truncated fashion to a court-appointed "panel of impartial third parties" instead of a mock jury. The presentation to the panel of neutrals is much like an *ad hoc* DRB hearing of a dispute, without the DRB members' pre-dispute involvement to avoid the dispute in the first place.

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[27] For additional detail on how to use Mock Trials see the paper presented by co-authors George Bowles and Rick Flake in their presentation to the 37th Annual Construction Law Conference in 2024, entitled Can You Take Me Higher – New Trends in Truncated ADR.

[28] *See* TCPRC, §154.026.

[29] See discussion of this ADR method in paper presented by co-authors George Bowles and Rick Flake in their presentation to the 37th Annual Construction Law Conference in 2024, entitled Can You Take Me Higher – New Trends in Truncated ADR.

[30] *See* TCPRC, §154.025.

The neutrals can be any court-appointed panel of neutrals.[31] The panel could, by agreement of the parties, be comprised of the panel of previously appointed arbitrators rather than by court-appointment. [32] However, an agreement to use an existing panel to provide an advisory opinion has advantages and disadvantages. For example, it is more convenient to seek an advisory opinion from the panelists who already have a good understanding of the nature of the dispute. On the other hand, the appointed panelists' advisory opinion will likely need to "ride the fence" to allow panelists to remain neutral if their advisory opinion does not result in settlement. As such, their advisory opinion may be relegated to emphasizing how the case could result in an adverse determination for either side or pointing out how the advisory opinion remains subject to open factors unaddressed or unresolved as of the time of the moderated settlement conference.[33]

[31] TCPRC, §154.001(1), which defines "Court" as "an appellate court, a district court, the business court, a constitutional county court, a statutory county court, a family law court, a probate court, a municipal court, or a justice of the peace court." Under TCPRC, §154.021, a Court may refer a pending dispute for resolution under a statutory ADR procedure on its own motion or the motion of a party.

[32] For acts other than wanton and willful disregard, Chapter 154.055 of the Texas Civil Practice and Remedies Code provides qualified immunity to *court-appointed* facilitators of the alternative dispute resolution procedures or systems recognized by the statute, i.e., mediations, mini-trials, summary jury trials, and arbitrations. Thus, ADR facilitators may want the parties to arrange for their court-appointment for such ADR methods. *See also* Footnote 11, *supra*.

[33] This ADR method was also discussed by co-authors George Bowles and Rick Flake in their presentation to the 37th Annual Construction Law Conference in 2024, entitled Can You Take Me Higher – New Trends in Truncated ADR.

Appendix A

BINDING MEDIATION/ARBITRATION AGREEMENT

_____ and _____ agree to engage in a mediation/arbitration proceeding under the terms and conditions set forth below and by Court order.

Both parties agree to first endeavor to settle all issues of their dispute in an amicable manner by mediation administered by _____. The Med/Arb will be conducted at _____. The mediation process will begin at 9:00 a.m. on the morning of _____, 2026, and will continue until approximately 1:00 p.m. or until determined by the mediator. Thereafter, if and only if the mediation does not result in an agreed upon settlement, any unresolved controversy or claim or counterclaim arising out of or relating to this case, contract, or breach thereof, which matters may have been presented confidentially in the mediation process, shall be settled by binding arbitration as outlined below, with the mediator acting as arbitrator. The parties acknowledge that the mediator may discuss all aspects of the case privately with each party during the mediation process and may use any information learned in the mediation process in any subsequent deliberation regarding an arbitration award.

On behalf of the respective parties, the parties' counsel agree that if a settlement is not reached in mediation, arbitration will be conducted in accordance with the following agreement:

1. **Mediator/Arbitrator**. The neutral for both mediation and, if necessary, arbitration shall be _____.

2. **Compensation for the Mediator/Arbitrator**. The neutral shall be paid _____ Dollars ($X,XXX) by each party, for a total fee of _____ Dollars ($X,XXX) for the med/arb process. The fees shall be paid no later than _____, 2026. The mediation will not proceed until all payments are made. Checks are to be made payable to _____ and delivered in advance of the hearing.

3. **Decision of Arbitrator**. If the case is arbitrated, the decision of the Arbitrator is final and binding. It will be confirmed in the form of a Final Award of the Arbitrator. The Award of the Arbitrator shall be in the form selected by the Arbitrator, which Award may be submitted by either party to a court of competent jurisdiction, who may enter the Award as a judgment. The Arbitrator shall render his final decision promptly, but not later than thirty (30) days after the close of the arbitration hearing. If either party desires a court reporter, that party shall arrange for the court reporter to be present and shall be responsible for payment to the court reporter.

4. **Conduct of the Arbitration for ADR Proceeding**. The parties specifically agree that the Arbitrator shall have the power to regulate all proceedings in every hearing before him, and to do all acts and to take all measures necessary or proper for the efficient performance of his duties under this Agreement. The following order of proceedings is merely advisory and is not binding on the Arbitrator. This order of proceedings will allow, however, for an orderly presentation of the case and is suggestive of the manner in which the parties will submit the issues to the Arbitrator.

5. **Preliminary Order of Proceedings**. **Written Submissions**. No later than _____, 2026, the parties shall deliver to the Arbitrator and to the opposing counsel, a brief synopsis of the facts and law which the parties wish the Arbitrator to consider. The synopsis shall not exceed three (10) pages, 8½ x 11-inch paper, double spaced, excluding appendices and attachments. The synopsis shall contain a statement of the party's position and may contain a concise description of evidence relevant to each position, and refer to legal authority in support thereof, if applicable. Witness lists shall be exchanged between the parties no later than _____, 2026. Exhibit books shall be exchanged between the parties no later than _____, 2026.

6. **Final Order of Presentation in Proceedings**. The Arbitrator shall have authority to determine the order of presentation; however, the following sequence of oral presentation is suggested: Plaintiff will present its case-in-chief, followed by opposing counsel's cross-examination. Defendants will then present their case-in-chief, followed by opposing counsel's cross-examination. Rebuttal evidence, if any, will then be received. The Arbitrator suggests that each side have two (2) hours each of presentation time, defined as one party's direct presentation and that same party's cross-examination time. Finally, Plaintiff may make a closing argument, followed by Defendants' closing argument.

7. **Admissibility of Evidence**. The introduction of evidence will not be limited to any formal rules of evidence. In the event of a dispute over material submitted to the Arbitrator, the Arbitrator's determination of admissibility will be final.

8. **Confidentiality**. All evidence, written or oral, presented at the arbitration proceeding, the statements of the parties' representative's and the witnesses, if any, and the arguments of counsel shall be confidential, within the meaning of the Texas Civil Practice and Remedies Code, Section 154.073, et seq., and its admissibility and disclosure shall be limited by and subject to the provisions of the 1987 Texas Alternate Dispute Resolution Act.

9. **Limited Appeal of Arbitrator's Final Decision**. The grounds for appeal of the Arbitrator's decision are limited only to an arithmetic error, fraud, or improper influence on the Arbitrator.

10. **Arbitrator**. Arbitrator is agreed to by the parties as a quasi-judicial officer. As such, the parties agree that the Arbitrator may not be sued by any party for serving

in the capacity as Arbitrator, rendering any decision, nor may Arbitrator's deposition be taken regarding any matter pertaining to this case. Injunctive relief shall be granted to Arbitrator is any party shall violate this Agreement in addition to recovery of legal fees and time expended.

This Agreement binds and inures to the benefit of the parties, their successors, and assigns.

SIGNED on this _____ day of _____, 2026.

PARTIES:

[name of corporation]

BY:_____

NAME:_____

TITLE:_____

[name of corporation]

BY:_____

NAME:_____

TITLE:_____

Appendix B

Basic Outline for Med+Arb Agreement

[*This outline should only be completed with advice of legal counsel. It assumes a separate mediation agreement exists with the Mediator, and provides a template or checklist to provide for the appointment of the Arbitrator to serve in conjunction with a Mediator, receiving certain limited information about the parties' dispute during the mediation process, and enabling the Arbitrator to understand the issues and promptly resolve the dispute if the parties are unable to settle at mediation with the help of their Mediator.*]

1. This Med+Arb Agreement has been prepared [__ in advance OR __ after] commencement of mediation, and is now in effect as the undersigned parties' agreement to submit to arbitration the following matters in dispute arising out of or relating to: [*describe the transaction or relationship giving rise to dispute*]:
   __ all claims/defenses in parties' Pleadings/Statements of Claims and Defenses
   __ only the following disputed issues:
      Issue 1: _____
      Issue 2: _____
2. The parties [__ agree/ __ do not agree] to keep the arbitration proceeding confidential, subject to the right to submit an award to a court of competent jurisdiction for enforcement.
3. The parties' Mediator is: _____.
4. The parties' Arbitrator is: _____, whose appointment is [__ confirmed OR __ pending confirmation] following consideration of the Arbitrator's disclosures, compensation terms, and deposit estimate provided to the administrator designated below.
5. The following entity/person is authorized to administer the arbitration:
   __ _____ (*insert AAA or other arbitration administration services provider*); or
   __ the Mediator
6. The parties shall, before mediation commences, advance deposits to the administrator to fund estimated arbitration costs and fees, which shall be [__shared equally OR __ Other: _____.] Sharing of costs and fees is subject to later award, if any, by the Arbitrator. Unused deposits shall be refunded to the parties.
7. The Administrator will submit the dispute to the Arbitrator for decision at the following time:
   __ Promptly after impasse.
   __ Promptly after impasse, if both parties re-confirm the dispute shall be so submitted.
8. The following dates are established for the parties to exchange and submit to the Arbitrator one or more of the following written submissions:
   __ Pleadings/Statements of Claims and Defenses: _____
   __ Parties' Mediation Position Statements: _____
   __ Parties' Supplemental Post-Mediation Briefs: _____
   __ Parties' Supplemental Post-Mediation Reply Briefs: _____
9. The Arbitrator will attend [__ in person OR __ virtually] each of the following mediation activities on the dates indicated below:
   __ Opening Joint Session (on _____, 20__)
   __ Additional Joint Sessions (on _____, 20__), or as later scheduled.

__ (*Assuming impasse*) Closing statements in Final Joint Session (on _____, 20__), or as later scheduled.

10. The parties agree to require or waive each of the following for these proceedings:
    __ Preliminary Hearing [__required] [__ waived]
    __ Scheduling Order [__required] [__ waived]
    __ Dispositive Motions [__required] [__ waived]
    __ Evidentiary Hearing* [__required] [__ waived]

    If the parties waive Evidentiary Hearing, there shall be no other arbitration proceedings unless the Arbitrator requires otherwise to complete the arbitration process.
11. The Arbitrator is permitted to pose questions during the mediation:
    __ Orally, in a joint session in the presence of the parties and the Mediator.
    __ In writing, to the Mediator, who shall deliver the parties' answers to the Arbitrator.
12. The parties shall have no ex parte communications with the Arbitrator. The parties may authorize the Mediator to convey to the Arbitrator certain non-confidential information appropriate to inform the Arbitrator on the disputed issue(s) to be resolved. The Mediator shall assist the parties to preserve the Arbitrator's neutrality and exercise caution to not communicate to the Arbitrator any confidential information that has been shared only between a party and the Mediator, such as information concerning offers, counter-offers, or Mediator Proposals, or information about the Mediator's impressions of the parties' positions.
13. The Arbitrator shall be considered disqualified, and shall withdraw, upon learning of:
    - Material information conveyed only to the Mediator in confidence.
    - Settlement offers or counter-offers exchanged between the parties.
    - Mediator's impressions of the strengths, weaknesses or credibility of a party's position.
    - The Mediator's Proposal, if any, or any statements relating to any of its terms.
14. Proposed forms of award [__will] [__will not] be filed with the Arbitrator. If required, the parties' proposed forms of award shall be filed within __ days after impasse.
15. Unless otherwise agreed, the award shall be issued to [__ the parties OR __ the parties and Mediator] within __ days after the dispute is submitted to the Arbitrator, and shall be:
    __ A standard award (stating the award of any damages to a party only).
    __ A reasoned award (briefly explaining the logical reasoning for the Arbitrator's award, without specific findings of fact or conclusions of law).
    __ An award that includes specific findings of fact or conclusions of law.
16. The award shall be:
    __ Final and binding, subject to the Federal Arbitration Act.
    __ Final and binding, subject to applicable law under the State of _____.
    __ Subject to appeal under AAA Optional Appellate Arbitration Rules.
    __ Advisory only and [__ is OR __ is not] admissible in future legal proceedings.
17. For claims for award of attorney fees and costs, the parties shall submit affidavits in support thereof within:
    __ days after impasse.
    __ days after post-mediation submissions (if specified above).

[SIGNATURES OF PARTIES]

Appendix D

Sample Clauses to Modify AIA A-133 (2019) *§§12.1.1., 12.1.2, and 12.2.2*
to use Neutral Advisor In Lieu of Initial Decision Maker[1]

§ 12.1.1 Neutral Advisor. The parties agree _____ shall serve as their advisor ("Neutral Advisor") with regard to the Project. The parties agree that, prior to initiation of any arbitration or litigation of any Dispute, either party shall request the assistance of their Neutral Advisor to help resolve the dispute. Upon receiving such request, the Neutral Advisor shall be authorized to promptly and confidentially consult with each party as the Neutral Advisor deems necessary or appropriate to understand the matter, and then require a special-called meeting of the parties, to be scheduled as soon as possible, to hear an open discussion of the matter. If the Neutral Advisor is unable to help the parties come to agreement to resolve the Dispute, the Neutral Advisor shall issue a written recommendation for how the matter should be resolved, which determination [__ shall OR __ shall not] be admissible in any future legal proceeding to resolve the Dispute. The Neutral Advisor's role shall be deemed fulfilled with respect to such Dispute upon the Neutral Advisor's issuance thereof. THE PARTIES AGREE THE NEUTRAL ADVISOR SHALL HAVE NO LIABILITY TO THEM TO ARISING OUT OF THE NEUTRAL ADVISOR'S ACTS OR OMISSIONS IN THE GOOD FAITH PERFORMANCE OF THE NEUTRAL ADVISOR'S ROLE HEREUNDER, AND THEY AGREE TO WAIVE ALL SUCH LIABILITY, INCLUDING ANY LIABILITY FOR THE NEUTRAL ADVISOR'S NEGLIGENCE. For any Dispute the parties that cannot resolve with the assistance of the Neutral Advisor, the parties shall proceed to resolve the Dispute in accordance with the remaining Dispute Resolution Procedures set forth in this Article 12.

§ 12.1.2 Informal Negotiations; Mediation. If the parties are unable to resolve the Dispute with the assistance of their Neutral Advisor, they shall next attempt to resolve the Dispute (whether before or after any termination of this Agreement) by negotiations between their senior executives. The parties agree that they shall, within five (5) business days after receipt of the Project Neutral's recommendation under Section 12.1.1, schedule a future date to convene such negotiations. If the parties fail to agree to schedule the negotiations, or they are unable to resolve the Dispute through such negotiation, then either party may request the American Arbitration Association ("AAA") to administer the mediation of the Dispute according to the AAA's Construction Industry Mediation Procedures, Sections M-1 through M-17, in effect as of the date of this Agreement. Unless the parties and the mediator agree to a different time, mediation shall be completed as soon as possible after notice has been issued to the AAA and the parties have mutually agreed upon the mediator. The mediator shall have at least _____(__) years of construction dispute resolution experience.

§ 12.2 Binding Dispute Resolution

For any Claim subject to but not resolved by the non-binding procedures in Section 12.1.1. and 12.1.2, above, the method of binding dispute resolution shall be as follows:
(Check the appropriate box.)

[ ] Arbitration pursuant to Article 15 of AIA Document A201–2017

[ ] Litigation in a court of competent jurisdiction

[ ] Other: (Specify)

The parties agree that they shall not commence any form of binding dispute resolution before exhausting the non-binding dispute resolution procedures in Section 12.1.1. and 12.1.2.

[1] DISCLAIMER: This Appendix B is for informational and educational purposes only. Clauses may require further refinement, for which an attorney should be consulted for clause-drafting assistance. No legal advice is given, or any attorney-client relationship created, by the publication of the above draft language.

Appendix C

SAMPLE CLAUSES FOR INCORPORATING THE DISPUTE REVIEW BOARD PROCESS INTO A CONSTRUCTION CONTRACT[1]

AAA Recommended Clause:

As soon as practicable after execution of this Agreement, the Parties shall establish a Dispute Avoidance and Resolution Board (DARB) in accordance with the AAA-ICDR Dispute Avoidance and Resolution Board Specifications, Operating Procedures, and Hearing Rules and Procedures ("Procedures") then in effect. The DARB members shall be selected and appointed pursuant to the Procedures, and the Parties, together with the DARB members, shall execute a Three-Party Agreement defining the DARB's authority, including its role in providing nonbinding recommendations or binding determinations and their admissibility in subsequent proceedings. The DARB shall remain available to the Parties throughout the Project, conducting regular site visits and periodic meetings with the Parties to facilitate dispute avoidance and real-time dispute resolution. The fees and expenses of the DARB members shall be shared equally by the Parties. Pending resolution of any dispute, the Parties shall continue performance under the Contract without delay.

Alternate Draft Clause based on AAA's DARB Rules

If a dispute arises from or relates to this Agreement or the breach hereof, and if the dispute cannot be settled through direct discussions, the parties agree they shall, prior to endeavoring to settle the dispute by mediation or arbitration, endeavor first to settle the dispute by submission of the dispute to the parties' Dispute Review Board ("DRB"), in accordance with the AAA-ICDR Dispute Avoidance and Resolution Board (DARB) Specifications, Operating Procedures, and Hearing Rules and Procedures (the "DARB Specifications").

The DRB shall consist of *[select one]* (a) ___ The member(s) who have executed the agreement ("Third Party Agreement") between them and the parties, attached hereto as in Exhibit __, each of whom agrees upon and accepts the establishment of the Board; or (b) *[select one]* [__ a panel of three members] -or- [__ a single member], to be agreed upon by the parties and the member(s), and set forth in a Three Party Agreement within ___ days after the effective date of this Agreement, failing in which the Board will be appointed in accordance with the DARB Specifications.

Members, if any, appointed to the Board by the AAA-ICDR shall have the following qualifications and expertise: _____. Except as otherwise provided in the Three Party Agreement, the members of the Board and the parties agree to cooperate in the accordance with the DARB Specifications and the Board's operating procedures, including those relating to the Interim Advisory Process and the Formal Process for referral of disputes. The Board's recommendations or determinations for any dispute referred to the Board through the Formal Process shall be *[select one]* (a) ___ non-binding or (b) ___ binding on the Parties, *[select one]*

[1] DISCLAIMER: This Appendix is for informational and educational purposes only. Clauses may require further refinement, for which an attorney should be consulted for clause-drafting assistance. No legal advice is given, or any attorney-client relationship created, by the publication of the above draft language.

(a) __ admissible or (b) ___ non-admissible in a subsequent dispute resolution proceeding to the extent permitted by law.

DRBF Recommended Clauses for Standing and Ad Hoc DRBs

(see following pages)

Note to Specifiers: This DRB model agreement may not be entirely applicable or enforceable in certain jurisdictions.

Dispute Review Board Agreement

1. PARTIES

1.1. [FILL IN NAME] ("Owner").

1.2. [FILL IN NAME] ("Contractor").

1.3. Dispute Review Board ("DRB") consisting of three members, one of whom shall serve as Chair of the DRB as designated by the Parties:

1. [FILL IN NAME] (Chair)
2. [FILL IN NAME]
3. [FILL IN NAME]

2. CONTRACT

2.1. The Contractor has entered into a contract dated [DATE] ("Contract") with the Owner for the construction of [PROJECT NAME] ("Project").

2.2. Section [XX] of the Contract (hereinafter referred to as "DRB Specification") is incorporated by reference into this Agreement, and the Owner, the Contractor, and the DRB shall be bound to the duties and responsibilities set forth therein. To the extent there is a discrepancy between this Agreement and the DRB Specification, the DRB Specification shall govern.

3. PURPOSES OF DRB

3.1. Engage in dispute avoidance activities, which include fostering and conducting proactive discussion on project issues via attending DRB regular meetings, participating in site visits, and, as jointly requested by the Parties, providing informal assistance or advisory opinions.

3.2. Engage in dispute resolution activities, which include promptly holding a hearing for formal disputes and issuing timely recommendations for resolution of such disputes.

4. DRB SCOPE OF WORK

4.1. General:

4.1.1. Stay abreast of Project developments and potential or existing disputes by means of periodic meetings, site visits, Project document reviews, and other means as agreed by the Parties.

4.1.2. Examine site conditions or specific construction features relating to potential or existing disputes.

4.2. Establish DRB Operating Procedures with process details that are consistent with the requirements and general guidelines set forth in the DRB Specification. In formulating and administering Operating Procedures the DRB shall include reasonable steps to make the DRB process as effective and efficient as practicable.

4.3. Dispute Avoidance Activities:

4.3.1. Commit to be reasonably available and to avoid conflicts with other commitments on days scheduled for DRB regular meetings and site visits.

4.3.2. Prepare agendas for and summaries of DRB regular meetings.

4.3.3. Review project documents provided in between and in advance of meetings.

4.3.4. Prepare for project meetings and site visits sufficiently to substantively discuss with the Project team the specified agenda topics.

4.3.5. Provide informal assistance or advisory opinions as requested by both the Owner and the Contractor.

4.4. Dispute Resolution Activities:

4.4.1. Upon receipt by the DRB of a dispute referral from either the Owner or Contractor, and in consultation with the Owner and Contractor, plan, schedule and conduct an effective and efficient DRB hearing process in the manner, timing, and location set by the DRB.

4.4.2. Convene internal meetings as needed to review and analyze the dispute, and to formulate the report.

4.4.3. Following each hearing and DRB deliberation, issue a timely written report to the Owner and the Contractor, including the supporting analysis and rationale for any recommendation.

4.4.4. Provide timely responses to requests for clarification or for an informal debrief.

4.5. Perform any other DRB services as needed to achieve the purposes of this Agreement.

5. RESPONSIBILITIES OF THE PARTIES

5.1. DRB Responsibilities:

5.1.1. Maintain impartiality and avoid conflicts of interest by continuing to meet the eligibility and disclosure requirements for DRB members, as set forth in the DRB Specification. Promptly advise all Parties upon becoming aware of any development that could be perceived as a conflict of interest and promptly resolve any such issues.

5.1.2. Advise the other DRB members, the Owner, and the Contractor when unable to continue serving as a DRB member.

5.1.3. Neither the DRB Members individually, nor the DRB collectively, shall:

5.1.3.1. Give advice regarding design or construction means or methods.

5.1.3.2. Discuss issues with the Owner or the Contractor, such as the conduct of the work and the resolution of construction problems, that could possibly

be construed as compromising the DRB's ability to impartially resolve future disputes.

5.1.3.3. Express an individual or collective opinion of merit, in whole or in part, for any potential or other dispute at any time prior to the issuance of a report, except in the case of informal assistance or an advisory opinion.

5.1.3.4. Meet or communicate with either the Owner or the Contractor in the absence of the other, except as required when performing the duties of the Chair or conducting a meeting or hearing which the Owner or Contractor refuses to attend.

5.1.4. Consider the facts and circumstances forming the basis of a referred dispute independently and impartially, and evaluate the merits based on careful consideration of the information submitted by the Parties, all Contract requirements, and applicable law/regulations. In doing so, the DRB shall not:

5.1.4.1. Ignore or undermine the provisions of the Contract, disregard or alter any requirements of the Contract, or alter the allocation of risk specified therein.

5.1.4.2. Supplant or otherwise interfere with the respective rights, authority, duties, and obligations of either the Owner or Contractor as set forth in the Contract or Contract Documents (as defined in the Contract).

5.1.4.3. Participate in negotiations with the Owner and Contractor, nor perform conciliation or mediation services in connection with any issue or dispute.

5.1.5. Make every effort to reach unanimous recommendations. If this cannot be accomplished, include written minority recommendations and supporting rationale within the full DRB report, but do not identify the dissenting member.

5.1.6. Individually and collectively agree to be bound by the Dispute Resolution Board Foundation's Code of Ethical Conduct as set forth in the current edition of the DRBF's *Dispute Board Manual: A Guide to Best Practices and Procedures*.

5.2. Owner Responsibilities:

5.2.1. Except for participation in the DRB's activities as provided in the DRB Specification and this Agreement, do not solicit advice or consultation from the DRB or individual DRB members on matters dealing with the conduct of the work or resolution of problems.

5.2.2. Furnish, or request the Contractor to furnish, to each DRB member (1) a copy of the conformed Contract (including all Contract Documents) and the baseline schedule and agreed updates, and (2) other documents necessary for the DRB to conduct its operations. Such other documents shall be regularly furnished or made available to the DRB in between and in advance of regular meetings.

5.2.3. Coordinate DRB operations in cooperation with the Contractor.

5.2.4. Arrange for or provide facilities at or near the site for periodic meetings, and provide any necessary support services.

5.2.5. Cooperate with the Contractor and the DRB to encourage avoidance of disputes and facilitate timely resolution of disputes.

5.3. Contractor Responsibilities:

5.3.1. Except for participation in the DRB's activities as provided in the Contract and this Agreement, do not solicit advice or consultation from the DRB or individual DRB members on matters dealing with the conduct of the work or resolution of problems.

5.3.2. Furnish to each DRB member and to the Owner copies of pertinent documents, other than those furnished by the Owner, as may be requested.

5.3.3. Cooperate with the Owner and the DRB to encourage avoidance of disputes and facilitate timely resolution of disputes.

6. TIME FOR BEGINNING AND COMPLETION OF DRB ACTIVITIES

6.1. The DRB shall begin its service under this Agreement upon receipt of notice of appointment by the Parties. DRB activities shall commence with preparation for the DRB kick-off meeting, including preparation of the DRB Operating Procedures.

6.2. This Agreement shall survive the termination, resignation or death of any DRB member.

6.3. The DRB's jurisdiction under this Agreement shall terminate on the date of final payment under the Contract, unless terminated earlier pursuant to Section 6.4.

6.4. Upon thirty (30) days notice, individual DRB members may be terminated (a) by mutual agreement of the Owner and Contractor, as provided in Section [XX] of the DRB Specification, (b) or by one of the Parties, as provided in Section [XX] of the DRB Specification.

6.5. In the event a DRB member is terminated, the member shall be compensated for services performed up to the effective date of the termination.

6.6. In the event a DRB member resigns, the member shall give the Parties at least thirty (30) days written notice to both Parties; shall be compensated for services up to the effective date of the resignation; and shall cooperate with the Owner and the Contractor in transitioning off the DRB.

7. PAYMENT

Note to Specifiers: This payment provision should be modified to reflect the allowable rates, travel time compensation, allowable expenses, etc., as contemplated by the DRB Specification. Specific terms for compensation and expense reimbursement should be filled in in the blanks set forth below.

7.1. Compensation for services rendered by DRB members shall be as follows: [FILL IN DETAILS].

7.2. Reimbursement of DRB members' expenses shall be as follows: [FILL IN DETAILS].

7.3. Payments made to the DRB members shall constitute full compensation for services rendered, work performed, travel time, and all expenses, materials, and incidentals necessary to serve on the DRB.

7.4. No payment shall be made to DRB members in the form of bonus, commission, or consideration of any nature other than that specified for performance and service provided under this Agreement.

7.5. DRB members shall individually submit invoices for work completed to the Contractor:

7.5.1. Not more often than once per month.

7.5.2. Based on the agreed compensation rates and expense reimbursement guidelines as set forth herein.

7.5.3. Accompanied by a description of activities performed during the invoice period, and an itemization of allowable expenses incurred (together with copies of original bills, receipts, and other expense back-up).

7.6. The Contractor shall pay acceptable invoices within thirty (30) days of their receipt.

7.7. The Contractor shall be reimbursed for the Owner's portion of the DRB costs in accordance with payment provisions specified in the Contract.

8. CONFIDENTIALITY AND RECORDKEEPING

Note to Specifiers: Insert number of years of the Project jurisdiction's record retention requirement.

8.1. No DRB member shall divulge information that has been acquired during DRB activities without obtaining prior written approval from the Owner and the Contractor.

8.2. DRB members shall maintain cost records pertaining to this Agreement for inspection by the Owner or the Contractor for a period of [X] years following termination of this Agreement.

9. ASSIGNMENT

9.1. No Party to this Agreement shall assign any duty established under this Agreement.

10. TERMINATION/REPLACEMENT

10.1. This Agreement may be terminated by mutual agreement of the Owner and Contractor at any time upon not less than thirty (30) days written notice to the DRB.

10.2. If a DRB member resigns, is unable to serve, or is terminated, the member shall be replaced within thirty (30) days in the same manner the member was originally selected. This Agreement shall be amended to indicate the member replacement.

11. LEGAL RELATIONS

11.1. The Owner and the Contractor acknowledge that each DRB member, in the performance of their duties on the DRB, is acting in the capacity of an independent agent and not as an employee of the Owner or the Contractor.

11.2. The Owner and the Contractor acknowledge that each DRB member is acting in a capacity intended to assist the Parties in avoiding disputes or facilitating the timely resolution of disputes. Accordingly, the Owner and Contractor agree and acknowledge that, to the fullest extent permitted by law, each DRB member shall be accorded quasi-judicial immunity for any actions or recommendations associated with DRB activities, and shall not be required to participate, appear or testify in any other legal proceedings between the Parties.

11.3. To the fullest extent permitted by law, the Owner and the Contractor shall indemnify and hold harmless each DRB member from (i) any personal or professional liability arising from or related to DRB activities under this Agreement, and (ii) any claims, losses, demands, costs, and damages (including reasonable attorney fees) for bodily injury, property damage, or economic loss arising out of or related to DRB members carrying out DRB activities under this Agreement. The foregoing indemnity and hold harmless agreement is a joint and several obligation of the Owner and the Contractor.

12. DISPUTES REGARDING THIS AGREEMENT

12.1. Disputes among the Parties arising out of this Agreement that cannot be resolved by negotiation, and actions to enforce any right or obligation under this Agreement, shall be initiated in the [COURT NAME] Court of the [JURISDICTION].

12.2. All questions shall be resolved by application of [JURISDICTION] law, without reference to the jurisdiction's choice of law rules.

12.3. The DRB members hereby consent to the personal jurisdiction of the Court of the [JURISDICTION].

13. FUNDING AGENCY REVIEW

13.1. The [AGENCY FUNDING THE PROJECT] has the right to attend DRB regular meetings and site visits and DRB hearings, but not to attend private DRB deliberations.

14. DRB AGREEMENT EFFECTIVE DATE

This Agreement shall be effective as of the following date: [INSERT DATE DRB WAS APPOINTED].

DRB MEMBERS

By: _____ _____
(Signature) (Name)

By: _____ _____
(Signature) (Name)

By: _____ _____
(Signature) (Name)

CONTRACTOR

By: _____
(Signature)

By: _____
(Name)

Title: _____

OWNER

By: _____
(Signature)

By: _____
(Name)

Title: _____

Note to Specifiers: This Ad Hoc DRB model agreement may not be entirely applicable or enforceable in certain jurisdictions.

DRBF Model Ad Hoc DRB Agreement (2023 Update/BOD Approved April 2023)

Note to Contract Drafters: The Parties will need to agree on a DRB selection process. The DRBF recommends a joint selection process for all members of the DRB, including: agreeing on qualifications appropriate to the Disputes; having prospective DRB members provide disclosures regarding any potential conflicts of interest; and conducting joint due diligence to ensure that all candidates meet qualifications and conflicts requirements.

Ad Hoc Dispute Review Board Agreement

2. PARTIES

14.1. [FILL IN NAME] ("Owner").

14.2. [FILL IN NAME] ("Contractor").

14.3. Dispute Review Board ("DRB") consisting of three members, one of whom shall serve as Chair of the DRB as designated by the Parties:

4. [FILL IN NAME] [FILL IN NAME] (Chair)
5. [FILL IN NAME]
6. [FILL IN NAME]

15. CONTRACT/PENDING DISPUTES

15.1. The Contractor has entered into a Contract with the Owner ("Contract") for [PROJECT NAME] ("Project").

15.2. This DRB Agreement shall be considered an amendment to the Contract to permit use of a DRB in lieu of the Contract's arbitration provision [OR DESCRIBE OTHER DISPUTE RESOLUTION PROVISION].

15.3. The Owner and the Contractor have the following pending disputes [DESCRIBE DISPUTES, INCLUDING WHETHER THEY INCLUDE ENTITLEMENT, TIME, AND/OR QUANTUM] (the "Disputes").

15.4. The Owner and the Contractor agree to have the DRB address the Disputes as provided herein and in Attachment 1 ("DRB Process").

15.5. The use of the DRB Process is without prejudice to any rights and responsibilities that the Parties otherwise have under the Contract and does not change the terms of the Contract except as expressly provided herein.

15.6. If the Parties are unable to resolve the Disputes based on the DRB Process, then [DESCRIBE NEXT STEPS AFTER CONCLUSION OF DRB PROCESS].

15.7. During the pendency of the DRB Process, the Contractor shall continue work, and the Owner shall continue making payments, as and to the extent required by the Contract.

16. DRB SCOPE OF WORK

16.1. The DRB shall conduct the following dispute resolution activities:

16.1.1. Plan, schedule and conduct a hearing process in the manner, timing, and location set by the DRB, in consultation with the Parties. The hearing process shall be administered as set forth in Attachment 1.

16.1.2. Convene internal meetings as needed to review and discuss the DRB process, the Disputes, and to formulate a report as described in Section 3.1.3 below.

16.1.3. Deliberate following the hearing and issue a timely written report to the Owner and the Contractor, including recommendations and the supporting analysis and rationale for all recommendations.

16.1.4. When requested and deemed appropriate by the DRB, provide timely written responses to requests for clarification made by either the Owner or the Contractor.

16.2. The DRB shall perform any other DRB services needed to achieve the purpose of this Agreement.

16.3. The Chair of the DRB shall confer with the Parties and the other DRB members in administering the DRB process as set forth herein, including implementation actions and associated timing/deadlines.

17. RESPONSIBILITIES OF THE PARTIES

17.1. DRB Responsibilities:

17.1.1. Maintain impartiality and avoid conflicts of interest by continuing to meet the eligibility and disclosure requirements for DRB members, as set forth in the DRB Specification. Promptly advise all Parties upon becoming aware of any development that could be perceived as a conflict of interest and promptly resolve any such issues.

17.1.2. Advise the other DRB members, the Owner, and the Contractor when unable to continue serving as a DRB member.

17.1.3. Neither the DRB Members individually, nor the DRB collectively, shall:

17.1.3.1. Give advice regarding design or construction means or methods.

17.1.3.2. Discuss issues with the Owner or the Contractor, such as the conduct of the work and the resolution of construction problems, that could possibly be construed as compromising the DRB's ability to impartially resolve future disputes.

17.1.3.3. Express an individual or collective opinion of merit, in whole or in part, for any potential or other dispute at any time prior to the issuance of a report, except in the case of informal assistance or an advisory opinion.

17.1.3.4. Meet or communicate with either the Owner or the Contractor in the absence of the other, except as required when performing the duties of the Chair or conducting a meeting or hearing which the Owner or Contractor refuses to attend.

17.1.4. Consider the facts and circumstances forming the basis of a referred dispute independently and impartially, and evaluate the merits based on careful consideration of the information submitted by the Parties, all Contract requirements, and applicable law/regulations. In doing so, the DRB shall not:

17.1.4.1. Ignore or undermine the provisions of the Contract, disregard or alter any requirements of the Contract, or alter the allocation of risk specified therein.

17.1.4.2. Supplant or otherwise interfere with the respective rights, authority, duties, and obligations of either the Owner or Contractor as set forth in the Contract or Contract Documents (as defined in the Contract).

17.1.4.3. Participate in negotiations with the Owner and Contractor, nor perform conciliation or mediation services in connection with any issue or dispute.

17.1.5. Make every effort to reach unanimous recommendations. If this cannot be accomplished, include written minority recommendations and supporting rationale within the full DRB report, but do not identify the dissenting member.

17.1.6. Individually and collectively agree to be bound by the Dispute Resolution Board Foundation's Code of Ethical Conduct as set forth in the current edition of the DRBF's *Dispute Board Manual: A Guide to Best Practices and Procedures*.

17.2. Owner Responsibilities:

17.2.1. Except for participation in the DRB's activities as provided in this Agreement, do not solicit advice or consultation from the DRB or individual DRB members.

17.2.2. Furnish, or request the Contractor to furnish, to each DRB member documents necessary for the DRB to conduct its operations.

17.2.3. Coordinate DRB operations in cooperation with the Contractor.

17.2.4. Provide any necessary support services.

17.2.5. Cooperate with the Contractor and the DRB to facilitate timely resolution of disputes.

17.3. Contractor Responsibilities:

17.3.1. Except for participation in the DRB's activities as provided in the Contract and this Agreement, do not solicit advice or consultation from the DRB or individual DRB members.

17.3.2. Furnish to each DRB member and to the Owner copies of pertinent documents, other than those furnished by the Owner, as may be requested.

17.3.3. Cooperate with the Owner and the DRB to facilitate timely resolution of disputes.

18. TIME FOR BEGINNING AND COMPLETION OF DRB ACTIVITIES

18.1. The DRB shall begin its activities as of the effective date of this Agreement.

18.2. This Agreement shall survive the termination, resignation or death of any DRB member.

18.3. The DRB's jurisdiction under this Agreement shall terminate by mutual agreement of the Owner and the Contractor.

18.4. Individual DRB members may be terminated by mutual agreement of the Owner and Contractor. In the event a member is terminated, he/she shall be replaced in the same manner as the original appointment.

18.5. In the event a DRB member is terminated, the member shall be compensated for services performed up to the effective date of the termination.

18.6. In the event a DRB member resigns, the member shall give the Parties at least thirty (30) days written notice to both Parties; shall be compensated for services up to the effective date of the resignation; and shall cooperate with the Parties in transitioning off the DRB.

19. PAYMENT

Note to Specifiers: This payment provision should be modified to reflect the allowable rates, travel time compensation, allowable expenses, etc., as contemplated by the DRB Specification. Specific terms for compensation and expense reimbursement should be filled in in the blanks set forth below.

19.1. Compensation for services rendered by DRB members shall be as follows: [FILL IN DETAILS].

19.2. Reimbursement of DRB members' expenses shall be as follows: [FILL IN DETAILS].

19.3. Payments made to the DRB members shall constitute full compensation for services rendered, work performed, travel time, and all expenses, materials, and incidentals necessary to serve on the DRB.

19.4. No payment shall be made to DRB members in the form of bonus, commission, or consideration of any nature other than that specified for performance and service provided under this Agreement.

19.5. DRB members shall individually submit invoices for work completed to the Contractor:

19.5.1. Not more often than once per month.

19.5.2. Based on the agreed compensation rates and expense reimbursement guidelines as set forth herein.

19.5.3. Accompanied by a description of activities performed during the invoice period, and an itemization of allowable expenses incurred (together with copies of original bills, receipts, and other expense back-up).

19.6. The Contractor shall pay acceptable invoices within thirty (30) days of their receipt.

19.7. The Contractor shall be reimbursed for the Owner's portion of the DRB costs in accordance with payment provisions specified in the Contract.

20. CONFIDENTIALITY AND RECORDKEEPING

Note to Specifiers: Insert number of years of the Project jurisdiction's record retention requirement.

20.1. No DRB member shall divulge information that has been acquired during DRB activities without obtaining prior written approval from the Owner and the Contractor.

20.2. DRB members shall maintain cost records pertaining to this Agreement for inspection by the Owner or the Contractor for a period of [X] years following termination of this Agreement.

21. ASSIGNMENT

21.1. No Party to this Agreement shall assign any duty established under this Agreement.

22. TERMINATION/REPLACEMENT

22.1. This Agreement may be terminated by mutual agreement of the Owner and Contractor at any time upon not less than thirty (30) days written notice to the DRB.

22.2. If a DRB member resigns, is unable to serve, or is terminated, the member shall be replaced within thirty (30) days in the same manner the member was originally selected. This Agreement shall be amended to indicate the member replacement.

23. LEGAL RELATIONS

23.1. The Owner and the Contractor acknowledge that each DRB member, in the performance of their duties on the DRB, is acting in the capacity of an independent agent and not as an employee of the Owner or the Contractor.

23.2. The Owner and the Contractor acknowledge that each DRB member is acting in a capacity intended to assist the Parties in avoiding disputes or facilitating the timely resolution of disputes. Accordingly, the Owner and Contractor agree and acknowledge that, to the fullest extent permitted by law, each DRB member shall be accorded quasi-judicial immunity for any actions or recommendations associated with DRB activities, and shall not be required to participate, appear or testify in any other legal proceedings between the Parties.

23.3. To the fullest extent permitted by law, the Owner and the Contractor shall indemnify and hold harmless each DRB member from (i) any personal or professional liability arising from or related to DRB activities under this Agreement, and (ii) any claims, losses, demands, costs, and damages (including reasonable attorney fees) for bodily injury, property damage, or economic loss arising out of or related to DRB members carrying out DRB activities under this Agreement. The foregoing indemnity and hold harmless agreement is a joint and several obligation of the Owner and the Contractor.

24. DISPUTES REGARDING THIS AGREEMENT

24.1. Disputes among the Parties arising out of this Agreement that cannot be resolved by negotiation, and actions to enforce any right or obligation under this Agreement, shall be initiated in the [Court Name] Court of the [Jurisdiction].

24.2. All questions shall be resolved by application of [Jurisdiction] law, without reference to the jurisdiction's choice of law rules.

24.3. The DRB members hereby consent to the personal jurisdiction of the Court of the [Jurisdiction].

25. FUNDING AGENCY REVIEW

13.1. The [Agency funding the Project] has the right to attend DRB regular meetings and site visits and DRB hearings, but not to attend private DRB deliberations.

26. DRB AGREEMENT EFFECTIVE DATE

This Agreement shall be effective as of the following date: [INSERT DATE DRB WAS APPOINTED].

DRB MEMBERS

By: _____ _____
(Signature) (Name)

By: _____ _____

(Signature)

By: _____
(Signature)

(Name)

_____
(Name)

CONTRACTOR

By: _____
(Signature)

By: _____
(Name)

Title: _____

OWNER

By: _____
(Signature)

By: _____
(Name)

Title: _____

Attachment 1

DRB Hearing Process

1.01 Hearing Scope

A. The Disputes described in Ad Hoc DRB Agreement Section 2.3 shall be the scope of the hearing in the DRB Process.

B. Within seven (7) days after the effective date of the DRB Agreement, the DRB Chair shall hold a conference call with the Parties addressing the following topics: (i) order of, and due dates for, delivering and exchanging pre-hearing submittals; (ii) use of experts (including a schedule for disclosure of experts and exchange of reports); (iii) date, time, and location for holding the DRB hearing; (iv) participants, witnesses, and observers at the hearing; and (v) any other matters relating to the hearing process that the DRB Chair or the Parties wish to raise; the DRB Chair shall confirm via email the steps and schedule agreed upon.

1.02 Pre-Hearing Submittals

A. On or before the date(s) set by the DRB Chair, the Owner and the Contractor shall each prepare a pre-hearing submittal and transmit it to the DRB and the other Party. The pre-hearing submittal for each Party shall include a position paper with such backup information as is referenced therein.

B. In order to minimize duplication and repetitiveness, backup and support information shall be included in a Common Reference Document (CRD), jointly prepared by the Parties prior to the submission of position papers. This document shall be tabbed, indexed, and the pages consecutively numbered for easy reference.

C. Position papers shall, at a minimum, contain a listing of the Disputes together with the basis and justification for the Party's position, with reference to the Contract, Contract Documents, and other supporting information in the CRD for each element of the Disputes.

D. The scope of the hearing may be limited to entitlement only. If the DRB recommends entitlement and the Parties accept it, the Parties shall endeavor to resolve by negotiation any related time and quantum issues. If they are unable to do so, the Parties may follow the pre-hearing process to bring to the DRB for hearing any unresolved time and quantum issues related to the Disputes.

E. Rebuttal papers may be required by the DRB if requested by both Parties or when deemed beneficial by the DRB for the hearing of disputes.

F. When the scope of the hearing includes time and quantum issues, the referring Party shall include a schedule impact analysis (for time-related issues) and full cost details (for quantum-related issues). The responding Party shall address such submissions and, if it so chooses, provide its own time and/or quantum analysis.

G. By a date set by the DRB Chair, the Parties shall submit to the DRB, with a concurrent copy sent to the other Party, any presentation materials that they propose to use at the hearing (for example, power points, enlarged copies of documents, summaries, chronologies, etc.). Presentation materials shall be consistent with the position papers and the CRD.

1.03 DRB Hearings

A. The Parties shall arrange for hearing facilities, at or near the Project site. The hearing location should be able to accommodate the number of participants and provide logistical support needed during the hearing.

B. Attendance:

1. By a date set by the DRB Chair, the Parties shall exchange and submit to the DRB a list of the participants and other attendees that each Party plans to have at the hearing.

2. The list should provide the following information:

- Name, title, and professional affiliation.
- Identification of the role of the person at the hearing (participant or observer).
- Brief summary of the matters that the person is anticipated to address if they are a participant.

C. Prior to the submission of this list, the Parties should attempt to agree on the attendees and participant/observer roles at the hearing. If the Parties cannot agree, the issue shall be submitted to the DRB for a final determination by the date set by the DRB Chair for submission of participant/attendee lists.

D. Legal counsel representing the Parties are permitted to attend DRB hearings, provided that prior permission is obtained from the other Party. Legal counsel shall not participate in the hearing unless requested by the Parties and approved in advance of the hearing by the DRB.

Legal counsel shall not be permitted to:

- Examine directly or by cross-examination any witness,
- Object to any question asked or factual statement made during the hearing,
- Make or argue legal issues unless called upon by the DRB, or
- Make statements of fact for or on behalf of a Party or witness.

E. The legal Rules of Evidence shall not apply in the DRB hearing process.

F. Subcontractor Claims:

1. At DRB hearings involving claims by a subcontractor or supplier against the Contractor that are actionable by the Contractor against the Owner under the Contract, the Contractor shall require and ensure that each subcontractor involved in the dispute shall have present an authorized representative with actual knowledge of the facts underlying the subcontractor claims.

2. Subcontractor claims against the Contractor that are not actionable against the Owner are outside the DRB's jurisdiction and shall not be heard.

G. The conduct of the hearing shall be established by the DRB, generally consistent with the following guidelines:

1. The DRB shall at all times exercise control over the hearing. The goal is to ensure that each Party is given a full opportunity to present its position, while at the same time ensuring that the hearing proceeds in an orderly fashion, expeditiously, and in a manner, as determined by the DRB, best suited to convey all information necessary to render the DRB recommendation.

2. The Party that referred the Disputes to the DRB shall present its position first, followed by the other Party. Both Parties shall be allowed successive rebuttals, assuring a full and adequate opportunity to present their positions and to rebut the opposing Party's position, until, in the DRB's opinion, all aspects of the Disputes have been fully covered.

3. The DRB may at any time ask questions, request clarifications, or ask for additional information. Either Party may request that the DRB direct a question to, or request a clarification from the other Party. The DRB shall not allow one Party to be questioned directly by the other Party, unless the DRB determines that it is appropriate to do so and the Parties agree.

4. Except for good cause shown, the DRB shall not allow introduction of arguments, exhibits, handouts, or documentary evidence that were not included in that Party's pre-hearing position paper(s)/submittals and have not been previously submitted to the other Party. In the rare instances it is permitted, the other Party shall be granted time to review and prepare a rebuttal to the new material.

5. The DRB may request additional information or documentation before, during and after the hearing. The DRB Chair shall advise the Parties when the hearing is closed.

1.04 Failure to Prepare a Pre-Hearing Submittal or Attend a DRB Hearing

A. In the event that either Party fails to deliver a pre-hearing submittal by the date established by the DRB, the DRB shall determine whether the hearing shall proceed 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 utilizing the information that has been submitted.

B. 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 decide whether or not to proceed with the hearing. If the DRB decides to continue with the hearing, it shall take place as if all Party representatives were in attendance, and the DRB shall consider all evidence brought before it, including hearing testimony from those Party representatives that are present.

1.05 Use of Experts

A. A Party intending to offer an expert's opinion at the hearing shall disclose such intention in writing to the other Party and to the DRB no less than thirty (30) days prior to the due date for delivering the pre-hearing submittal. The expert's name, qualifications, and a general statement of the aspect of the dispute that shall be covered by his or her testimony shall be included in the disclosure.

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

C. Any expert reports prepared by either Party that a Party intends to rely on at the hearing shall be included in the Party's position papers.

1.06 DRB Report

A. The DRB's recommendation for resolution of the Disputes shall be formalized in a written report signed by all DRB members. The report should consist of a concise description of the Disputes and relief requested; appropriate summaries of each Party's position; findings as to the facts of the Disputes; citation to applicable parts of the Contract, Contract Documents, project records, and Party submissions; analysis and rationale for the recommendation; and the recommendation. The report shall be submitted simultaneously to the Parties within thirty (30) days after the DRB closes the hearing, unless extended by agreement of the Parties.

B. If the DRB cannot arrive at a unanimous recommendation, it shall prepare minority findings and recommendation(s), which, together with the majority findings and recommendation(s) shall comprise the DRB report. The report shall identify the issues of disagreement, along with the supporting rationale for the minority opinion(s). The identity of the dissenting DRB member shall not be included in the report and all members of the DRB shall sign the report.

1.07 Clarification

A. Either Party may request clarification of the DRB report within ten (10) days following receipt of the report. Requests for clarification shall be submitted in writing simultaneously to the DRB and to the other Party. Requests for clarification shall be limited to seeking feedback from the DRB to assist the requesting Party in understanding the DRB's analysis and recommendation, not to re-argue the Disputes.

B. Within ten (10) days after receipt of the request for clarification, the DRB shall provide to both Parties a written response to the request.

C. Only one request for clarification from each Party shall be allowed.

1.08 Acceptance

A. The DRB's recommendation shall not be binding on either the Owner of the Contractor.

B. The Owner and the Contractor shall submit their written acceptance or rejection of the DRB recommendation simultaneously to the other Party and to the DRB within thirty (30) days of the later of (i) receipt of the report or (ii) receipt of responses to requests for clarification.

C. Failure by either Party to accept or reject within the specified period shall be deemed to be acceptance of the recommendation by that Party.

D. Acceptance by the Owner of a recommendation on entitlement only, or on entitlement with guidelines for time and/or quantum, shall not obligate the Owner to any particular time or quantum amount.

1.09 Admissibility/Participation

A. The DRB report [shall be] [shall not be] admissible in any subsequent dispute resolution or legal proceedings between the Parties. The DRB members' hearing and deliberation notes shall not be (i) admissible or (ii) subject to discovery.

B. DRB members shall not participate, or be required to participate, in any subsequent dispute resolution or legal proceedings.

END