



Construction Policy Bulletin

CPB 10-7 Dispute Resolution Advisor

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| References: | <i>Amendments to the 2006 Standard Specifications</i> | Section 5-1.145, "Requests for Information" Section 5-1.146, "Potential Claims and Dispute Resolution" Section 5-1.15, "Dispute Resolution" Section 5-1.15A, "General" Section 5-1.15B, "Dispute Resolution Advisor" Section 9-1.07E(3), "Performance Failure Withholds" Section 9-1.08D, "Final Payment and Claims" |
| | <i>Standard Specifications</i> | Section 9-1.04, "Notice of Potential Claim" Section 9-1.07B, "Final Payment and Claims" |
| | <i>Construction Manual</i> | Section 5-404, "Alternative Dispute Resolution Process" |

Effective Date: December 20, 2010

Approved:

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Approval Date: December 17, 2010

Background

Alternative dispute resolution (ADR) assists contractors and owners in resolving disputes and potential claims during construction projects, thereby mitigating damages and avoiding costly litigation after project completion.

The construction industry often uses a single project-neutral to help resolve disputes at the project level. These independent project-neutrals hear disputes at meetings, render recommendations, and issue written reports on contract disputes between project owners and contractors, without prejudice toward either.

Existing Procedure

No procedure exists for ADR on Department of Transportation (Caltrans) projects with bid amounts less than ten million dollars. Disputes in these projects follow the dispute resolution process outlined in Section 9-1.04, "Notice of Potential Claim," and Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications*.

New Procedure

A Dispute Resolution Advisor (DRA) is an experienced neutral party Caltrans and its contractor use to help resolve disputes on contracts with a total bid of \$3 million to \$10 million and at least 100 working days. Refer to the attached "Dispute Resolution Advisor Process," a flow chart detailing the DRA process.

Amendments to the 2006 Standard Specifications has added Sections 5-1.146, "Potential Claims and Dispute Resolution"; 5-1.15, "Dispute Resolution"; 5-1.15A, "General"; 5-1.15B, "Dispute Resolution Advisor"; 9-1.07E(3), "Performance Failure Withholds"; and 9-1.08D, "Final Payment and Claims."

DRA-related information is posted on the Division of Construction's DRA website:

http://www.dot.ca.gov/hq/construc/dispute_resolution/drainfo.htm

The Division of Construction's ADR engineer maintains the DRA website, the list of prequalified candidates, and a database of established DRAs and their recommendations.

Two new forms have been introduced. Use form CEM-6206, "Dispute Resolution Advisor Establishment Report," to document the establishment of the DRA. Use form CEM-6207, "Dispute Resolution Advisor Dispute Meeting Report," to document general information about a DRA dispute meeting, the DRA's recommendation, and whether each party accepts or rejects the recommendation.

DRA Selection

Caltrans and the contractor (the parties) jointly select the DRA within 30 days of contract approval so that the DRA is in place and able to hear contract disputes as they occur.

Each party proposes three potential DRA candidates, and they select one of the six candidates to be the DRA. The parties may select their potential candidates from a prequalified list available on the Division of Construction's DRA website or nominate candidates not on the prequalified list.

Use the following procedure to select the best DRA candidates from the prequalified list:

1. Review the list of names and associated summaries of experience to find the most qualified candidates for the particular project.
2. Select a candidate with the knowledge and work history that best match the type of project.
3. Select a candidate who has dispute resolution experience in the areas with the largest potential for dispute.
4. Contact the Division of Construction's field coordinator and ADR engineer for guidance and additional information about the prospective candidates.
5. Contact the candidates and determine their desire and availability to serve. If a candidate is willing and available to serve, request a disclosure statement with an updated résumé.

Nominating a DRA candidate not on the prequalified list requires that the candidate have a minimum of ten years' experience in or directly related to public-works, heavy-highway construction projects with or on behalf of federal, state (particularly Caltrans), or local government agencies. The experience must be any combination of the following:

1. Supervisor, manager, or executive in public-works heavy-highway construction contracts with emphasis in resolving disputes arising out of those contracts.

2. Attorney representing parties in litigating or arbitrating public-works, heavy-highway construction contract claims.
3. Judge or arbitrator adjudicating or otherwise resolving public-works, heavy-highway construction contract claims.

A DRA candidate must have completed DRA training through the Dispute Resolution Board Foundation. It is also desirable for the DRA candidate to have served on at least three Caltrans project Dispute Resolution Boards as a member or at least two as chairperson.

When a candidate is not on the Caltrans prequalified list of DRA candidates, request a disclosure statement with a current résumé and a list of the Caltrans projects on which the candidate served as a DRB member or chairperson. Send the information to the Division of Construction's ADR engineer, who reviews the documents and verifies the candidate's Caltrans DRA or DRB experience.

The Division of Construction's field coordinator must approve DRA candidates not on the Caltrans prequalified list. If a candidate is approved, the ADR engineer adds the candidate to the prequalified list with the candidate's permission.

Submit the names, disclosure statements, and résumés of three DRA candidates to the contractor at the preconstruction conference, and ask the contractor to do the same. Jointly with the contractor, review the disclosure statements and résumés of the potential DRA candidates for proper qualifications and possible conflicts of interest. Jointly select the most-qualified candidate as the DRA.

If one candidate cannot be agreed upon, each party selects one of the three nominated by the other, with final selection of the DRA decided by a coin toss.

Upon selection of the DRA, promptly notify the DRA in writing, with a courtesy copy to the contractor. Notify the candidates not selected that they are no longer under consideration for the project. Complete form CEM-6206, "Dispute Resolution Advisor Establishment Report," and send it to the ADR engineer.

DRA Replacement

With at least 15 days' notice, the DRA may resign, or either party may replace the DRA for failing to comply fully with the required employment or financial disclosure conditions of the DRA described in the contract and the DRA Agreement. If Caltrans wants to replace the DRA, the district submits its recommendation to the Division of Construction's field coordinator for approval before sending a letter to notify the DRA and the contractor.

The parties select a DRA replacement within 15 days, using the same procedure used to select the original DRA.

DRA Operation

When contractually required, the parties establish and use the DRA as part of the administrative dispute resolution and claims process.

If a contractor does not make a good-faith effort to comply with the requirements to establish the DRA or to attend the initial meeting, withhold a percentage of the estimated value of the work performed during each estimate period that the contractor does not comply, as stated in the *Dispute Resolution Advisor Agreement* and Section 9-1.07E(3), "Performance Failure Withholds," of the

Amendments to the 2006 Standard Specifications. Although the withholding requirement is shown in two sections of the contract, make only one withhold per performance failure regarding the DRA.

For projects with federal funding, notify the Federal Highway Administration (FHWA) representative when an issue is referred to the DRA. Coordinate with the FHWA representative on full-oversight projects to ensure their participation in any related contract change order. Give the FHWA the date of DRA dispute meetings, information regarding the dispute, and the DRA's recommendation.

Either Caltrans or the contractor may refer a dispute to the DRA, who will fairly and impartially review, hear, and provide written recommendations to the parties to help resolve the dispute. The parties must adhere to the DRA process timelines and other contract requirements. The contractor must exhaust the DRA process before filing a claim, or the contractor is barred from filing the claim in arbitration.

The parties and the DRA comply with the contract provisions and the *Dispute Resolution Advisor Agreement* and help develop the DRA operating procedures. The resident engineer ensures that DRA operating procedures are fair and comply with the contract and the *DRA Agreement*. Both parties and the DRA sign the *DRA Agreement* and approve acceptable operating procedures at the initial DRA meeting, held at the start of the project. Except for this initial meeting, the DRA meets only to hear disputes.

In the response to the supplemental potential claim record, the resident engineer reminds the contractor of its obligation to refer disputes to the DRA within five days, starting the DRA process timeline.

The contract and the *DRA Agreement* provide for both informal and traditional dispute processes. The informal dispute process is optional and intended for small, uncomplicated disputes. It is used only when the parties and the DRA agree that its use would be appropriate to resolve the dispute. The informal dispute process operates parallel with but independent of the traditional dispute process. If the parties use the informal process, no additional time will be added to the traditional dispute process unless they agree to allow more time. After an informal dispute meeting, the DRA provides an oral, nonbinding recommendation the same day as the dispute meeting.

The traditional dispute process requires formal position papers and strict timeframes. It resolves all project disputes not resolved informally. The process is mandatory if the contractor wishes to pursue the dispute. After a traditional dispute meeting, the DRA provides a written, nonbinding recommendation within 10 days unless the parties agree to allow more time. The contract and the *DRA Agreement* set forth additional time requirements.

Accepting and Rejecting a DRA Recommendation

Upon receiving the DRA's recommendation, provide a copy to the Division of Construction's field coordinator and ADR engineer.

Although the DRA's recommendation is nonbinding on either party, the parties must nevertheless respond to the DRA and the other party so it is clear if the dispute is resolved or remains unresolved.

Accepting a DRA recommendation that finds in favor of Caltrans is delegated to the district.

Accepting a DRA recommendation in the contractor's favor or rejecting a DRA recommendation requires approval from the Division of Construction's field coordinator. The deputy district director of construction and the field coordinator will review and discuss the reasoning for the proposed response before sending it to the DRA and the contractor.

Complete form CEM-6207, "Dispute Resolution Advisor Dispute Meeting Report," to notify the Division of Construction's ADR engineer of the dispute meeting and each party's acceptance or rejection of the recommendation.

DRA Member Payment

Pay half the cost of the DRA's participation in authorized onsite meetings and authorized offsite project work at rates specified in Section 5-1.15B, "Dispute Resolution Advisor," of the *Amendments to the 2006 Standard Specifications*. No markups are allowed. Authorized onsite DRA meetings include the initial startup and ad hoc dispute meetings. Authorized offsite project work includes such work as the contract review, dispute review and evaluation, and recommendation preparation. Caltrans and the contractor must approve DRA payments for offsite project work or services before the costs are incurred.

The contractor submits extra work bills for reimbursement of the Caltrans portion of DRA costs. Evidence of full payment to the DRA is required to substantiate payment. Caltrans and the contractor pay their own costs to prepare for and participate in DRA meetings.

At no cost to the contractor or the DRA, Caltrans provides administrative services, such as conference facilities, for the DRA meeting. The resident engineer ensures that the facility is adequate for the number of participants and has appropriate accommodations for each party's presentations.

The next revision of Chapter 5-404 of the *Construction Manual* will incorporate this procedure as will the amendments to the *Standard Specifications*.

If you have questions or comments about this bulletin, please contact Andy Alvarado, Division of Construction, at (916) 653-8633.

Attachments: Flowchart, "Dispute Resolution Advisor Process"
 CEM-6206, "Dispute Resolution Advisor Establishment Report"
 CEM-6207, "Dispute Resolution Advisor Dispute Meeting Report"