



# **AAA-ICDR<sup>®</sup> Dispute Avoidance and Resolution Board**

**Specifications, Operating Procedures, and  
Hearing Rules and Procedures**



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## Introduction

For more than 50 years the American Arbitration Association® and its International Centre for Dispute Resolution® (AAA-ICDR®) have worked closely with the construction industry through its National Construction Dispute Resolution Committee to develop ways to prevent and manage conflict in the industry.

The National Construction Dispute Resolution Committee (NCDRC) is a Committee of the AAA-ICDR that serves as an advisory body with regard to construction dispute resolution services. Composed of liaisons from a diverse group of leading construction industry and related organizations, the NCDRC provides industry guidance to the AAA-ICDR on trends in alternative dispute resolution including recommendations for AAA-ICDR rules and procedures.

The complexity and long-term nature of construction projects create a level of uncertainty, and it is impossible to resolve every detail and foresee external factors that may create a dispute at the outset. As the provider of choice for dispute avoidance, conflict management and dispute resolution services, the *AAA-ICDR Dispute Avoidance and Resolution Board (DARB) Procedures®* are designed to avoid and resolve potential disputes at the project stage, focusing on real-time resolution, utilizing construction industry experts available throughout the project.

## I. AAA-ICDR Dispute Avoidance and Resolution Board Guide Specifications

### 1.1 General

#### A. Definitions

*American Arbitration Association-International Centre for Dispute Resolution* – Neutral not-for-profit provider of Dispute Avoidance and Resolution Board (DARB) services, internationally and domestically.

*Board* – See Dispute Avoidance and Resolution Board.

*Contract* – The construction Contract of which this AAA-ICDR Dispute Avoidance and Resolution Board Guide Specifications (Specification) section is part.

*Dispute* – A claim, change order request, or other issue that cannot be resolved through negotiations, conciliation or mediation between the Owner and Contractor.

*Dispute Avoidance and Resolution Board (Board or DARB)* – Neutral construction professionals selected and approved by the Owner and Contractor for their experience in the type of construction involved in the Project and independence to assist the Owner and Contractor in avoiding and resolving disputes. A typical Board is comprised of three members.

*Parties* – The Owner and the Contractor.

*Project* – The construction project that is the subject of the Contract. *Site* – Location of the construction Project.



## B. Summary

The purpose of a Dispute Avoidance and Resolution Board (Board) is to assist the Parties in avoiding and resolving Disputes in connection with or arising out of the performance of the Project.

A Dispute Avoidance and Resolution Board consists of respected experts in construction of the type of construction involved in the Project and/or construction claims, who are selected by and approved by both Parties. The Board will be established at the commencement of the Project.

The Board meets regularly with representatives of the Parties at the jobsite or virtually at which time the Board and the Parties discuss the progress of the work, difficulties encountered, potential future claims or disputes and ways to avoid and resolve them in real-time. A site visit may be made to observe the progress of the work after the meeting.

In the event a Dispute arises, the Owner or Contractor may refer the Dispute to the Board for resolution through either the Interim Advisory Process or the Formal Process described in Section 1.5 B and 1.5 C below.

The Interim Advisory Process, described in Section 1.5 B below, is a more expeditious proceeding to provide the Parties with immediate verbal or written guidance on an issue to help the Parties to resolve the issue promptly. The Board's Advisory Opinion is not binding on the Parties, and the Dispute may be presented subsequently through the Formal Process.

In the Formal Process, described in Section 1.5 C below, each Party is given the opportunity to present its position in writing and then, if needed, verbally at a hearing. Promptly after completion of the proceedings, the Board provides written Recommendations for resolution of the Dispute to the Parties.

Depending on the Contract requirements or agreement of the Parties, the recommendations/determinations may be: (1) non-binding (Recommendations) or (2) binding (Determinations) until overturned in a subsequent dispute resolution proceeding. If non-binding, the Recommendations may be designated as admissible or not admissible in a subsequent dispute resolution proceeding. If there is not a designation, the default will be that the Recommendation is admissible in a later proceeding but non-binding.

AAA-ICDR will assist in the selection of Board members, prepare and provide notices of meetings, transmit meeting minutes and Board recommendations, and collect and disburse Board member fees and expenses, and provide other administrative services as required.

## C. Scope

These Specifications describe the purpose, procedure, function and features of the DARB. Section II (AAA-ICDR DARB Operating Procedures) sets out the requirements of a Three-Party Agreement among the Owner, Contractor and the Board members to formalize creation of the Board and establish the scope of its services and the rights and



responsibilities of the Board and Parties. In the event of a conflict between this Specification and the Three-Party Agreement, the latter governs.

#### **D. Purpose**

The Board, as an independent third party, will assist in and facilitate the avoidance, and if that is not possible, the timely resolution of Disputes between the Parties.

The Board will encourage and promote resolution of disputes by the Parties through good-faith discussion and negotiation between the Parties to avoid referring Disputes to the Board.

#### **E. Three-Party Agreement**

All Board members and the authorized representatives of the Owner and Contractor shall execute the Three-Party Agreement within 14 days after the selection of the third member of the Board.

#### **F. Continuance of Work**

Both Parties shall proceed diligently with the work and comply with all applicable Contract provisions while the Board considers a Dispute.

#### **G. Tenure of Board**

The Board will be deemed established on the date of establishment stated in the Three-Party Agreement.

The Board will be dissolved thirty days after final payment is accepted by the Contractor or mutual written agreement of the Parties. A unilateral termination (either for breach or for convenience) of the Contract does not terminate the Board, and the Board has the authority to consider Disputes referred by a Party regarding the termination.

#### **1.2 Commencing an AAA-ICDR DARB**

Within 14 days of the effective date of the Contract, the Parties shall submit a Request for Dispute Avoidance and Resolution Board (DARB) assistance with the AAA-ICDR. The Request for Assistance shall include (1) a description of the construction Project including name, location, approximate Contract price, and Contract time, (2) contact information for the representatives of each Party, (3) a list all design professionals, consultants, lawyers, and first-tier subcontractors then known, and (4) the AAA-ICDR filing fee.

Prior to the dissemination of a list of potential Board Members, the AAA-ICDR shall conduct an administrative conference with the parties to discuss the process. The conference will take place within 14 calendar days after the request for the DARB. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA-ICDR may contact the parties individually.



### 1.3 Membership of the Board

#### A. Selection of Board Members

All members shall be selected from a list provided by the AAA-ICDR from its Roster of DARB Members. The Parties will consult in good faith to reach agreement on the members that will constitute the Board.

If the Parties are unable to mutually agree on the members, the Board will consist of: (1) one member nominated by the Owner and approved by the Contractor, (2) one member nominated by the Contractor and approved by the Owner, and (3) a third member nominated by the first two members and approved by both the Owner and the Contractor. The third member will serve as Chair unless the Parties agree otherwise.

If the Parties cannot agree on the selection of DARB members, the AAA-ICDR will select the members without the submission of additional lists.

#### B. Alternative Procedure for Selection of Single-Member Board

If the Contract specifies or the Parties agree on using a single-member Board, the member will be selected in accordance with this Section.

The Single Member Board shall be selected from a list provided by the AAA-ICDR from its Roster of DARB Members. The Parties will consult in good faith to reach agreement on the member that will constitute the Board.

If the Parties cannot agree, the AAA-ICDR shall promptly schedule a conference call with the Parties to discuss desired qualifications of the Board member.

Within 14 days after the telephone conference, the AAA-ICDR shall send the Parties an identical list of persons selected from its Roster of DARB Members, including detailed biographical information.

The Owner and the Contractor shall each have 14 days in which to strike names not preferred, number the remaining names in order of preference, and return the list to the AAA-ICDR. The Owner and the Contractor may strike up to three (3) names each.

From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA-ICDR shall invite the acceptance of the Board member to serve.

If, for any reason, an appointment cannot be made from the original list, the AAA-ICDR shall have the authority to send an additional list. If no names are available from that list, the AAA-ICDR shall have the authority to make the appointment from among other members of its Roster of DARB Members, without the submission of additional lists.



### **C. Neutrality**

The Board members shall be impartial and independent, and shall disclose to the AAA-ICDR any circumstance likely to give rise to justifiable doubt to their impartiality and independence, including financial or personal interest in the Project, past or present business or personal relationships of the members or the member's employer with the Parties or the Parties' key employees, subcontractors, design professionals, consultants, and lawyers on this Project. Upon receipt of such information, the AAA-ICDR shall communicate the information to the Parties and, if the AAA-ICDR deems it appropriate to do so, to the Board members and others. The foregoing duty to disclose is a continuing duty throughout the member's service on the DARB.

### **D. Board Member Challenge Procedure**

Any objection for cause by either Party to the continued service of a Board member shall be made to the AAA-ICDR. The AAA-ICDR shall determine whether the Board member should be removed and shall inform the Parties of its decision, which shall be conclusive.

### **E. Vacancies**

If for any reason a Board member is unable, unwilling, or incapable to perform the duties of the office, or is removed, the AAA-ICDR may, declare the office vacant. The new Board member(s) shall be selected in the same manner as the original member. In the event of a vacancy after a dispute has been submitted and hearings commenced, the remaining Board members may continue with the hearing and determination of that Dispute, unless the Parties agree otherwise.

## **1.4 Operation**

### **A. General**

The Board shall adopt the operating procedures detailed in Section II, *AAA-ICDR Dispute Avoidance and Resolution Board Operating Procedures*, or formulate new or revised operating procedures consistent with these Rules. Notice of adoption of the operating procedures shall be provided by the Board to the Parties within 28 days after the effective date of the Three-Party Agreement.

The operating procedures shall be discussed, amended, if necessary, and approved by all parties at the first Board Meeting.

### **B. Reports and Information**

The Board will be kept informed of construction activity and other developments by means of timely transmittal of relevant information prepared by the Parties in the normal course of construction, including but not limited to periodic reports and minutes of project progress meetings.





## C. Periodic Meetings and Visits

The Board shall visit the project site and meet with representatives of the Parties at regular intervals. These visits will occur every three months or as agreed upon among the Parties, and the Board, depending on the progress of the work. Additional meetings (virtual or in-person) may be held as necessary and convenient.

Each meeting shall consist of an informal roundtable discussion and field observation of the work. The roundtable discussion will be attended by authorized representatives of the Parties, including senior company executives where appropriate and practicable. Subcontractors and design professionals may be included where appropriate.

The Parties and Board will discuss the progress of the work, difficulties encountered in construction, payment and other commercial issues, schedule and delay, and potential claims or disputes and ways to avoid and resolve them. Any other issues can also be raised by the Board or Parties at this time. A primary purpose of these meetings is to assist the Parties in the avoidance and resolution of future Disputes. A site visit will be made to observe the progress of the work. The field observations shall cover all active segments of the work. The Board shall be accompanied by authorized representatives of both Parties.

### 1.5 Review of Disputes

#### A. General

The Parties may refer Disputes or Questions to the Board through the Interim Advisory Process or the Formal Process.

#### B. Interim Advisory Process

By mutual agreement of both Parties a Dispute or Question may be referred to the Board, with copy to the AAA-ICDR, using the Interim Advisory Process.

Typically, the Dispute or Question will be presented at a regular meeting of the Board. Each Party will submit short written statements setting out their position to the other Party and Board, with accompanying exhibits, fourteen days prior to the meeting.

The Parties will present their positions to the Board in the meeting. Upon conclusion of the meeting the Board will confer and provide their non-binding Recommendations to the Parties, unless the Board determines it needs more time to deliberate in which case the Recommendations will be delivered in writing within 14 days.

The Recommendations will have no binding effect. Either Party may still present the Dispute to the Board through the Formal Process.



## C. Formal Process

### 1. Prerequisites to Review

A Dispute is subject to referral to the Board using the Formal Process when either Party believes that bilateral negotiations are not likely to succeed or have reached an impasse.

### 2. Requesting Review and Initial Filing Deadlines

Either Party may refer a Dispute to the Board using the Formal Process. Requests for Board Review using the Formal Process shall be submitted in writing to the Chair of the Board. The Request for Board Review shall set forth in writing the nature of the Dispute, the factual and contractual basis of the Dispute, and all remedies sought, together with all documents that support each element of the claim.

A copy of the Request for Board Review shall be simultaneously provided to the other Party by the referring Party.

Within 28 days after the Request for Board Review has been filed, the opposing Party shall submit in writing to the Chair of the Board a Response to Request for Board Review, including the factual and contractual basis of any defense, together with all documents that support each element of the defense. If the responding Party wishes to counterclaim, the responding Party shall, within 28 days after the Request for Board Review has been filed, submit, in writing to the Chair of the Board, a Counterclaim setting forth in writing the factual and contractual basis of the counterclaim and all remedies sought, together with all documents that support each element of the Counterclaim. A copy of the Response and/or Counterclaim shall be simultaneously provided to the other Party by the responding Party. Within 28 days after a Counterclaim is filed, the Party opposing the Counterclaim shall submit, in writing to the Chair of the Board, a Response to the Counterclaim setting forth the factual and contractual basis of any defense, together with all documents which support each element of the Response to the Counterclaim. A copy of the Response to the Counterclaim shall be simultaneously provided by the filing Party to the other Party.

### 3. Scheduling Review

Within 7 days of receipt of the Response to the Request for Board Review or Response to Counterclaim, whichever comes later, the Chair will, in consultation with the Parties, establish dates for any additional pre-hearing submissions and schedule a hearing date. The hearing will generally be conducted at the time of the next regularly scheduled meeting.

In addition, the Board may convene a preliminary hearing by conference call for the purpose of addressing an information exchange, the order of proceedings at the hearing, bifurcation of merit and quantum issues, and such other matters that the Board believes will expedite the hearing process.



#### 4. Hearing Location

The hearing shall be held at the job site unless mutually agreed otherwise. Other considerations may include a virtual hearing or a hybrid model combining a virtual and in-person hearing. Any location or other method of hearing should have the necessary access to facilities and documentation

#### 5. Hearing Procedures

The Board shall adopt the Dispute Avoidance and Resolution Board Hearing Rules and Procedures (Hearing Procedures) detailed in Section III of these Rules or develop new or revised hearing procedures consistent with the Specifications. Hearing procedures shall be provided by the Board to the Parties within 28 days of the effective date of the Three-Party Agreement.

#### 6. Hearing Attendance; Counsel at Hearing

The Owner and the Contractor shall have authorized representatives at all hearings. The Board may establish rules for the participation of legal counsel and experts at hearings. Unless the Board permits, counsel may not: (a) examine directly or cross-examine any participants; (b) object to questions or factual statements during the hearing or (c) make motions or offer arguments.

#### 7. Deliberations

After the hearing is concluded, the Board will confer to formulate its recommendations. All Board deliberations shall be conducted in private, with all Board Member views kept strictly confidential from disclosure to others.

#### 8. Recommendations or Determinations

The Board's recommendation or determination for resolution of the dispute will be provided in writing to the Parties within 14 days of the completion of the hearings. In difficult or complex cases, and in consideration of the Board's schedule, this time may be extended by mutual agreement of the Parties and the Board.

#### 9. Acceptance or Rejection of Recommendation

Within 14 days of receiving the Board's recommendation, or such other time specified by the Board, both Parties shall provide written notice to the other and to the Board of acceptance or rejection of the Board's recommendation or determination. The failure of either party to respond within the specified period shall be deemed an acceptance of the Board's recommendation or determination. If, with the aid of the Board's recommendation or determination, the Parties are able to resolve their Dispute, the Owner will promptly process any required Contract modifications.



## 10. Clarification and Reconsideration

Either Party may seek clarification or reconsideration of Recommendations or Determinations within 7 days of receipt of the Recommendations or Determinations by filing a brief setting out the basis for request. The other Party will have 7 days to respond. The Board will amend or clarify its Recommendations or Determinations or deny the request within 7 days.

## 11. Effect of Recommendations

The Recommendations or Determinations shall be (a) non-binding or (b) binding on the Parties until overturned in a subsequent de novo dispute resolution proceeding. The Contract or written agreement of the Parties will specifically address and control this issue.

If the Recommendations or Determinations are non-binding, the Contract or written agreement of the Parties will specifically address and control whether the Recommendations are admissible in a subsequent dispute resolution proceeding to the extent permitted by law. If the contract is silent on this issue, the default will be that it is admissible in a later proceeding but non-binding.

### 1.6 Alternative Dispute Resolution

The Owner and Contractor may, by agreement at any time during review of a Dispute by the Board, refer the dispute to the AAA-ICDR for mediation or any other form of alternative dispute resolution. In such an agreement, the Owner and Contractor shall specify the Dispute that is being referred and, in the event of settlement, shall advise the Board regarding such settlement, after which the Board shall have no further authority to proceed with that matter.

### 1.7 Board Member Fees and Expenses

The fees and expenses of the three members of the Board shall be shared equally by the Parties.

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

## II. AAA-ICDR Dispute Avoidance and Resolution Board Operating Procedures

### 2.1 Defined Terms

For the purposes of these Rules of Operation, terms not otherwise defined herein shall have the meanings as assigned to them in the Contract, unless the context clearly requires otherwise.

### 2.2 General

Pursuant to the Contract, the Dispute Avoidance and Resolution Board (Board) will have the authority to implement these Operating Procedures or formulate new or revised Procedures consistent with the Contract.



The Board will operate in an informal and flexible manner, while attempting to ensure that the parties always understand the procedures the Board will follow. The Board encourages the Parties to evaluate and recommend changes in the Board operating procedures and guidelines to improve the process.

There shall be no *ex parte* communication, advice or other consultation between any Board member and any Party to the contract including subcontractors and suppliers on any matter or issue that is pending or may become before the Board.

### 2.3 Role of Chair

The Chair will be responsible for overseeing and keeping records of the DARB activities under the Operating Procedures. The Chair will prepare a meeting agenda in consultation with the Parties. The Chair will prepare meeting minutes.

### 2.4 Periodic Progress Reports

Within 60 days after it is established, the Board, in consultation with the Parties, will establish a procedure to provide the Board with Monthly Progress Reports under the Contract. The Board members will use these reports to keep informed of construction developments and the progress of the work.

### 2.5 Scheduling of Meetings and Site Visits

Regular meetings and site visits to review the progress of the work will be made at least every 3 months or as agreed upon by the Parties and the Board. The Board may, in consultation with the Parties, schedule other visits to the site of the work that is the subject of a Dispute.

At least 30 days prior to a proposed meeting and site visit, the AAA-ICDR will contact the Parties to make scheduling and logistical arrangements. The date, time, and location(s) of the meeting and site visit will be confirmed in writing to the Parties at least 10 days prior to the meeting and site visit.

### 2.6 Site Visits

During a site visit, the Chairperson and Members will be accompanied at all times by authorized representatives of the Parties. The Parties may designate other persons to attend the site visits, as necessary or appropriate to assist the Board. Site visits can also be conducted virtually by agreement of the Parties and the Board.

### 2.7 Agenda for Meetings and Site Visits

Each meeting and site visit will begin with an informal roundtable discussion and be followed by a field inspection of the Contract work. The agenda for the roundtable discussion generally shall include the following:

- Meeting convened by the Chair of the Board;
- Review of last meeting minutes and any necessary revisions to those minutes;



- Contractor discussion items:
  - Work accomplished since the last meeting;
  - Current status of the work schedule and schedule for future work;
  - Anticipated or potential problems and proposed solutions;
  - Status of payment and other commercial issues; and
  - Status of current and potential disputes, claims or other controversies.
- Owner discussion items:
  - The work schedule;
  - Perspective on payment and other commercial issues;
  - Perspective on potential disputes, claims and other controversies;
  - Status of past disputes, claims or other controversies.
- Discussion amongst the Parties and Board on how to prevent and avoid issues and disputes from maturing into formal Disputes.
- Other issues raised by the Parties or Board for discussion;
- Set tentative date(s) for next meeting(s).

## 2.8 Distribution of Meeting Minutes

Within two weeks after the site visit, the AAA-ICDR will distribute minutes of the site visit meeting to the Parties.

## 2.9 DARB Hearing Rules and Procedures

DARB hearings will be conducted in accordance with the *AAA-ICDR Dispute Avoidance and Resolution Board Hearing Rules and Procedures* in Section III.

# III. AAA-ICDR Dispute Avoidance and Resolution Board Hearing Rules and Procedures

## 3.1 Defined Terms

For the purposes of these Rules, terms not otherwise defined herein shall have the meanings as assigned to them in the Contract, unless the context clearly requires otherwise.

## 3.2 General Authority of the Dispute Avoidance and Resolution Board (DARB)

Pursuant to the Contract, the Dispute Avoidance and Resolution Board (Board) will implement these Hearing Rules and Procedures in a reasonable manner to make the hearing informal, efficient, expeditious, and fair. The Board, however, will retain the authority to conduct the hearing, as it deems most appropriate, consistent with the Contract and these Rules.



### 3.3 Role of Chair

The Chair will be responsible for directing the course of the hearing and for keeping the official records of the hearing.

### 3.4 Scheduling of Hearing

Within 7 days of receipt of the Response to Request for Board Review or Response to Counterclaim, whichever comes later, the Chair will establish the dates for any additional pre-hearing submissions and the hearing date. Except in circumstances that require immediate action, the hearing will be scheduled during a regularly scheduled site visit.

### 3.5 Hearing Location

To the extent practicable, any Board hearing will be conducted at the job site, unless the Parties and the Board, by agreement, select another location or a virtual hearing.

### 3.6 Preliminary Conference

The Board may request that the affected parties participate in a virtual or in-person preliminary conference with the Board. At the preliminary conference, the Board shall provide the parties with organizational instructions and inform them of any issues that the Board would like to have addressed at the hearing. The Board may also address issues such as bifurcation of liability and quantum, the amount and elements of damages in Dispute, the desired order of presentation of the parties' positions, the persons who will be in attendance at the hearing, and any other matters that would promote the efficient, expeditious, and fair processing of the hearing.

### 3.7 Exchange/Submission of Documents and Exhibits

The Board may require the Parties to produce documents at or before any hearing. At least 14 days prior to the scheduled hearing date, the Board will notify the Parties in writing of any documents that may be required to be produced for the hearing.

At least 10 days prior to a scheduled hearing date, the parties shall exchange and simultaneously submit to the Board a list of each document or exhibit that each party intends to submit, use, or refer to in its presentation at the hearing. Each Party shall include with the list a copy of each document or exhibit not included in prior submissions to the Board.

The Parties are encouraged to submit exhibits, charts, or summaries of documents in order to facilitate the Board's understanding of the issues in the Dispute and to avoid the submission of voluminous records that may not be necessary for the Board's determination. At least 10 days prior to a scheduled hearing; such documents also shall be exchanged with the other party and submitted to the Board.



### 3.8 Preparation for Dispute Avoidance and Resolution Board Hearing

The Parties will prepare individual, stand-alone Statements of Position describing the dispute, the Party's position, the contractual justification for that position, and any reference material. The following are suggested guidelines for Statements of Position and related documentation.

The Parties should attempt to agree to a simple statement of the dispute, typically limited to one paragraph.

Absent agreement of the Parties, the Statement of Position should be structured as a stand-alone document that describes the dispute, sets out the quantification of time and damages being sought and disputed, states the Party's position on entitlement, identifies the contractual justification for the Parties' positions, attaches the exhibits supporting each Party's position, and outlines the testimony that will be offered at the hearing.

The Parties should stipulate to as many facts, dates, and quantities as possible and include this stipulation with their Statement of Position.

If quantum is to be considered in the same hearing, the claiming Party should definitize its damages in detail with supporting records, and other documents as exhibits. The other Party should respond to each item of cost it disputes and state the basis for disputing the item.

The Parties should not send to the Board or each other any further exhibits or correspondence regarding the dispute, without the prior approval of the Board, between the time the Statements of Position and responses have been sent out and the hearing.

The Statements of Position should be delivered to the other Party and Board electronically 14 days prior to the established hearing date.

These guidelines are subject to change to fit the circumstances of a particular dispute.

### 3.9 Evidence/Burden of Proof

The Board will not be bound by the any rules of evidence or burden of proof. The Board may limit the presentation of documents or oral statements when it deems them to be irrelevant or repetitive or when it determines it has sufficient understanding of the facts and argument to make its Recommendations.

### 3.10 Presentation of Dispute

In the hearing, each Party shall make an initial presentation of its position with respect to the Dispute or defense and one or more rebuttals to any assertion by the other Party, until the Board determines that all aspects of the Dispute have been addressed adequately. The Board may limit the presentation of documents or oral statements when it considers them to be irrelevant or repetitive. The Board members shall control the hearing and guide the discussions of issues by asking





questions of the Parties in order to expeditiously obtain all information the Board needs to make its Recommendations. The Board may permit the questioning of one Party by another Party only if it would facilitate the presentation or clarification of an issue in the Dispute.

### 3.11 Representatives Required to be Present at Hearing

Authorized representatives of the Parties shall attend the hearing, including a senior company executive from each Party. Except as provided in Section 3.12 hereunder, no other person may attend the hearing without the express permission of the Board granted after hearing the objections of the other Party.

At least 10 days prior to a scheduled hearing date, the Parties shall exchange and submit simultaneously to the Board a list of their respective witnesses and representatives planning to attend the hearing. The list should contain the following information: the person's name, title, professional affiliation, and a brief summary of the matters that the person will address.

### 3.12 Participation of Counsel and Independent Experts

If a Party intends to be accompanied at the hearing by counsel or by an independent expert, the Party shall notify the other Party in writing at least 10 days prior to the scheduled hearing date and shall include such person on the list required by Section 3.11. If a Party has not notified the other Party within the appropriate time period that it intends to be accompanied by counsel or by an independent expert, but receives another Party's notice that it will be so accompanied, the recipient Party may then elect to be accompanied by counsel or independent expert if it notifies the other Parties and the Board, in writing, at least 5 days prior to the scheduled hearing date.

Unless the Board determines that it would assist resolution of the Dispute, counsel may not: (a) examine directly or cross-examine any witness, (b) object to questions or factual statements made or related during the meeting, or (c) make motions or offer arguments.

### 3.13 Consolidation/Bifurcation of Disputes

The Board will notify the Parties in writing if it decides to consolidate Disputes arising out of the same circumstances or involving similar factual or legal issues, or if it decides to bifurcate a Dispute into entitlement and quantum hearings.

Alternatively, the Board, on its own or at the recommendation of the Parties, may issue recommendations as to entitlement only and request that the Parties attempt to negotiate quantum. If the Parties cannot do so, the Board may schedule further hearings to address any unresolved issues.

### 3.14 Disputes Involving Subcontractor Claims

The Contractor shall identify each portion of the Dispute that involves a Subcontractor Claim and the identity of the Subcontractor. The Contractor must include the Subcontractor's presentation within the Contractor's submissions and



comply with all requirements of these Rules. The Contractor is responsible for communicating with and controlling its Subcontractors.

At any DARB meeting on a Dispute that includes one or more Subcontractor Claims, the Contractor shall require that an authorized representative of each Subcontractor that is involved in the Dispute with direct and actual knowledge of the facts underlying the Subcontractor claim attend to assist in presenting the Subcontractor claim and to answer questions raised by the Board members or the Owner's representatives.

### 3.15 Failure to Comply with Hearing Rules and Procedures

A Party's failure to comply with the Board's hearing rules and procedures and other requirements or obstruction of the process may be considered by the Board in making its Recommendations.

### 3.16 DARB Deliberations

After the close of hearing on a Dispute, the Board will meet to formulate Recommendations for resolution of the Dispute. All Board deliberations will be conducted in private and are confidential.

### 3.17 Issuance of Recommendations

Within 14 days after the close of the hearing, unless extended by agreement of the Board and Parties, the Board's Recommendations will be forwarded to the Parties by the AAA-ICDR.

The Recommendations shall be (a) non-binding or (b) binding on the Parties until overturned in a subsequent de novo dispute resolution proceeding. The Contract or written agreement of the Parties will specifically address and control this issue.

If the Recommendations are non-binding, the Contract or written agreement of the Parties will specifically address and control whether the Recommendations are admissible in a subsequent dispute resolution proceeding to the extent permitted by law.

If the contract is silent as to these issues, the default will be that the Recommendation is admissible in a later proceeding but non-binding.

### 3.18 Final Dispute Resolution

If Recommendations are not accepted by a Party, the Dispute will be resolved by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules or administered by the ICDR in accordance with its International Arbitration Rules if the dispute is determined to be international in scope.