

## SECTION 253 Dispute Resolution Procedures

*Dispute resolution procedures are mobilized into the contract in [standard spec 104.3.6](#).*

### 253.1 General

The department and the contractor are encouraged to resolve emerging disputes as early as possible. An early resolution of simple disputes may be facilitated by a third-party advisory opinion while more complicated or contentious disputes may benefit from employing a formal DRB review.

Interpret these terms, used within the departments dispute resolution procedures, as follows:

<b>DRB agreement</b>	Agreement between the department, contractor, and DRB members.
<b>Dispute</b>	An issue, claim, change order request, or other controversy that remains unresolved following good faith negotiations between authorized representatives of the department and contractor.
<b>Dispute review board (DRB)</b>	One or three neutral individuals mutually selected by the department and contractor to review disputes and render findings and recommendations based on the contract.
<b>Project manager</b>	Region project manager assigned to administer, oversee, and manage the project.
<b>Construction oversight engineer</b>	Bureau of Project Development engineer assigned to the WisDOT region in which the claim or dispute originated.
<b>Bureau</b>	The department's bureau of project development.

### 253.2 Third-Party Advisory Opinion

#### 253.2.1 General

A third-party advisory opinion may be provided by the bureau and subsequently by a member of the statewide standing DRB roster.

If after attaining and considering the bureau's recommendation concerning a pending or active dispute, the parties still do not agree on entitlement, either party may request a third-party advisory opinion by a member of the statewide standing DRB roster.

A third-party advisory opinion may expedite the settlement process and is less costly and less time consuming than a formal DRB hearing. Where third-party advisory opinions have been used, their success in promoting resolution of the dispute has led to wide endorsement of this approach. When considering referral of an issue for a third-party advisory opinion, the parties should thoroughly consider and discuss the issue with each other. The parties should recognize that if the issues are complex, a third-party advisory opinion may be ineffective.

In making this determination, the disputing parties should take into consideration the complexity of the issues, whether experts may be necessary, and the length and complexity of the presentations. A DRB third-party advisory opinion does not require acceptance or rejection by the parties. DRB preliminary views on issues form a basis for negotiated settlements without further DRB assistance. Third-party advisory opinions are based only on information available at the time, are subject to change based upon further data, and are not used or referred to in future hearings on the issue.

If the issue is not resolved after the third-party advisory opinion and a subsequent dispute hearing is held, no reference to the third-party advisory opinion is allowed. All positions, evidence, and other relevant data are resubmitted at the hearing. If the dispute is later taken before a formal DRB, the DRB is not bound by the third-party advisory opinion.

Third-party advisory opinions are typically limited to entitlement issues and not quantum. The DRB may provide advice on the method to use in determining quantum without specifically determining quantum.

#### 253.2.2 Availability

Under [standard spec 104.3.6](#), after the contractor provides the department a 5-Day written statement and the department responds with a 5-Day written response, a third-party advisory opinion may be used in the dispute resolution process when mutually agreed upon by both the contractor and department.

#### 253.2.3 Third-Party Advisory Opinion Process

##### 253.2.3.1 General

In general, the DRB will operate in according to these guidelines. However, it is not desirable to adopt hard-and-fast rules for the functioning of the third-party advisory opinion process. The entire procedure should be kept flexible to adapt to changing situations. The DRB may initiate, with the department's and contractor's concurrence, new procedures or modifications to existing procedures whenever this is deemed appropriate and beneficial in resolving the dispute.

#### **253.2.3.2 Request Third-Party Advisory Opinion**

When both disputing parties have decided that a third-party advisory opinion would be beneficial in resolving an issue or dispute, the project manager will contact the construction oversight engineer for concurrence. If the construction oversight engineer agrees that the issue warrants a third-party advisory opinion, a DRB will be engaged by the bureau to hear the issues and render an opinion.

#### **253.2.3.3 DRB Selection**

The project manager will coordinate with the construction oversight engineer to select a single member DRB from the statewide standing DRB member roster.

#### **253.2.3.4 DRB Advisory Agreement**

The construction oversight engineer will execute the agreement to engage a DRB selected from the statewide standing roster of DRB members.

#### **253.2.3.5 Meeting Procedures**

When a DRB has been retained, the DRB in conference with both parties and bureau will set a date for presentations. The department will provide to the DRB, a set of plans, specifications, and pertinent project correspondence. The department will provide to the DRB and contractor, its 5-Day written response, and any other supporting documents pertinent to the dispute.

The contractor will provide to the DRB and department, its 5-Day written statement and supporting documents pertinent to the dispute.

The disputing parties may further supplement the 5-Day written statements by each preparing a short summary of its position and submitting it to the DRB and the other disputing party before the meeting. Normally the disputing parties do not submit comprehensive position papers.

Submittals will be provided to the appropriate parties 7 calendar days before the meeting. At the meeting each party is given ample time to present its position, make rebuttals, provide key contract documents, and respond to the DRB's questions and requests.

The time required for these meetings varies widely, depending on the scope and complexity of the issues, but they are often less than a couple of hours.

#### **253.2.3.6 Findings and Recommendations**

The DRB may verbally render an opinion at the meeting or soon thereafter.

After the meeting, the DRB will write the third-party advisory opinion, including the rationale, to ensure clarity. Copies are provided to the disputing parties and bureau.

In some circumstances, after hearing the parties' presentations, the DRB may determine that the dispute is too complex to issue a third-party advisory opinion. In such cases, they should immediately advise the parties and suggest engaging the claim process.

Occasionally the DRB, after deliberation, is unable to formulate an opinion and so advises the parties. Nonetheless, this opportunity for the parties to state their positions in a clear, uninterrupted fashion, and with subsequent questions from the neutral, is often a useful step in resolving disputes.

Third-party advisory opinions are often sufficient to enable the parties to promptly resolve the dispute without a formal DRB hearing.

#### **253.2.3.7 Clarification**

After third-party advisory opinions are rendered, either party may ask for clarification. If the DRB determines clarification is appropriate and helps resolve the dispute, the DRB will provide clarification.

#### **253.2.4 Payment**

The department will bear all costs and expenses of the third-party advisory opinion. DRB members will be compensated and reimbursed expenses as prescribed in the DRB advisory agreement executed by the department and DRB member.

The department will provide, at no cost to the contractor, administrative services such as coordination of the third-party advisory opinion and meeting facilities when state owned facilities are utilized. If other facilities and amenities are desired by both parties, these costs will be equally shared by both parties.

The following payment procedures will be used:

1. The DRB member will submit invoices to the construction oversight engineer for review.
2. After the oversight engineer has reviewed and approved the invoices, the invoices will be forwarded to the project manager.
3. The project manager will review and then forward the DRB invoices along with any non-state facility or amenity charges to the contractor.

4. The contractor will pay the department-approved invoices.
5. The contractor will submit to the project manager the invoices and documentation verifying payment.
6. The department will execute a change order to pay the entire DRB invoiced amount and 50 percent of non-state facility and/or amenity invoices.

There will be no markups applied to expenses connected with the DRB, either by the DRB members or by the contractor when requesting payment of the department's share of expenses.

The department will reimburse the contractor for the department's share of the third-party advisory opinion costs under the Dispute Review Board administrative item.

### **253.3 Formal Dispute Review Board**

#### **253.3.1 Overview**

##### **253.3.1.1 General**

Any of the procedures for the formal DRB review established by these guidelines may be altered or modified by mutual agreement of the department and the contractor to better suit their needs in a particular dispute.

These guidelines describe the purpose, procedure, function, and features of the DRB. The agreement among the department, contractor, and DRB members will formalize creation of the DRB and establish the scope of its services and the rights and responsibilities of the department and the contractor. In the event of a conflict between these guidelines and the agreement, the latter governs.

##### **253.3.1.2 Purpose**

The purpose of the formal DRB is to provide an independent and impartial review of the dispute and provide non-binding written findings and recommendations based on the contract, applicable contract law, industry practices, and the facts presented.

It is not the purpose, or responsibility, of the DRB to resolve the dispute. That responsibility remains with the department and the contractor. However, it is anticipated that the DRB review will assist the department and the contractor in resolving the dispute.

Creation of the DRB is not intended as a substitute for department or contractor responsibility to make a good-faith effort to settle the dispute. The department will avoid indiscriminate referral of disputes to the DRB without prior attempts by the department and the contractor to resolve them.

##### **253.3.1.3 Standard Specifications**

Under [standard spec 105.13](#), a DRB will be established to assist in the analysis of disputes when mutually agreed upon by both the department and contractor.

Using a DRB does not relieve the contractor or department from complying with all contract terms and conditions, and does not waive any notice or timeliness requirements prescribed in [standard spec 104.3](#). However, if a dispute is referred to the DRB, the claim submittal and review times prescribed in the standard specifications may be superseded by times established by the DRB, and agreed to in writing by both the department and the contractor.

Both the department and the contractor will proceed diligently with the work and comply with applicable contract provisions while the DRB considers a dispute.

##### **253.3.1.4 Requesting DRB**

Either party may request a DRB review. Requests must be in writing and clearly state in full detail the specific issues of the dispute to be considered by DRB. Contractor requests are submitted to the construction oversight engineer assigned to the region in which the dispute has occurred. Department requests will be submitted to the contractor's home office address. The construction oversight engineer will coordinate the DRB process.

##### **253.3.1.5 Summary**

Individual DRB members are not the "representative of" or "advocate for" either party. The entire DRB will function as an objective, impartial, and independent body at all times. In order to avoid any suggestion of partiality, there should be no individual communication in regard to the project between DRB members and employees of the contractor or department during the life of the DRB. The parties will direct any matters needing attention between members of the DRB to the chair of the DRB.

The construction oversight engineer will engage the DRB process. The DRB will impartially consider disputes referred to it. The DRB will provide non-binding written findings and recommendations to the department and the contractor.

Although findings and recommendations of the DRB should carry great weight for both the department and the contractor, they are not binding on either the department or the contractor. However, the findings and recommendations are admissible in subsequent claim resolution proceedings.

### **253.3.2 Formal DRB Membership**

#### **253.3.2.1 General**

The DRB will consist of either one or three members. If both parties cannot agree on the number of members for the DRB, a three member DRB will be established.

#### **253.3.2.2 Criteria**

##### **253.3.2.2.1 Experience**

It is desirable that all DRB members be experienced with the construction process including design, construction, contract administration, contract law, and resolution of construction disputes.

It is not necessary that the DRB members be intimately familiar with the specific type of construction involved in the dispute.

All DRB members will have attended the one-day DRB panel member workshop offered by the Dispute Review Board Foundation, or its equivalent in other training, or will be a qualified DRB panel member in another state which has training as a prerequisite to qualification for service on DRB panels.

##### **253.3.2.2.2 Neutrality**

DRB members must be neutral, act impartially, and be free of any conflict of interest.

The term "member" also includes the member's current primary or full-time employer, and "involved" means having a contractual relationship with either the department or the contractor, such as a subcontractor, architect, engineer, or construction manager.

##### **253.3.2.2.3 Prohibitions; Disqualifying Relationships for Prospective Members**

A prospective DRB member will be disqualified for one or more of the following:

- An ownership interest in any entity involved in the construction contract, or a financial interest in the contract, except for payment for services on this dispute review board.
- Previous employment by, or financial ties to, any party involved in the construction contract within a period of 6 months before award of the contract, except for fee-based consulting services on other projects.
- A close professional or personal relationship with a key member of any entity involved in the construction contract which, in the judgment of either the department or the contractor, could suggest partiality.
- Prior involvement in the project of a nature that could compromise the prospective member's ability to participate impartially in the DRB's activities.

##### **253.3.2.2.4 Prohibitions; Disqualifying Relationships for Members**

A DRB member will be disqualified for one or more of the following:

- Employment, including fee-based consulting services, by any entity involved in the construction contract.
- Discussion concerning, or the making of, an agreement with any entity involved in the contract regarding employment after the contract is completed.

#### **253.3.2.3 Disclosure Statement**

As a part of the selection process, each prospective DRB member will be required to submit a complete disclosure statement for the approval of both the department and the contractor. Each statement will include a resume of experience, together with a declaration describing past, present, and anticipated or planned future relationships, including indirect relationships through the prospective member's primary or full-time employer, to this project and with the department or the contractor, or others involved in the contract, including subcontractors, suppliers, design professionals, and consultants. Disclosure of close professional or personal relationships with key members of the department or the contractor or other parties involved in the construction contract must be included.

#### **253.3.2.4 Statewide Standing Roster**

The department and Wisconsin Transportation Builders Association have established a statewide standing roster of prequalified DRB members. A list of standing roster members is maintained. The list contains names of the pre-qualified members with addresses, email addresses, telephone numbers, resumes, and disclosure statements.

#### **253.3.2.5 Selection Process**

When establishing a 3-member DRB for a project or dispute, the department and the contractor will each select 1 DRB member. The two selected DRB members will then jointly select a chair for the DRB. The disputing parties may mutually place restrictions on the chair selection. Any restriction agreed on by the disputing parties will be communicated to the DRB members charged with selecting the chair.

When establishing a 1-member DRB for a particular project dispute, the department and contractor will jointly select the DRB member.

After being selected, DRB members must submit an updated disclosure statement to the department and contractor for review and approval. DRB members do not need to be on the statewide standing DRB roster in order to be selected. However, if a DRB member (chair or non-chair) is selected from outside the standing roster, the proposed DRB member must meet all the aforementioned criteria and disclosure requirements and both disputing parties must approve the selection.

If a party disputes the qualification of a proposed DRB member, from the statewide standing DRB roster or from outside the roster, the disputing party will identify what disqualifies the proposed neutral. The department and the contractor will jointly determine whether the candidate will be accepted on the DRB. If the candidate is rejected, the party responsible for the selection will select another candidate and again seek approval from the other parties.

#### **253.3.2.6 Tenure of DRB**

Once a DRB is engaged on a project, the DRB will be deemed established for any subsequent disputes that may require a DRB under [standard spec 105.13](#).

The DRB will be dissolved as of the date of final payment to the contractor unless earlier terminated or dissolved by mutual agreement of the department and contractor.

#### **253.3.2.7 DRB Review Agreement**

After DRB member selections have been made, the DRB members, the construction oversight engineer, and authorized representatives of the contractor will execute the agreement.

### **253.3.3 Formal DRB Review Process**

#### **253.3.3.1 General**

In general, the DRB will operate within these guidelines. However, it is not desirable to adopt hard-and-fast rules for the functioning of the DRB. The entire procedure will be kept flexible to adapt to changing situations. The DRB will initiate, with the department's and contractor's concurrence, new procedures or modifications to existing procedures whenever this is deemed beneficial and appropriate.

The department and the contractor will cooperate to ensure that the DRB considers disputes promptly, considering the particular circumstances and the time required to prepare appropriate documentation.

Procedures and time periods may be modified by mutual agreement of the disputing parties.

#### **253.3.3.2 Contract Documents, Reports and Information**

The department will provide a set of plans and specifications to each DRB member. The department and contractor will provide the DRB requested reports, documents, or other information needed to fully understand and review the dispute. The DRB may not request reports, documents, or other information that are not normally generated by the department or the contractor in the course of construction of the project.

#### **253.3.3.3 Scheduling Review**

The construction oversight engineer and DRB chair will schedule the hearing.

After conferring with both the department and the contractor, the DRB chairperson will establish a submittal schedule so that adequate time is allowed for each party to address the other party's statements and supporting documentation before the presentation.

#### **253.3.3.4 Pre-presentation Requirements**

Concise written position statements will be prepared by both the department and the contractor, with page number references to any supporting documentation. The position statement will be submitted to each DRB member and to the other party. Submit copies to the other disputing party at least 14 calendar days before the DRB hearing. Both parties will be allowed to amend or append information to their position statement up to 7 calendar days before the hearing. Any amendments or appendages will be copied to the involved parties as prescribed for the position statement.

In large dollar amount disputes or disputes involving complex issues, the DRB may meet privately to review the information provided, discuss the procedures to be followed in hearing the dispute and the method of presentation to be followed. The DRB may also call a pre-meeting conference to discuss procedures with both the department and the contractor.

At least 7 calendar days before the date scheduled for a hearing, each party must submit to the DRB Members and to the other party a list of the persons who will attend or represent them at the hearing.

### **253.3.3.5 Presentation**

Unless the DRB, the department, and the contractor agree otherwise; the presentation will be conducted at the nearest department region office. However, any location that would be more convenient and still provide required facilities and access to necessary documentation is acceptable.

The department and the contractor will have representatives at all presentations. The DRB will establish which party will make its presentation first. The department and the contractor will be allowed successive rebuttals until all aspects are fully covered. The DRB members and the department and the contractor may ask questions, request clarification, or ask for additional data. Questions from the department or contractor will be directed to the DRB; cross examination will not be allowed. In difficult or complex cases, additional presentations may be necessary in order to facilitate full consideration and understanding of evidence presented by both the department and the contractor. Both the department and the contractor will be provided adequate opportunity to present their evidence, documentation, and testimony regarding issues before the DRB.

Unless the department and the contractor agree otherwise, presentations must relate to issues of entitlement only. When the department and the contractor agree that the DRB will review or give guidance on issues of quantum as well as entitlement, both the department and the contractor will complete their presentations on entitlement before quantum is presented.

Normally, a formal transcript of the presentations is not prepared. When requested by either the department or the contractor, the DRB may allow recordation and transcription by a court reporter with the cost to be allocated as agreed by the department and the contractor. A transcript, when prepared, will not constitute the official record of the DRB review. The record prepared by the DRB will be the official record of the DRB review. The DRB may provide for audio or video recordings of the presentations for DRB use only.

The department and the contractor may have their attorneys or other representatives in attendance at the presentations to counsel and advise them. If the department and the contractor agree, the representatives will be allowed to make brief opening and closing remarks to the DRB, but are not allowed to present project specific details. No other participation by attorneys at the presentations will be allowed unless the department and the contractor mutually agree.

If either the department or the contractor fails to appear before the DRB on the date scheduled for the presentations, without justifiable cause, the party that was absent will be liable for additional costs attributable to the cancellation of the hearing.

### **253.3.3.6 Deliberations**

After the presentation is concluded, the DRB will confer to formulate its findings and recommendations. All DRB deliberations will be conducted in private, with all individual views kept strictly confidential from disclosure to others.

### **253.3.3.7 Special Services**

If at any time in the DRB process, the DRB believes assistance from a technical expert or specialist is necessary or would facilitate dispute resolution, the DRB may request permission to retain those services. The DRB will provide the department and contractor a written request detailing the following:

- Services desired.
- Benefit of services requested.
- Proposed service provider.
- Qualifications of proposed service provider.
- Estimated fees for requested services.

The department and contractor must mutually agree to that assistance and approve the proposed service provider.

### **253.3.3.8 Findings and Recommendations**

The findings and recommendations of the DRB concerning any dispute are non-binding.

It is not the responsibility of the DRB to resolve the dispute. The findings and recommendations of the DRB will be based upon the contract, applicable contract law, industry practices, and the facts. The DRB must also evaluate whether the burden of proof has been met.

The DRB's findings and recommendations will be provided in writing to both the department and the contractor within 28 days of the completion of the presentations. In difficult or complex cases, and in consideration of the DRB's schedule, this time may be extended by mutual agreement of the DRB, the department, and the contractor. The DRB should describe the logic and reasoning behind its findings and recommendations. The findings and recommendations will address entitlement only, unless it is mutually

agreed that the DRB will be asked to review or give guidance on issue of quantum as well. For relatively simple disputes, if both parties request and sufficient documentation is submitted, the DRB may also make a concurrent recommendation on monetary damages.

If the department and the contractor request the DRB to review issues of quantum and the exact value of the quantum cannot be determined expeditiously by the DRB, then quantum may be addressed in the DRB's findings and recommendations by providing guidelines to determine quantum. The department and contractor will then subsequently make the final determination of quantum. If there is still disagreement between the department and the contractor, then this disagreement may then be submitted back to the DRB for a final analysis and finding.

If the three-member DRB is unable to reach unanimity in its findings and recommendations, the DRB will so advise the department and the contractor in the report of the DRB. A dissenting member may, at their discretion, prepare a minority report to be included with the DRB report.

#### **253.3.3.9 Acceptance or Rejection**

Within 14 calendar days after the DRB finding date, the department and contractor will either accept or reject the DRB's recommendation. If rejecting the recommendation, written notice will be provided to the other party within those 14 calendar days. Unless extended by mutual agreement, a party's failure to provide notice within the established time constitutes acceptance of the DRB recommendation.

If either party rejects the DRB recommendation, the department will have 28 calendar days to confirm, overrule, or modify, in whole or in part, the DRB recommendation. Within 14 calendar days of the department's decision, the contractor will either accept or reject the department's decision.

If the contractor rejects the department decision, the dispute will continue under the administrative claims process prescribed in [standard spec 105.13](#). Subsequent claim submittal and review times may be revised by mutual written agreement of the department and the contractor.

If, with the aid of the DRB's findings and recommendations, the department and the contractor are able to resolve their dispute, the department will promptly process any required contract changes.

#### **253.3.3.10 Clarification and Reconsideration**

Should the dispute remain unresolved because of a bona fide lack of understanding of the findings and recommendations or if evidence becomes available which was not available at the time of presentation, either the department or the contractor may, within 14 calendar days following the date of the DRB's findings and recommendations, request in writing that the DRB clarify specified portions of its findings and recommendations or reconsider its recommendation. This request will be submitted to the DRB and other party. The DRB will decide if it will provide further explanation or reconsider the matter. If the DRB decides to provide further explanation or reconsider its findings and recommendations, the 14-day timeframe for acceptance or rejection and the 28-day timeframe for the department's decision will be suspended until clarification or a new recommendation is received.

#### **253.3.3.11 Admissibility**

If the DRB's findings and recommendations do not resolve the dispute, the contract, the written findings, and recommendations including any minority report, and the qualifications of the DRB members, will be admissible as evidence to the extent allowed by law in any subsequent dispute resolution proceeding or forum to establish (a) that a DRB considered the dispute, (b) the qualifications of the DRB members, and (c) the DRB's findings and recommendations that resulted from the process.

#### **253.3.3.12 Legal Relations**

Each DRB member, in the performance of his or her duties on the DRB, is acting in the capacity of an independent agent and not as an employee of either the department or the contractor.

Each DRB member acts to facilitate resolution of disputes. The department and the contractor will agree that to the fullest extent allowed by law, each DRB member will be accorded quasi-judicial immunity for any actions or decisions associated with the review and findings and recommendations of disputes referred to the DRB. A DRB member will not be called as a witness by either the department or the contractor in subsequent proceedings on the dispute. Other than the DRB findings and recommendations, all DRB records, proceedings and deliberations are to be kept confidential to the fullest extent allowed by law. The DRB will, upon project completion, turn all records of the DRB over to the department for storage and preservation according to department policy and state law.

#### **253.3.4 Payment**

The department and the contractor will bear the costs and expenses of the DRB equally. Each DRB member will be compensated and reimbursed expenses as prescribed in the DRB review agreement executed by the department, contractor, and DRB member.



If the DRB desires special services such as legal, technical, or other expert assistance or testimony, or other consultation, accounting, data research, and the like, both the department and the contractor must agree to the special services.

The department will provide, at no cost to the contractor, administrative services such as coordination of the DRB and state-owned conference facilities. If other facilities or amenities are desired by both parties, these facility and amenity expenses will be shared equally by both parties.

The following payment procedures will be used:

1. The DRB members will submit invoices to the construction oversight engineer for review.
2. After the construction oversight engineer has reviewed and approved the invoices, the invoices will be forwarded to the project manager for review and approval.
3. After the project manager has reviewed and approved the invoices, the invoices will be forwarded to the contractor for review and approval.
4. If the contractor approves the invoices, the contractor will make payment of approved invoices.
5. The contractor will provide the project manager documentation verifying payment.
6. The department will then execute a change order to pay the contractor 1/2 of the contractor paid invoice.

There will be no markups applied to expenses connected with the DRB, either by the DRB members or by the contractor when requesting payment of the department's share of DRB expenses. Regardless of the DRB recommendation, neither the department nor the contractor will be entitled to reimbursement of DRB costs from the other party.

The department will reimburse the contractor for the department's share of the DRB costs under the Dispute Review Board administrative item.