

1 Sections 1-09.11 through 1-09.11(1)B are deleted and replaced with the following:  
2

3 **(September 3, 2019)**

4 ***Disputes and Claims***

5 When protests occur during a Contract, the Contractor shall pursue resolution through  
6 the Engineer in accordance with Section 1-04.5. Unless noted otherwise in the  
7 specifications, compliance with all the requirements of Section 1-04.5 is a condition  
8 precedent to initiating any action pursuant to these Special Provisions.  
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10 If the negotiations using the procedures outlined in Section 1-04.5 fail to provide  
11 satisfactory resolution of the protest, then the Contractor shall provide the Engineer with  
12 written notification of dispute stating that the Contractor will continue to pursue the  
13 dispute in accordance with the provisions of these Special Provisions. The written  
14 notification of dispute shall be provided within 14 calendar days after receipt of the  
15 Engineer's written determination that the Contractor's protest is invalid pursuant to  
16 Section 1-04.5. Should the Contractor not provide written notification of dispute within  
17 the designated time period, the Contractor shall be deemed to have waived any right to  
18 pursue the protest further and the matter shall be considered resolved.  
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20 When the Proposal Form includes the Bid item "Disputes Review Board", unresolved  
21 protests shall be subject to the *Disputes Review Board* section of these Special  
22 Provisions. Either party, Engineer or Contractor, may refer a matter in dispute to the  
23 Disputes Review Board. Compliance with the requirements of the *Disputes Review*  
24 *Board* section of these Special Provisions is a condition precedent to any further right of  
25 the Contractor to pursue the dispute either by certified claim or litigation/arbitration.  
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27 When the Proposal Form does not include the Bid item "Disputes Review Board", the  
28 Contractor's written notification of dispute shall indicate whether the Contractor is  
29 requesting to resolve the dispute through the use of a Disputes Review Board as  
30 outlined in the *Disputes Review Board* section of these Special Provisions, or will submit  
31 a formal certified claim directly to the Engineer pursuant to Section 1-09.11(2). If the  
32 Contractor requests a Disputes Review Board, the Engineer will notify the Contractor in  
33 writing within 7 calendar days of receipt of the request whether the request is  
34 acceptable. If both parties to the dispute agree to use a Disputes Review Board, then a  
35 pay item "Disputes Review Board" will be added to the Contract by change order and  
36 the dispute will be subject to the provisions of the *Disputes Review Board* section of  
37 these Special Provisions. If the parties do not agree to establish a Disputes Review  
38 Board or the Contractor does not request a Disputes Review Board in its written  
39 notification of dispute, the Contractor shall comply with the provisions of Section 1-  
40 09.11(2).  
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42 Regardless of any protest or dispute, the Contractor shall proceed promptly with the  
43 Work as the Engineer orders.  
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45 **Disputes Review Board**

46 The procedures set forth in these Special Provisions shall only apply when the  
47 Contract includes the pay item "Disputes Review Board".  
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49 **Disputes Review Board – General**

50 In order to assist in the resolution of dispute(s) between the Contracting  
51 Agency and the Contractor arising out of the work of this Contract, a Disputes  
52 Review Board, hereinafter called the "Board", will consider disputes referred to

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it and furnish written recommendations to the Contracting Agency and Contractor to assist in resolution of the dispute(s). The purpose of the Board response to such issues is to provide nonbinding findings and recommendations designed to expose the disputing parties to an independent view of the dispute.

**Disputes Eligible for Consideration by the Disputes Review Board**

The Board shall consider and provide written recommendations concerning the following disputes:

1. Interpretation of the Contract.
2. Entitlement to additional compensation and/or time for completion.
3. Other subjects mutually agreed by the Contracting Agency and Contractor to be a Board issue.

**Board Member Qualifications**

The following definitions apply for the purpose of setting forth experience and disclosure requirements for Board members.

**Financial ties** - any ownership interest, loans, receivables or payables. Party directly involved - The Contracting Agency or Contractor of this Contract.

**Party indirectly involved** - The firms associated with the Contractor on this Contract, including joint venture partners, subcontractors of any tier, and suppliers; and firms associated with the Contractor or the Contracting Agency on this Contract, such as designers, architects, engineers, or other professional service firms or consultants.

The Board members shall:

1. Be experienced in the interpretation of construction contract documents.
2. Have attended training by the Dispute Resolution Board Foundation in dispute resolution within the last five years.
3. Be experienced in construction Contract dispute resolution for an owner or Contractor at the level of having responsibility and authority to settle disputes.
4. Be able to discharge their responsibilities impartially and independently, considering the facts and conditions related to the matters under consideration in strict compliance with the provisions of the Contract.
5. Not be a current employee of any party directly or indirectly involved.

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6. Not have been an employee of any party directly or indirectly involved with the Project within a period of one year of the Contract Execution date.
7. Not have a financial interest in the Contract except for payments for services on the Board.

**Board Member Ongoing Responsibilities**

While serving on the Disputes Review Board on this project:

1. Board members shall not participate in any discussion contemplating the creation of an agreement or making an agreement with any party directly or indirectly involved in the Contract regarding employment or fee-based consulting services, or any other business arrangement after the Contract is completed.
2. Board members shall not officially give any advice to either party. The individual members will act in a completely independent manner and will have no consulting or business connections with either party, except for payments for services on the Board.
3. During routine meetings of the Board as well as during formal hearings, Board members shall refrain from expressing opinions on the merits of statements on matters under dispute or potential dispute. Opinions of Board members expressed in private sessions with other Board members should be kept strictly confidential.
4. The Board shall comply with the terms of the Contract and enforce such terms consistent with the laws of the State of Washington. Board members shall not supplant or otherwise interfere with the respective rights, authorities, duties and obligations of the parties as defined in the Contract. In making its recommendations, the Board shall not make a recommendation that ignores, disregards, or undermines the intention, requirements, or allocation of risk, established by the Contract.
5. Throughout the life of the Contract, if Board members become aware of potential conflicts of interest, they shall be disclosed to the parties immediately.

**Establishment of the Board**

The Contracting Agency and Contractor shall meet prior to the start of Contract time to jointly select three Board nominees. If the pay item, "Disputes Review Board" is added by change order, the Contracting Agency and Contractor shall meet to select Board nominees after the change order is processed.

The Contracting Agency and the Contractor shall provide to the Board nominees a list of the firms directly and indirectly involved with the Project, including, but not limited to designers, architects, engineers, professional service firms, consultants, JV partners, subcontractors and suppliers, along with a listing of key personnel of each.

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Board nominees shall provide to the Contractor and Contracting Agency the following information within 21 calendar days of nomination. Board nominees that are included on the Washington State Department of Transportation “Statewide Prequalified DRB Candidate Roster” will not be required to submit resumes.

1. Resume showing:
  - a. Full name and contact information
  - b. Experience qualifying the person as a Board member as outlined in the *Board Member Qualifications* section of these Special Provisions.
  - c. Previous Board participation, if any. List each Board assignment separately, indicating the name and location of the project, approximate dates of Board service, name of Contracting Agency, name of Contractor, names of the other Board members and the approximate number of disputes heard. When previous Board experience is extensive, the list may be truncated at the prospective Board member’s discretion.
2. Disclosure statement addressing the following:
  - a. Previous or current direct employment by one of the parties directly or indirectly involved.
  - b. Previous or current engagement as a consultant to any party directly or indirectly involved - by the prospective Board member or by the firm to which the prospective Board member is directly employed.
  - c. Previous, current, or future financial ties to any of the parties directly or indirectly involved.
  - d. Previous or current personal or professional relationships with a key member of any party directly or indirectly involved.
  - e. Previous and current service as a Board member on projects where any of the parties directly or indirectly involved in this Contract were also involved.
  - f. Any prior involvement in this project.

Within 14 calendar days of receiving the resumes and disclosure statements from the Board nominees, the Contracting Agency and the Contractor shall review and jointly agree on the final selection of the three members to serve on the Board. In the event that any of the three nominees are not acceptable to either party, the process shall be repeated until all positions are filled.

The Contracting Agency, the Contractor, and the Board shall execute the Three-Party Agreement not later than the first Board meeting. The Three-Party

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Agreement form (WSDOT Form 134-091) is available online at WSDOT Electronic Forms webpage.

The Board shall determine and notify the parties which Board member will act as the Board chair.

**Disputes Review Board Candidates**

The qualifications of some potential Board members have been reviewed and deemed potentially acceptable by the Washington State Department of Transportation (WSDOT). This list of potential Board members, Statewide Prequalified DRB Candidate Roster, is available from the WSDOT Headquarters Construction Office website at <https://www.wsdot.wa.gov/business/construction/dispute-review-boards>. Either party may propose a Board nominee that is not on the WSDOT list. In either case, Board nominees must comply with the requirements of the *Board Member Qualifications, Board Member Ongoing Responsibilities, and Establishment of the Board* sections of these Special Provisions, and every Board member must be deemed acceptable by both the Contracting Agency and the Contractor.

**Replacement or Termination of a Board Member**

Procedures for terminating Board members are defined in The Three-Party Agreement.

**Disputes Review Board Procedures – General**

The Board, Contracting Agency, and Contractor may mutually develop rules of operation of the Board that supplement the Three-Party Agreement. Such supplemental rules must be in writing and accepted by the Board, Contracting Agency, and Contractor.

The Board members shall act impartially and independently in the consideration of facts and conditions surrounding any dispute presented by the Contracting Agency or the Contractor and that the recommendations concerning any such dispute are advisory.

The Contracting Agency and the Contractor shall furnish to the Board documents in accordance with the Three-Party Agreement.

**Regular Disputes Review Board Meetings**

All regular Board meetings will be held at or near the job site. The frequency of regular meetings will be set by mutual agreement of the Board, the Contracting Agency and the Contractor. Each regular meeting is expected to consist of a round table discussion and a field inspection of the project site. A member of the Contracting Agency and Contractor are expected to jointly facilitate the round table discussion. Round table discussion attendees are expected to include selected personnel from the Contracting Agency and the Contractor. The agenda for each meeting will be managed by the Board.

**Standard Procedure for Consideration of Disputes**

**Dispute Referral**

Disputes shall be referred in writing to the Board chair with a copy concurrently provided to the other Board members and the other party.

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1. The dispute referral shall concisely define the nature and specifics of the dispute that is proposed to be considered by the Board and the scope of the recommendation requested. This referral is not expected to contain a mutually agreed upon statement of the dispute.
2. The Board chair shall confer with the parties to establish a briefing schedule for delivering prehearing submittals/rebuttals, and a date, time, and location for convening the Board for a hearing.

**Pre-Hearing Submittal**

1. The Contracting Agency and the Contractor shall each prepare a pre-hearing submittal and transmit both a hard copy and an electronic copy of it to all three members of the Board and the other party. The pre-hearing submittal, comprising a position paper with such backup data as is referenced in the position paper, shall be tabbed, indexed, and the pages consecutively numbered.
2. Both position papers shall, at a minimum, contain the following:
  - a. A mutually agreed upon joint statement of the dispute and the scope of the desired report being requested of the Board, placed at the beginning of the papers. The language of this joint statement shall summarize in a few sentences the nature of the dispute. If the parties are unable to agree on the wording of the joint statement of dispute, each party's position paper shall contain both statements, and identify the party authoring each statement.
  - b. The basis and justification for the party's position, with reference to Contract language and other supporting documents for each element of the dispute. In order to minimize duplication and repetitiveness, the parties may identify a common set of documents that will be referred to by both parties, and submit them in a separate package.
3. If requested by the Board or either party, the Contracting Agency and the Contractor shall each prepare and submit a rebuttal paper in response the position paper of the other party.
4. The number of copies, distribution requirements, and time for submittal will be established by the Board and communicated to the parties by the Board chair.

**Disputes Review Board Hearing**

1. The Contracting Agency will arrange for or provide hearing facilities at or near the project site.
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- a. The Contracting Agency and the Contractor will have a representative at all hearings.
  - b. The Contracting Agency and Contractor shall both limit attendance at the hearing to personnel directly involved in the dispute and participants in the good-faith negotiations that were conducted prior to submittal to the Board except as noted elsewhere in this section.
  - c. At least 14 calendar days before the hearing, each party shall provide a list of proposed attendees to the Board and to the other party. In the event of any disagreement, the Board shall make the final determination as to who attends the hearing.
  - d. Attorneys shall not attend hearings except as follows:
    - i. Attorneys are identified as such on the list of proposed attendees;
    - ii. All parties desiring their attorney present are able to do so.
    - iii. Attorneys shall not participate in the hearing, unless the scope and extent of Attorney participation is mutually agreed to by the Contracting Agency, Contractor and the Board at least 7 calendar days before the hearing.
  - e. For hearings regarding disputes involving a Subcontractor, the Contractor shall require and ensure that each Subcontractor involved in the dispute have present an authorized representative with actual knowledge of the facts underlying the Subcontractor disputes.
3. A party furnishing written evidence or documentation of any kind to the Board must furnish copies of such information to the other party and the Board a minimum of 21 calendar days prior to the date the Board sets to convene the hearing for the dispute, unless otherwise mutually agreed to by the parties and the Board. Either party shall produce such additional evidence as the Board may deem necessary and furnish copies to the other party prior to submittal to the Board.
  4. The conduct of the hearing shall be established by the Board and be generally consistent with the following guidelines:
    - a. The party who referred the dispute to the Board shall present first, followed by the other party.
    - b. To assure each party a full and adequate opportunity to present their position, both parties shall be allowed successive rebuttals and to rebut the opposing party's position until, in the Board's opinion, all aspects of the dispute have been fully and fairly covered.

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- c. The Board shall be fully prepared to, and may at any time, ask questions, request clarifications, or ask for additional data, documents, and/or job records.
  - d. Either party may request that the Board direct a question to, or request a clarification from the other party. The Board shall determine at what point in the proceedings such requests may be made and if they will be granted. In general, the Board will not allow one party to be questioned directly by the other party.
  - e. In difficult or complex cases, additional hearings may be necessary to facilitate full consideration and understanding of the dispute.
  - f. The Board, in its discretion, may allow introduction of arguments, exhibits, handouts, or documentary evidence that were not included in that party's prehearing position paper or rebuttal and have not been previously submitted to the other party. In such cases the other party will be granted time to review and prepare a rebuttal to the new material, which may require a continuation of the hearing.
5. After the hearing is concluded, the Board shall meet in private and reach a conclusion supported by two or more members. Its findings and recommendations, together with its reasons shall then be submitted as a written report to both parties. The recommendations shall be based on the pertinent Contract provisions, facts, and circumstances involved in the dispute. The Contract shall be interpreted and construed in accordance with the laws of the State of Washington.

**Failure to Prepare a Pre-Hearing Submittal or Attend a Hearing**

In the event that either party fails to deliver a pre-hearing submittal by the date established by the Board, the Board shall, at its discretion, determine whether the hearing shall proceed as originally scheduled, or allow additional time for the submittal and/or reschedule the hearing. On the final date and time established for the hearing, the Board shall proceed with the hearing utilizing the information that has been submitted.

In the event that representatives of either the Contracting Agency or the Contractor fail to appear at the appointed time of a hearing, the Board shall postpone the hearing until such time as representatives from both parties are available to proceed with the hearing.

**Use of Outside Experts**

- 1. By the Contracting Agency or the Contractor:
  - a. A party intending to offer an outside expert's analysis at the hearing shall notify the other party and the Board in writing no less than 30 calendar days prior to the due date for delivering the pre-hearing submittal, and provide the following disclosure:

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- i. The expert's name and a general statement of the area of the dispute that will be covered by his or her testimony.
    - ii. A statement prepared by the proposed expert which addresses the requirements of the *Establishment of the Board* section of these Special Provisions, item 2.
    - iii. A statement prepared by the proposed expert which identifies the experience and training which qualifies them as an expert.
  - b. Upon receipt of the disclosure, the other party shall have the opportunity to secure the services of an outside expert to address or respond to those issues that may be raised by the other party's outside expert. The notification and disclosure requirement shall be the same as that specified elsewhere in this section, except the time requirement is 21 calendar days.
2. By the Board:
- a. When requested by the Board and subject to approval of the parties, outside experts may be needed to assist the Board. In such cases, the outside expert shall in no way be deemed authorized to usurp the Board's authority to issue the Board recommendations. Such authority shall remain vested solely in the Board.
  - b. Prior to arranging for outside experts, the Board shall obtain prior approval from the Contracting Agency and the Contractor by providing:
    - i. A statement explaining why the expert assistance is needed.
    - ii. An estimate of the cost of the expert assistance.
    - iii. The expert's name and a general statement of the area of expertise they will provide.
    - iv. A statement prepared by the proposed expert which addresses the requirements of the *Establishment of the Board* section of these Special Provisions, item 2.
    - v. A statement prepared by the proposed expert which identifies the experience and training which qualifies them as an expert.
    - vi. A confidentiality statement, consistent with the confidentiality obligations of the Board described in the Three Party Agreement, executed by the proposed expert.

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**Disputes Review Board Report**

The Board’s recommendations shall be formalized in a written report signed by all Board members. The recommendations shall be based on the Contract Provisions and the facts and circumstances involved in the dispute. The report should include a description of the dispute, statements of each party's position, findings as to the facts of the dispute, discussion and rationale for the recommendation(s), and the recommendation(s). The report shall be submitted concurrently to the parties, as soon as possible after completion of the hearing as agreed by all parties.

Either party may request clarification of a report within 14 calendar days following receipt of the report. Within a reasonable period of time, the Board shall provide written clarification to both parties. Requests for clarification shall be submitted in writing simultaneously to the Board and the other party.

Either party may request reconsideration of a report, provided:

1. The request is made within 14 calendar days following receipt of the report, and
2. New information is obtained or developed that was not known at the time of the hearing or, in the party's opinion, the Board misunderstood or failed to consider pertinent facts of the dispute.

Requests for reconsideration shall be submitted in writing simultaneously to the Board and the other party. The Board shall give the party not requesting reconsideration the option of submitting a rebuttal to any information that is the basis of the request for reconsideration. The Board shall provide a written response to the request for reconsideration.

**Acceptance of Disputes Review Board Recommendations**

Within 30 calendar days of receiving the Board’s report, or within 14 calendar days of receiving the Board’s written clarification and/or reconsideration, both the Contracting Agency and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. Although both parties should place weight upon the Board recommendations, the recommendations are not binding.

If the Board’s assistance does not lead to resolution of the dispute, the Contractor must file a claim according to Section 1-09.11(2) before seeking any form of judicial relief.

In the event the Board’s recommendations do not lead to resolution of the dispute, the Board’s recommendation consisting solely of the Board’s written report and any written minority reports, along with the Board’s written clarifications and written responses to requests for reconsideration, if any, will be admissible in any subsequent dispute resolution proceedings including, but not limited to litigation/arbitration. The aforementioned list of documentation shall be considered all inclusive.

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**Payment for the Disputes Review Board**

The Contracting Agency and Contractor shall share equally in the cost of the Board’s services and all operating expenses of the Board. The Board members’ compensation shall be in accordance with the Three Party Agreement. After the Contractor and Contracting Agency review invoices from the Board and other operating expenses of the Board, the Contractor shall make full payment for all Board members and Board operating expenses. The Contracting Agency will reimburse the Contractor for fifty percent of such payments, under the pay item “Disputes Review Board”.

The Contractor and the Contracting Agency shall equally bear the cost of the services of the outside expert hired to advise the Board. Outside experts hired to advise the Board shall Contract directly with the Contractor after concurrence from the Board and approval from the Contracting Agency. Invoices for these services shall be submitted by the expert to both the Contractor and Contracting Agency for approval by both parties. The Contractor shall pay approved invoices in full, and the Contracting Agency will reimburse the Contractor for fifty percent of such payments, under the Bid item “Disputes Review Board”.

The cost for securing outside expert services for the Contracting Agency or the Contractor shall be borne by the party securing such services.

The Contracting Agency will provide administrative services, such as conference facilities and copying services, to the Board and the Contracting Agency will bear the costs for these services.

**Indemnification of Disputes Review Board Members**

The Contracting Agency and Contractor shall indemnify and hold harmless the Board members from and against all claims, damages, losses and expenses, including but not limited to attorney’s fees arising out of and resulting from the actions and recommendations of the Board.