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ConsensusDocs 200.4 DRB ADDENDUM SPECIFICATION

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ConsensusDocs 200.4

DRB ADDENDUM SPECIFICATION



ARTICLE 1 GENERAL

1.1 The Parties have elected pursuant to their Agreement dated [] (“Agreement”) to implement dispute avoidance and mitigation procedures on the Project. This Addendum provides for the establishment and operation of a Dispute Review Board (“DRB”) to assist in and facilitate (a) the avoidance of disputes and (b) the timely resolution of disputes.

1.2 The Parties and each member of the DRB shall also enter into Three-Party Agreement for a Dispute Review Board (“TPA”) by executing the ConsensusDocs DRB Three-Party Agreement or similar agreement.

1.3 To the extent there is a conflict between the provisions of this DRB Addendum, the TPA, and the provisions of the Agreement, the provisions of the Agreement take precedence over the provisions of the DRB Addendum or TPA.

1.4 MATTERS ELIGIBLE FOR CONSIDERATION BY THE DRB

1.4.1 Except as provided otherwise, all matters that arise as a result of the Parties’ performance of the Agreement may be addressed by the DRB, and any unresolved dispute that arises under this Agreement may referred to the DRB by either Party. The Parties may request the DRB to address any issue arising out of the Project.

ARTICLE 2 DEFINITIONS

2.1 “Consulting Capacity” includes consulting agreements or other professional engagements on a fee for services basis.

2.2 “Day” means a calendar day.



2.3 “Financial Ties” includes any agreements, ownership interest, loans, receivables, or payables.

2.4 An “Involved Entity” means a program/construction manager, design professional, other professional service firms or consultants/sub-consultants, joint-venture partners, first-tier subcontractors, and Project-related supplier, vendor, lender, surety, or tenants.

2.5 “Party” means either the Owner or the Constructor, including each joint-venture partner of the Constructor.

ARTICLE 3 DRB QUALIFICATIONS

3.1 DRB members shall be experienced in the type of construction to be performed on the Project, the interpretation and application of contract documents, and the resolution of construction disputes. DRB members shall also be familiar with alternative dispute resolution techniques and trained in the best practices for conduct of DRB proceedings.

3.2 Eligibility and Disclosure Requirements

3.2.1 Direct Employment

3.2.1.1 A Party’s current employees shall not serve as a DRB member.

3.2.1.2 A past employee of a Party or Involved Entities shall disclose the employment and obtain permission from the other Party prior to appointment as a DRB member.

3.2.2 Consulting Capacity

3.2.2.1 An individual serving in a Consulting Capacity with a Party shall not serve as a DRB member.

3.2.2.2 An individual previously serving in a Consulting Capacity for a Party shall disclose the service and obtain permission from the other Party prior to appointment as a DRB member.

3.2.2.3 An individual currently serving in a Consulting Capacity with an Involved Entity shall disclose the service and obtain permission from the other Party prior to appointment as a DRB member.

3.2.3 Financial Ties

3.2.3.1 Unless waived by the Parties, an individual with any Financial Ties with a Party shall not serve as a DRB member.

3.2.3.2 Previous Financial Ties to any Party shall be disclosed.

3.2.3.3 Current Financial Ties to any Involved Entity Parties shall be disclosed.



3.2.4 Close Personal or Professional Relationships

3.2.4.1 An individual with a close personal or professional relationship with the Party or a Party's employee shall not serve as a DRB member.

3.2.4.2 An individual with a past close personal or professional relationships with the Party or a Party's employee shall disclose such relationship prior to appointment as a DRB member.

3.2.5 DRB Member Involvement

3.2.5.1 Past and current service as a DRB member on projects where any of the Parties or Involved Entities was also involved shall be disclosed.

3.2.5.2 No DRB member shall have had substantial prior involvement in the Project (as determined by the Parties).

3.3 While serving as a DRB member on the Project, DRB members:

- a) Shall have a continuing obligation to avoid conflicts and make appropriate disclosures consistent with this Addendum; and
- b) Shall disclose any discussion contemplating entering an agreement with a Party or Involved Entity regarding employment, fee-based consulting services, or any other business arrangement after the Project is completed. No such agreement shall be entered into until the Parties give written approval.
- c) The DRB members shall adhere to the ethical obligations set forth in the TPA.

ARTICLE 4 ESTABLISHMENT OF THE DRB

4.1 As soon as practicable after the effective date of the Agreement, each Party shall investigate qualifications and determine individuals who are qualified and willing to serve on the DRB.

4.2 Within fourteen (14) Days after the effective date of the Agreement, the Parties shall confer about the qualifications to evaluate nominees and to jointly select a pool of prospective nominees.

4.3 The Parties shall provide to the DRB nominees a list of the Parties to the Agreement and Involved Entities (including key employees of each) as known at that time. Within three (3) Days of receipt of notice of potential nomination to the DRB and the Parties' disclosure listing, DRB nominees shall provide to both Parties: (a) full contact information, including name, e-mail, address, telephone number, and fax, and (b) a resume demonstrating relevant experience and skills to serve as a DRB member.

4.3.1 A disclosure statement consistent with the requirements of article 3 DRB Qualifications shall be provided within fourteen (14) Days after receipt of all DRB resumes and disclosures. The Parties shall solicit and receive information they may need from prospective candidates and jointly agree on the final selection of the three DRB members. The Parties shall advise the DRB members in writing of their appointment. In the event that all three DRB members were not selected from the initial pool of nominees, the process shall be repeated as expeditiously as practical.



4.3.2 If the DRB Chair has not already been appointed by the Parties as part of the selection process, then as soon as is practicable after appointment of the DRB the DRB members shall nominate the Chair and obtain concurrence by the Parties.

4.3.3 The Parties and each DRB member shall execute the TPA no later than the first DRB meeting, provided, however, the effective date of the TPA shall be the date the Parties confirmed in writing the first DRB member's appointment.

ARTICLE 5 DRB OPERATIONS

5.1 In consultation with the Parties, the DRB shall adopt Operating Procedures to provide more detail about the conduct of its operations, which shall be consistent with the Agreement, this Addendum, and the TPA. The Operating Procedures shall be flexible and subject to adjustment as needed to properly and efficiently carry out the responsibilities of the DRB.

5.2 The DRB will visit the Project site and meet with representatives of the Parties at periodic intervals and at other times requested by the Parties.

5.3 The initial meeting of the DRB shall occur as soon as practicable, but no later than forty-five (45) Days, after the effective date of the Agreement. Prior to the initial meeting of the DRB, the Parties shall furnish the DRB members a copy of any contract documents, schedules, schedule of values, and other documents that would assist the DRB to understand the nature, scope, and timing of the Project.

5.4 The Parties will copy the DRB members on all significant Project documentation, including progress meeting minutes, requests for information and responses, key submittals, notices of potential changes to the Project, requests for additional compensation or time, periodic schedule updates, and updated correspondence logs between the Parties, and such other documentation as directed by the DRB.

5.5 Each periodic meeting shall include an informal discussion of the Project status and a field observation of the work in progress. The Parties shall be invited to attend the DRB's periodic meetings and field observations.

5.6 The primary purpose of the DRB shall be to avoid disputes and to assist the Parties to mitigate impacts of unforeseen events that may arise in connection with the Project. Provided the other Party has provided advance consent, a Party's attorney may attend the periodic meetings, but only as a silent observer.

5.7 Statements made at periodic meetings of the DRB by either Party or the DRB will not be admissible in any subsequent proceedings of the DRB, or at any subsequent arbitration or litigation. Discussions held at periodic meetings of the DRB are deemed settlement negotiations.

5.8 An Involved Entity and other stakeholders may be invited to attend periodic meetings of the DRB.



5.9 Verbal Advisory Opinions

5.9.1 An advisory opinion serves as a method for potentially avoiding a DRB hearing. It is not intended to replace the formal dispute resolution process specified herein, but may be implemented as part of the direct discussions conducted between the Parties at periodic meetings.

5.9.2 When jointly requested by the Parties, the DRB may, at its discretion, provide a verbal advisory opinion on any issue that could lead to a dispute referable to the DRB. The Chair, in consultation with the Parties, shall establish the procedures and schedule for providing an advisory opinion. In the event that the Parties do not resolve the issue based on the advisory opinion, either Party may pursue a dispute as provided below, and the prior proceedings of the advisory opinion process shall not be considered in the DRB's consideration of the dispute.

ARTICLE 6 FORMAL DISPUTE RESOLUTION PROCESS

6.1 Prior to referring a dispute to the DRB, the Parties shall participate in direct discussions consistent with the Agreement. Such negotiations may involve the solicitation and rendering of a verbal DRB advisory opinion as described above.

6.2 Dispute Referral

6.2.1.1 Either Party may refer a dispute to the DRB.

6.2.1.2 The dispute referral shall be made in writing to the DRB Chair, the other DRB members, and the other Party. The dispute referral shall concisely define the nature and specifics of the dispute that are to be considered by the DRB and the scope of the report requested.

6.2.1.3 Within ten (10) Days after receipt of the dispute referral, the DRB Chair shall confer with the Parties to establish the scope of the dispute and DRB hearing; due dates for delivering pre-hearing position papers; a date, time, and location for convening the DRB hearing; and any other matters that will promote the prompt and efficient implementation of the hearing process. Hearings shall be convened at the next periodic DRB meeting, unless the Parties and the DRB agree to another time.

6.2.2 Pre-Hearing Submittals

6.2.2.1 The Parties shall each prepare a pre-hearing position paper and transmit it to all members of the DRB and the other Party. Each Party shall submit its pre-hearing position paper concurrently or as directed by the DRB. The Parties may submit rebuttals only as approved by the DRB Chair. The number of copies, distribution requirements, and time for submittals will be established by the DRB Chair, after consultation with the Parties.

6.2.2.2 The Parties shall submit the following:

- a) A joint statement of the dispute and the scope of the requested report. The joint statement shall summarize in a few sentences the nature of the dispute and the requested relief. If the Parties are unable to agree on the wording of



- this joint statement, each Party's submittal shall contain its own statement with an explanation of areas of disagreement with the other Party's statement.
- b) In order to minimize duplication, the Parties are encouraged to identify a common set of documents that will be referred to by both Parties and submit them in a separate package at the same time as the initial position paper. The pre-hearing position paper should include all backup information and documents as referenced in the position paper, tabbed, indexed, and pages consecutively numbered.
 - c) Each Party shall also submit in its position paper the basis and justification for the Party's position, with reference to contract language and other supporting documents for each element of the dispute.

6.2.3 When a hearing concerns time, the referring Party shall include a schedule impact analysis.

6.2.4 When a hearing concerns costs or monetary damages, the referring Party shall include full details and documentary back-up that are calculated and supported in accordance with requirements set forth in the Agreement

6.2.5 Conduct of Formal Dispute Hearings

6.2.5.1 The Parties shall provide or arrange for hearing facilities at or near the site or other agreed upon location.

6.2.5.2 Prior to the hearing date, the Chair shall set a time for the Parties to exchange and submit to the DRB any summaries, handouts, or other visual aids that the Parties intend to use at the hearing.

6.2.5.3 Attendance

6.2.5.3.1 The Parties shall require attendance at the hearing of their personnel directly involved in the dispute, and participants in the good-faith discussions that were conducted prior to submittal to the DRB.

6.2.5.3.2 Prior to the date of the hearing, the Chair shall set a time for each Party to exchange and submit to the DRB a list of proposed attendees. In the event of any disagreement, the DRB shall make the final determination on who may attend or participate in the hearing.

6.2.5.3.3 Attorneys shall not participate in the hearing without consent of the other Party and the DRB Chair.

6.2.5.3.4 At DRB hearings regarding pass-through claims by a subcontractor or supplier that are actionable by Constructor against Owner, Constructor shall require that each such subcontractor or supplier involved in the dispute have present at the hearing an authorized representative with actual knowledge of the facts of the pass-through claims.



6.2.5.4 The conduct of the hearing shall be established by the DRB according to its Operating Procedures and generally consistent with the following guidelines

- a) The Party that referred the dispute to the DRB shall present its position first, followed by the other Party.
- b) Both Parties shall be allowed successive rebuttals, assuring a full and adequate opportunity to present their positions, and to rebut the opposing Party's positions, until, in the DRB's opinion, all aspects of the dispute have been fully and fairly covered. The DRB shall be fully prepared to, and may at any time, ask questions, request clarifications, or ask for additional information or project records.
- c) No cross-examination will be allowed. However, either Party may request that the DRB direct a question to, or request a clarification from the other Party. The DRB shall determine at what point in the proceedings such requests may be made and if they will be granted.

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

6.2.6.1 In the event that either Party fails to deliver a pre-hearing submittal by the date established by the DRB, the DRB shall, at its discretion, determine whether the hearing shall proceed as originally scheduled, or whether additional time shall be provided and a new date established. On the final date and time established for the hearing, the DRB shall proceed with the hearing utilizing the information that has been submitted.

6.2.6.2 In the event that some or all of the representatives of either Party fail to appear at the appointed time of a DRB hearing, the DRB shall proceed with the hearing. The hearing shall take place as if all Party representatives were in attendance, and the DRB shall consider all evidence presented to it from those Party representatives that are present.

6.2.7 Use of Experts

6.2.7.1 A Party intending to offer an expert's conclusion at the hearing shall disclose such intention in writing to the other Party and to the DRB no less than thirty (30) Days prior to the due date for delivering the pre-hearing position paper. The expert's name and a statement of the area of the dispute that will be covered by his or her testimony shall be included in the disclosure, along with any conclusions the expert has made.

6.2.7.2 Upon receipt of the above disclosure, the other Party shall have the opportunity to secure the services of an expert to address or respond to those issues that may be raised by the offering Party's expert. The disclosure requirements shall be the same as that specified above, except that the time requirement is ten (10) Days prior to the due date for the responding Party's pre-hearing position paper.

6.2.7.3 As part of the pre-hearing submittals, the Parties shall exchange and submit to the DRB any expert reports that a Party intends to use at the hearing. The timing of such submittal shall be set by the DRB Chair, in consultation with the Parties.

6.2.8 DRB Formal Report



6.2.8.1 The DRB's findings and recommendation for resolution of a dispute will be formalized in a written report signed by all DRB members. The report should consist of: a concise description of the issues in dispute and the relief requested; short statements of each party's position; findings as to the facts of the dispute; analysis and rationale for the recommendation(s); and the recommendation(s). The report shall be submitted concurrently to the Parties on a schedule as agreed by the Parties and the DRB.

6.2.8.2 If the DRB cannot arrive at a unanimous report, the DRB shall prepare minority findings and recommendation(s), which, together with the majority findings and recommendation(s), shall comprise the DRB report. The report shall identify the issues of disagreement, along with the reasons for disagreement, but shall be signed by the three DRB members without identifying the member that did not agree with the unanimous portion of the report.

6.2.8.3 The DRB formal report shall be admissible in any subsequent proceedings, and the Parties waive any objections to the relevancy and admissibility of the report.

6.2.8.4 Clarification

6.2.8.4.1 Within ten (10) Days following receipt of the report, either Party may request clarification of a report. Requests for clarification shall be submitted in writing to the DRB and with a simultaneous copy to the other Party. Only one request for clarification per dispute from each Party will be allowed.

6.2.8.4.2 Within a reasonable period of time not to exceed fourteen (14) Days from receipt of the request for clarification, the DRB shall provide written clarification to both Parties, or advise the Parties that no clarification is needed.

6.2.8.5 Reconsideration

6.2.8.5.1 Within ten (10) Days following receipt of the report, either Party may request reconsideration of the report on the basis of new information obtained or developed that was not known at the time of the hearing. The DRB will not entertain requests for reconsideration that amount to a renewal of prior argument or additional argument based on facts available at the time of the hearing.

6.2.8.5.2 Requests for reconsideration shall be submitted in writing to the DRB and with a simultaneous copy to the other Party. Only one request for reconsideration per dispute from each Party will be allowed.

6.2.8.5.3 Within a reasonable period of time not to exceed fourteen (14) Days from receipt of the request for reconsideration, the DRB shall provide to both Parties a written response to the request for reconsideration.

6.2.8.6 Acceptance

6.2.8.6.1 Although the Parties agree that great weight should be given to the DRB's report, it is not binding on any Party. Within fourteen (14) Days of receipt



of the report or following receipt of responses to requests for clarification or reconsideration, whichever is later, the Parties shall submit their written acceptance or rejection of the report simultaneously to the other Party and the DRB.

6.2.8.6.2 Acceptance by either Party of a report on entitlement only, or on entitlement with guidelines for quantum, does not obligate the Party to any particular quantum.

6.2.8.6.3 If either Party rejects the DRB report, the Party may proceed to the binding dispute resolution process as provided in the Agreement.

6.2.8.7 Mediation

6.2.8.7.1 The Parties may agree to mediate a dispute after the DRB issues its report.

CONSTRUCTOR:

BY: _____ NAME: _____ TITLE: _____

WITNESS: _____ NAME: _____ TITLE: _____

OWNER:

BY: _____ NAME: _____ TITLE: _____

WITNESS: _____ NAME: _____ TITLE: _____

END OF DOCUMENT

