

DISPUTE RESOLUTION BOARD THREE-PARTY AGREEMENT

THIS THREE-PARTY AGREEMENT, hereinafter called "AGREEMENT", made and entered into as of the day and year of the last signature affixed below, between the Ohio Department of Transportation, hereinafter called the "DEPARTMENT"; and John R, Jurgensen Company, hereinafter called the "CONTRACTOR"; and the Dispute Resolution Board, hereinafter called the "DRB", and consisting of three members for the construction of Project 21-0591, CLE-SR 32-03.50 (PART 1, 2, 3), PID 103954, hereinafter called the "PROJECT,":

Luke Johansen,	DRB Member
Thomas Hesmond,	DRB Member
Tom Hyland,	DRB Chairperson

WITNESSETH, that:

WHEREAS the contract for the PROJECT provides for the establishment and operation of the DRB to assist in resolving disputes and claims; and

WHEREAS, the DRB is composed of three Members, one selected by the DEPARTMENT, one selected by the CONTRACTOR, and the CHAIRPERSON selected by the aforementioned two;

NOW THEREFORE, in consideration of the terms, conditions, covenant, and performance contained herein, or attached and incorporated and made part hereof, the parties hereto agree as follows:

I. DESCRIPTION OF WORK

In order to assist in the resolution of disputes and claims between the CONTRACTOR and the DEPARTMENT, the DEPARTMENT has provided in the PROJECT contract, for the establishment of the DRB. The purpose of this DRB is to fairly and impartially consider disputes placed before it and provide recommendations for resolution of these disputes to both the DEPARTMENT and the CONTRACTOR. DRB members shall perform the services necessary to participate in the DRB's actions as designated in Section II, Scope of Work.

II. SCOPE OF WORK

The Scope of Work of the DRB includes, but is not limited to, the following items of work:

A. Operating Procedures for Dispute Resolution

Upon execution of this AGREEMENT, the DRB shall establish Operating Procedures that will govern the conduct of its business based on the DRB Guidelines which can be obtained from ODOT's Dispute Resolution Coordinator in the Office of Construction Management. The DRB may elect to adopt the "Dispute Resolution Board Operating Procedures for Dispute Resolution" in its entirety or a modified version thereof. At a minimum, these procedures will establish both the requirements and timeframes for documentation submissions by both the CONTRACTOR and

DEPARTMENT, documentation exchange between the CONTRACTOR and DEPARTMENT, and the hearing procedures.

The members of the DRB will keep current on the progress of this project through 1) visits to the project, 2) keeping current project files, and 3) meetings with DEPARTMENT and CONTRACTOR personnel. The frequency of project visit, meetings, and the content of members' files shall be as agreed upon among the DEPARTMENT, CONTRACTOR, and members of the DRB.

Upon receipt by the DRB of a written *Notice of Intent to Appeal to the DRB* of a dispute, from either the CONTRACTOR or the DEPARTMENT, the DRB shall convene to review and consider the appeal. The time and location of DRB meetings shall be determined by the DRB with reasonable notice to the DEPARTMENT and CONTRACTOR. Both the DEPARTMENT and CONTRACTOR shall be given the opportunity to present their evidence at these meetings. It is expressly understood that the DRB members are to act impartially and to independently consider the contract provisions, as well as the facts and conditions surrounding any written appeal presented by the DEPARTMENT or the CONTRACTOR, and that the DRB's recommendations concerning any such appeal are advisory. The DRB's recommendations, resulting from its consideration of a dispute or claim, shall be furnished to the DEPARTMENT and to the CONTRACTOR in accordance with the process set forth in the Dispute Resolution Board Process Proposal Note 108. The recommendations shall be based on the pertinent contract provisions and the facts and circumstances involved in the dispute.

Either the DEPARTMENT or the CONTRACTOR may appeal a recommendation to the DRB for reconsideration. However, reconsideration will only be allowed when there is new evidence to present.

B. DRB Member Replacement

Should the need arise to appoint a replacement DRB member, the replacement DRB member shall be appointed in the same manner as the original DRB members were appointed. The selection of a replacement DRB member shall begin promptly upon notification of the necessity for a replacement and shall be completed within 30 calendar days. This AGREEMENT shall be amended to indicate a change in DRB membership.

C. Virtual and In-Person Meetings

The DEPARTMENT's Engineer and the CONTRACTOR shall mutually agree on the appropriateness of holding In-Person update status meetings or Dispute hearings or holding such meetings virtually.

III. DEPARTMENT RESPONSIBILITIES

The DEPARTMENT shall furnish the following services and items:

A. Contract Related Documents

The DEPARTMENT shall furnish the DRB three copies of the contract for the PROJECT, change orders, written instructions issued by the DEPARTMENT to the CONTRACTOR, or other documents pertinent to the performance and therefore, necessary for the DRB to perform its responsibilities.

B. Coordination and Services

The DEPARTMENT's Engineer for the PROJECT will, in cooperation with the CONTRACTOR, coordinate the operations of the DRB. The DEPARTMENT, through the Engineer, will arrange or provide conference facilities at or near the contract.

C. Dispute Resolution Documents

1. The DEPARTMENT shall cooperate with the CONTRACTOR to jointly create a Common Support Document Appendix for each claim that is to be heard by the DRB. This Appendix shall include all reference documents (applicable plans sheets, specification references, sketches or drawings, etc.) common to both the DEPARTMENT'S and the CONTRACTOR'S dispute resolution submittal. The DEPARTMENT will be responsible for producing 5 copies of this document for the first claim (one copy for each DRB member, the DEPARTMENT and the CONTRACTOR). The CONTRACTOR will be responsible for producing 5 copies of this document for the second claim. The responsibility will continue to alternate with subsequent claims, if necessary.
2. The DEPARTMENT shall furnish to each DRB member, one copy of all pertinent documents not included in the Common Support Document Appendix, which are or may become necessary for the DRB to perform its responsibilities. Pertinent documents are any documents substantiating or justifying the DEPARTMENT'S position. A copy of such pertinent documents must also be furnished to the CONTRACTOR.

Except for its participation in the DRB's activities as provided in the contract and in this AGREEMENT, the DEPARTMENT will not solicit advice or consultation from the DRB or any of its members on matters dealing in any way with the project, the conduct of the work, or resolution of problems.

IV. CONTRACTOR RESPONSIBILITY

The CONTRACTOR shall furnish the following items:

A. Contract Related Documents

The CONTRACTOR shall furnish each member of the DRB a copy of the progress schedule and updates and any other CONTRACTOR-generated documents pertinent to the performance and therefore, necessary for the DRB to perform its responsibilities.

B. Dispute Resolution Documents

1. The CONTRACTOR shall cooperate with the DEPARTMENT to jointly create a Common Support Document Appendix for each claim that is heard by the DRB. This Appendix shall include all reference documents (applicable plans sheets, specifications, sketches or drawings, etc.) common to both the CONTRACTOR'S and the DEPARTMENT'S dispute resolution submittal. The DEPARTMENT will be responsible for producing 5 copies of this document for the first claim (one copy for each DRB member, the DEPARTMENT and the CONTRACTOR). The CONTRACTOR will be responsible for producing 5 copies of this document for the second claim. The responsibility will continue to alternate with subsequent claims, if necessary.
2. The CONTRACTOR shall furnish to each DRB member, one copy of all pertinent documents not included in the Common Support Document Appendix, which are or may become necessary for the DRB to perform its responsibilities. Pertinent documents are any documents which are used in the performance of the work or in justifying or substantiating the CONTRACTOR's position. A copy of such pertinent documents must also be furnished to the DEPARTMENT.

Except for its participation in the DRB's activities as provided in the contract and in this AGREEMENT, the CONTRACTOR will not solicit advice or consultation from the DRB or any of its members on matters dealing in any way with the PROJECT, the conduct of the work, or resolution of problems.

V. DURATION OF DRB

The DRB will exist for the life of the PROJECT only and will not review disputes or claims on any other project unless otherwise agreed upon by the DEPARTMENT and the CONTRACTOR. If, after the DEPARTMENT has made final acceptance of the PROJECT, there are unresolved disputes and claims remaining, this AGREEMENT shall remain active and in full force and effect until the PROJECT is otherwise administratively closed by the DEPARTMENT following final payment so that the DRB may continue in operation until all unresolved disputes and claims are resolved.

VI. COMPENSATION

A. Compensation Allowed

1. IN-PERSON MEETINGS

A. MEMBER'S Fees

DRB Members shall be compensated at an agreed rate of \$1,800.00 per day upon which there is a regularly scheduled on-site DRB Meeting.

B. CHAIRPERSON's Fee

The DRB Chairperson shall be compensated at an agreed rate of \$2,200.00 per day upon which here is a regularly scheduled on-site DRB Meeting.

C. Travel Time

The DRB shall be compensated at the rate of \$125.00 per hour for the time spent en route to and from an on-site DRB meeting.

D. Transportation Costs

The DRB shall be reimbursed for reasonable travel expenses incurred in accordance with the Ohio Office of Budget and Management Travel Policy as published on the State of Ohio website.

2. ONLINE/VIRTUAL MEETINGS

A. MEMBER'S Fees

1. Meeting

For regularly scheduled DRB meetings that are conducted via virtual meeting platforms, i.e., Skype, Microsoft Teams, Zoom, etc., the DRB shall be compensated at an hourly rate of \$225.00 per hour for time spent logged in and participating in the meeting.

2. Preparation

Time spent by the DRB preparing for a virtual meeting, including document review, equipment set-up, agenda preparation, and other activities necessary to meaningfully participate in the remote meeting will be compensated at an agreed rate of \$225.00 per hour and shall include all incidentals.

B. Travel Time

No travel expenses are eligible for reimbursement when virtual meetings are held in lieu of in-person meetings.

C. Maximum Compensation

Total compensation for virtual meetings shall not exceed \$900.00 per meeting for DRB Members or \$1,125 per meeting for the DRB Chairperson.

3. REVIEW AND RESEARCH AWAY FROM THE PROJECT

No additional compensation will be made for the time spent on review and research activities by the DRB, unless an estimate of that time is specifically agreed upon in advance and in writing by the DEPARTMENT and the CONTRACTOR. Such time that has been agreed to will be compensated at an agreed rate of \$225.00 per hour. The agreed rate shall include all incidentals.

B. Payment

1. SUBMISSION FOR COMPENSATION

The DRB members shall submit to the CONTRACTOR, quarterly, each member's billable time and travel expenses, and all required supporting documentation.

2. MEMBER COMPENSATION

After review and verification by the CONTRACTOR and DEPARTMENT of the members' submission for compensation, the CONTRACTOR shall pay each member their earned fees.

3. CONTRACTOR REIMBURSEMENT

The DEPARTMENT will reimburse the CONTRACTOR for the DEPARTMENT'S share of actual invoice costs of the members under Lump Sum Item Special – Department's Share of Dispute Resolution Board. The Department will not pay a percent mark-up on these costs. The Department will make partial payments according to C&MS 109.09.

VII. ASSIGNMENT OF TASKS OF WORK

The DRB members shall not assign any of the work of this AGREEMENT. However, if upon submission of a Claim to the DRB, the DRB believes that assistance with a technical issue is necessary in order to render a recommendation, the DRB may seek the advice and input of outside experts after obtaining mutual consent of the CONTRACTOR and DEPARTMENT. The source and nature of any outside information will be shared with all parties within the recommendation.

VIII. CONFLICT OF INTEREST

The members of the DRB agree individually that they do not have any direct or indirect ownership or financial interest in the CONTRACTOR, any consultant or consulting firm on the project, any subcontractor or supplier on the project or any business of another DRB member. The members of the DRB agree individually that they are not currently employed by the DEPARTMENT, the CONTRACTOR, or any consultants or consulting firms on the project. Service as a member of other DRB's, as a Dispute Resolution Advisor or as an arbitrator or mediator shall not be construed to be employment. The members of the DRB, the DEPARTMENT, and the CONTRACTOR agree that during the life of the contract, no unilateral discussion will be had, or agreement will be made between any DRB member and any party to this AGREEMENT for employment after the contract is completed.

In the event that a DRB member's status changes in regard to the aforementioned areas of conflict, the members of the DRB agree individually to immediately disclose this in writing to both the DEPARTMENT and the CONTRACTOR. Upon receiving such notification, the DEPARTMENT or the CONTRACTOR may, within seven (7) calendar days, give notice that this DRB member is no longer acceptable. In no event, shall a DRB member participate in a hearing of a dispute or claim by the DRB involving a firm by which he/she is employed.

IX. TERMINATION OF AGREEMENT

The parties to this AGREEMENT mutually agree that this AGREEMENT may be terminated at any time upon not less than a thirty (30) calendar day written notice to the other parties. In the event the AGREEMENT is terminated Section 108.02.G of ODOT's Construction and Material Specifications (C&MS), Dispute Resolution and Administrative Claims Process that was in affect at the time of the bidding of this project will immediately become effective. All disputes in Step 1 or Step 2 of this PN108 Note will continue as in Step 1 or Step 2 as described by Section 108.02.G of ODOT's C&MS. Any claims in Step 3, to be heard by the DRB, will instead be heard by the Director's Claims Board.

DRB members may withdraw from the DRB by providing 30 day notice. DRB members may be terminated for cause only by their original appointing authority, therefore, the DEPARTMENT may only terminate the DEPARTMENT appointed member, the CONTRACTOR may only terminate the CONTRACTOR appointed member, and the first two members must agree to terminate the CHAIR.

X. LEGAL RELATIONS

The parties hereto mutually understand and agree that each DRB member in the performance of 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 and accordingly, no party to this AGREEMENT shall bear a greater responsibility for damages or personal injury than is normally provided by Federal and Ohio Law.

The parties expressly agree that each DRB member is acting in a capacity intended to facilitate resolution of disputes. The DEPARTMENT and the CONTRACTOR further agree that neither of them will seek nor require the testimony or production of documents and/or records from the DRB members in any administrative, judicial or other proceeding.

XI. FEDERAL REVIEW

The Federal Highway Administration shall be informed of the work of the DRB and shall have the right to review all records and attend any meeting or hearing of the DRB.

XII. ELECTRONIC SIGNATURE

The Parties' acceptance and execution of this AGREEMENT may be made by electronic acknowledgement, and all agree that electronic acknowledgment of this AGREEMENT shall be considered the equivalent of written signatures.

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the day and year of the last signature affixed below.

DRB MEMBER
Luke Johansen

DRB MEMBER
Thomas Hesmond

By: _____

By: _____

For the OHIO DEPARTMENT OF
TRANSPORTATION
Jack Marchbanks
as signed by Josh Bowman

DRB CHAIR
Tom Hyland

By: _____

By: _____

CONTRACTOR
John R Jurgensen Company
Chris Kunz

ODOT CHIEF LEGAL COUNSEL,
Approval as to Form Only
Jodi M. Elsass-Locker, Esq.

By: _____

By: _____