**PROJECT NAME**

**ODOT PROJECT XX XXXX**

**PID #XXXXX**

**ODOT – NAME OF CONSTRUCTION COMPANY**

**DRA Operating & Hearing Procedures**

Pursuant to the Ohio Department of Transportation (Department) Proposal Note 109, the Dispute Resolution Advisor (DRA) adopts the following Operating Procedures. These procedures provide guidelines for the DRA, the Contractor and Department and are intended to be flexible to meet circumstances that may arise during the life of the project. Nothing in the Operating Procedures is intended to supersede provisions of the *Three-Party Agreement* or the contract documents*.* To the extent that any discrepancies exist, the *Three-Party Agreement* will control.

**1.0 Regular Meetings**

**1.1** The purpose of the DRA is to provide special expertise to assist in dispute prevention and to facilitate the timely and equitable resolution of disputes and claims if they arise in an effort to promote project partnering, avoid delays to the contract work, minimize the expense of the dispute and claim resolution process, and to avoid litigation. The DRA is not the "representative of" or "advocate for" either party. The DRA will function as an objective, impartial, and independent party at all times.

**1.2** The DRA will keep current on the progress of the project through: (1) regular visits to the project, (2) receiving interim progress reports from the project, and (3) joint consultation and meetings with Department and Contractor personnel. The content of job progress documentation (aka Monthly Information Packages) for the DRA will be as agreed among the Department, Contractor and the DRA.

**1.3** The Department and the Contractor will each designate a point of contact (POC) for communications with the DRA. The designated POCs of the Department and the Contractor will be responsible for circulating communications from the DRA with each other and to their respective project and management organizations. The DRA expects that most communications will be by e-mail, copied to all parties and the DRA. However, other forms of communication may be permitted, with copies or notice to all parties and the DRA.

**1.4** The DRA will circulate an agenda approved by the Parties for use at each regular DRA meeting. It will be the responsibility of the Department and the Contractor to circulate the agenda to all parties that will attend the DRA meeting and to prepare meeting presentations. The parties are encouraged to have in attendance at the regular DRA meetings project management teams, senior management of the Contractor and the Department, and other stakeholders on the project to the extent reasonable. At the conclusion of each meeting, the DRA will make a field inspection of the work accompanied by representatives of both the Contractor and the Department. Any areas of the project that are being impacted by a potential issue will be pointed out jointly by the parties.

**1.5** Although the parties may keep notes of the DRA meetings, no party shall make nor distribute official meeting notes – this serves to foster frank discussions of the issues. However, the parties shall agree upon a bullet point list of topics discussed in the DRA meeting and that will be circulated to all.

**1.6** The Department and the Contractor shall have no *ex parte* communications with the DRA, except for communications with the DRA on administrative matters such as scheduling meetings, process for submission of position papers, submission of regular project information updates, scheduling of hearings, and the like. The parties shall not independently solicit advice or consultation from the DRA the substance of matters dealing in any way with the project, the conduct of the work, or resolution of problems, disputes or claims. The parties shall direct any matters needing attention between meetings of the DRA to the DRA.

**2.0 Appeals to the DRA**

**2.1** The DRA will encourage the Department and the Contractor to resolve potential disputes and claims without resorting to use of the DRA. However, when it becomes apparent that resolution is unlikely, a dispute shall be promptly moved to consideration by the DRA. The escalation process set forth in Proposal Note 109 should be expedited to the greatest extent possible so that disputes and claims are dealt with in a manner that will not impede the progress of the project.

**2.2** Step 1 (On-Site Determination) and Step 2 (District Dispute Resolution Committee) disputes will follow the procedures set forth in Proposal Note 109. The DRA will monitor compliance with the Step 1 and 2 procedures by obtaining a status report from both the Department and the Contractor at the regular DRA meetings.

**2.3** Step 3 (Appeal to DRA) will follow Proposal Note 109. Within fourteen (14) calendar days of receipt of a Step 2 decision, the Contractor must submit a written *Notice of Intent to Appeal* *to the DRA*. This notice shall state the Contractor’s request for a DRA hearing and shall briefly summarize the nature of the dispute and the remedies sought. The Contractor must also submit copies of this notice to the District Construction Administrator (DCA) and Claims Coordinator in the Division of Construction Management. A dispute becomes a “Claim” when the DRA receives the *Notice of Intent to Appeal to the DRA.*

**2.4**. The DRA will notify the parties of the date of receipt of the *Notice of Intent to Appeal to the DRA* for purposes of triggering the time period in Subsection 2.6 below. The DRA may hold a telephonic administrative conference with the parties to review the appeal process and timelines. The DRA may also request that, prior to the conference call with the DRA, the parties confer and attempt to agree on the details of the appeal process and timeline to the extent possible, subject to the DRA’s approval. The time frames set out in Subsections 2.5 and 2.8 below may be revised by agreement of the parties and with the approval of the DRA.

**2.5** Within thirty (30) calendar days of receipt of the *Notice of Intent to Appeal to the DRA,* the Contractor shall send (via overnight mail service or by email if not too voluminous, or as agreed upon) to the DRA a complete copy of its Claim Documentation, and shall simultaneously deliver in person, by overnight mail or by email (if not too voluminous, as agreed upon) a copy to the DCA*.* The DRA may also request electronic versions of the Claim Documentation.

**2.6** The Contractor’s Claim Documentation at a minimum shall contain the following:

1. The Claim Documentation should clearly and in detail give requiredinformation for each item of additional compensation and any time extension requested. In addition to the documentation submitted at Step 2, the narrative shall be enhanced to include sufficient description and information to enable understanding by a third-party who has no knowledge of the dispute or familiarity with the project. The documentation must also include a discussion of the efforts to partner the dispute that gave rise to the Claim.

1. A narrative of the disputed work or project circumstance at issue. This section must include the dates of the disputed work, the date of early notice, and efforts to mitigate.
2. References to the applicable provisions of the plans, specifications, proposal, or other contract documents. Copies of the cited provisions shall be included in the Claim Documentation.
3. The dollar amount of additional compensation and length of contract time extension being requested.

1. The cost and supporting documents that served as the basis for the requested compensation and/or time.
2. A detailed schedule analysis must be included in the Claim Documentation for any dispute concerning additional contract time, actual or constructive acceleration, or delay damages. At a minimum, the schedule analysis must account for information included in the Schedule Update immediately preceding the occurrence of the circumstance alleged to have caused delay and must comport with contract and accepted industry practices relating to delay and disruption analyses.

1. Copies of relevant correspondence and other pertinent documents.

In the event entitlement only is submitted to the DRA, the Claim Documentation should include only the information and materials set forth in Section 2.6.(a) through (c), and (g).

**2.7** When submitting its Claim Documentation, the Contractor must certify its Claim in writing and under oath in accordance with the requirements of Proposal Note 109, Section 9, Part D.

**2.8** Within thirty (30) calendar days of receipt of the Contractor’s Claim Documentation, the District shall send (via overnight mail service) to the DRA a complete copy of its Claim Documentation, and shall simultaneously deliver in person or mail (via overnight mail service) a copy to the Contractor. The DRA may also request electronic versions of the Claim Documentation. In the event that the Contractor requests and is granted a time extension for the submission of its Claim Documentation, the District will also be granted an equal time extension for submission of its Claim Documentation, but in all cases the DRA shall be provided with the District’s Claim Documentation at least fourteen (14) days before a hearing date. The District’s Claim Documentation at a minimum shall include the following:

1. A narrative of the disputed work or project circumstance at issue with sufficient description and information to enable understanding by a third-party who has no knowledge of the dispute or familiarity with the project. This section must include the dates of the disputed work and the date of early notice. The narrative must also discuss the efforts taken to partner the dispute that gave rise to the Claim.

1. References to the applicable provisions of the plans, specifications, proposal, or other contract documents. Copies of the cited provisions shall be included in the claim document.
2. Responses to each argument set forth by the Contractor. In the event that the Contractor has asserted a Claim for additional contract time, actual or constructive acceleration or delay damages, the District shall provide a detailed response to the Contractor’s schedule analysis, or its own alternative schedule analysis.

1. Any counterclaims, accompanied by supporting documentation, the District wishes to assert.
2. Copies of relevant correspondence and other pertinent documents.

In the event entitlement only is submitted to the DRA, the Claim Documentation should include only the information and materials set forth in Section 2.8. Section 2.6(a) through (c), and (e).

**2.9** At the parties’ request or on its own initiative, the DRA may also permit and set submission dates for rebuttal papers if it would assist in a full consideration of the parties’ positions on the Claim.

**3.0 DRA Hearing**

**3.1** The DRA, in consultation with the parties, will schedule a hearing on the Claim. Unless a claim is of a complex nature, the hearing will be held during the next regularly scheduled site visit or at such other time as the parties may agree. For urgent matters, the DRA will attempt to schedule a hearing within such time as is reasonable. Hearings will be conducted at a location selected by the parties after consultation with the DRA.

**3.2** In particularly large or complex disputes, the DRA may request the parties to participate in a pre-hearing conference. The purpose of such a conference will be to provide the parties with organizational instructions and inform them of any particular issues that the DRA would like to have addressed at the hearing. The DRA will also address issues such as the submission of presentation materials, the submission of exhibits, the presenters and desired order of presentation, the persons who may need to be present at the hearing, and any other matters that will promote the efficient and expeditious hearing on the Claim. Pre-hearing conferences may be held by telephone conference call as long as all parties agree in advance and their designated representatives are present on the call.

**3.3** No later than fourteen (14) calendar days prior to the hearing the Contractor and the District shall provide the DRA with the list of names and professional affiliations of each person who may present information or be present at the hearing. Prior to the submission of such witness/representative list, the parties shall attempt to agree upon the witnesses/ representatives to be present at the meeting. If the parties cannot agree upon the witnesses/ representatives to be called/present at the meeting, any unresolved issue will be submitted to the DRA along with the list of agreed upon witnesses/representatives; the DRA will review the disputed attendee list and inform the parties of its decision on disputed attendees prior to the hearing. The witness/representative list should contain the following information: the person’s name, title, professional affiliation, and, if the person will make a presentation or be a fact witness, a brief summary of the matters that the person will address. In the case of expert witnesses, the parties should submit and exchange expert reports and resumes at the time primary documentation is due.

**3.4** With the approval of the DRA, the parties may be given reasonable time, generally not to exceed 60 days, for submission and review of additional documentation by either party prior to the hearing date. However, unless otherwise permitted by the DRA, the exchange of documentation and all disclosures specified in Step 3 of the process shall be completed at least fourteen (14) calendar days prior to the hearing.

**3.5** Upon request of one or more of the parties, or at the DRA’s discretion, the DRA may delay the hearing one (1) time to allow more time for requests for and review of more documentation. The DRA may, on its own initiative, request information of the Contractor or the District in addition to that submitted for the hearing. If either party fails to reasonably comply with such request, the DRA may make its recommendation without such information.

**3.6** In the event of multiple claims, the DRA may direct that they be considered in a single hearing. The DRA may hold such hearing after the completion of the project or at such time that it is assured that all disputes on the project have been processed through Steps 1 and 2 of the Proposal Note 109 Process and that Claims are properly before the DRA.

**3.7** During the preparation of their respective Claim Documentation, the parties are encouraged to confer and agree to the extent possible on the following matters:

* a joint statement of the Claim defining the issues, claim elements, and/or counterclaims before the DRA, and the remedies sought by each party
* a joint set of common exhibits, to the extent possible, that includes in 3-ring binders tabbed or numbered documents that they both plan to use during the course of the hearing
* submission of visual aids, exhibits, charts or summaries of documents in order to facilitate the DRA’s understanding of the issues and also avoid the submission of voluminous records that may not be necessary for the DRA’s determination (any visual aids, exhibits, charts or summaries should be consistent with and not additive to the parties’ Claim Documentation)

**3.8** No later than seven (7) calendar days prior to the hearing, the Contractor and District shall submit to all DRA members (with a copy sent simultaneously to the other party) all presentation aids and handouts that will be used at the hearing.

**3.9** At the hearing, the Contractor and Department will each be allowed adequate time to present their respective positions to the DRA. As a general procedure, it is contemplated that the party bringing the Claim will go first, and that each party will make an initial presentation of its claim or defense, not subject to interruption by the other party. Then, one or more uninterrupted rebuttals to any assertion by the other party may be presented until the DRA determines that the testimony is repetitious or all aspects of the Claim have been adequately covered. The DRA will control the hearing and guide the discussion of issues by questioning the parties or focusing their presentations in order to expeditiously obtain all information that the DRA deems necessary to make its findings and recommendations. The DRA may limit the presentation of documents or oral statements when it deems them to be redundant. The parties should not present information or documents not included in the pre-hearing submissions. If additional information is developed or documents are discovered after submission of the Claim Documentation, and the DRA permits this additional information or documents to be presented, the affected parties will be given a reasonable opportunity to consider and respond to it, including recessing the close of the hearing.

**3.10** The Contractor’s position on the Claim will be presented by knowledgeable representatives of the Contractor. The Department’s position on the Claim will be presented by knowledgeable representatives of the Department. Although the DRA recommends that one person for each party be designated to coordinate the presentation to the DRA, other individuals may give portions of the presentations, as reasonable and necessary. The DRA will ensure that the parties have ample opportunity to present their positions, at which point the hearing will be closed, unless the DRA requests additional material or a party requests the opportunity to submit additional material/rebuttal and the DRA approves such a request. In that event, the hearing will be closed upon receipt by the DRA of the additional material and/or rebuttals or at such other time as the DRA has no further questions. The DRA will communicate to the parties when the hearing is closed.

**3.11** Although the DRA does not allow legal counsel to participate directly in DRA meetings or hearings, the DRA, upon request of either party, may permit attendance in a meeting or hearing by legal counsel. Legal counsel may not (a) examine directly or by cross-examination any witness, (b) object to questions asked or factual statements made or related during the hearing or (c) make or argue legal motions. Legal counsel will not be permitted to make statements of fact for or on behalf of a party or witness and shall at all times comply with the instructions of the DRA. The DRA may ask legal counsel and/or experts for either party to address legal or technical expert issues that the DRA determines would assist it in resolution of the Claim.

**3.12** In general, no formal record will be kept of a DRA hearing. The DRA may permit a departure from this rule depending on the nature and magnitude of the Claim or as the parties agree but videos will not be permitted under any circumstances.

**3.13** The Contractor shall identify clearly in all Claim Documentation and hearing submissions that portion of the Claim involving a subcontractor and the identity of the subcontractor. The Contractor shall ensure that all subcontractor documents are timely exchanged with the Department and submitted to the DRA as part of the Contractor’s Claim Documentation. At any hearing on a Claim that includes one or more subcontractors, the Contractor shall have present a subcontractor representative(s) with direct and actual knowledge of the Claim. Such subcontractor representative(s) may assist in or make the presentation of the subcontractor issues and answer questions.

**4.0 DRA Findings and Recommendations**

**4.1** Within thirty (30) calendar days after the DRA closes the hearing or at such other time as agreed, the DRA will make its written recommendation. For larger or more complex disputes, the thirty-day period may be lengthened, as reasonably determined by the DRA and agreed by the parties. If the DRA needs an extension, the DRA will confer with the Contractor and the Department on the revised date by which the DRA’s written recommendation will be issued.

**4.2** The recommendation of the DRA will be written and non-binding. The DRA will submit copies of the recommendation to the Contractor, the DCA, and the Claims Coordinator in the Division of Construction Management. The DRA’s recommendation will be titled “Dispute Resolution Advisor Recommendation”, and will include a heading with the ODOT project number, claim number (to be provided by the District at Step 2), topic of claim and date of the decision. The Introduction to the decision will include the date of the hearing, the location and names of all the attendees, including identification of Board members. The next section should be a brief description of the project (including date awarded; bid and current value of the contract; original and current completion date and % complete) followed by a brief description of the claim. The recommendation should include a summary of the positions of both parties; the facts both parties agree to and the facts that are in dispute; a discussion of the parts of the contract that are critical to the decision of the DRA and all reasoning to aid the parties in fully understanding the DRA’s recommendation. The written recommendation should be consistent with the form of ODOT’s Director’s Claims Board decisions, examples of which may be found on ODOT’s Disputes and Claims web site in the Claims Database.

**4.3** Within three (3) calendar days of receipt of the recommendation, either party may request a conference with the DRA for the purpose of hearing the DRA’s explanation or clarification of the recommendation. In making such a request the party shall identify with particularity the portion of the DRA’s recommendation that it feels needs clarification. As a general matter, the DRA will not grant such a request unless the DRA’s recommendation is unclear. If the DRA agrees to such a conference, within seven (7) days of receipt of the request or at such other time as the parties may agree, the DRA shall hold a conference (either in person or by teleconference) with both the Department and the Contractor.

**4.4** Within twenty-one (21) calendar days of receipt of the recommendation, the Contractor must send to the Claims Coordinator in ODOT’s Division of Construction Management a written notice of whether it accepts the DRA’s recommendation, with a copy to the DRA. Within twenty-one (21) calendar days of receipt of the recommendation, the Claims Coordinator in the Division of Construction Management must send to the Contractor a written notice whether the Department accepts the DRA’s recommendation, with a copy to the DRA.

**4.5** Either party may request that the DRA reconsider its recommendation, however reconsideration is only appropriate when new information to present or an assumed agreement on key factual matters turns out to be incorrect and correction is needed. When the DRA is of the opinion that a request for reconsideration meets these requirements and will likely lead to resolution of the dispute by the parties, it will grant that request. Reconsideration will be the exception, not the rule, and an additional hearing will not be held unless the DRA determines that one is needed.

**5.0 Advisory Recommendation Process**

**5.1** To more fully allow the DRA to act in an advisory capacity to assist the Department and the Contractor in resolving disputes, the Advisory Recommendation Process may be used to provide the parties with a preliminary assessment of the merits of each party’s position in the dispute based upon the information presented pursuant to this process. The process is meant to be expedient, completed with limited documentation, and will not prejudice a future formal DRA hearing of the dispute if it becomes a Claim. The Advisory Recommendation Process is not to be substituted for good faith negotiation efforts. Rather, the Advisory Recommendation Process should be utilized when negotiations have reached an interim impasse.

**5.2** A dispute may be identified as a candidate for an Advisory Recommendation by the Department, the Contractor, the DRA, or any combination of the above. Both the Department and the Contractor must concur that the dispute is appropriate for the Advisory Recommendation Process. The parties will notify the DRA if they wish to use the Advisory Recommendation Process.

**5.3** In most cases, the dispute will be scheduled for presentation to the DRA at the DRA’s next regularly scheduled meeting. If the parties agree and schedules permit, a dispute may be heard during the period between the regularly scheduled meetings, in which case a meeting will be scheduled at a time and location convenient to the parties and the DRA.

**5.4** The DRA will decide on a case-by-case basis the nature of the submissions that it wishes the parties to make. At a minimum, the DRA will require submission and exchange by the parties of brief position papers (not more than five pages), plus copies of relevant specification sections, plans, notes, drawings, and other pertinent Contract and/or Project related documentation. The submissions will be made and exchanged at least fourteen (14) days prior to the next quarterly meeting or hearing date unless the parties, with the DRA’s approval, agree to alter the time frames.

**5.5** The Contractor will make its presentation first, followed by the Department. Each party will be allowed sufficient time to make a thorough oral presentation, make rebuttals, provide the DRA with relevant documentation, and respond to the DRA’s queries and requests. Either that same day or the next, the DRA will orally share and discuss with the parties its assessment and Advisory Recommendation with respect to the dispute. The Advisory Recommendation shall not be binding on either party or on the DRA and does not require either party to accept or reject it. The Advisory Recommendation does not prejudice the opportunity for a Step 3 hearing if the dispute is not resolved.

**5.6** The DRA Advisory Recommendation process may be used by the parties at any time after Step 1 of the Dispute Resolution Advisor Process. If the parties remain unable to resolve the dispute following the Advisory Recommendation Process, the dispute may proceed in accordance with the next level of the Proposal Note 109 process and the requirements of these Operating Procedures. If the dispute is presented as a Claim to the DRA at a later date, pursuant to the Proposal Note 109 process, the DRA will focus anew upon the facts of the Claim as presented at that time, without reference to the Advisory Recommendation Process.

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