

DISPUTES REVIEW BOARD

THREE PARTY AGREEMENT

THIS THREE PARTY AGREEMENT ("Agreement") is made and entered into between the REGENTS of the UNIVERSITY OF WASHINGTON, hereinafter called the "University"; the General Contractor, \_\_\_\_\_, hereinafter called "Contractor"; and the DISPUTES REVIEW BOARD, hereinafter called the "Board," and consisting of three members: \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_. This Agreement shall be effective on the last date set forth on the signature page.

RECITALS

1. The University is now engaged in the construction of the \_\_\_\_\_ project (the "Project") and desires to provide for an expeditious, non-litigious method for resolving disputes which arise during the course of construction.

2. University and Contractor desire to create the Board consisting of three members, one selected by the University, one selected by Contractor, and the third member selected by the first two members.

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

I. DESCRIPTION OF WORK

In order to assist in the resolution of disputes and claims between Contractor and the University, the University has provided, in the Contract Documents, for the establishment of a Disputes Review Board. The intent of the Board is to fairly and impartially consider disputes placed before it and provide written recommendations for resolution to both the University and Contractor. The members of this Board shall perform the services necessary to participate in the Board's actions in accordance with the following Scope of Work and the Appendix to this Agreement.

II. SCOPE OF WORK

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

A. Third Board Member Selection

The first duty of the University and Contractor selected members of the Board is to select the third member. Unless otherwise agreed to by the University and the Contractor, the third member shall have had no financial or employment ties with either Contractor or the University (other than as a Dispute Review Board member) within the two years immediately preceding the execution of this Agreement. The goal is to obtain a third Board member who will complement the first two by furnishing expertise which will facilitate the Board's operations. The first two Board members shall proceed with the selection of the third Board member upon receiving their notices to proceed with the work of this Agreement. Should the first two members be unable to select a third member within 30 calendar days of the latest notice to proceed, the third member will be selected by a member of Judicial Arbitration and Mediation Services (JAMS).

B. Board Consideration of Claims

Upon receipt by the Board of a written appeal of a claim, from either Contractor or the University in accordance with the Construction Contract Documents (General Conditions Part 8), the Board shall convene to review and consider the appeal. It is expressly understood that the Board members are to act impartially and independently in the consideration of facts and conditions surrounding any written appeal presented by the University or Contractor and that the recommendations concerning any such appeal are advisory, although admissible in subsequent proceedings.

The process to be followed in any appeal shall include the appellant going first and presenting evidence to support its claim. The respondent shall then present evidence supporting its defense. Witnesses for each party shall also submit to questions from the Board and the adverse party. The Board has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

The Board, exercising its discretion, shall conduct the proceedings with a view toward expediting the resolution of the claim and may direct the order of proof and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

All provisions of Part 8 of the General Conditions of the Construction Contract are applicable to the Board's consideration of the claim, including but not limited to, the provision indicating that the Board's findings and recommendations are admissible evidence in any further proceedings.

The time and location of Board meetings shall be determined by the Board. The parties anticipate that the Board shall meet at monthly intervals unless more frequent meetings are required to consider appeals submitted by the parties.

C. Informal Guidance Meetings

The Board will be available on relatively short notice to meet with the parties to provide informal non-binding guidance on the preliminary thoughts of the Board regarding any issue. Either party may request such a meeting through telephonic, facsimile, or electronic communications with the Chairperson. The Chairperson shall contact the other party to obtain approval for any informal procedures requested. This informal guidance process is in addition to the formal process set forth herein. Use of the Board informally shall not waive the formal requirements set forth herein. Guidance provided during informal meetings is not admissible in a subsequent formal hearing or litigation. The Chairperson shall be responsible for contacting the other Board members if a meeting is agreeable to the parties. These meetings will be very informal discussions with input and comments encouraged from all parties. Initial impressions and guidance will be provided by the Board members orally. No written recommendations will be made. All communication and materials submitted during this informal process shall be privileged and confidential pursuant to chapter 7.07 RCW.

D. Procedures

After selection of the third Board member and prior to consideration of an appeal, the Board shall establish rules that will govern the conduct of its business and reporting procedures based on the terms of this Agreement and the Guidelines, attached as an Appendix to this Agreement. The Board recommendations, resulting from its consideration of appeals, shall be furnished in writing to the University and Contractor. The recommendations shall be based on the pertinent contract provisions and facts and circumstances involved in the dispute.

E. Construction Site Visits

The Board members shall visit the Project site to keep abreast of construction activities and to develop a familiarity with the work in progress. The frequency, exact time and duration of these visits shall be as mutually agreed among the University, Contractor, and the Board. It is generally contemplated that the Board will visit the Project site approximately once each month.

F. Board Member Replacement

Should the need arise to select a replacement Board member, the replacement Board member shall be selected in the same manner as the original Board members were selected. The selection of replacement Board members shall begin promptly upon notification of the necessity for a replacement and shall be completed within 30 calendar days. The Agreement will be amended to indicate the change in Board membership. In the event of an impasse in selection or replacement of any Board member, the selection will be made by a member of Judicial Arbitration and Mediation Services.

III. CONTRACTOR'S RESPONSIBILITY

Contractor shall furnish one copy of all documents it might have, other than those furnished by the University, which are pertinent to the performance of the Board.

IV. UNIVERSITY'S RESPONSIBILITY

The University shall furnish the following services and items.

A. Contract Related Documents

The University shall furnish the Board three copies of the Contract Documents, change orders, written instructions issued by the University to Contractor or other documents pertinent to the performance of the Work and therefore, necessary to the Board's work.

B. Coordination and Services

The University will, in cooperation with Contractor, coordinate the operations of the Board. The University will arrange to provide conference facilities at or near the Project site and provide administrative services, such as a meeting room and secretarial and copying services.

C. Board Cost Records

The University will maintain complete cost records for the University and Contractor shared expenses of the Board, and these records will be available for inspection by Contractor. These expenses include the third member's wages and travel expense, local lodging and subsistence for all Board members and direct costs associated with Board operations. Excluded from these records are the wages and travel expense of the University and Contractor selected members of the Board.

V. TIME FOR COMPLETION

Once the Board is convened, it shall be in operation through completion of the Project. The Board members shall not begin any work under the terms of this Agreement until authorized in writing by the University. The responsibilities of a Board member under this Agreement shall conclude upon Final Acceptance of the Project by the University.

## VI. PAYMENT

Board members shall be paid by the University and Contractor for services rendered under this Agreement as provided hereinafter. Such payments shall be full compensation for work performed or services rendered, and for all labor, materials, supplies, equipment and incidentals necessary to serve on the Board.

### A. All-Inclusive Rate Payment

#### 1. Fee - University and Contractor Selected Members

Payment for services rendered as University and Contractor members of the Board will be at the respective rates agreed to between the University and Contractor and their respective Board members. Payment shall be made under separate agreement between the respective parties and shall include travel expenses from the Board member's point of origin to the initial local point of arrival, such as Sea-Tac International Airport.

#### 2. Fee - Third Selected Member

Payment for services rendered as a member of the Board shall be at the hourly billing rate not to exceed \$165.00. This hourly rate includes all direct labor costs, overhead and profit. Subsequent changes in the billing rate are subject to agreement between the University, Contractor and the Board member and must be authorized by an amendment to this Agreement.

#### 3. Direct Non-Salary Costs

Direct non-salary costs will be reimbursed at the actual cost to the Board member except for the non-local travel by the University and Contractor selected members, which is separately compensated by the selecting party. Non-salary charges may include, but are not limited to, local travel, printing, long-distance telephone, supplies, etc. Automobile mileage will be reimbursed at the rate in effect at the time the trip is taken and shall be supported by the date and time of each trip with origin and destination of such trips. The current rate is 57.5 cents per mile which will remain in effect until changed in writing by the University.

Subsistence and lodging expenses, including expenses for high cost cities, will be reimbursed in accordance with UW Travel Office and General Services Administration Per Diem Rates (<http://www.gsa.gov/portal/category/104711>).

The billing for non-salary costs, directly identifiable with the Project, shall be an itemized listing of the charges supported by the original bills, invoices, expense accounts and miscellaneous supporting data retained by the Board member. Copies of the original supporting documents shall be provided to the University when submitting an invoice for payment of these services.

#### 4. Maximum Total Amount Payable

The maximum total amount payable under this Agreement, for the total of the three members' fee and travel costs and the Board's direct non-salary costs shall not exceed Seventy-Five Thousand Dollars (\$75,000.00), unless an amendment to this Agreement increasing the amount payable has been negotiated and executed by the University prior to costs being incurred.

B. Payments

The Owner and Third Board member may submit invoices to the University for partial payment for Board work completed not more often than once per month during the progress of the Work. Such invoices shall be on forms provided by the University and accompanied by a general description of activities performed during this billing period, and shall include copies of the original supporting documents for non-salary items. The value of the work accomplished for partial payment shall be established by the billing from the Board member, itemizing direct payroll (fee) and direct non-salary costs for the Board. Contractor shall pay the fee and direct non-salary costs for its selected member. Owner and Contractor shall share equally in the third Board member's fee and travel, and all operating expenses of the Board. These equally shared expenses shall be billed to and paid by Owner. Contractor's share will be deducted from monies due the Contractor from the Owner by issuance of a Change Order at Final Completion.

C. Inspection

The Board member shall keep available for inspection by representatives of the University and Contractor, for a period of six years after final payment, the cost records and accounts pertaining to this Agreement. If any litigation, claim or audit arising out of, in connection with, or related to this contract is initiated before the expiration of the six-year period, the cost records and accounts shall be retained until such litigation, claim, or audit involving the records is completed.

VII. ASSIGNMENT OF TASKS OR WORK

No Board member shall assign any of the work of this Agreement.

VIII. TERMINATION OF BOARD MEMBERS

Board members may withdraw from the Board by providing thirty (30) calendar days written notice to the other parties. Board members may be terminated for cause only by the party which selected the terminated Board member. Accordingly, only the University may terminate the University selected member, only Contractor may terminate the Contractor selected member, and the first two members must agree to terminate the third member.

IX. LEGAL RELATIONS

The parties mutually understand and agree that Board members perform their Board duties in the capacity of an independent contractor and not as an agent or employee of either the University or Contractor.

X. DISPUTES

Any dispute between the parties hereto, arising out of the work of the Board or other terms of this Agreement, which cannot be resolved by negotiation and mutual concurrence between the parties, shall be referred to the Superior Court of the State of Washington in King County as provided in Section XI following.

XI. VENUE, APPLICABLE LAW AND PERSONAL JURISDICTION

In the event that either party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, such action shall be initiated in the Superior Court of the State of Washington, situated in King County. This Agreement and the rights of the parties hereunder shall be governed by the laws of the state of Washington. The Board member hereby consents to the personal jurisdiction of the Superior Court of the State of Washington, situated in King County.

XII. INCORPORATION BY REFERENCE

The provisions of this Agreement form a part of, and are incorporated in the Contract Documents of the Public Works Contract between University and Contractor. All terms defined elsewhere in the Contract Documents shall have the same meaning here.

XIII. HOLD HARMLESS

With respect to the performance of services under this Agreement, the Disputes Review Board and each member thereof are immune from suit by the Owner or Contractor and their respective agents, officers, successors, and assigns in any civil action based upon any acts or omissions except in cases of willful or wanton or bad faith misconduct.

To the extent allowed by law, and except in cases involved willful and wanton or bad faith misconduct by a Board Member, each Board Member shall be indemnified and held harmless by the Contractor and Owner equally for any claims, losses, demands, costs and damages (including reasonable attorney's fees) arising out of or related to Board members carrying out Board functions.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by having their authorized representatives affix their signatures below.

BOARD MEMBER

BOARD MEMBER

By: \_\_\_\_\_  
Name:  
Title: University Member

By: \_\_\_\_\_  
Name:  
Title: Third Board Member

Date: \_\_\_\_\_

Date: \_\_\_\_\_

BOARD MEMBER

By: \_\_\_\_\_  
Name:  
Title: Contractor Member

Date: \_\_\_\_\_

CONTRACTOR

UNIVERSITY OF WASHINGTON

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:  
Capital Planning and Development

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## APPENDIX

### OBJECTIVE:

The principal objective of the Disputes Review Board is to assist in the resolution of disputes without resort to litigation. If this objective is achieved, such disputes can be resolved promptly with minimum expense, and with minimum disruption to the administration and performance of the Work. It is not intended for the University or Contractor to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately assigning them to the Board. It is intended that the mere existence of the Board will encourage the University and Contractor to resolve potential disputes without resorting to this appeal procedure. When a dispute which is serious enough to warrant the Board's review does develop, the process for prompt and efficient action will already be in place.

### RESPONSIBILITY OF THE BOARD

The Board's responsibility is to mediate disputes or controversy between Contractor and the University arising from performance of the Work. Primarily, the Board will consider claims and disputes involving interpretation of the Plans, Specifications, delays, acceleration of the Work, scheduling, classification of extra work, changed conditions, design changes and other similar matters. During its visits to the job site, the Board will encourage the settlement of differences at the job level.

The Board will refrain from officially giving any advice or consultative services to either party. The individual members will act in a completely independent manner and will have no consultative or business connections with either party during the course of their service as Board Members.

Normally, the Board Member selected by the first two will act as Chairperson for all activities. However, Chairperson duties may be delegated to another member from time to time.

### CONSTRUCTION PROGRESS MEETINGS

The Board will attend and participate in one construction progress meeting each month at or near the job site for the duration of the Project during which the Owner and Contractor shall conduct a round table discussion about the project, as described below. The Board may participate in and ask questions regarding the discussion and, if requested, provide informal guidance for resolution of disputes.

The agenda for each round table discussion will generally be as follows:

- (1) Opening remarks by the University's Representative.
- (2) A description by Contractor of Work accomplished since the last meeting; the current status of the work, and a forecast for the coming period.
- (3) An outline, by Contractor, of potential problems and description of proposed solutions.
- (4) An outline, by the University's Project Architect or Engineer, of the status of the Work.
- (5) A brief description of potential claims or disputes known to the parties.
- (6) A summary of the status of past disputes and claims.

If requested by either the Owner or Contractor, the Contractor and its representatives will attend additional meetings with the Board, along with representatives from the Owner and the University's Project Architect or Engineer.

The Contractor will record and distribute minutes of all meetings and circulate them for revision and/or approval by all concerned.

The Contractor will provide a site tour to the Board before or after each monthly Construction Progress Meeting. The site tour will cover all active segments of the Work, the Board being accompanied by both University and Contractor personnel.

#### ADVISORY OPINIONS

The usual Board procedure for dispute resolution consists of the prompt referral of a dispute to the Board, preparation of position papers by the owner and contractor, holding a hearing, and issuing a written report containing the Board's recommendation. Although the Board hearing procedure may be far more efficient than litigation and other judicial processes, it still requires the parties to prepare written documents, presentations at a hearing, and preparation of a written report by the Board. Advisory opinions are typically used soon after the parties find they have a potential dispute and have carefully considered and formed their positions and conducted preliminary negotiations, but before expenditure of additional resources and further hardening of the parties' positions. Advisory opinions may be used to provide quick insight into the Board's likely assessment of the relative merits of the parties' positions on a dispute. Frequently advisory opinions are used when the parties disagree as to the interpretation of a specific provision of the contract. This process is quick and may be entirely oral and does not prejudice the opportunity for a Board hearing if the dispute is not resolved and either party chooses to request one. Advisory opinions are an informal method of advising the parties on resolving potential disputes before they escalate. Both parties have to agree to seek an advisory opinion. Provided that both parties agree to an advisory opinion, the process would proceed as follows:

- Although this is not necessary, the parties sometimes submit a brief written claim statement and some documentation supporting their position to the Board and to the other party at the prescribed time prior to the meeting. Submission in writing enables the Board to be prepared and educate itself on the issue.
- The advisory meeting is normally held in conjunction with a periodic meeting, although advisory opinions are not generally issued on an impromptu basis. The meeting itself consists of brief oral presentations by each party, followed by any questions from the Board.
- A short intermission is taken to allow the Board members to caucus and form their opinion.
- The meeting is then reconvened, and the Board provides an oral opinion on the matter. Advisory opinions are always "based only upon information available at the time," "subject to change later based upon further data," and "not to be used or referred to in future disputes on this issue." The Board may or may not issue a written opinion, but if a written advisory opinion is issued, it must be at the specific request of both parties. Some of the factors that should be considered in making this decision include:
  - Written advisory opinions may (1) serve to avoid subsequent disputes as to what the Board actually said, i.e., the issue of each party hearing what they want to hear, and (2) assist resolution in the event that one of the parties needs to obtain approval from higher authority.
  - The absence of written advisory opinions maintains the informality of the proceeding, which may assist in reaching agreement of the parties.

The parties may consider the Board's opinion in their continued efforts to resolve the dispute among themselves. The opinion is only advisory and does not require an acceptance or rejection by either party. If the dispute is not resolved and a hearing is held, the oral presentations and advisory opinion are completely disregarded and the traditional Board hearing procedure is followed. When deciding whether a dispute should be submitted for an advisory opinion, the parties should consider the complexity of the dispute. The parties and the Board should recognize that if the issues are more complex than can be realistically dealt with in an advisory opinion, the Board may refuse to hear the dispute on an informal basis. In general, however, such an informal



presentation of a dispute and the subsequent Board opinion provides useful input in the negotiation process at minimal cost. Advisory opinions may be limited to merit issues only as a discussion of quantum are at times too complex.

#### HANDLING OF WRITTEN APPEALS

When a written appeal is referred to the Board (in accordance with Part 8 of the Construction Contract), it shall, first, decide when to conduct the hearings. If the matter is not urgent, it may be scheduled for the time of the next regular visitation of the site. For an urgent matter, the Board should meet at its earliest convenience.

The Board may also require that written documentation and arguments from both parties be sent to each individual member for study before the hearings begin, copies should also be provided to the other party.

Normally, the hearings will be conducted at the Project site. However, any location which would be more convenient and still provide all required facilities and access to necessary documentation would be satisfactory. Private sessions of the Board might also be held at a location other than the job site.

The University and Contractor shall have representatives at all hearings. The claimant will discuss the claim followed by the respondent. Each party will then be allowed one or more rebuttals until all issues are thoroughly reviewed. At any time Board members may ask questions, request clarification, or ask for further data. In large or complex cases, one or more additional hearings may be necessary in order to consider all the evidence presented by both parties. Questions from the opposing party shall also be allowed

After the hearings are concluded, the Board shall meet in private and reach a conclusion supported by two or more members. Board's 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 Document provisions and the relevant facts and circumstances.

The Board should make every effort to reach a unanimous decision. If unanimity is not achieved, the dissenting member may prepare a minority report.

Although great weight should be given to the Board's recommendations, such recommendations are not binding. Either party may request reconsideration of the Board's recommendations. However, if the Board's recommendations do not resolve the claim, all records, and written recommendations, including any minority reports, will be admissible as evidence in any subsequent litigation.

Contractor will be barred from presenting, in any subsequent litigation, any relevant facts or circumstances giving rise to or supporting its Claims which were not presented to the Board prior to the Board reporting its findings and recommendations on appeal.

It may not be necessary for the Board to keep a formal record of its sessions during the consideration of a claim. The decision whether to keep a formal record will depend partly upon the nature and magnitude of the claim and upon the attitude of the parties. If possible, it is desirable to keep the hearings completely informal.

#### MISCELLANEOUS

It is not desirable to adopt hard and fast rules for the function of the Board. The entire procedure should be flexible so that it can be adapted to changing situations. The Board should initiate, with the other parties' concurrence, new rules or modifications to old ones whenever such is deemed necessary.