

## **ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION**

### **ARTICLE 1 DEFINITIONS**

(A) "ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION" MEANS A VOLUNTARY AND NON-BINDING PROCESS FOR THE ADMINISTRATIVE REVIEW, CONSIDERATION AND ATTEMPTED SETTLEMENT OF A DISPUTE WITHOUT RESORT TO JUDICIAL PROCESS, INCLUDING WITHOUT LIMITATION, PARTNERING, DIRECT NEGOTIATION, MEDIATION, IMPARTIAL FACT-FINDING, DISPUTE REVIEW BOARD AND MINI-TRIALS, BUT NOT ARBITRATION. NONE OF THE METHODS OF ALTERNATIVE DISPUTE RESOLUTION LISTED IN THIS DIVISION SHALL RESULT IN A BINDING DECISION OR DETERMINATION.

(B) "DISPUTE" MEANS A DISAGREEMENT BETWEEN A PUBLIC AUTHORITY AND ONE OR MORE CONTRACTORS ARISING OUT OF A CONTRACT AWARDED BY THAT PUBLIC AUTHORITY FOR THE CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT, ADDITION, ALTERATION, REPAIR, PAINTING, DECORATION OR INSTALLATION OF A PUBLIC IMPROVEMENT.

(C) "PUBLIC AUTHORITY" MEANS THE STATE, OR A COUNTY, TOWNSHIP, MUNICIPAL CORPORATION, SCHOOL DISTRICT OR OTHER POLITICAL SUBDIVISION, OR ANY PUBLIC AGENCY, AUTHORITY, BOARD, COMMISSION, INSTRUMENTALITY, INSTITUTION OR SPECIAL DISTRICT OF THE STATE, OR A COUNTY, TOWNSHIP, MUNICIPAL CORPORATION, SCHOOL DISTRICT OR OTHER POLITICAL SUBDIVISION.

(D) "PARTNERING" MEANS A VOLUNTARY DISPUTE PREVENTION PROCESS INVOLVING TEAM BUILDING ACTIVITIES TO HELP DEFINE COMMON GOALS, IMPROVE COMMUNICATION, AND FOSTER A PROBLEM SOLVING ATTITUDE AMONG A GROUP OF CONTRACTING PARTIES THAT MUST WORK TOGETHER THROUGHOUT CONTRACT PERFORMANCE TO BE LESS ADVERSARIAL AND MORE COOPERATIVE.

(E) "DIRECT NEGOTIATION" MEANS NEGOTIATION IN WHICH ALL PARTIES INVOLVED ARE REPRESENTED BY THEIR PRINCIPALS.

(F) "MEDIATION" MEANS A VOLUNTARY PROCESS IN WHICH A NEUTRAL THIRD-PARTY MEETS WITH THE PARTIES WHO HAVE A DISAGREEMENT OR DISPUTE AND ATTEMPTS TO FACILITATE A MUTUALLY SATISFACTORY RESOLUTION.

(G) "IMPARTIAL FACT FINDING" MEANS A VOLUNTARY PROCESS IN WHICH A NEUTRAL THIRD-PARTY, OR FACT FINDER, INVESTIGATES A DISPUTE AND ISSUES A REPORT ABOUT THE RELEVANT FACTS. THE PARTIES MAY AGREE TO USE THE REPORT AS THE BASIS FOR A SETTLEMENT OR FOR OTHER PURPOSES.

(H) "DISPUTE REVIEW BOARD" MEANS A VOLUNTARY PROCESS IN WHICH A STANDING GROUP OF INDIVIDUALS, SELECTED BY MUTUAL AGREEMENT, MEET REGULARLY OR ON DEMAND, DURING THE COURSE OF A PARTICULAR RELATIONSHIP, TO ATTEMPT TO RESOLVE DISPUTES.

(I) "MINI-TRIAL" MEANS A VOLUNTARY STRUCTURED SETTLEMENT PROCESS IN WHICH EACH PARTY PRESENTS A HIGHLY ABBREVIATED SUMMARY OF ITS POSITION TO SENIOR OFFICIALS OF EACH PARTY AUTHORIZED TO SETTLE THE DISPUTE OR A THIRD-PARTY NEUTRAL ADVISOR WHO WILL RENDER AN ADVISORY OPINION UPON REQUEST OF BOTH PARTIES.

## **ARTICLE 2 APPLICATION**

(A) ANY STATE AGENCY OR STATE INSTITUTION SUPPORTED IN WHOLE OR IN PART BY THE STATE CHARGED WITH PREPARING CONTRACTS FOR AND ADMINISTERING THE CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT, ADDITION, ALTERATION, REPAIR, PAINTING, DECORATION OR INSTALLATION OF A PUBLIC IMPROVEMENT SHALL REQUIRE, AS PART OF THE STANDARD CONDITIONS OF CONTRACT FOR ANY SUCH CONTRACT, THAT PROCEDURES BE IMPLEMENTED FOR ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION.

(B) ANY OTHER PUBLIC AUTHORITY CHARGED WITH PREPARING CONTRACTS FOR AND ADMINISTERING THE CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT, ADDITION, ALTERATION, REPAIR,

PAINTING, DECORATION OR INSTALLATION OF A PUBLIC IMPROVEMENT MAY REQUIRE, AS PART OF THE STANDARD CONDITIONS FOR ANY SUCH CONTRACT, THAT PROCEDURES BE IMPLEMENTED FOR ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION.

(C) IF ESTABLISHED AND IMPLEMENTED, COMPLETION OF THE APPLICABLE ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE SHALL BE A CONDITION PRECEDENT TO THE FILING OF AN ACTION IN A COURT OF COMPETENT JURISDICTION IN CONFORMANCE WITH R.C. 153.12 THRU 153.16.

### **ARTICLE 3 PROCESS**

- (A) IF ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURES HAVE BEEN ESTABLISHED IN ACCORDANCE WITH ARTICLE 2, THE PUBLIC AUTHORITY, EACH CONTRACTOR AND ANY OTHER APPROPRIATE PARTIES INVOLVED IN THE PUBLIC IMPROVEMENT SHALL AGREE UPON ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURES PRIOR TO THE START OF ANY CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT, ADDITION, REPAIR, PAINTING, DECORATION OR INSTALLATION OF A PUBLIC IMPROVEMENT.
- (B) ANY AGREED UPON ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE SHALL BE IN WRITING, SHALL BE EXECUTED BY ALL APPROPRIATE PARTIES, AND SHALL INCLUDE THE FOLLOWING:
- (1) THE TYPES OF ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURES DETERMINED BY THE PARTIES TO BE APPROPRIATE FOR THE SIZE AND COMPLEXITY OF THE PROJECT.
  - (2) THE LENGTH OF TIME THE PARTIES WILL ENGAGE IN ANY PROCEDURE.
  - (3) THE NAME OR NAMES OF ANY IMPARTIAL THIRD-PARTY OR INDIVIDUALS TO FACILITATE ANY PROCEDURE OR THE METHOD BY WHICH AN IMPARTIAL THIRD-PARTY OR DISPUTE REVIEW BOARD MAY BE CHOSEN.

- (4) A METHOD OF PAYMENT FOR ANY ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE OR IF NO METHOD OF PAYMENT IS PROVIDED THAT THE COSTS SHALL BE BORNE EQUALLY BY THE PUBLIC AUTHORITY AND EACH CONTRACTOR AND/OR OTHER PARTY INVOLVED.
- (C) A PERSON SERVING AS AN IMPARTIAL THIRD-PARTY OR MEMBER OF A DISPUTE REVIEW BOARD SHALL NOT BE PERMITTED TO TESTIFY AS A WITNESS IN ANY SUBSEQUENT PROCEEDING, IN ACCORDANCE WITH R.C. 2317.023, UNLESS THE AFFECTED PARTIES AGREE OTHERWISE.
- (D) ANY IMPARTIAL THIRD-PARTY OR DISPUTE REVIEW BOARD WILL SUGGEST, MONITOR AND CONTROL THE FORM AND CONTENT OF THE INFORMATION TO BE PROVIDED BY THE PARTIES IN THE ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE, SUBJECT TO APPLICABLE LAW.
- (E) NO IMPARTIAL THIRD-PARTY OR DISPUTE REVIEW BOARD MAY COMPEL THE PARTIES ENGAGED IN ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION TO ENTER INTO AN AGREEMENT, AND NO IMPARTIAL THIRD-PARTY OR DISPUTE REVIEW BOARD SHALL HAVE AUTHORITY TO MAKE A BINDING DETERMINATION OF THE DISPUTE OR A BINDING DECISION ON THE FACTS OF THE DISPUTE.
- (F) ANY PROFESSIONAL DESIGN FIRM AND ANY CONSTRUCTION MANAGER PROVIDING SERVICES FOR THE PROJECT SHALL BE PERMITTED TO PARTICIPATE IN THE ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE UNLESS ALL PARTIES REQUEST THEIR EXCLUSION.
- (G) THE PARTIES MAY, BY MUTUAL CONSENT, PERMIT PERSONS WHO ARE NOT PARTIES TO THE WRITING REQUIRED IN DIVISION (A) TO BE INCLUDED AS PARTIES TO THE ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION.
- (H) THE PARTIES WILL CONTINUE WITH THE ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE THROUGH THE TIME PERIOD ESTABLISHED IN THE WRITING REQUIRED IN DIVISION (A), UNTIL A SETTLEMENT IS REACHED, ONE OF THE PARTIES WITHDRAWS FROM THE PROCESS, OR THE IMPARTIAL THIRD-PARTY OR DISPUTE REVIEW BOARD CONCLUDES AND INFORMS THE PARTIES THAT ADDITIONAL

ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION IS NOT PRODUCTIVE OR DESIRABLE.

- (I) ANY ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE SHALL PROVIDE THE METHODS BY WHICH ANY RESULTING SETTLEMENT BETWEEN THE PARTIES SHALL BECOME EFFECTIVE, INCLUDING WITHOUT LIMITATION AS A CHANGE ORDER TO THE CONTRACT, AN AGREEMENT EXECUTED BY EACH PARTY, OR ITS COUNSEL OR A JUDGMENT ENTRY IN A COURT OF COMPETENT JURISDICTION AS REQUIRED BY LAW.
- (J) A SETTLEMENT RESULTING FROM AN ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE SHALL NOT BE BINDING UNTIL THE PARTIES AGREE IN WRITING TO ALL OF THE TERMS OF THE SETTLEMENT.

#### **ARTICLE 4 MEDIATION FOR STATE ASSISTED PROJECTS**

- (A) IF THE PARTIES ON A STATE-ASSISTED PROJECT CHOOSE MEDIATION AS A FORM OF ALTERNATIVE DISPUTE RESOLUTION, THE REQUIREMENTS OF THIS ARTICLE SHALL APPLY TO THE MEDIATION.
- (B) ANY MEDIATION ON A CLAIM FOR EQUITABLE ADJUSTMENT UNDER THE CONTRACT IS TO PROCEED IN CONJUNCTION WITH THE ADMINISTRATIVE REMEDIES OUTLINED IN THE ARTICLE ON DISPUTE RESOLUTION PROCEDURE IN THE GENERAL CONDITIONS OF THE CONTRACT ("ARTICLE 8").
- (C) MEDIATION SHALL NOT TAKE PLACE UNTIL THE ADMINISTRATIVE DISPUTE RESOLUTION PROCESS HAS REACHED THE STATE ARCHITECT LEVEL OF REVIEW OF THE ARTICLE 8 CLAIM. THE PARTIES TO THE MEDIATION MAY WAIVE THIS REQUIREMENT BY MUTUAL CONSENT.
- (D) THE MEDIATOR WILL BE CHOSEN BY MUTUAL AGREEMENT OF THE PARTIES FROM A ROSTER OF MEDIATORS KEPT BY THE DEPARTMENT OF ADMINISTRATIVE SERVICES. IF NONE OF THE MEDIATORS ON THE ROSTER ARE ACCEPTABLE TO THE PARTIES, THE PARTIES MAY AGREE TO CHOOSE ANOTHER MEDIATOR NOT LISTED ON THE ROSTER.

- (E) THE COST OF THE MEDIATOR'S SERVICES WILL BE SPLIT EQUALLY BETWEEN THE CONTRACTOR AND THE STATE. IF MULTIPLE PARTIES, OR MULTIPLE CLAIMS, ARE INVOLVED IN THE MEDIATION, THE COSTS OF THE MEDIATOR'S SERVICES WILL BE SPLIT EQUALLY BETWEEN THE PARTIES UNLESS THE PARTIES AGREE TO ANOTHER METHOD OF COST-SHARING.
- (F) THE MEDIATION WILL BE SCHEDULED FOR ONE DAY AND BE HELD AT THE OFFICE OF THE STATE ARCHITECT AND ENGINEER.
- (G) PRESENTATIONS SHALL BE INFORMAL AND THE RULES OF EVIDENCE SHALL NOT APPLY.
- (H) PRINCIPALS WITH AUTHORITY TO SETTLE THE DISPUTE SHALL EITHER ATTEND THE MEDIATION OR BE IMMEDIATELY AVAILABLE TO COMMUNICATE WITH THE PARTICIPANTS IN THE MEDIATION. EACH PARTY IS ENTITLED TO BE REPRESENTED BY LEGAL COUNSEL AT ITS OWN EXPENSE.
- (I) IF THE MEDIATION DOES NOT RESULT IN A SETTLEMENT OF THE CLAIM FOR EQUITABLE ADJUSTMENT, THE STATE ARCHITECT SHALL ISSUE A DECISION ON THE CLAIM WITHIN THIRTY DAYS AFTER THE DATE OF THE CONCLUSION OF THE MEDIATION. ONCE THE THIRTY-DAY PERIOD HAS EXPIRED, BOTH PARTIES WILL BE DEEMED TO HAVE SATISFIED ANY REQUIREMENT OF OBTAINING OR PROVIDING A FINAL ADMINISTRATIVE DECISION ON THE CLAIM FOR EQUITABLE ADJUSTMENT.
- (J) IN ACCORDANCE WITH R.C. 2317.023, ALL STATEMENTS AND EVIDENCE PREPARED EXPRESSLY FOR OR PRESENTED SOLELY AT THE MEDIATION SHALL BE CONSIDERED MADE IN COMPROMISE NEGOTIATIONS, AND SHALL BE INADMISSABLE FOR ANY OTHER PURPOSE OR PROCEEDING UNLESS OTHERWISE DISCOVERABLE.

## **ARTICLE 5 PARTNERING**

- (A) PROJECTS WHICH UTILIZE CRITICAL PATH METHOD SCHEDULING, OR WILL BE DIFFICULT OR COMPLEX, SHOULD UTILIZE PARTNERING SERVICES.
- (B) PARTNERING SHOULD BE COMPREHENSIVE AND FOCUS ON ALL ISSUES NECESSARY FOR SUCCESSFUL COMPLETION OF THE PROJECT. PARTNERING SESSIONS SHOULD NOT ONLY ADDRESS METHODS OF BUILDING TRUST BETWEEN THE PARTIES, BUT SHOULD ALSO ADDRESS ISSUES CONCERNING THE IDENTIFICATION OF AREAS OF RESPONSIBILITY, CHAINS OF DECISION-MAKING, CONTACTS BETWEEN PARTIES, FUTURE SOURCES OF CONFLICTS, AND POTENTIAL RESOLUTIONS OF ISSUES AND RESPONSES TO THOSE ISSUES WHICH MAY ARISE DURING CONSTRUCTION, RECONSTRUCTION, ADDITION, REPAIR, PAINTING, DECORATION OR INSTALLATION OF A PUBLIC IMPROVEMENT.
- (C) NOT LATER THAN THE PROGRAM DEVELOPMENT STAGE, THE PUBLIC AUTHORITY OR OWNER OF THE PUBLIC IMPROVEMENT, AS APPLICABLE, SHALL USE ALL REASONABLE EFFORTS TO INCLUDE A LINE ITEM IN THE BUDGET OF THE PUBLIC IMPROVEMENT FOR PARTNERING SERVICES TO BE UTILIZED FOR THE ENTIRE PERIOD OF THE CONSTRUCTION, RECONSTRUCTION, ADDITION, REPAIR, PAINTING, DECORATION OR INSTALLATION OF A PUBLIC IMPROVEMENT.
- (D) IF PARTNERING SERVICES ARE UTILIZED, PARTICIPATION SHALL BE MANDATORY FOR ALL PERSONS WITH SIGNIFICANT RESPONSIBILITIES FOR THE PUBLIC IMPROVEMENT.
- (E) THE PARTIES MAY AGREE DURING PARTNERING TO UTILIZE A SPECIFIC FORM OF ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION AND THE PROCESS AND PROCEDURES THE PARTIES WILL UTILIZE IN IMPLEMENTING THE FORM OF ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION.
- (F) PARTNERING SERVICES SHOULD EXTEND OVER THE ENTIRE PERIOD OF THE CONSTRUCTION, RECONSTRUCTION, ADDITION, REPAIR, PAINTING, DECORATION OR INSTALLATION OF A PUBLIC IMPROVEMENT, AND MAY

INCLUDE INTERVENTION OR PROJECT REALIGNMENT SERVICES TO BE UTILIZED WHEN SERIOUS DISPUTES ARISE. THE PARTIES SHOULD AGREE DURING THE INITIAL PARTNERING SESSIONS TO THE TYPES OF SITUATIONS AND CIRCUMSTANCES IN WHICH INTERVENTION OR REALIGNMENT SERVICES WILL BE UTILIZED.

- (G) IF REALIGNMENT OR INTERVENTION SERVICES ARE UTILIZED, ANY PARTNERING FACILITATORS SHALL NOT BE PERMITTED TO BE CALLED AS WITNESSES IN ANY LITIGATION, ARBITRATION OR ANY OTHER QUASI-JUDICIAL PROCEEDING.

**ARTICLE 6 RESOURCE**

- (A) THE OHIO COMMISSION ON DISPUTE RESOLUTION AND CONFLICT MANAGEMENT MAY BE CONSULTED BY ANY PARTY IN THE DETERMINATION OF THE MOST APPROPRIATE ALTERNATIVE DISPUTE RESOLUTION FOR CONSTRUCTION PROCEDURE AND SELECTION OF A COMPETENT IMPARTIAL THIRD-PARTY OR DISPUTE REVIEW BOARD.