

## **Between Nova Scotia Road Builders Association (NSRBA) And Nova Scotia Public Works (NSPW)**

### **INTRODUCTION:**

NSPW has a long-standing relationship with the private Contractors in Nova Scotia who work on various highway construction projects in the Province. These projects typically run with only minor incidents however differences of opinion or disputes will occasionally arise which may lead to claims against the Province by the Contractors involved. These claims have had prolonged settlement times reaching into years. Occasionally claims end up in the courts costing time, expense, frustration, and hardship for all parties involved. The Alternate Dispute Resolution Process (ADRP) was created in response to a request from The Nova Scotia Road Builders Association (NSRBA) to formalize the process of dispute resolution so claims can be dealt with in a timely manner and in a less formal way than a legal judgement.

### **DEFINITIONS AND ACRONYMS**

**Alternate Dispute Resolution Process (ADRP):** The ADRP is a four-step process designed to avoid costly litigation. It involves increasing discussion levels between NSPW and the Contractor with a goal of resolving conflict and disputes through three steps of discussion, compromise, and negotiation and as a last resort – Step 4, arbitration by a dispute resolution panel. An Alternate Dispute Resolution is not legally binding.

**Applicant:** The person or organization (typically the Contractor) who challenges a decision of NSPW and therefore initiates the Alternate Dispute Resolution Process with the aim of having the dispute settled without involving the courts.

**Claim Start Date:** The date the Contractor brings the dispute to the attention of the NSPW Project Engineer through a written request for resolution. This date must be within 6 months of the date on the Engineers Certificate of Final Estimate.

**Contract:** The formal agreement between NSPW and the successful Contractor setting forth their obligations, including, but not limited to, the furnishing of labor, materials and services, the basis of payment and other requirements contained in the contract documents.

**Contractor:** A private entity who enters a contract with NSPW and is acting directly or through their agents or employees and who is primarily liable for the acceptable performance of the work for which they have contracted,

**Date of Final Estimate:** The date found on the Engineer's Certificate of Final Estimate. The date on the Certificate is the date the work has been completed to the satisfaction of the Engineer.

**Defendant:** The person or organization (typically NSPW) whose decisions are being challenged and must defend these decisions to the Dispute Resolution Panel.

**Discovered:** All dispute related documents, notes, plans, specifications, and correspondence, including email, that have been submitted during or prior to Step 3 by both parties. All discovered material shall be reviewed and agreed to by both parties at the beginning of Step 4.

**Dispute/Claim:** Any situation arising out of a difference of opinion between the Contractor and NSPW regarding the administration of any part of a contract. Warranty issues will not be considered as claims to be included under this process.

**Dispute Resolution Panel (DRP):** The name given to the group of professionals assembled to hear and offer opinions on claims made by a Contractor against NSPW or NSPW against a Contractor. A DRP is only assembled for Step 4 of the Alternate Dispute Resolution Process.

**DMPC:** Director Major Projects & Construction

**EDHEC:** Executive Director, Highway Engineering and Construction

**Final Estimate:** The Estimate which is prepared after all work defined in the contract has been completed to the satisfaction of NSPW.

**NSPW:** Nova Scotia Public Works

**NSRBA:** Nova Scotia Road Builders Association

**Project:** A specific section of a highway, the location, or the type of work together with all appurtenances and constructions to be performed under a Contract. A contract document may include more than one project.

**Project Engineer:** The NSPW field representative responsible for planning, coordination, and administration of an assigned contract. In this process, the term "Project Engineer" shall be used to mean either the Project Engineer or any other NSPW authorized field staff acting solely under the direction of, and on behalf of, the Project Engineer.

**Proposal:** A document issued by NSPW that announces and provides location, details, and description of work to be performed, whose purpose is to solicit bids from various Contractors. A proposal may also be referred to as a Tender.

**Request for Resolution:** A request made in writing to the NSPW Project Engineer to initiate the Alternate Dispute Resolution process at Step 1.

**Special Provision:** Additions or revisions to the NSPW Standard Specifications applicable to an individual contract.

**Tender:** See Proposal.

**Working Days:** Any day of a week other than Saturday, Sunday, or Nova Scotia Statutory holiday.

**Written Response:** For the purposes of this process an email is an acceptable format for any written request or written submission unless otherwise noted.

### **Alternate Dispute Resolution Process (ADRP)**

All contracts hold the potential for conflict. Contracts between NSPW and Contractors will follow the process outlined below in an effort to resolve disputes which may arise.

Any written briefs or submissions prepared as part of this ADRP shall be regarded as "without prejudice" for the purpose of settlement negotiations and shall be treated as confidential by the

parties and their representatives unless otherwise required by law. Evidence that is independently admissible, such as the contract or any exchanges between the parties before entering the ADRP, shall not be rendered inadmissible by virtue of its use during the dispute resolution process.

### **STEP 1: Contractor and NSPW Project Engineer or Field Representative**

The Contractor and the Project Engineer shall first engage in a discussion in an attempt to resolve any disputes between themselves, however should they be unable to reach an agreement or compromise, the Contractor shall be entitled to request engagement of STEP 1 of the Alternate Dispute Resolution Process.

The Contractors' request must:

- Be submitted in writing and be addressed to the applicable Project Engineer.
- The subject line of the request must clearly state ADRP Step 1 Request.
- Be received by the Project Engineer within six (6) months of the date on the Engineers Certificate of Final Estimate.
- Include a thorough description of the dispute along with copies of all supporting documentation.
- Include details on their expected resolve.

Upon receipt of the ADRP Step 1 request, the Project Engineer shall:

- Acknowledge receipt of the request within two (2) working days and provide the Contractor with a date of an expected response. This date can be as little as one (1) working day however cannot be later than ten (10) working days from receipt of original request.
- After reviewing the documentation, submit the decision in writing to the Contractor. The initial response may be verbal however must be followed immediately by a written response documenting the response.
- The subject line must clearly state ADRP Step 1 Decision.
- File all documentation including any email correspondence in the applicable Contract files.

Should the Contractor not agree with the Project Engineers' decision, the Contractor may request to have the dispute advanced to Step 2 of the ADRP.

Unless the Contractor proceeds to file a request to proceed to Step 2, the decision issued at the end of Step 1 will stand.

### **STEP 2: Contractor, Construction Manager and / or District Director**

To initiate Step 2 of the process, the Contractor must submit their request in writing to the appropriate Construction Manager or District Director within ten (10) working days of being notified of the Step 1 decision.

The subject line of the request must clearly state ADRP Step 2 Request

The request must include all relevant documents, notes, plans, specifications, and all other correspondence which is to be used to support their side of the dispute, including any email correspondence.

The Construction Manager shall:

- Acknowledge receipt of the request, in writing within two (2) working days.
- Contact the Project Engineer and obtain all relevant documents, notes, plans, specifications, and all other correspondence which is to be used to support NSPW side of the dispute, including any email correspondence.
- Within ten (10) working days of receipt of the ADRP Step 2 request, arrange for a meeting at a mutually agreed upon location. Invitees shall include the Contractor, their field representative, NSPW field representative, Construction Manager, District Director, and any other persons relevant to the dispute.
- At least three (3) full working days, prior to the meeting, the Construction Manager shall provide the invitees with copies of all documentation and correspondence gathered from both the Contractor and the Project Engineer. This is to ensure all attendees have the same information and are familiar with the dispute and the events that led to it.
- It is anticipated that a decision on the dispute will be made at the time of the meeting by either the Construction Manager or the District Director. This decision will immediately be followed by a written confirmation of the response. NSPW reserves the right to withhold their immediate decision but shall reply in writing within five (5) working days of the meeting.
- The subject line must clearly state ADRP Step 2 Decision.

Should the Contractor not agree with the Construction Manager's or District Director's decision, the Contractor may request to have the dispute advanced to Step 3 of the ADRP.

Unless the Contractor proceeds to file a request to proceed to Step 3, the decision issued at the end of Step 2 will stand.

### **STEP 3: Contractor and Executive Director of Highway Engineering and Construction (EDHEC) and Director Major Projects and Construction (DMPC), or designate**

To initiate Step 3 of the process, the Contractor must submit their request in writing to the Executive Director Highway Engineering and Construction (EDHEC) within ten (10) working days of being notified there has been no resolve at step 2.

The subject line of the request must clearly state ADRP Step 3 Request.

The request must include all relevant documents, notes, plans, specifications, and all other correspondence which was used to support their side of the dispute, including any email correspondence. Any information discovered after Step 3 was initiated, but before the Decision is rendered, may be submitted but must be clearly marked "new information". There will be no further opportunity to add new information past Step 3 in the process.

The EDHEC shall:

- Acknowledge receipt of the request in writing within two (2) working days.
- Contact the Construction Manager and/or the District Director to obtain all relevant documents, notes, plans, specifications, and all other correspondence which is to be used to support their side of the dispute, including any email correspondence. Any information that was discovered after Step 3 was initiated, but before the Decision is rendered, shall be submitted and clearly marked “new information”.
- Review the documentation along with DMPC or designate. Review the dispute with district staff, other members of the NSPW Executive, and, if necessary, a solicitor.
- Within ten (10) working days of acknowledgement of ADRP Step 3 request, EDHEC shall arrange for a meeting at a mutually agreed upon location. Invitees shall include the Contractor, their field representative, NSPW field representative, Construction Manager, District Director, DMPC and any other persons relevant to the dispute.
- At least three (3) full working days, prior to the meeting, the EDHEC shall provide the invitees with copies of all documentation and correspondence gathered during the Step 2 Process from both the Contractor and the Construction Manager and any new documents submitted with the Step 3 request. This is to ensure all attendees have the same information and are familiar with the dispute and the events that led to it.
- Any new information brought forward after the documents are dispersed to both parties, and/or during the meeting, will be accepted however the other party must be given the opportunity to thoroughly review and comment on the information. Depending on the content of the new information presented, either party may ask for a delay to the meeting of up to two (2) working days, to review.
- It is anticipated that a decision on the dispute will be made at the time of the meeting by EDHEC, and this decision will be followed with a written confirmation of the response. However, if the decision is not made at the time of the meeting NSPW must reply in writing within five (5) working days of the meeting.
- The subject line must clearly state ADRP Step 3 Decision.

No new information can be submitted after the Step 3 meeting. If, at the end of Step 3 but before initiating Step 4 any new information comes to light that a party wishes to rely upon, the Dispute must go back to Step 1. No new information can be submitted after Step 3 and prior to Step 4. Restarting the Alternate Dispute Resolution Process may only be permitted once.

If the dispute is still not resolved at Step 3 the Contractor will be given the opportunity to apply to the Chief Engineer to have Step 4 initiated and must submit their request in writing to the Chief Engineer within twenty (20) working days of receipt of the EDHEC decision.

If the Contractor has not restarted the process at Step 1, nor have they submitted a request to the Chief Engineer to initiate Step 4 within the twenty (20) working day time limit the issue will be considered closed and no further action by the Contractor shall be considered.

Unless the Contractor proceeds to file a request to proceed to Step 4, the decision issued at the end of Step 3 will stand.

#### **STEP 4: Contractor / NSPW and Dispute Resolution Panel**

**Once the Step 4 process has started all offers aimed at a negotiated settlement will be permanently revoked and will no longer be considered.** Furthermore, the Alternate Dispute Resolution Panel does not have discretion in determining a remedy. The remedy shall consist of a winner-take-all decision predetermined by the disputed value or requested outcome.

Disputes, where the dollar value is less than \$20,000, will not be allowed to proceed to Step 4.

Although both parties are free to obtain legal advice at any time during the ADRP, solicitors or other legal counsel are not permitted to attend the meetings or Hearing in Step 4.

If the dispute is still not resolved at Step 3 the Contractor must apply to the Chief Engineer to have Step 4 initiated and must submit their request in writing to the Chief Engineer within twenty (20) working days of receipt of the Step 3 EDHEC decision.

The subject line of the request must clearly state ADRP Step 4 Request.

The request must include all relevant documents, notes, plans, specifications, and all other correspondence which was used to support their side of the dispute, including any email correspondence. **Only documentation that has already been presented up to and including Step 3, will be admissible at Step 4.** Documentation not previously presented is not admissible.

Upon receipt of the request the Chief Engineer will review the dispute with EDHEC and decide whether to allow the dispute to proceed to Step 4 based on the information and documents presented at Step 3. Both the Contractor and the EDHEC will be advised of the decision, in writing by the Chief Engineer within ten (10) working days.

#### **DEPOSIT**

- It shall be the responsibility of the applicant (party requesting a Step 4 resolution) to provide a deposit which will be held by the Chief Engineer.
- Deposits are to be made at the time of application to the Chief Engineer. All funds will be returned should the Chief Engineer decide the matter will not proceed to the Step 4 ADRP.
- The deposit shall be \$10,000.00 and shall be in the form of certified cheque or bank draft made payable to the Minister of Finance.
- The Chief Engineer may request more than \$10,000 depending upon the complexity of the dispute. The Chief Engineer shall inform the applicant if a larger deposit is required.
- In order to expedite payment to all service providers and suppliers, NSPW shall initially pay all acceptable and reasonable costs and expenses as they are incurred during Step 4 of the ARDP.
- Acceptable Expenses may include, but are not limited to:
  - conference room costs.
  - audio / visual requirements.
  - room incidentals.
  - refreshments before and during the hearing.
  - light lunch if approved.
  - panel travel costs including mileage, meals, lodging if necessary, and incidentals all at prevailing Government reimbursement rates.
  - panel honorariums not to exceed \$1500.00 per panel member for a noncomplex hearing. The Chief Engineer may set the honorarium at a higher rate depending on

the complexity of the dispute and anticipated effort required of the Dispute Resolution Panel (DRP) to render a decision.

- NSPW shall gather and verify all acceptable expenses incurred and paid by NSPW during Step 4 of the ADRP. Copies of the expenses, including the expenses incurred by the panel members and their honorariums, will be presented to the unsuccessful party for review and verification.
- NSPW shall also gather and verify all panel travel expenses and prepare a cheque requisition for each panel member, which will include the honorarium. Copies will be forwarded to panel members for review, and approval, before the requisitions are sent to Finance for payment.
- In the event the decision brought down by the DRP is not favorable to the applicant, the deposit will be used to cover all expenses incurred in the execution of Step 4 of the ADRP. NSPW shall deduct all incurred expenses from the deposit and return any unused portion to the depositor. If the costs exceed the amount of the deposit, the applicant will be responsible for the balance of the costs and shall submit a certified cheque to NSPW for the difference within ten (10) days of being notified of the deficit.
- In the event the decision brought down by the DRP is favorable to the applicant all expenses shall be covered by the defendant and the full deposit shall be returned to the applicant.

#### DISPUTE RESOLUTION PANEL (DRP)

- In any given ADRP there will be three panel members that will consist of a chair plus two members.
- Potential members should hold a professional designation and/or have long-term experience in construction contracts and the administration of these contracts. They should be familiar with contract law as it pertains to the construction industry. They should have practical experience within the road building industry or other heavy construction and be familiar with contract specifications and testing methods.

#### SELECTION OF PANEL FOR AN ADRP

The Chief Engineer will assign a Panel Chair whose duties will be as described as follows:

- The Panel Chair will be an independent third party. Both parties shall be given the opportunity to approve the selection. The Panel Chair may serve on as many disputes as they want provided they remain independent and are approved by both parties prior to each dispute.
- In addition to the Panel Chair, both NSPW and NSRBA shall each select one member to sit on the panel. Each shall submit the name of the member of their choice to the other party for approval. This step is necessary to ensure the chosen panel member is considered at arm's-length from the issue.
- The Panel will function as described below, under responsibilities, and their decision, although not binding, will be impartial, thoughtful, and based on the evidence as presented.

## RESPONSIBILITES (COORDINATOR)

The Chief Engineer shall assign a coordinator whose duties shall be to support, organize and communicate with both parties and the panel to achieve ADRP expectations and goals.

The coordinator shall work with the Executive Director NSRBA to identify and assemble the Dispute Resolution Panel within twenty (20) working days after agreement to proceed to Step 4 has been granted by the Chief Engineer.

- The coordinator shall gather all documentation that was presented up to and including Step 3. The coordinator shall send all documents to both parties to obtain agreement that the documents presented represent all relevant documentation that was discovered up to and including Step 3.
- Once agreed to, the coordinator shall clearly label and number all information and email a complete set to both parties and the panel. This must be completed a minimum of twenty (20) working days before the hearing date. If possible, the coordinator shall then follow with bound and indexed (tabbed) hard copies and mail to all participants. This is to ensure all participants can easily draw everyone's attention to specific sections when making their arguments.
- The Coordinator shall find appropriate accommodation for the meeting. The room shall be a standard conference meeting room of sufficient size to accommodate the Panel (3 people), the Contractor and their witnesses (2-5 people); all relevant NSPW staff and their witnesses (2-5 people) the Executive Director of NSRBA and the coordinator (2 people). Total accommodation would be a maximum of 15 people.
- The room shall be located, if possible, at a neutral and convenient location in agreement with both parties.
- If a power point presentation will be used, the coordinator will arrange for any electronic aids needed (i.e., projector / screen). The power point presentation must not contain any evidence not brought forward at the Step 3 submission.
- Light refreshments, tea, coffee, and water shall be provided one-half hour prior to the scheduled meeting start time. Since the standard scheduled meeting time is approximately 3 hours and 20 minutes, a second round of light refreshments will be provided after the second presentation round.
- The coordinator shall consult with both the Executive Director, NSRBA, and the Executive Director HEC, NSPW to see if additional hearing time may be needed. If approved, the coordinator shall skip the 2<sup>nd</sup> round of refreshments, and order a light lunch instead.
- The coordinator shall gather and verify all acceptable expenses incurred and paid by NSPW during the ADRP. See "Deposit" for process regarding acceptable expenses and payment of expenses.

## RESPONSIBILITES (PANEL MEMBERS):

PANEL CHAIR: As noted under "Dispute Resolution Panel" above the Chair will be an independent third party. It shall be the responsibility of the Panel Chair to see that all protocols as set out in this document are followed. This includes regulating presentations by the parties in terms of evidence presented and the time frames defined. There shall be no new evidence presented which was not in the preapproved document package emailed to all participants.

PANEL MEMBERS: The panel members will receive all relevant documentation related to the dispute a minimum of twenty (20) working days prior to the hearing from the coordinator. Both NSPW, the Contractor and Executive Director, NSRBA shall be copied on this email to ensure the panel receives only previously discovered documents. The Panel will be required to review the information and become familiar with all aspects of the dispute in order to objectively evaluate all submissions in support of and in defense of the dispute before them.

EXPENSES: Panel members will be reimbursed for any reasonable travel related expenses (mileage, lunch, lodging if necessary and incidentals) at prevailing Government reimbursement rates and shall also be paid an honorarium not to exceed \$1500.00 for noncomplex cases. The Chief Engineer may set the honorarium at a higher rate depending on the complexity of the dispute and anticipated effort required of the Dispute Resolution Panel (DRP) to render a decision.

This shall be considered full compensation for review of the material prior to the ADRP hearing, meeting at chosen location to hear dispute, responding to the parties with their decision, in writing, after the fact and any other incidentals that may arise.

Important: Honorariums are considered taxable income; therefore, the Panel members must provide the coordinator with their addresses and social insurance numbers. The coordinator shall provide this information to the Department of Finance along with copies of the reimbursement cheque requisitions (prepared by the coordinator). The panel shall be given the opportunity to review the requisitions that were prepared on their behalf before they are sent to Finance for payment.

#### THE HEARING:

The standard hearing shall be a length of 3 hours and 20 minutes.

It shall be the responsibility of both parties to be prepared to present their sides of the dispute as clearly as possible with a full understanding of all aspects of the dispute.

Standard Hearing Schedule (three hours and twenty minutes):

- Light refreshments, tea, coffee, and water shall be provided one-half hour prior to the scheduled meeting start time.
- The applicant shall be the first presenter and shall be given a maximum of 1 hour for their presentation.
- There will be a short 10-minute recess.
- The defendant will be given 1 hour for their presentation.
- There will be another 10-minute recess at which time a second round of light refreshments will be provided.
- 15 minutes shall be given to both parties (1<sup>st</sup> for the Applicant, 2<sup>nd</sup> the defendant) for any rebuttal.
- Another 30 minutes shall be given to the panel for any questions or clarification required by the Panel.
- The presenting parties shall then be dismissed, and the panel will convene privately to review all submissions and presentations provided by the parties, and then render a decision.

If this is a complicated dispute more presentation time may be required. Each party may request a maximum of one (1) additional hour to present making total presentation time two (2) hours for

each party. The additional hearing time must be approved by both the Executive Director, NSRBA, and the Executive Director, NSPW. The coordinator shall arrange for lunch at the most convenient time so as not to interrupt either party presentation. If no consensus can be reached, the standard hearing time shall prevail.

**THE PANEL DECISION:**

**The Dispute Resolution Panel does not have discretion in determining a remedy rather, the remedy shall consist of a winner-take-all decision predetermined by the disputed value or requested outcome in relation to the contract.**

The decision of the panel will be considered final. It will be at least a 2/3 majority and will be made without prejudice. The decision is not binding on the parties. It is intended that the decision will be consistent with the terms of the contract and as such be representative of what might be expected during and after a litigation process.

The Panel Chair shall provide their decision, in writing, to both the Contractor and the Chief Engineer within 7 (seven) working days of the DRP meeting. The decision shall briefly outline the reasons for their decision by citing clauses in the contract and evidence submitted which support their decision.

The subject line must clearly state ADRP Step 4 Decision.

**CLOSE OUT**

Both parties shall within twenty (20) working days of receipt of the panel's decision indicate in writing to each other as to whether they accept the Panel's decision.

Should either the Contractor or NSPW not accept the decision of the panel they can advance the dispute to the litigation process.

NSPW will release any security or holdback and pay an interim "final estimate" to the contractor. The dispute would remain unsettled until the contractor either abandons the dispute with notification in writing to the Chief Engineer or the dispute has been duly litigated.