

Dispute Review Board Code of Ethics and Nominee Disclosure Guidelines

Code of Ethics

For the Dispute Review Board to be successful it is essential that all Board members are trusted implicitly by the contracting parties. To this end, the Colorado Department of Transportation (CDOT) and the Colorado Contractors' Association (CCA) have established a Code of Ethics, which sets forth the key elements of the behaviors to which all Board members must subscribe in order for the Dispute Review Board process to function effectively. The four Fundamental Canons of the Code of Ethics are:

Canon 1 – Conflict of Interest and Disclosure

Board members must avoid the appearance of, or any actual, conflict of interest during the term of the Dispute Board. Board members must disclose, before their appointment, any interest, past or present relationship, or association that could reasonably be considered by a contracting party as likely to affect that member's independence or impartiality. If, during the term of a Dispute Board, a Board member becomes aware of any fact or circumstance that might reasonably be considered by a contracting party as likely to affect that Board member's independence or impartiality, the Board member must inform the other Board members and disclose the matter to the contracting parties.

Canon 2 – Confidentiality

Board members must ensure that information acquired during the term of the Dispute Board remains confidential and must not be disclosed unless such information is already in the public domain. Any such confidential information may only be disclosed if approved by the contracting parties or if compelled by law. Board members must not use such confidential information for any purpose beyond the activities of the Dispute Board.

Canon 3 – Board Conduct and Communications

Board members must conduct all Board activities in an expeditious, diligent, orderly, and impartial manner. Board members must act honestly, with integrity and without bias. There must be no unilateral communications as between a Board member and a contracting party, except as permitted under the Dispute Board operating procedures.

Canon 4 – Board Procedures

All Board meetings and hearings must be conducted in accordance with the applicable contract provisions and operating procedures, in a manner that provides procedural fairness to the contracting parties. Dispute Board recommendations and decisions must be made expeditiously on the basis of the provisions of the contract, the applicable law and the information, facts and circumstances submitted by the contracting parties.

Nominee Disclosure Guidelines

An essential element in the DRB process is that each contracting party be completely satisfied with every Board member. Both parties must carefully investigate nominees to ensure that each nominee is experienced and technically qualified. More importantly, each party must be satisfied that the nominees are impartial and have no conflicts of interest and that the appointment of a member cannot be even remotely perceived as a possible conflict to anyone who is not affiliated with the project.

If either party is uncomfortable with a nominee, it not only has the right to reject that nominee, but it must also reject that nominee, or the DRB process may not be effective.

Because of the importance of Board member impartiality and the serious consequences that conflicts of interest have on this dispute resolution process, all current and past relationships between prospective Board members and the parties involved in the contract must be fully disclosed and understood. In addition, potential Board members must recognize that there will be restrictions on their future relationship with the parties.

Relationships that could affect the perception of Board member impartiality include direct employment, consulting assignments, financial ties, close personal or professional relationships, and service on other DRBs with any party involved in the contract.

Definitions:

Party directly involved: The contracting parties: the owner, the contractor, and all joint-venture partners.

Party indirectly involved: The construction manager, subcontractors of any tier, suppliers, designers, architects, other professional service firms, or consultants to any party.

Financial ties: Ownership interest, loans, receivables, or payables, etc.

Prohibited: Service as a DRB member should not be allowed.

Disclose: A written statement to both parties setting forth all the facts.

Written permission: Written acknowledgement that both parties are aware of the disclosed facts and agree that they do not preclude participation as a DRB member.

The following guidelines are recommended:

1. Direct Employment

- a. Current employees of any of the parties directly or indirectly involved must be prohibited from serving as Board members for the project.
- b. It is not recommended that past employees of either party serve as Board members. However, if a prospective Board member is a past employee of one of the parties directly involved, then, in addition to disclosure, permission from the other party must be obtained before agreeing to serve on the DRB.
- c. If a prospective Board member is a past employee of one of the parties indirectly involved, this must be disclosed to both parties prior to appointment to the DRB.
- d. Discussions concerning future employment of a Board member by a party directly or indirectly involved are prohibited throughout the life of the DRB.

2. Consulting Assignments

- a. Individuals who are employed in a consulting capacity by any of the parties directly involved must be prohibited from serving as Board members for the project.
- b. Individuals currently employed as a consultant by one of the parties indirectly involved must, in

addition to disclosure, obtain permission from both contracting parties before agreeing to serve on the DRB.

- c. Previous employment as a consultant by any party directly or indirectly involved must be disclosed prior to appointment.
- d. Discussions with a Board member about future consulting work with one of the parties directly involved is prohibited.
- e. Board members should obtain permission from both parties prior to agreeing on future consulting for parties indirectly involved.

3. Financial Ties

- a. Individuals with current financial ties to any of the parties directly involved must be prohibited from serving as Board members for the project.
- b. Individuals with current financial ties to any of the parties indirectly involved must disclose such relationships prior to appointment.
- c. Previous financial ties with any party directly or indirectly involved must be disclosed prior to appointment to the DRB.
- d. During the course of the project, the establishment of financial ties or discussions about future such financial ties with any party directly involved is prohibited.
- e. Obtain permission from both contracting parties before discussing future financial ties with any party indirectly involved in the project.

4. Close Personal or Professional Relationships

- a. Close personal or professional relationships that could give rise to the perception of bias with a key member of any party directly or indirectly involved must be disclosed and such relationship completely understood and accepted by the parties prior to appointment to the DRB.
- b. The establishment of close personal or professional relationships with a key member of the parties directly or indirectly involved during the course of the project must be avoided. In the event that such relationships develop, Board members must disclose the nature of the relationships to both parties and offer his/her resignation if warranted.

5. Services as a DRB member on another contract involving one or more of the parties

- a. Candidates must disclose all past and current service as a Board member on projects where any of the parties directly or indirectly involved were also involved. Describe the role of the involved parties on the other project.
- b. In addition to disclosure, obtain permission from each contracting party before agreeing to serve on another DRB for a contract in which one of the contracting parties is directly involved. If one of the contracting parties is indirectly involved on the other contract, this must be disclosed along with a description of their role on the other contract.
- c. Before agreeing to serve on another DRB for a contract in which a party indirectly involved is involved on both projects, disclose this relationship to both contracting parties and obtain permission whenever the role of the indirectly involved party is significant.

These guidelines are summarized in the following table where “past” is any time prior to execution of the *Dispute Review Board Three Party Agreement* on this project, “current” is anytime during the life of the project, and “future” is any time after termination of the DRB on the contract.

		Directly Involved	Indirectly Involved
Direct Employment	Past	Permission Required	Disclose
	Current	Prohibited	Prohibited
	Future	Discussion is Prohibited	Discussion is Prohibited
Consulting Assignments	Past	Disclose	Disclose
	Current	Prohibited	Permission Required
	Future	Discussion is Prohibited	Permission Required
Financial Ties	Past	Disclose	Disclose
	Current	Prohibited	Disclose
	Future	Discussion is Prohibited	Permission Required
Close Personal or Professional Relationships	Past	Disclose	Disclose
	Current	Prohibited	Disclose
	Future	Avoid / Disclose	Avoid / Disclose
DRB Member on Another Project Involving One or More of the Parties	Past	Disclose	Disclose
	Current	Disclose	Disclose
	Future	Permission Required	Permission Required

In addition, potential Board members must not have had any prior substantial involvement in the project, in the judgment of either party, nor may they have any financial interest in the contract or project, other than service as a Board member.

The repeated selection of the same individual by either (1) a particular owner or contractor, or (2) only owners or only contractors can lead to the perception of bias. While individuals in these categories may be completely impartial and neutral, it is the perception of bias that is the concern. The important point is that both parties should avoid selecting Board members that may engender the perception of bias.

It is difficult to envision a specification that addresses all possibilities of perceived bias. However, the parties are in control of this situation and each party must remember that the other party needs to feel comfortable with every Board member if they are going to trust these individuals to recommend acceptable resolutions of their disputes.

Nominees of either party or, in the case of a three-member Board, the third nominee made by the party nominees shall complete the Disclosure Form and submit it to the party who nominated them.