Memorandum: Public Construction Contract Provisions Increasing Alignment between Principal and Agent to Facilitate Successful Projects

Town+Gown: NYC

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I. Introduction

This paper is the culmination of a series of research projects conducted by Town+Gown[1] to analyze provisions in the City of New York Standard Construction Contract (as amended in March 2017, the "Contract") that act as constraints on the cultural and behavioral practices regarded as essential to successful project delivery. Historically, many deem the Contract, like other public construction contracts, to preclude nimble, real-time problem identification and resolution to avoid disputes,[2] which often results in an adversarial relationship between the principal (owner) and agent (contractor) and ultimately leads to delays and decreased cost-efficiency of projects.[3]

Although the statutory requirements for bidding, the fixed-price structure of the Contract, and the standard delivery method for public works have each received their fair share of criticism for their detrimental impacts on project delivery,[4] a contract that implements collaborative principles is crucial to avoiding or mitigating costly disputes, which in turn is key to a successful project.[5] Therefore, the purpose of this paper will be to assess the current dispute resolution mechanisms in the Contract and propose a collaborative and communicative Early Problem Identification and Resolution Board ("EPIRB") process to increase the likelihood of successful project delivery.

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[1] https://www1.nyc.gov/site/ddc/about/town-gown.page.
[2] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[3] Culture+Data for Better Capital Project Delivery" on November 14, 2019 (at 0:34-0:35), https://www.youtube.com/watch?v=jBdnNMBnxAI.
[4] DarConte, Best Value Alignment Process for Public Works Construction in New York State; William Ibbs and Dick Oliver, Impact of Various Construction Contract Types and Clauses on Project Performance, (Construction Industry Institute, 1986).
[5] § 16:1.Introduction, 33 N.Y.Prac., New York Construction Law Manual § 16:1 (2d ed.); *see also* Peter E. D. Love, Zahir Irani, and David J. Edwards, A Rework Reduction Model for Construction Projects (2004) (stating "[c]lients and their project team members must communicate and work together harmoniously if projects are to be delivered on or ahead of time.")

This paper will first provide an overview of public construction process in the City of New York (the "City"), including an introduction to the Contract, the principal-agent theory in construction, the New York state statutory requirements governing the bidding phase, and the general ramifications of misalignment of risk between the contract parties on the quality, timeliness, and cost-efficiency of project delivery. This will be followed by an examination of the construction industry's increased focus on team collaboration in project delivery.

This paper will then proceed to identify the current dispute resolution methodology in Article 27 of the Contract, starting with the presentation of the dispute to the Commissioner,[6] the Commissioner's final and binding decision, followed by the available appeal process, first to the Comptroller[7] and subsequently to the Contract Dispute Resolution Board.[8] This section will highlight the shortcomings of the current dispute resolution procedures, specifically its tendency to (i) disincentivize cooperation and sharing of information between the owner and contractor, (ii) foster an adversarial relationship between the parties, (iii) prevent the parties from early identification and mitigation of disputes, and (iv) prohibit each party from taking initiatives on behalf of and for the benefit of the wider team.[9]

The final part of this paper will propose a contract specification to implement the EPIRB as a pilot program to be incorporated by reference in the Contract (the "EPIRB Specification"). The EPIRB Specification will create a process, apart from the Contract's existing change order, claims, and dispute resolution provisions, to encourage and support the earliest possible problem identification and resolution, when changes may be less expensive than under the Contract's

[6] Defined in Article 2.1.7 of the Contract as "the head of the Agency that has entered into [the] Contract, or his/her duly authorized representative."
[7] Defined in Article 2.1.8 of the Contract as "the Comptroller of the City of New York."
[8] *See* Article 27.6 of the Contract.
[9] Culture+Data for Better Capital Project Delivery" on November 14, 2019 (at 0:39) https://www.youtube.com/watch?v=jBdnNMBnxAI.

existing provisions during the course of a project, therefore facilitating a collaborative and flexible contractual relationship in order to avoid or minimize delays and cost overruns. Ultimately, it is hoped that the EPIRB Specification will increase the chances of successful City public construction projects.

II. Overview of the City's Public Construction Process: Project Delivery Method, Statutory Bidding Requirements, and Pricing Structure

Public construction projects in the City have traditionally used the Design-Bid-Build ("DBB") project delivery method.[10] In DBB, the engineer or architect creates plans for the project during the design phase, followed by the bidding phase in which private contractors bid for the job subject to the construction contract.[11] The City, acting through a designated agency (the "Agency"), is the owner of the applicable real property and its improvements[12] and can be thought of as the "principal" under the Contract.[13] The private contractor directly contracts with the City and is in charge of the project's construction and delivery; the contractor thus serves as the "agent" of the City under the Contract.[14] Although the Design-Build project delivery method, recently authorized for certain New York public owners, including the City, reflects increased awareness of the correlation between early project team integration and successful project outcomes, most public owners, including the City, will continue to use DBB on most of their projects despite being "by its very design[,] a fragmented approach to project delivery that contributes negatively to team relationships and performance."[15]

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[10] § 150:18. Private financing trends, 4G N.Y.Prac., Com. Litig. in New York State Courts § 150:18 (5th ed.)
[11] § 150:18. Private financing trends, 4G N.Y.Prac., Com. Litig. in New York State Courts § 150:18 (5th ed.); Design consultants and contractors are retained by the City pursuant to separate contracts. *See* DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[12] § 1:8. Owners—Public owners, 33 N.Y.Prac., New York Construction Law Manual § 1:8 (2d ed.).
[13] Anita Ceric, The Principal-Agent Theory and the Role of Project Managers in Construction: Guidelines for Future Research https://www.irbnet.de/daten/iconda/CIB_DC25687.pdf.
[14] Anita Ceric, The Principal-Agent Theory and the Role of Project Managers in Construction: Guidelines for Future Research https://www.irbnet.de/daten/iconda/CIB_DC25687.pdf.
[15] DarConte, Best Value Alignment Process for Public Works Construction in New York State.

New York law demands a competitive bidding process for public construction contracts which requires that the Contract be awarded to the lowest price proposed by a *responsible* bidder,[16] defined as a bidder that is "pecuniarily responsible, morally worthy, skilled, and possesses judgment, integrity, and sufficient financial resources; is 'accountable or reliable'; and has the ability to perform the contract according to its terms."[17] This concept helps to ensure that public works contracts are awarded only to those contractors the City has determined to be capable of performing the entire scope of work (i) in a satisfactory manner, (ii) within the specified timeframe, and (iii) for the agreed-upon price.[18]

It is well-established that in general, competitive bidding protects taxpayer money by limiting the potential influence of favoritism and political allegiances while driving down the prices of bids.[19] However, when applied to the production of unique and often complex infrastructure and buildings though construction services—such as public construction projects—the aforementioned benefits are undercut by the cost overruns related to inadequate designs and specifications or the incompleteness of the contract.[20] These cost overruns take two forms: (i) the cost of additional or extra work not initially anticipated, and (ii) the adaptation costs due to disruptions in the normal flow of work and the attendant inefficiencies and opportunistic behavior associated with the renegotiation of the underlying contract.[21]

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[16] *See* N.Y. Gen. Mun. Law § 103 (emphasis added) (stating "[A]ll contracts for public work involving an expenditure of more than thirty-five thousand dollars … shall be awarded … to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section.").
[17] § 2:4. Bidding on public contracts—Lowest responsible bidder, 33 N.Y.Prac., New York Construction Law Manual § 2:4 (2d ed.).
[18] § 2:4. Bidding on public contracts—Lowest responsible bidder, 33 N.Y.Prac., New York Construction Law Manual § 2:4 (2d ed.).
[19] Patrick Bajari, Stephanie Houghton, Steven Tadelis, Bidding for Incomplete Contracts: An Empirical Analysis of Adaptation Costs (2010). http://faculty.haas.berkeley.edu/stadelis/incomplete.pdf
[20] Patrick Bajari, Stephanie Houghton, Steven Tadelis, Bidding for Incomplete Contracts: An Empirical Analysis of Adaptation Costs (2010). http://faculty.haas.berkeley.edu/stadelis/incomplete.pdf
[21] Patrick Bajari, Stephanie Houghton, Steven Tadelis, Bidding for Incomplete Contracts: An Empirical Analysis of Adaptation Costs (2010). http://faculty.haas.berkeley.edu/stadelis/incomplete.pdf

The statutory bid/award requirements, when combined with the DBB delivery method, creates an inherent gap between design and construction that "limits innovation, ignores lifecycle cost, inhibits collaboration and the exchange of knowledge, and increases cost due to a lack of transparency."[22]

Historically, City construction projects have been subject to the oft-criticized Wicks Law: a New York state statute that mandates independent prime contracts for (i) plumbing and gas fitting work; (ii) steam, hot water heating, ventilation and air conditioning work; and (iii) electrical wiring and illuminating fixtures work when the total project cost exceeds $3 million.[23] However, pursuant to a 2008 amendment to Wicks Law, the City is exempted from the statutory requirements if it requires that the contractor enter into a project labor agreement ("PLA").[24] A PLA is a "pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor

[22] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[23] NY General Municipal Law § 101 (stating "when the entire cost of such public work shall exceed three million dollars in the count[y] of … New York … [the City] shall prepare separate specifications for the following three subdivisions of the work to be performed:
a. Plumbing and gas fitting;
b. Steam heating, hot water heating, ventilating and air conditioning apparatus; and
c. Electric wiring and standard illuminating fixtures.
2. Such specifications shall be drawn so as to permit separate and independent bidding upon each of the above three subdivisions of work.").
[24] https://www.lambbarnosky.com/client-memos/recent-amendment-to-the-wicks-law/#:~:text=If%20a%20public%20entity%20compels%20entry%20into%20a,respect%20to%20each%20specification%20of%20work%20described%20above; *see also* https://www1.nyc.gov/assets/mocs/downloads/pdf/pla/NYC%20PLAs%20Primer%202016%20Compatibility%20Mode_2_16_16.pdf.

organization can perform project work."[25] This paper will therefore assume that the City will elect to use a PLA to avoid the onerous effects of Wicks Law.[26]

Lastly, with respect to pricing structure, the Contract is fixed-price, which means that the contractor agrees to perform a specified scope of construction in exchange for a specified price.[27] The successful bid price is incorporated in the Contract, all terms of which the bidder agrees to when it submits its bid prices.[28] There is no opportunity for negotiation of the Contract's terms and conditions.[29] Thus, the contractor is unavoidably subject to the standard provisions, regardless of how much risk is shifted to the contractor and the contractor's ability to manage such risk. Changes to the stipulated price are only available for extra work[30] performed pursuant to a written change order that is authorized by the head of the Agency.[31] The use of fixed-price contracts—as opposed to cost-reimbursable contracts, which allow the contractor price adjustments to reflect project costs—for complex infrastructure projects has been criticized for (i) allocating unnecessary risk to the contractor, (ii) fostering adversarial relationships between principal and agent, (iii) requiring excessive expenditure of time and effort on design prior to construction, and (iv) limiting adjustability post contract execution with respect to changing design or scope of work.[32]

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[25] SECTION 222, Project labor agreements, Labor (LAB) CHAPTER 31, ARTICLE 8
[26] See https://www1.nyc.gov/assets/mocs/downloads/pdf/pla/NYC%20PLAs%20Primer%202016%20Compatibility%20Mode_2_16_16.pdf (stating that "[the exemption from Wicks Law] is advantageous to the City because: the City no longer must bid the 'Wicks trades' separately (leading to more subcontracting opportunities, savings and flexibility)").
[27] § 1:19. Types of contracts—Lump sum contracts, 33 N.Y.Prac., New York Construction Law Manual § 1:19 (2d ed.).
[28] *See* § 1.1.5 of the Contract.
[29] William Ibbs and Dick Oliver, Impact of Various Construction Contract Types and Clauses on Project Performance, (Construction Industry Institute, 1986)
[30] "Extra Work" shall mean Work other than that required by the Contract at the time of award which is authorized by the Commissioner pursuant to Chapter VI of [the] Contract." §2.1.16 of the Contract.
[31] *See* "Article 25. Changes" in the Contract.
[32] William Ibbs and Dick Oliver, Impact of Various Construction Contract Types and Clauses on Project Performance, (Construction Industry Institute, 1986)

In summary, the combination of DBB, the competitive bid-award requirements, and the fixed-price contract fuels adversarial relationships between principal and agent, which are exacerbated by the fact that the procurement system vastly reduces the chance of an ongoing business relationship between owner and contractor (as is common in the private sector).[33] The procurement system also acts as a constraint on project team integration and collaboration because the absence of the contractor during the design phase limits the use of the contractor's knowledge and experience until much later in the delivery process, when any change is more expensive compared to changes in the design phase.[34]

III. Industry's Increased Focus on Team Collaboration in Project Delivery

Public owners in New York State have explored alternative delivery methods (to DBB) for their projects, including construction management at risk, design-build, and integrated project delivery.[35] However, improvements in project delivery can result from project team behavioral innovation that is compatible with all project delivery methods, including DBB.[36] Rapid Alignment Initiated Delivery ("RAID") emphasizes holistic, culture-based solutions to maximize value and minimize waste by integrating the project team and aligning the interests of the owner, design consultant, contractor, and subcontractors.[37] Implementing tools to facilitate team integration is seen as the best opportunity for improving delivery outcomes because of the arduous procurement regulations and the sluggish pace of legislative reforms in New York and the likelihood that most public projects will continue to use DBB.[38]

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[33] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[34] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[35] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[36] DarConte, Best Value Alignment Process for Public Works Construction in New York State
[37] *See* DarConte, Best Value Alignment Process for Public Works Construction in New York State (stating "[a] true value – driven project is built around collaboration of the key project stakeholders. Being a "people business" the correct project team alignment process brings about action through a shared purpose bound by individual engagement and accountability.").
[38] DarConte, Best Value Alignment Process for Public Works Construction in New York State.

The RAID model was developed through a case study of a public construction project in which there was "no option for failure."[39] The author then proceeded to identify six inter-dependent elements that serve as "the blueprint for building a high-performance project delivery team.[40] These six elements are (1) ethical behavior, (2) equitable risk allocation, (3) clearly defined objectives and goals, (4) sustained visible leadership, (5) relationships and integrated teams exhibiting project-first thinking, and (6) demonstrated competencies and capabilities.[41]

Studies have shown that the primary and direct consequence of poor organizational practices (i.e., fragmentation, lack of coordination, and adversarial contractual relationships) is rework, defined as "the unnecessary effort of redoing a processor activity that was incorrectly implemented the first time."[42] The timing of changes is largely determinative of the impact on project delivery; harmful effects of rework are more substantial if they occur later in the construction process due to the "ripple" effects on the project's supply chain.[43]

It is estimated that 90% of errors in buildings that necessitate rework can be traced to the design phase (50% of errors) and the construction stage (40% of errors).[44] Therefore, mitigating the cost overruns and delays caused by rework requires a solution that applies to the root causes of changes and rework in both the design and construction phases to support the earliest possible identification and resolution of problems when the project horizon is greatest and solutions may be less expensive than through the Contract's formal processes..

[39] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[40] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[41] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[42] Peter E. D. Love, Zahir Irani, and David J. Edwards, A Rework Reduction Model for Construction Projects (2004).
[43] William Ibbs, Impact of Change's Timing on Labor Productivity; Peter E. D. Love, Zahir Irani, and David J. Edwards, A Rework Reduction Model for Construction Projects (2004).
[44] Peter E. D. Love, Zahir Irani, and David J. Edwards, A Rework Reduction Model for Construction Projects (2004).

a. Design Phase:

The root cause of costly rework originating in the design phase is attributable to fragmentation due to budgetary practices that discourage agencies from spending money on adequate project scope development prior to adoption in the budget, often leading to misalignment of scope and cost.[45] To the extent the misalignment continues through the procurement process—deemed by law and contract not to exist—makes early identification and resolution of problems during the construction phase (when resolution may be cheaper) far less likely, turning what could be potential effective mitigation through provisions reflecting a culture of collaboration, trust, and mutual respect into the default adversarial process.[46]

Further, DBB, by its very design, precludes the contractor from integrating its vast construction knowledge and experience in the planning and design of the project.[47] Contractors have expertise with respect to construction methods and material and labor markets.[48] Most importantly, however, contractors have the requisite knowledge to evaluate the proposed design in terms of coherence, completeness, and cost.[49] Instead of utilizing the contractor's knowledge and skill, DBB separates design from construction.[50] Therefore, the design and cost consultants, under a separate contract with the City, are wholly responsible for construction budgeting and constructability analysis.[51] This is not tenable in the modern construction industry. "[I]t can no longer be assumed that 'the most advanced construction technology and knowledge of the most

[45] DarConte, Best Value Alignment Process for Public Works Construction in New York State; *see also* [New York City Public Construction Costs, *Proposed Strategies for Reduction*].
[46] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[47] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[48] Sweet, Schneier, Legal Aspects of Architecture, Engineering and the Construction Process, pg. 358 (9th Ed.).
[49] Sweet, Schneier, Legal Aspects of Architecture, Engineering and the Construction Process, pg. 359 (9th Ed.).
[50] Sweet, Schneier, Legal Aspects of Architecture, Engineering and the Construction Process, pg. 358 (9th Ed.).
[51] DarConte, Best Value Alignment Process for Public Works Construction in New York State.

construction methods lie with architects and engineers.'"[52] This knowledge "lies increasingly with 'specialty contractors…'"[53]

Further, public contract law and the contract assumed 100% complete designs that go out to prospective bidders.[54] This required assumption not only increases time spent during design because the construction process is not available to resolve design-related issues,[55] but also is flatly unrealistic because project scope and schedule changes are inevitable,[56] and incomplete, unclear and missing design documentation has been identified as a main factor in design-related building errors.[57] The reality is that although traditional contract law is predicated on completeness, this assumption is not realistic in practice and construction contracts and perpetuates a fiction of completeness that becomes apparent during construction with real consequences leading to disputes under the contract.[58] At the outset of final design, the owner has a higher level of information regarding the project relative to the contractor.[59] As the project progresses, however, this information asymmetry flips–and the contractor has more information about the project than the owner during the build phase.[60] As a result, the inherent adversarial dynamic is exacerbated, often leading to change orders and disputes about change orders.[61]

b. Construction Phase:

[52] Sweet, Schneier, Legal Aspects of Architecture, Engineering and the Construction Process, pg. 374 (9th Ed.).
[53] Sweet, Schneier, Legal Aspects of Architecture, Engineering and the Construction Process, pg. 374 (9th Ed.).
[54] DarConte, Best Value Alignment Process for Public Works Construction in New York State.
[55] DarConte, Best Value Alignment Process for Public Works Construction in New York State (stating "[t]he process maximizes project duration since bidding cannot commence until after construction documents are 100 percent complete. Project construction cannot begin until the bidding phase is completed, construction contracts are awarded, and notice to proceed is issued[.]").
[56] [New York City Public Construction Costs, *Proposed Strategies for Reduction*].
[57] Peter E. D. Love, Zahir Irani, and David J. Edwards, A Rework Reduction Model for Construction Projects (2004).
[58] Interview with Terri Matthews, Town+Gown, regarding "Fiction of Completeness," (Dec. 6, 2021).
[59] Interview with Terri Matthews, Town+Gown, regarding "Fiction of Completeness," (Dec. 6, 2021).
[60] Interview with Terri Matthews, Town+Gown, regarding "Fiction of Completeness," (Dec. 6, 2021).
[61] Interview with Terri Matthews, Town+Gown, regarding "Fiction of Completeness," (Dec. 6, 2021).

Although collaboration and transparency in the design phase are important to successful project delivery, there is also a need for "[c]ontinuous risk assessment and mitigation strategies throughout the project cycle [in order to] help keep the final scope, schedule and budget within a reasonable range of the initial estimates."[62] The ultimate goal of continuous risk identification and mitigation is to deal with disputes before they become formalized claims.

c. Facilitating Collaboration Through the Contract:

Ultimately, equitable risk allocation and problem identification is crucial to effective project delivery.[63] The general principles of equitable risk allocation are "reasoned risk allocation, prompt payment and change management practices all supported by fairness and equity in relationships."[64] This is precisely where the DBB project delivery method, statutory bidding requirements, pricing structure, procurement system, and—most importantly—the Contract, tend to fall short. Successful project delivery is difficult when the contract "inhibits coordination [and] stifles cooperation and innovation…"[65] Accordingly, the proposed EPIRB process is intended to help facilitate a culture of collaboration, information sharing and the earliest possible active problem identification and mitigation, within the Contract structure, to achieve successful project delivery.

IV. Overview of Alternative Dispute Resolution Methodologies

a. General Principles

There are a multitude of ways to resolve a dispute, ranging from informal, non-binding face-to-face meetings to "a full-blown jury trial with expert witnesses and scores of documents

[62] [New York City Public Construction Costs, *Proposed Strategies for Reduction*].
[63] FX DarConte, FH Griffis, J P Hogan, A Bates, RAPID ALIGNMENT INITIATED DELIVERY (2020).
[64] FX DarConte, FH Griffis, J P Hogan, A Bates, RAPID ALIGNMENT INITIATED DELIVERY (2020).
[65] Owen Matthews, Gregory A. Howell, Integrated Project Delivery An Example of Relational Contracting, Lean Construction Journal (2005).

and exhibits."[66] There are several dispute resolution mechanisms that fall between informal dispute resolution and litigation on what can be thought of as an alternative dispute resolution ("ADR") spectrum. Mediation, in which a third party with expertise in the industry guides the parties to settlement, is understood to be an effective and less costly approach in situations where there is a high level of distrust and/or hostility, or if the parties have seemingly reached an impasse.[67] Minitrials, a more structured and formal version of mediation in which the third-party expert makes a written recommendation which the parties may utilize in reaching a settlement, has been very successful in resolving disputes in the construction industry despite being non-binding on the parties.[68]

It is important to note that New York courts have taken a *laissez faire* approach with respect to binding alternative dispute processes controlled by an employee of the owner, finding that they do not contravene New York public policy.[69] As a result, if the contract is valid and enforceable (i.e., not fraudulent or unconscionable), courts will not override clear contractual provisions that provide for binding alternative dispute resolution, even if the party that controls such dispute resolution is also party to the dispute.[70]

b. Dispute Resolution in the Contract

Article 27 of the Contract provides the exclusive procedure for resolving disputes related to "the scope of Work delineated by the Contract, the interpretation of Contract documents, the amount to be paid for Extra Work or disputed work performed in connection with the Contract,

[66] § 16:1. Introduction, 33 N.Y.Prac., New York Construction Law Manual § 16:1 (2d ed.)
[67] § 16:8. Informal dispute resolution—Mediation, 33 N.Y.Prac., New York Construction Law Manual § 16:8 (2d ed.)
[68] § 16:10. Informal dispute resolution—Minitrials, 33 N.Y.Prac., New York Construction Law Manual § 16:10 (2d ed.)
[69] *Westinghouse*
[70] *Westinghouse*

the conformity of the Contractor's Work to the Contract, and the acceptability and quality of the Contractor's Work."[71] Such disputes arise when the engineer, head of the Agency (the "Commissioner") or other designee of the City makes a determination that the contractor does not agree with and wishes to challenge.[72]

The dispute resolution process outlined in Article 27 imposes substantial risk on the contractor for multiple reasons. First, while any dispute is being presented, heard, or considered pursuant to Article 27, the contractor is obligated to continue performing its work under the Contract and at the direction of the engineer.[73] Further, failure to continue work as directed constitutes a waiver of the claim by the contractor.[74] Although this language ostensibly reflects the City's interest in continuing work during dispute resolution to adhere to the project delivery schedule, the below-listed procedural components of Article 27 are considered onerous and time-consuming.

The process, as delineated in the contract, is as follows. The dispute must first be presented to the Commissioner within thirty days of receiving written notice of the determination that gave rise to the dispute (the "Notice of Dispute").[75] Once the Commissioner receives the Notice of Dispute, the parties submit materials that are relevant to the dispute or requested by the Commissioner.[76] Within thirty days (unless otherwise agreed) of receiving all information relevant to the dispute, the Commissioner must make a determination, which is deemed final and binding on all parties unless appealed by the contractor to the Comptroller (and then ultimately to the

[71] § 27.1.2 of the Contract.
[72] § 27.1.2 of the Contract.
[73] § 27.1.3 of the Contract.
[74] § 27.1.3 of the Contract.
[75] § 27.4 of the Contract.
[76] § 27.4 of the Contract.

Contract Dispute Resolution Board).[77] Although the City may not appeal the Commissioner's decision, it may seek (and the Contract Dispute Resolution Board may administer) a decision that is less favorable to the contractor—and more favorable to the City—than the decision of the Commissioner.[78]

c. Elements of the Proposed EPIRB Process

The proposed EPIRB structure, as an earlier alternative mechanism to the current alternative dispute resolution structure in the Contract creates an informal, non-binding dispute review and resolution method before proceeding further along the ADR spectrum to more formal dispute resolution provisions under the Contract and ultimately, if necessary, to litigation. As a general rule, the "earlier and more simply parties can resolve their disagreements, the quicker and less expensive the resolution will be and the more likely it is that permanent damage will not be done to the parties' relationship."[79] In the Contract, Article 27.4.1 provides that informal dispute resolution is available to resolve the dispute by mutual consent prior to making a binding determination.[80] However, the article gives the Commissioner complete discretion whether to convene the informal meeting to resolve the dispute between the contractor and designee of the City.[81]

[77] § 27.4.2 and § 27.4.3 of the Contract. See also § 27.5 (stating that "[b]efore any dispute may be brought by the Contractor to the Contract Dispute Resolution Board, the Contractor must first present its claim to the Comptroller for his or her review, investigation, and possible adjustment."); See also 27.7 (stating that "[i]n the event the claim has not been settled or adjusted by the Comptroller within the period provided in this Article 27, the Contractor, within thirty (30) Days thereafter, may petition the Contract Dispute Resolution Board to review the Commissioner's determination.")
[78] § 27.4.3 of the Contract.
[79] § 16:1. Introduction, 33 N.Y.Prac., New York Construction Law Manual § 16:1 (2d ed.)
[80] § 27.4.1 of the Contract.
[81] § 27.4.1 of the Contract.

A dispute review board ("DRB")[82] is an extremely effective[83] alternative dispute resolution method in large, complex public construction projects, which requires regular meetings to "review symptoms and patterns of *potential* problems, and to resolve disputes between the parties *as they arise*."[84] Implementation of the proposed EPIRB process, substantially in the form of a DRB, as well as participation in the associated process, would be made a condition precedent to moving along the ADR "spectrum" to the binding resolution process enumerated in Article 27 of the Contract. To be clear, DRBs are distinct from the "Contract Dispute Resolution Board" in the current Contract. The Contract Dispute Resolution Board is essentially an appellate adjudicator which issues final and binding decisions regarding disputes only *after* the Commissioner has made a certain determination on the dispute and such determination has been appealed to the Comptroller.[85] In contrast, EPIRB, as a form of a DRB, would be non-binding and facilitate resolution of disputes before they grow into larger issues and disputes that-become claims.[86]

The DRB is established in the general contract between the owner and the contractor; that is, at the commencement of the project as opposed to the commencement of a dispute.[87] In the typical situation, the DRB has three members: one selected by the owner (and approved by the contractor), one selected by the contractor (and approved by the owner), and the third jointly-

[82] Also known as "dispute resolution boards" (*see* AAA DRB Operating Procedures or "contract boards" (*see* § 16:7. Informal dispute resolution—Dispute review boards, 33 N.Y.Prac., New York Construction Law Manual § 16:7 (2d ed.)).
[83] § 16:7. Informal dispute resolution—Dispute review boards, 33 N.Y.Prac., New York Construction Law Manual § 16:7 (2d ed.) (stating "…the effectiveness of dispute review boards cannot be questioned. Of 63 projects studied that had dispute review boards, none had disputes that ended up in court—an outstanding success rate.").
[84] § 14.05 DISPUTE REVIEW BOARDS, CDPGF § 14.05 (emphasis added).
[85] *See* note 40
[86] § 14.05 DISPUTE REVIEW BOARDS, CDPGF § 14.05
[87] § 16:7. Informal dispute resolution—Dispute review boards, 33 N.Y.Prac., New York Construction Law Manual § 16:7 (2d ed.); § 14.05 DISPUTE REVIEW BOARDS, CDPGF § 14.05 (https://1.next.westlaw.com/Document/Ib2565b7bb93611de9b8c850332338889/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default))

selected and approved by both parties.[88] The DRB members agree to be impartial and not to advocate for either side,[89] potentially in a tripartite contract among the owner, contractor and DRB members providing that the members will "consider impartially all disputes regarding the general contract work placed before them and to issue recommendations to resolve these disputes."[90] To be effective, the DRB members must be well-qualified construction industry experts[91] and sufficiently familiar with the specific project, which requires periodic site visits throughout its duration.[92]

DRBs, which "operate in an informal and flexible manner,"[93] have distinct advantages over reactionary, binding, formal dispute resolution. The first is early intervention: because the board is in place prior to a certain dispute arising, it can identify problems and gather facts simultaneously, while a multitude of solutions remain available to the parties.[94] This provides an opportunity to prevent disputes from ever arising.[95] The second advantage is that DRBs resolve disputes quickly (especially when compared to litigation-like dispute resolution), which has the effect of "avoiding the intense adversarial relationship and exacerbations of other contract problems that can develop when a dispute is dragged out and allowed to interfere with the work," as well as reducing the overall costs of dispute resolution.[96] Lastly, the mere presence of a DRB

[88] Sweet, Schneier, Legal Aspects of Architecture, Engineering and the Construction Process, pg. 788 (9th Ed.).
[89] Sweet, Schneier, Legal Aspects of Architecture, Engineering and the Construction Process, pg. 358 (9th Ed.).
[90] § 16:7. Informal dispute resolution—Dispute review boards, 33 N.Y.Prac., New York Construction Law Manual § 16:7 (2d ed.).
[91] § 16:7. Informal dispute resolution—Dispute review boards, 33 N.Y.Prac., New York Construction Law Manual § 16:7 (2d ed.); Sweet, Schneier, Legal Aspects of Architecture, Engineering and the Construction Process, pg. 788 (9th Ed.).
[92] § 14.05 DISPUTE REVIEW BOARDS, CDPGF § 14.05.
[93] AAA DRB Operating Procedures 2.0 (https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Operating_Procedures.pdf).
[94] § 16:7. Informal dispute resolution—Dispute review boards, 33 N.Y.Prac., New York Construction Law Manual § 16:7 (2d ed.); § 14.05 DISPUTE REVIEW BOARDS, CDPGF § 14.05.
[95] § 14.05 DISPUTE REVIEW BOARDS, CDPGF § 14.05.
[96] § 16:7. Informal dispute resolution—Dispute review boards, 33 N.Y.Prac., New York Construction Law Manual § 16:7 (2d ed.); § 14.05 DISPUTE REVIEW BOARDS, CDPGF § 14.05.

encourages "cooperation and reasonableness" between owners and contractors, regardless of whether problems have actually arisen.[97] This is largely attributable to the aforementioned site visits, which begin with an informal roundtable meeting to discuss the progress of the work, anticipated problems, schedule for future work, and status of current disputes.[98] The informal meeting is followed by a field inspection to assess the ongoing contract work,[99] and is further supplemented by periodic progress reports, provided by the owner and contractor to the board.[100]

V. Proposed EPIRB Contract Specification

A. Purpose. The purpose of this specification is to create an Early Problem Identification and Resolution Board ("EPIRB") process to provide the Agency and the Contractor (in their capacity as parties to the Contract, the "Parties") with the ability to identify problems at the earliest possible time and collaborate with the EPIRB to resolve these problems before proceeding to the process in Article 27 of the Contract. [Optional: The Agency and the Contractor agree to utilize the EPIRB process in this specification before proceeding to Article 27 of the Contract.]

B. Creation of the EPIRB. Within [thirty (30)] business days after the Notice to Proceed, the Parties shall create the EPIRB for the Work. The EPIRB shall consist of three (3) persons (the "EPIRB Members"). The Agency shall select and appoint one (1) EPIRB Member, subject to the good faith approval of the Contractor. The Contractor shall select and appoint one (1) EPIRB Member, subject to the good faith approval of the Agency. The parties shall mutually select and

[97] § 16:7. Informal dispute resolution—Dispute review boards, 33 N.Y.Prac., New York Construction Law Manual § 16:7 (2d ed.)
[98] AAA DRB Operating Procedures 7.0 (https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Operating_Procedures.pdf).
[99] AAA DRB Operating Procedures 7.0 (https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Operating_Procedures.pdf).
[100] AAA DRB Operating Procedures 4.0 (https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Operating_Procedures.pdf).

appoint one (1) EPIRB Member, who shall serve as the chair of the EPIRB (the "Chair"). The Parties shall also execute an EPIRB Agreement pursuant to Paragraph G, 1, below.

1. Role of Chair. The Chair shall be responsible for overseeing and keeping records of the EPIRB activities under the Operating Procedures (as hereinafter defined), including keeping meeting minutes of each site visit.

2. Costs. The costs for the EPIRB shall be split evenly between the Agency and the Contractor.

C. Direct Discussions before Utilizing the EPIRB Process. The Parties shall first endeavor to identify problems and seek resolution of such problems arising under, or by virtue of, this Contract through good faith direct discussions during project meetings, as permitted under the contract. For the purposes of direct discussions, the Parties shall be represented by one or more persons who possess the necessary authority to resolve such matters. If the Parties' representatives are not able to resolve such matter within [five (5)] business days of the date of first discussion, the Parties' representatives shall promptly provide written notice to senior executives of the parties that resolution was not reached. Upon receipt of such written notice, senior executives of the Parties shall meet within [five (5)] business days to endeavor to reach resolution. If the issue remains unresolved after [fifteen (15)] business days from the date of first discussion, such issue shall become a "Matter," which the Parties shall submit to the EPIRB for resolution as provided in this specification.

D. Utilizing the EPIRB Process for Early Problem Identification and Resolution.[101] The Parties shall submit a Matter pursuant to Paragraph C above, to the EPIRB for mitigation and resolution pursuant to the procedures provided below.

The EPIRB shall endeavor to help the Parties reach a mutually agreeable resolution to Matter within [five (5)] business days of receipt of the Matter, unless good cause is shown to extend the time and the Parties mutually agree to grant a time extension (EPRIB process resolution).

E. EPRIB Issuance of Nonbinding Findings. The EPIRB early problem identification and resolution procedures shall result in its issue of a nonbinding finding on the Matter within [five (5)] business days after the EPRIB process resolution, which finding may be introduced as evidence at a subsequent binding adjudication of the Matter pursuant to Article 27.4 of the Contract. The Parties agree that the dispute mitigation procedure shall be conducted through collaboration with the Early Problem Identification and Resolution Board (the "EPIRB"). The EPIRB shall issue nonbinding findings with respect to a Matter submitted to the EPIRB pursuant to this Article

F. Failure to Resolve Matter. If the Matter remains unresolved following the issuance of the EPRB's nonbinding finding or if the EPIRB fails to issue a nonbinding

[101] *See* New York State Department of Transportation Contract Administration Manual §105-14: Disputed Work and Dispute Resolution (https://www.dot.ny.gov/main/business-center/contractors/construction-division/construction-repository/CAM_Sect105-14.pdf)

Facilitator/Dispute Review Board (DRB)

A facilitator's function is to help the two parties reach a mutually agreeable settlement. A DRB's function is to render a recommended settlement after hearing both sides of the dispute. The costs for the facilitator or DRB will be evenly split between the Department and the Contractor. The Contractor first pays all costs for the facilitator or DRB and turns in the paid invoices to the EIC for processing a CO. The CO will be for one-half the amount of the receipted invoices. The input from the facilitator and the recommendation of the DRB for settlement are non-binding and must be accepted by both sides in order to be implemented. An accepted settlement would be put in writing and contain a waiver of claim. This written document must be countersigned by both parties to provide the basis of payment for the Contractor in a CO.

finding ~~s~~, within [five (5)] business days following the referral, the Parties may utilize Sections [list the sections above] of the Contract. The Parties may use the EPRIB's non-binding finding and supporting materials for change order negotiations under Section [XX] of the Contract.

G. EPIRB Agreement and Operating Procedures.

1. EPIRB Agreement. The Parties shall enter into a retainer agreement (the "EPIRB Agreement") with the EPIRB members. The EPIRB Agreement shall establish the scope of the EPIRB responsibilities ("Operating Procedures"). Pursuant to the EPIRB Agreement, the EPIRB shall have the authority to implement the Operating Procedures or formulate new or revised Operating Procedures, provided they are consistent with the EPIRB Agreement. The EPIRB shall operate in an informal, flexible manner and shall provide written notice to the parties with respect to any change in the Operating Procedures. The EPIRB shall be available to either Party, upon request, throughout the course of the Work ~~Project~~.

2. Progress Reports; Site Visits. Within [sixty (60)] days after the EPIRB Agreement is fully executed, the EPIRB, in consultation with the Parties City and the Contractor, shall establish a procedure for the Parties to provide the EPIRB with monthly progress reports. Site visits to review the progress of the Work will be made at least every [three (3)] months or as otherwise agreed upon by the City, the Contractor, and the EPIRB. At least [thirty (30)] business days prior to a proposed site visit, the Chair shall contact the Parties to make scheduling and logistical arrangements for the site visit. The date, time, and location to be visited will be confirmed in writing to the Parties at least [ten (10)]

business days prior to the site visit. Each site visit shall begin with an informal discussion followed by a filed inspection of the Work.

3. Site Visit Informal Meeting Agenda. Each informal meeting as part of a certain site visit shall follow the below-specified agenda, unless otherwise agreed to by the Parties to the EPIRB Agreement:

(i) Review of last meeting minutes and any necessary revisions to those minutes;

(ii) Contractor discussion items, including but not limited to:

(a) Work accomplished since the last meeting;

(b) Current status of the work schedule and schedule for future work;

(c) Anticipated or potential problems and proposed solutions; and

(d) Status of current and potential disputes, claims and other controversies;

(iii) Owner discussion items, including but not limited to:

(a) The Work schedule;

(b) Perspectives on potential disputes, claims and other controversies;

(c) Status of past disputes, claims and other controversies;

(iv) Such other items as the parties may wish to discuss with the DRB; and

(v) Set tentative date for next meeting. .