

Engineering Management
Field Project

Dispute Resolution Process Analysis
Prepared for
The Colorado Department of Transportation

By

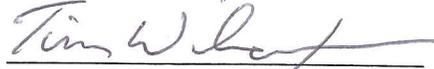
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EXECUTIVE SUMMARY

The use of dispute review boards (DRBs) as a method of alternative dispute resolution (ADR) on construction projects is a relatively new practice. The results of this research promote DRB usage. This report is meant to both improve CDOT's DRB practices and serve as a launching point for other DOTs wishing to evaluate the feasibility of DRB implementation. The ultimate goal of the DRB is to benefit taxpayers by increasing the efficiency with which construction projects are administered. The Colorado Department of Transportation is one of a few DRB progressive DOTs in the country. This quality improvement project provides a historical context for the CDOT DRB. It then compares CDOT DRB procedures to the practices of other DRB-savvy DOTs to uncover potential improvement opportunities for CDOT. The project also examines expert opinions from the industry for any other possibilities for CDOT improvement. Four suggestions for improvement resulted from this research.

Personal experience with DRB formation on a large CDOT project uncovered varying levels of DRB familiarity and acceptance among a small sample of project level staff. This discovery prompted the examination of a large sample of project level employees to determine their opinions on DRBs. Opinions were analyzed via electronic survey and one improvement opportunity was uncovered. This methodology is based on the idea being that complete DRB specification implementation is highly dependent upon the "buy in" of project level staff. Overall, the survey results contradicted the author's initial impressions regarding DRB familiarity and acceptance among CDOT project level staff. The results showed that while most respondents lacked formal DRB training, they were at least moderately familiar with and accepting of CDOT DRB specifications.

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LIST OF ABBREVIATIONS AND ACRONYMS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
CALTRANS	California Department of Transportation
CAT	Boston Central Artery/Tunnel Project
CCA	Colorado Contractors Association
CDOT	Colorado Department of Transportation
CEPM	Construction Engineering Project Manager
CM/GC	Construction Manager/General Contractor
DOT	Department of Transportation (Generic)
DRA	Dispute Resolution Advisor
DRB	Dispute Review (or Resolution) Board
DRBF	Dispute Resolution Board Foundation
DRJ	Dispute Resolution Journal
FDOT	Florida Department of Transportation
FHWA	Federal Highway Administration
MTA	Metropolitan Transportation Authority
QAR	Quality Assurance Review
RE	Resident Engineer
SKK	Shea-Kiewit-Kenny
TCC	Technology and Construction Court
TREX	Colorado Transportation Expansion Project
WashDOT	Washington Department of Transportation

1.0 INTRODUCTION

Between fiscal years (FY) 2002 and 2006, contractors filed \$98 million in construction claims in the state of Colorado. This figure for construction claims over a five-year period was documented by the Colorado Department of Transportation (CDOT) in an internal document, which is included as Appendix A. CDOT defines a construction claim as a dispute that cannot be resolved at the project level. Colorado has not stood alone in its challenges with past construction claims. The figure is grossly amplified when discussing the issue of construction claims on a national level. The issue is further exacerbated on a global scale. It is disheartening to think of all the additional transportation projects that could have been potentially funded with lost revenues resulting from unresolved disputes.

For perspective on the magnitude of Colorado's construction claim costs, TREX, the largest single construction project completed in Colorado history, had a price tag of \$1.67 billion. Completed in 2006, the TREX design build project reconstructed eight interchanges, 18 bridges, and also reconstructed and widened 17 miles of highway in a highly urbanized setting. Within this same corridor, TREX also built 19 miles of double track light rail transit (Moler 2001). While CDOT construction claims over a five-year period equated to approximately 6% of the TREX project, there is good news.

Fortunately, systematic approaches for minimizing resources lost as a result of construction disputes are at the disposal of owners through alternative dispute resolution (ADR). If a dispute cannot be resolved at the project level, an ADR process is basically an alternative to the more formal and costly litigation option. ADR comes in a variety of forms and CDOT has heavily utilized one form in particular to bring claims under control

(Spear and Largent 2010). While ADR may be used on design build, CM/GC, or other types innovative contracting, ADR nuances specific to every contracting mechanism are not considered in this research. ADR procedures can be similar across all contracting mechanisms. When considering the qualifications required of those officiating the ADR process, anyone with vast construction administration experience can serve on projects with varied contracting mechanisms (Largent 2012).

While ADR will be discussed in a general sense within this document, the ADR process focal to this research is the dispute resolution board (DRB) process. Appendix B is an excerpt from the Colorado Department of Transportation (CDOT) Standard Specifications related to ADR. Appendix B also includes supplemental information to the CDOT Standard Specification. Appendix B defines a DRB as a one- or three-member independent panel of experts in the field of major transportation construction who make non-binding decisions on construction disputes.

A non-binding decision implies the winning party cannot take the decision to a court of law for enforcement should the opposing party not comply with the decision (Pedreira 2011). While these decisions are non-binding, disputes unsolved at the project level are typically solved at the DRB level (Harmon 2003). As opposed to juries and judges, owners and contractors agree that ADR boards composed of industry experts with experience administering construction projects are better equipped to decide on disputes related to complex construction projects (Spear and Largent 2010).

Not all owners across the country are clamoring to utilize DRBs, however. Compared to many other transportation authorities, CDOT is relatively progressive in the dispute resolution parameters set forth in its standard contract documents. Currently,

many states do not use DRBs. The list below shows DRB entities from The Dispute Resolution Board Foundation. While this list even includes many entities outside the United States, most likely it is not exhaustive given the dynamics associated with DRBs gradually gaining momentum in the United States and abroad (DRBF 2012).

- California DOT
- Channel Tunnel Rail Link, UK
- City and County of Copenhagen
- City of Atlanta, Georgia
- Colorado DOT
- Dallas Area Rapid Transit
- Electricity Corp. of New Zealand
- Eurotunnel, UK - France
- Florida DOT
- Greater Vancouver Regional District
- Hong Kong Airport Authority
- International Monetary Fund
- Massachusetts Highway Department
- Toronto Transit Commission
- Virginia DOT
- Washington DOT

By implementing ADR processes, CDOT has already realized millions in decreased construction dispute claims (Spear and Largent 2010). While this is a positive development, a central assertion of this research is that there is still room for improvement. Executive management and those responsible for writing the Colorado Standard Specifications have fully accepted the conclusion that DRBs are a best practice on projects meeting certain criteria. However, preliminary research suggests CDOT employees at the resident engineer level and below have differing levels of comfort and familiarity with utilizing DRBs on projects.

Even with adequate specifications, awareness and perceptions at the project level are critical. If project level CDOT officials are not fully informed or fully convinced of

the potential benefits of DRBs on projects, the processes will most likely be underutilized or improperly utilized. One of the chief purposes of this project is to evaluate CDOT DRB practices. Another central objective is to document current levels of ADR familiarity and acceptance among project level CDOT officials. Overall, the mission of this project is to answer these questions:

1. Is there consensus among industry experts proclaiming ADR a best practice on projects meeting certain criteria? Moreover, are DRBs looked upon favorably?
2. Generally, how do the current CDOT ADR specifications align with the latest opinions of other ADR industry experts and specifications from other DOTs? In other words, from an independent perspective, do the CDOT ADR specifications generally set the department up for success? After these independent sources have been analyzed, are there any recommendations for improvement?
3. Are those responsible for administering construction projects familiar with the CDOT specifications related to DRBs?
4. If officials are familiar with the specifications, have project level CDOT officials fully bought into DRBs as a best practice?
5. If CDOT officials are unfamiliar, why are they unfamiliar?

6. If CDOT officials are familiar but resistant to utilizing standard ADR specifications, what is the root cause?

7. Finally, is there a correlation between DRB training and DRB opinions? In other words, are those who have attended CDOT DRB training more likely to have positive opinions about DRBs?

2.0 LITERATURE REVIEW

The project objectives have been identified in the introduction. This section will review the most relevant literature on the subject of alternative dispute resolution. ADR will be covered in a general sense, but most of the content will focus specifically on DRB use. Of the questions posed in the introduction, those addressed in this section are:

1. Is there consensus among industry experts proclaiming ADR a best practice on projects meeting certain criteria? Moreover, are DRBs looked upon favorably?
2. Generally, how do the current CDOT ADR specifications align with the latest opinions of other ADR industry experts and specifications from other DOTs? In other words, from an independent perspective do the CDOT ADR specifications generally set the department up for success? After these independent sources are analyzed, are there any recommendations for improvement?

2.1 CDOT DOCUMENTS

Before viewpoints outside the agency are analyzed, it is helpful to first analyze foundational CDOT ADR literature. One unpublished document largely shaped CDOT ADR policy and specification development. The other published document is reflective of CDOT ADR policy and provides insight into the reasoning behind CDOT policy while referencing the unpublished internal report as supporting material. The two key CDOT documents reviewed are the internal CDOT 2006 Quality Assurance Review (QAR) and an article published in the 2010 May/October issue of the *Dispute Resolution Journal (DRJ)*.

The article published in the *DRJ* was written by CDOT officials responsible for spearheading the movement towards ADR. These two key CDOT documents suggest that as claims began to pile up from 2003 to 2005, there was a pronounced sense of urgency to address them. Specifically, the *DRJ* article references the 2006 QAR, which indicates CDOT was forced to do something about these immense claims immediately. This is reflected in the purpose statement of the QAR included as Appendix A. The purpose statement in the 2006 QAR recommends reviewing the current claims procedure for effectiveness and developing potential improvements as part of an “expeditious” process.

Documented in the QAR is that in 2005, CDOT was continuing to lose millions of dollars due to perceived systematic issues. What is not documented in the QAR is that the Colorado Contractors Association (CCA) was also displeased with the CDOT dispute specifications. One of CCA’s contentions was that the current specifications did not provide an adequate litigation option should other dispute resolution measures fail. In 2007, CCA made clear their intentions to take this issue to the legislature (Largent 2012). Consequently, the chief engineer ordered a task force to address these issues expeditiously. Given the circumstances, it can be assumed the time involved with the rigors of a full and exhaustive academic evaluation of ADR was not a luxury afforded to the ADR task force. Still, both CDOT documents accomplished their intended goals, with the 2006 QAR being the longest at fifteen pages.

Many of the published documents analyzed in this research contain similar components, and the CDOT produced *DRJ* article falls into this category. The following

components are commonly found in many of the published documents including the CDOT article:

- A large construction claims dollar figure on the front end to grab the reader's attention.
- An arbitration explanation including downfalls.
- A litigation explanation including downfalls.
- A discussion about how disputes are most effectively handled at the "project level" or lowest level possible.
- A description of what a dispute resolution board (DRB) is including the basic structure.
- An explanation of how DRBs are best used on projects.
- The final component is often a caveat describing that while ADR usually works, arbitration or litigation are still needed on occasion.

There are several instances in the literature in which the terms arbitration and litigation are used without proper definition. Simply defining these two terms does not get to the heart of the differences between the two so they can then be compared to ADR. ADR can simply be thought of as an alternative to litigation (Spear and Largent 2010). Keeping in mind that arbitration is a form of ADR, it is more instructive to explore specific differences between arbitration and litigation.

Binding arbitration is often looked at differently compared to the other ADR methods because of the enforceability of the decision and the lack of an appeals process. The CDOT *DRJ* article thoroughly explains both arbitration and litigation. However, for a more direct comparison it is necessary to briefly step away from the CDOT documents.

To gain a basic understanding, Table 1 best illustrates the differences between arbitration and litigation.

Table 1. Comparing arbitration and litigation

	Arbitration	Litigation
Private/Public	Private - between the two parties	Public - in a courtroom
Type of Proceeding	Civil – private	Civil and criminal
Evidence allowed	Limited evidentiary process	Rules of evidence allowed
How arbitrator/judge selected	Parties select arbitrator	Court appoints judge - parties have limited input
Formality	Informal	Formal
Appeal available	Usually binding; no appeal possible	Appeal possible
Use of attorneys	At discretion of parties; limited	Extensive use of attorneys
Waiting time for case to be heard	As soon as arbitrator selected; shorter	Must wait for case to be scheduled; longer
Costs	Fee for arbitrator, attorneys - relatively less	Court costs, attorney fees; costly - relatively more

Source: Data adapted from Murray 2012

Referencing the results of the 2006 QAR, the *DRJ* article produced by CDOT makes the case for DRBs by discussing the disadvantages of litigation and arbitration. The *DRJ* article includes results from a survey of public owners regarding the desirability of litigation. The survey results indicate there are two primary reasons owners strive to avoid litigation: 1) Those making the decisions on construction dispute cases that go to litigation are not professionally equipped to make such decisions on complex construction projects, and 2) the proceedings are often lengthy and incur excessive costs (Spear and Largent 2010).

It was noted that compared to private sector contractors, the public owners have legal staff on hand to handle cases destined for litigation. However, the emotional toll on the public employees whose cases are involved in litigation was also noted. This is not to

mention the expense of public employees being pulled away from their normal project related duties to participate in the rigors of legal proceedings (Spear and Largent 2010). These extra burdens can serve to exacerbate the strain understaffed units feel as they attempt to complete their numerous projects.

While arbitration is typically viewed as a lesser evil compared to litigation, it does not get the CDOT stamp of approval in the DRJ article. If non-binding ADR fails to resolve an issue, arbitration is generally the next stop on the route to a resolution. As indicated by Table 1, arbitration cases are private and thus the outcomes do not set legal precedence. This is generally perceived as an advantage over litigation by both parties. However, the owners surveyed raised several concerns about arbitration (Spear and Largent 2010).

As shown in Table 1, compared to litigation, arbitration is typically less expensive. However, in the CDOT *DRJ* article, owners voiced concerns over excessive arbitration costs for longer cases. Another issue owners raised was related to limited discovery or evidentiary process. Owners often expressed concern their cases were being arbitrated without enough of the relevant facts. The most significant concern is that owners felt the pool of arbitrators was biased towards candidates who mainly work for contractors. The article astutely pointed out this is the exact converse of the main concern expressed by contractors regarding administrative remedies (Spear and Largent 2010).

The explanation of administrative remedies was unique to the CDOT *DRJ* article. An administrative remedy avoids taking the dispute to arbitration or litigation. With the administrative review process, the contractor files a detailed certified claims package that

is escalated through various levels of authority within the owner's management structure. The claim is escalated until a decision acceptable to both parties is reached. A sample escalation structure would first be the active project engineer, then resident engineer, followed by program engineer, then regional engineer, and finally the state level chief engineer (Spear and Largent 2010).

The level of detail associated with administrative remedies specific to CDOT's organizational structure was unique to the *DRJ* article. On the other hand, it could be argued that variations of this remedy are the default dispute resolution process practiced by most state DOTs. When a dispute arises, the owner's project engineer is first involved. If a resolution cannot be reached at the project level, the issue is escalated through the chain of command. While the individuals on the decision-making end have construction engineering expertise, resolving that particular construction dispute is not their chief job duty. Without ADR, it is common for these items on multiple projects to slide up the walls of the pyramid until they all come to a point on the chief engineer's desk.

The CDOT article highlights the "snowball" phenomenon. This is where the resolution to the issue (or settlement) becomes exponentially more costly as it travels up the chain of command (Spear and Largent 2010). The administrative remedy process or lack thereof is precisely what led to \$98 million in claims being filed over a five-year period in Colorado. However, it is not just the owners who find fault with administrative remedies. Contractors view administrative remedies as being unfair because at every level, the decision is being made by someone employed by the owner. The time it takes issues to slide up the walls of the pyramid is also typically unacceptable to contractors on

large and fast-paced projects (Spear and Largent 2010). It could be argued these delays in dispute resolution decisions can directly or indirectly contribute to the “snowball” phenomenon.

Following the significant claim events between FY 2002 and 2006, CDOT achieved great results on projects that utilized DRBs. From 2008 to 2010, CDOT awarded 245 construction projects. Only thirty disputes arose from thirteen of the 245 projects awarded. Within this two-year period, CDOT achieved a 100% ADR success rate as not one dispute escalated past the DRB level to go to arbitration or litigation (Spear and Largent 2010). Given these figures, it is legitimate to question the need for this research as it is true for CDOT that far fewer claims are going to court.

While court costs related to unresolved disputes are down, change order costs are still significant enough to consider. CDOT FY 2011 change order costs totaled approximately \$16.6 million (Sullivan 2012). It is impossible to draw any concrete conclusions from this number as the justifications behind these change orders vary greatly. Some FY 2011 change orders were reported on projects that achieved substantial completion years ago. The \$16.6 million is only mentioned to report magnitude and pose a controversial question: “Is there a potential connection between under or improper ADR specification utilization and increased change order costs?” This controversial question is currently impossible to validate with published data and is only intended to be thought provoking.

Change orders are typically written for legitimate reasons on projects as needs for modifications to the contract arise. For example, change orders can compensate contractors for legitimate delays or differing site conditions. Change orders do not

require court proceedings for contractors to obtain additional compensation. It is dependent upon the amount of the change order, but most only require consensus of legitimacy between the resident engineer and the contractor, although some instances also require FHWA approval. Again, depending upon the amount of the change order, more signatures from increasing levels of CDOT authority are required. In these circumstances, well-deserved trust in the judgment of those closest to the project is often extended by those of higher authority as they sign off.

If a project level CDOT staff member is either unfamiliar with or opposed to the DRB process, it could be asserted that change order totals have upward potential. This is because an overly aggressive attitude of self-reliance can prolong construction disputes with adverse impacts. Issues can fester over the life of the project as both parties struggle to stay on schedule. When issues compound over time, writing larger change orders near the project acceptance stage is not an example of effectively handling issues at the project level. When issues cannot be swiftly resolved at the immediate project level, the stress experienced by both parties might have been avoided with ADR. After due diligence is expended by those closest to the project, they should shift the burden to a technically competent independent body removed from the emotions often surrounding the dispute. This can allow the CDOT project engineer and contractor to focus on completing the project on schedule rather than bickering while locked in a stalemate.

Section 2.1 has sufficiently explored the generalities of CDOT DRB policy along with many of its intricacies. The remainder of the literature review will evaluate CDOT ADR policy compared to other independent sources to highlight similarities. More importantly, any differences with independent sources will be spotlighted. Some of these

differences will result in recommendations for DRB specification improvement. Again, sections outside the literature review will evaluate the CDOT staff opinions toward ADR.

2.2 HOW DO THE DRB STATES COMPARE?

Dispute resolution boards are far from the industry standard among state DOTs. While other states may be successfully practicing ADR in the form of DRBs undetected, four DOTs currently stand out as the most DRB savvy. These states are California, Colorado, Florida, and Washington. Since ADR is a relatively new concept in an industry that trusts the tried and true of the decades, this level of savviness does appear to vary. It is clear that some DOTs are more advanced in their DRB procedures after the latest standard specifications along with any readily available and relevant special provision (SPs) are analyzed.

While the length of the DRB language can be indicative of specification robustness, it can also be misleading. For example, while the CALTRANS specifications do not technically top out in the length comparison, the nine pages included cover an impressive amount of ground. Table 2 offers an informed appraisal of each DOT's DRB specifications. That being said, there is a potential limitation of Table 2 related to a given DOT's actual DRB savviness. Put simply, there could be a disconnect between DOT specifications and what is actually practiced.

The goal of Table 2 was to compress a large amount of DRB data on leading DOTs to facilitate an objective appraisal of the CDOT specifications. As a supplement to this table, the most relevant excerpts from each DOT's specifications are available as appendices. The combination of these materials enables the reader to judge which specifications they might aim to emulate.

Table 2. Comparing the DRB practices of four leading states

DRB Practices	California DOT	Colorado DOT	Florida DOT	Wash. DOT
Length of Standard Spec. Language on DRB?	9 pages (No SPs Found)	18 pages (24 pages of SPs)	Briefly mentioned (12 [‡] pages of SPs & 7 pages in Construction Administration Manual)	9 pages (No SPs Needed)
What's the Trigger?	\$3M-\$10M DRA ^β , >\$10M DRB	>\$15M ^μ	>\$15M ^α	When a Dispute Arises & Contractor Requests DRB
When Does the DRB Engage?	Project Start	As Needed for On Demand, Project Start for Standing DRB	As Needed for Regional, Project Start for Project Specific	When a Dispute Arises
Number of Members?	DRA ^β -1, DRB-3	On Demand DRB-1 to 3, Standing DRB- 3	Regional-3, Project Specific-3	3
How Are Members Selected?	See Note 1	See Note 2	See Note 3	Same as CDOT's 3 member DRB

Source: Data adapted from various DOT Specifications

β- Unique to California, DRA-Dispute Resolution Advisor; similar to the CDOT single member DRB.

‡ - The FDOT DRB special provisions contain some overlap when describing the statewide, regional, and project specific DRB procedures. The most substantial DRB procedural information is in the Construction Project Administration Manual.

μ - As defined in CO an On-Demand DRB can be instituted at any phase of an active project. However, a standing DRB should be called for on projects involving any of the following: Contract amount >\$15M, complex construction, complex structures, multiphase construction, major impacts to traffic, and projects with other complicating factors that could lead to disputes. The one- or three-member On Demand DRB trigger is dispute value. If the dispute has a value of \$250,000 or less, the board shall have one member. For disputes greater than \$250,000, the board shall have three members.

α - Standing Regional DRBs are available by default for any project when a dispute arises. Project specific DRBs are formed for projects >\$15M or when any other complicating factors exists which could lead to disputes.

Note 1- In the case of a DRA, the contractor & owner agree on one candidate from the preapproved candidates list. In the case of a DRB, the contractor and owner each appoint one member and the two members appoint the third. All three candidates must be from the preapproved candidates list.

Note 2- In the case of a one member On Demand DRB, the contractor & owner agree on one candidate who may or may not be from the suggested candidates list. In the case of a three-member DRB, the contractor and owner each appoint one member and the two members appoint the third. Likewise, the individuals chosen for the three-member DRB may or may not be from the suggested candidates list.

Note 3- Regional DRBs are formed by district of a list of preapproved candidates. For Regional DRBs these preapproved candidates are approved by both FDOT and the Florida Transportation Builders' Association. Project specific DRBs are formed by the contractor and owner each appointing one member and the two members appoint the third.

Table 2 Continued. Comparing the DRB practices of four leading states

DRB Practices	California DOT	Colorado DOT	Florida DOT	Wash. DOT
What's the cost for a 3-member board?	\$4,500/day for on-site meetings, \$150/hour/member for incidentals	\$3,600/day/ for on-site meetings >4 hours, \$2,400/day for on-site meetings <4 hours, \$150/hour/member for incidentals	\$8,000/Hearing when Hearing Length is 1 day (This compensates members for <u>all</u> Hearing Related Activities) \$3,300/ day if Hearing Extends Beyond 1 day	See Note 4
Is Formal DRB Training Required?	Yes	No	Yes	No

Source: Data adapted from various DOT Specifications

Note 4- The owner and contractor establish independent contracts with their appointee and directly pay 100% of the respective costs. Pre-established costs aren't specified. The third-member costs are shared equally between the owner and contractor.

A comparison of the CDOT specifications with three other states that have DRB language in their standard specifications leads to the following conclusion. Overall, the CDOT specifications are solid and set the department up for success. However, there are two potential improvement recommendations for the CDOT specifications or construction manual:

1. Make formal DRB training a requirement for DRB members to be eligible for the suggested member list as is done in California and Florida.

2. Include further guidance on DRB formation. This suggestion stems from the author's personal project experience in using the CDOT specifications to form his first standing DRB. In that situation, it was unclear who was responsible for selecting CDOT's appointed member. It was also unclear as to whether further approval up the chain of command of this appointee was required. The FDOT specifications place the primary responsibility for preliminary member selection on the Resident Engineer. They then call for secondary approval by the equivalent to the CDOT Area Engineer. The FDOT specifications also reinforce that all appointees should be independent third party neutrals who should be under contract in time to attend the preconstruction conference. See Appendix D for the exact specifications relevant to FDOT.

2.3 HARMON'S TAKE

For over a decade, Dr. Kathleen Harmon has been known as an expert in the field of ADR with nearly twenty publications on the subject. She is currently compiling global ADR statistics for the Dispute Resolution Board Foundation to update the figures currently found on the Foundation's website (DRBF 2012). Harmon is the president of Harmon/York Associates. Established in 1983, Harmon/York is a consulting firm offering dispute resolution services (Harmon/York 2012). Dr. Harmon's perspective is obviously pro-ADR. While her pro-ADR affiliation is duly noted, failing to tap into at least a portion of her array of publications on the subject of ADR in this research would be an oversight.

2.3.1 Effectiveness of Dispute Review Boards

The first item discussed in Harmon's 2003 work is the structure of a DRB. She describes a DRB as "a panel of three respected, experienced industry professionals jointly selected by the owner and contractor and established at the beginning of a construction project" (Harmon 2003). The majority of the article focuses on an evaluation of the effectiveness of DRBs. However, Harmon's early mention of DRB structure is interesting because the CDOT specifications offer a one-member option in certain circumstances. For larger (in excess of \$15 million) and more complex transportation construction projects, a "standing DRB" is typically used. Consistent with CDOT specifications, this standing DRB board structure is exactly as described in the 2003 publication.

In contrast, the CDOT specifications in Appendix B also describe a structural variation of the DRB when an "on demand DRB" is used instead of a "standing DRB." The CDOT specifications direct that if a standing DRB is not required by contract and the dispute is less than \$250,000, the "On Demand DRB" shall have one member. The specifications detail that each DRB member is compensated at a rate of \$1,200 per day if their time spent on DRB related activities exceeds four hours. All DRB costs are equally split between the owner and contractor. The one-member "on demand DRB" option could raise issues of bias. However, this \$250,000 trigger seems the result of a logical cost analysis of DRB expertise versus the benefit of a conceivably more unbiased board structure on a relatively smaller claim compared to a total project cost of \$15 million or greater.

The true focus of this article was a discussion of the results of a 2001 survey conducted at a dispute review board meeting in Las Vegas, Nevada. The sample size was

48. This was because 15 of the 63 respondents did not provide useful data. The professional cross section was described as follows: attorneys (13%), consultants (46%), contractors (21%), engineers (13%), and owner/administrators (7%). Of the 48 respondents, 89% agreed having a DRB would minimize dispute-related costs, and 98% believed having a DRB reduces the cost of outside council.

Many other questions were posed to the group at the DRB meeting in Las Vegas. The overwhelming result was that ADR is beneficial to owners and contractors alike in reducing unrecoverable dispute related project costs (Harmon 2003). While this was a survey of individuals at a DRB conference, it is worth noting that 54% of the respondents were either attorneys, contractors, engineers, or owners. These professionals have much less of a vested interest in personal financial gain from selling DRB services. Actually, attorneys arguably have more to gain if disputes go to court as they typically have little involvement in the ADR process.

2.3.2 Case Study “the Big Dig”

Dr. Harmon’s next work primarily focuses on the results of DRB use on the Central Artery/Tunnel (CAT) project in Boston. Also known as “the Big Dig,” the project is the largest and most complex transportation project in United States history, with an eventual cost of \$14.625 billion. Before getting into the details associated with the CAT project, Harmon provided historical context related to DRB use on tunnel projects. The first DRB in United States history was utilized for the second bore of the Eisenhower Tunnel in Colorado. The project began construction in 1975 and ended over budget and two years behind schedule in 1979. The first bore went so poorly that it prompted CDOT officials to form the first ever DRB for the second bore to control cost

and manage disputes. On the maiden DRB voyage during the second bore, four disputes were brought before the board and all were resolved without litigation (Harmon 2009).

Before the specifics related to the CAT project are explored, the discussion on DRB structure is worth noting. This discussion is specifically related to the question as to whether CDOT specifications are in line with industry standards. This publication describes the DRB structure exactly as the CDOT specifications for a standing DRB: a three-member board in which the contractor selects a member, followed by the owner selecting a member. These two members then select the third. All three are required to have substantial engineering or construction experience (Harmon 2009).

The results of DRB utilization on the CAT project demonstrate that this case study shows the author's objectiveness on the subject. The essence of the article poses four main questions, three of which are most relevant to the discussion:

1. Were DRBs successful at resolving claims?
2. What factors impeded DRB success?
3. Did DRBs minimize dispute resolution costs?

For this particular project, it can be deduced from the second question that the DRBs could have been more effective. The CAT project achieved substantial completion in 2005. In 2006, 74% of the unresolved claims (\$57.57 million) were on projects with DRB provisions, while only approximately 15% (\$794,366) non-DRB contracts had unresolved claims. As far as impedance to DRB success, the issues cited were:

- ADR process drug out too long;
- DRB process perceived as confrontational;
- Hearing preparation time was overdone;

- Unconvincing and below average DRB settlement recommendations (Harmon 2009).

Before generalizations about DRB are made based on this case study, it helps to put the CAT project in perspective. It is common knowledge in the civil engineering community that the CAT project had widespread issues. The project was supposed to finish in 1998 and finished over seven years late. The original estimate in 1982 was \$2.6 billion and the eventual cost in 1982 U.S. dollars was \$8.0 billion (\$14.63 billion, 2005) (Harmon 2009) . Extensively covered by the media was the loss of life that occurred after a large section of tunnel ceiling tile fell on a family, killing one. In summary, the DRB analysis offered in this work is valuable, but no DRB can completely mitigate problems of this magnitude on a project.

2.3.3 Is a DRB Right for Your Project?

This publication is mostly related to the evaluation of the usefulness of ADR on specific projects. While DRB structure is not central to this article, it is one area where the author's opinion appears to have evolved. Specifically, structural variations of the typical three-member arrangement are mentioned. The significance of this mention is that the one-member CDOT "on call DRB" configuration is recognized (Harmon 2011). While the \$250,000 trigger is specific to CDOT, the one-member variation in certain circumstances is validated. However, potential issues may be raised with the all members being attorneys variation offered. While the author is simply reporting structural variations used by others, fundamental to CDOT's DRB process is that at least two members are preferably experts in the construction industry.

This work included much of the same language included in the CDOT documents, further validating the CDOT specifications. The document does point out that for smaller projects, DRBs can be cost prohibitive. Also discussed are some of the common reservations associated with having the ADR process established up front in the contract documents. One reservation discussed was the idea that having a standing DRB will actually encourage more contractor claims because everything is “ready to go” for frivolous claims. Explained is the converse opinion that having a DRB in place can be a deterrent for frivolous claims. This is because intelligent contractors realize the endgame of a frivolous claim before a panel of three experts will be an “embarrassment” (Harmon 2011). As previously mentioned, it could also be argued that the contractor’s obligation of paying half the bill for the embarrassment is a further deterrent to frivolous claims.

2.4 ONE LAWYER’S PERSPECTIVE

This section will analyze two separate works by Daniel McMillan who is a partner at an international law firm. The documents reviewed span over a ten-year period. While the first hails from 2000, it is still relevant to today’s DRBs. Additionally, it is also interesting to investigate whether a particular expert’s ideas might have evolved. The beginning of McMillan’s first work covers familiar ground by explaining aspects of the DRB such as concept and structure. This legal expert does not dismiss ADR as a viable method of avoiding litigation. Instead, McMillan offers suggestions on how to avoid the pitfalls associated with DRBs. Guidance on how to avoid these pitfalls can be inferred from his list of important attributes of a DRB:

1. Confidence in the Impartiality of the DRB;
2. Admissibility of Recommendations;
3. Qualifications of DRB Members;
4. Project Familiarity;

5. Removal of DRB Members;
6. Timely Resolution of Disputes. (McMillan 2000)

McMillan's work confirms CDOT's use of DRBs as a best practice projects meeting certain criteria. His list offered in the first work further confirms CDOT specifications to be generally in line with the typical contract documents described by someone in the legal community. It is worth noting that this source is a legal professional whose employer conceivably has more to gain should construction disputes go to litigation. This lawyer actually confirms the primary purpose of the DRB is avoiding litigation and also provides helpful suggestions on how to ensure DRBs achieve this goal.

McMillan makes an important recommendation related to the removal of DRB members. This recommendation is significant because it is inconsistent with CDOT ADR specifications. McMillan discusses a case in which the contractor and owner became involved in litigation. The litigation involved the issue of the owner motioning for the removal of its appointed DRB member. The owner's appointed member was allegedly involved in ex parte communications with the contractor. The impartiality of the DRB is paramount. It is the industry standard for DRB specifications to strictly prohibit one party from contacting any DRB member without the presence of both parties. Typically, both parties and all DRB members are present during or copied on any in person or written communication (McMillan 2000).

The owner eventually prevailed in the Metropolitan Transportation Authority v. Shea-Kiewit-Kenny case. Still, the unpleasant cascade of events that unfolded throughout subsequent trials associated with this case confirmed a need for change. Throughout this extensive work, McMillan reinforces the critical nature of having confidence in the impartiality of the DRB. Citing the Metropolitan Transportation

Authority v. Shea-Kiewit-Kenny case, McMillan strongly recommends including a clause that enables either party to dismiss a DRB member “for or without cause” (McMillan 2000). By contrast, as shown in Appendix B, CDOT specifications specify the service of a DRB member can only be terminated by the written agreement of both parties.

McMillan does not oversimplify the consequences of this recommendation. Rather he thoroughly tracks the potential problems associated with having “for or without cause” termination language in the standard contract documents. For example, he acknowledges the possibility of having a revolving door of ADR members. McMillan further recognizes the potential loss of background knowledge on the project vital to a successful DRB. While McMillan validates concerns related to these potential consequences, he comes full circle to underscore the most vital component of a DRB. He firmly believes that without confidence in the impartiality of the DRB, the DRB concept falters. Thus the “for or without cause” termination language is worth the potential negative consequences (McMillan 2000).

McMillan’s latest work on ADR, published ten years later, again discusses the issue of member removal and specifically the MTA v. SKK case. Over the past ten years, the author may have been exposed to the negative effects associated with the replacement of board members. This is purely conjecture, but the author’s opinion has slightly evolved. While the “for cause” or “without cause” options are both listed in the latest publication, McMillan appears to now slightly lean towards the “for cause” option.

Owners who include “for cause” language can still have members removed, but the likelihood of resulting litigation over member removal has decreased. This is because the rules of the American Arbitration Association (AAA) “provide a ‘for cause’ standard

under which the AAA decides whether cause has been established” (McMillan 2010). Under these guidelines, a savvy owner with the “for cause” language in their standard contract documents who wishes to have a member removed for alleged misconduct has an advantage.

McMillan’s latest work highlights another potential improvement opportunity for CDOT ADR specifications. This improvement opportunity is related to how the termination of contract should coincide with the termination of any DRB proceedings. The *El Dorado Irrigation District v. Traylor Bros., Inc.* case describes how an owner’s ADR contract language can be used against them in litigation without proper termination language. In 2003 the owner filed a breach of contract lawsuit because the contractor failed to take corrective action following significant tunnel construction errors. The contractor later “moved for a summary judgment citing the owner’s failure to comply with the DRB process before commencing litigation.” The contractor’s motion was denied in part because the court cited that “unlike most model DRB provisions, the construction contract expressly provided that termination of the contract terminated DRB operations” (McMillan 2010).

This is an example of how without the proper language, an owner’s ADR specifications could have been used against them in extreme circumstances. It underscores the importance of ADR termination language. Language stating DRB operations terminate when the contract terminates are not readily apparent in the CDOT specifications found in Appendix A. However, the analysis of McMillan’s work reinforces that CDOT specifications are generally in step with industry standards. Still,

the analysis does bring about two recommendations for potential improvement. The two recommendations are:

1. Potentially including “for cause” language related to member removal instead of requiring both parties to agree upon member removal. It is reasonable to assume that litigation in the MTA v. SKK case would have proven more challenging for the owner had the CDOT specifications been part of the contract documents.
2. The potential addition of language explicitly stating the obligations associated with the DRB terminate at the same time the construction contract terminates.

2.5 INTERNATIONAL PERSPECTIVES

This section explores alternative dispute resolution practices “across the pond.” A review of two separate publications suggests that alternative dispute resolution has somewhat different connotations in the United Kingdom. The first publication analyzed from the U.K. dated 2006 lists seven different alternative dispute resolution options. The ADR options explored in this work are:

1. Negotiation
2. Arbitration
3. Expert determination
4. Adjudication
5. Mediation
6. Conciliation
7. Lastly, dispute review boards. (Klien 2006)

While the sources from the U.S. would not disagree with the classification of these options as ADR methods, most publications from the United States place a greater emphasis on dispute review boards (Spear and Largent 2010). This is because as of 2007, dispute review boards, which originated in the United States, were a new concept

in the United Kingdom (Newport 2007). The placement of the DRB concept at number seven of seven on the list in the 2006 publication leads one to believe DRBs are not the primary ADR method abroad, or at least in the U.K.

Towards the end of the work, Klien begins the discussion of DRBs by mentioning they are “becoming more and more popular for larger projects.” He then describes the DRB structure differently than most U.S. publications do. He describes a board of three to five individuals, whereas in the U.S. the board would be described as containing one to three members. The issue of payment is another differentiator. Mr. Klien describes a DRB process by which the owner pays 100% of the cost, but the board is still viewed as neutral. This is different from American DRBs, which typically split the cost 50/50 between contractor and owner (Klien 2006). Some do believe the owner still actually pays 100% even in the American model because the contractor simply builds this cost into the bids. On the other hand, it could be argued that the contractor has the incentive of extra profit should the planned DRB costs not be realized (Klien 2006).

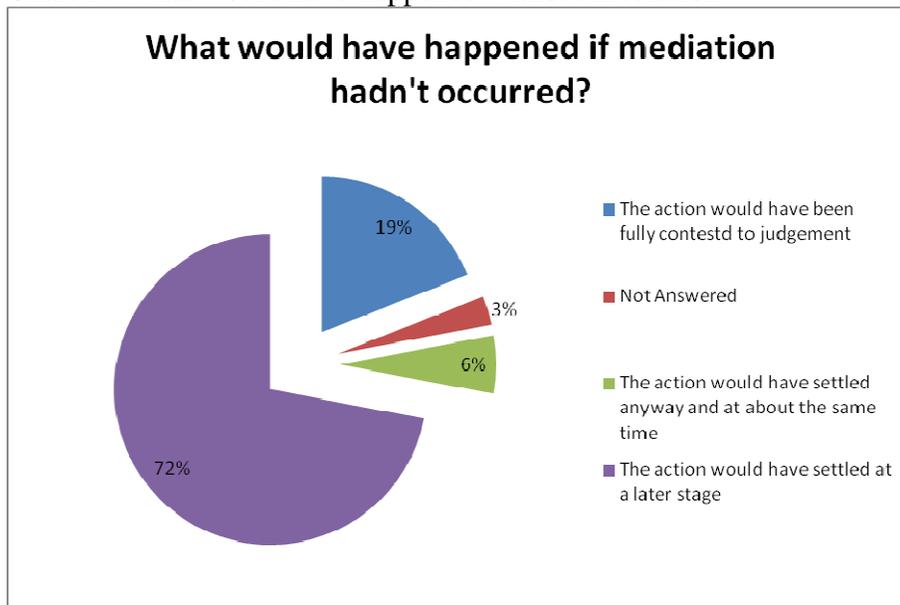
Since the DRB concept is still in the formative stages in the UK, the remainder of the analysis of the British publications focuses on a more popular ADR method. This method is referred to as mediation and is recognized in both the U.S. and UK. Put simply, the mediation process is an informal exercise in which an appointed mediator meets privately with each party to hear arguments after reviewing relevant project documents. One of the main goals of these private meetings is to reduce expectations on both sides, drawing both closer to common ground. Once the mediator feels the two parties are close to common ground, the mediator facilitates a meeting with the two parties present and attempts to finalize a mutually agreeable settlement (Klien 2006).

This next work analyzed deals solely with mediation in the United Kingdom, again underscoring its popularity. This also indirectly points to DRBs as less popular as they are not even mentioned in passing in this publication. The author Nicholas Gould is a partner at Fenwick Elliot in London. Mr. Gould explains that the use of construction mediation in England is no longer a new phenomenon. This is despite the fact that a special English court has been established to handle construction litigation. Originally named the Official Referees, this court was renamed the Technology and Construction Court or TCC in 1998. One of the goals of Gould's publication was to gain relevant data on the effectiveness of mediation. Two of the measures of effectiveness were purely whether mediation avoided litigation and measuring associated cost savings (Gould 2009).

While data in this article is related strictly to mediation and not DRBs, it is still relevant because it indirectly makes a strong case for DRBs. Compared to DRBs, mediation is more of an afterthought attempt at ADR involving mostly lawyers. If mediation in this context can be effective at minimizing dispute costs by avoiding litigation, imagine the effectiveness of more widespread use of DRBs in the U.K. It is reasonable to conclude that a process with attributes such as up-front project involvement of construction industry experts would be even more beneficial. Overall, the data presented in this publication further substantiates the CDOT position that ADR is a best practice on projects meeting certain criteria. The data was collected by a questioner of "parties to litigation in the TCC." This can be translated as parties that have filed legal proceedings with the TCC. Many of the parties that file legal proceedings with the TCC settle out of court through mediation.

One shortcoming of the survey data in this article is that the sample size is not readily available although it can be inferred to be greater than 100 from the details of the study. That said, the results of the survey, displayed below in Chart 1, provide a strong endorsement for ADR and more specifically mediation. When asked, “What would have happened if the mediation had not taken place?” an overwhelming majority, or 72% of the respondents, replied that “the action would have settled at a later stage.” Only 7% of the respondents indicated they thought “The action would have settled anyway and about the same time” (Gould 2009).

Chart 1. What would have happened without mediation

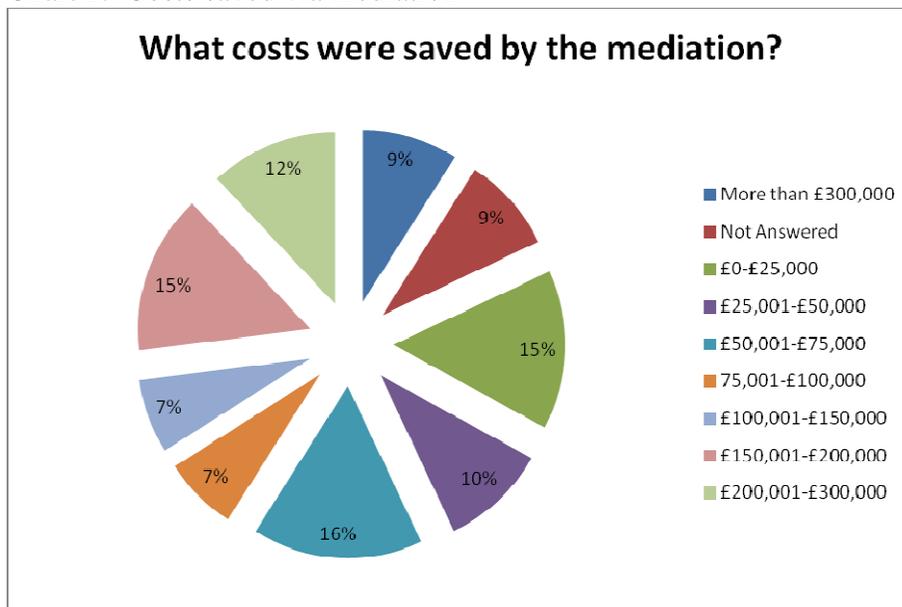


Source: Data adapted from Gould 2009

The results related to cost savings were even more compelling. Chart 2 displays the results to the question, “What costs were saved by the mediation?” Over 9% stated they had saved over £300,000 while 41% believed they had saved £75,000 to £300,000. While the numbers are impressive, there is some cause for skepticism. Successfully predicting the future has always proven elusive. It is reasonable to assume the

professionals surveyed would have solid experience with estimating legal costs should their case proceed to litigation. Still, it is reasonable to challenge accuracy when attempting to pinpoint even a cost savings range credited to mediation. This is especially true when these cost savings are associated with fictitious alternate litigation scenarios. While the predicted mediation cost savings can be questioned, what cannot be disputed is the momentum associated with mediation and its effectiveness at avoiding litigation thus far.

Chart 2. Costs saved via mediation



Source: Data adapted from Gould 2009

The literature about ADR in the United Kingdom confirms that the United States appears to be on the leading edge of DRB practice. It is possible that other global territories are utilizing DRBs undetected by this research. However, sources from more exotic locales were also analyzed in this research to confirm the assertion that the U.S. is on the leading edge of DRB practice. For example, the recommendations from a recent article on construction dispute management in Zambia suggest ADR is in the formative

stages there as well. The recommendations include forming a campaign to inform government agencies on ADR. Again, DRBs are not specifically mentioned in this publication (Musonda and Muya 2011). While no further insights into DRBs were specifically gained by looking at its use abroad, it is instructive to learn more about ADR awareness outside the United States.

2.6 CONCLUSION & RECOMMENDATIONS

Overall, the literature suggests that while ADR and more specifically DRBs are far from industry standard, they are gaining momentum. Based on a variety of sources representing a variety of industries, DRBs appear to be a best practice on projects of certain criteria. It also appears that CDOT specifications are generally in step with those DOTs utilizing DRB processes. However, there are four recommendations for potential improvement for to the CDOT specifications or construction manual, described in detail in the respective section of the literature review. These recommendations are as follows:

1. Consider making formal DRB training a requirement for DRB members to be eligible for the suggested member list as do California and Florida.
2. Consider including further guidance on DRB formation in the construction manual. The FDOT specifications can be used as an example to answer these protocol questions.
3. Consider including “for cause” language related to member removal instead of requiring both parties to agree upon member removal.
4. Consider the addition of language explicitly stating the obligations associated with the DRB terminate at the same time the construction contract terminates.

3.0 RESEARCH METHODOLOGY

The majority of the primary research will focus on the results of a survey released to CDOT employees and consultants who administer construction projects. This survey concentrates on CDOT DRB specification familiarity and acceptance among employees administering construction projects. A summary of the problem is, unfamiliarity or resistance to the CDOT DRB specifications leads to improper implementation or underutilization of DRB procedures. This can adversely affect project progress and potentially lead to increased construction dispute settlement costs. To validate the relevance of this survey, these items had to first be established:

1. Whether CDOT properly aligns with industry experts in its opinion that DRBs are a best practice on projects meeting certain criteria.
2. Whether the DRB specifications that CDOT seeks compliance on are adequate compared to other states.

The literature review showed that CDOT is in step with industry standards in both their DRB stance and DRB specifications. A literature review typically takes the form of secondary research, but this literature review was actually a mixture of secondary and primary research. It took the form of secondary research when simply reporting the opinions of industry experts. However, there were two major instances where the literature review crossed over into the primary research realm:

1. In comparing and contrasting various DOT DRB specifications to identify specific potential deficiencies in the CDOT specifications.
2. In analyzing DRB case law issues that were revealed in McMillan's work to again identify specific potential deficiencies in the CDOT specifications.

The analysis of the survey results will offer insight into questions 3-7 found in the introduction. These questions are:

3. Are those responsible for administering construction projects familiar with the CDOT specifications related to DRBs?
4. If officials are familiar with the specifications, have project level CDOT officials fully bought into DRBs as a best practice?
5. If CDOT officials are unfamiliar, why are they unfamiliar?
6. If CDOT officials are familiar but resistant to utilizing standard ADR specifications, what is the root cause?
7. Finally, is there a correlation between DRB training and DRB opinions? In other words, are those who have attended CDOT DRB training more likely to have positive opinions about DRBs?

The anonymous ten-question survey was administered via SurveyMonkey[®]. The invitation to participate in the survey was distributed by email to those believed to be involved in the administration of CDOT construction projects. These invitees included consultants, construction project managers and their assistants, resident engineers who manage the construction project managers, and the program engineers who manage and

support the resident engineers in addressing construction disputes. The CDOT guidelines for broadcasting surveys dictated the survey first be sent to the resident engineers and program engineers. The resident engineers would then choose whether to forward the survey to the appropriate staff including any consultants functioning as an extension of their construction administration staff.

Given the CDOT guidelines for survey administration, it is difficult to assess exactly how many individuals the survey was distributed to since distribution was largely at the discretion of the resident engineers. The survey was emailed to all 55 resident engineers (PE IIs) in the state of Colorado and 13 program engineers (PE IIIs). It is reasonable to assume that on average each resident engineer supervises approximately two construction project managers. These two construction project managers could be either CDOT employees or consultants. Based on these presumptions, it can be assumed that approximately 178 individuals had the opportunity to complete the survey. The informal response rate was 39% given 70 individuals responded. Statistically speaking, 70 is a large sample size given the $n=30$ threshold. A blank copy of the survey is included as Appendix F.

4.0 CDOT SURVEY RESULTS

The first survey question was a filter to ensure only those responsible for administering construction projects in some capacity completed the survey. Of the 70 respondents, 100% said they were involved in the administration of construction projects. The second question offers a cross section of the respondent's position classifications. In CDOT's hierarchy, "Engineering/Physical Sci. Tech." are more commonly known as

civil engineering technicians. The CEPM series is an acronym for construction engineering project managers. These construction project managers do not hold a professional engineering license. CEPMs are typically seasoned construction project managers who operate under a resident engineer's (PE II) professional license.

The PE I designation is indicative of an entry level project manager holding a professional engineering license. PE IIIs have previously been referred to as program engineers. Chart 3 below reflects the outcome of Question 2. An overwhelming majority of the respondents were PE IIs. This was a favorable result because out of the five position classifications that responded, the resident engineers have the most power in deciding when and if DRBs are utilized. The other classifications can make suggestions, but ultimately the construction project is under the responsible charge of the resident engineer.

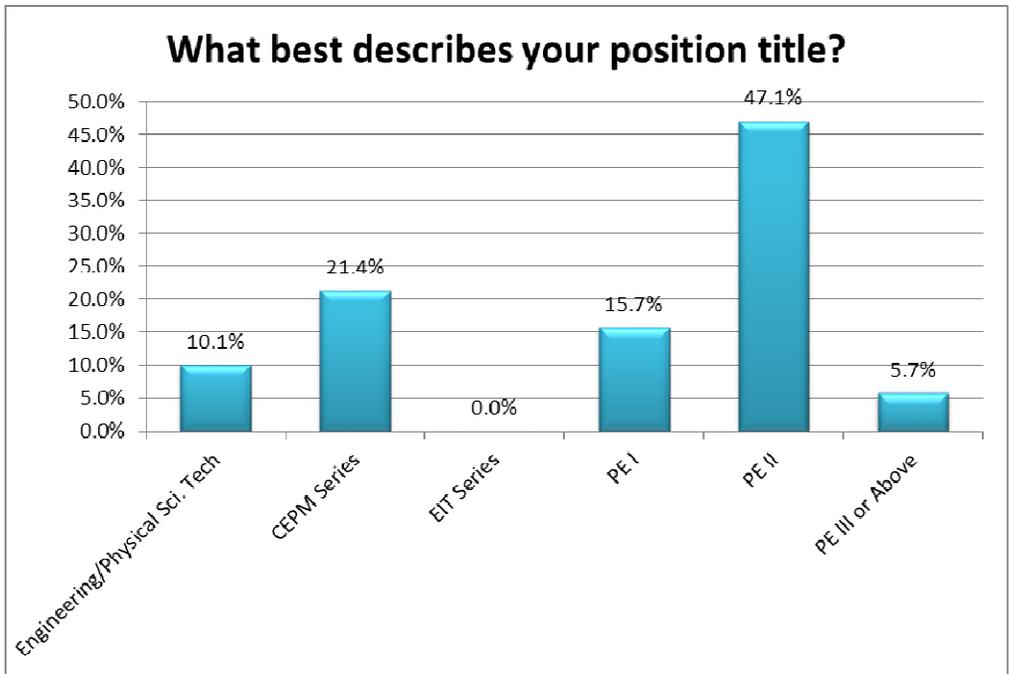


Chart 3. Job classification cross section

4.1 DRB SPECIFICATION FAMILIARITY

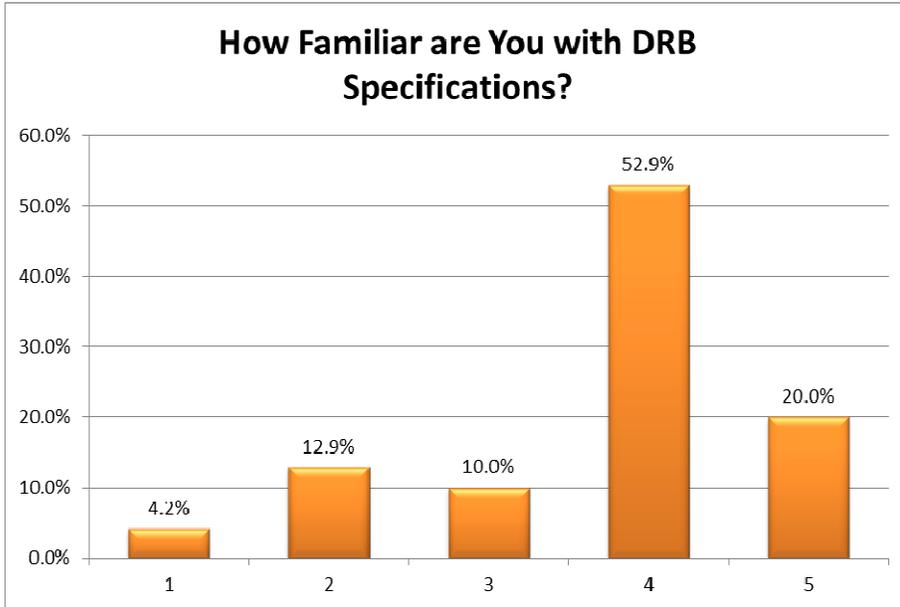


Chart 4. DRB specification familiarity

Question 3 rated CDOT dispute resolution specification familiarity on a scale from 1 to 5, with 5 being completely familiar. As a follow-up, Question 4 probed into the reason behind the respondent's DRB specification familiarity level. Question 4 was not particularly useful because as displayed in Chart 4, only 27% of respondents reported a familiarity level of 1-3. Of the 27% who were unfamiliar, most were classified as not yet encountering a situation where DRBs were required on their projects.

The results from Question 5 were interesting because despite the reporting of a high level of DRB specification familiarity, 63% of respondents had not attended DRB training. The follow up Question 6 explored the reasons behind 63% of respondents not attending DRB training. The percentage of respondents self-taught by reading the specifications was 26% and only 17% were unaware DRB training exists. Only three respondents reported issues associated with training not being available within their physical location.

4.2 DRB PERCEPTIONS

The outcome of Question 7 was surprising given the author’s previous experience with DRB perceptions with a small sample size. As evident in Chart 5, on a scale of 1 to 5, 86% of respondents reported a moderate to completely positive perception rating of DRBs. Only 4.3% of respondents reported a negative perception of DRBs. Participants were instructed to answer “N/A” if they were not familiar enough with DRBs to report a perception. This made Question 8 mostly irrelevant as it delved into why respondents’ perceptions might be negative. Of the three participants with negative perceptions, one commented they do not believe in standing DRBs. This individual thought it was best to assemble a DRB if the need arises. Another respondent asserted that DRB utilization reflects negatively upon CDOT, while one more suggested that previous DRB decisions appear to be arbitrary and capricious.

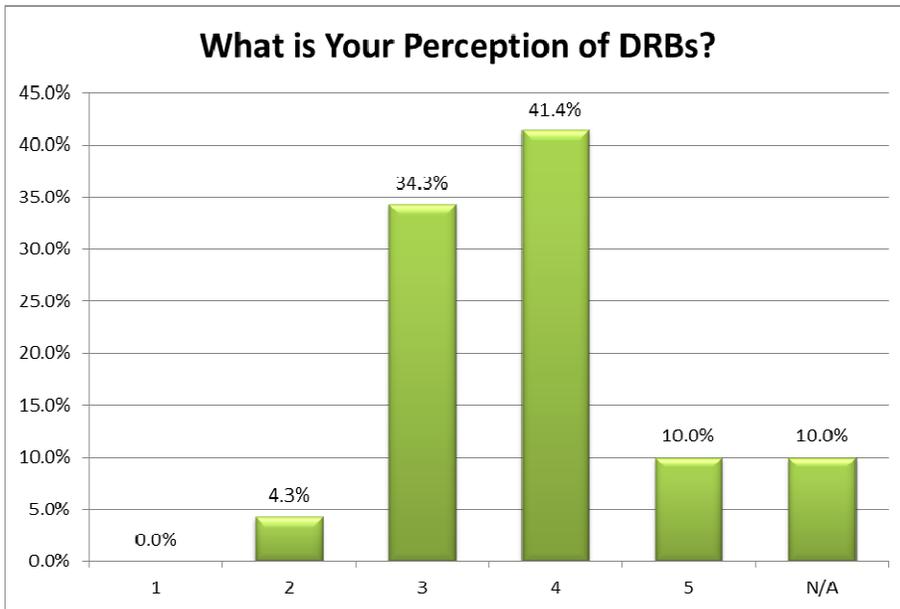


Chart 5. DRB perceptions

4.3 DRB EXPERIENCE

Question 9 explored whether CDOT staff had actually utilized dispute resolution boards. This question also evaluated on a scale of 1 to 5 whether the DRB experience was positive or negative. The detailed results of Question 9 are included as Chart 6.

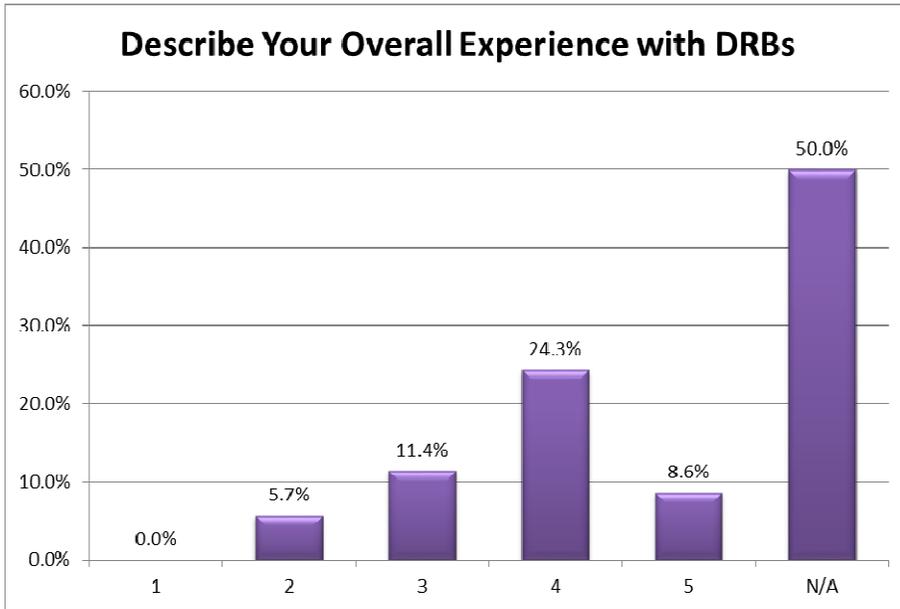


Chart 6. DRB usage experience

Fifty percent of the participants answered N/A as they had never used DRBs. Of the 50% participants with DRB experience, 44.3% reported a moderate to absolutely positive DRB experience. Of the four respondents who reported a negative DRB experience, the issues encountered were:

1. The DRB was too relaxed on the rules of discovery.
2. The DRB appeared to disregard CDOT Standard Specifications and judged by their own opinion.
3. The DRB was not cost effective.

4. Another individual reported a deficiency with the standard special provisions on their project. The deficiency was that provisions did not allow for an advisory opinion to be informally issued by the standing DRB, and therefore the issue turned into a formal dispute. This same individual felt the cost of the standing DRB was unjustified and eventually disbanded the standing DRB. The CDOT standard special provisions now provide language making quick advisory opinions available. An advisory opinion in the CDOT specifications is a method by which an issue can be informally brought before the DRB for a merit based opinion. In other words, the DRB can be briefed on the issue by both parties. The DRB can then quickly relay whether a potential dispute has merit but they do not offer any opinions associated with merit.

5.0 CONCLUSIONS

The survey results indicated that employees felt mostly familiar with CDOT DRB specifications. The results also reflected a consensus of “buy in” regarding DRB procedures as most respondents reported a moderate to completely positive perception of DRBs. However, it was interesting that while only 50% of respondents had actually used DRBs on projects, 73% of respondents reported DRB specification familiarity levels of 4 to 5. Added to this is the fact that only 37% of respondents had attended DRB training. The professionals occupying the position classifications surveyed in this research are under notable pressure to be knowledgeable on a sometimes daunting wide range of subjects. Being self-taught by reading the specifications is possible, but it is also possible that participants were potentially somewhat overly confident in their level of DRB familiarity.

Despite the suggestion that the reporting of DRB familiarity may have been somewhat inflated, the results are overwhelmingly good for CDOT. Familiarity is likely simply linked to the fact that only 50% of these construction administrators have found themselves in a position where DRBs are required. In Colorado, very few disputes are morphing into claims that go to litigation. The sheer existence of dispute resolution infrastructure is likely at least partially responsible for DRB specifications not being required. The survey results are overwhelmingly positive for CDOT mostly because of the moderate to completely positive perception of DRBs. This indicates project level employees are mostly open to the implementation of DRBs on projects should it be required.

There is little reason to question the accuracy of the reporting of DRB perceptions given the anonymity of the surveys and the historically candid nature of CDOT personnel. It was previously asserted that resident engineers have the greatest power in deciding when and if DRBs are used on their projects. The excellent response rate among resident engineers boded well for the legitimacy of this survey. Thirty-three out of fifty-five total CDOT REs responded to the survey. Survey participation is typically attractive to individuals with strong opinions on a subject. Using this logic, it could be assumed the opportunity to participate in the survey would have drawn out those with negative DRB perceptions. The mostly positive perception among the 60% of REs who responded is indicative of a consensus of DRB “buy in” among REs throughout the state of Colorado.

Overall, the conclusion of this research is that CDOT is set up for continued DRB success. This is especially true if CDOT considers the four modifications to the DRB specifications provided in the literature review conclusion. There does not appear to be a correlation between a lack of formal DRB training and negative perceptions of DRBs. This conclusion is drawn from the fact that 63% of survey participants have not attended DRB training and the overwhelming majority had a moderate to completely positive perception of DRBs. Still, there is one improvement recommendation for CDOT resulting from the survey related to DRB training.

The results regarding perceptions are good news, but most individuals have not used DRBs on projects and most individuals have not attended DRB training. More importantly, 55% of the resident engineers surveyed have not attended DRB training. Given the influence of the RE, a recommendation to CDOT is to consider assessing the

number of REs who normally manage projects meeting the CDOT criteria for DRB usage. This information can be used to determine whether it is appropriate to encourage specific REs to attend DRB training. It is usually not cost effective or necessary to utilize DRBs on small mill and overlay projects for example. If REs who manage large and/or complex projects then choose to attend DRB training, they can then discern whether members of their staff should also attend DRB training.

This training consideration is important as CDOT's DRB training is valuable in explaining how DRBs can benefit REs and when DRB use is appropriate. One potential benefit to REs that is not evident from reading the specifications is that DRBs can reduce the stress level of the RE by offering an outlet for a dispute that has reached an impasse. When the RE has expended the appropriate level of effort in attempting to solve the dispute at the project level, the RE can release this burden to an independent body to render a judgment. Besides reducing stress, this outlet also allows the resident engineer to move on and more productively focus on their wide range of responsibilities outside resolving one dispute.

6.0 SUGGESTIONS FOR ADDITIONAL WORK

The research has shown that while the use of DRBs are not widespread among DOTs, it does appear to be gaining traction. With multiple independent data sources touting DRB effectiveness, it can be assumed that other states will follow suit. As more states utilize DRBs and begin tracking DRB expenditures, more data will be available. If the state of economic uncertainty continues, increased scrutiny of change order costs is likely. This is true even if construction disputes are not morphing into claims that go to litigation. Assuming better data will be available in the future, investigating any correlation between the underutilization of DRB specifications and increased change order totals is a suggestion for future work. This is of interest given the current controversy associated with the assertion of any correlation.

This research provided specific DRB cost data from various DOTs. The sources explored in this research provided sparse information related to the cost to benefit ratios of DRBs. The data uncovered was not conclusive enough to report. An additional suggestion for future work is more specific analysis of DRB cost to benefit ratios as better data comes available. For example, are there fewer disputes on projects where DRBs are in place or readily available? Even with more information on actual total DRB costs on projects conclusive ratios will be difficult to obtain. This will still be difficult because the majority of the benefit cost involves theoretical expenses that never occurred because litigation was avoided. However, reasonable assumptions could be made on projects where litigation was avoided by analyzing the litigation fees on a similar project with similar claims.

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Appendix A

2006 QAR

COLORADO DEPARTMENT OF TRANSPORTATION

QUALITY ASSURANCE REVIEW

Claims Process

November 2006

Quality Assurance Review Claims Process

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TEAM MEMBERS

QIC Champion

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QAR Team Leaders

Dennis Largent **CDOT, Area Engineer**
Chris Horn **FHWA**

QAR Team Members

Mark Mueller **CDOT** **Region 1**

Claims Process Quality Assurance review

Purpose – The purpose of this QAR was to review the claims procedure to identify effectiveness and improvements to facilitate an expeditious process. The CDOT and Federal Highway Administration Quality Improvement Council (QIC) with concurrence from the Executive Management Team determined that a Quality Assurance Review (QAR) was necessary for the claims process.

Scope – The scope of this effort was to obtain statewide information related to the construction claims process. The QAR interviews were conducted during October, November and December of 2005 and included construction Project Engineers, Resident Engineers, Program Engineers from each CDOT Region, the CDOT Audit Unit and Colorado Contractors selected by the Colorado Contractors Association. The information obtained through these interviews was used to identify problems and provide suggestions for subsequent efforts to improve the Claims Process. The interviews were based on a standardized list of questions and allowed for follow-up questions. 100 past claims from FY 2001 to FY 2007 were analyzed to identify basis of claims and determine if there were trends to causes of claims. The QAR was conducted in accordance with current QAR process procedures and was consistent with the QIC direction.

Claims Process Executive Summary

Recommendations –

1. Establish uniform enforcement/application of specifications and require contract administration training courses, including CPM Scheduling for the RE, PE, Asst PE and Inspector levels.
2. Establish a joint CDOT/CCA/FHWA Round Table for discussion of specification enforcement and interpretation. (Consider including ACEC representative)
3. Implementation of the “Partnering” specification on all projects should continue.
4. Establish a joint CDOT/CCA/FHWA team to review and update Standard Specification 105.21. (Consider including CDOT Audit Unit, AG and ACEC representative)
5. Continue to track and analyze claims to identify trends in causes of claims.
6. The Task Force should develop alternative dispute resolution processes for application on all CDOT projects.

Reducing the number and size of claims would benefit both CDOT and the Contractors. The recommendations, if implemented, would improve CDOT and Contractor personnel’s abilities to resolve disputes at the lowest level and avoid claims.

The claims process includes dispute resolution and claims avoidance but what has been evident in the analysis of past and current claims and expressed by the interviewees is that both parties have been entrenched in their positions to such an extent that resolution at the project level has been impossible. Dispute resolution and claims avoidance training for CDOT and or joint training with contractor personnel would be beneficial. The cost to implement these recommendations would not represent a significant increase to the projected training budget or projected staff involvement in committees/Task Forces. The potential savings from decreasing the number and size of claims may be significant. The QAR team requests that due consideration be given these recommendations.

Major Observations and Recommendations based on interviews –

32 interviewees who had claims filed on at least one project identified the basis of claim for those claims as:

Changed or differing site conditions = 10

Material changes or out of specification materials = 6

Utility delays = 3

Plan or specification errors or Differing interpretations = 5

Time or schedule issues = 5

ROW issues = 1

Other causes = 2

The major observations of the interviewees related to the claims process and recommendations of the QAR TF are as follows:

1. Consistent enforcement of CDOT specifications.

- a. 21 of 32 CDOT Construction personnel, 2 of 2 AG's office representatives, and 6 of 6 CCA interviewees expressed that consistent enforcement of specifications was needed.

- 1.) The QAR TF will work together with the Project Development Engineering Training Program to develop contract administration training.

2. Additional training is needed.

- a. 18 of 32 CDOT Construction personnel and 6 of 6 CCA interviewees expressed that training in areas of claims avoidance, dispute resolution, scheduling, contract administration and change order preparation was needed.

- 1.) The QAR TF will work together with the Project Development Engineering Training Program to develop the proper training.

3. Enforce timeframes as stated in the Claims Specification.

- a. 10 of 32 Construction personnel, 2 of 2 CDOT Audit Unit personnel, and 2 of 2 AG's office interviewees expressed that the Claims specification timeframes need to be strictly enforced.

The 6 CCA interviewees observation was that CDOT always uses the maximum amount of time allowed and that CDOT uses the timeframes against the Contractors.

- 1.)The QAR TF will work together with the Project Development Engineering Training Program to develop contract administration training that emphasis's consistent enforcement of the specification.

- 2.)The QAR TF will work together with CCA to establish a "Roundtable" form to discuss this and other claims issues.

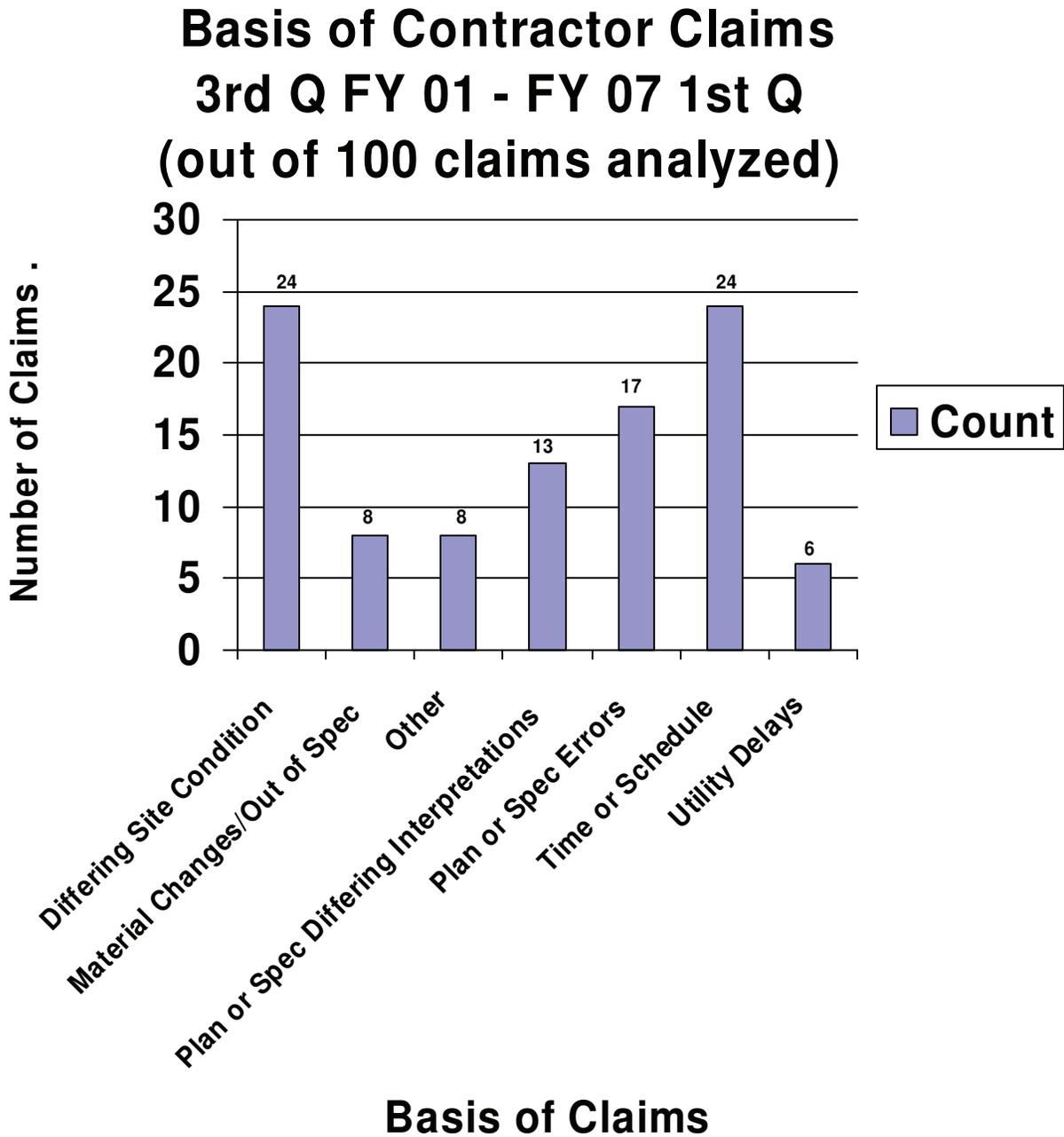
4. CCA expressed that it was also their observation that finances are playing too large a role in decision making.

- b. The QAR TF will work with CCA to establish a "Roundtable" form to discuss this and other claims issues.

Major Observations and Recommendations based on analysis of past claims:

The analysis of claims from the 3rd quarter of FY 2001 to the 1st quarter of FY 2007 provided the following information.

Of 100 claims analyzed the basis of claim identified was:



A direct comparison of the total number of active construction projects totaling a specific construction budget to the number of those projects with claims and the total dollar amount claimed was attempted but the active construction project data could not be collected. Therefore a comparison of the number of projects with claims and total dollar amount claimed was made to the number of construction projects reaching final acceptance and the total contractor payments made on those projects in FY's 2002 to 2006. While this was not the most accurate comparison that could be made it is an indicator of the relationship of the size of CDOT's construction program to the number of projects with claims and the size of those claims filed in each Fiscal Year.

In FY 2002 there were 123 construction projects that reached final acceptance. The contractor payments on those projects totaled approximately \$354 million dollars. During FY 2002 there were 17 claims being tracked with the total claimed amount being approximately \$11 million dollars.

In FY 2003 there were 113 construction projects that reached final acceptance. The contractor payments on those projects totaled approximately \$388 million dollars. During FY 2003 there were 23 claims being tracked with the total claimed amount being approximately \$11 million dollars.

In FY 2004 there were 151 construction projects that reached final acceptance. The contractor payments on those projects totaled approximately \$537 million dollars. During FY 2004 there were 38 claims being tracked with the total claimed amount being approximately \$15 million dollars.

In FY 2005 there were 131 construction projects that reached final acceptance. The contractor payments on those projects totaled approximately \$441 million dollars. During FY 2005 there were 31 claims being tracked with the total claimed amount being approximately \$25 million dollars.

In FY 2006 there were 169 construction projects that reached final acceptance. The contractor payments on those projects totaled approximately \$581 million dollars. During FY 2006 there were 40 claims tracked with the total claimed amount being approximately \$36 million dollars.

FYI – The third quarter of FY 2001 was the first data kept on claims. The construction contract payment data for FY 2001 was not available at the time this report was written but there were 5 claims being tracked for approximately \$4 million dollars in the 3rd quarter of FY 2001.

Fiscal Year	Number of Final Estimates Approved	Total Net Payments	# of Claims in database	Percentage of # of Claims to # of projects	approx \$ amt of Claims	Percentage of claim amount to total payments
2002	123	\$354,341,868	17	13.8	11,000,000	3.1
2003	113	\$388,742,706	23	20.4	11,000,000	2.8
2004	151	\$537,288,787	38	25.2	15,000,000	2.8
2005	131	\$441,358,858	31	23.7	25,000,000	5.7
2006	169	\$581,534,579	40	23.7	36,000,000	6.2

In FY 2002 CDOT could expect approximately 1 in 7 projects would have a claim and the claimed dollar amount would be approximately 3% of the contracted dollar amount of the project. In FY 2006 these figures had risen to approximately 1 in 4 projects would have a claim and the claimed dollar amount would be approximately 6% of the contracted amount.

The number of projects completed in FY 2006 (169) increased by 37% from FY 2002 (123) and the total net earnings of those projects increased by 64% (\$354M to \$581M). The total number of claims increased by 135% (17 to 40) and the total dollar amount claims increased by 227% (\$11M to \$36M). The number and size of claims has grown disproportionately relative to the growth of the construction program.

The major observations from the past claims database and recommendations of the QAR TF are as follows:

1) Further definition of “Differing Site Conditions” is necessary to analyze this specific “Basis of Claim”.

a.) Specific reasons identifying what the differing conditions were is needed to analyze past claims. This data is, for the most part, not available. The “Claims Status Report” form has been modified to identify specific reason for the differing condition for future claims. This basis of claim should be monitored closely and analyzed to identify specific areas that need to be addressed.

2.) Time and or Scheduling claims should be bound by the question – “Is the time dispute an excusable delay?”. This appears to be a straight forward question that when answered “yes” should result in an analysis of the CPM schedule and the amount of time added justified by the CPM schedule. When answered “no” the additional time is not allowed by specification. Why then were there 24 of the 100 analyzed past claims a result of time disputes? The underlying reason for these claims were “Liquidated Damages”. When LD’s were assessed the contractors sought to reduce the amount of the LD’s by claiming owner caused delays. The delays were typically not disputed at the time they occurred but at the end of the project. These disputes were therefore denied compensation because CDOT was not notified at the time of the delay. These disputes were also typically denied because the reason for the delay did not meet the definition for an excusable delay.

a.) Analysis of time disputes should utilize the CPM schedules required by the contract. Increased training in CPM scheduling will aid in decreasing the number of claims in this area.

1.) Increased effort in analyzing the baseline CPM schedules for logic, methods statements and production rates should be emphasized in training.

b.) Consistent enforcement of the specification requiring monthly updates of the CPM Schedules should be done. Analysis of the monthly updates should provide indication of the contractor’s ability to complete the project on time. The specification requires a “Job Progress Narrative Report” be submitted with each update. This report is required to include such items as problem areas, current and anticipated delaying factors, and their effects, impacts to the job or project completion and any corrective action proposed or taken. This specification requirement should be enforced on a consistent basis. The Claims specification should reference the Job Progress Narrative Report for timely notification of time disputes.

3.) Plan or Specification Errors and Differing Interpretations of Plan or Specifications combined for 30 of the 100 analyzed past claims. This constituted the number one basis of claim.

- a.) The Claims QAR Task Force will work together with the Project Development Engineering Training Program to develop plan preparation and reading and specification writing training.
- b.) Plans and specifications should be consistent statewide.
 - 1.) The CADD Unit, in implementing the Microstation and INRoads design platform, is configuring the design standards to improve the consistency of plans statewide.
 - 2.) Project Special Provisions are required to be approved by the Standards and Specification Unit. This requirement must be enforced. Emphasis on this will be made in training.

An Implementation Plan –

The Implementation Plan entails the QAR task force work with the Project Development Engineering Training Program Coordinator to develop the appropriate training courses. Members of the QAR task force along with members of CCA, FHWA, the AG's office and possibly ACEC shall establish a joint roundtable meeting for discussion of the claims specification. This joint team shall review and revise the claims specification as needed. The role of the task force will be to determine the actual scope of the effort and make decisions regarding the best administrative as well as operational solutions to provide for a straight forward and manageable process.

The implementation of these recommendations has already begun. The Engineering Training Program has already begun development of contract administration and CPM Scheduling training courses. A CDOT/CCA/FHWA Task Force has been formed to develop alternative dispute resolution guidelines. This same TF will also review and revise the claims and partnering specifications as necessary. The claims process will be included as an agenda item on all 2007 CDOT\CCA Regional Roundtable meetings. The Project Development Branch has developed a new claims database that will allow queries of the data and reports in many different formats to be used to analyze claims. The process of reporting the necessary data by the Project Engineers to Project Development Branch is also being updated to a web based site and automated.

Implementation Costs and Benefits -

The implementation costs for training will be included in the budget of the Engineering Training Program. The costs associated with the task force work will be borne by the units each individual is assigned to. Costs for maintaining the claims database, analyzing the data and producing reports from the database will be borne by Project Development Branch.

The benefits of increased training would be more consistent enforcement and application of specifications, a better understanding and use of alternative dispute resolution methods and improved contract administration practices. Successful achievement of this should result in fewer claims.

The benefits of reviewing and revising Standard Specification 105.21 would be to include guidelines for resolving disputes at the lowest level. The current claims process can last in excess of two years if arbitration is requested. A timely and efficient process could help resolve claims faster and with less cost to both CDOT and contractors. While training may reduce claims, an efficient process is needed for those claims that are not resolved at the project level.

Financial Impact –

Determining the absolute cost of this effort is difficult. However, the upfront investment of implementation of the recommendations should result in fewer claims and an overall cost savings.

The direct financial impact associated with implementation is the associated cost of the task force members and associated cost of developing and implementing training courses.

Improving dispute resolution and claims avoidance abilities of construction project personnel and Resident Engineers and improving the claims process itself should result in a financial savings to not only CDOT but the Contractors as well.

Cost/Benefit Analysis –

A direct Cost/Benefit analysis can not be made until actual costs of implementation can be established and an estimate of reduction in claims can be made.

There is however another type of cost/benefit that should also be considered, and that is CDOT and Contractor relations. Improvement in consistent enforcement of specifications and dispute resolution processes would lessen the occasional adversarial relationship between CDOT project personnel and contractor personnel. Decreasing the number and size of claims would also result in a decrease in the amount of time project personnel have to spend dealing with claims thus increasing the amount of time that can be spent on other project related needs.

Impact if not implemented. -

The number and size of claims filed by Contractors will continue to rise. Claim costs will continue to rise for both CDOT and the Contractors.

CONCLUSION AND SUMMARY –

Reducing the number and size of claims would benefit both CDOT and the Contractors. The recommendations, if implemented, would improve project personnel's abilities to resolve disputes at the project level and avoid claims.

The claims process includes dispute resolution and claims avoidance but what has been evident in most, if not all, of the current claims is that both parties have been entrenched in their positions to such an extent that resolution at the project level has been impossible. Dispute resolution and claims avoidance training for CDOT and or joint training with contractor personnel would be beneficial and is recommended. The inclusion of alternative dispute resolution methods in the claims process to resolve disputes at the lowest level will be a major benefit. The Task Force should review the Partnering and dispute resolution processes being used by the TREX and COSMIX projects for similar application on all CDOT projects.

The cost to implement these recommendations would not represent a significant increase to the projected training budget or projected staff involvement in committees/Task Forces. The potential savings in both dollars and time from decreasing the number and size of claims may be significant. The QAR team requests that due consideration be given these recommendations.

Table 1. QAR Implementation Plan

Who?	What?	When?	Cost of Implementation	Benefit of Implementation
Proj Devel Branch (PDB)	1.) Establish core curriculum training for enforcement/application of specifications and contract administration, including CPM Scheduling, for PE II's, PE I's, EIT I-III's, CEPM I and II's.	Underway	The implementation costs for staff involvement would be borne by the units participating in the class preparation. A funding source has not been designated for the cost of developing & providing the course(s). The cost of sending personnel to the training would be borne by the individual's cost.	The benefits would be more consistent enforcement and application of specifications and contract administration. Successful achievement of this should result in fewer claims.
PDB	2.) Establish a joint CDOT/CCA/FHWA Round Table Panel for discussion of specification enforcement and interpretation.	3 rd Q FY 07		
PDB	3.) Review and revise the Construction Manual to include revisions to Standard Specification 105.21 and other recommendations of the Task Force.	In conjunction w/spec revision		
PDB	1.) Joint training with CDOT and CCA on dispute resolution and claims avoidance practices for all project supervisory personnel.	FY 08	The implementation costs for staff involvement would be borne by the units participating in the class preparation. Existing funds can be used to absorb the cost of providing the course(s). The cost of sending personnel to the training would be borne by the individual's cost centers budgeted training funds.	The benefit of dispute resolution training, partnering and revision of the Claims specification would be more disputes being resolved at the project level and correspondingly fewer claims.
PDB	2.) Continued use of "Partnering" specification on all projects.	Continuous		
ADR TF formed 10/5/06	3.) Review of Standard Specification 105.21 "Disputes and Claims for Contract Adjustments" by a joint CDOT/CCA/FHWA team.	Complete by Jan 2008		
ADR TF formed 10/5/06	4.) Inclusion of "Dispute Resolution Boards" on projects of certain size, type, or complexity.	Complete by Jan 2008		

QAR Claims Process Interview Questions

RE/PE Questions:

- 1) Have you ever handled a claim?
 - i. Explain the nature of the claim.
 - ii. How was the claim handled? Explain the process that was followed.
- 2) How was the PE's decision arrived at and who provided input?
- 3) What process did the Contractor follow after the PE's decision was rendered?
- 4) How was the final decision reached?
- 5) What caused the claim? i.e. plan error, changed condition, change in character of work, written or oral order, delay (CDOT or Contractor caused), interpretation of specifications or plans, etc...
- 6) What type of dispute resolution/claims avoidance procedure was followed before the claim was filed?
- 7) What method of "Partnering" was used on the project?
- 8) What were the experience levels of the CDOT staff (construction and design)? The Contractors and subcontractors staff?
- 9) Was the design in-house or consultant?
 - i. Did it make a difference?
 - ii. What role in the claims process did the design team play?
- 10) Did the contractor submit a construction schedule and method statements per 108.03 before starting work?
 - i. Were monthly updates submitted?
 - ii. What role in the claim did they play?
- 11) When was the written notice of claim submitted in relationship to when the work involved was performed?
- 12) Was an internal audit completed? If so, how was this information incorporated into the PE decision?
- 13) What type of issues were involved with meeting the timeframes for responding to the claim? i.e. internal audit, other workload responsibilities, change in project personnel (promotions, transfers etc...), consultants etc...
- 14) Describe how the experience has effected your decisions since.
- 15) How can the process be improved?

PE III Questions:

- 1) Have you ever handled a claim?
 - i. Explain the nature of the claim.
 - ii. How was the claim handled? Explain the process that was followed.
- 2) How was the final decision reached?
- 3) What caused the claim? i.e. plan error, changed condition, change in character of work, etc...
- 4) What type of Partnering or Dispute Resolution process does the Region use?
- 5) What type of issues were involved with meeting the timeframes for responding to the claim? i.e. other workload responsibilities, change in project personnel (promotions, transfers etc...), consultants etc...
- 6) Describe how the experience has effected your decisions since.
- 7) How can the process be improved?

Audit Unit:

- 1) What difficulties have been experienced in regards to the contractors complying with the specification requiring access to their records?
- 2) What difficulties have been experienced in regards to the contractors keeping “full and complete records of the costs and additional time incurred for each claim”?
- 3) What other difficulties have been encountered with the claims specification?
- 4) What is the length of time needed to perform an audit?
 - a. What factors may influence this timeframe?
- 5) How can the process be improved?

CCA:

- 1) Have you ever filed a claim?
 - a. More than one?
- 2) What process was followed in filing the claim?
- 3) What process was followed in CDOT making a decision regarding the claim?
- 4) What process did you follow after CDOT’s decision was rendered?
- 5) What process was followed to reach the final decision?
- 6) What caused the claim? i.e. plan error, changed condition, change in character of work, written or oral order, delay (CDOT or Contractor caused), interpretation of specifications or plans, etc...
- 7) What type of dispute resolution/claims avoidance procedure did the project and contractor personnel follow before the claim was filed?
- 8) Was there “Partnering” on the project?
- 9) How were the construction schedule and method statements used in resolving the claim?
- 10) When was the written notice of claim submitted in relationship to when the work involved was performed?
- 11) What type of issues were involved with meeting the timeframes for responding to the claim? i.e. internal audit, other workload responsibilities, change in project personnel (promotions, transfers etc...), consultants etc...
- 12) What caused the Contractor or CDOT request a time extension to respond to the claim?
- 13) Describe how the experience has effected your decisions since.
- 14) How can the process be improved?

AG:

- 1) What types of issues have caused claims to reach the AG level?
- 2) At what point in the claim process should the AGs office become involved?
- 3) What are the strong points of the specifications?
- 4) What are the weak points of the specifications?
- 5) How can the process be improved?

Appendix B

CDOT Specifications

105.22

If the inspection discloses any unsatisfactory work, the Engineer will give the Contractor a written list of the work needing correction. Upon correction of the work, another inspection will be made. If the work has been satisfactorily completed, the Engineer will notify the Contractor in writing of the date of final inspection and acceptance. Final acceptance under this subsection does not waive any legal rights contained in subsection 107.21.

105.22 Dispute Resolution. Subsections 105.22, 105.23, and 105.24 detail the process through which the parties (CDOT and the Contractor) agree to resolve any issue that may result in a dispute. The intent of the process is to resolve issues early, efficiently, and as close to the project level as possible. Figure 105-1 in the standard special provisions outlines the process. Specified time frames may be extended by mutual agreement of the Engineer and the Contractor.

A dispute is a disagreement concerning contract price, time, interpretation of the Contract, or all three between the parties at the project level regarding or relating to the Contract. Disputes include, but are not limited to, any disagreement resulting from a delay, a change order, another written order, or an oral order from the Project Engineer, including any direction, instruction, interpretation, or determination by the Project Engineer, interpretations of the Contract provisions, plans, or specifications or the existence of alleged differing site conditions.

The term “merit” refers to the right of a party to recover on a claim or dispute, irrespective of quantum, based on the substance, elements, and grounds of that claim or dispute. The term “quantum” refers to the quantity or amount of compensation or time deserved when a claim or dispute is found to have merit.

Disputes from subcontractors, materials suppliers, or any other entity not party to the Contract shall be submitted through the Contractor. Review of a pass-through dispute does not create privity of Contract between CDOT and the subcontractor.

When an issue arises on the project that cannot be resolved between the parties, either party may consider it a dispute and initiate the dispute resolution process as described in subsection 105.22(b).

If CDOT does not respond within the specified timelines, the Contractor may advance the dispute to the next level.

When the Project Engineer is a Consultant Project Engineer, actions, decisions, and determinations specified herein as made by the Project Engineer shall be made by the Resident Engineer.

A claim will not be accepted by CDOT until all remedies for dispute resolution provided for in subsections 105.22 and 105.23 have been exhausted. If CDOT contends that the Contractor has failed to follow the provisions of subsection 105.22 or 105.23, CDOT will notify the Contractor in writing and provide the Contractor with ten days in which to cure the alleged failure. After the CDOT notice, unless the Engineer grants an exception in writing, failure to comply with the requirements set forth in subsections 105.22, 105.23 and 105.24, shall bar the Contractor from any further administrative, equitable, or legal remedy.

- (a) *Document Retention.* The Contractor shall keep full and complete records of the costs and additional time incurred for each dispute for a period of at least three years after the date of final payment or until the dispute is resolved, whichever is more. The Contractor, subcontractors, and lower tier subcontractors shall provide adequate facilities, acceptable to the Engineer, for an audit during normal business hours. The Contractor shall permit the Engineer or Department auditor to examine and copy those records and all other records required by the Engineer to determine the facts or contentions involved in the dispute. CDOT and CDOT's attorneys and consultants will affirmatively act to protect the records and information from disclosure beyond those persons having a need to know the information for the purpose of making a decision regarding the claim, or for law enforcement purposes. The Contractor shall identify and segregate any documents or information that the Contractor considers particularly sensitive, such as confidential or proprietary information.
- (b) *Initial Dispute Resolution Process.* To initiate the dispute resolution process the Contractor shall provide a written notice of dispute to the Project Engineer upon the failure of the Parties to resolve the issue through negotiation. Disputes will not be considered unless the Contractor has first complied with specified issue resolution processes such as those specified in subsections 104.02, 106.05, 108.08(a), and 108.08(d).

The Contractor shall supplement the written notice of dispute within 15 days with a written Request for Equitable Adjustment (REA) providing the following:

- (1) The date of the dispute
- (2) The nature of the circumstances which caused the dispute
- (3) The Contract provisions and any other basis supporting the Contractor's position
- (4) The estimated dollar cost, if any, of the dispute with supporting documentation
- (5) An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption.

The Contractor shall submit as much of the above information as is reasonably available with the REA and then supplement the REA as additional information becomes available.

- (c) *Project Engineer Review.* Within 15 days after receipt of the REA, the Project Engineer will meet with the Contractor to discuss the merits of the dispute. Within seven days after this meeting, the Project Engineer will issue a written decision on the merits of the dispute.

The Project Engineer will either deny the merits of the dispute or notify the Contractor that the dispute has merit. This determination will include a summary of the relevant facts, Contract provisions supporting the determination, and an evaluation of all scheduling issues that may be involved.

If the dispute is determined to have merit, the Contractor and the Project Engineer will determine the adjustment in payment, schedule, or both within 30 days. When a satisfactory adjustment is determined, it shall be implemented in accordance with subsections 106.05, 108.08, 109.04, 109.05 or 109.10 and the dispute is resolved.

If the Contractor accepts the Project Engineer's denial of the merits of the dispute, the dispute is resolved and no further action will be taken. If the Contractor does not respond in seven days, it will be assumed he has accepted the denial. If the Contractor rejects the Project Engineer's denial of the merits of the dispute or a satisfactory adjustment of payment or schedule cannot be agreed upon within 30 days, the Contractor may further pursue resolution of the dispute by providing written notice to the Resident Engineer within seven days, according to subsection 105.22(d).

- (d) *Resident Engineer Review.* Within seven days after receipt of the Contractor's written notice to the Resident Engineer of unsatisfactory resolution of the dispute, the Project Engineer and Resident Engineer will meet with the Contractor to discuss the dispute. Meetings shall continue weekly for a period of up to 30 days and shall include a Contractor's representative with decision authority above the project level.

If these meetings result in resolution of the dispute, the resolution will be implemented in accordance with subsections 108.08, 109.04, 109.05, or 109.10 and the dispute is resolved.

If these meetings do not result in a resolution or the participants mutually agree that they have reached an impasse, the dispute shall be presented to the Dispute Review Board in accordance with subsection 105.23.

105.23 Dispute Review Board. A Dispute Review Board (DRB) is an independent third party that will provide specialized expertise in technical areas and administration of construction contracts. The DRB will assist in and facilitate the timely and equitable resolution of disputes between CDOT and the Contractor in an effort to avoid animosity and construction delays, and to resolve disputes as close to the project level as possible. The DRB shall be established and operate as provided herein and shall serve as an independent and impartial board.

There are two types of DRBs: the "On Demand DRB" and the "Standing DRB". The DRB shall be an "On Demand DRB" unless a "Standing DRB" is specified in the Contract. An On Demand DRB shall be established only when the Project Engineer initiates a DRB review in accordance with subsection 105.23(a). A Standing DRB, when specified in the Contract, shall be established at the beginning of the project.

- (a) *Initiation of Dispute Review Board Review.* When a dispute has not been resolved in accordance with subsection 105.22, the Project Engineer will initiate the DRB review process within 5 days after the period described in subsection 105.22(d).

- (b) *Formation of Dispute Review Board.* DRBs will be established in accordance with the following procedures:
1. CDOT, in conjunction with the Colorado Contractors Association, will maintain a non-exclusive statewide list of suggested DRB candidates experienced in construction processes and the interpretation of contract documents and the resolution of construction disputes. The Board members shall be experienced in highway and transportation projects. When a DRB is formed, the parties shall execute the agreement set forth in subsection 105.23(1). Either party may add candidates to the list at any time.
 2. If the dispute has a value of \$250,000 or less, the On Demand DRB shall have one member. The Contractor and CDOT shall select the DRB member and execute the agreement within 30 days of initiating the DRB process. If the parties do not agree on the DRB member, each shall select five candidates. Each party shall numerically rank their list using a scale of one to five with one being their first choice and five being their last choice. If common candidates are listed, but the parties cannot agree, that common candidate with the lowest combined numerical ranking shall be selected. If there is no common candidate, the lists shall be combined and each party shall eliminate three candidates from the list. Each party shall then numerically rank the remaining candidates, with No. 1 being the first choice. The candidate with the lowest combined numerical ranking shall be the DRB member.
 3. If the dispute has a value over \$250,000, the On Demand DRB shall have three members. The Contractor and CDOT shall each select a member and those two members shall select a third member to act as the chairperson and execute the agreement within 45 days of initiating the DRB process.
 4. The Standing DRB shall always have three members. The Contractor and CDOT shall each select a member and those two members shall select a third member to act as the chairperson, unless otherwise agreed to by the parties. The Contractor and CDOT shall submit their proposed Standing DRB members at the Preconstruction Conference.
 5. DRB members shall not have been involved in the administration of the project under consideration. DRB candidates shall disclose to the parties the following relationships:
 - (1) Prior employment with either party
 - (2) Prior or current financial interests or ties to either party
 - (3) Prior or current professional relationships with either party
 - (4) Anything else that might bring into question the impartiality or independence of the DRB member

If either party objects to the selection of a potential DRB member based on the disclosures of the potential member, that potential member shall not be placed on the Board.

6. There shall be no ex parte communications with the DRB at any time.
 7. The service of a Board member may be terminated only by written agreement of both parties.
 8. If a Board member resigns, is unable to serve, or is terminated, a new Board member shall be selected within four weeks in the same manner as the Board member who was removed was originally selected.
- (c) *Additional Responsibilities of the Standing Disputes Review Board*
1. General. Within 120 days after the establishment of the Board, the Board shall meet at a mutually agreeable location to:
 - (1) Obtain copies of the Contract documents and Contractor's schedules for each of the Board members.
 - (2) Agree on the location of future meetings, which shall be reasonably close to the project site.
 - (3) Establish an address and telephone number for each Board member for the purposes of Board business.
 2. Regular meetings. Regular meetings of the Board shall be held approximately every 120 to 180 days throughout the life of the Contract, except that this schedule may be modified to suit developments on the job as the work progresses. Regular meetings shall be attended by representatives of the Contractor and the Department.
 3. The Board shall establish an agenda for each meeting which will cover all items that the Board considers necessary to keep it abreast of the project such as construction status, schedule, potential problems and solutions, status of past claims and disputes, and potential claims and disputes. Copies of each agenda shall be submitted to the Contractor and the Department at least seven days before the meeting date. Oral or written presentations or both shall be made by the Contractor and the Department as necessary to give the Board all the data the Board requires to perform its functions. The Board will prepare minutes of each meeting, circulate them to all participants for comments and approval, and issue revised minutes before the next meeting. As a part of each regular meeting, a field inspection trip of all active segments of the work at the project site may be made by the Board, the Contractor, and the Department.
- (d) *Arranging a Dispute Review Board Hearing.* When the Project Engineer initiates the DRB review process, the Project Engineer will:
1. Arrange a hearing between CDOT, the Contractor, and the DRB (date, time, and location) and notify the Contractor at least 15 days before the hearing. Unless otherwise agreed to by both parties the DRB hearing will be held within 30 days after the DRB agreement is signed.

2. Ensure DRB members have copies of all documents previously prepared by the Contractor and CDOT pertaining to the dispute, the DRB request, the Contract documents, and the special provisions at least two weeks before the hearing.

(e) *Pre-Hearing Submittal:* At least ten days prior to the hearing, CDOT and the Contractor shall each prepare and circulate to the DRB and the other party a pre-hearing position paper containing the following:

1. A joint statement of the dispute, and the scope of the desired decision. The joint statement shall summarize in a few sentences the nature of the dispute. If the parties are unable to agree on the wording of the joint statement, each party's position paper shall contain both statements, and identify the party authoring each statement.
2. The basis and justification for the party's position, with reference to contract language and other supporting documents for each element of the dispute. To minimize duplication and repetitiveness, the parties may identify a common set of documents that will be referred to by both parties and submit them in a separate package.
3. When the scope of the hearing includes quantum, the requesting party's position paper shall include full cost details, calculated in accordance with methods set forth in subsection 105.24(b).
4. A list of proposed attendees at the hearing. In the event of any disagreement, the DRB shall make the final determination as to who attends the hearing.
5. A list of any intended experts including their qualifications and a summary of what their presentation will include.

The number of copies, distribution requirements, and time for submittal shall be established by the DRB and communicated to the parties by the Chairperson.

(f) *Dispute Review Board Hearing.* The DRB shall preside over a hearing. The chairperson shall control the hearing and conduct it as follows:

1. An employee of CDOT presents a brief description of the project and the status of construction on the project.
2. The party that requested the DRB presents the dispute in detail as supported by previously submitted information and documentation.
3. The other party presents its position in detail.
4. Employees of each party are responsible for leading presentations at the DRB hearing.
5. Attorneys shall not participate in the hearing unless the DRB specifically addresses an issue to them or unless agreed to by both parties. Attorneys representing the parties are permitted to attend the hearing, provided their presence has been noted in the pre-hearing submittal.

6. Either party may use experts. A party intending to offer an outside expert's analysis at the hearing shall disclose such intention in the pre-hearing position paper. The expert's name and a general statement of the area of the dispute that will be covered by his presentation shall be included in the disclosure. The other party may present an outside expert to address or respond to those issues that may be raised by the disclosing party's outside expert.
 7. If both parties approve, the DRB may retain an outside expert. The DRB chairperson shall include the cost of the outside expert in the DRB's regular invoice. CDOT and the Contractor shall equally bear the cost of the services of the outside expert employed by the DRB.
 8. Upon completion of their presentations and rebuttals, both parties and the DRB will be provided the opportunity to exchange questions and answers. All questions shall be directed to the chairperson first. Attendees may respond only when board members request a response.
 9. The DRB shall hear only those disputes identified in the written request for the DRB and the information contained in the pre-hearing submittals. The board shall not hear or address other disputes. If either party attempts to discuss a dispute other than those to be heard by the DRB or attempts to submit new information, the chairperson shall inform such party that the board shall not hear the issue and shall not accept any additional information.
 10. If either party fails to timely deliver a position paper, the DRB may reschedule the hearing one time. On the final date and time established for the hearing, the DRB shall proceed with the hearing using the information that has been submitted.
 11. If a party fails to appear at the hearing, the DRB shall proceed as if all parties were in attendance.
- (g) *Dispute Review Board Recommendation.* The DRB shall issue a Recommendation in accordance with the following procedures:
1. The DRB shall not make a recommendation on the dispute at the meeting. Prior to the closure of the hearing, the DRB members and the Contractor and CDOT together will discuss the time needed for analysis and review of the dispute and the issuance of the DRB's recommendation. The maximum time shall be 30 days unless otherwise agreed to by both parties.
 2. After the meeting has been closed, the DRB shall prepare a written Recommendation signed by each member of the DRB. In the case of a three member DRB, where one member dissents that member shall prepare a written dissent and sign it.
 3. The chairperson shall transmit the signed Recommendation and any supporting documents to both parties.

105.23

- (h) *Clarification and Reconsideration of Recommendation.* Either party may request clarification or reconsideration of a decision within ten days following receipt of the Recommendation. Within ten days after receiving the request, the DRB shall provide written clarification or reconsideration to both parties unless otherwise agreed to by both parties.

Requests for clarification or reconsideration shall be submitted in writing simultaneously to the DRB and to the other party.

The Board shall not accept requests for reconsideration that amount to a renewal of a prior argument or additional argument based on facts available at the time of the hearing.

Only one request for clarification or reconsideration per dispute from each party will be allowed.

- (i) *Acceptance or Rejection of Recommendation.* CDOT and the Contractor shall submit their written acceptance or rejection of the Recommendation, in whole or in part, concurrently to the other party and to the DRB within 14 days after receipt of the Recommendation or following receipt of responses to requests for clarification or reconsideration.

If the parties accept the Recommendation or a discreet part thereof, it will be implemented in accordance with subsections 108.08, 109.04, 109.05, or 109.10 and the dispute is resolved.

If either party rejects the Recommendation in whole or in part, it shall give written explanation to the other party within 14 days after receiving the Recommendation. When the Recommendation is rejected in whole or in part by either party, the other party may either abandon the dispute or pursue a formal claim in accordance with subsection 105.24.

- (j) *Admissibility of Recommendation.* Recommendations of a DRB issued in accordance with subsection 105.23 are admissible in subsequent proceedings but shall be prefaced with the following paragraph:

This Recommendation may be taken under consideration with the understanding that:

1. The DRB Recommendation was a proceeding based on presentations by the parties.
2. No fact or expert witnesses presented sworn testimony or were subject to cross-examination.
3. The parties to the DRB were not provided with the right to any discovery, such as production of documents or depositions.
4. There is no record of the DRB hearing other than the Recommendation.

(k) *Cost and Payments.*

1. General Administrative Costs. The Contractor and the Department shall equally share the entire cost of the following to support the Board's operation:
 - (1) Copies of Contract and other relevant documentation
 - (2) Meeting space and facilities
 - (3) Secretarial Services
 - (4) Telephone
 - (5) Mail
 - (6) Reproduction
 - (7) Filing
2. The Department and the Contractor shall bear the costs and expenses of the DRB equally. Each DRB board member shall be compensated at an agreed rate of \$1,200 per day if time spent on-site per meeting is greater than four hours. Each DRB board member shall be compensated at an agreed rate of \$800 per day if time spent on-site per meeting is less than or equal to four hours. The time spent traveling to and from each meeting shall be reimbursed at \$50 per hour if the travel distance is more than 50 miles. The agreed daily and travel time rates shall be considered full compensation for on-site time, travel expenses, transportation, lodging, time for travel of more than 50 miles and incidentals for each day, or portion thereof that the DRB member is at an authorized DRB meeting. No additional compensation will be made for time spent by DRB members in review and research activities outside the official DRB meetings unless that time, (such as time spent evaluating and preparing recommendations on specific issues presented to the DRB), has been specifically agreed to in advance by the Department and Contractor. Time away from the project that has been specifically agreed to in advance by the parties will be compensated at an agreed rate of \$125 per hour. The agreed amount of \$125 per hour shall include all incidentals. Members serving on more than one DRB, regardless of the number of meetings per day, shall not be paid more than the all inclusive rate per day or rate per hour for an individual project.
3. Payments to Board Members and General Administrative Costs. Each Board member shall submit an invoice to the Contractor for fees and applicable expenses incurred each month following a month in which the Board members participated in Board functions. Such invoices shall be in the format established by the Contractor and the Department. The Contractor shall submit to the Department copies of all invoices. No markups by the Contractor will be allowed on any DRB costs. The Department will split the cost by authorizing 50 percent payment on the next progress payment. The Contractor shall make all payments in full to Board members within seven calendar days after receiving payment from the Department for this work.

(I) *Dispute Review Board Three Party Agreement.*

DISPUTE REVIEW BOARD
THREE PARTY AGREEMENT
COLORADO PROJECT NO.

THIS THREE PARTY AGREEMENT, made this ____ day of _____,
by and between: the Colorado Department of Transportation, hereinafter
called the "Department"; and

_____,
hereinafter called the "Contractor"; and

_____,
_____, and

hereinafter called the "Dispute Review Board" or "Board".

WHEREAS, the Department is now engaged in the construction of the

[Project Name]

and

WHEREAS, the Contract provides for the establishment of a Board in
accordance with subsections 105.22 and 105.23 of the Standard Specifications;

NOW, THEREFORE, it is hereby agreed:

ARTICLE I
DESCRIPTION OF WORK AND SERVICES

The Department and the Contractor shall form a Board in accordance with
this agreement and the provisions of subsection 105.23.

ARTICLE II
COMMITMENT ON PART OF THE PARTIES HERETO

The parties hereto shall faithfully fulfill the requirements of subsection
105.23 and the requirements of this agreement.

ARTICLE III
COMPENSATION

The parties shall share equally in the cost of the Board, including general
administrative costs (meeting space and facilities, secretarial services,
telephone, mail, reproduction, filing) and the member's individual fees.
Reimbursement of the Contractor's share of the Board expenses for any
reason is prohibited.

The Contractor shall make all payments in full to Board members. The
Contractor will submit to the Department an itemized statement for all such

payments, and the Department will split the cost by including 50 percent payment on the next progress payment. The Contractor and the Department will agree to accept invoiced costs prior to payment by the Contractor.

Board members shall keep all fee records pertaining to this agreement available for inspection by representatives of the Department and the Contractor for a period of three years after the termination of the Board members' services.

Payment to each Board member shall be at the fee rates established in subsection 105.23 and agreed to by each Board member, the Contractor, and the Department. In addition, reimbursement will be made for applicable expenses.

Each Board member shall submit an invoice to the Contractor for fees incurred each month following a month in which the members participated in Board functions. Such invoices shall be in the format established by the Contractor and the Department.

Payments shall be made to each Board member within 60 days after the Contractor and Department have received all the applicable billing data and verified the data submitted by that member. The Contractor shall make payment to the Board member within seven calendar days of receipt of payment from the Department.

ARTICLE IV ASSIGNMENT

Board members shall not assign any of the work to be performed by them under this agreement. Board members shall disclose any conflicts of interest including but not limited to any dealings with the either party in the previous five years other than serving as a Board member under other contracts.

ARTICLE V COMMENCEMENT AND TERMINATION OF SERVICES

The commencement of the services of the Board shall be in accordance with subsection 105.23 of the specifications and shall continue until all assigned disputes under the Contract which may require the Board's services have been heard and a Recommendation has been issued by the Board as specified in subsection 105.23. If a Board member is unable to fulfill his responsibilities for reasons specified in subsection 105.23(b)7, he shall be replaced as provided therein, and the Board shall fulfill its responsibilities as though there had been no change.

ARTICLE VI LEGAL RELATIONS

The parties hereto mutually agree that each Board member in performance of his duties on the Board is acting as an independent contractor and not as an employee of either the Department or the Contractor. Board members

will guard their independence and avoid any communication about the substance of the dispute without both parties being present.

The Board members are absolved of any personal liability arising from the Recommendations of the Board.

IN WITNESS HEREOF, the parties hereto have caused this agreement to be executed the day and year first written above.

BOARD MEMBER: _____.

BY: _____

BOARD MEMBER: _____.

BY: _____

BOARD MEMBER: _____.

BY: _____

CONTRACTOR: _____.

BY: _____

TITLE: _____

COLORADO DEPARTMENT OF TRANSPORTATION

BY: _____

TITLE: CHIEF ENGINEER

105.24 Claims for Unresolved Disputes. The Contractor may file a claim only if the disputes resolution process described in subsections 105.22 and 105.23 has been exhausted without resolution of the dispute. Other methods of nonbinding dispute resolution, exclusive of arbitration and litigation, can be used if agreed to by both parties.

This subsection applies to any unresolved dispute or set of disputes between CDOT and the Contractor with an aggregate value of more than \$15,000. Unresolved disputes with an aggregate value of more than \$15,000 from subcontractors, materials suppliers or any other entity not a party to the Contract shall be submitted through the Contractor in accordance with this subsection as a pass-through claim. Review of a pass-through claim does not create privity of Contract between CDOT and any other entity.

Subsections 105.22, 105.23 and 105.24 provide both contractual alternative dispute resolution processes and constitute remedy-granting provisions pursuant to Colorado Revised Statutes which must be exhausted in their entirety.

Merit-binding arbitration or litigation proceedings must commence within 180-calendar days of the Chief Engineer's decision, absent written agreement otherwise by both parties.

The venue for all unresolved disputes with an aggregate value \$15,000 or less shall be the County Court for the City and County of Denver.

Non-binding Forms of alternative dispute resolution such as Mediation are available upon mutual agreement of the parties for all claims submitted in accordance with this subsection.

The cost of the non-binding ADR process shall be shared equally by both parties with each party bearing its own preparation costs. The type of nonbinding ADR process shall be agreed upon by the parties and shall be conducted within the State of Colorado at a mutually acceptable location. Participation in a nonbinding ADR process does not in any way waive the requirement that merit-binding arbitration or litigation proceedings must commence within 180-calendar days of the Chief Engineer's decision, absent written agreement otherwise by both parties.

- (a) *Notice of Intent to File a Claim.* Within 30 days after rejection of the Dispute Resolution Board's Recommendation issued in accordance with subsection 105.23, the Contractor shall provide the Region Transportation Director with a written notice of intent to file a claim. The Contractor shall also send a copy of this notice to the Resident Engineer. For the purpose of this subsection Region Transportation Director shall mean the Region Transportation Director or the Region Transportation Director's designated representative. CDOT will acknowledge in writing receipt of Notice of Intent within 7 days.
- (b) *Claim Package Submission.* Within 60 days after submitting the notice of intent to file a claim, the Contractor shall submit five copies of a complete claim package representing the final position the Contractor wishes to have considered. All claims shall be in writing and in sufficient detail to enable the RTD to ascertain the basis and amount of claim. The claim package shall include all documents supporting the claim, regardless of whether such documents were provided previously to CDOT.

If requested by the Contractor the 60 day period may be extended by the RTD in writing prior to final acceptance. As a minimum, the following information shall accompany each claim.

1. A claim certification containing the following language, as appropriate:

A. For a direct claim by the Contractor:

CONTRACTOR'S CLAIM CERTIFICATION

Under penalty of law for perjury or falsification, the undersigned, (name) _____, (title) _____, of (company) _____, hereby certifies that the claim of

\$ _____ for extra compensation and ____ Days additional time, made herein for work on this contract is true to the best of my knowledge and belief and supported under the Contract between the parties.

This claim package contains all available documents that support the claims made herein and I understand that no additional information, other than for clarification and data supporting previously submitted documentation, may be presented by me.

Dated _____ /s/ _____

Subscribed and sworn before me this ____ day of _____.

NOTARY PUBLIC

My Commission Expires: _____

B. For a pass-through claim:

PASS-THROUGH CLAIM CERTIFICATION

Under penalty of law for perjury or falsification, the undersigned, (name) _____, (title) _____, of (company) _____, hereby certifies that the claim of

\$ _____ for extra compensation and ____ Days additional time, made herein for work on this Project is true to the best of my knowledge and belief and supported under the contract between the parties.

This claim package contains all available documents that support the claims made herein and I understand that no additional information, other than for clarification and data supporting previously submitted documentation, may be presented by me.

Dated _____ /s/ _____

Subscribed and sworn before me this ____ day of _____.

NOTARY PUBLIC

My Commission Expires: _____

Dated _____ /s/ _____

The Contractor certifies that the claim being passed through to CDOT is passed through in good faith and is accurate and complete to the best of my knowledge and belief.

Dated _____ /s/ _____

Subscribed and sworn before me this ____ day of _____.

NOTARY PUBLIC

My Commission Expires: _____

2. A detailed factual statement of the claim for additional compensation, time, or both, providing all necessary dates, locations, and items of work affected by the claim. The Contractor's detailed factual statement shall expressly describe the basis of the claim and factual evidence supporting the claim. This requirement is not satisfied by simply incorporating into the claim package other documents that describe the basis of the claim and supporting factual evidence.
3. The date on which facts were discovered which gave rise to the claim.
4. The name, title, and activity of all known CDOT, Consultant, and other individuals who may be knowledgeable about facts giving rise to such claim.
5. The name, title, and activity of all known Contractor, subcontractor, supplier and other individuals who may be knowledgeable about facts giving rise to such claim.
6. The specific provisions of the Contract, which support the claim and a statement of the reasons why such provisions support the claim.
7. If the claim relates to a decision of the Project Engineer, which the Contract leaves to the Project Engineer's discretion, the Contractor shall set out in detail all facts supporting its position relating to the decision of the Project Engineer.
8. The identification of any documents and the substance of all oral communications that support the claim.
9. Copies of all known documents that support the claim.
10. The Dispute Review Board Recommendation.
11. If an extension of contract time is sought, the documents required by subsection 108.08(d).
12. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:
 - A. These categories represent the only costs that are recoverable by the Contractor. All other costs or categories of costs are not recoverable:
 - (1) Actual wages and benefits, including FICA, paid for additional labor
 - (2) Costs for additional bond, insurance and tax
 - (3) Increased costs for materials
 - (4) Equipment costs calculated in accordance with subsection 109.04(c) for Contractor owned equipment and based on certified invoice costs for rented equipment

- (5) Costs of extended job site overhead
 - (6) Salaried employees assigned to the project
 - (7) Claims from subcontractors and suppliers at any level (the same level of detail as specified herein is required for all such claims)
 - (8) An additional 16 percent will be added to the total of items (1) through (7) as compensation for items for which no specific allowance is provided, including profit and home office overhead.
 - (9) Interest shall be paid in accordance with CRS 5-12-102 beginning from the date of the Notice of Intent to File Claim
- B. In adjustment for the costs as allowed above, the Department will have no liability for the following items of damages or expense:
- (1) Profit in excess of that provided in 12.A.(8) above
 - (2) Loss of Profit
 - (3) Additional cost of labor inefficiencies in excess of that provided in A. above
 - (4) Home office overhead in excess of that provided in A. above
 - (5) Consequential damages, including but not limited to loss of bonding capacity, loss of bidding opportunities, and insolvency
 - (6) Indirect costs or expenses of any nature in excess of that provided in A. above
 - (7) Attorneys fees, claim preparation fees, and expert fees
- (c) *Audit.* An audit may be performed by the Department for any claim, and is mandatory for all claims with amounts greater than \$250,000. All audits will be complete within 60 days of receipt of the complete claim package, provided the Contractor allows the auditors reasonable and timely access to the Contractor's books and records. For all claims with amounts greater than \$250,000 the Contractor shall submit a copy of certified claim package directly to the CDOT Audit Unit at the following address:

Division of Audit
4201 E. Arkansas Ave
Denver, Co. 80222

(d) *Region Transportation Director Decision.* When the Contractor properly files a claim, the RTD will review the claim and render a written decision to the Contractor to either affirm or deny the claim, in whole or in part, in accordance with the following procedure.

The RTD may consolidate all related claims on a project and issue one decision, provided that consolidation does not extend the time period within which the RTD is to render a decision. Consolidation of unrelated claims will not be made.

The RTD will render a written decision to the Contractor within 60 days after the receipt of the claim package or receipt of the audit whichever is later. In rendering the decision, the RTD: (1) will review the information in the Contractor's claim; (2) will conduct a hearing if requested by either party; and (3) may consider any other information available in rendering a decision.

The RTD will assemble and maintain a claim record comprised of all information physically submitted by the Contractor in support of the claim and all other discoverable information considered by the RTD in reaching a decision. Once the RTD assembles the claim record, the submission and consideration of additional information, other than for clarification and data supporting previously submitted documentation, at any subsequent level of review by anyone, will not be permitted.

The RTD will provide a copy of the claim record and the written decision to the Contractor describing the information considered by the RTD in reaching a decision and the basis for that decision. If the RTD fails to render a written decision within the 60 day period, or within any extended time period as agreed to by both parties, the Contractor shall either: (1) accept this as a denial of the claim, or (2) appeal the claim to the Chief Engineer, as described in this subsection.

If the Contractor accepts the RTD decision, the provisions of the decision shall be implemented in accordance with subsections 108.08, 109.04, 109.05, or 109.10 and the claim is resolved.

If the Contractor disagrees with the RTD decision, the Contractor shall either: (1) accept the RTD decision as final, or (2) file a written appeal to the Chief Engineer within 30 days from the receipt of the RTD decision. The Contractor hereby agrees that if a written appeal is not properly filed, the RTD decision is final.

- (e) *Chief Engineer Decision.* When a claim is appealed, the RTD will provide the claim record to the Chief Engineer. Within 15 days of the appeal either party may submit a written request for a hearing with the Chief Engineer or duly authorized Headquarters delegates. The Chief Engineer or a duly authorized Headquarters delegate will review the claim and render a decision to affirm, overrule, or modify the RTD decision in accordance with the following.

The Contractor's written appeal to the Chief Engineer will be made a part of the claim record.

The Chief Engineer will render a written decision within 60 days after receiving the written appeal. The Chief Engineer will not consider any information that was not previously made a part of the claim record, other than clarification and data supporting previously submitted documentation.

The Contractor shall have 30 days to accept or reject the Chief Engineer's decision. The Contractor shall notify the Chief Engineer of its acceptance or rejection in writing.

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If the Contractor accepts the Chief Engineer's decision, the provisions of the decision will be implemented in accordance with subsections 108.08, 109.04, 109.05, or 109.10 and the claim is resolved.

If the Contractor disagrees with the Chief Engineer's decision, the Contractor shall either (1) pursue an alternative dispute resolution process in accordance with this specification or (2) initiate litigation or merit binding arbitration in accordance with subsection 105.24(f).

If the Chief Engineer does not issue a decision as required, the Contractor may immediately initiate either litigation or merit binding arbitration in accordance with subsection 105.24(f).

For the convenience of the parties to the Contract it is mutually agreed by the parties that any merit binding arbitration or De Novo litigation shall be brought within 180-calendar days from the date of the Chief Engineer's decision. The parties understand and agree that the Contractor's failure to bring suit within the time period provided, shall be a complete bar to any such claims or causes of action.

- (f) *De Novo Litigation or Merit Binding Arbitration.* If the Contractor disagrees with the Chief Engineer's decision, the Contractor may initiate de novo litigation or merit binding arbitration to finally resolve the claim that the Contractor submitted to CDOT, depending on which option was selected by the Contractor on Form 1378 which shall be submitted at the preconstruction conference. Such litigation or arbitration shall be strictly limited to those claims that were previously submitted and decided in the contractual dispute and claims processes outlined herein. This does not preclude the joining in one litigation or arbitration of multiple claims from the same project provided that each claim has gone through the dispute and claim process specified in subsections 105.22 through 105.24. The parties may agree, in writing, at any time, to pursue some other form of alternative dispute resolution.

Any offer made by the Contractor or the Department at any stage of the claims process, as set forth in this subsection, shall be deemed an offer of settlement pursuant to Colorado Rule of Evidence 408 and therefore inadmissible in any litigation or arbitration.

If the Contractor selected litigation, then de novo litigation shall proceed in accordance with the Colorado Rules of Civil Procedure and the proper venue is the Colorado State District Court in and for the City and County of Denver, unless both parties agree to the use of arbitration.

If the Contractor selected merit binding arbitration, or if both parties subsequently agreed to merit binding arbitration, arbitration shall be governed by the modified version of AAA's Construction Industry Arbitration Rules which appear in a standard special provision included in the Contract.

REVISION OF SECTION 105
DISPUTES AND CLAIMS FOR
CONTRACT ADJUSTMENTS

NOTICE

This is a standard special provision that revises or modifies CDOT's *Standard Specifications for Road and Bridge Construction*. It has gone through a formal review and approval process and has been issued by CDOT's Project Development Branch with formal instructions for its use on CDOT construction projects. It is to be used as written without change. Do not use modified versions of this special provision on CDOT construction projects, and do not use this special provision on CDOT projects in a manner other than that specified in the instructions unless such use is first approved by CDOT's Standards and Specifications Unit. The instructions for use on CDOT construction projects appear below.

Other agencies which use the *Standard Specifications for Road and Bridge Construction* to administer construction projects may use this special provision as appropriate and at their own risk.

Instructions for use on CDOT construction projects:

Use in all Design-Bid-Build projects and Modified Design/Build projects. Use in Design/Build projects unless your modified version of the SSP is approved by the Standards & Specifications Unit. If a standing DRB is required for the project, add the following General Note to the Plans: "There shall be a Standing Disputes Review Board for this Project." A standing DRB should be called for on the following types of projects:

1. Large projects (greater than \$15 million)
2. Projects with complex construction
3. Projects with large complex structures
4. Projects with multi-phase construction
5. Projects with major impacts to traffic
6. Projects with other complicating factors that could easily lead to disputes

On projects that require a standing DRB, establish a planned force account item to cover the ongoing costs of the DRB.

REVISION OF SECTION 105
DISPUTES AND CLAIMS FOR
CONTRACT ADJUSTMENTS

Section 105 of the Standard Specifications is hereby revised for this project as follows:

In subsection 105.22 delete the fourth, fifth, sixth, seventh, and eighth paragraphs and replace them with the following:

If CDOT does not respond within the specified timelines, the Contractor may advance the dispute to the next level.

When the Project Engineer is a Consultant Project Engineer, actions, decisions, and determinations specified herein as made by the Project Engineer shall be made by the Resident Engineer.

The dispute resolution process set forth in this subsection shall be exhausted in its entirety prior to initiation of litigation or arbitration. Failure to comply with the requirements set forth in this subsection shall bar either party from any further administrative, equitable, or legal remedy. If a deadline is missed that does not prejudice either party, further relief shall be allowed.

All disputes and claims shall be submitted within 30 days of the date of the certified letter submitting the CDOT Form 96, *Contractor Acceptance of Final Estimate*, to the Contractor. Failure to submit a dispute or claim within this time period releases the State of Colorado from all disputes and claims for which notice has not already been submitted in accordance with the Contract.

All disputes and claims seeking damages calculated on a Total Cost or Modified Total Cost basis will not be considered unless the party asserting such damages establishes all the legal requirements therefore.

Delete subsection 105.22(a) and (b) and replace them with the following:

- (a) *Document Retention*. The Contractor shall keep full and complete records of the costs and additional time incurred for each dispute for a period of at least three years after the date of final payment or until dispute is resolved, whichever is more. The Contractor, subcontractors, and lower tier subcontractors shall provide adequate facilities, acceptable to the Engineer, for an audit during normal business hours. The Contractor shall permit the Engineer or Department auditor to examine and copy those records and all other records required by the Engineer to determine the facts or contentions involved in the dispute. The Contractor shall identify and segregate any documents or information that the Contractor considers particularly sensitive, such as confidential or proprietary information.

Throughout the dispute, the Contractor and the Project Engineer shall keep complete daily records of extra costs and time incurred, in accordance with the following procedures:

1. Daily records shall identify each operation affected, the specific locations where work is affected, and the potential effect to the project's schedule. Such records shall also reflect all labor, material, and equipment applicable to the affected operations.
2. On the first work day of each week following the date of the written notice of dispute, the Contractor shall provide the Project Engineer with the daily records for the proceeding week. If the Contractor's records indicate costs greater than those kept by the Department, the Project Engineer will meet with the Contractor and present his records to the Contractor at the meeting. The Contractor shall notify the Engineer in writing within three work days of any inaccuracies noted in, or disagreements with, the Department's records.

- (b) *Initial Dispute Resolution Process*. To initiate the dispute resolution process the Contractor shall provide a written notice of dispute to the Project Engineer upon the failure of the Parties to resolve the issue through

REVISION OF SECTION 105
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negotiation. Disputes will not be considered unless the Contractor has first complied with specified issue resolution processes such as those specified in subsections 104.02, 106.05, 108.07(a), and 108.07(d).

The Contractor shall supplement the written notice of dispute within 15 days with a written Request for Equitable Adjustment (REA) providing the following:

- (1) The date of the dispute
- (2) The nature of the circumstances which caused the dispute
- (3) A statement explaining in detail the specific provisions of the Contract and any basis, legal or factual, which support the dispute.
- (4) If any, the estimated quantum, calculated in accordance with methods set forth in Subsection 105.24(b)12., of the dispute with supporting documentation
- (5) An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption.

The Contractor shall submit as much information on the quantum and impacts to the Contract time as is reasonably available with the REA and then supplement the REA as additional information becomes available. If the dispute escalates to the DRB process the DRB shall not hear any issue or consider any information that was not contained in the Request for Equitable Adjustment and fully submitted to the Project Engineer and Resident Engineer during the 105.22 process.

In subsection 105.23(b) delete items 3 and 4 and replace them with the following:

3. If the dispute has a value over \$250,000, the On Demand DRB shall have three members. The Contractor and CDOT shall each select a member and those two members shall select a third. Once the third member is approved the three members will nominate one of them to be the Chair and execute the agreement within 45 days of initiating the DRB process.
4. The Standing DRB shall always have three members. The Contractor and CDOT shall each select a member and those two members shall select a third member. Once the third member is approved the three members will nominate one of them to be the Chair.. The Contractor and CDOT shall submit their proposed Standing DRB members within 5 days of execution of the Contract. The third member shall be selected within 15 days of execution of the Contract. Prior to construction starting the parties shall execute the Three Party Agreement. The CDOT Project Engineer will be responsible for executing the agreement. The Project Engineer will invite the Standing DRB members to the Preconstruction and any Partnering conferences.

Subsection 105.23 (c) shall include the following:

4. Advisory Opinions
 - (1) Advisory opinions are typically used soon after the parties find they have a potential dispute and have conducted preliminary negotiations but before expenditure of additional resources and hardening their positions. Advisory opinions provide quick insight into the DRB's likely assessment of the dispute. This process is quick and may be entirely oral and does not prejudice the opportunity for a DRB hearing.
 - (2) Both parties must agree to seek an advisory opinion and so notify the chairperson. The procedure for requesting and issuing advisory opinions should be discussed with the DRB at the first meeting with the parties.
 - (3) The DRB may or may not issue a written opinion, but if a written advisory opinion is issued, it must be at the specific request of both parties.
 - (4) The opinion is only advisory and does not require an acceptance or rejection by either party. If the dispute is not resolved and a hearing is held, the oral presentations and advisory opinion are completely disregarded and the DRB hearing procedure is followed.
 - (5) Advisory opinions should be limited to merit issues only.

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In subsection 105.23(d) delete item 1 and replace it with the following:

1. Contact the Contractor and the DRB to coordinate an acceptable hearing date and time. The hearing shall be held at the Resident Engineer's office unless an alternative location is agreed to by both parties. Unless otherwise agreed to by both parties the DRB hearing will be held within 30 days after the DRB agreement is signed by the CDOT Chief Engineer.

Delete subsection 105.23(e) and replace it with the following:

- (e) *Pre-Hearing Submittal:* At least fifteen days prior to the hearing, CDOT and the Contractor shall submit by e-mail to the DRB Chairperson their parties pre-hearing position paper. The DRB Chairperson shall simultaneously distribute by e-mail the pre-hearing position papers to all parties and other DRB members, if any. At the same time, each party shall submit a copy of all its supporting documents to be used at the hearing to all DRB Members and the other party unless the parties have agreed to a common set of documents as discussed in #2 below. In this case, CDOT shall submit the common set of documents to the Board and the Contractor. The pre-hearing position paper shall contain the following:
1. A joint statement of the dispute, and the scope of the desired decision. The joint statement shall summarize in a few sentences the nature of the dispute. If the parties are unable to agree on the wording of the joint statement, each party's position paper shall contain both statements, and identify the party authoring each statement. The parties shall agree upon a joint statement at least 20 days prior to the hearing and submit it to the DRB or each party's independent statement shall be submitted to the DRB and the other party at least 20 days prior to the hearing.
 2. The basis and justification for the party's position, with reference to specific contract language and other supporting documents for each element of the dispute. To minimize duplication and repetitiveness, the parties may identify a common set of documents that will be referred to by both parties and submit them in a separate package to the DRB. The engineer will provide a hard copy of the project plans and Project and Standard Special Provisions, if necessary, to the DRB. Other standard CDOT documents such as Standard Specifications and M&S Standards are available on the CDOT website.
 - (1) If any party contends that they are not necessary to the proceedings, the DRB shall determine that issue in the first instance. Should the DRB determine that a dispute does not involve a party, that party shall be relieved from participating in the DRB hearing and paying any further DRB costs.
 - (2) When the scope of the hearing includes quantum, the requesting party's position paper shall include full cost details, calculated in accordance with methods set forth in subsection 105.24(b)12. The Scope of the hearing will not include quantum if CDOT has ordered an audit and that audit has not been completed.
 3. A list of proposed attendees at the hearing. In the event of any disagreement, the DRB shall make the final determination as to who attends the hearing.
 4. A list of any intended experts including their qualifications and a summary of what their presentation will include and an estimate of the length of the presentation.

The number of copies, distribution requirements, and time for submittal shall be established by the DRB and communicated to the parties by the Chairperson.

A pre-hearing phone conference with all DRB members and the parties shall be conducted as soon as a hearing date is established but no later than 10 days prior to the hearing. The DRB Chairperson shall explain the specifics of how the hearing will be conducted including how the two parties will present their information to the DRB (Ex: Each party makes a full presentation of their position or presentations will be made on a "point by point" basis with each party making a presentation only on an individual dispute issue before moving onto to the next issue). If the pre-hearing position papers and documents have been received by the Board prior to the conference call, the DRB Chairperson shall at this conference discuss the estimated hours of review and research activities for this dispute (such as time spent evaluating and

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preparing recommendations on specific issues presented to the DRB). If the pre-hearing position papers and documents have not been received by the Board prior to the conference call, another conference call will be scheduled during the initial conference call to discuss the estimated hours of review. Compensation for time agreed to in advance by the parties will be made at an agreed rate of \$125 per hour in accordance with subsection 105.23 (k) 2. Compensation for the phone conference time will also be made at an agreed to rate of \$125 per hour in accordance with subsection 105.23 (k) 2. The Engineer shall coordinate the phone conference.

In subsection 105.23(f) delete items 2 and 3 and replace them with the following:

- 2. The party that requested the DRB presents the dispute in detail as supported by previously submitted information and documentation in the pre-hearing position paper. No new information or disputes will be heard or addressed by the DRB.
- 3. The other party presents its position in detail as supported by previously submitted information and documentation in the pre-hearing position paper. No new information or disputes will be heard or addressed by the DRB.

In subsection 105.23(f) delete item 9 and replace it with the following:

- 9. The DRB shall hear only those disputes identified in the written request for the DRB and the information contained in the pre-hearing submittals. The board shall not hear or address other disputes. If either party attempts to discuss a dispute other than those to be heard by the DRB or attempts to submit new information, the chairperson shall inform such party that the board shall not hear the issue and shall not accept any additional information. The DRB shall not hear any issue or consider any information that was not contained in the Request for Equitable Adjustment and fully submitted to the Project Engineer and Resident Engineer during the 105.22 process.

Subsection 105.23(i) shall include the following as the fourth paragraph:

If either party fails to submit its written acceptance or rejection of the Dispute Board's recommendation, according to these specifications, such failure shall constitute that party's acceptance of the Board's recommendation.

In subsection 105.23 (l) delete the third party agreement and replace it with the following:

<p>DISPUTE REVIEW BOARD THREE PARTY AGREEMENT COLORADO PROJECT NO.</p>
<p>THIS THREE PARTY AGREEMENT, made as of the date signed by the Chief Engineer below, by and between: the Colorado Department of Transportation, hereinafter called the "Department"; and</p> <p>_____ ,</p> <p>hereinafter called the "Contractor"; and</p> <p>_____ ,</p> <p>_____ ,</p> <p>_____ ,</p> <p>and</p> <p>_____ ,</p> <p>hereinafter called the "Dispute Review Board" or "Board".</p> <p>WHEREAS, the Department is now engaged in the construction of the</p>

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[Project Name]

and

WHEREAS, the Contract provides for the establishment of a Board in accordance with subsections 105.22 and 105.23 of the specifications.

NOW, THEREFORE, it is hereby agreed:

ARTICLE I
DESCRIPTION OF WORK AND SERVICES

The Department and the Contractor shall form a Board in accordance with this agreement and the provisions of subsection 105.23.

ARTICLE II
COMMITMENT ON PART OF THE PARTIES HERETO

The parties hereto shall faithfully fulfill the requirements of subsection 105.23 and the requirements of this agreement.

ARTICLE III
COMPENSATION

The parties shall share equally in the cost of the Board, including general administrative costs (meeting space and facilities, secretarial services, telephone, mail, reproduction, filing) and the member's individual fees. Reimbursement of the Contractor's share of the Board expenses for any reason is prohibited.

The Contractor shall make all payments in full to Board members. The Contractor will submit to the Department an itemized statement for all such payments, and the Department will split the cost by including 50 percent payment on the next progress payment. The Contractor and the Department will agree to accept invoiced costs prior to payment by the Contractor.

DISPUTE REVIEW BOARD
THREE PARTY AGREEMENT PAGE 2
COLORADO PROJECT NO.

Board members shall keep all fee records pertaining to this agreement available for inspection by representatives of the Department and the Contractor for a period of three years after the termination of the Board members' services.

Payment to each Board member shall be at the fee rates established in subsection 105.23 and agreed to by each Board member, the Contractor, and the Department. In addition, reimbursement will be made for applicable expenses.

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Each Board member shall submit an invoice to the Contractor for fees incurred each month following a month in which the members participated in Board functions. Such invoices shall be in the format established by the Contractor and the Department.

Payments shall be made to each Board member within 60 days after the Contractor and Department have received all the applicable billing data and verified the data submitted by that member. The Contractor shall make payment to the Board member within seven calendar days of receipt of payment from the Department.

ARTICLE IV
ASSIGNMENT

Board members shall not assign any of the work to be performed by them under this agreement. Board members shall disclose any conflicts of interest including but not limited to any dealings with the either party in the previous five years other than serving as a Board member under other contracts.

ARTICLE V
COMMENCEMENT AND TERMINATION OF SERVICES

The commencement of the services of the Board shall be in accordance with subsection 105.23 of the specifications and shall continue until all assigned disputes under the Contract which may require the Board's services have been heard and a Recommendation has been issued by the Board as specified in subsection 105.23. If a Board member is unable to fulfill his responsibilities for reasons specified in subsection 105.23(b)7, he shall be replaced as provided therein, and the Board shall fulfill its responsibilities as though there had been no change.

ARTICLE VI
LEGAL RELATIONS

The parties hereto mutually agree that each Board member in performance of his duties on the Board is acting as an independent contractor and not as an employee of either the Department or the Contractor. Board members will guard their independence and avoid any communication about the substance of the dispute without both parties being present.

The Board members are absolved of any personal liability arising from the Recommendations of the Board. The parties agree that members of the dispute review board panel are acting as mediators for purposes of C.R.S. § 13-22-302(4) and, as such, the liability of any dispute review board member shall be limited to willful and wanton misconduct as provided for in C.R.S. § 13-22-305(6)

DISPUTE REVIEW BOARD
THREE PARTY AGREEMENT PAGE 3
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IN WITNESS HEREOF, the parties hereto have caused this agreement to be executed the day and year first written above.

BOARD MEMBER: _____

BY: _____

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BOARD MEMBER: _____

BY: _____

BOARD MEMBER: _____

BY: _____

CONTRACTOR: _____

BY: _____

TITLE: _____

COLORADO DEPARTMENT OF TRANSPORTATION

BY: _____ Date: _____

TITLE: CHIEF ENGINEER

In subsection 105.24 (b) 12, delete A and replace with the following:

- A. These categories represent the only costs that are recoverable by the Contractor. All other costs or categories of costs are not recoverable:
 - (1) Actual wages and benefits, including FICA, paid for additional labor not otherwise included in (5) below
 - (2) Costs for additional bond, insurance and tax
 - (3) Increased costs for materials
 - (4) Equipment costs calculated in accordance with subsection 109.04(c) for Contractor owned equipment and based on certified invoice costs for rented equipment
 - (5) Costs of extended job site overhead
 - (6) Costs of salaried employees not otherwise included in (1) or (5) above incurred as a direct result of the dispute or claim
 - (7) Claims from subcontractors and suppliers at any level (the same level of detail as specified herein is required for all such claims)
 - (8) An additional 16 percent will be added to the total of items (1) through (7) as compensation for items for which no specific allowance is provided, including profit and home office overhead.
 - (9) Interest shall be paid in accordance with CRS 5-12-102 beginning from the date of the Notice of Intent to File Claim

In subsection 105.24(c) delete the first sentence and replace it with the following:

An audit may be performed by the Department for any dispute or claim, and is mandatory for all disputes and claims with amounts greater than \$250,000.

Subsection 105.24 shall include the following:

**AMERICAN ARBITRATION ASSOCIATION CONSTRUCTION INDUSTRY ARBITRATION RULES MODIFIED
FOR USE WITH CDOT SPECIFICATION SUBSECTION 105.24**

REGULAR TRACK PROCEDURES

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R-1. Agreement of Parties

- (a) The parties shall be deemed to have made these rules a part of their Contract. These rules and any amendments shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.
- (b) Unless the parties determine otherwise, the Fast Track Procedures shall apply in any case in which aggregate claims do not exceed \$75,000, exclusive of interest and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties except for pass-through claims. The Fast Track Procedures shall be applied as described in Sections F-1 through F-13 of these rules, in addition to any other portion of these rules that is not in conflict with the Fast Track Procedures.
- (c) Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes shall apply to all cases in which the disclosed aggregate claims of any party is at least \$500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use these procedures in cases involving claims under \$500,000, or in nonmonetary cases. The Procedures for Large, Complex Construction Disputes shall be applied as described in Sections L-1 through L-4 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Construction Disputes.
- (d) All other cases shall be administered in accordance with Sections R-1 through R-45 of these rules.

R-2. Independent Arbitration Provider and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by an independent third-party (Arbitration Provider) and an arbitration is initiated under these rules, they thereby authorize the Arbitration Provider to administer the arbitration. The authority and duties of the Arbitration Provider are prescribed in the parties' Contract and in these rules, and may be carried out through such of the Arbitration Provider's representatives as it may direct. The Arbitration Provider will assign the administration of an arbitration to its Denver office

R-3. Initiation of Arbitration

Arbitration shall be initiated in the following manner.

- (a) The Contractor shall, within 30 days after the Chief Engineer issues a decision, submit to the Chief Engineer written notice of its intention to arbitrate (the "demand"). The demand shall indicate the appropriate qualifications for the arbitrator(s) to be appointed to hear the arbitration.
- (b) CDOT may file an answering statement with the Contractor within 15 days after receiving the demand. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought.
- (c) The Chief Engineer shall retain an Arbitration Provider, such as the American Arbitration Association, which will administer an arbitration pursuant to these Rules, except to the extent that such rules conflict with the specifications, in which case the specifications shall control.
- (d) The Arbitration Provider shall confirm its retention to the parties.

R-4. Consolidation or Joinder

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If the parties' agreement or the law provides for consolidation or joinder of related arbitrations, all involved parties will endeavor to agree on a process to effectuate the consolidation or joinder.

If they are unable to agree, the Arbitration Provider shall directly appoint a single arbitrator for the limited purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder. The Arbitration Provider may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator.

R-5. Appointment of Arbitrator

An arbitrator shall be appointed in the following manner:

- (a) Immediately after the Arbitration Provider is retained, the Arbitration Provider shall send simultaneously to each party to the dispute an identical list of 10 names of potential arbitrators. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement. Absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.
- (b) If the parties cannot agree to arbitrator(s), each party to the dispute shall have 15 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the Arbitration Provider. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the Arbitration Provider shall invite an arbitrator to serve.
- (c) Unless both parties agree otherwise one arbitrator shall be used for claims less than \$250,000 and three arbitrators shall be used for claims \$250,000 and greater. Within 15 calendar days from the date of the appointment of the last arbitrator, the Arbitration Provider shall appoint a chairperson.
- (d) The entire claim record will be made available to the arbitrators by the Chief Engineer within 15 calendar days from the date of the appointment of the last arbitrator.

R-6. Changes of Claim

The arbitrator(s) will not consider any information that was not previously made a part of the claim record as transmitted by the Chief Engineer, other than clarification and data supporting previously submitted documentation.

R-7. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator shall disclose to the Arbitration Provider any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any interest in the result of the arbitration or any relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.
- (b) Upon receipt of such information from the arbitrator or another source, the Arbitration Provider shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- (c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-6 is not to be construed as an indication that the arbitrator considers that the disclosed circumstances are likely to affect impartiality or independence.

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- (d) In no case shall an arbitrator be employed by, affiliated with, or have consultive or business connection with the claimant Contractor or CDOT. An arbitrator shall not have assisted either in the evaluation, preparation, or presentation of the claim case either for the Contractor or the Department or have rendered an opinion on the merits of the claim for either party, and shall not do so during the proceedings of arbitration.

R-8. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for: (i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith; and/or (iii) any grounds for disqualification provided by applicable law.
- (b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the Arbitration Provider shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-9. Communication with Arbitrator

No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration.

R-10. Vacancies

- (a) If for any reason an arbitrator is unable to perform the duties of the office, the Arbitration Provider may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.
- (b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.
- (c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-11. Jurisdiction

- (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
- (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than 15 days after the Arbitration Provider confirms its retention to the parties. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-12. Administrative Conference

At the request of any party or upon the Arbitration Provider's own initiative, the Arbitration Provider may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The

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conference may address such issues as arbitrator selection, potential exchange of information, a timetable for hearings and any other administrative matters.

R-13. Preliminary Hearing

- (a) At the request of any party or at the discretion of the arbitrator or the Arbitration Provider, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.
- (b) During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-14. Exchange of Information

- (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct: (i) the production of documents and other information; (ii) short depositions, particularly with regard to experts; and/or (iii) the identification of any witnesses to be called.
- (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
- (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
- (d) Additional discovery may be ordered by the arbitrator in extraordinary cases when the demands of justice require it.

R-15. Date, Time, and Place of Hearing

- (a) The arbitrator shall set the date, time, and place for each hearing and/or conference. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule.
- (b) The parties may mutually agree on the locale where the arbitration is to be held. Absent such agreement, the arbitration shall be held in the City and County of Denver.
- (c) The Arbitration Provider shall send a notice of hearing to the parties at least ten calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-16. Attendance at Hearings

The arbitrator and the Arbitration Provider shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any person other than a party and its representative.

R-17. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the Arbitration Provider of the name and address of the representative at least three calendar days prior to the date set for the hearing at which that person is first to appear.

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R-18. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-19. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

R-20. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-21. Postponements

The arbitrator for good cause shown may postpone any hearing upon agreement of the parties, upon request of a party, or upon the arbitrator's own initiative.

R-22. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-23. Conduct of Proceedings

- (a) The Contractor shall present evidence to support its claim. CDOT shall then present evidence supporting its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure; provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
- (b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. The arbitrator shall entertain motions, including motions that dispose of all or part of a claim or that may expedite the proceedings, and may also make preliminary rulings and enter interlocutory orders.
- (c) The parties may agree to waive oral hearings in any case.

R-24. Evidence

- (a) The arbitrators shall consider all written information available in the claim record and all oral presentations in support of that record by the Contractor and CDOT. Conformity to legal rules of evidence shall not be necessary.

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- (b) The arbitrators shall not consider any written documents or arguments which have not previously been made a part of the claim record, other than clarification and data supporting previously submitted documentation. The arbitrators shall not consider an increase in the amount of the claim, or any new claims.
- (c) The arbitrator shall determine the admissibility, relevance, and materiality of any evidence offered. The arbitrator may request offers of proof and may reject evidence deemed by the arbitrator to be cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where: (i) any of the parties is absent, in default, or has waived the right to be present, or (ii) the parties and the arbitrators agree otherwise.
- (d) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
- (e) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

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R-25. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

- (a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.
- (b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence, unless otherwise agreed by the parties and the arbitrator, shall be filed with the Arbitration Provider for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-26. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the Arbitration Provider to so advise the parties. The arbitrator shall set the date and time and the Arbitration Provider shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-27. Interim Measures

- (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.
- (b) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-28. Closing of Hearing

When satisfied that the presentation of the parties is complete, the arbitrator shall declare the hearing closed.

If documents or responses are to be filed as provided in Section R-24, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of documents, responses, or briefs. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties and the arbitrator, upon the closing of the hearing.

R-29. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 15 calendar days from the closing of the reopened hearing within which to make an award.

R-30. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-31. Extensions of Time

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The parties may modify any period of time by mutual agreement. The Arbitration Provider or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The Arbitration Provider shall notify the parties of any extension.

R-32. Serving of Notice

- (a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith, or for the entry of judgment on any award made under these rules, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.
- (b) The Arbitration Provider, the arbitrator and the parties may also use overnight delivery, electronic facsimile transmission (fax), or electronic mail (email) to give the notices required by these rules.
- (c) Unless otherwise instructed by the Arbitration Provider or by the arbitrator, any documents submitted by any party to the Arbitration Provider or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-33. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions.

R-34. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the Arbitration Provider's transmittal of the final statements and proofs to the arbitrator.

R-35. Form of Award

After complete review of the facts associated with the claim, the arbitrators shall render a written explanation of their decision. When three arbitrators are used, and only two arbitrators agree then the award shall be signed by the two arbitrators. The arbitrator's decision shall include:

- (a) A summary of the issues and factual evidence presented by the Contractor and the Department concerning the claim;
- (b) Decisions concerning the validity of the claim;
- (c) Decisions concerning the value of the claim as to cost impacts if the claim is determined to be valid;
- (d) The contractual and factual bases supporting the decisions made including an explanation as to why each and every position was accepted or rejected;
- (e) Detailed and supportable calculations which support any decisions.

R-36. Scope of Award

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- (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract.
- (b) In addition to the final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. (c) The award of the arbitrator may include interest at the statutory rate and from such date as the arbitrator may deem appropriate.

R-37. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known address, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-38. Modification of Award

Within 10 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.

If the modification request is made by a party, the other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 25 calendar days after transmittal by the Arbitration Provider to the arbitrator of the request.

If applicable law provides a different procedural time frame, that procedure shall be followed.

R-39. Appeal of Award

Appeal of the arbitrators' decision concerning the merit of the claim is governed by the Colorado Uniform Arbitration Act, C.R.S. §§ 13-22-202 to -230. Either party may appeal the arbitrator's decision on the value of the claim to the Colorado State District Court in and for the City and County of Denver for trial de novo.

R-40. Release of Documents for Judicial Proceedings

The Arbitration Provider shall, upon the written request of a party, furnish to the party, at its expense, certified copies of any papers in the Arbitration Provider's possession that may be required in judicial proceedings relating to the arbitration.

R-41. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the Arbitration Provider nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these rules shall be deemed to have consented that neither the Arbitration Provider nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

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R-42. Administrative Fees

The Arbitration Provider shall prescribe filing and other administrative fees and service charges to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. Such fees and charges shall be borne equally by the parties.

The Arbitration Provider may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-43. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, Arbitration Provider representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties.

R-44. Neutral Arbitrator's Compensation

Arbitrators shall be compensated a rate consistent with the arbitrator's stated rate of compensation.

If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the Arbitration Provider and confirmed to the parties.

Such compensation shall be borne equally by the parties.

R-45. Deposits

The Arbitration Provider may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

R-46. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the Arbitration Provider for final decision. All other rules shall be interpreted and applied by the Arbitration Provider.

R-45. Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the Arbitration Provider may so inform the parties in order that the parties may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the Arbitration Provider may suspend the proceedings.

FAST TRACK PROCEDURES**F-1. Limitations on Extensions**

In the absence of extraordinary circumstances, the Arbitration Provider or the arbitrator may grant a party no more than one seven-day extension of the time in which to respond to the demand for arbitration or counterclaim as provided in Section R-3.

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F-2. Changes of Claim

The arbitrator will not consider any information that was not previously made a part of the claim record as transmitted by the Chief Engineer, other than clarification and data supporting previously submitted documentation

F-3. Serving of Notice

In addition to notice provided above, the parties shall also accept notice by telephone. Telephonic notices by the Arbitration Provider shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

F-4. Appointment and Qualification of Arbitrator

Immediately after the retention of the Arbitration Provider, the Arbitration Provider will simultaneously submit to each party a listing and biographical information from its panel of arbitrators knowledgeable in construction who are available for service in Fast Track cases. The parties are encouraged to agree to an arbitrator from this list, and to advise the Arbitration Provider of their agreement, or any factual objections to any of the listed arbitrators, within 7 calendar days of the transmission of the list. The Arbitration Provider will appoint the agreed-upon arbitrator, or in the event the parties cannot agree on an arbitrator, will designate the arbitrator from among those names not stricken for factual objections.

The parties will be given notice by the Arbitration Provider of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified above. Within the time period established by the Arbitration Provider, the parties shall notify the Arbitration Provider of any objection to the arbitrator appointed. Any objection by a party to the arbitrator shall be for cause and shall be confirmed in writing to the Arbitration Provider with a copy to the other party or parties.

F-5. Preliminary Telephone Conference

Unless otherwise agreed by the parties and the arbitrator, as promptly as practicable after the appointment of the arbitrator, a preliminary telephone conference shall be held among the parties or their attorneys or representatives, and the arbitrator.

F-6. Exchange of Exhibits

At least 2 business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator is authorized to resolve any disputes concerning the exchange of exhibits.

F-7. Discovery

There shall be no discovery, except as provided in Section F-4 or as ordered by the arbitrator in extraordinary cases when the demands of justice require it.

F-8. Date, Time, and Place of Hearing

The arbitrator shall set the date and time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The Arbitration Provider will notify the parties in advance of the hearing date. All hearings shall be held within the City and County of Denver.

F-9. The Hearing

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- (a) Generally, the hearing shall not exceed 1 day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule 1 additional hearing day within 7 business days after the initial day of hearing.
- (b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions above.

F-10. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the Arbitration Provider's transmittal of the final statements and proofs to the arbitrator.

F-11. Time Standards

The arbitration shall be completed by settlement or award within 60 calendar days of confirmation of the arbitrator's appointment, unless all parties and the arbitrator agree otherwise or the arbitrator extends this time in extraordinary cases when the demands of justice require it.

F-12. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the Arbitration Provider regional office.

PROCEDURES FOR LARGE, COMPLEX CONSTRUCTION DISPUTES

L-1. Large, Complex Construction Disputes

The procedures for large, complex construction disputes shall apply to any claim with a value exceeding \$500,000 or as agreed to by the parties.

L-2. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the Arbitration Provider shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference call will take place within 14 days after the retention of the Arbitration Provider. In the event the parties are unable to agree on a mutually acceptable time for the conference, the Arbitration Provider may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the Arbitration Provider may deem appropriate:

- (a) To obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) To discuss the views of the parties about the technical and other qualifications of the arbitrators;
- (c) To obtain conflicts statements from the parties; and
- (d) To consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

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L-3. Arbitrators

- (a) Large, Complex Construction Cases shall be heard and determined by three arbitrators.
- (b) The Arbitration Provider shall appoint arbitrator(s) in the manner provided in the Regular Construction Industry Arbitration Rules.

L-4. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person.

At the preliminary hearing the matters to be considered shall include, without limitation:

- (a) Service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);
- (b) Stipulations to uncontested facts;
- (c) The extent to which discovery shall be conducted;
- (d) Exchange and premarking of those documents which each party believes may be offered at the hearing;
- (e) The identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;
- (f) Whether, and the extent to which, any sworn statements and/or depositions may be introduced;
- (g) The extent to which hearings will proceed on consecutive days;
- (h) Whether a stenographic or other official record of the proceedings shall be maintained;
- (i) The possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and
- (j) The procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

L-5. Management of Proceedings

- (a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Construction Cases.
- (b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost effective resolution of a Large, Complex Construction Case.

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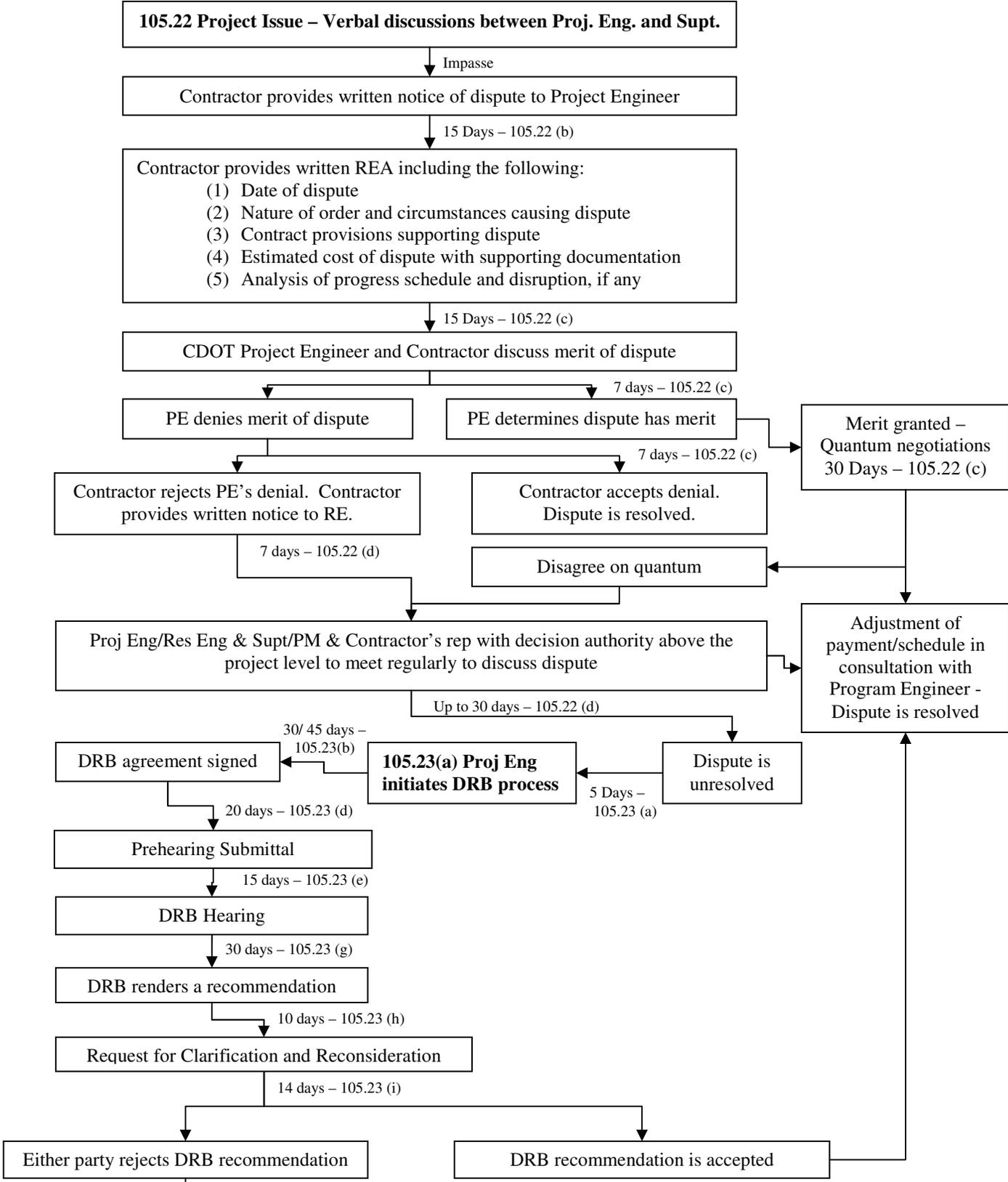
- (c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of document and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.
- (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to such persons who may possess information determined by the arbitrator(s) to be necessary to a determination of the matter.
- (e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.
- (f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.
- (g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
- (h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Subsection 105.24 shall include the following:

The following flow chart provides a summary of the disputes and claims process described in subsections 105.22, 105.23, and 105.24

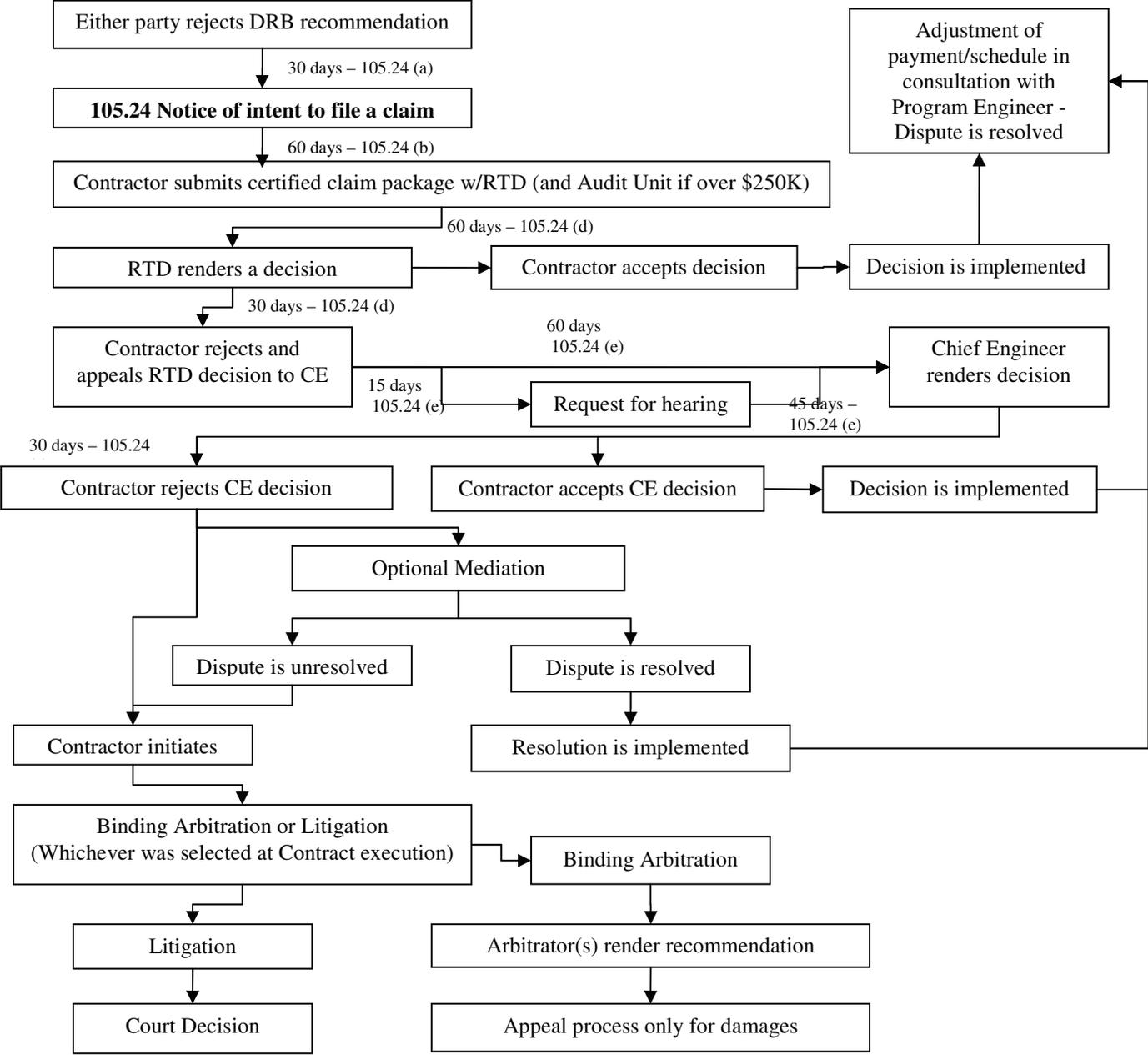
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**Figure 105-1
DISPUTES AND CLAIMS FLOW CHART**



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Figure 105-1 (continued)



SECTION 5

5. Cost accounting

Maintain the records in an organized way in the original format, electronic and hard copy, conducive to professional review and audit.

5-1.27C Record Inspection, Copying, and Auditing

Make your records available for inspection, copying, and auditing by State representatives for the same time frame specified under section 5-1.27B. The records of subcontractors and suppliers must be made available for inspection, copying, and auditing by State representatives for the same period. Before Contract acceptance, the State representative notifies the Contractor, subcontractor, or supplier 5 business days before inspection, copying, or auditing.

If an audit is to start more than 30 days after Contract acceptance, the State representative notifies the Contractor, subcontractor, or supplier when the audit is to start.

5-1.27D Cost Accounting Records

Maintain cost accounting records for the project distinguishing between the following work cost categories:

1. Work performed based on bid item prices
2. Change order work other than extra work. Distinguish this work by:
 - 2.1. Bid item prices
 - 2.2. Force account
 - 2.3. Agreed price
3. Extra work. Distinguish extra work by:
 - 3.1. Bid item prices
 - 3.2. Force account
 - 3.3. Agreed price
 - 3.4. Specialist billing
4. Work performed under potential claim records
5. Overhead
6. Subcontractors, suppliers, owner-operators, and professional services

Cost accounting records must include:

1. Final cost code lists and definitions
2. Itemization of the materials used and corresponding vendor's invoice copies
3. Direct cost of labor
4. Equipment rental charges
5. Workers' certified payrolls
6. Equipment:
 - 6.1. Size
 - 6.2. Type
 - 6.3. Identification number
 - 6.4. Hours operated

5-1.27E Change Order Bills

Maintain separate records for change order work costs.

Submit change order bills using the Department's Internet change order billing system.

The Contractor submitting and the Engineer authorizing a change order bill using the Internet change order billing system is the same as each party signing the bill.

The Department provides billing system:

1. Training within 30 days of your request
2. Accounts and user identification to your assigned representatives after a representative has received training

Each representative must maintain a unique password.

5-1.28–5-1.29 RESERVED**5-1.30 NONCOMPLIANT AND UNAUTHORIZED WORK**

Correct or remove and replace work that does not comply with the Contract, is unauthorized, or both. The Department does not pay for any of the following:

1. Corrective, removal, or replacement work
2. Unauthorized work

If ordered, submit a work plan for the corrective, removal, or replacement work.

The Department may reduce payment for noncompliant work left in place.

If you fail to comply promptly with an order under section 5-1.30, the Department may correct, remove, or replace noncompliant or unauthorized work. The Department deducts the cost of this work.

5-1.31 JOB SITE APPEARANCE

Keep the job site neat. In areas visible to the public:

1. If practicable, dispose of debris removed during clearing and grubbing concurrently with its removal. If stockpiling is necessary, dispose of weekly.
2. Furnish trash bins for debris from construction. Place debris in trash bins daily.
3. Stack forms for falsework to be reused neatly and concurrently with their removal.

5-1.32 AREAS FOR USE

Occupy the highway only for purposes necessary to perform the work.

If no State-owned area is designated for the Contractor's use, you may arrange for temporary storage with the Department.

Defend, indemnify, and hold the State harmless to the same extent as under section 7-1.05.

The Department does not allow temporary residences within the highway.

5-1.33 EQUIPMENT

Clearly stencil or stamp at a clearly visible location on each piece of equipment except hand tools an identifying number and:

1. On compacting equipment, its make, model number, and empty gross weight that is either the manufacturer's rated weight or the scale weight
2. On meters and on the load-receiving element and indicators of each scale, the make, model, serial number, and manufacturer's rated capacity

Submit a list describing each piece of equipment and its identifying number

Upon request, submit manufacturer's information that designates portable vehicle scale capacities.

For proportioning materials, use measuring devices, material plant controllers, and undersupports complying with section 9-1.02B.

Measuring devices must be tested and approved under California Test 109 in the Department's presence by any of the following:

1. County Sealer of Weights and Measures
2. Scale Service Agency
3. Division of Measurement Standards Official

The indicator over-travel must be at least 1/3 of the loading travel. The indicators must be enclosed against moisture and dust.

Group measuring system dials such that the smallest increment for each indicator can be read from the location at which proportioning is controlled.

5-1.34–5-1.35 RESERVED**5-1.36 PROPERTY AND FACILITY PRESERVATION****5-1.36A General**

Preserve property and facilities, including:

1. Adjacent property
2. Department's instrumentation
3. ESAs
4. Lands administered by other agencies
5. Railroads and railroad equipment
6. Roadside vegetation not to be removed
7. Temporary work
8. Utilities
9. Waterways

Immediately report damage to the Engineer.

If you cause damage, you are responsible.

The Department may make a temporary repair to restore service to a damaged facility.

Install sheet piling, cribbing, bulkheads, shores, or other supports necessary to support existing facilities or support material carrying the facilities.

Maintain temporary facilities until they are no longer needed.

Dispose of temporary facilities when they are no longer needed.

Excavate and backfill as necessary to remove temporary facilities. Backfill with materials of equal or better quality and to a comparable density of surrounding materials and grade surface to match the existing grade and cross slope.

5-1.36B Landscape

If you damage plants not to be removed:

1. Dispose of them unless the Engineer authorizes you to reduce them to chips and spread the chips within the highway at locations designated by the Engineer
2. Replace them

Replace plants with plants of the same species.

Replace trees with 24-inch-box trees.

Replace shrubs with no. 15-container shrubs.

Replace ground cover plants with plants from flats. Replace *Carpobrotus* ground cover plants with plants from cuttings. Plant ground cover plants 1 foot on center.

If a plant establishment period is specified, replace plants before the start of the plant establishment period; otherwise, replace plants at least 30 days before Contract acceptance.

Water each plant immediately after planting and saturate the backfill soil around and below the roots or ball of earth around the roots of each plant. Water as necessary to maintain plants in a healthy condition until Contract acceptance.

5-1.36C Railroad Property

If working on or adjacent to railroad property, do not interfere with railroad operations.

For an excavation on or affecting railroad property, submit work plans showing the system to be used to protect railroad facilities. Instead of the 15 days specified in section 5-1.23B, allow 65 days for the review of the plans.

5-1.36D Nonhighway Facilities

The Department may rearrange a nonhighway facility during the Contract. Rearrangement of a nonhighway facility includes installation, relocation, alteration, or removal of the facility.

The Department may authorize facility owners and their agents to enter the highway to perform rearrangement work for their facilities or to make connections or repairs to their property. Coordinate activities to avoid delays.

Notify the Engineer at least 3 business days before you contact the regional notification center under Govt Code § 4216 et seq. Failure to contact the notification center prohibits excavation.

Before starting work that could damage or interfere with underground infrastructure, locate the infrastructure described in the Contract, including laterals and other appurtenances, and determine the presence of other underground infrastructure inferred from visible facilities such as buildings, meters, and junction boxes.

Notify the Engineer if the infrastructure described in the Contract cannot be found. If after giving the notice, you find the infrastructure in a substantially different location from described, finding the infrastructure is change order work.

Underground infrastructure described in the Contract may be in different locations from described, and additional infrastructure may exist.

Upon discovering an underground main or trunk line not described in the Contract, immediately notify the Engineer and the infrastructure owner. The Engineer orders the locating and protecting of the infrastructure. The locating and protecting is change order work. If ordered, repair infrastructure damage. If the damage is not due to your negligence, the repair is change order work.

If necessary underground infrastructure rearrangement is not described in the Contract, the Engineer may order you to perform the work. The rearrangement is change order work.

If you want infrastructure rearrangement different from that described in the Contract:

1. Notify the Engineer
2. Make an arrangement with the infrastructure owner
3. Obtain authorization for the rearrangement
4. The Department does not adjust time or payment for rearrangement different from that described the Contract
5. Pay the infrastructure owner any additional cost

Immediately notify the Engineer of a delay due to:

1. The presence of main line underground infrastructure not described in the Contract or in a substantially different location
2. Rearrangement different from that described the Contract

5-1.37 MAINTENANCE AND PROTECTION**5-1.37A General**

Maintain and protect work until the Department has granted relief from maintenance or accepted the Contract.

Prevent construction equipment that exceeds the maximum weight limits in Veh Code Div 15 from operating on completed or existing treated base, pavement, or structures.

5-1.37B Load Limits**5-1.37B(1) General**

For areas within the project limits and subject to the Contractor providing protective measures and repairing related damage, construction equipment exceeding the size or weight limits in Veh Code Div 15 may move over:

1. Public roads within the highway
2. Treated base or pavement under construction or completed

3. Culverts and pipes
4. Structures not open to traffic that are designed for AASHTO HS20-44 live loading, except culverts and pipes. Before crossing one of these structures, submit the dimensions and maximum axle loadings of the equipment; and unless a material hauling equipment lane on a bridge is shown on the drawings, comply with the following specifications:
 - 4.1. The maximum loading on a bridge due to pneumatic-tired truck and trailer combinations must not exceed:
 - 4.1.1. 28,000 lb for single axles
 - 4.1.2. 48,000 lb for tandem axles
 - 4.1.3. 60,000 lb total gross load for single vehicles
 - 4.1.4. 110,000 lb total gross load for truck and trailer or semi-trailer combinations
 - 4.2. The loading on a bridge due to 2- and 3-axle pneumatic tired earthmovers must not exceed that shown in the following table:

Allowable Construction Loading on Bridges for 2- and 3-Axle Earthmovers

Bridge girder center-to-center spacing (feet)	Maximum axle loading (pounds)
4	28,000
5	29,000
6	30,000
7	32,000
8	34,000
9	37,000
10 and over	40,000

NOTE: Minimum axle spacing:

For 2-axle earthmovers:
Axles 1 to 2 = 20 feet

For 3-axle earthmovers:
Axles 1 to 2 = 8 feet
Axles 2 to 3 = 20 feet

5. Completed or existing base, pavement, and structures under the Department's *Transportation Permits Manual*, whether open to the public or not

Loads imposed on existing, new, or partially completed structures must not exceed the load carrying capacity of the structure or any portion of the structure as determined by AASHTO LRFD with interims and California Amendments, Design Strength Limit State II. The f_c to be used in computing the load carrying capacity must be the smaller of the following:

1. Actual compressive strength at the time of loading
2. Value of f_c shown on the plans for that portion of the structure or 2.5 times the value of f_c shown on the plans for portions of the structure where no f_c is shown

5-1.37B(2) Increased Load Carrying Capacity

You may submit a request to the Department to redesign a structure to increase its load carrying capacity.

The Department does not authorize a redesign for any of the following:

1. Load increase more than 130,000 lb per single axle or pair of axles less than 8 feet apart
2. Total gross vehicle weight more than 330,000 lb

Your request to the Department must include:

1. Description of the structure or structures
2. Detailed overload description
3. Date the revised plans are required
4. Signed statement agreeing to pay the costs, including the engineering costs
5. Signed statement agreeing to waive a time extension request for any delay

If the Department authorizes a redesign to strengthen the structure, the Engineer notifies you of the change's estimated cost and availability date of the revised plans. If the cost and date are satisfactory to you, the Engineer prepares a *Change Order* for the changes.

5-1.37B(3) Material Hauling Equipment Lane on Bridges

Section 5-1.37B(3) applies to a bridge constructed with a material hauling equipment lane.

You may cross the bridge with pneumatic-tired material hauling equipment that exceeds the size and weight limits specified but that does not exceed the load limits shown on the material hauling equipment loading diagram on the plans.

For each bridge with a material hauling equipment lane:

1. Construct a minimum 150-foot approach at each bridge end to a grade that provides a smooth transition to the bridge roadway grade. Maintain these approaches in a smooth and uniform condition during the operation of the equipment.
2. Operate equipment in a way that prevents jolting and bouncing of the equipment while crossing the bridge.
3. Confine equipment to the material hauling lane using temporary barriers unless the plans show that the entire bridge may be used for hauling equipment and the permanent barriers are completed.
4. At most 1 piece of equipment may be on the bridge at one time.

If ordered, verify the weight of loaded material hauling equipment by weighing. The Department furnishes individual wheel or axle type scales. The Department weighs the equipment within the project limits and within the highway at a location accessible to the equipment. You determine the exact weighing location. Install and maintain the scales. Installing and maintaining scales is change order work.

5-1.38 MAINTENANCE AND PROTECTION RELIEF

You may request relief from maintenance and protection responsibilities on a completed work portion. The work portion must have been completed under the Contract and to the Engineer's satisfaction. Work parts eligible for relief include:

1. Completed 0.3 mi of roadway or 0.3 mi of one roadway of a divided highway or frontage road including:
 - 1.1. Planned roadway protection work
 - 1.2. Lighting
 - 1.3. Required traffic control
 - 1.4. Access facilities
2. Bridge or other major structure
3. Complete unit of a traffic control signal system or a highway lighting system
4. Nonhighway facility constructed for another agency

If relieved by the Department, you are not required to perform further work on that portion of work. On a relieved portion of work, you are not responsible for damage, including damage caused by traffic or the elements, except for that caused by your own activities or negligence

5-1.39 DAMAGE REPAIR AND RESTORATION

5-1.39A General

Before Contract acceptance, restore damaged work to the same state of completion as before the damage. Restoration of damaged work includes restoration of erected falsework and formwork.

The Department does not adjust payment for repair or restoration that the Engineer determines was caused by your failure to construct the work under the Contract or protect the work.

5-1.39B Damage Caused by an Act of God

Under Pub Cont Code § 7105, the Department pays for repair or restoration to damaged work in excess of 5 percent of the total bid if the damage was caused by an act of God.

Submit a request for repair or restoration work payment before performing work other than emergency work.

SECTION 5

CONTROL OF WORK

The Engineer determines the repair or restoration work cost under section 9-1.04 except markups are not allowed.

The Department may change the Contract for the areas requiring repair or restoration. If the cost for the changes exceeds the repair or restoration cost based on the Bid Item List, the Engineer determines the payment adjustment under section 9-1.04.

5-1.39C Landscape Damage

5-1.39C(1) General

Repair slopes or other existing facilities that were damaged after starting job site activities and before starting plant establishment.

As ordered, replace plants that have been damaged from either or both of the following conditions:

1. Ambient air temperature falling below 32 degrees F during the plant establishment period
2. Department or its supplier restricting or stopping water delivery during the plant establishment period

This plant replacement work is change order work.

5-1.39C(2) Plant Establishment Period of 3 Years or More

Section 5-1.39C(2) applies if a plant establishment period of 3 years or more is specified in the special provisions. Perform work specified in section 5-1.39C(2) as ordered.

Repair slopes or other existing facilities that were damaged before starting job site activities. This work is change order work.

Repair slopes or other existing facilities that were damaged by a change in the runoff pattern from that which existed on the date of the *Notice to Bidders* and was the result of work by others within the highway. This work is change order work.

Replace plants and repair slopes, irrigation systems, and other highway facilities damaged as a result of rain during the plant establishment period. The Department pays 1/2 the accumulated costs in excess of the greater of 5 percent of the plant establishment work or \$2,000; the Contractor pays the other 1/2. The Engineer determines the repair cost under section 9-1.04.

5-1.40–5-1.41 RESERVED

5-1.42 REQUESTS FOR INFORMATION

Submit an RFI upon recognition of any event or question of fact arising under the Contract.

The Engineer responds to the RFI within 5 days. Proceed with the work unless otherwise ordered. You may protest the Engineer's response by:

1. Submitting an *Initial Potential Claim Record* within 5 days after receiving the Engineer's response
2. Complying with section 5-1.43

5-1.43 POTENTIAL CLAIMS AND DISPUTE RESOLUTION

5-1.43A General

Minimize and mitigate impacts of potentially claimed work or event.

For each potential claim, assign an identification number determined by chronological sequencing and the 1st date of the potential claim.

Use the identification number for each potential claim on the:

1. *Initial Potential Claim Record*
2. *Supplemental Potential Claim Record*
3. *Full and Final Potential Claim Record*

Failure to comply with this procedure is:

1. Waiver of the potential claim and a waiver of the right to a corresponding claim for the disputed work in the administrative claim procedure

2. Bar to arbitration (Pub Cont Code § 10240.2)

5-1.43B Initial Potential Claim Record

Submit an *Initial Potential Claim Record* within 5 days of the Engineer's response to the RFI or within 5 days from the date when a dispute arises due to an act or failure to act by the Engineer. The *Initial Potential Claim Record* establishes the claim nature and circumstances. The claim nature and circumstances must remain consistent.

The Engineer responds within 5 days of receiving the *Initial Potential Claim Record*. Proceed with the potentially claimed work unless otherwise ordered.

Within 20 days of a request, provide access to the project records determined necessary by the Engineer to evaluate the potential claim.

5-1.43C Supplemental Potential Claim Record

Within 15 days of submitting the *Initial Potential Claim Record*, submit a *Supplemental Potential Claim Record* including:

1. Complete nature and circumstances causing the potential claim or event
2. Contract specifications supporting the basis of a claim
3. Estimated claim cost and an itemized breakdown of individual costs stating how the estimate was determined
4. TIA

The Engineer evaluates the *Supplemental Potential Claim Record* and furnishes you a response within 20 days of receiving the submittal. To pursue a potential claim, comply with sections 5-1.43D and 5-1.43E.

If the estimated cost or effect on the scheduled completion date changes, update the *Supplemental Potential Claim Record* information as soon as the change is recognized and submit this information.

5-1.43D Full and Final Potential Claim Record

Notify the Engineer within 10 days of the completion date of the potentially claimed work. The Engineer authorizes this completion date or notifies you of a revised date.

Within 30 days of the completion of the potentially claimed work, submit a *Full and Final Potential Claim Record* including:

1. A detailed factual account of the events causing the potential claim, including:
 - 1.1. Pertinent dates
 - 1.2. Locations
 - 1.3. Work items affected by the potential claim
2. The Contract documents supporting the potential claim and a statement of the reasons these parts support entitlement
3. If a payment adjustment is requested, an itemized cost breakdown. Segregate costs into the following categories:
 - 3.1. Labor, including:
 - 3.1.1. Individuals
 - 3.1.2. Classifications
 - 3.1.3. Regular and overtime hours worked
 - 3.1.4. Dates worked
 - 3.2. Materials, including:
 - 3.2.1. Invoices
 - 3.2.2. Purchase orders
 - 3.2.3. Location of materials either stored or incorporated into the work
 - 3.2.4. Dates materials were transported to the job site or incorporated into the work
 - 3.3. Equipment, including:
 - 3.3.1. Detailed descriptions, including make, model, and serial number
 - 3.3.2. Hours of use
 - 3.3.3. Dates of use
 - 3.3.4. Equipment rates at the rental rate listed in Labor Surcharge and Equipment Rental Rates in effect when the affected work related to the claim was performed

4. If a time adjustment is requested:
 - 4.1. Dates for the requested time.
 - 4.2. Reasons for a time adjustment.
 - 4.3. Contract documentation supporting the requested time adjustment.
 - 4.4. TIA. The TIA must demonstrate entitlement to a time adjustment.
5. Identification and copies of your documents and copies of communications supporting the potential claim, including certified payrolls, bills, cancelled checks, job cost reports, payment records, and rental agreements
6. Relevant information, references, and arguments that support the potential claim

The Department does not consider a *Full and Final Potential Claim Record* that does not have the same nature, circumstances, and basis of claim as those specified on the *Initial Potential Claim Record* and *Supplemental Potential Claim Record*.

The Engineer evaluates the information presented in the *Full and Final Potential Claim Record* and furnishes you a response within 30 days of its receipt unless the *Full and Final Potential Claim Record* is submitted after Contract acceptance, in which case, a response may not be furnished. The Engineer's receipt of the *Full and Final Potential Claim Record* must be evidenced by postal return receipt or the Engineer's written receipt if delivered by hand.

5-1.43E Alternative Dispute Resolution

5-1.43E(1) General

5-1.43E(1)(a) General

Section 5-1.43E applies to a contract with 100 or more working days.

"The parties" in section 5-1.43E means you and the Department.

"Dispute meeting" in section 5-1.43E refers to both the traditional and informal dispute meeting processes.

The alternative dispute resolution process must be used for the timely resolution of disputes that arise out of the work.

You must comply with section 5-1.43E to pursue a claim, file for arbitration, or file for litigation. You must comply with section 5-1.43E(2)(d). You may comply with section 5-1.43E(1)(d).

The alternative dispute resolution process is not a substitute for the submitting of an RFI or a potential claim record.

Do not use the alternative dispute resolution process for disputes between you and subcontractors or suppliers that have no grounds for a legal action against the Department. If you fail to comply with section 5-1.43 for a potential claim on behalf of a subcontractor or supplier, you release the Department of the subcontractor's potential claim.

Do not use the alternative dispute resolution process for quantification of disputes for overhead type expenses or costs. For disputes for overhead type expenses or costs, comply with section 9-1.17D.

You, the Department, and the DRA or DRB must complete and comply with the *Dispute Resolution Advisor Agreement* or *Dispute Resolution Board Agreement*. For these agreement forms, go to the Department's Division of Construction Web site.

No DRA- or DRB-related meetings are allowed until you, the Department, and the DRA or DRB, execute the agreement. However, you, the Department, and the DRA or DRB, may agree to sign and execute the agreement at the 1st meeting.

5-1.43E(1)(b) Establishment of Procedures

Upon selecting the DRA or DRB, the parties must meet with the DRA or DRB to establish and agree to procedures for:

1. Submitting documents
2. Conducting hearings
3. Providing recommendations

Appendix D

FDOT Specifications

PROSECUTION OF WORK - DISPUTES REVIEW BOARD.

(REV 1-4-11) (FA 1-21-11) (7-11)

ARTICLE 8-3 (Pages 81 - 83) is expanded by the following new Subarticle:

8-3.7 Disputes Review Board: For this Contract, a Disputes Review Board will be established to assist in the resolution of disputes and claims arising out of the work on the Contract.

8-3.7.1. Purpose: The Board will provide special expertise to assist in and facilitate the timely and equitable resolution of disputes and claims between the Department and the Contractor in an effort to avoid construction delay and future claims.

It is not intended for the Department or the Contractor to default on their normal responsibility to cooperatively and fairly settle their differences by indiscriminately assigning them to the Board. It is intended that the Board encourage the Department and Contractor to resolve potential disputes or claims without resorting to this alternative resolution procedure.

The Board will be used when normal Department-Contractor dispute or claim resolution is unsuccessful. Either the Department or the Contractor may refer a dispute or claim to the Board. Referral to the Board should be initiated as soon as it appears that the normal dispute resolution effort is not succeeding. Referral to the Board is accomplished by providing a position paper outlining the nature and scope of the dispute or claim and describing the basis for entitlement to the dispute or claim. Only disputes or claims that have been duly preserved under the terms of the Contract as determined by the Board will be eligible to be heard by the Board. Requests for equitable adjustment must be certified as required by 4-3.2. Claims that are referred to the Board must be in compliance with 5-12. It is a condition of this Contract that the parties shall use the Dispute Review Board. The completed DRB hearing of any unresolved dispute or claims is a condition precedent to the Department or the Contractor having the right to initiate arbitration, other alternative resolution procedures, or to file a lawsuit, as provided by law, on such unresolved disputes or claims.

The recommendations of the Board will not be binding on either the Department or the Contractor unless otherwise stated in the Contract.

The Board will fairly and impartially consider disputes or claims referred to it and will provide written recommendations to the Department and Contractor to assist in the resolution of these disputes or claims.

8-3.7.2. Continuance of Work: During the course of the Disputes Review Board process, the Contractor will continue with the work as directed by the Engineer in a diligent manner and without delay or otherwise conform to the Engineer's decision or order, and will be governed by all applicable provisions of the Contract. Throughout any protested work, the Contractor will keep complete records of extra costs and time incurred. The Contractor will permit the Engineer and Board access to these and any other records needed for evaluating the disputes and claims.

8-3.7.3. Membership: The Disputes Review Board will consist of one member selected by the Department and approved by the Contractor, and one member selected by the Contractor and approved by the Department. The first two members will mutually select and

agree on the third member. Normally, the third member will act as Chairman for all Board activities.

8-3.7.4 Qualification: It is desirable that all Board members have at least ten years of experience with the type of construction involved in this project, in the interpretation of Contract Documents, and in contract dispute resolution. Board members must have attended the Dispute Resolution Board Foundation's Administration and Practices Workshop and must be on the Department's Lists of Candidate Members as provided on the Department's website. The goal in selecting the third member is to complement the construction experience of the first two members, to provide leadership for the Board's activities, and to provide expertise in the area of administering alternative contract resolution proceedings. It is imperative that Board members not show or be perceived as showing partiality to either the Contractor or the Department. A Board member shall not have any conflict of interest, which could affect their ability to act in a disinterested and unbiased manner.

8-3.7.5 Conflict of Interest: A person selected to the Board shall submit to the party appointing him/her a resume covering his/her applicable education and experience, a list of all DRBs, with meeting frequencies, on which he/she currently serves, and a disclosure statement covering, but not limited to, any of the following categories of relationships or prior involvement in this project:

- a. Any direct or indirect ownership or financial interest in the Contractor awarded the project, the CEI consulting firm on the project, any subcontractor or supplier on the project or any business of another Board member.
- b. Current employment by the Department, the Contractor awarded the contract, or the CEI consulting firm on the project. Service as a Dispute Review Board Member shall not be construed to be employment.
- c. Current employment by any subcontractor or supplier on the project.
- d. Current employment by a consulting engineering firm that will be seeking future contracts for CEI services from the Department.
- e. Within the two year period immediately prior to award of the contract, employment by: the Central Office of the Department; the Department's District or Turnpike in which the project is located; the Department, as a consultant in the District or Turnpike in which the project is located; the Contractor awarded the contract, the CEI consulting firm on the project, any subcontractor or supplier on the project or any business of another Board member. Service as a Dispute Review Board Member shall not be construed to be employment.
- f. A close personal relationship with any key individual in any firm involved in the contract.
- g. A prior involvement in the project of a nature, which might be construed as compromising his/her ability to act impartially in carrying out the duties of the Board.
- h. A contract as a consultant to the Contractor awarded the contract.
- i. A contract as a consultant with any subcontractor or supplier on the project.
- j. Current full-time employment by a Department prequalified contractor or consultant.

8-3.7.6 Disqualification: Category a, b, c, e, and j relationships listed in 8-3.7.5 shall disqualify a person from serving on the Board for this project. The other categories of relationships or prior involvement in this project listed above will be considered by the Contractor and the Department in arriving at their decision as to whether or not to accept a person as a member of the Board.

If during the life of the contract, a Board member is made aware that a firm of which he/she is an employee is involved in the contract as a subcontractor or supplier, he/she shall immediately give notice to the Department and the Contractor. Upon receiving such notification, the Department or the Contractor may, within ten (10) days, give notice that this Board member is no longer acceptable and a new Board member shall be selected and approved as provided above. In no event, shall a Board member participate in a hearing by the Board of dispute involving a firm by which he is employed.

The Department may disqualify a person from serving on future Disputes Review Boards for Department projects who submits a disclosure statement which fails to provide accurate and complete disclosure of a relationship that prohibits him/her from serving on the Board for this project or one of the possible conflicts of interest listed above.

8-3.7.7 Selection of Members: Every attempt shall be made by the Department and the Contractor to complete the selection of Disputes Review Board members and execute the Three-Party Agreement prior to date of the preconstruction conference and, if applicable, the initial partnering workshop. The Department and the Contractor shall select their Board members and give the other party notice of the person they have selected to serve as a member of the Board. This notice shall be accompanied by the resume and disclosure statement submitted by that person.

Within ten (10) days of receiving the notice of selection of a Board member, the Department and the Contractor shall review the accompanying resume and disclosure statement, make such inquiries as each deems necessary and notify the other party in writing as to whether or not the person selected is acceptable. Failure to give this notice within the ten (10) days allowed shall be construed to be acceptance.

If a person selected is not acceptable to the other party, the party who selected that person shall within five (5) days select another person and provide to the other party to the contract a notification accompanied by a resume and disclosure statement.

Once the Contractor and the Department have agreed upon the first two members of the Board they shall immediately notify those members of their approval. Within one week of this notification, the first two members of the Board shall select the third member and give written notice to the Contractor and the Department accompanied by that person's resume and disclosure statement.

Within ten (10) days of receiving the notice of selection of a third member of the Board, the Department and the Contractor shall review the accompanying resume and disclosure statement, make such inquiries as each deems necessary and notify the first two members in writing as to whether or not the person selected is acceptable. If a person selected is not acceptable to the Contractor or the Department the first two members of the Board shall immediately select another person and provide notification accompanied by a resume and disclosure statement. Failure to give this notice within the ten (10) days allowed shall be construed to be acceptance.

If, (1) the Department or the Contractor fail to provide the other party notice of selection of a Board Member within the time specified, herein; (2) the first two members of the Board fail to provide notice to the parties of their selection of the third member of the Board within the times specified, herein; or (3) the parties are unable to agree on appointment of a Board member within 60 days after award of the contract, that member shall be appointed by mutual consent of the Department's State Construction Engineer and the President of the Florida Transportation Builders Association.

Immediately after agreement is reached on all members of the Board the Contractor, the Department and the members of the Board shall proceed with execution of a Three Party Agreement as provided on the Department's website. The execution of this agreement will not modify the requirements, terms or conditions of this Specification.

If during the life of the contract, a Board member has a discussion regarding employment or entered into any agreement for employment after completion of the contract with the Department, the Contractor or any subcontractor or supplier on the project, he/she shall immediately disclose this to the Contractor and the Department and shall be disqualified from serving on the Board.

Should the Department and the Contractor mutually agree to terminate a Disputes Review Board Three Party Agreement, the existing Disputes Review Board Three Party Agreement will remain in force until replaced by another a fully executed Disputes Review Board Three Party Agreement. If, after the Department has made final acceptance of the project, there are unresolved disputes and claims remaining, the Disputes Review Board Three Party Agreement shall remain active and in full force and effect until the project is otherwise administratively closed by the Department following final payment so that the Board may continue in operation until all unresolved disputes and claims are resolved.

8-3.7.8 Limitation for Referral of Disputes or Claims to the Board: Any disputes or claims that were not resolved prior to Final Acceptance of the project pursuant to 5-11 must be referred to the Board within 90 calendar days after Final Acceptance on projects with an original Contract amount of \$3,000,000 or less, and within 180 calendar days after Final Acceptance on projects with an original Contract amount greater than \$3,000,000. Only duly preserved disputes or claims will be eligible to be heard by the Board. Failure to submit all disputes or claims to the Board within aforementioned timeframe after Final Acceptance constitutes an irrevocable waiver of the Contractor's dispute or claim.

8-3.7.9. Basis of Payment: A per day cost of \$3,300 has been established by the Department to reimburse the Contractor for providing compensation to the three members of the Disputes Review Board. This amount will be paid to the Contractor for each day the Disputes Review Board is convened for regular DRB project meetings. For each day of the meeting, the Contractor shall compensate each Disputes Review Board member a sum of \$1,100. Such payment will be full compensation to the Board member for salary and all travel expenses (air fare, rental or personal automobile, motel room, meals, etc.) related to membership on the Board. Do not pay prior to the execution of the Three Party Agreement.

A per hearing cost of \$8,000 has been established by the Department for providing compensation for all members of the Dispute Review Board for participation in an actual hearing. The Board chairman will receive \$3,000 for participation in the hearing while the remaining two members will receive \$2,500 each. The Department and the Contractor will equally provide compensation to the Board for participation in an actual hearing. The Department

will compensate the Contractor \$4,000 as its contribution to the hearing cost. Such payment will be full and complete compensation to the Board members for all expenses related to the hearing. This includes travel, accommodations, meals, pre- and post- hearing work, review of position papers and any rebuttals, conducting the hearing, drafting and issuance of recommendations, readdressing any requests for clarification. It is not intended for hearings to last longer than a single day, however, in some cases they may. Any additional time and/or compensation for a hearing would only be allowed upon prior written approval of the Department and the Contractor. If an additional day(s) is granted for the hearing, it will be at \$3,300 per day, regular meeting rate, payment of which is equally split between the Department and the Contractor.

The Department will prepare and mail minutes and progress reports, will provide administrative services, such as conference facilities and secretarial services, and will bear the cost of these services.

If the Board desires special services, such as legal consultation, accounting, data research, and the like, both parties must agree, and the costs will be shared by them as mutually agreed.

Payment shall be made under:

Item No. 999- 20- 1 Disputes Review Board meeting - per day.

Item No. 999- 20- 2 Disputes Review Board hearing - per each

PROSECUTION OF WORK – REGIONAL DISPUTES REVIEW BOARD.
(REV 1-4-11) (FA 1-21-11) (7-11)

ARTICLE 8-3 (Pages 81 - 83) is expanded by the following new Subarticle:

8-3.7 Disputes Review Board: For this Contract, a Disputes Review Board will be available to assist in the resolution of disputes and claims arising out of the work on the Contract.

8-3.7.1 Purpose: The Board will provide special expertise to assist in and facilitate the timely and equitable resolution of disputes and claims between the Department and the Contractor in an effort to avoid construction delay and future claims.

It is not intended that the Department or the Contractor default on their normal responsibility to cooperatively and fairly settle their differences by indiscriminately assigning them to the Board. It is intended that the Board encourage the Department and Contractor to resolve potential disputes or claims without resorting to this alternative resolution procedure.

The Board will be used when normal Department-Contractor dispute or claim resolution is unsuccessful. Either the Department or the Contractor may refer a dispute or claim to the Board. Referral to the Board should be initiated as soon as it appears that the normal dispute resolution effort is not succeeding. Referral to the Board is accomplished by providing a position paper outlining the nature and scope of the dispute or claim and describing the basis for entitlement to the dispute or claim. Only disputes or claims that have been duly preserved under the terms of the Contract as determined by the Board will be eligible to be heard by the Board. Requests for equitable adjustment must be certified as required by 4-3.2. Claims that are referred to the Board must be in compliance with 5-12. It is a condition of this Contract that the parties shall use the Dispute Review Board. The completed DRB hearing of any unresolved disputes or claims is a condition precedent to the Department or the Contractor having the right to initiate arbitration, other alternative resolution procedures, or to file a lawsuit, as provided by law on such unresolved disputes or claims.

The recommendations of the Board will not be binding on either the Department or the Contractor.

The Board will fairly and impartially and without regard to how or by whom they may have been appointed, consider disputes or claims referred to it and will provide written recommendations to the Department and Contractor to assist in the resolution of these disputes or claims.

8-3.7.2 Continuance of Work: During the course of the Disputes Review Board process, the Contractor will continue with the work as directed by the Engineer in a diligent manner and without delay or otherwise conform to the Engineer's decision or order, and will be governed by all applicable provisions of the Contract. Throughout any protested work, the Contractor will keep complete records of extra costs and time incurred. The Contractor will permit the Engineer and Board access to these and any other records needed for evaluating the disputes or claims.

8-3.7.3 Membership: The Disputes Review Board will consist of members pre-selected by the Engineer and the President of the Florida Transportation Builders' Association (FTBA), and posted on the Department's Website.

If during the life of the contract, a Board member has a discussion regarding employment or entered into any agreement for employment after completion of the contract with the Department, the Contractor or any subcontractor or supplier on the project, he/she shall immediately disclose this to the Contractor and the Department and shall be disqualified from serving on the Board.

Once established, the Board will remain active and in full force and effect. If, after the Department has made final acceptance of the project, there are unresolved disputes and claims remaining, the Disputes Review Board shall remain active and in full force and effect until the project is otherwise administratively closed by the Department following final payment so that the Board may continue in operation until all unresolved disputes and claims are resolved.

8-3.7.4 Procedure and Schedules for Disputes Resolution: Disputes and claims will be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. Steps may be omitted as agreed by the Department and the Contractor and the time periods stated below may be shortened in order to hasten resolution.

a. If the Contractor objects to any decision, action or order of the Engineer, the Contractor may file a written protest with the Engineer, stating clearly and in detail the basis for the objection, within 15 days after the event.

b. The Engineer will consider the written protest and make his decision on the basis of the pertinent contract provisions, together with the facts and circumstances involved in the dispute or claim. The Engineer's decision will be furnished in writing to the Contractor within 15 days after receipt of the Contractor's written protest.

c. This decision will be final and conclusive on the subject, unless a written appeal to the Engineer is filed by the Contractor within 15 days of receiving the decision. Should the Contractor preserve its protest of the Engineer's decision, the matter can be referred to the Board by either the Department or the Contractor.

d. Upon receipt by the Board of a written duly preserved protest of a dispute or claim, either from the Department or the Contractor, it will first be decided when to conduct the hearing.

e. Either party furnishing any written evidence or documentation to the Board will furnish copies of such information to the other party a minimum of 15 days prior to the date the Board sets to convene the hearing for the dispute or claim. If the Board requests any additional documentation or evidence prior to, during, or after the hearing, the Department and/or Contractor will provide the requested information to the Board and to the other party.

f. The Contractor and the Department will each be afforded an opportunity to be heard by the Board and to offer evidence. Neither the Department nor the Contractor may present information at the hearing that was not previously distributed to both the Board and the other party.

g. The Board's recommendations for resolution of the dispute or claim will be given in writing to both the Department and the Contractor, within 15 days of completion of the hearings. In cases of extreme complexity, both parties may agree to allow additional time for the Board to formulate its recommendations. The Board will focus its attention in the written report to matters of entitlement and allow the parties to determine the monetary damages. If both parties request, and sufficient documentation is available, the Board may make a recommendation of monetary damages.

h. Within 15 days of receiving the Board's recommendations, both the Department and the Contractor will respond to the other and to the Board in writing, signifying either acceptance or rejection of the Board's recommendations. The failure of either party to respond within the 15 day period will be deemed an acceptance of the Board's recommendations by that party. If the Department and the Contractor are able to resolve the dispute or claim with or without the aid of the Board's recommendations, the Department will promptly process any required Contract changes.

i. Should the dispute or claim remain unresolved, either party may seek reconsideration of the decision by the Board only when there is new evidence to present. No provisions in this Specification will abrogate the Contractor's responsibility for preserving the request for equitable adjustment in accordance with 4-3.2 or the Contractor's responsibility for preserving a claim filed in accordance with 5-12.

Although both the Department and the Contractor should place great weight on the Board's recommendation, it is not binding. If the Board's recommendations do not resolve the dispute or claim, all records and written recommendations of the Board will be admissible as evidence in any subsequent dispute resolution procedures.

8-3.7.5 Contractor Responsibility: The Contractor shall furnish to each Board member a set of all pertinent documents which are or may become necessary for the Board, except documents furnished by Department, to perform their function. Pertinent documents are any drawings or sketches, calculations, procedures, schedules, estimates, or other documents which are used in the performance of the work or in justifying or substantiating the Contractor's position. A copy of such pertinent documents must also be furnished to the Department.

Except for its participation in the Board's activities as provided in the construction Contract and in this Agreement, the Contractor will not solicit advice or consultation from the Board or any of its members on matters dealing in any way with the project, the conduct of the work or resolution of problems.

8-3.7.6 Department Responsibilities: Except for its participation in the Board's activities as provided in the construction Contract and in this Agreement, the Department will not solicit advice or consultation from the Board or any of its members on matters dealing in any way with the project, the conduct of the work or resolution of problems.

The Department shall furnish the following services and items:

a. **Contract Related Documents:** The Department shall furnish each Board member a copy of all Contract Documents, supplemental agreements, written instructions issued by the Department to the Contractor, or other documents pertinent to the performance of the Contract and necessary for the Board to perform their function. A copy of such pertinent documents must also be furnished to the Contractor.

b. **Coordination and Services:** The Department, in cooperation with the Contractor, will coordinate the operations of the Board. The Department, through the Project Engineer, will arrange or provide conference facilities at or near the Contract site and provide secretarial and copying services.

8-3.7.7 Limitation for Referral of Disputes or Claims to the Board: Any disputes or claims that were not resolved prior to Final Acceptance of the project pursuant to 5-11 must be referred to the Board within 90 calendar days after Final Acceptance for projects with an original Contract amount of \$3,000,000 or less, and within 180 calendar days after Final Acceptance on projects with an original Contract amount greater than \$3,000,000. Only duly

preserved disputes or claims will be eligible to be heard by the Board. Failure to submit all disputes or claims to the Board within aforementioned timeframe after Final Acceptance constitutes an irrevocable waiver of the Contractor's dispute or claim.

8-3.7.8 Basis of Payment: A per hearing cost of \$8,000 has been established by the Department for providing compensation for all members of the Dispute Review Board for participation in an actual hearing. The Board chairman will receive \$3,000 for participation in the hearing while the remaining two members will receive \$2,500 each. The Department and the Contractor will equally provide compensation to the Board for participation in an actual hearing. The Department will compensate the Contractor \$4,000 as its contribution to the hearing cost. Such payment will be full and complete compensation to the Board members for all expenses related to the hearing. This includes travel, accommodations, meals, pre- and post- hearing work, review of position papers and any rebuttals, conducting the hearing, drafting and issuance of recommendations, readdressing any requests for clarification. It is not intended for hearings to last longer than a single day, however, in some cases they may. Any additional time and/or compensation for a hearing would only be allowed upon prior written approval of the Department and the Contractor. If an additional day(s) is granted for the hearing, it will be at \$3,300 per day, payment of which is equally split between the Department and the Contractor. Payment shall be made by issuing a work order against contingency funds set aside for this Contract.

The Department will prepare and mail minutes and progress reports, will provide administrative services, such as conference facilities and secretarial services, and will bear the cost of these services. If the Board desires special services, such as legal consultation, accounting, data research, and the like, both parties must agree, and the costs will be shared by them as mutually agreed.

PROSECUTION OF WORK – STATEWIDE DISPUTES REVIEW BOARD.
(REV 1-4-11) (FA 1-21-11) (7-11)

ARTICLE 8-3 (Pages 81 - 83) is expanded by the following new Subarticle:

8-3.8 Statewide Disputes Review Board: For this Contract, a Statewide Disputes Review Board will be available to assist in the resolution of disputes and claims arising out of the administration and enforcement of a specification when such specification specifically refers disputes to this Board.

8-3.8.1 Purpose: The Board will provide special expertise to assist in and facilitate the timely and equitable resolution of the disputes and claims between the Contractor and the Department.

It is not intended that the Department or the Contractor default on their normal responsibility to cooperatively and fairly settle their differences by indiscriminately assigning them to the Board. It is intended that the Board encourage the Department and Contractor to resolve potential disputes or claims without resorting to this alternative resolution procedure.

The Board will be used when normal Department-Contractor dispute or claim resolution is unsuccessful. Either the Department or the Contractor may refer a dispute or claim to the Board. Referral to the Board should be initiated as soon as it appears that the normal dispute resolution effort is not succeeding. Referral to the Board is accomplished by providing a position paper outlining the nature and scope of the dispute or claim and describing the basis for entitlement to the dispute or claim. Only disputes or claims that have been duly preserved under the terms of the Contract as determined by the Board will be eligible to be heard by the Board. Requests for equitable adjustment must be certified as required by 4-3.2. Claims that are referred to the Board must be in compliance with 5-12. It is a condition of this Contract that the parties shall use the Statewide Disputes Review Board.

The recommendations of the Board will be binding on both the Department and the Contractor.

The Board will fairly and impartially and without regard to how or by whom they may have been appointed, consider disputes or claims referred to it and will provide written recommendations to the Department and Contractor to assist in the resolution of these disputes or claims.

8-3.8.2 Membership: The Statewide Disputes Review Board will consist of members pre-selected by the Engineer and the President of the Florida Transportation Builders' Association (FTBA), and posted on the Department's Website.

Members on the Board will be pre-qualified as experts of the type of work being referred to this Board.

If during the life of the contract, a Board member has a discussion regarding employment or entered into any agreement for employment after completion of the contract with the Department, the Contractor or any subcontractor or supplier on the project, he/she shall immediately disclose this to the Contractor and the Department and shall be disqualified from serving on the Board.

After the Department has made final acceptance of the project, if disputes arise, the Statewide Disputes Review Board shall be activated to hear and rule on the disputed issue.

8-3.8.3 Procedure and Schedules for Disputes Resolution: Disputes or claims will be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. Steps may be omitted as agreed by the Department and the Contractor and the time periods stated below may be shortened in order to hasten resolution.

a. If the Contractor objects to any decision, action or order of the Engineer resulting from the Engineer's evaluation of the guaranteed product or performance period, the Contractor may file a written protest with the Engineer, stating clearly and in detail the basis for the objection, within 15 days after the event.

b. The Engineer will consider the written protest and make his decision on the basis of the pertinent contract provisions, together with the facts and circumstances involved in the dispute. The Engineer's decision will be furnished in writing to the Contractor within 15 days after receipt of the Contractor's written protest.

c. The Engineer's decision will be final and conclusive on the subject, unless the Contractor files a written appeal to the Engineer within 15 days of receiving the decision. Upon the Engineer's receipt of the Contractor's written appeal containing specific protest of all or part of the Engineer's decision, either the Department or the Contractor can refer the matter to the Board.

d. Upon receipt by the Board of a written duly preserved protest of a dispute or claim, either from the Department or the Contractor, it will first be decided when to conduct the hearing.

e. Either party furnishing any written evidence or documentation to the Board will furnish copies of such information to the other party a minimum of 15 days prior to the date the Board sets to convene the hearing for the dispute or claim. If the Board requests any additional documentation or evidence prior to, during, or after the hearing, the Department and/or Contractor will provide the requested information to the Board and to the other party.

f. The Contractor and the Department will each be afforded an opportunity to be heard by the Board and to offer evidence. Neither the Department nor the Contractor may present information at the hearing that was not previously distributed to both the Board and the other party.

g. The Board's recommendations for resolution of the dispute or claim will be given in writing to both the Department and the Contractor, within 15 days of completion of the hearings. The Board will focus its attention in the written report to matters of responsibility for repairs of guaranteed work or performance period as provided for by the Contract Documents.

8-3.8.4 Contractor Responsibility: The Contractor shall furnish to each Board member a set of all pertinent documents that are or may become necessary for the Board, except documents furnished by Department, to perform their function. Pertinent documents are any drawings or sketches, calculations, procedures, schedules, estimates, or other documents which are used in the performance of the work or in justifying or substantiating the Contractor's position. A copy of such pertinent documents must also be furnished to the Department.

Except for its participation in the Board's activities as provided in the construction Contract and in this Agreement, the Contractor will not solicit advice or consultation from the Board or any of its members on matters dealing in any way with the project, the conduct of the work or resolution of problems.

8-3.8.5 Department Responsibilities: Except for its participation in the Board's activities as provided in the construction Contract and in this Agreement, the Department will not solicit advice or consultation from the Board or any of its members on matters dealing in any way with the project, the conduct of the work or resolution of problems.

The Department shall furnish the following services and items:

a. **Contract Related Documents:** The Department shall furnish each Board member a copy of all Contract Documents, supplemental agreements, written instructions issued by the Department to the Contractor, or other documents pertinent to the performance of the Contract and necessary for the Board to perform their function. A copy of such pertinent documents must also be furnished to the Contractor.

b. **Coordination and Services:** The Department, in cooperation with the Contractor, will coordinate the operations of the Board. The Department, through the Project Engineer, will arrange or provide conference facilities at or near the Contract site and provide secretarial and copying services.

8-3.8.6 Basis of Payment: A per hearing cost of \$8,000 has been established by the Department for providing compensation for all members of the Dispute Review Board for participation in an actual hearing. The Board chairman will receive \$3,000 for participation in the hearing while the remaining two members will receive \$2,500 each. The Department and the Contractor will equally provide compensation to the Board for participation in an actual hearing. The Department will compensate the Contractor \$4,000 as its contribution to the hearing cost. Such payment will be full and complete compensation to the Board members for all expenses related to the hearing. This includes travel, accommodations, meals, pre- and post- hearing work, review of position papers and any rebuttals, conducting the hearing, drafting and issuance of recommendations, readdressing any requests for clarification. It is not intended for hearings to last longer than a single day, however, in some cases they may. Any additional time and/or compensation for a hearing would only be allowed upon prior written approval of the Department and the Contractor. If an additional day(s) is granted for the hearing, it will be at \$3,300 per day, payment of which is equally split between the Department and the Contractor. Payment shall be made by issuing a work order against contingency funds set aside for this Contract.

The Department will prepare and mail minutes and progress reports, will provide administrative services, such as conference facilities and secretarial services, and will bear the cost of these services. If the Board desires special services, such as legal consultation, accounting, data research, and the like, both parties must agree, and the costs will be shared by them as mutually agreed.

Section 3.4

DISPUTE REVIEW BOARD

3.4.1 Purpose

The purpose of this procedure is to provide for uniformity in the use of Dispute Review Boards (DRB).

3.4.2 Initiating Specifications

(A) Resident Level Responsibilities

All contracts should contain a special provision for either a contract specific Dispute Review Board (DRB) or a Regional DRB (RDRB). Conventional contracts over \$15 million should contain a special provision for a contract specific Dispute Review Board (DRB). The Resident Engineer (RE) also has the option to add a contract specific DRB to projects less than \$15 million, for complex projects, or for projects with a higher than normal probability of issues. For capacity only projects, a RDRB can be deemed sufficient based on the complexity of the project or a decreased probability of issues. Complex Design-Build contracts over \$30 million should contain a contract specific DRB, while smaller and/or less complex Design-Build contracts can utilize a RDRB. If there is no special provision for a contract specific DRB, then there should be one for a Regional DRB (RDRB).

3.4.3 Contract Specific DRB

3.4.3.1 Member Selection

(A) Resident Level Responsibilities

Projects with contract specific DRBs require the appointment of the three members. The process of appointing the three members should be completed early enough that the members can attend the pre-construction meeting.

The RE will select an appointee from the Florida Department of Transportation's (Department's) list of candidate members. The name of the proposed DRB member selected by the RE should be reviewed by the District Construction Engineer (DCE) prior to submitting to the Contractor for review. In selecting a member, keep in mind, we

are not looking for someone who will take our side, but someone knowledgeable of the type of work that will understand the issues that may come up and who is able to knowledgeably evaluate a dispute. The RE should review the resume and disclosure statement, other DRB workload (recommend 10 days per month or fewer that are committed to DRB meetings) and availability of the members of the proposed Department selection, the Contractor selected member and the proposed chairperson. Copies of these resumes should also be forwarded to the DCE.

When the Contractor submits its appointee, the RE should seek the advice of the DCE before approving the appointment. The RE and the DCE should carefully review the resume of the appointee and solicit references if unknown.

3.4.3.2 Three Party Agreement

(A) Resident Level Responsibilities

A contract specific DRB requires a ***DRB Three Party Agreement, Form No. 700-011-02*** be executed before the pre-construction meeting. This document is not included in contracts but is to be downloaded off the Forms and Procedures website. The Project Administrator (PA) should take the lead in getting this agreement executed. The DRB and Contractor should execute 2 copies of the agreement. The copies should then be sent to the DCE for execution. The agreement will be returned to the PE for distribution, one original retained by the Department, the other original to the Contractor, and one copy each to the DRB members.

(B) District Level Responsibilities

The DCE is responsible for executing the Three Party Agreement, unless delegated. In the case of delegation, documentation of such delegation should be maintained in files.

3.4.3.3 Meeting

(A) Resident Level Responsibilities

Meeting frequency should be determined on a project-by-project basis. Meetings should generally be held monthly at least for the first six months to acclimate the DRB, as problems often become apparent in the early part of a project. If the project is behind schedule, or the Contractor is submitting numerous ***Notices of Intent to Claim***, a monthly meeting is necessary. Projects that are running smoothly with few claims and on schedule should evaluate the meeting frequency. The RE and the Contractor must agree to changes to the frequency of meetings. This is not meant to be a unilateral

decision by the Department.

When possible, DRB meetings should be scheduled to coincide with regular periodic progress meetings. DRB meetings are scheduled well in advance. The RE must assure that these meetings occur when scheduled. The RE should not cancel a meeting without adequate notice. DRB members should be paid for a meeting canceled with less than 5 working days advance notice unless the Board initiates such cancellation.

On a contract specific DRB, all three members should attend each scheduled periodic meeting. In the event that one member of the Board is unable to attend a regular scheduled meeting, the Chairman should attempt to reschedule the meeting. Should rescheduling not be possible, the other two members may attend the meeting without the third member. Only the members attending should be compensated. No hearing will be conducted without all three members present.

The Department project staff will take minutes of the regular periodic meetings, including that portion devoted to DRB discussion.

(B) District Level Responsibilities

The District Construction Office is responsible for initiating a request to include the DRB special provision for a contract and should provide a projected quantity for meetings. The quantity should allow for the life of the contract. Generally, one meeting per month for the first six months and a meeting once every other month should be followed, unless circumstance dictates otherwise.

3.4.3.4 Use of the DRB

(A) Resident Level Responsibilities

On all matters that relate to DRBs, communicate only with the Chairman. All personnel on the project should understand that there should be no communication with any DRB member outside of a meeting. The only exception is communication between the parties and the DRB Chairman relating to scheduling meetings or administrative matters relating to a hearing.

On rare occasions, the Department or the Contractor may bring an issue that is unusually complex or request that a detailed analysis be developed. In this instance it may be appropriate for the DRB to request additional compensation. It is important that there be agreement among all parties as to what the expectations and compensation will be as it relates to the number of days the DRB members are to be compensated

and level of detail of the recommendation, prior to presenting the issue to the DRB.

The default of a Contractor does not terminate the contract. The DRB is still in existence and all parties have the same responsibilities as existed prior to a default.

If a Contractor refuses to participate in a hearing, they should be reminded that the hearing is a condition precedent to any other forum of resolution. The hearing should then take place absent the Contractor. The Department will not refuse to participate in a hearing unless determined appropriate after consultation with the State Construction Office and the Central Office Civil Litigation Section. The only exception would be if all parties agree that the issue is one over which the Department has no jurisdiction or the issue involves a third party which cannot come before the DRB.

3.4.3.5 Payment

(A) Resident Level Responsibilities

Costs associated with a contract specific DRB are reimbursed to the Contractor through an established pay item. The Contractor pays the members of the DRB and the Department reimburses the Contractor using this pay item. Invoices must be prepared by the DRB Chairman and submitted to the Contractor, with a copy sent to the Project Engineer showing the date and nature of the services provided and support and document the quantity for the estimate, particularly when the services provided were not in attendance at a regularly scheduled meeting. Normally the pay quantity for a meeting is 1.0, however, the pay quantity can be a fractional quantity. No payment is made until the Three Party Agreement is executed.

It is possible that a DRB meeting could occur after the Contractor has submitted a qualified acceptance letter. In that case, the PE will process another estimate to reimburse the Contractor for payments to the individual members.

3.4.4 Regional DRB

3.4.4.1 Member Selection

(A) Central Office Level Responsibilities

There are three regular members and two alternates designated for each RDRB for a period of one calendar year. The list of the members is available on the State Construction Office's web site.

3.4.4.2 Three Party Agreement

(A) Central Office Level Responsibilities

The Three Party Agreement for RDRB has been executed and is maintained in the State Construction Office.

3.4.4.3 Meeting Frequency

A RDRB does not have regular periodic meetings unless requested by the DCE. When a hearing is requested by the RE or the Contractor, a pre-hearing (orientation) meeting may be appropriate to acquaint the RDRB with the project and any issue to be heard.

(A) Resident Level Responsibilities

The RE initiates a request to the DCE that the RE, or the Contractor, intends to present a dispute to the RDRB.

(B) District Level Responsibilities

The DCE or designee shall schedule the RDRB meeting to hear the dispute submitted by the RE.

3.4.4.4 Payment

(A) Resident Level Responsibilities

RDRB is paid using a work order against a contingency pay-item or Contingency Supplemental Agreement. If the RDRB meets to hear issues on more than one project, the meeting should be paid for using contingency funds from only one project.

It is possible that a RDRB meeting could occur after the Contractor has submitted a qualified acceptance letter. In that case, since the project is still open in Transport, another estimate will be processed to reimburse the Contractor for payments to the individual members.

If the project is closed out, as may be the case on a project that contains a Warranty/Guarantee specification, a **Contract Invoice Transmittal, Form No. 350-060-02**, will be issued, in accordance with the **Disbursement Handbook**, to reimburse the Contractor for payments to the individual members.

3.4.5 Request for Hearing

(A) Resident Level Responsibilities

Exemplar Operating Guidelines are posted on the State Construction Office website. The Department and the Contractor have the responsibility to resolve issues in a timely manner. On Partnered projects, there is a clearly defined escalation process. On other projects, the escalation process may not be clearly defined.

The Department does not have to wait for the Contractor to bring an issue to the DRB or RDRB. It is important that issues be escalated soon enough to mitigate impacts to the project. Once the project personnel recognize that a resolution, that is mutually agreeable to the Contractor and the Department, will not come about, or that the partnering process dictates, then the issue should be brought to the DRB or RDRB. The PA and the RE should consult with the DCE prior to requesting a hearing.

If the Department requests a hearing, the initial request should be for entitlement only. A request by either the Department or the Contractor for a hearing on quantum should be made only after a finding or recommendation on entitlement was issued and the Department and Contractor have made a sincere effort to resolve the quantum issue, or such is not otherwise reasonably possible. The Department should resist any effort made by the Contractor to have the entitlement and quantum issues heard by the DRB at the same hearing because it deprives both sides of an opportunity to arrive at a mutually agreeable solution.

3.4.6 Preparation for the Hearing

(A) Resident Level Responsibilities

The Department's position must be based on facts, plans, specifications, and contract documents. Send copies of the Department's position papers and rebuttals to the DCE for review prior to submitting to the DRB or RDRB.

The person(s) who will be representing the Department at the hearing should be familiar with how a hearing is conducted. A "dry run" should be conducted to make sure the Department's position is presented clearly.

Send copies of Contractor's position papers and rebuttals to the DCE for review.

3.4.7 During the Hearing

(A) Resident Level Responsibilities

Prior to the start of the hearing, request the DRB or RDRB to go over the Operating Guidelines

Keep in mind that neither party is to be permitted to present information that hasn't been previously given to the other party prior to the hearing without the other party's consent.

3.4.8 Recommendation of the Board

(A) Resident Level Responsibilities

The RE should discuss the recommendation with the DCE to determine whether to accept or reject the recommendation. The RE should accept or reject the recommendation in writing within the time period stated in the Specification. If the RE wants to reject the recommendation, the rejection has to be based on the DRB or RDRB disregarding or failing to recognize specifications and contract documents. If the recommendation does not provide sufficient information to indicate which facts or contract provisions were used to support the decision, request further information. Consultation with the State Construction Office and Central Office Civil Litigation Section will be necessary before the RE decides to reject any recommendation.

A copy of the Board's recommendation shall be sent to the State Construction Office.

4. Washington State Department of Labor and Industries (per [Section 1-07.10](#)) shows the Contractor is current with payments of industrial insurance and medical aid premiums.
5. All claims, as provided by law, filed against the retainage have been resolved. In the event claims are filed and provided the conditions of 1, 2, 3, and 4 are met, the Contractor will be paid such retained percentage less an amount sufficient to pay any such claims together with a sum determined by the Contracting Agency sufficient to pay the cost of foreclosing on claims and to cover attorney's fees.

1-09.10 Payment for Surplus Processed Materials

After the Contract is completed, the Contractor will be reimbursed actual production costs for surplus processed material produced by the Contractor from Contracting Agency-provided sources if its value is \$3,000 or more (determined by actual production costs).

The quantity of surplus material eligible for reimbursement of production costs shall be the quantity produced (but an amount not greater than 110 percent of Plan quantity or as specified by the Engineer), less the actual quantity used. The Contracting Agency will determine the actual amount of surplus material for reimbursement.

The Contractor shall not dispose of any surplus material without permission of the Engineer. Surplus material shall remain the property of the Contracting Agency without reimbursement to the Contractor if it is not eligible for reimbursement.

1-09.11 Disputes and Claims

When protests occur during a Contract, the Contractor shall pursue resolution through the Project Engineer. The Contractor shall follow the procedures outlined in [Section 1-04.5](#).

If the negotiations using the procedures outlined in [Section 1-04.5](#) fail to provide satisfactory resolution of protests, then the Contractor shall provide the Project Engineer with written notification that the Contractor will continue to pursue the dispute in accordance with the provisions of [Section 1-09.11](#). The written notification shall be provided within 7 calendar days after receipt of the Engineer's written determination that the Contractor's protest is invalid pursuant to [Section 1-04.5](#). The Contractor's written notice of dispute shall indicate whether the Contractor prefers to resolve the dispute through the use of a Disputes Review Board as outlined in [Section 1-09.11\(1\)](#), or to submit a formal claim directly to the Contracting Agency pursuant to [Section 1-09.11\(2\)](#).

If a Disputes Review Board is requested by the Contractor, the Contracting Agency will notify the Contractor in writing whether the use of a Disputes Review Board is agreed upon within 7 calendar days after receiving the Contractor's written notice of dispute. If both parties to the dispute agree, then the dispute will be referred to a Disputes Review Board according to [Section 1-09.11\(1\)](#). If the parties do not mutually agree to establish a Disputes Review Board then none shall be used, and the Contractor shall submit a formal claim directly to the Contracting Agency as outlined in [Section 1-09.11\(2\)](#), Claims.

In spite of any protest or dispute, the Contractor shall proceed promptly with the Work as the Engineer orders.

1-09.11(1) Disputes Review Board

In order to assist in the resolution of disputes arising out of the Work of this project, the Contract provides for the establishment of a Disputes Review Board, hereinafter called the "Board". The Board is created when negotiations using the procedures outlined in [Section 1-04.5](#) fail to provide a satisfactory resolution and the Contracting Agency and Contractor mutually agree to use a Board as part of the disputes resolution process prior to the Contractor filing a formal claim pursuant to [Section 1-09.11\(2\)](#).

The Board will consider disputes referred to it and furnish recommendations to the Contracting Agency and Contractor to assist in the resolution of the differences between them. The purpose of the Board response to such issues is to provide nonbinding findings and recommendations designed to expose the disputing parties to an independent view of the dispute.

The Board members will be especially knowledgeable in the type of construction involved in the Project and shall discharge their responsibilities impartially and independently considering the facts and conditions related to the matters under consideration and the provisions of the Contract

1-09.11(1)A Disputes Review Board Membership

The Board shall consist of one member selected by the Contracting Agency and one member selected by the Contractor, with these two members to select the third member. The first two members shall be mutually acceptable to both the Contracting Agency and the Contractor. If one or both of the two members selected are not acceptable to the Contracting Agency or Contractor, another selection shall be made.

The Contracting Agency and Contractor shall each select their respective Board member and negotiate an agreement, separate and apart from this Contract, with their respective Board member within 14 calendar days after the parties have agreed to establish a Board, as outlined in [Section 1-09.11\(1\)](#).

The agreements with these two Board members shall contain language imposing the “Scope of Work” and “Suggested Administrative Procedures” for Disputes Review Boards available at www.wsdot.wa.gov/business/consulting. These negotiated agreements shall also include clauses that require the respective selected members to immediately pursue selection of a third member. The goal is to obtain a third Board member who will complement the first two by furnishing a needed expertise, which will facilitate the Board’s operations.

In case a member of the Board needs to be replaced, the replacement member will be appointed in the same manner as the replaced member was appointed. The appointment of a replacement Board member will begin promptly upon determination of the need for replacement and shall be completed within 30 calendar days.

Service of a Board member may be terminated at any time with not less than 30 calendar days notice as follows:

1. The Contracting Agency may terminate service of the Contracting Agency appointed member.
2. The Contractor may terminate service of the Contractor appointed member.
3. The third member’s services may be terminated by agreement of the other two members.
4. By resignation of the member.

Termination of a member will be followed by appointment of a substitute as specified above.

No member shall have a financial interest in the Contract, except for payments for services on the Board. The Contracting Agency-selected member and the Contractor-selected member shall not have been employed by the party who selected them within a period of 1 year; except that, service as a member of other Disputes Review Boards on other contracts will not preclude a member from serving on the Board for this Contract.

Compensation for the Board members, and the expenses of operation of the Board, shall be shared by the Contracting Agency and Contractor in accordance with the following:

1. The Contracting Agency will compensate directly the wages and travel expense for its selected member.
2. The Contractor shall compensate directly the wages and travel expense for its selected member.
3. The Contracting Agency and Contractor shall share equally in the third member’s wages and travel expense, and all of the operating expenses of the Board. These equally shared expenses shall be billed to and paid by the Contracting Agency. The Contractor’s share will be deducted from monies due or coming due the Contractor.
4. The Contracting Agency, through the Engineer, will provide administrative services, such as conference facilities and secretarial services, to the Board and the Contracting Agency will bear the costs for this service.

The Contracting Agency and Contractor shall indemnify and hold harmless the Board Members from and against all claims, damages, losses, and expenses, including but not limited to, attorney's fees arising out of and resulting from the actions and recommendations of the Board.

1-09.11(1)B Disputes Review Board Procedures

The Board, the Contracting Agency, and the Contractor shall develop by agreement the Board's rules of operation and procedures to be followed for the Project. In developing the Agreement, the parties shall take into consideration their respective duties and responsibilities set forth in the "Scope of Work" section of their agreements.

The parties may also consider the "Suggested Administrative Procedures" for the Board's operation included in their agreements. These Procedures express, in general terms, the policy for the creation and operation of the Board.

No dispute shall be referred to the Board unless the Contractor has complied with the requirements of Sections 1-04.5 and 1-09.11 and the parties have mutually agreed to refer the dispute to the Board in an attempt to resolve the dispute prior to the Contractor filing a claim according to Section 1-09.11(2). If the dispute is referred to the Board, then the Board will consider the matter in dispute and provide recommendations concerning:

1. The interpretation of the Contract.
2. Entitlement to additional compensation or time for performance.
3. The amount of additional compensation or time for performance following a recommendation of entitlement by the Board provided that; (1) the parties were not able to reach a resolution as to the amount of the equitable adjustment or time; (2) the Engineer has made a unilateral determination of the amount of compensation for time; and (3) the Contractor has protested the Engineer's unilateral determination.
4. Other subjects mutually agreed by the Contracting Agency and Contractor to be a Board issue.

Once the Board is established, the dispute resolution process shall be as follows:

1. Board hearing dates will be scheduled by agreement of the parties.
2. The Contractor and the Contracting Agency shall each be afforded an opportunity to be heard by the Board and to offer evidence. Either party furnishing any written evidence or documentation to the Board must furnish copies of such information to the other party a minimum of 15 calendar days prior to the date the Board sets to convene the hearing for the dispute. Either party shall produce such additional evidence as the Board may deem necessary to an understanding and determination of the dispute and furnish copies to the other party.
3. After the hearing is concluded, the Board shall meet in private and reach a conclusion supported by two or more members. Its findings and recommendations, together with its reasons shall then be submitted as a written report to both parties. The recommendations shall be based on the pertinent Contract Provisions and facts and circumstances involved in the dispute. The Contract shall be interpreted and construed in accordance with the laws of the State of Washington. The Board shall make every effort to reach a unanimous decision. If this proves impossible, the dissenting member may prepare a minority report.
4. Within 30 calendar days of receiving the Board recommendations, both the Contracting Agency and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. Although both parties should place weight upon the Board recommendations, the recommendations are not binding.

In the event the Board's recommendations do not lead to resolution of the dispute, all Board records and written recommendations, including any minority reports, will be admissible as evidence in any subsequent litigation.

If the Board's assistance does not resolve the dispute, the Contractor must file a claim according to [Section 1-09.11\(2\)](#) before seeking any form of judicial relief.

1-09.11(2) Claims

If the Contractor claims that additional payment is due and the Contractor has pursued and exhausted all the means provided in [Sections 1-04.5](#) and [1-09.11\(1\)](#) to resolve a dispute, including the use of a Disputes Review Board if one was established, the Contractor may file a claim as provided in this Section. The Contractor agrees to waive any claim for additional payment if the written notifications provided in [Section 1-04.5](#) are not given, or if the Engineer is not afforded reasonable access by the Contractor to complete records of actual cost and additional time incurred as required by [Section 1-04.5](#), or if a claim is not filed as provided in this Section. The fact that the Contractor has provided a proper notification, provided a properly filed claim, or provided the Engineer access to records of actual cost, shall not in any way be construed as proving or substantiating the validity of the claim. If the claim, after consideration by the Engineer, is found to have merit, the Engineer will make an equitable adjustment either in the amount of costs to be paid or in the time required for the Work, or both. If the Engineer finds the claim to be without merit, no adjustment will be made.

All claims filed by the Contractor shall be in writing and in sufficient detail to enable the Engineer to ascertain the basis and amount of the claim. All claims shall be submitted to the Project Engineer as provided in [Section 1-05.15](#). As a minimum, the following information must accompany each claim submitted:

1. A detailed factual statement of the claim for additional compensation and time, if any, providing all necessary dates, locations, and items of Work affected by the claim.
2. The date on which facts arose which gave rise to the claim.
3. The name of each Contracting Agency individual, official, or employee involved in or knowledgeable about the claim.
4. The specific provisions of the Contract which support the claim and a statement of the reasons why such provisions support the claim.
5. If the claim relates to a decision of the Engineer which the Contract leaves to the Engineer's discretion or as to which the Contract provides that the Engineer's decision is final, the Contractor shall set out in detail all facts supporting its position relating to the decision of the Engineer.
6. The identification of any documents and the substance of any oral communications that support the claim.
7. Copies of any identified documents, other than Contracting Agency documents and documents previously furnished to the Contracting Agency by the Contractor, that support the claim (manuals which are standard to the industry, used by the Contractor, may be included by reference).
8. If an extension of time is sought:
 - a. The specific days and dates for which it is sought,
 - b. The specific reasons the Contractor believes a time extension should be granted,
 - c. The specific provisions of [Section 1-08.8](#) under which it is sought, and
 - d. The Contractor's analysis of its progress schedule to demonstrate the reason for a time extension.
9. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:
 - a. Labor;
 - b. Materials;
 - c. Direct equipment. The actual cost for each piece of equipment for which a claim is made or in the absence of actual cost, the rates established by the AGC/WSDOT Equipment Rental Agreement which was in effect when the Work was performed.

In no case shall the amounts claimed for each piece of equipment exceed the rates established by that Equipment Rental Agreement even if the actual cost for such equipment is higher. The Contracting Agency may audit the Contractor’s cost records as provided in Section 1-09.12 to determine actual equipment cost. The following information shall be provided for each piece of equipment:

- (1) Detailed description (e.g., Motor Grader Diesel Powered Caterpillar 12 “G”, Tractor Crawler ROPS & Dozer Included Diesel);
- (2) The hours of use or standby; and
- (3) The specific day and dates of use or standby;

- d. Job overhead;
- e. Overhead (general and administrative);
- f. Subcontractor’s claims (in the same level of detail as specified herein is required for any Subcontractor’s claims); and
- g. Other categories as specified by the Contractor or the Contracting Agency.

10. A notarized statement shall be submitted to the Project Engineer containing the following language:

Under the penalty of law for perjury or falsification, the undersigned,

_____, _____
(name) (title)

of _____
(company)

hereby certifies that the claim for extra compensation and time, if any, made herein for Work on this Contract is a true statement of the actual costs incurred and time sought, and is fully documented and supported under the Contract between the parties.

Dated _____/s/_____

Subscribed and sworn before me this _____ day of _____

Notary Public

My Commission Expires: _____

It will be the responsibility of the Contractor to keep full and complete records of the costs and additional time incurred for any alleged claim. The Contractor shall permit the Engineer to have access to those records and any other records as may be required by the Engineer to determine the facts or contentions involved in the claim. The Contractor shall retain those records for a period of not less than three years after final acceptance.

The Contractor shall pursue administrative resolution of any claim with the Engineer or the designee of the Engineer.

Failure to submit with the Final Contract Voucher Certification such information and details as described in this Section for any claim shall operate as a waiver of the claims by the Contractor as provided in Section 1-09.9.

Provided that the Contractor is in full compliance with all the provisions of this Section and after the formal claim document has been submitted, the Contracting Agency will respond, in writing, to the Contractor as follows:

1. Within 45 calendar days from the date the claim is received by the Contracting Agency if the claim amount is less than \$100,000;
2. Within 90 calendar days from the date the claim is received by the Contracting Agency if the claim amount is equal to or greater than \$100,000; or
3. If the above restraints are unreasonable due to the complexity of the claim under consideration, the Contractor will be notified within 15 calendar days from the date the claim is received by the Contracting Agency as to the amount of time which will be necessary for the Contracting Agency to prepare its response.

Full compliance by the Contractor with the provisions of this Section is a contractual condition precedent to the Contractor's right to seek judicial relief.

1-09.11(3) Time Limitation and Jurisdiction

For the convenience of the parties to the Contract it is mutually agreed by the parties that any claims or causes of action which the Contractor has against the State of Washington arising from the Contract shall be brought within 180 calendar days from the date of final acceptance ([Section 1-05.12](#)) of the Contract by the State of Washington; and it is further agreed that any such claims or causes of action shall be brought only in the Superior Court of Thurston County. The parties understand and agree that the Contractor's failure to bring suit within the time period provided, shall be a complete bar to any such claims or causes of action. It is further mutually agreed by the parties that when any claims or causes of action which the Contractor asserts against the State of Washington arising from the Contract are filed with the State or initiated in court, the Contractor shall permit the State to have timely access to any records deemed necessary by the State to assist in evaluating the claims or action.

1-09.12 Audits

1-09.12(1) General

The Contractor's wage, payroll, and cost records on this Contract shall be open to inspection or audit by representatives of the Contracting Agency during the life of the Contract and for a period of not less than 3 years after the date of final acceptance of the Contract. The Contractor shall retain these records for that period. The Contractor shall also guarantee that the wage, payroll, and cost records of all Subcontractors and all lower tier Subcontractors shall be retained and open to similar inspection or audit for the same period of time. The audit may be performed by employees of the Contracting Agency or by an auditor under contract with the Contracting Agency. The Contractor, Subcontractors, or lower tier subcontractors shall provide adequate facilities, acceptable to the Engineer, for the audit during normal business hours. The Contractor, Subcontractors, or lower tier subcontractors shall make a good faith effort to cooperate with the auditors. If an audit is to be commenced more than 60 calendar days after the final acceptance date of the Contract, the Contractor will be given 20 calendar days notice of the time when the audit is to begin. If any litigation, claim, or audit arising out of, in connection with, or related to this Contract is initiated, the wage, payroll, and cost records shall be retained until such litigation, claim, or audit involving the records is completed.

1-09.12(2) Claims

All claims filed against the Contracting Agency shall be subject to audit at any time following the filing of the claim. Failure of the Contractor, Subcontractors, or lower tier subcontractors to maintain and retain sufficient records to allow the auditors to verify all or a portion of the claim or to permit the auditor access to the books and records of the Contractor, Subcontractors, or lower tier subcontractors shall constitute a waiver of a claim and shall bar any recovery thereunder.

1-09.12(3) Required Documents for Audits

As a minimum, the auditors shall have available to them the following documents:

1. Daily time sheets and supervisor's daily reports.
2. Collective Bargaining Agreements.
3. Insurance, welfare, and benefits records.
4. Payroll registers.
5. Earnings records.
6. Payroll tax forms.
7. Material invoices and requisitions.
8. Material cost distribution worksheet.
9. Equipment records (list of company equipment, rates, etc.).
10. Vendors', rental agencies', Subcontractors', and lower tier subcontractors' invoices.
11. Contracts between the Contractor and each of its Subcontractors, and all lower-tier subcontractor contracts and supplier contracts.
12. Subcontractors' and lower tier subcontractors' payment certificates.
13. Canceled checks (payroll and vendors).
14. Job cost reports, including monthly totals.
15. Job payroll ledger.
16. General ledger.
17. Cash disbursements journal.
18. Financial statements for all years reflecting the operations on this Contract. In addition, the Contracting Agency may require, if it deems appropriate, additional financial statements for 3 years preceding execution of the Contract and 3 years following final acceptance of the Contract.
19. Depreciation records on all company equipment whether these records are maintained by the company involved, its accountant, or others.
20. If a source other than depreciation records is used to develop costs for the Contractor's internal purposes in establishing the actual cost of owning and operating equipment, all such other source documents.
21. All documents which relate to each and every claim together with all documents which support the amount of damages as to each claim.
22. Worksheets or software used to prepare the claim establishing the cost components for items of the claim including but not limited to labor, benefits and insurance, materials, equipment, Subcontractors, all documents which establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.
23. Worksheets, software, and all other documents used by the Contractor to prepare its Bid.

An audit may be performed by employees of the Contracting Agency or a representative of the Contracting Agency. The Contractor and its Subcontractors shall provide adequate facilities acceptable to the Contracting Agency for the audit during normal business hours. The Contractor and all Subcontractors shall cooperate with the Contracting Agency's auditors.

1-09.13 Claims Resolution**1-09.13(1) General**

Prior to seeking claim resolution through nonbinding alternative dispute resolution processes, binding arbitration, or litigation, the Contractor shall proceed under the administrative procedures in Sections 1-04.5 and 1-09.11, and any Special Provision provided in the Contract for resolution of disputes. The provisions of these Sections must be complied with in full, as a condition precedent to the Contractor's right to seek claim resolution through any nonbinding alternative dispute resolution process, binding arbitration or litigation.

1-09.13(2) Nonbinding Alternative Disputes Resolution (ADR)

Nonbinding ADR processes are encouraged and available upon mutual agreement of the Contractor and the Contracting Agency for all claims submitted in accordance with [Section 1-09.11](#), provided that:

1. All the administrative remedies provided for in the Contract have been exhausted;
2. The Contracting Agency has been given the time and opportunity to respond to the Contractor as provided in [Section 1-09.11\(2\)](#); and
3. The Contracting Agency has determined that it has sufficient information concerning the Contractor's claims to participate in a nonbinding ADR process.

The Contracting Agency and the Contractor mutually agree that the cost of the nonbinding ADR process shall be shared equally by both parties with each party bearing its own preparation costs.

The type of nonbinding ADR process shall be agreed upon by the parties and shall be conducted within the State of Washington at a location mutually acceptable to the parties.

The Contractor agrees that the participation in a nonbinding ADR process does not in any way waive the requirement that binding arbitration or litigation proceedings must commence within 180 calendar days of final acceptance of the Contract, the same as any other claim or causes of action as provided in [Section 1-09.11\(3\)](#).

1-09.13(3) Claims \$250,000 or Less

The Contractor and the Contracting Agency mutually agree that those claims which total \$250,000 or less, submitted in accordance with [Section 1-09.11](#) and not resolved by nonbinding ADR processes, shall be resolved through mandatory and binding arbitration as described herein.

1-09.13(3)A Administration of Arbitration

Arbitration shall be as agreed by the parties or, if the parties cannot agree, arbitration shall be administered through the American Arbitration Association (AAA) using the following arbitration methods:

1. The current version of the Construction Industry Arbitration Rules and Mediation *Fast Track Procedures* shall be used for claims with an amount less than \$75,000.
2. The current version of the Construction Industry Arbitration Rules and Mediation *Regular Track Procedures* shall be used for claims with an amount equal to or greater than \$75,000 and less than \$250,000.

The Contracting Agency and the Contractor mutually agree the venue of any arbitration hearing shall be within the State of Washington and any such hearing shall be conducted within the State of Washington.

The Contracting Agency and the Contractor mutually agree to be bound by the decision of the arbitrator, and judgment upon the award rendered by the arbitrator may be entered in the Superior Court of Thurston County. The decision of the arbitrator and the specific basis for the decision shall be in writing. The arbitrator shall use the Contract as a basis for decisions.

1-09.13(3)B Procedures to Pursue Arbitration

If the dispute cannot be resolved through administrative procedures provided in [Sections 1-04.5](#) and [1-09.11](#), and any Special Provision provided in the Contract for resolution of disputes or through a mutually agreed upon nonbinding ADR process, the Contractor shall advise the Engineer, in writing, that mandatory and binding arbitration is desired. The parties may agree on an arbitration process, or, if the parties cannot agree a demand for arbitration shall be filed by the Contractor, in accordance with the AAA rules, with the Contracting Agency, and with the AAA. Selection of the arbitrator and the administration of the arbitration shall proceed in accordance with AAA rules using arbitrators from the list developed by the AAA, except that: for claims under \$25,000 using the Northwest Region Expedited Commercial Arbitration Rules, arbitration selection shall proceed pursuant to Section 55 of

the Expedited Procedure of the Construction Industry Arbitration Rules. Arbitration shall proceed utilizing the appropriate rule of the AAA as determined by the dollar amount of the claim as provided in [Section 1-09.13\(3\)A](#).

Unresolved disputes which do not involve delays or impacts to unchanged Work may be brought to binding arbitration prior to Physical Completion of the project, provided that:

1. All the administrative remedies provided for in the Contract have been exhausted;
2. The dispute has been pursued to the claim status as provided in [Section 1-09.11\(2\)](#); and
3. The Contractor certifies in writing that claims for delays or impacts to the Work will not result from the dispute.

Unless the Contracting Agency and the Contractor agree otherwise, all other unresolved claims (disputes which have been pursued to the claim status) which arise from a Contract must be brought in a single arbitration hearing and only after Physical Completion of the Contract. The total of those unresolved claims cannot be greater than \$250,000 to be eligible for arbitration.

In addition, the Contractor agrees arbitration proceedings must commence, by filing of the aforementioned demand for arbitration, within 180 calendar days of final acceptance of the contract, the same as any other claim or causes of action as provided in [Section 1-09.11\(3\)](#).

The scope and extent of discovery shall be determined by the arbitrator in accordance with AAA rules. In addition, each party for claims greater than \$25,000 shall serve upon the other party a "statement of proof". The statement of proof shall be served, with a copy to the AAA, no less than 20 calendar days prior to the arbitration hearing and shall include:

1. The identity, current business address, and residential address of each witness who will testify at the hearing;
2. The identity of a witness as an expert if an expert witness is to be called, a statement as to the subject matter and the substance of the facts and opinions on which the expert is expected to testify, a summary of the grounds for each opinion, and a resume of the expert's qualifications; and
3. A list of each document that the party intends to offer in evidence at the arbitration hearing. Either party may request from the other party a copy of any document listed. If such a request is made, a copy of the document shall be provided within 5 calendar days from the date the request is received.

The arbitrator may permit a party to call a witness or offer a document not shown or included in the statement of proof only upon a showing of good cause.

1-09.13(4) Claims in Excess of \$250,000

The Contractor and the Contracting Agency mutually agree that those claims in excess of \$250,000, submitted in accordance with [Section 1-09.11](#) and not resolved by nonbinding ADR processes, shall be resolved through litigation unless the parties mutually agree to resolve the claim through binding arbitration.

Appendix F

CDOT DISPUTE RESOLUTION PROCESS SURVEY

1. Are you at all involved with the administration of construction projects? This includes any type of oversight of personnel administering construction projects. If No, please do not complete this survey.

Yes No

2. What best describes your position title?

- a. Engineering/Physical Sci. Tech
- b. CEPM Series
- c. EIT Series
- d. PE I
- e. PE II
- f. PE III or Above

3. How familiar are you with CDOT's dispute resolution specifications related to dispute resolution boards (DRBs)? 1 is completely unfamiliar and 5 being completely familiar?

1 2 3 4 5

4. If your familiarity level was 1-3, what best describes the reason?

- a. N/A, I am familiar and answered 4 or 5 on the previous question
- b. I've never heard of DRBs
- c. I've heard of DRBs, but haven't read the DRB discussion in the specs.
- d. My projects typically have criteria not requiring DRBs
- e. I don't care to learn about DRBs

5. Have you ever attended a training course on DRBs?

Yes No

6. If you have not attended DRB training, what best describes the reason?
- N/A, I've attended DRB training
 - I trained myself on DRBs by reading the specs.
 - Unaware DRB training exists
 - Not interested in the subject
 - Not interested in using DRBs on my projects
 - No time because of all my project demands
 - Supervisor will not approve this training
 - Region will not approve the travel required because of budget constraints
7. What is your perception of DRBs? 1 is completely negative and 5 is completely positive? N/A if you're completely unfamiliar with DRBs.
- 1 2 3 4 5 N/A
8. If your perception of DRBs is negative (1 or 2), what best describes the reason?
- N/A, I answered 3-5 or N/A on the previous question
 - DRBs don't work
 - DRBs are too expensive
 - DRB utilization on my projects reflects negatively on me
 - I prefer to maintain control of the outcomes of claims on my projects
9. If you have ever utilized DRBs on any project(s) describe your overall DRB experience. 1 is absolutely negative and 5 being absolutely positive. N/A if you have never used DRBs.
- 1 2 3 4 5 N/A
10. If your DRBs experience was negative (1 or 2), what best describes the reason?
- N/A, I answered 3-5 or N/A on the previous question
 - DRB members weren't neutral
 - Members didn't completely understand the project issues
 - Members weren't properly trained on CDOT procedures
 - I didn't agree with the board's recommendations
 - Contractor didn't accept the board's recommendations