

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.

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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 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).

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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.

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

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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 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:

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- 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:

DISPUTE REVIEW BOARD
THREE PARTY AGREEMENT
COLORADO PROJECT NO.

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

_____;

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 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.

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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.

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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.

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

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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)

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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: _____.

BOARD MEMBER: _____.

BY: _____.

BOARD MEMBER: _____.

BY: _____.

CONTRACTOR: _____.

BY: _____.

TITLE:

COLORADO DEPARTMENT OF TRANSPORTATION

BY: _____ Date: _____.

TITLE: CHIEF ENGINEER

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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

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.

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(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

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,

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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.
- (d) In no case shall an arbitrator be employed by, affiliated with, or have consultative 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

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- (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 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.

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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.

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

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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.
- (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.

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

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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

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.

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(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

- (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

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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.

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

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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.

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,

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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

- (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.

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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.

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;

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- (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.
- (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**

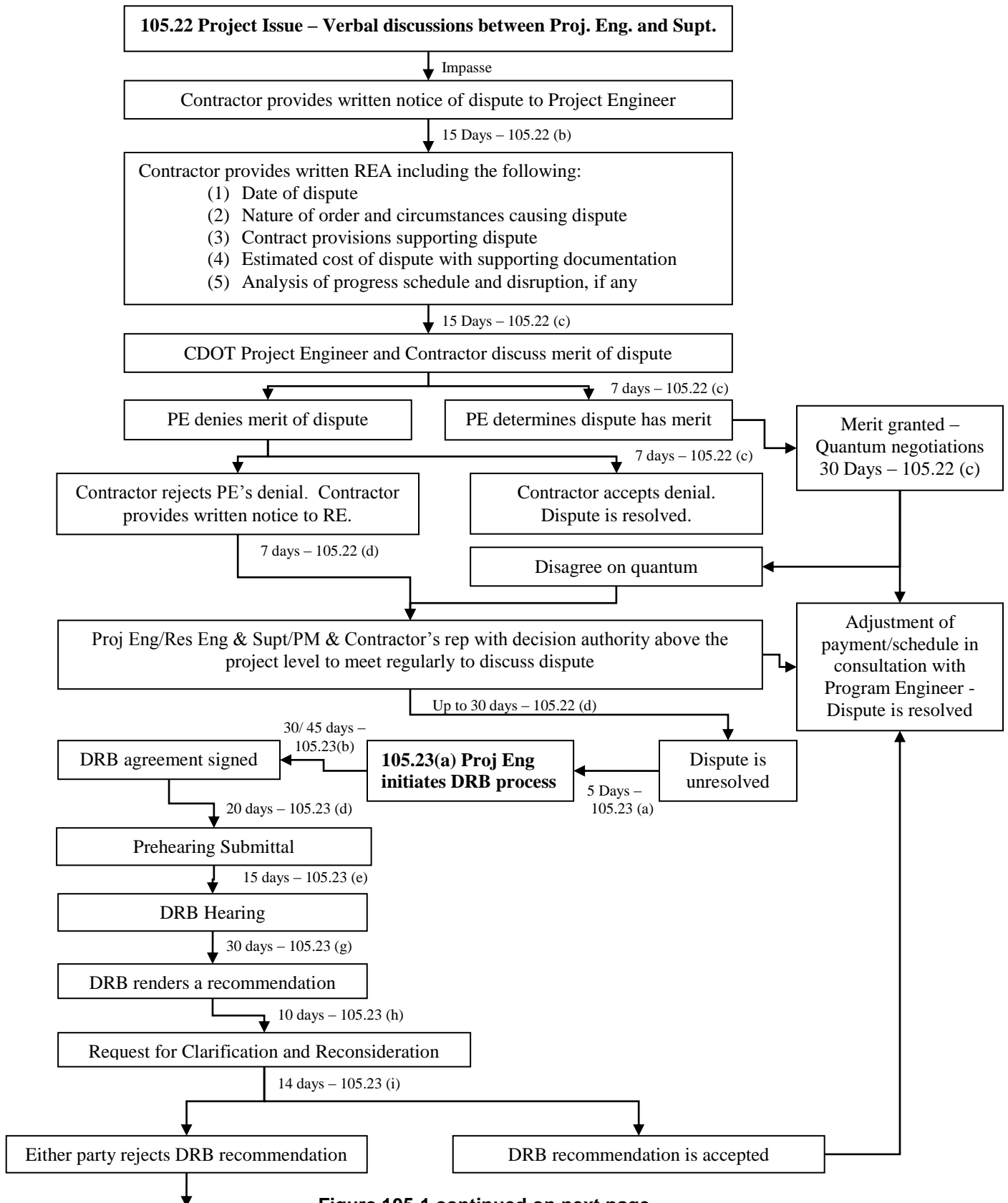


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Figure 105-1 (continued)

