**Notice**

The Standard Special Provision (SSP) on the following page revises or modifies CDOT’sStandard Specifications for Road and Bridge Construction*.* The Construction Engineering Services Branch has reviewed, approved, and issued it. Use as written without change. Do not use modified versions of it on CDOT construction projects. Do not use the following special provision on CDOT projects in a manner other than specified in the instructions without approval by CDOT’s Standards and Specifications Unit. The instructions for use appear below.

Other agencies using the Standard Specifications for Road and Bridge Constructionto administer construction projects may use this special provision appropriately and at their own risk.

**Instructions for use on CDOT construction projects:**

Use the following standard special provision on all projects.

**Revise Section 105 of the Standard Specifications as follows:**

**Remove and replace Subsections 105.22, “Dispute Resolution”; 105.23, “Dispute Review Board”; and 105.24, “Claims for Unresolved Disputes”, as follows:**

**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 process intends to resolve issues early, efficiently, and as close to the project level as possible. Figure 105-1 outlines the process. Specified time frames may be extended by mutual agreement of the Engineer and the Contractor. In these subsections, when a time frame ends on a Saturday, Sunday, or holiday, the time frame shall be extended to the next scheduled workday.

Definitions:

**Issue.** A disagreement concerning contract price, contract time, interpretation of the Contract, or a combination thereof between the parties at the project level regarding or relating to the Contract. Issues include, but are not limited to, a 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.

**Dispute.** An Issue that the Contractor and CDOT have not been able to resolve, and for which the Contractor submits a written formal notice of Dispute per subsection 105.22(c).

**Claim.** A Dispute not resolved at the Resident Engineer level or resolved after a DRB recommendation.

**Merit.** Refers to the right of a Contractor to recover on a Claim or Dispute, irrespective of Quantum, based on the substance, elements, and grounds of that Claim or Dispute.

**Quantum.** Refers to the quantity or amount of compensation or time (or both), if any, that may be granted to the Contractor when a Dispute or Claim is found to have Merit.

The Contractor shall bring the Issue(s) to the Project Engineer’s attention, in writing, within 15 days of the Contractor being aware of the Issue(s). Written notice must take the form of a stand-alone, non-chain e-mail or letter, addressed and delivered to the Project Engineer. If a Contractor provides written notice outside of the 15-day deadline, it shall be presumed that CDOT suffered prejudice. Where the Contractor failed to provide the required notice, the failure to provide notice may be treated as a separate and threshold Dispute to be resolved before other related Dispute(s) are submitted, addressed, or resolved.

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

An audit may be performed by the Department for any Dispute or Claim. All audits will be completed within 90 days of the request for an audit, provided the Contractor allows the auditors reasonable and timely access to the Contractor’s books and records.

If CDOT does not respond within the specified timelines, the Contractor may advance the Dispute to the next review level in the dispute resolution process.

When the Project Engineer is a Consultant Project Engineer, actions, decisions, and determinations specified 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 before initiation of litigation. Failure to comply with the requirements set forth in this subsection, including notice requirements, shall bar either party from any further administrative, equitable, or legal remedies. Subject to the rebuttable presumption of prejudice to CDOT set forth above, if a deadline is missed that does not prejudice either party, further relief shall be allowed.

All written notices of Dispute shall be submitted within 30 days of the date of the Project Engineer’s Final Acceptance letter; see subsection 105.21(b).

When a project has a landscape maintenance period, the Project Engineer will grant partial acceptance per subsection 105.21(a). This partial acceptance will be the project acceptance of all the construction work performed before this partial acceptance.

All Disputes and Claims related to the work in which this partial acceptance is granted shall be submitted within 30 days of the Project Engineer’s partial acceptance.

Should the Contractor’s Dispute use the Total Cost approach for calculating damages, damages will be determined by subtracting the contract amount from the total cost of performance. Should the Contractor’s Dispute use the Modified Total Cost approach for calculating damages, if the Contractor’s bid was unrealistic in part, or some of its costs were unreasonable or some of its damages were caused by its own errors, those costs and damages will be deducted from the total cost of performance to arrive at the Modified Total Cost. The Total Cost or Modified Total Cost basis for calculating damages shall not be available for any Disputes or Claims seeking damages where the Contractor could have kept separate cost records at the time the Dispute arose as described in subsection 105.22(a).

1. *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 longer. The Contractor, subcontractors, and lower-tier subcontractors shall provide adequate facilities, acceptable to the Project Engineer, for an audit during normal business hours. The Contractor shall permit the Project Engineer or Department auditor to examine and copy those records and all other records required by the Project 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, per 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 workday 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 preceding 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 CDOT’s records to the Contractor at the meeting. The Contractor shall notify the Engineer in writing within three workdays of any inaccuracies noted in, or disagreements with, the Department’s records.
3. *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 that caused the Dispute.
3. A detailed explanation of the Dispute, citing specific provisions of the Contract and any basis, legal or factual, that supports the Dispute.
4. If any, the estimated Quantum, calculated per the methods set forth in subsection 105.24(b)12, 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. This analysis shall meet the requirements of subsection 108.08(d).

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, neither party shall provide or present to the DRB any Issue or any information that was not contained in the REA and fully submitted in writing to the Project Engineer and Resident Engineer during the subsection 105.22 process.

1. *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 per 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(e).

1. *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 hold at least one meeting (or more than one meeting upon mutual agreement of the parties) with the Contractor.

Meetings shall continue weekly for a period of up to 30 days. Meetings shall include a Contractor's representative with decision authority above the project level to discuss the Dispute. When the Project Engineer is a Consultant and the Resident Engineer rendered the Project Engineer’s written decision, the Program Engineer will render the Resident Engineer’s written decision. Within 7 days after this meeting, the Resident Engineer will issue a written decision on the Merits of the Dispute.

If these meetings result in the resolution of the Dispute, the resolution will be implemented per 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 per 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 the 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 and shall serve as an independent and impartial board. A DRB member shall not be called as a witness for future litigation.

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 may be established at any time during the project to assist with Issue and Dispute resolution and when the Project Engineer initiates a DRB review per subsection 105.23(a). A Standing DRB, when specified in the Contract, shall be established at the beginning of the project.

* 1. *Initiation of Dispute Review Board Review*. When a Dispute has not been resolved per subsection 105.22, the Project Engineer will initiate the DRB review process within five days after the period described in subsection 105.22(e).

1. *Formation of Dispute Review Board*. DRBs will be established per the following procedures:
   1. CDOT, in conjunction with the Colorado Contractors Association (CCA), will maintain a statewide list of pre-approved DRB candidates experienced in construction processes and the interpretation of contract documents, and the resolution of construction Disputes. Only individuals who have completed training (currently titled DRB Administration and Practice Training) through the Dispute Resolution Board Foundation or otherwise approved by CDOT can be a DRB member. DRB nominees shall be selected from the list of pre-approved candidates. When a DRB is formed, the parties shall execute the agreement set forth in subsection 105.23(m).
   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 Three-Party 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, the 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 Number 1 being the first choice. The candidate with the lowest combined numerical ranking shall be the DRB member. The CDOT Project Engineer will be responsible for having all parties execute the agreement.
   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 Three-Party 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 five days of execution of the Contract. The third member shall be approved before the Pre-construction Conference. The third member shall be selected within 15 days of the execution of the Contract. Before construction starts, the parties shall execute the Three-Party Agreement. The CDOT Project Engineer will be responsible for having all parties execute the agreement. The Project Engineer will invite the Standing DRB members to the Pre-construction and any Project First conferences.
   5. DRB members shall not have been involved in the administration of the project under consideration. CDOT and the Contractor shall inform their selected DRB member who the major firms/people are on the project and request their selected DRB member to review the CDOT disclosure requirements and Canon of Ethics and then submit a disclosure statement, which shall also be submitted to the other party. DRB candidates shall complete the DRB Disclosure Requirements and DRB Nominee Disclosure Form and disclose to the parties the following relationships:
2. Prior employment with either party
3. Prior or current financial interests or ties to either party
4. Prior or current professional relationships with either party
5. Anything else that might bring into question the impartiality or independence of the DRB member.
6. Before agreeing to serve on a DRB, members shall notify all parties of any other CDOT DRB’s they are serving or that they will be participating in another DRB.

If either party objects to the selection of the chair or other DRB members based on the disclosures, or based on information not disclosed, which might bring into question the impartiality, independence, or performance of the potential member, that potential member shall not be placed on the Board.

1. There shall be no ex parte communications with the DRB at any time.
2. The service of a Board member may be terminated only by written agreement of both parties.
3. If a Board member resigns, is unable to serve, or is terminated, a new Board member shall be selected within 30 days in the same manner as the Board member who was removed was originally selected.
4. *Additional Responsibilities of the Standing Disputes Review* *Board*
5. General. No later than 10 days after the Three-Party Agreement has been signed by the Chief Engineer, the DRB will coordinate with the parties on the date and location of the initial DRB meeting.
   1. Obtain copies of the Contract documents and the 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.
6. 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.
7. 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.
8. Advisory Opinions
9. 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.
10. Both parties must agree to seek an advisory opinion and notify the chairperson. The procedure for requesting and issuing advisory opinions should be discussed with the DRB at the first meeting with the parties.
11. The DRB shall issue a one-page written opinion within 5 days of the hearing.
12. The opinion is only advisory and does not require 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.
13. Advisory opinions should be limited to Merit Issues only.
14. *Arranging a Dispute Review Board Hearing*. When the Project Engineer initiates the DRB review process, the Project Engineer will:
15. 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, an On Demand DRB hearing will be held within 30 days after the Three-Party Agreement is signed by the CDOT Chief Engineer. Unless otherwise agreed to by both parties, a Standing DRB hearing will be held within 30 days after the DRB has been requested per subsection 105.23(a).
16. 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.
17. *Pre-Hearing Submittal*. All Pre-hearing Submittals shall include only arguments, supporting documentation, Quantum, and other information as previously submitted in writing and as previously disputed in the formal Dispute process covered in subsections 105.22(b), (c), (d), and (e). All Pre-hearing Submittals planned to be used at the hearing shall be submitted to the other party 35 days before the hearing for review for compliance with this requirement. If either party contends there are new arguments, supporting documents, new Quantum, or any new information in a pre-hearing Submittal, and the other party objects to this information being presented to the DRB, the objecting party shall submit its objections in writing to the other party within 10 days. The parties shall meet within five days to reconcile the objection before the submittal is submitted to the DRB. If the parties cannot reconcile the objection, but the new argument, supporting documentation, new Quantum, or new information does not change either party’s position on Merit or Quantum, the information shall be allowed in the Pre-hearing submittal and presented to the DRB. If the parties cannot reconcile the objections within the five days allowed, each party shall submit a one-page brief on their objections, but not the actual information objected to, to the DRB for a decision on the use of the documents. The DRB shall not approve any information simply because it is relevant to the Dispute or referenced during the Dispute. Neither party shall attempt to present anything to the DRB that they did not present to the other party during the Dispute process. The Dispute process shall be delayed while this determination is being made and a new hearing date set, if necessary. Pre-hearing Submittals to the DRB are as follows:

1. Joint Statement: At least 20 days before the hearing, the Joint Statement(s) shall be submitted to the DRB. The parties shall make every attempt to agree upon a Joint Statement of the Dispute. If the parties cannot agree on the Joint Statement, each party’s independent statement shall be submitted to the DRB. The Joint Statement shall summarize, in a few sentences, the nature of the Dispute(s) and the scope of the desired decision.

1. Position Paper: At least 15 days before the hearing, CDOT and the Contractor shall submit by email to the DRB Chairperson their party’s Position Paper. The DRB Chairperson shall simultaneously distribute by email the Position Papers to all parties and other DRB members, if any. The Position Paper shall contain the following:
2. The basis and justification for the party’s position, with reference to specific contract language and the supporting documents of each element of the Disputes.
3. A list of proposed attendees for the hearing. In the event of any objection by a party, the DRB shall make a final determination as to who attends the hearing.
4. When the scope of the hearing includes Quantum, full cost details will be calculated per the methods set forth in subsection 105.24(b)12. The Scope of the hearing will not include Quantum if CDOT has requested an audit that has not been completed.
5. Supporting Documents: At least 15 days before the hearing, each party shall submit a copy of all its supporting documents to the DRB and the other party. Supporting documents include any presentations, visuals, or handouts planned to be used at the hearing. To minimize duplication and repetitiveness, the parties are encouraged to identify a common set of documents that will be referred to by both parties and submit them in a separate package to the DRB at least 20 days before the hearing. Common documents are communications between parties, speed memos, change orders, schedules, request for equitable adjustment, correspondence, and any document used in the subsection 105.22 process. CDOT shall submit the common set of documents to the Board and the Contractor.
6. If relevant to the Dispute and requested by the Board, the Engineer shall provide to the DRB either website links, electronic PDFs, or hard copies of pertinent contract documents such as plans, specifications, and M and S Standards.
7. *Pre-Hearing Phone Conference.* A pre-hearing phone conference with all Board members and the parties shall be conducted as soon as a hearing date is established, but no later than 10 days before 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. (Ex. Each party makes a full presentation of their positions, or presentations will be made on a “point by point” basis, with each party making a presentation only on the individual dispute issue before moving onto the next Issue.)

If the pre-hearing position papers and documents have been received by the DRB before the conference call, the Chairperson shall discuss the estimated hours of review and activities for the Disputes (such as time spent evaluating and preparing a recommendation on specific Issues presented to the DRB). If the pre-hearing position papers and documents have not been received by the Board before the conference call, another conference call will be scheduled during the initial conference call to discuss the estimated hours of review. The Engineer shall coordinate the conference call.

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

An employee of CDOT presents a brief description of the project and the status of construction on the project.

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. Rebuttals of the other party’s arguments shall not be presented at this time.

The other party presents its position in detail as supported by previously submitted information and documentation.

The party that requested the DRB presents their rebuttals, followed by the other party’s rebuttals.

Upon completion of their presentations and rebuttals, both parties and the DRB will be provided the opportunity to exchange questions and answers. Questions from the parties shall be directed to the Chairperson. Attendees may respond only when board members request a response.

Employees of each party are responsible for leading presentations at the DRB hearing.

Attorneys shall not participate in the hearing unless the DRB specifically addresses an Issue to them or unless agreed to by both parties. Should the parties disagree on attorney participation, the DRB shall decide on what, if any, participation will be permitted. Attorneys representing the parties are permitted to attend the hearing, provided their presence has been noted in the pre-hearing submittal.

Either party may use experts only if the expert has previously presented to the other party before the DRB process. 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.

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.

If either party attempts to present an argument, documentation, Quantum, or new information that the other party feels was not in the Pre-hearing submittals, the chairperson shall require the party to demonstrate where in the Pre-hearing submittals the information in question resides.

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.

If a party fails to appear at the hearing, the DRB shall proceed as if all parties were in attendance.

1. *Dispute Review Board Recommendation*. The DRB shall issue a Recommendation per the following procedures:
2. The DRB shall not make a recommendation on the Dispute at the meeting. Before 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.
3. 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. The DRB‘s recommendation shall include the following:
   1. A summary of the Issues and factual evidence presented by the Contractor and CDOT concerning the Dispute.
   2. Recommendations concerning the validity of the Dispute.
   3. Recommendations concerning the value of the Dispute as to cost impacts if the Dispute is determined to be valid.
   4. The contractual and factual bases supporting the recommendation(s) made, including an explanation as to why each and every position was accepted or rejected.
   5. Detailed and supportable calculations that support any recommendation(s).
4. The chairperson shall transmit the signed Recommendation and any supporting documents to both parties.
5. *Clarification and Reconsideration of Recommendation.* Either party may request in writing clarification or reconsideration of a decision within 10 days following receipt of the Recommendation. Within 10 days after receiving the request, the DRB shall provide written clarification or reconsideration to both parties.

Requests for clarification or reconsideration shall be submitted in writing simultaneously to the DRB and 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. The Board shall not consider any documents or arguments that have not been made a part of the pre-hearing submittal, other than clarification and data supporting previously submitted documentation.

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

1. *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 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 per 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 a written explanation to the other party and the DRB 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 per subsection 105.24.

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.

1. *Admissibility of Recommendation*. Recommendations of a DRB issued per 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:

The DRB Recommendation was a proceeding based on presentations by the parties.

No fact or expert witnesses presented sworn testimony or were subject to cross-examination.

* + - 1. The parties to the DRB were not provided with the right to any discovery, such as the production of documents or depositions.
      2. There is no record of the DRB hearing other than the Recommendation.

(m) *Cost and Payments.*

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 the Contract and other relevant documentation
2. Meeting space and facilities
3. Secretarial services
4. Telephone
5. Mail
6. Reproduction
7. Filing

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 the 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.

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 a 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.

1. *Dispute Review Board Three Party Agreement.*

DISPUTE REVIEW BOARD

THREE PARTY AGREEMENT

COLORADO PROJECT NUMBER

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 THE 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, and 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 the Board members. The Contractor shall submit to the Department an itemized statement for all such payments, and the Department will split the cost by including a 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 member 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.

DISPUTE REVIEW BOARD

THREE PARTY AGREEMENT PAGE 2

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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 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).

Board members shall not be called as witnesses for future litigation.

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

BOARD MEMBER: .

BY: .

BOARD MEMBER: .

BY: .

BOARD MEMBER: .

BY: .

CONTRACTOR: .

BY: .

TITLE:

COLORADO DEPARTMENT OF TRANSPORTATION

BY: . DATE: ,

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 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 per 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 (CRS), which must be exhausted in their entirety.

Litigation proceedings must commence within 180 calendar days of the Chief Engineer's decision, absent a written agreement otherwise by both parties.

The venue for all unresolved Disputes with an aggregate value of $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 per 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 litigation proceedings must commence within 180 calendar days of the Chief Engineer's decision, absent written agreement otherwise by both parties.

1. *Notice of Intent to File a Claim*. Within 30 days after rejection of the Dispute Resolution Board’s Recommendation issued per subsection 105.23, the Contractor shall provide the Region Transportation Director (RTD) 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 the Notice of Intent within seven days.
2. *Claim Package Submission*. Within 60 days after submitting the notice of intent to file a Claim, the Contractor shall submit, to the RTD, 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 the 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 before final acceptance. At a minimum, the following information shall accompany each Claim:

A claim certification containing the following language, as appropriate:

1. 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 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, 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: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. For a pass-through Claim:

PASS-THROUGH CLAIM CERTIFICATION

Under penalty of law for perjury or falsification, the undersigned, (name) , (title) , , of (company) , hereby certify that the Claim of $ for extra compensation and Days additional time, made 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 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 this 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: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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.

* + - 1. The date on which facts were discovered that gave rise to the Claim.

1. The name, title, and activity of all known CDOT, Consultant, and other individuals who may be knowledgeable about facts giving rise to such Claim.
2. The name, title, and activity of all known contractors, subcontractors, suppliers, and other individuals who may be knowledgeable about facts giving rise to such Claim.
3. The specific provisions of the Contract, which support the Claim, and a statement of the reasons why such provisions support the Claim.
4. 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.
5. The identification of any documents and the substance of all oral communications that support the Claim.
6. Copies of all known documents that support the Claim.
7. The Dispute Review Board Recommendation.
8. If an extension of contract time is sought, the documents required per subsection 108.08(d), along with a statement defining if any liquidated damages should be released, if applicable.
9. If additional compensation beyond the Contract Amount is sought, the exact amount sought and a breakdown of that amount into the following categories:
   1. These categories represent the only costs that, if applicable, are recoverable by the Contractor. All other costs or categories of costs are not recoverable:
   2. Actual wages and benefits, including FICA, paid for additional labor.
   3. Costs for additional bond, insurance, and tax.
   4. Increased costs for materials.
   5. Equipment costs calculated per subsection 109.04(c) for Contractor-owned equipment and based on certified invoice costs for rented equipment.
   6. Costs of extended job site overhead (only applies if the Dispute also includes a time extension).
   7. Salaried employees assigned to the project (only applies if the Dispute also includes a time extension or if the Dispute required salaried employee(s) to be added to the Project).
   8. Claims from subcontractors and suppliers at any level (the same level of detail as specified is required for all such Claims).
   9. 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.
   10. Interest shall be paid per CRS 5-12-102 beginning from the date of the Notice of Intent to File Claim.
   11. In adjustment for the costs as allowed above, the Department will have no liability for the following items of damages or expense:
   12. Profit in excess of that provided in 12.A.(8) above.
   13. Loss of Profit.
   14. Additional cost of labor inefficiencies in excess of that provided in A. above.
   15. Home office overhead in excess of that provided in A. above.
   16. Consequential damages, including but not limited to loss of bonding capacity, loss of bidding opportunities, and insolvency.
   17. Indirect costs or expenses of any nature in excess of those provided in A. above.
   18. Attorney’s fees, Claim preparation fees, and expert fees.
10. *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, per 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. Within 15 days of the appeal, either party may submit a written request for a hearing with the RTD or duly authorized Region delegates.

The RTD will render a written decision to the Contractor within 45 days after the receipt of the Claim package or receipt of the audit, or after the hearing, 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 45-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 per 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.

1. *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 per the following.

The Chief Engineer will render a written decision within 45 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.

If the Contractor accepts the Chief Engineer's decision, the provisions of the decision will be implemented per 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 per this specification or (2) initiate litigation per subsection 105.24(e).

If the Chief Engineer does not issue a decision as required, the Contractor may immediately initiate litigation per subsection 105.24(e).

For the convenience of the parties to the Contract, it is mutually agreed by the parties that any Merit binding 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.

1. *De Novo Litigation*. If the Contractor disagrees with the Chief Engineer's decision, the Contractor may initiate de novo litigation to finally resolve the Claim that the Contractor submitted to CDOT. Such litigation shall be strictly limited to those Claims that were previously submitted and decided in the contractual Dispute and Claims processes outlined. This does not preclude the joining in one litigation 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.

De novo litigation shall proceed per 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.

Figure 105-1 summarizes the disputes and claims process described in subsections 105.22, 105.23, and 105.24.

(Insert Flow Chart)