

**Michigan Department of Transportation
Dispute Review Board (DRB) Procedures
Revised - 2020**

This document describes the Michigan Department of Transportation (MDOT) procedures for submittal and review of Contractor claims using a Dispute Review Board (DRB). The Dispute Review Board (DRB) process is used on projects that have incorporated the Special Provision for Dispute Review Board. For a claim issue to be considered, the Contractor, Engineer, and DRB must adhere to these procedures.

DRB Selection

DRB members are to be selected as noted in the DRB special provision. The Department nominated DRB candidate will be selected by the Engineer in consultation with the Region Construction Engineer (RCE). To ensure an effective DRB, the Engineer and Contractor must be completely satisfied with every board member and must be willing to reject any proposed member that they are not comfortable with. The conflict of interest standards coupled with the ability of either party to reject a nominee, puts the ability to select a truly neutral and impartial DRB within the power of the two parties.

The Construction Field Services (CFS) Construction Contracts Engineer has a database of all pre-qualified DRB candidates, their past experience, and current commitments on DRBs. Questions and inquiries on the candidates and the selection process may be directed to the CFS Construction Contracts Engineer.

When DRB selection has been completed, the DRB chairperson is to provide the Contract ID and DRB member names to the CFS Construction Contracts Engineer.

Conflict of Interest

Each DRB member including the DRB chairperson must provide a conflict of interest disclosure statement to both the Contractor and the Engineer as noted in the DRB special provision. Upon receiving a disclosure statement, the Department or the Contractor may give notice that this DRB member is no longer acceptable and a new DRB member will need to be selected and approved. During the tenure of the project, if any relationships or situations arise, or any other situations that could be construed as a conflict of interest, the DRB member must disclose the information for review. Failure to disclose a conflict of interest may result in termination of the DRB member and/or removal from the Department approved DRB candidate list.

The Engineer and Contractor may consult the Department's DRB Conflict of Interest Committee comprised of the Engineer of Design, Engineer of Construction Field Services, and the Contract Services Division Administrator. The Department DRB Conflict of Interest Committee will preside over any conflict of interest, disclosure, or inappropriate behavior issue that cannot be resolved between the Engineer and the Contractor during selection of DRB members and over the course of the project. The DRB candidate may appeal any decision of this committee to the Department's DRB Conflict of Interest Appeal Committee comprised of the Bureau Director of Development, Bureau Director of Field Services, and the Chief Operations Officer. The DRB Conflict of Interest Appeal Committee will determine the final Department position on the issue.

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DRB Agreement

Execution of the DRB agreement between the Contractor, the Department and the DRB members will proceed when agreement is reached on all members of the DRB. The execution of this agreement will not modify the requirements, terms, or conditions of the Special Provision for Dispute Review Board or these DRB procedures. The Engineer will coordinate and ensure that all signatures, with the exception of the Attorney General Representative signature, are obtained before or at the first DRB meeting. If DRB membership changes during the project, a new DRB agreement must be completed and signed by all parties. The DRB will remain in operation until the date of final payment to the contractor unless terminated or dissolved earlier by mutual agreement of the Engineer and Contractor.

DRB Attendance

DRB members are expected to physically attend all progress meetings and hearings. A DRB hearing must not be conducted without all DRB members in attendance. DRB progress meetings should not be scheduled or conducted if more than one DRB member will not be able to physically attend. If a DRB member does not attend a progress meeting, then no compensation and reimbursement will be made on that members behalf. No other adjustments to a DRB member's compensation and reimbursement amounts can be made.

DRB Progress Meetings

For the DRB to become familiar with project work, construction operations, time frames, issues, etc., the DRB should meet monthly with representatives from both the Contractor and the Engineer during active construction. If the DRB is in place and available, they should attend the preconstruction meeting as their first DRB progress meeting. If conditions warrant during seasonal suspension or other reasonable circumstances, the Contractor and Engineer may mutually agree to either increase the time between meetings to better serve their needs or eliminate the meetings entirely.

The DRB chairperson will develop an agenda for each progress meeting in accordance with Attachment B - Agenda for DRB Progress Meetings. The parties are encouraged to openly share all issues encountered on the project with the DRB at the progress meeting. The DRB should ask questions to ensure they understand the construction methods, scheduling, and other project topics. The questions should be carefully and tactfully posed to provide a better understanding of the issues and avoid the perception of bias. The DRB should discuss potential emerging issues and encourage the parties to actively discuss and resolve disputes before they escalate. However, the DRB is not to act as a mediator, negotiator, or arbitrator in any sense and should not provide suggestions on construction methods, solutions to problems, or other unsolicited advice. At the conclusion of each meeting, if deemed appropriate, the DRB will conduct a field inspection of active work accompanied by representatives of both the Contractor and Engineer. Any segments or areas of the project that are being impacted by potential issues or claims should be pointed out by the parties.

The DRB chairperson will provide minutes of the DRB progress meetings which will be distributed to all parties/attendees for comment. Minutes as amended will be adopted at the next progress meeting.

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Advisory Opinions

Advisory opinions are an informal method intending to resolve potential disputes before they escalate. The process of requesting and issuing advisory opinions should be discussed and agreed upon at the first DRB meeting.

Prior to referring an issue for an advisory opinion, the Engineer and Contractor must discuss the issue with each other. The DRB must only issue advisory opinions if jointly requested by the Engineer and Contractor. The parties may submit a brief statement to the DRB summarizing their position and specifically stating the disputed issue prior to conducting an advisory opinion. At the meeting, both parties will provide brief oral presentations and allow for questions from the DRB. Advisory opinions are to be oral in nature and are to be stated by the DRB chairperson after deliberation. Advisory opinions are based upon known information at that time, subject to change, and do not set precedence for future hearings. The DRB may decline to issue an advisory opinion due to the complexity of the claim issue and inform the parties that a hearing would be more appropriate. DRB members are not to provide unsolicited opinions, commentary, direction, or interpretation of contract language. There will not be any supplemental payment for the issuance of DRB advisory opinions as they are included and part of regular progress meetings.

Claims Process

Upon the Contractor filing a Notice of Intent to File Claim, the Contractor and the Engineer will work to resolve the potential claim issue before (if possible) the disputed work begins. Efforts should be made to resolve disputes at the lowest possible level without resorting to the use of the DRB process. When the Engineer receives Form 1953, Claim Content and Certification, they will issue a documented response to the Contractor's official claim within seven (7) business days (Please note that this timeframe varies from the 30 calendar days allotted under the normal claims procedure). This documented response is to be provided to the Contractor after discussion with the TSC Manager on the respective claim issue. A copy of Form 1953, Claim Content and Certification, and the Engineer's response is to be provided to the Region Construction Engineer and the CFS Construction Contracts Engineer. The Engineer's decision will be final and conclusive on the subject unless the Contractor requests a DRB hearing within five (5) business days of receipt of the Engineer's claim decision.

DRB Hearing Process

1. Once the contractor has requested a DRB hearing, the Engineer will notify the project DRB chairperson, and promptly assemble their claim package to support their position.
2. The Engineer will create a single claim file that will include the Contractor's claim package (including the request for the DRB and any rebuttals to the Engineers original decision) followed by the Engineer's claim package. The Engineer will submit the complete claim file to the DRB and Contractor within ten (10) business days of the DRB hearing request. If upon review of the claim file, the DRB deems additional information is necessary to better understand either party's position; the DRB chairperson will request additional information from the appropriate party and copy the other party.
3. The DRB chairperson, Engineer, and Contractor will schedule a hearing to be conducted within ten (10) business days after receiving the complete claim file from the Engineer.

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4. The Contractor must pay each DRB member and provide proof of payment to the Engineer prior to conducting the DRB hearing. The Engineer will then process the reimbursement of the cost share amount to the Contractor on the next progress pay estimate through the appropriate project pay item after the hearing is conducted.
5. Within seven (7) business days after the hearing date, the DRB will issue a documented recommendation for entitlement of the claim, including the underlying logic, to the Engineer and the Contractor using a format similar to Attachment A – DRB Recommendation Form. The DRB chairperson will provide a copy of the documented recommendation to the Contractor, Engineer, RCE, and the CFS Construction Contracts Engineer. The DRB recommendation will address entitlement only and allow the parties to determine the related compensation. However, if both parties request a DRB compensation recommendation and sufficient documentation has been submitted, the DRB may make a recommendation providing guidelines to help determine the specific compensation amount.

Upon receipt of the DRB recommendation, the Contractor and Engineer have five (5) business days to document one of the following options to the other party and copy the DRB:

1. Accept the DRB recommendation as issued for any submitted claim issue.
2. Reject the DRB recommendation as issued for any submitted claim issue.
3. Appeal the DRB recommendation as issued for any submitted claim issue.

Failure by either party to document a response within five (5) business days will constitute full acceptance of the DRB recommendation by that party.

If both parties accept a DRB recommendation, the Contractor and Engineer must continue to resolve all aspects of the dispute in a timely manner including compensation. Acceptance of a DRB recommendation does not obligate either party to the compensation amounts (time and/or money) from the claim package. Compensation must still be reviewed, negotiated, and resolved between the Engineer and Contractor and, if necessary, a contract modification processed.

Documented rejection of a DRB recommendation by either party will be considered the final DRB administrative action regarding a properly documented and submitted claim issue and the Engineer retains all administrative control of the project and will provide the contractor with final direction on the claim issue. Further legal action may then be pursued by the Contractor as project administrative options will be considered to have been exhausted.

Either party may appeal a DRB recommendation. The documented appeal must request a DRB appeal hearing and include new evidence or reasonable demonstration that the DRB misunderstood, or failed to consider, pertinent facts of the claim issue. The documented appeal and any response to the appeal from the opposite party must be added to the claim file and then resubmitted to the DRB within ten (10) business days of receiving the request for a DRB appeal hearing. Appeal hearings are to be conducted only after the DRB reviews the new information and determines that reconsideration is warranted. The DRB appeal hearing process will be the same as the DRB hearing process detailed herein.

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DRB Hearings

All DRB hearings should be conducted in the following format:

1. Contractor presentation
2. Engineer presentation/rebuttal
3. Break (if requested by any party)
4. Contractor rebuttal/final statement
5. Engineer final statement
6. DRB questions (questions may also be asked at any time by the DRB). Rebuttals may continue until all position points are clear to the DRB.

Interruptions will not be permitted while a party is making its presentation, other than clarification requests or other questions by the DRB. The DRB must refrain from expressing any opinion on the merits of the claim and avoid questions that could be construed as favoring either party.

No formal record or meeting minutes will be kept of a DRB hearing. Any departure from the informal setting will depend on documented approval of both parties and the magnitude of the dispute. Audio and/or video recordings of the DRB hearing are not permitted under any circumstances.

Any DRB hearing must be limited to a review of the material in the claim file and the oral representation at the DRB hearing. New material may not be presented at the DRB hearing that was not previously distributed to all parties, unless agreed to by all parties.

If the DRB chairperson determines the claim package has changed or new claim issues have been introduced, the claim package will be remanded back to the Contractor and Engineer. The Contractor and Engineer are encouraged to resolve the changed claim issue or new claim issue without resorting to the DRB.

The DRB will meet confidentially following the hearing to formulate their recommendation(s). The recommendation(s) will be based on the pertinent contract provisions and the facts and circumstances involved in the claim. All individual views of the DRB will be kept strictly confidential. Should there be additional questions, the DRB chairperson may schedule a follow up meeting or submit a documented inquiry to both parties.

Hearings and progress meetings are to be conducted at the job site trailer, project office or nearest MDOT facility with representatives of both the Engineer and the Contractor present. Any cost for a non-MDOT facility will be equally borne by the Department and the Contractor as agreed to by both parties. Facility provisions should include a separate meeting room for DRB deliberations.

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General Provisions

1. Each DRB member must be totally neutral and impartial. This is the primary key to the success of the DRB process. It is to be fully understood by all parties that individual DRB members are not the "representative of" or "advocate for" the party from which they were nominated. The entire DRB must function as an objective, impartial and independent body at all times. In order to avoid any suggestion of partiality, there should be no individual communication in regard to the project between DRB members and employees of the Contractor or Department during the life of the project with the exception of inquiries and dialogue at scheduled hearings/meetings and other procedural contacts with the DRB chairperson as stated in these procedures. The parties will direct any DRB matters needing attention between meetings or hearings to the DRB chairperson. Inappropriate behavior by any DRB member is grounds for dismissal of the DRB member by agreement of the Engineer and Contractor. Furthermore, any DRB member, including the Chair, may be dismissed from the DRB without cause at any time by mutual agreement of the Engineer and Contractor.
2. The DRB Procedures for the project specific DRB including organization, communications, advisory opinions, and meeting protocol are to be discussed at the first DRB meeting.
3. During the life of the project the DRB chairperson is to provide notice of hearing dates, advisory opinions, and hearing recommendations to the CFS Construction Contracts Engineer.
4. The Engineer is to invite the RCE and CFS Construction Contracts Engineer to all DRB progress meetings and hearings. The FHWA Area Engineer is to be informed by the Engineer of all DRB submittals, meetings, and hearings related to DRB issues on Projects of Division Interest (PoDI). When a hearing is requested, the Engineer will send the claim file to the FHWA Area Engineer. DRB issues are to be discussed with the FHWA Area Engineer by the Engineer in the same manner as contractor claims.
5. An independent, unrelated claim issue is an issue that has no interrelationship to any other claim issue(s). Independent, unrelated claim issues may be advanced through the DRB process at the documented request of the Contractor. The DRB chairperson will have final determination as to which claim issues are independent. Related claim issues cannot be separated as they move through the DRB process. The Contractor cannot accept a DRB recommendation on one of the related issues and appeal the decision on the other related issue. If the Contractor appeals either of the DRB recommendations, both issues must advance to the DRB appeal hearing.
6. A DRB recommendation is not legally binding on either party. The Engineer retains all administrative control of the project and will provide final direction to the Contractor. The Contractor may pursue further legal action concerning a specific claim issue after the DRB

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process has been completed but only claim issues and their respective amounts that have been vetted through the DRB process will be considered following the proper administrative actions. Once final DRB processing has been completed these claim issues and their respective amounts can then be pursued through other legal processes.

7. DRB recommendations and Engineer decisions must be based on the specific Contract provisions and the facts and circumstances involved in the particular claim. DRB recommendations and Engineer decisions made at any stage in the DRB process will not constitute an admission of liability or set future precedent.
8. The Engineer must discuss the final contractor compensation on the claim issue with the respective Federal Highway Administration (FHWA) Area Engineer to ensure federal participation or state funding on Projects of Division Interest (PoDI), per the most current contract modification process and the MDOT/FHWA Stewardship Agreement.
9. The Contractor's documented acceptance of the Engineers decision on a claim item(s) constitutes a settlement of the claim item(s) and bars the Contractor from pursuing further legal remedies against the Department on the settled claim item(s).
10. The timeframes noted within the DRB process may be extended if mutually agreed upon by the Contractor and the Engineer. Should any specified time begin or end on a Saturday, Sunday, or legal holiday, the specified time will begin or end, as applicable, on the next business day following the Saturday, Sunday, or legal holiday.
11. It is the responsibility of the Contractor to provide a copy of the claim file to any subcontractor, supplier, etc., involved in the claim. The Contractor must notify any subcontractors, suppliers, etc., with an interest in the claim of the scheduled DRB hearing time, date, and location.
12. DRB members are to be provided read-only access to project files in ProjectWise per the same viewing rights as the prime Contractor. The Engineer will furnish or provide access to the DRB members any other requested documents necessary for the DRB to perform its functions including electronic copies of any contract documents, periodic reports such as minutes of the weekly progress meetings, work orders, contract modifications, etc.
13. Lawyers, attorneys, and/or legal counsel of any kind are not permitted to be DRB candidates nor are they permitted to serve on a DRB in any capacity and are not permitted to attend DRB hearings or progress meetings.
14. Claim submittals to DRBs may be audited by CFS, Office of Commission Audits (OCA), or the Office of Auditor General (OAG) at any point in time.
15. The Engineer, Contractor, and DRB members may evaluate the performance of the DRB by providing feedback to the CFS Construction Contracts Engineer directly or through a survey as provided to all parties.

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Attachment A - DRB Recommendation Form

Recommendation of Dispute Review Board

Contract ID: XXXXX-XXXXXX
Region: XXXX
Dispute No.: XXXX
Hearing Date: XXXX
Prime Contractor: XXXX

Dispute (summary of disputed issue):

Contractor's Position:

Engineer's Position:

DRB Recommendation:

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Attachment B - Agenda for DRB Progress Meetings

DRB Progress Meeting Agenda

Contract ID:
Project Description:
Prime Contractor:
CE Consultant:

Date:	Contract Day: Actual Day/Total Days:
Meeting Number:	Percent Complete (Days):
Notice to Proceed:	Original Contract Amount:
First Chargeable Work Day:	Current Contract Amount:
Orig. Contract Time:	Revised Contract Time:
Amount Earned to Date:	Percent Complete (\$):
Orig. Completion Date:	Revised Completion Date:
Scheduled Percent Complete (\$) ES/LS:	
Job Incentive(s):	

Agenda Items

1. Sign-in of all participants
2. Opening remarks of Chairperson
3. Revise/Adopt Previous Meeting Minutes
4. Description by Contractor of:
 - a. Work accomplished since last meeting
 - b. Current status of the work schedule
 - c. Days gained/lost since last meeting and reasons
 - d. Schedule for future
 - e. Potential problems/challenges
 - f. Proposed solutions to these problems
5. Discussion by Engineer of:
 - a. Work schedule as he/she views it
 - b. Potential new disputes or claims
 - c. Status of past disputes and claims
 - d. Other controversies
6. Next Meeting Date
7. Tour of Project (if applicable)