

**Michigan Department of Transportation  
Dispute Review Board (DRB) Procedures  
Revised - December 19, 2012**

This document describes the Michigan Department of Transportation (MDOT) procedures for submittal and review of Contractor claims using a Dispute Review Board (DRB).

Contractor Notice of Intent to File a Claim

Only claims that have been submitted per Section 104.10 of the Standard Specifications for Construction will be eligible to be reviewed by the DRB. Requests for equitable adjustment must be certified as required by subsection 104.10.E of the Standard Specifications for Construction. The request to conduct a DRB hearing shall be accompanied by a summary of the issues on which the claim is based, in sufficient detail for the DRB to gain an understanding of the claim and for the other party to prepare a response.

DRB Hearing Process

Upon the Contractor filing a Notice of Intent to File Claim, the Contractor and Engineer will work to resolve the claim issue before the respective work begins. The Contractor and Engineer are encouraged to resolve potential claim issues without resorting to the use of the DRB process. In order for a claim to be considered by the DRB, the following procedure must be adhered to:

1. Upon receipt of the Contractor's claim in accordance with subsection 104.10.E of the Standard Specifications for Construction, the Engineer will consider the claim and render a decision on the basis of the applicable Contract documents along with the facts and circumstance involved in the claim.
2. The Engineer's decision will be furnished in writing to the Contractor within 5 days after receipt of the Contractor's claim.
3. The Engineer's decision will be final and conclusive on the subject unless the Contractor files a written appeal to the Engineer and Region Construction Engineer (RCE) within 5 days upon receipt of the Engineer's claim decision. The written appeal shall include a request for a DRB hearing along with five (5) copies of the claim package that meets the requirements of Subsection 104.10.E of the Standard Specifications for Construction.
4. The RCE will record the date the claim package was received from the Contractor in the claims tracking database (CTD) and notify the project DRB chairperson.
5. The RCE will promptly assemble the claim package from the Engineer to support the Department's position on the claim within 5 days of receiving the written request from the Contractor for a DRB.
6. The RCE will create a "claim file" that will include all documents submitted by the Contractor and all documents supporting the position of the Engineer.
7. If upon review of the claim packages the RCE deems additional information is necessary to better understand the Contractor's claim or the Engineer's position, the RCE will promptly make a request for additional information in writing to the appropriate party and copy the other party.
8. The RCE will submit the "claim file" to the DRB chair no later than 3 days after receiving complete claim packages from the Contractor and Engineer.
9. The RCE must receive proof of full payment from the contractor to the DRB panel for all hearing costs before scheduling any hearings. MDOT will then process the cost

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share amount reimbursement to the contractor through the appropriate project pay items.

10. If upon review of the claim package submittal the DRB chairperson deems additional information is necessary to better understand the Contractor's claim or the Engineer's position; the DRB chair will promptly make a request for additional information in writing to the appropriate party and copy the other party.
11. The DRB chair will schedule a hearing to be held within 10 days after receiving the claim file from the RCE. The 10 day period may be extended if agreed to in writing by the Contractor and the Engineer. The RCE will record the scheduled date of the DRB hearing in the CTD.
12. Within 5 days after the hearing date, the DRB will issue a written recommendation for entitlement of the claim, including the underlying logic, to the Engineer, the Contractor, and the RCE using the format in *Attachment A – DRB Recommendation Form*. In cases of extreme complexity, both parties may agree in writing to allow additional time for the DRB to formulate its recommendations. The DRB will focus its attention in their recommendation to the matters of entitlement and allow the parties to determine the related compensation. If both parties request and sufficient documentation is available, the DRB may make a recommendation on the compensation.

Upon receipt of the DRB recommendation, the Contractor and Engineer have 5 days to initiate one of the following options:

1. Accept the DRB recommendation in whole.
2. Accept the DRB recommendation on the independent, unrelated claim issues.
3. Accept the DRB recommendation on the related claim issues.
4. Appeal the DRB recommendation in whole.
5. Appeal the DRB recommendation on the independent, unrelated claim issues.
6. Appeal the DRB recommendation on the related claim issues.

If the Contractor or Engineer accepts the DRB recommendation in whole or in part:

1. The Contractor's and Engineer's acceptance shall be documented in writing to the RCE within 5 days upon receiving the DRB recommendation.
2. The RCE will record the date of receipt of the Contractor's and/or Engineer's letter of acceptance and the terms accepted in the CTD.
3. If the DRB recommendation requires a Contract modification and the Engineer accepts the DRB recommendation, the Contract modification will be submitted to the Contractor for signature within 5 days of the RCE's receipt of the contractor's letter accepting the DRB recommendation.
4. The Engineer will record the date the Contract modification is submitted to the Contractor for signature in the CTD.

If the Contractor or Engineer fails to accept or appeal the DRB Recommendation, in whole or in part, in writing within 5 days of receipt of the DRB recommendation, that failure to respond in writing shall constitute acceptance of the DRB recommendation by the Contractor or Engineer.

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Either party may appeal the recommendation of the DRB when there is new evidence to present or a counter-argument to the DRB recommendation has not been provided in the previous claim submittal. If the Contractor or Engineer does not accept the DRB recommendation, in whole or in part:

1. The Contractor and/or Engineer shall submit a written appeal to the RCE within five (5) days of receipt of the DRB recommendation. The written appeal shall meet the requirements of subsection 104.10.E of the Standard Specifications for Construction and include the Contractor's or Engineer's new evidence or counter-argument for disputing the DRB's recommendation.
2. The RCE will record the date of receipt of the Contractor's or Engineer's written appeal in the CTD.

Within five (5) days of receiving the written appeal from the Contractor or Engineer, the RCE will:

1. Submit the Contractor's or Engineer's appeal and five (5) copies of the new information to the DRB chair.
2. Submit 1 copy of the new information to the Contractor or Engineer.

Within two (2) days of the DRB chair's receipt of the RCE's submission of the new information, the DRB chair will review the information to ensure that all of the required documentation needed to respond to the issues raised in the claim is available for review at the DRB appeal hearing. If it is determined that additional information is needed, the DRB chair will immediately request the RCE to obtain and supply the additional information from the Contractor or Engineer.

The requested information shall be submitted to the DRB chair within five (5) days of the DRB chair's request. If additional information is submitted by either party, the RCE will distribute the information packet to the opposite party at least two (2) days prior to the date of the DRB appeal hearing.

The DRB appeal hearing will be scheduled and conducted no later than 10 days following the receipt of the Contractor's or Engineer's appeal to the RCE, unless an extension is approved by both parties. The appeal hearing will not be scheduled until the RCE receives proof of full payment from the contractor to the DRB panel for the appeal hearing. MDOT will then process the cost share amount reimbursement to the contractor through the appropriate project pay items. Once the DRB appeal hearing is scheduled:

1. The RCE will record the scheduled date of the DRB appeal hearing in the CTD.
2. Within five (5) days after the appeal hearing date, the DRB will issue a written recommendation for entitlement of the claim, including the underlying logic, to the Engineer, the Contractor, and the RCE using the format in *Attachment A – DRB Recommendation Form*. In cases of extreme complexity, both parties may agree to allow

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additional time for the DRB to formulate its recommendations. The DRB will focus its attention in their recommendation to the matters of entitlement and allow the parties to determine the related compensation. If both parties request and sufficient documentation is available, the DRB may make a recommendation on the compensation.

3. The RCE will record the date the DRB appeal hearing recommendation is issued in the CTD.

Upon receipt of the DRB appeal hearing recommendation, the Contractor and Engineer have five (5) days to initiate one of the following options:

1. Accept the DRB recommendation in whole.
2. Accept the DRB recommendation on the independent, unrelated claim issues.
3. Accept the DRB recommendation on the related claim issues.

If the Contractor or Engineer accepts the DRB appeal hearing recommendation in whole or in part:

1. The Contractor's and Engineer's acceptance shall be documented in writing to the RCE within 5 days upon receiving the DRB hearing appeal recommendation.
2. The RCE will record the date of receipt of the Contractor's and/or Engineer's letter of acceptance and the terms accepted in the CTD.
3. If the DRB hearing appeal recommendation requires a Contract modification and the Engineer accepts the DRB hearing appeal recommendation, the Contract modification will be submitted to the Contractor for signature within 5 days of the RCE's receipt of the contractor's letter accepting the DRB hearing appeal recommendation.
4. The Engineer will record the date the Contract modification is submitted to the Contractor for signature in the CTD.

If the Contractor or Engineer fails to accept or reject DRB appeal recommendation, in whole or in part, in writing within 5 days of receipt of the DRB appeal recommendation, that failure to respond in writing shall constitute acceptance of the DRB appeal recommendation by the Contractor or Engineer.

The DRB appeal recommendation can only be appealed if new information is provided or becomes available after a DRB recommendation has been issued.

The DRB appeal recommendation will be considered the final administrative action regarding a properly documented and submitted claim. If either party rejects the entire recommendation or a portion thereof, further legal action may be pursued as project administrative options will be considered to have been exhausted.

Any claims documented per Section 104.10 of the Standard Specifications for Construction that were not resolved prior to final acceptance of the project per Subsection 109.06.C of the Standard Specifications for Construction must be referred to the DRB within:

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1. 45 calendar days after final acceptance for projects with an original Contract amount of \$5,000,000 or less or,
2. 90 calendar days after final acceptance on projects with an original Contract amount greater than \$5,000,000.

Failure to submit all claims per Section 104.10 of the Standard Specifications for Construction to the DRB within the aforementioned timeframe after final acceptance constitutes an irrevocable waiver of the Contractor's claim.

DRB Hearing and Appeal Hearings

DRB hearings and appeal hearings will be conducted in an informal manner. The following is the format for a DRB hearing or appeal hearing:

1. Contractor presentation.
2. Engineer presentation/rebuttal.
3. Contractor rebuttal/final statement
4. Engineer final statement
5. DRB panel questions (questions may also be asked at anytime by the DRB panel members).

In the interest of keeping hearings informal, no formal record will be kept of a DRB hearing or appeal hearing. Any departure from the informal setting will depend on written approval of both parties and the magnitude of the dispute. Audio and/or video recordings are not permitted under any circumstances.

The DRB hearing shall be limited to a review of the material in the claim file, the oral representation at the DRB hearing or appeal hearing and/or material submitted as part of the appeal. New material may not be presented at the DRB hearing or appeal hearing that was not previously distributed to the RCE and the other party.

If the RCE or DRB chair 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. In order for the claim issue to be considered by the DRB, the Contractor and Engineer must adhere to the aforementioned procedures.

The DRB will meet confidentially following the hearing or appeal 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 panel will be kept strictly confidential. Should there be additional questions, the DRB chair may schedule a follow up meeting or submit a written inquiry to both parties.

Lawyers, attorneys, and/or legal counsel are not permitted to be DRB candidates nor are they permitted to serve on a DRB panel in any capacity. Lawyers, attorneys and/or legal counsel are not permitted to attend DRB hearings, appeal hearings or progress meetings.

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Hearings and appeal hearings are to be conducted at the job site trailer, project office or nearest MDOT facility with representatives of both the Department 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.

The Contractor shall notify any subcontractors, suppliers, etc., with an interest in the claim of the scheduled DRB hearing or appeal hearing time, date, and location.

DRB Progress Meetings

In order for the DRB to become familiar with the project work, construction operations, time frames, etc., it will generally meet together with representatives from both the Contractor and the Engineer once per month during the first three to six months from the start of construction and no less than quarterly thereafter, as mutually determined by the Contractor and Engineer. If conditions warrant, the Contractor and Engineer may mutually agree to reduce or increase the time between meetings to better serve their needs as well as eliminate the meetings entirely. Factors to be considered when setting the time between meetings include work progress, occurrence of unusual events, the number and complexity of ongoing or potential claims, field conflicts, etc. On projects with unresolved issues, the DRB will meet at least monthly with both the Contractor and Engineer present until the unresolved issues are resolved or a claim is filed. The Contractor is to provide full payment to the DRB for any meetings conducted and agreed to by both parties. This payment must be provided within three (3) calendar days from the date of the progress meeting. Proof of full payment from the contractor to the DRB panel for progress meetings must be received prior to MDOT reimbursement to the contractor. MDOT will then process the cost share amount reimbursement to the contractor through the appropriate project pay items.

The DRB chair will develop an agenda for each regular meeting in accordance with *Attachment B - Agenda for DRB Progress Meetings*. The parties are encouraged to openly share all issues encountered with the DRB panel at the progress meetings.

At the conclusion of each meeting, if deemed appropriate, the DRB panel will conduct a field inspection of active work accompanied by representatives of the Contractor and Engineer. Any segments or areas of the project that are being impacted by potential issues or claims will be pointed out by the parties.

The DRB chair will provide minutes of the DRB progress meetings which will be distributed to all parties for comment, addition, and correction. Minutes as amended will be adopted at the next meeting.

General Provisions

1. The Department nominated DRB panel candidate will be selected by the respective Region Construction Engineer in cooperation with the respective Construction Engineer.

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2. A DRB kick-off meeting should be conducted via email or in person. This meeting should establish operating procedures for the project specific DRB panel including organization, communications, and meeting protocol.
3. A DRB recommendation or appeal recommendation is not legally binding on either party and does not constitute final Department action until all MDOT approvals required by the Contract are properly obtained. Either party may pursue further legal action concerning a specific claim issue after the DRB process has been completed but only claim issues and their respective amounts that have been vetted through the DRB process will be considered following administrative actions. Once final DRB processing has been completed these claim issues and their respective amounts can then be pursued through other legal processes.
4. Decisions made by the Engineer or recommendations made by the DRB panel at any stage in the DRB process shall not constitute an admission of liability or set future precedent.
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 written request of the contractor. The RCE will have final determination as to which claim issues are independent.
6. Related claim issues cannot be separated as they move through the DRB process. The Contractor cannot accept a DRB recommendation or appeal 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.
7. The Contractor's written acceptance of a DRB recommendation or appeal recommendation on a claim issue or item constitutes a settlement of the claim issue or item and constitutes a waiver by the Contractor from pursuing further legal actions against the Department on the claim issue or item.
8. The term "day", as used in these procedures, means a calendar day. Should any specified time begin or end on a Saturday, Sunday, or legal holiday, the specified time shall begin or end, as applicable, on the next business day following the Saturday, Sunday, or legal holiday.
9. It is the responsibility of the Contractor to provide a copy of the claim file or appeal file to any subcontractor, supplier, etc., involved in the claim.
10. The Construction Field Services Division will review data related to all DRB recommendations and monitor the data for trends that require action. All DRB recommendations will be provided to members of the Statewide Alignment Construction Team (SACT) for circulation in the regions and TSCs.

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11. The Engineer will furnish to each of the DRB panel members all documents necessary for the DRB panel to perform its function including copies of all Contract documents, plus periodic reports such as minutes of the weekly progress meetings, Work Orders, Contract Modifications, etc., as requested unless these documents are available for viewing online.
12. It is to be fully understood that individual DRB panel members are not the "representative of" or "advocate for" the party which selected them. The entire DRB will 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 DRB. The parties shall direct any matters needing attention between meetings of the DRB to the chairman of the DRB.

Federal Participation in Contractor Claims and Court Awards

Federal regulations (23 CFR Section 635.124) require that "FHWA shall be made aware by the STD [State Transportation Department] of the details of the claim at an early stage so that coordination of efforts can be satisfactorily accomplished" . . . "Federal participation can be approved provided that:

1. The FHWA was consulted and concurred in the proposed course of action
2. All appropriate courses of action had been considered; and
3. The SHA pursues the case diligently and in a professional manner."

The following procedure is necessary when MDOT plans to request federal participation in any settlement to a Contractor as a result of a claim on a construction Contract:

1. The TSC may seek advice of a Federal Highway Administration (FHWA) Area Engineer on claim issues. MDOT is required to notify FHWA Area Engineers of all individual claims on FHWA oversight projects.
2. FHWA needs to be notified in advance of a DRB hearing. The RCE will be responsible for sending notification to the respective FHWA Area Engineer of a DRB hearing, regardless of oversight responsibility. FHWA may attend the DRB hearing as an observer.
3. The Attorney General notifies the Construction Field Services Division when a Contractor files a lawsuit as a result of a claim on any federal aid project, regardless of oversight responsibility.
4. MDOT's Construction Field Services Division mails a copy of the lawsuit on all federal aid projects, regardless of oversight responsibility, to the FHWA Engineering and Operation Manager. The cover letter shall request FHWA review and determination of the extent of involvement in the litigation and participation in any settlement that may result.
5. FHWA sends a letter to MDOT's Construction Field Services Division to either:

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- a. Request a meeting with the Construction Field Services Division and the Attorney General assigned to the case to discuss and reach agreement on the proposed course of action and level of FHWA involvement, or
  - b. Request that MDOT continue to keep the FHWA Engineering and Operation Manager informed during the course of the litigation.
  - c. The letter will also address FHWA participation in the claim.
6. MDOT's Construction Field Services Division shall notify the FHWA Engineering and Operation Manager when the Attorney General is involved in serious settlement discussions. If requested by FHWA, a meeting with MDOT's Construction Field Services Division and the Attorney General will be scheduled to go over acceptance or rejection of the proposed settlement. At this meeting, the three groups will discuss the legal and factual aspects and reach concurrence on a course of action.
  7. After the lawsuit is settled, MDOT's Construction Field Services Division will send the FHWA Engineering and Operation Manager a letter with the court order. If an award is made, a request for FHWA participation shall be included.
  8. If participation is requested, FHWA will respond in writing to MDOT's Construction Field Services Division, with a copy to MDOT's Financial Operations Division.
  9. If approved for federal participation, additional federal funds will be reimbursed using the normal financial reimbursement procedures.

**Attachment A - DRB Recommendation Form**

Recommendation of Dispute Review Board

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

Dispute (summary of disputed issue):

Contractor's Position:

Engineer's Position:

DRB Recommendation:

## 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 Chairman
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)