

**Michigan Department of Transportation
Dispute Review Board (DRB) Procedures
Revised – November 16, 2015**

This document describes the Michigan Department of Transportation (MDOT) procedures for submittal and review of Contractor claims and Contractor performance evaluation appeals 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. The DRB process is used on Contractor claims and Contractor performance evaluation appeals as described in this document.

Contractor Claims

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 must 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.

Contractor Performance Evaluation Appeals

On projects that have incorporated the Special Provision for Dispute Review Board, the Contractor may also elect to have the DRB panel review any Contractor appeals of their Contractor Performance Evaluations (CPE) on the project. If utilized, the CPE appeal process will be conducted and reimbursed under the same procedures as a DRB hearing. The DRB CPE appeal hearing will be conducted prior to any appeal to the Department. The results of the DRB hearing for a CPE appeal are not binding, and may be used by either party to support their position in a formal appeal to the Department which is conducted per the Special Provision for Contractor Performance Evaluations.

Panel Selection

DRB Panel members are to be selected from the Department's Dispute Review Board (DRB) Candidate List which is available under the **Construction Field Services - Reference** heading on the Department's publication website at:

http://www.michigan.gov/mdot/0,1607,7-151-9622_11044_11367---,00.html

The Department nominated DRB panel candidate will be selected by the Engineer in consultation with the Region Construction Engineer (RCE). When panel selection has been completed the Engineer is to provide the Contract ID, panel member names and notation of panel chairperson to the Construction Field Services (CFS) Construction Contracts Engineer. Questions and inquiries on the candidates and the selection process may be directed to the CFS Construction Contracts Engineer who maintains the database of all pre-qualified DRB candidates. The Construction Contracts Engineer has the most current list of DRB candidate participation on panels and the candidate's current commitments on existing and proposed panels.

It is to be fully understood by all parties that individual DRB panel 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

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project with the exception of inquiries and dialogue at scheduled hearings/meetings and other procedural contacts with the panel chairperson as stated in these procedures. The parties will direct any matters needing attention between meetings or hearings of the DRB to the chairperson of the DRB. Inappropriate behavior by any DRB panel member is grounds for dismissal of the panel member by the nominating party. The Contractor, Engineer, or DRB members may present documentation supporting inappropriate behavior of any panel member, including the chairperson, to the Chief Operations Officer for consideration of removal from the panel as part of the Conflict of Interest panel as described below.

A Department DRB conflict of interest panel 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 panel members and over the course of the project. If a conflict of interest is disclosed by a DRB candidate during the selection process the documented disclosure will be provided by the Engineer to the Engineer of Design, Engineer of Construction Field Services, and the Contract Services Division Administrator for an initial determination. These three individuals will provide a single documented decision to the DRB candidate, Engineer and the Contractor. The DRB candidate may appeal the decision of this initial panel and request an appeal hearing with the Department's DRB appeal panel comprised of the Bureau Director of Development, Bureau Director of Field Services, and the Chief Operations Officer. The appeal hearing will include the appeal panel and the DRB candidate. The appeal panel will issue the final Department position on the conflict of interest to the DRB candidate, Engineer and Contractor.

Execution of the DRB agreement between the Contractor, the Department and the DRB members will proceed immediately after project award and 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 Boards 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 preconstruction meeting.

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 panel in any capacity and are not permitted to attend DRB hearings, appeal hearings or progress meetings.

The Engineer, Contractor, and DRB panel members will 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.

DRB Hearing Process

Upon the Contractor filing a Notice of Intent to File a 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 followed:

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

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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 documented and furnished to the Contractor within seven (7) business 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 documented appeal to the Engineer within five (5) business days upon receipt of the Engineer's claim decision. The documented appeal must include a request for a DRB hearing along with the claim package that meets the requirements of subsection 104.10.E of the Standard Specifications for Construction.
4. The Engineer 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 Engineer will promptly assemble the claim package to support the Department's position on the claim within five (5) business days of receiving the documented request from the Contractor for a DRB hearing.
6. The Engineer will create a "claim file" that will include all documents submitted by the Contractor and all documents supporting the position of the Engineer.
7. The Engineer will submit the "claim file" to the DRB chairperson no later than three (3) business days after creating the final claim package.
8. 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 chairperson will promptly make a documented request for additional information to the appropriate party with a copy sent to the other party.
9. The DRB chairperson will schedule a hearing to be conducted within 10 business days after receiving the claim file from the Engineer. The 10 business day period may be extended if documented approval is received from both the Contractor and the Engineer. The Engineer will record the scheduled date of the DRB hearing in the CTD. The Engineer is to invite the RCE and CFS Construction Contract Engineer to all DRB hearings.
10. The Engineer must receive proof of full payment from the Contractor to the DRB panel for each hearing prior to commencement of the hearing or the hearing is to be rescheduled. The Engineer will then process the reimbursement of the cost share amount to the Contractor through the appropriate project pay items after the hearing is conducted.
11. 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 place the document in the electronic project files and inform the Contractor, Engineer, RCE, and the CFS Construction Contracts Engineer of the file location. In cases of extreme complexity, all parties may document agreement 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 a DRB compensation recommendation after receiving the DRB recommendation of entitlement and sufficient documentation has been submitted to the DRB panel for review, the DRB may make a recommendation on the compensation amount. The compensation recommendation will be discussed at an additional hearing

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day that must be scheduled and compensated with the pay item Dispute Review Board, Hearing, Additional Day. The DRB panel may request an official hearing if the compensation issue is complex and detailed or the DRB panel may simply decline to consider the request if DRB panel compensation cannot be agreed upon.

12. 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) or Projects of Corporate Interest (PoCI).

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:

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.

If the Contractor or Engineer fails to document a response to any DRB Recommendation to the other party within five (5) business days of receipt of the DRB recommendation, that failure to document a response will constitute full acceptance of the DRB recommendation by the Contractor or Engineer.

If the Contractor and Engineer accept the DRB recommendation for any submitted claim issue:

1. The Contractor's and Engineer's acceptance must be documented to the other party and copied to the DRB within five (5) business days upon receiving the DRB recommendation.
2. The Engineer will record the date of receipt of the Contractor's 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 five (5) business days of the receipt of the contractor's documented acceptance of 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 rejects the DRB recommendation for any submitted claim issue:

1. The Contractor's or Engineer's rejection must be documented to the other party and copied to the DRB within five (5) business days upon receiving the DRB recommendation.
2. The Engineer will record the date of receipt of the Contractor's rejection and the terms (if applicable) in the CTD.
3. A rejected DRB recommendation will be considered the final administrative action regarding a properly documented and submitted claim. The Engineer retains all administrative control of the project and will provide the contractor with final direction

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on the claim issue. Further legal action may be pursued by the Contractor as project administrative options will be considered to have been exhausted.

Either party may appeal any 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 appeals the DRB recommendation, in whole or in part:

1. The Contractor and/or Engineer must submit a documented appeal to the other party and the DRB chairperson within five (5) business days of receipt of the DRB recommendation. The documented appeal must 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 Engineer will record the date of receipt of the Contractor's documented appeal in the CTD.

Within five business (5) days of the DRB chairperson's receipt of the documented appeal, the DRB chairperson will review the information with the panel 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 chairperson will immediately request additional information from the Contractor or Engineer.

The requested information must be submitted to the DRB chairperson within five (5) business days of the DRB chairperson's request. If additional information is submitted by either party, it must also be provided to the other party.

The cost participation and cost reimbursement processes for an appeal hearing will be the same as the cost processes for a regular hearing, but compensated under the appeal pay items. Time frames for appeal hearings will be the same as regular hearings unless noted otherwise in these procedures. The Engineer will process the reimbursement for appeal hearings to the Contractor through the appropriate project pay items after the appeal hearing is conducted and proof of payment is provided to the Engineer by the Contractor.

The DRB appeal hearing will be scheduled and conducted no later than 10 business days following the receipt of the Contractor's or Engineer's appeal, unless an extension is approved by all parties. The appeal hearing will not be scheduled until the Engineer receives proof of full payment from the Contractor to the DRB panel for the appeal hearing. The RCE is to be invited to all appeal hearings. Once the DRB appeal hearing is scheduled:

1. The Engineer will record the scheduled date of the DRB appeal hearing in the CTD.
2. Within seven (7) business days after the appeal 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 the format in *Attachment A – DRB Recommendation Form*. The Engineer will provide a copy of the recommendation to the RCE. In cases of extreme complexity, both parties may agree to allow additional time for the DRB to formulate its recommendations. The DRB will focus its attention in their

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recommendation to the newly submitted matters of entitlement and allow the parties to determine the related compensation. If both parties request a DRB compensation recommendation after receiving the DRB recommendation and sufficient documentation is available, the DRB may make a recommendation on the compensation as noted for regular hearings.

3. The Engineer must discuss the final contractor compensation on the claim issue with the respective FHWA Area Engineer to ensure federal participation or state funding on Projects of Division Interest (PoDI) or Projects of Corporate Interest (PoCI).
4. The Engineer 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) business days to initiate one of the following options:

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

Any additional appeals are to be conducted only with the approval of the DRB through the DRB chairperson after reviewing any new information. The Contractor and Engineer must submit the new information within five (5) business days of receiving the DRB appeal hearing recommendation.

If the Contractor and Engineer accept the DRB appeal hearing recommendation:

1. The Contractor's and Engineer's acceptance must be documented to the other party and copied to the DRB within five (5) business days upon receiving the DRB hearing appeal recommendation.
2. The Engineer will record the date of receipt of the Contractor's letter of acceptance and the terms accepted in the CTD.
3. If the DRB hearing appeal recommendation requires a contract modification, the contract modification will be submitted to the Contractor for signature within five (5) business days of the Engineer's receipt of the Contractor's documented acceptance of 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 rejects the DRB appeal recommendation for any submitted claim issue:

1. The Contractor's and Engineer's rejection must be documented to the other party and copied to the DRB within five (5) business days upon receiving the DRB appeal recommendation.
2. The Engineer will record the date of receipt of the Contractor's rejection and the terms in the CTD.

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3. A rejected DRB appeal recommendation will be considered the final administrative action regarding a properly documented and submitted claim. 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 be pursued by the Contractor as project administrative options will be considered to have been exhausted.

If the Contractor or Engineer fails to document acceptance or rejection of the DRB appeal recommendation to the other party, in whole or in part, within five (5) business days of receipt of the DRB appeal recommendation, that failure to respond will constitute full acceptance of the DRB appeal recommendation by the Contractor or Engineer.

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:

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 timeframes after final acceptance constitutes an irrevocable waiver of the Contractor's claim.

DRB Hearings and Appeal Hearings

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

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 panel questions (questions may also be asked at any time by the DRB panel).

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 documented approval of both parties and the magnitude of the dispute. Audio and/or video recordings are not permitted under any circumstances.

Any DRB hearing must be limited to a review of the material in the claim file, the oral representation at the DRB hearing/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 all parties, unless agreed to by all parties.

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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. In order for the claim issue to be considered by the DRB, the Contractor and Engineer must adhere to these 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 chairperson may schedule a follow up meeting or submit a documented inquiry to both parties.

Hearings, appeal 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 panel deliberations.

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

DRB Progress Meetings

In order for the DRB to become familiar with project work, construction operations, time frames, etc., the DRB panel will meet together with representatives from both the Contractor and the Engineer once per month beginning from the start of construction until final project acceptance. The DRB panel members are to attend the preconstruction meeting as their first progress meeting. The second progress meeting will occur prior to the commencement of work operations if needed based on the project schedule and approval of the Contractor and the Engineer. The third and/or regular monthly progress meetings will occur after work operations start. Monthly progress meetings will occur until the project is accepted by the Department. If conditions warrant during seasonal shutdowns/suspensions or other designated times, the Contractor and Engineer may mutually agree to increase the time between meetings to better serve their needs as well as eliminate the meetings entirely. The RCE is to be invited to all progress meetings or informed of their scheduled dates and times.

The Contractor is to provide full payment to the DRB panel members for any meetings or hearings conducted and agreed to by both parties. Payment must be provided to the DRB panel members per the Special Provision for Dispute Review Board. Proof of full payment from the Contractor to the DRB panel for progress meetings must be received prior to conducting the meeting and prior to reimbursement to the Contractor. The Engineer will then process the cost share amount reimbursement to the Contractor through the appropriate project pay items after the meeting is conducted.

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The DRB chairperson 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 on the project with the DRB panel at the progress meeting.

The DRB panel may issue oral advisory opinions at progress meetings only if requested by the Engineer or Contractor. There will not be any supplemental payment for the issuance of DRB advisory opinions at progress meetings. Advisory opinions are to be oral in nature and are to be stated by the panel after deliberation. The DRB may decline to issue a DRB advisory opinion due to the complexity of the claim issue and inform the parties that a hearing should be conducted. The Contractor or Engineer may then request a hearing as they determine appropriate. DRB members are not to provide unsolicited advisory opinions, commentary, and direction to the contractor, or any interpretation of contract language. The DRB is not to act as a mediator in any sense during progress meeting discussions. The intent of DRB advisory opinions are to enhance the resolution of claims before they escalate.

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 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.

General Provisions

1. The DRB operating procedures for the project specific DRB panel including organization, communications, and meeting protocol are to be discussed at the preconstruction meeting.
2. A DRB recommendation or appeal 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 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.
3. Recommendations made by the DRB panel at any stage in the DRB process will not constitute an admission of liability or set future precedent.
4. 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 panel chairperson will have final determination as to which claim issues are independent.

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5. 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. The Contractor's documented acceptance of a DRB recommendation where the Engineer is in concurrence on the claim issue constitutes a settlement of the claim issue and constitutes a waiver by the Contractor from pursuing further legal actions against the Department on the claim issue.
7. The term "day", as used in these procedures, means a business day unless specified otherwise. 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.
8. 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.
9. The CFS Construction Contracts Engineer will review data related to all DRB recommendations and monitor the data for trends that require action. The CFS Construction Contracts Engineer will present a summary of DRB issues and recommendations to the members of the Statewide Alignment Construction Team (SACT) for discussion with construction staff.
10. The Engineer will furnish to each of the DRB panel members all requested documents necessary for the DRB panel 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., unless these documents are available for viewing directly online.
11. The DRB decision is solely for merit of the claim or dispute. Either party may request the DRB panel provide a non-binding recommendation on financial compensation. Any financial compensation recommendation must still be negotiated between the Engineer and Contractor and obtain appropriate approvals, including the FHWA, per the most current contract modification process and the MDOT/FHWA Stewardship Agreement. Any claim submittals to DRB panels may also be audited by CFS, Office of Commission Audits (OCA), or the Office of Auditor General (OAG) at any point in time.
12. The FHWA Area Engineer is to be informed by the Engineer of all DRB submittals, meetings, hearings, and appeals related to DRB issues on Projects of Division Interest (PoDI) and Projects of Corporate Interest (PoCI). When a hearing is requested, the Engineer will send a claim package to the FHWA Area Engineer. Also, refer to the most current Bureau of Highway Instructional Memorandum and the Construction Manual for information regarding federal participation in contractor claims and court awards. DRB

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issues are to be discussed with the FHWA Area Engineer by the Engineer in the same manner as contractor claims.

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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:

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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)