DECLARATION AND DESCRIPTION

The Virginia Department of Transportation (VDOT) is firmly committed to the formation of a partnering relationship with the Contractor, all subcontractors, suppliers, FHWA representatives; where appropriate, other federal agencies, local government officials, utilities representatives, law enforcement and public safety officials, consultants, and other stakeholders to effectively and efficiently manage and complete each construction or maintenance contract to the mutual and individual benefits and goals of all parties. Partnering is an approach to fulfilling this commitment where all parties to the contract, as well as individuals and entities associated with or otherwise affected by the contract, willingly agree to dedicate themselves by working together as a team to fulfill and complete the construction or maintenance contract in cost effective ways while preserving the highest standards of safety and quality called for by the contract documents combined with the goals of on time/on budget completion. The approach must still allow for the fact that the members of the team share many common interests yet have differing authorities, interests, and objectives that must be accommodated for the project to be viewed as successful by all parties. It is recognized by VDOT that partnering is a relationship in which:

- Trust and open communications are encouraged and expected by all participants
- All parties move quickly to address and resolve issues at the lowest possible level by approaching problems from the perspectives and needs of all involved
- All parties have identified common goals and at the same time respect each other’s individual goals and values
- Partners create an atmosphere conducive to cooperation and teamwork in finding better solutions to potential problems and issues at hand

II. PARTNERING STRUCTURE

It is the business intent of the Department that partnering will be required on all projects, either in the formal sense or informally where the spirit and principles of partnering are practiced from onsite field personnel to executive level owners and employees. The VDOT Field Guide to Partnering available on the VDOT website http://www.virginiadot.org/business/resources/partnerfinalallowres.pdf will be the standard reference guide utilized to structure and guide both types of partnering efforts. This guide will be systematically evaluated to incorporate better practices as our partnering efforts evolve. Of particular note is the need for effective and responsive communication between parties to the partnering relationship as emphasized by the Special Provision for Project Communication and Decision Making now included as standard provision in all contracts advertised by the Scheduling and Contract Division of VDOT.
Where formal partnering is specifically required as a pay item in the contract, partnering efforts shall be promoted by a professional facilitator trained in partnering principles. Partnering, and more specifically the Partnering Charter, will not change the legal relationship of the parties to the Contract nor relieve either party from any of the terms of the Contract.

Informal partnering need not require the services of a professional facilitator and may be conducted by the actual partnering participants themselves. Informal partnering will also not change the legal relationship of the parties to the Contract nor relieve either party from any of the terms of the Contract.
III. PROCEDURES

The following are general procedures for partnering and are not to be considered as inclusive or representative of procedural requirements for all projects. Participants shall consult the VDOT Field Guide for Partnering for assistance in developing specific guidelines to those efforts required for their individual projects.

A. Formal Partnering

Pre-Partnering Meeting

The Contractor’s Project Manager or designee and the VDOT District Administrator or designee shall mutually schedule a Pre-Partnering meeting prior to the Partnering Workshop as soon as possible after the Department’s award of the contract. During the Pre-Partnering meeting these individuals or their representatives shall develop an agenda for the workshop, select a facilitator, decide on those individuals and entities associated with or affected by the Construction contract that should be invited to participate and extend appropriate notice in sufficient time to arrange attendance and meaningful participation. The selection of the facilitator must be mutually acceptable to both the Department and the Contractor.

Partnering Workshop

Generally, the Partnering Workshop will be scheduled after the pre-construction conference. Formal partnering efforts require that the Contractor be responsible for employing a facilitator trained in the recognized principles of partnering to conduct the first preconstruction partnering workshop, known as the Formal Partnering Kick-Off Workshop. The facilitator will lead all parties through the Partnering Workshop agenda and the VDOT Field Guide to Partnering during the kick-off workshop. The extent of the formal partnering preconstruction workshop and agenda will be predicated on project complexity, size, number of potential stakeholders, potential outstanding issues, and local needs, etc. The Formal Partnering Kick-Off Workshop will establish the specific frequency and general schedule for further Partnering meetings.

B. Informal Partnering

Where informal partnering is applicable, at least 5 days prior to or in connection with the pre-construction conference the Contractor shall attend a conference with the Engineer at which time he and the Engineer shall discuss the extent of the informal partnering efforts required for the project, how these have been accommodated in the Contractor’s bid and the identity of expectations and stakeholders associated with the project. Informal partnering efforts require the Department and the Contractor to mutually choose a single person from among their collective staffs, or a trained facilitator to be responsible for leading all parties through the VDOT Field Guide to Partnering and any subsequent partnering efforts.

Partnering Meetings During Project Construction

In either formal or informal partnering efforts the Contractor shall provide a location for regularly scheduled partnering meetings during the construction period. Such meetings will be scheduled as deemed necessary by either party. The Contractor and VDOT will require the attendance of their key decision makers, including subcontractors and suppliers. Both the Contractor and VDOT shall also encourage the attendance of affected utilities, concerned businesses, local government and civic leaders or officials, residents, and consultants, which may vary at different times during the life of the Contract. The Department and the Contractor are to agree upon partnering invitees in advance of each meeting. Follow-up partnering
workshops may be held throughout the duration of the project as deemed necessary by the Contractor and the Engineer. The following resolution guidelines will be followed to assist in the formal Partnering process for this project:

**ISSUE RESOLUTION LADDER**

<table>
<thead>
<tr>
<th>Level</th>
<th>Prime Contractor</th>
<th>VDOT</th>
<th>Allotted Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>DRB</td>
<td>DRB Process</td>
<td>DRB Process</td>
<td>Within 7 working days, once Level 4 time is expired</td>
</tr>
<tr>
<td>Level 4</td>
<td>President</td>
<td>District Administrative/District Construction Engineer</td>
<td>5 Days</td>
</tr>
<tr>
<td>Level 3</td>
<td>Vice President</td>
<td>Project Manager/Area Construction Engineer</td>
<td>5 Days</td>
</tr>
<tr>
<td>Level 2</td>
<td>Project Manager</td>
<td>Construction Manager</td>
<td>4 Days</td>
</tr>
<tr>
<td>Level 1</td>
<td>Project Engineer/Foreperson</td>
<td>Project Inspector/Inspectors</td>
<td>1 Day</td>
</tr>
<tr>
<td>Level Safety</td>
<td>Safety/MOT Officer</td>
<td>Safety/MOT Officer</td>
<td>Immediately</td>
</tr>
</tbody>
</table>

The Issue Resolution Ladder as shown above has default allocated times with the provision that mutually agreed timeframes can be established at the time of the first partnering meeting if the default timeframes are not acceptable. The mutually agreed upon allotted timeframes, if necessary, shall be executed through a Work Order, otherwise default allocated timeframes shall be binding to both parties.

Early or prior knowledge by the Department of an existing or impending claim for damages could alter the plans, scheduling or other action of the Department or result in mitigation of or elimination of the effect of the act objected to by the Contractor. Therefore, a written statement describing the act of omission or commission by the Department or its agents that allegedly caused damage to the Contractor and the nature of the claimed damage shall be submitted to the Engineer at the time of occurrence or beginning of the work upon which the claim and subsequent action are based. If such damage is deemed certain, in the opinion of the Contractor, to result from his acting on an order from the Engineer, he shall immediately take written exception to the order. Submission of a notice of Potential Change Order (PCO) and Notice of Intent to File a claim as specified herein and Section 105.19 shall be mandatory. Failure to submit such notice shall be a conclusive waiver to such claim for damages by the Contractor. An oral notice or statement will not be sufficient nor will a notice or statement after the event.

(a) At the time of occurrence or prior to beginning the relevant work to this occurrence, the Contractor shall furnish the Engineer with a notice of Potential Change Order (PCO). This notice shall provide a preliminary cost estimate and list of materials, equipment and labor for which additional compensation will be requested. Only actually documented costs for materials, labor, and equipment will be considered. The Contractor shall afford the Engineer every facility for keeping an actual cost record of the work. The Contractor and the Engineer shall compare records and bring them into agreement at the end of each day. Failure on the part of the Contractor to afford the Engineer proper facilities for keeping a record of actual costs will constitute a waiver of a claim for such extra compensation except to the extent that it is substantiated by the Department's records.
In addition to the above, the Contractor shall submit a preliminary Time Impact Analysis (TIA), as specified in Section 108.03 of the Special Provision For Category IV Progress Schedule of this Contract. The Contractor shall provide the Engineer with a brief description of the PCO, a list of activities on the critical path from the CPM Project Schedule that would be impacted by the PCO, the Contractor's assessment of the impact on the Interim Milestone dates and Contract Completion date, as well as a description of the Contractor's proposed plan to mitigate the impacts of the PCO. Failure to submit such information shall be a conclusive waiver to such claim for any time extension to any of the Milestones dates or the Contract completion date by the Contractor.

This filing of such notice of PCO, and the associated cost and time estimates, by the Contractor and the keeping of cost records and evaluation of TIA by the Engineer shall in no way establish validity of a PCO.

Upon receipt of the Contractor’s written notification of the PCO, the Area Construction Engineer will investigate the conditions relevant to the PCO and any negotiations occurred at Level 1 and 2 of issue resolution ladder. The Area Construction Engineer will provide the Contractor, within fourteen (14) calendar days, with a preliminary decision whether the PCO has merit.

(b) In case, the Contractor disagrees with the Area Construction Engineer's preliminary decision, the Contractor must notify the level 4 management to resolve the issue.

(c) If the issue is not resolved at Level 4 management, the Contractor shall refer the PCO to the Dispute Resolution Board (DRB), as specified in the Special Provision for Dispute Resolution. The Contractor shall provide to the DRB, with a copy to the Engineer, the formal, written PCO request, the Area Construction Engineer's decision, and any additional information he deems necessary to substantiate its case within 7 days from Level 4 management's decision. Failure to submit this information by the Contractor to DRB shall constitute an express waiver of the Contractor's claim for cost and time extension to the Interim Milestone dates and Contract Completion date.

(d) If the Contractor is dissatisfied with the recommendation from the DRB, the Contractor shall submit a Notice of Intent to File a claim to the Area Construction Engineer in accordance with the requirements herein and Section 105.19 of the Specifications. Failure by the Contractor to submit this notice shall constitute an express waiver of the Contractor’s claim for cost and time extension to the Interim Milestone dates and Contract Completion date. The Department and Contractor will continue to make every effort to resolve and close the issue/s until the completion of the project. Any unresolved issue for which Notice of Intent to File a claim has been submitted shall be in accordance with Section 105.19 “Submission and Disposition of Claims of the Specifications.

At all times during the course of the Potential Change Order or claim resolution process, as described above, the Contractor shall continue to prosecute the Work as stipulated in the Contract in a diligent manner and without delay, or shall conform to the Engineer’s written direction or order. Records of the Work shall be kept by both parties in sufficient detail to substantiate and quantify payment in accordance with the applicable sections of the Specifications and the Contract Provisions.

IV. MEASUREMENT AND PAYMENT
Formal Partnering (Kick-Off Workshop) will be measured per day and will be paid for at the contract unit price per day which price shall include providing the partnering facilities, professional facilitation, and other miscellaneous costs including copying fees and refreshments. Subsequent follow-up partnering workshops are not considered a pay item, unless the Contractor and the Engineer mutually agree in advance it is appropriate to hold additional formally facilitated workshop(s), in which case the method of measurement and basis of payment will be the same as for the Formal Partnering (Kick-Off Workshop). The maximum daily value for this pay item shall not exceed $5,000 unless otherwise specified.

In Informal Partnering, because the extent to which certain partnering activities are pursued is at the Contractor’s option, and may vary according to project complexity, work history between the parties, project duration, the Contractor’s own unique methods, means, and schedule to execute and complete the work, etc., informal partnering shall not be paid for as a separate bid item but the all costs associated with informal partnering efforts for the duration of the work shall be considered inclusive and incidental to the cost of other appropriate items.

Payment will be made under:

<table>
<thead>
<tr>
<th>Pay Item</th>
<th>Pay Unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formal Partnering</td>
<td>Day</td>
</tr>
</tbody>
</table>
I. PURPOSE

In accordance with the terms and conditions set forth herein a Dispute Resolution Board (DRB) shall be established to assist in the resolution of Disputes arising on this project. The Board shall assist in and facilitate the timely and equitable resolution of Disputes between the Department and the Contractor in an effort to avoid construction delay, the formal claims process and litigation. The Board shall fairly and impartially consider Disputes referred to it, and shall provide non-binding, written recommendations to the Department and the Contractor to assist in the resolution of these Disputes. It is intended that the Department and the Contractor resolve potential Disputes as quickly as possible at the project level to maintain cooperative working relationships, minimize costs, avoid delays, claims and litigation.

II. DEFINITIONS

For the purposes herein the following definitions shall apply:

Dispute - A controversy, matter in question, or difference of opinion that remains unresolved following good faith negotiations between representatives of the Department and the Contractor. Typically, disputes may include such matters as Potential Change Orders (PCO's), interpretation of the contract/contract documents, costs, time for performance, time extension to Contract completion and/or Interim Milestone dates, utility conflicts and unknown site conditions.

Dispute Resolution Board - Three neutral individuals selected for their experience and expertise relative to the type(s) of construction under contract whose purpose shall be to consider and recommend resolution of Disputes referred to them.

Dispute Resolution Board Meeting or Board Meeting - An informal informational meeting attended by members of the Board, the Contractor, and the Department at which project information, special areas of concern and project progress are ordinarily discussed.

Dispute Resolution Board Hearing or Board Hearing - A meeting called for the specific purpose of hearing a Dispute. The Hearing may be scheduled for the next scheduled Board Meeting if this proves advantageous.

Party - Generally defined as The Virginia Department of Transportation and the Prime Contractor for the construction contract for the purposes of this Special Provision. For the purposes of the Special Provision for the Dispute Resolution Board Agreement, the term shall generally refer to the Virginia Department of Transportation, the Prime Contractor for the construction contract and the three members of the Dispute Resolution Board.

III. CONTINUANCE OF WORK DURING DISPUTE

At all times during the course of the dispute resolution process, the Contractor shall continue to prosecute the work as directed by the contract in a diligent manner and without delay, or shall conform to the Department’s written direction or order. Records of the work shall be kept in sufficient detail by both parties to substantiate and quantify payment in accordance
with the applicable sections of the Specifications and the contract provisions. Nothing in this Special Provision shall limit or modify the procedures contained in Section 105.19, as amended by the Special Provisions of this Contract. Failure to properly submit a Dispute to the DRB under the terms of the Special Provision for Partnering and the Issue Resolution Ladder contained therein shall be a conclusive waiver of the Contractor’s right for a DRB review of the Dispute and to such claim for damages by the Contractor.

IV. BOARD MEMBERSHIP

Board members shall be experienced with the type(s) of construction involved in this project, the interpretation of contract documents, plans, specifications and contract negotiations. The Contractor and the Department shall select Board members.

The Dispute Resolution Board shall consist of one member nominated by the Department, and approved by the Contractor; one member nominated by the Contractor, and approved by the Department; and a third member nominated by the first two members, and approved by the Contractor and the Department. This third member shall be the chairperson of the Board. At least one member of the Board shall have previous alternative dispute resolution experience.

Nomination And The Approval - The Department and the Contractor shall complete the nomination and the approval process and negotiate a working agreement with their prospective members by NTP date + 90 Calendar Days. This working agreement shall be separate but in accordance the terms and conditions of the Dispute Resolution Board Agreement and this Special Provision. Once executed, copies shall be provided to all signatories to the working agreement and the other Party.

Immediately after approval, the Department and the Contractor shall notify their respective members to begin selection of the third member. The third member shall be selected and approved after the first two members are notified to proceed with their selection by no later than NTP date + 160 Calendar Days. The first two members shall ensure that the third member meets the criteria listed herein. Once all members of the Board are selected, the Dispute Resolution Board shall execute the Dispute Resolution Board Agreement within two (2) weeks after approval of the third Board member. Around this same time the Board shall meet to formulate its rules of operation and the general frequency and location of its Meetings.

It is imperative that Board members are neutral, show no partiality to either the Contractor or the Department, or have any conflict of interest. To that end, no member shall have the following:

1. An ownership interest in any entity involved in the construction contract or a financial interest in the contract within a period of two (2) years prior to the award date of the construction contract, except for payment rendered for services on the Dispute Resolution Board;

2. Previous employment by, or financial ties to any Party involved in the design or construction contract within a period of two (2) years prior to the award date of the construction contract;

3. A close professional, personal or familial relationship with any key entity involved in the design or construction contract which, in the judgment of either Party, could suggest favoritism or partiality;
4. Prior involvement in the project of a nature which could compromise that member’s ability to participate impartially in the Board’s activities;

5. Employment with or any contractual relationship with any Party, regardless of tier, to the design or construction contract;

6. A discussion or an agreement with any Party to the design or construction contract regarding employment or any other type of contractual relationship to occur after the construction contract is completed;

7. Disclosure of any information or relationship that could be perceived as a conflict of interest show of favoritism or partiality shall be an ongoing responsibility of the Board Members.

As a part of the nomination and approval process, the first two prospective Board members shall submit complete disclosure statements to the Department and the Contractor. Each statement shall include a resume of experience, together with a declaration of all past, present, and anticipated or planned future relationships to this project and with all Parties and entities involved in the design or planned construction of this project. Disclosure of any recent, close, professional, personal and familial relationships with all key members of all Parties to the design or construction contract shall be included. The third Board member shall supply such a statement to the first two Board members and to the Department and the Contractor before his/her appointment is final.

Services of a Board member may be terminated for any reason at any time provided written notice is given no less than thirty (30) calendar days prior to the effective date of termination.

Conditions for termination are:

1. The Department may terminate the services of its appointee

2. The Contractor may terminate the services of its appointee

3. The third member’s services may only be terminated by the consent of the Department and the Contractor

4. The personal resignation of the Board member

If it becomes necessary to replace a member of the Board, the replacement member shall be nominated and approved in the same manner as the original member. Once the need for a replacement member is determined, the nomination and approval procedures shall begin immediately and shall be completed within thirty (30) calendar days, or as mutually agreed upon by the Parties, from the notice of termination. The Dispute Resolution Board Agreement will be amended to reflect the change and the Board shall provide the replacement member all of the information and documentation supplied to the other members up to the effective date of his/her appointment.

V. RULES OF OPERATION FOR BOARD MEMBERS

The Board shall formulate its own rules of operation consistent with the purposes of this Special Provision. The procedure for operations shall be flexible to allow for changing situations. The Board shall furnish a copy of its rules of operation to the Department and the Contractor.
The Department will furnish the Board a complete set of plans and specifications for each Board member's use. Other relevant contract and non-contract documents may also be furnished by or at the request of either the Department or the Contractor.

In order to keep abreast of construction development and progress, the Board shall be informed by the Department and the Contractor of construction activity by means of the timely transmittal of relevant information. Such transmittals shall take the form of standard monthly progress reports and the minutes of any partnering or progress meetings with copies to all Parties.

Unless otherwise agreed to by the Contractor and the Department, Dispute Resolution Board Meetings shall be held at the project site. These Meetings shall be held at regular intervals (generally every 90 days throughout the life of the project) and at times of major, unique or critical construction activities. The frequency of such Board Meetings shall be as agreed upon by the Department, the Contractor and the Board, depending on the progress of the work. The frequency of such Meetings may be adjusted for reasons of project complexity, participant's scheduling, critical operations or the like at the Parties' discretion.

In cases of alleged differing site conditions or specific construction problems that may require or be best understood by visual inspection, it will be advantageous for the Board to meet at the project site. Where this is inconvenient or will cause delay to the project, photographs, or video recordings including narrative descriptions of the conditions can be supplied by either or both Parties.

Board Meetings shall consist of an informal round table discussion attended by representatives of the Department and the Contractor directly involved in the work under discussion. Attorneys may attend such meetings but may not participate. An agenda, prepared by Board Chairperson with input from the Contractor, the Department and other Board members, is suggested to keep matters in focus and on track. The Contractor and the Department are encouraged to submit items early to meet the time frames for inclusion on the agenda. Copies of the proposed agenda shall be distributed to the Board chairperson and the other Parties in sufficient time so as to be received by each Party no later than seven (7) calendar days before the scheduled Meeting date.

A suggested agenda may include the following:

- Meeting convened by the Board’s chairperson
- Opening remarks by the Department’s project representative and approval of the last Board Meeting’s minutes, if appropriate
- A description by the Contractor or his project representative of:
  - work accomplished since the last meeting
  - current status of the work schedule
  - schedule of future work
  - status of past Disputes
  - potential Disputes
  - proposed solutions for these problems
  - upcoming critical items of work
- Discussion by the Department’s project representative of:
  - the work schedule from the Department’s perspective
  - status of past Disputes
  - potential Disputes
• proposed solution of these problems

Setting of tentative date of next Board Meeting

Site tour by Board Members accompanied by managerial staff member/s from both the Contractor and the Department

The Department shall prepare minutes of regularly scheduled Board Meetings and circulate them for comments and revisions to all parties/attendees. Finalized minutes shall be approved by the Board by no later than the commencement of the next regularly scheduled Board Meeting. Seeking any Board member’s advice or consultation during Meetings or at any other time is counterproductive to the impartial nature of the Board and expressly prohibited.

VI. PROCEDURES FOR SCHEDULING AND CONDUCTING A DISPUTE RESOLUTION BOARD HEARING

INFORMAL HEARINGS AND ADVISORY OPINIONS: Informal hearings are when the Board is notified of a possible impending issue surfacing and an informal preliminary assessment is conducted by the Board. Two weeks prior to the regularly scheduled quarterly site meeting and informal hearing, a brief written claim summary is submitted for the Board’s information. The Party alledging a dispute should provide any documentation to support its position to the Chair and to the other party at least two weeks prior to the scheduled Board meeting. Either party should provide any response to the Dispute or rebuttal at least one week prior to the Board meeting. After the informal hearing and caucus by the Board, the Board will give a verbal commentary (advisory opinion) on the merits of the issue. An advisory opinion serves as a method for potentially avoiding a DRB Formal hearing. It is not intended to replace the Dispute Resolution process specified herein, but will be implemented as part of the good faith negotiations between the Parties to resolve simple disputes (those without any time impact and cost less than $50,000.00). When mutually agreed to by the Department and the Contractor, the DRB may, at its discretion, provide an advisory opinion on any issue. If the Contractor or Department is dissatisfied with the advisory recommendation from the DRB, each party can bring the issue forward for formal hearings. The issue must be brought to the attention of each Party in accordance with the provisions and timeframes of Issue Resolution Ladder, however, the actual hearings, whether formal or informal, can be held within a reasonable time frame by mutual consent

FORMAL HEARINGS: Formal Hearings are when a meeting is held with both parties and DRB members to discuss the issue but generally with more extensive documentation, exhibits and argument, after which the Board releases a written recommendation within fourteen (14) working days. Any issue/s, which is/are not, resolved via the Issue Resolution Ladder negotiations between representatives of the Department and the Contractor; and are complex issue/s such as the following

• Those with time impact to Interim Milestones or the contract completion date and;

• Those involving cost of more than $50,000.00

shall be referred to the Board within the time allotted in the Issue Resolution Ladder.

Either the Department or the Contractor may refer a matter believed to be a Dispute to the Board at any time. The Contractor or Department must have complied with the terms and conditions set forth in the Issue Resolution Ladder prior to the step of submitting a Dispute to the DRB. In any event, the DRB shall not review a Dispute submitted by the Contractor that has not been reviewed/negotiated by the Department and the Engineer, nor shall the DRB
review a Dispute submitted by the Department that has not been reviewed/negotiated by the Contractor. The request for a Board Hearing shall be submitted in writing to the chairperson of the Dispute Resolution Board. This request for a Hearing shall state clearly and in full detail the specific issue(s) of the Dispute to be considered by the Board and a recommendation as to whether it may be heard at the next Board Meeting or if a Hearing needs to be arranged. A copy of the request for a Hearing shall be simultaneously furnished to the other Party. After conferring with each Party, the Board chairperson shall establish a submittal schedule and date for the Hearing so that adequate time is allowed for the other Party to respond to the requesting Party’s statement and for the Board members to review both statements and any supporting documentation prior to the Hearing. Statements and documentation shall conform to the following requirements:

Each Party shall prepare concise written position statements, with page number references for any supporting documentation;

The Party requesting the Hearing shall submit their position paper first, followed by the other Party, with copies provided to each Board member and the other Party;

At the Board’s discretion and mutually agreed by both the Contractor and the Department, DRB hearings and the submittal process procedure can be modified to fit the needs of the Partnering effort.

Normally, Hearings will be conducted at the project site by individuals directly involved with the performance of the work. However, any location that can provide all the required facilities and access to necessary documentation may be used. During the Hearing, the party requesting the Hearing shall present its position first, followed by the other party. Attorneys may attend the Hearing but may not participate. Each Party will be permitted successive rebuttals until all aspects are fully covered. The Board members and the Parties may ask questions, request clarification, or ask for additional data. In difficult or complex cases additional Hearings may be necessary to facilitate full consideration and understanding of all the information and documentation presented. Both the Department and the Contractor shall be given reasonable time to present the information and documentation regarding the issue(s) before the Board.

Generally, a formal transcript will not be prepared. Each Board member will take notes during the Hearing.

During the Hearing no Board member shall express any opinion concerning the merits of any aspect of the Dispute.

The Boards services shall conclude 60 (sixty) days from the project completion date as noted in VDOT Form C5. Therefore, contractor/Department must strictly follow the contract requirements to bring disputed issues in front of the Board in a timely manner. Any disputed issues that arise from last three months of construction will only be permitted to be heard by the Board in final hearing after project completion date, for which either party must submit the request within 10 (ten) days from project completion date. All issues prior to last 90 days of construction shall be brought in front of the Board according to Issue Resolution Ladder incorporated in Partnering Special Provisions. Failure to follow these and Special Provisions’ requirements shall be a conclusive waiver to such claim for damages by the Contractor.

VII. BOARD DELIBERATIONS AND RECOMMENDATIONS

After the Hearing is concluded, the Board will confer to formulate its recommendations. All deliberations of the Board will be conducted in private and with individual views kept strictly confidential. The Board’s deliberations and recommendations, together with any
explanations for its reasoning, shall not be disclosed to either Party except by final written recommendation.

The Board shall make every effort to reach a unanimous recommendation. If this is not possible, the dissenting member may prepare a minority report.

The Board’s recommendation for resolution of the Dispute will be provided in writing to the Department and the Contractor within fifteen (15) Calendar Days of the completion of the Hearing. In difficult or complex cases or in consideration of the Board’s schedule, this time may be extended by the mutual agreement of the Board and both Parties.

Within fifteen (15) Calendar Days of receiving the Board’s recommendation, each Party shall respond to the other Party in writing stating its position on the Board’s recommendation. If the Board’s recommendation is accepted, the Department will move to promptly process the resolution as mutually agreed upon by the next monthly progress estimate or within the time frame that is stated in the work/change order. Failure to timely respond to the Board’s recommendation shall constitute a rejection of the recommendation.

If both parties are in agreement then the DRB recommendations shall be executed through a Work Order.

**Clarifications and Reconsiderations** - In the event the Board’s recommendation is rejected, at the request of either Party, the Board may meet with both Parties to provide additional clarification of its recommendations. This Meeting shall not be used to appeal the Board’s recommendation or to introduce additional information or documentation unless such information or documentation is newly revealed and directly pertinent to the issue(s) in question. If new information has become available, either Party may request that information be considered before the Board makes its final recommendation. The recommendation of the Board is not binding upon either Party.

**Admissibility** - If the Board’s recommendation does not resolve the dispute, the written recommendation, including any minority report, will be admissible as evidence to the extent permitted by law in any subsequent dispute resolution proceeding or forum to establish (a) that a Dispute Review Board considered the Dispute, (b) the qualifications of the Board member, and (c) the Board’s recommendation that resulted from the process.

The Parties agree not to subpoena or otherwise seek discovery from Board members, including their notes, transcripts of Board Meetings or Hearings, any other documents originated by the Board or presented by either Party, and not otherwise part of the normal contract documentation, for any subsequent administrative or judicial proceeding between the Parties or any other entity, regardless of tier, involved in the prosecution of the work.

**VIII. PAYMENT FOR BOARD SERVICES**

Payment for services of the Board will be in accordance with Section VII in the Dispute Resolution Agreement.

The Department will, at its expense, copy, and mail minutes, monthly progress reports and provides administrative services such as meeting facilities and secretarial services.
I. PARTIES

The parties to this Agreement are:

A. The Virginia Department of Transportation:
   1. Authorized Representative: ________________________________

B. Contractor:
   1. Authorized Representative: ________________________________

C. Dispute Resolution Board Members:
   1. ________________________________
   2. ________________________________
   3. ________________________________

II. PURPOSE

The Department and the Contractor are now engaged in the construction of ____________________________
(Particulars of Project Number)

The construction contract for this project provides for the establishment and operation of a
Dispute Resolution Board to assist in resolving Disputes as defined in the Special Provision
for the Dispute Resolution. The objective of the Board is to consider fairly and impartially
the Disputes that are referred to it and to provide written non-binding recommendation(s) to
the Department and the Contractor to resolve these Disputes.

III. SCOPE OF DUTIES

Duties of Board members and the other parties to this Agreement shall be as stipulated in
the Special Provision for Dispute Resolution that is incorporated herein. Other duties that
may prove necessary to facilitate a recommendation from the Board shall be mutually
decided and agreed upon by all signatories to this Agreement.

*(To be executed after award of the Contract)
IV. AREAS OF RESPONSIBILITIES

A. Board Responsibilities

The Board is organized to facilitate the resolution of Disputes between the Department and the Contractor arising under the terms and conditions of the construction contract. The Board will consider matters such as, but not limited to, those involving the interpretation of the contract documents, delays, acceleration of the work, scheduling issues, extra work, differing site conditions, design changes and similar construction related issues. Board members shall not assign or subcontract any of the duties or services of this Agreement.

The Board shall encourage the parties involved in the Dispute to settle issues at the job level prior to arranging for a Hearing before the Board.

Except for the duties and services required by this Agreement and the Special Provision for the Dispute Resolution, the Board members shall refrain from giving any advice to either Party concerning the conduct of the work, the merits of a Dispute, the resolution of other non-Dispute problems or other project-related issues.

B. Contractor Responsibilities

Except for its participation in the Board’s activities as provided for in the construction contract, the Dispute Resolution special provision and this Agreement, the Contractor shall not solicit advice or consultation from the Board or its members on matters dealing with the prosecution, conduct, or resolution of Disputes or other project-related issues.

The Contractor may furnish to each Board member one copy of documents relative to the contract excluding bid documents (unless required by other provisions), other than those furnished by the Department, which are necessary for the performance of the Board to its stated purpose and duties.

C. Department Responsibilities

Except for its participation in the Board’s activities as provided for in the construction contract, the Dispute Resolution special provision and this Agreement, the Department shall not solicit advice or consultation from the Board or its members on matters dealing with the prosecution, conduct, or resolution of Disputes or other project-related issues.

The Department shall furnish each Board member one copy of all contract documents, including but not limited to: the plans, specifications, all addenda to the specifications and plans, geotechnical logs and design summaries; if available, progress schedules and updates, weekly progress reports, change orders, and any other documents necessary for the Board to perform its stated purpose and duties.

The Department will, in cooperation with the Contractor, coordinate the operations of the Board. The Department will arrange for or provide conference facilities at or near the project site and provide secretarial and copying services.

V. TERMINATION OF BOARD MEMBER SERVICES

Board members may withdraw from the Board by providing not less than thirty- (30) calendar days written notice prior to the effective date of termination. Board members may
be terminated for any reason only by their original nominator. The Department and the Contractor must agree to terminate the services of the third member.

If it becomes necessary to replace a member of the Board, the replacement member shall be nominated and approved in the same manner as the original member. Once the need for a replacement member is determined, the nomination and approval procedures shall begin immediately and shall be completed within thirty (30) calendar days, or as mutually agreed upon by the Parties, from the notice of termination. The Dispute Resolution Board Agreement will be amended to reflect the change and the Board shall provide the replacement member all of the information and documentation supplied to the other members up to the effective date of his/her appointment.

VI. LEGAL RELATIONSHIPS

The Parties acknowledge and agree that the Dispute Resolution Board members are serving in a non-binding, advisory capacity. Each Board member, in the performance of his or her duties on the Board, is acting independently and is not an employee or agent of either the Department or the Contractor.

Each Board member, in the performance of his or her duties on the Board, is acting independently and is not an employee or agent of either the Department or the Contractor. Each member shall carry Insurance at no cost to the Department that he or she deems necessary to perform their duties on the Board.

By signing this Agreement all signatories agree to the respective duties and obligations stated herein.

The Parties agree not to subpoena or otherwise seek discovery from Board members, including their notes, transcripts of Board Meetings or Hearings, any other documents originated by the Board or presented by either Party, and not otherwise part of the normal contract documentation, for any subsequent administrative or judicial proceeding between the Parties or any other entity, regardless of tier, involved in the prosecution of the work.

VII. PAYMENT FOR SERVICES

The Department and the Contractor shall share equally (50:50 split) and pay the invoiced cost of all Board members’ services and expenses for all services including but not limited to: Board Meetings, Site visits, Board Hearings. The Department will, at its expense, copy, and mail minutes, monthly progress reports and provides administrative services such as meeting facilities and secretarial services.

Payment for services of the Department appointed and Contractor appointed members of the Board shall be at the hourly or daily rates agreed to between the Department and the Contractor and their respectively appointed Board member. Payment for services rendered by the third member of the Board shall be made at the rates agreed to among the Department, the Contractor, and the third member. The Department, the Contractor, and the third member shall mutually agree upon changes to the billing rates of the third member.

Changes in the billing rates are subject to approval between the Department and the Contractor and the respective and mutually appointed members.

The first two members appointed to the Board shall be reimbursed for the time and expense associated in the selection of the third member.
Direct non-fee expenses shall be reimbursed at the actual cost to the Board member, unless such costs are covered by the State per diem charges, in which case the State guidelines shall govern. Non-fee expenses may include, but are not limited to, automobile mileage or rental, parking fees, travel expense from the member's point of departure to the initial point of arrival, food and lodging, printing, long distance telephone calls, postage and courier delivery. Billing for these expenses shall include a detailed listing of items or charges supported by copies of the original bills, receipts, invoices, or expense accounts. If the Board requests special services such as accounting or data research, both the Contractor and the Department must agree prior to the service being solicited and the cost will be divided as mutually agreed upon.

For Board Meetings, each Board member shall submit to the Department an invoice for services rendered and associated costs within 10 days after any scheduled Meeting during the progress of the work. These invoices shall be in a format approved by the Department and the Contractor accompanied by a general description of the activities performed during that period.

For Board Hearings, the Board shall submit an invoice of its fees and associated costs within 10 days after any scheduled Hearing to the Department for processing with copies to the Contractor. The value of the services submitted for payment shall be based on the established billing rate for the number of hours/days rendered for each Board member together with any direct, non-fee expenses. The Department shall make payment to the Dispute Resolution Board within 60 days from its receipt of the invoices. Payment received shall constitute full compensation for services performed and for all materials, supplies, services, and incidentals required completing the services.

The Department in turn will invoice the Contractor for 50% of invoiced costs for all services. The Contractor shall make payment to the Department within 60 days of the receipt of the invoice.

Each Board member shall keep, available for inspection by representatives of the Department and the Contractor for a period of three years after final payment of the construction contract the cost records and accounts pertaining to this Agreement.

VIII. DATE OF AGREEMENT

This Agreement is effective as of _____________________________________________
And is signed by the Party or its duly authorized representative:

1. Board Member (Department Appointed) _______________________________________
2. Board Member (Contractor Appointed) _______________________________________
3. Board Member (Board Appointed) ___________________________________________

VIRGINIA DEPARTMENT OF TRANSPORTATION

By: Department Representative: _______________________________________________
   Title: ____________________________________________________________________

CONTRACTOR

By: Contractor Representative: _______________________________________________
SECTION 110
CLAIMS

110.01 General.
When filing a claim, the Contractor shall follow the procedures set forth in this Section.

110.02 Notice of Intent.
In any case where the Contractor deems that extra compensation is due him for additional cost not clearly covered in his contract and not ordered by the Engineer as extra work as defined herein, the Contractor shall notify the Project Manager in writing, with copy to the Construction Engineer, of his intention to make claim for such extra compensation.

The written notice of intent shall be furnished to the Engineer prior to the time the contested work is started. Oral notification by the Contractor and confirmed in writing by the Contractor within three calendar days, will be accepted as complying with this requirement.

The written notice of intent shall set forth the reasons the Contractor believes additional compensation will be due, the nature of cost involved and insofar as possible the total amount of the claim.

The Contractor hereby agrees to waive any claim for additional compensation if notification, as provided in the foregoing, is not furnished or the Engineer is not provided facilities by the Contractor for keeping account of actual costs.

Such notice by the Contractor, and the fact that the Engineer has kept account of the cost as aforesaid, is not evidence of the validity of the claim. A separate determination of the validity of the claim will be made by the ALDOT.

110.03 Record Keeping.
After giving the ALDOT a notice of intent to file a claim, the Contractor shall keep daily records of all costs incurred for affected operations. These daily records shall identify each operation affected, the specific locations where work is affected, and the potential effect to the project’s schedule. The ALDOT’s Project Manager will also keep records of all labor, material, and equipment applicable to affected operations. On Monday, or the first work day, of each week following the date of the notice of intent to file a claim, the Contractor shall provide the ALDOT’s Project Manager with the daily records for the preceding week. If the Contractor’s records indicate costs greater than those kept by the ALDOT, the ALDOT will meet with the Contractor and present its records to the Contractor at the meeting. The Contractor shall notify the Engineer in writing within three work days of any inaccuracies noted in, or disagreements with, the ALDOT’s records. The Engineer will review the matter, correct any inaccuracies he finds in the ALDOT’s records, and notify the Contractor in writing of his decision.

Refusal or failure by the Contractor to attend the aforementioned meetings and present his records shall constitute a waiver by the Contractor of his claim.

To protect the integrity of the independent records maintained by ALDOT for comparison with those submitted by the contractor, ALDOT records, other than those mentioned above, will not be made available to the Contractor until after ALDOT’S receipt of the Contractor’s complete records documenting the claim, ALDOT will retain possession of the records and provide copying facilities with the contractor reimbursing the ALDOT for the expense of the copying. No amendment to the claim shall be made following receipt of the ALDOT’s records.

110.04 Claims Process.

(a) GENERAL.
After the work has been completed on the disputed item(s) of work, the Contractor shall have 90 calendar days to submit his claim. Any claim not submitted within this 90 calendar day period is waived. The Contractor shall submit six copies of the claim, containing the required documentation listed in Article 110.03, to the Project Manager. Once the claim is received, a joint review of the claim will be made by the Division and the Construction Bureau and a written response to the Contractor will be made within 90 calendar days. If the Contractor does not agree with this decision, he may request to make a presentation to the Claims Committee. This written request, along with six additional copies of the original claim, shall be made to the Project Manager, by certified mail, within 30 calendar days from the date of the ALDOT’s response. Failure to make the request within the required time period shall constitute waiver of the claim by the Contractor.
CLAIMS

(b) CLAIMS COMMITTEE.

The Claims Committee will be composed of ALDOT employees, appointed by the Director, who were not involved in the design or construction of the project. For Federal Aid projects, the FHWA will be invited to send an observer. The presentation will convene at the mutual convenience of the ALDOT and the Contractor. Issues not specifically presented in the claim package acted upon by the Construction Bureau and the Division are not subject to consideration by the Claims Committee. Following the presentation, the Claims Committee will provide a written recommendation to the Director. The Claims Committee’s recommendation may be accepted, modified or denied by the Director. If accepted, the Director’s decision shall be final, non-appealable, and not subject to judicial or other review except as provided in these Specifications.

If the Contractor does not accept the decision of the Director, he may request to make a presentation to the Claims Appeal Board. This request shall be made in accordance with Item 110.04(c)2. below.

(c) CLAIMS APPEAL BOARD.

1. COMPOSITION AND APPOINTMENT.

The Claims Appeal Board is a standing committee created to receive a presentation regarding a claim. The Claims Appeal Board will hear claims for additional monetary compensation which may include a request for a time extension; however, stand-alone time extension requests will not be considered by the Board. The Board consists of three primary members who are normally appointed for two-year terms. A three-member pool of alternates will be selected from which to provide a substitute for the primary member in the event that the primary member is unable to serve at a particular time or in the event that the Director declares the position vacant due to unfitness, death, illness, incapacity, conflict of interest or any other circumstance which would make service on the Board by that member impossible, difficult or unobjectionable. The three primary members of the Board and three alternates are appointed in the following manner. The Transportation Director appoints the primary and one alternate for one position. The Alabama Road Builders’ Association appoints the primary and one alternate for a second position. The Transportation Director and the Alabama Road Builders’ Association jointly appoint the primary and one alternate for a third position. The jointly appointed primary member will be the Board Chairman. The jointly appointed alternate will be the alternate Board Chairman. At least one Board Member must be a licensed Professional Engineer in the State of Alabama.

In the event that an alternate member is elevated to permanently replace a primary member of the Board, then a new alternate shall be appointed in the same manner as was the departing alternate. Such will also be the case if an alternate position is declared vacant by the Director due to death, illness, incompetence or other reasons. In the event that both the primary member and the alternate member are unable to serve or must excuse themselves due to conflict of interest, etc., in a particular claim(s) hearing, a new member of the Board will be appointed in the same manner as the primary member to sit for that particular hearing.

The ALDOT will notify the Contractor in writing of the date of the presentation and the names of the Board members. The Contractor will have ten calendar days from receipt of the letter to file with the Director, by certified mail, an objection as to the composition of the Board which specifically details the nature of the objection. The Director shall have final authority in determining the composition of the Board.

Each Board member will be paid $60 per hour for actual time spent on reviewing the plans, specifications, and claim; attending the presentation and for preparing the report to the Director. This payment will cover all compensation and expenses.

2. PRESENTATIONS.

The Contractor may initiate a request for a Board presentation by submission of a written notice by certified mail to the Director within 30 calendar days from the date of the Director’s decision on the recommendation of the Claims Committee. Failure to make the request within the required time period shall constitute waiver of the claim by the Contractor. The Board presentation will convene at the mutual convenience of the Board, the Department, and the Contractor. Issues not specifically presented in the original claims package are waived and are not subject to consideration by the Board. The Contractor shall not contact or have any discussions with members of the Claims Appeal Board while the claim is pending except during the formal presentation.

The FHWA will be invited to send an observer for Federal Aid projects.
The Contractor shall pay for 50 percent of the expenses of a Board presentation. The written recommendation of the Board will be sent to the Director following the presentation. The Claims Appeal Board's recommendation may be accepted, modified, or denied by the Director. After receiving the recommendation of the Claims Appeal Board, the Director has 45 calendar days to report his decision to the Contractor.

The Director's decision in the resolution of any and all claims shall be final, non-appealable and not subject to judicial or other review. The decision of the Director is binding upon all parties including, but not limited to, contractors, subcontractors, and third party beneficiaries. After the final ruling by the Director on a claim, a supplemental agreement shall be processed to make payment for any amount deemed payable by the Director.

110.05 Claim Compensation.

(a) GENERAL.

1. COMPENSABLE ITEMS.

The liability of the Department for claims will be limited to the following specifically identified compensable items:

a. Additional job site labor expenses.
b. Additional costs for materials.
c. Additional job-site overhead.
d. An additional 10 percent of the total of Subitems a, b, and c above for home office overhead and profit.
e. Equipment costs, which shall be determined in accordance with the requirements of Item 109.04(b)4.
f. Bond costs.
g. Subcontractor costs as determined by, and limited to, those items identified as payable under Subitems a, b, c, d, e, and f above.
h. Administrative allowance, to the Prime Contractor, equal to three percent of the first $20,000 and one percent of all over $20,000 of the total amount for processing a claim on behalf of a subcontractor.
i. Gross receipts tax.
j. Interest that accrues after 30 calendar days from the date of the Governor's signature on the supplemental agreement that makes payment for a claim.

2. NON-COMPENSABLE ITEMS.

The Department will have no liability for the following specifically identified non-compensable items:

a. Profit, in excess of that provided herein.
b. Loss of anticipated profit.
c. Labor and equipment inefficiencies.
d. Home office overhead in excess of that provided herein.
e. Consequential damages, including but not limited to loss of bonding capacity, loss of bidding opportunities and insolvency.
f. Indirect costs or expenses of any nature.
g. Attorneys fees, claims preparation expenses or costs of litigation.
h. Interest prior to the final resolution of the claim as defined in Subitem 110.05(a)1.j. above.

(b) CLAIMS FOR DELAY.

The Department will have no liability for damages due to delay, beyond those items which are specifically identified as compensable under Subarticle 110.05(a) above. Equipment costs, for equipment involved in a delay claim, shall be determined in accordance with the requirements for Standby Rates as provided in Item 109.04(b)4.

The Department will be liable only for those delay damages caused by or arising from acts or omissions on the part of the Department which violate legal or contractual duties owed to the Contractor by the Department. Such delays may constitute a basis for a claim for delay damages and/or a request for a time extension. The Contractor assumes the risk of damages from all other causes of delay.
SECTION 110
CLAIMS

(c) CLAIMS FOR ACCELERATION.

The Department will have no liability for any constructive acceleration unless the Department gives express written direction for the Contractor to accelerate his effort beyond that required by the original contract. Any acceleration related costs will be handled as extra work as provided in Article 104.03.

110.06 Required Claim Documentation.

All claims shall be submitted in writing, and shall be sufficient in detail to enable the Engineer to ascertain the basis and the amount of each claim. All information submitted to the Department under this Article will be used solely for analyzing and/or resolving the claim. As a minimum, the following information shall be provided for all claims:

(a) A copy of the "Written Notice of Potential Claim" filed for the specific claim by the Contractor.
(b) The date on which actions resulting in the claim occurred or conditions resulting in the claim became evident.
(c) A detailed factual statement of the claim providing all necessary dates, locations and items of work affected by the claim.
(d) The specific provisions of the Contract which support the claim, and a statement of the reasons why such provisions support the claim.
(e) The amount of additional compensation sought and a break-down of the amount into the categories specified as payable under Article 110.05, Claim Compensation.
(f) The name, function, and activity of each Department official, or employee, involved in, or knowledgeable about facts that give rise to such claim.
(g) The name, function, and activity of each Contractor or Subcontractor official, or employee, involved in, or knowledgeable about facts that give rise to such claim.
(h) The identification of any pertinent documents, and the substance of any material oral communication relating to such claim.
(i) If an extension of time is also sought, the specific days for which it is sought and the basis for such request.

For delay claims, in addition to the above, a description of the operations that were delayed, the reasons for the delay and how they were delayed will be required.

110.07 Auditing Of Claims.

All claims filed against the Department shall be subject to audit by the Department’s External Auditor at any time following the filing of such claim. The audit may begin on ten days notice to the Contractor, Subcontractor, or Supplier. The Contractor, Subcontractor, or Supplier shall cooperate with the auditors. Failure of the Contractor, Subcontractor, or Supplier to maintain and retain sufficient records to allow the Department’s auditor to verify the claim shall constitute a waiver of that portion of such claim that cannot be verified and shall bar recovery thereunder.

Without limiting the generality of the foregoing, and as a minimum, the auditors shall have available to them the following documents:

(a) Daily time sheets and foreman’s daily reports.
(b) Union agreements, if any.
(c) Insurance, welfare, and benefits records.
(d) Payroll register.
(e) Earnings records.
(f) Payroll tax returns.
(g) Material invoices, purchase orders, and all material and supply acquisition contracts.
(h) Material cost distribution worksheet.
(i) Equipment records (list of company equipment, rates, etc.).
(j) Vendor rental agreements, and Subcontractor invoices.
(k) Subcontractor payment certificates.
(l) Canceled checks (payroll and vendors).
(m) Job cost report.
(n) Job payroll ledger.
(o) General ledger; general journal, (if used) and all subsidiary ledgers and journals together with all supporting documentation pertinent to entries made in these ledgers and journals.
(p) Cash disbursements journal.
(q) Financial statements for all years reflecting the operations on this project.
(r) Income tax returns for all years reflecting the operations on this project.
(s) Depreciation records on all company equipment whether such records are maintained by the company involved, its accountant, or others.
(t) If a source other than depreciation records is used to develop costs for the Contractor's internal purposes in establishing the actual cost of owning and operating equipment, all such other source documents.
(u) All documents which reflect the Contractor's actual profit and overhead during the years this Project was being performed and for each of the five years prior to the commencement of this Project.
(v) All documents related to the preparation of the Contractor's bid including the final calculations on which the bid was based.
(w) All documents which relate to each and every claim together with all documents which support the amount of damages as to each claim.
(x) Worksheets used to prepare the claim establishing the cost components for items of the claim including, but not limited to, labor, benefits and insurance, materials, equipment, subcontractors, and all documents which establish the time periods, individuals involved, the hours and the rates for the individuals.

SECTION 111
DISADVANTAGED BUSINESS ENTERPRISE (DBE)

111.01 Goals.
This contract contains a specific goal for the participation of certified DBEs. The goal is expressed as the percentage of the total amount of the contract that is required for DBE participation and is given in the proposal. This type of participation is defined as Race Conscious.
If no specific percentage is indicated in the proposal, then any DBE firm utilized for work in this contract is defined as Race Neutral. The requirements listed in Article 111.08 and 111.09 still apply to contracts with no specific goal. In addition, any participation by DBEs above the required goal is also defined as Race Neutral.

111.02 Certification.
The Department maintains a current listing of certified DBE firms by categories of work. The Department's certification extends only to the requirements of 49 CFR 26 with regard to business size, disadvantaged status, and ownership and control of business. The certification does not attest in any way to the capabilities or capacity of any business to perform satisfactorily.
DBE firms that are not on the current certification list must seek approval prior to tendering an offer on any project.

111.03 Low Bidder Submittal DBE Utilization Plan.
This contract will be awarded to the lowest responsible bidder. The apparent low bidder will be notified by the Department and, within ten calendar days, must submit the following information in writing on Form OE-110 (DBE Utilization Plan) provided by the Department:
- the name and address of the DBE firm or firms;
- the description of the work to be subcontracted;
- the dollar amount of the work;
- a written commitment from the bidder to use the DBE;
- a written confirmation from the DBE that it is participating in the contract as provided in the commitment.

111.04 Failure by Low Bidder to Meet DBE Goal.
In the event the apparent low bidder cannot meet the DBE goal, the low bidder must provide documentation that good faith efforts were made to meet the goal.

111.05 Good Faith Efforts by Low Bidder.
(a) SOLICITATION OF DBE PARTICIPATION.
A good faith effort is soliciting through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising, written notices, corresponding with the ALDOT’s DBE Program Coordinator, placing postings on the Small Business Network of Bid Express) the interest of all certified
5-1.43E  Alternative Dispute Resolution

5-1.43E(1)  General

5-1.43E(1)(a)  General
Section 5-1.43E applies to a contract with 100 or more working days.

"The parties" in section 5-1.43E means you and the Department.

"Dispute meeting" in section 5-1.43E refers to both the traditional and informal dispute meeting processes.

The alternative dispute resolution process must be used for the timely resolution of disputes that arise out of the work.

You must comply with section 5-1.43E to pursue a claim, file for arbitration, or file for litigation. You must comply with section 5-1.43E(2)(d). You may comply with section 5-1.43E(1)(d).

The alternative dispute resolution process is not a substitute for the submitting of an RFI or a potential claim record.

Do not use the alternative dispute resolution process for disputes between you and subcontractors or suppliers that have no grounds for a legal action against the Department. If you fail to comply with section 5-1.43 for a potential claim on behalf of a subcontractor or supplier, you release the Department of the subcontractor's potential claim.

Do not use the alternative dispute resolution process for quantification of disputes for overhead type expenses or costs. For disputes for overhead type expenses or costs, comply with section 9-1.17D.

You, the Department, and the DRA or DRB must complete and comply with the Dispute Resolution Advisor Agreement or Dispute Resolution Board Agreement. For these agreement forms, go to the Department's Division of Construction Web site.

No DRA- or DRB-related meetings are allowed until you, the Department, and the DRA or DRB, execute the agreement. However, you, the Department, and the DRA or DRB, may agree to sign and execute the agreement at the 1st meeting.

5-1.43E(1)(b)  Establishment of Procedures
Upon selecting the DRA or DRB, the parties must meet with the DRA or DRB to establish and agree to procedures for:

1. Submitting documents
2. Conducting hearings
3. Providing recommendations
4. Associated tasks

The established procedures must comply with the Contract and the Dispute Resolution Advisor Agreement or Dispute Resolution Board Agreement. The procedures need not comply with laws of evidence.

5-1.43E(1)(c)  Dispute Meetings
You must follow the traditional dispute meeting process to pursue a potential claim.

Either you or the Department may refer a dispute to the DRA or DRB. To request a dispute meeting, submit a copy of the referral and supporting documentation to the DRA or DRB. The documentation must describe the dispute in individual discrete segments such that resolved and unresolved discrete segments are differentiated. Include an estimate of the cost of the affected work and impacts to the work completion date.

A copy of all documents submitted to the DRA or DRB must be simultaneously submitted to the other party.
The Department provides the DRA or DRB with the Contract documents and provides conference facilities for meetings at no cost to you.

Neither you nor the Department may meet with or discuss Contract issues with the DRA or DRB members unless the other party is present.

Only the Engineer, the Department's area construction engineer, or the Department's structure representative and your superintendent or project manager may present information at a dispute meeting. If the dispute involves a subcontractor, the subcontractor's superintendent or project manager must be present at the dispute meeting and may present information.

Only persons who are directly involved with the Contract and who have direct knowledge of the dispute may participate in the dispute meeting. No participation of either party's attorney is allowed. However, you and the Department may agree to a request from the DRA or DRB for participation of a person not associated with the Contract to provide technical services if the services are necessary to help the DRA or DRB make a recommendation.

If the DRA or DRB needs outside technical services, you and the Department must agree to the services before they are acquired. If you, the Department, and the DRA or DRB agree, the technical services may be provided by technical staff who works for you or the Department.

During a dispute meeting, each party presents its position, makes rebuttals, provides relevant documents, and responds to DRA or DRB questions and requests. The following is not allowed:

1. Testimony under oath
2. Cross-examination
3. Reporting of the procedures by a shorthand reporter or by electronic means

If either party fails to attend a dispute meeting, all documents submitted by the nonattending party is considered as the nonattending party's entire argument.

**5-1.43E(1)(d) Informal Dispute Meetings**

You and the Department may resolve small and uncomplicated disputes using an informal process. You and the Department may use this process only if you, the Department, and the DRA or DRB agree its use is appropriate for resolving the dispute.

The informal dispute meeting process is independent from the traditional process. The Department does not grant time extensions for the traditional dispute process if the informal dispute process is used.

You and the Department must each furnish the DRA or DRB a 1-page brief description of the dispute with supporting documentation and any additional information requested by the DRA or DRB.

In an informal dispute meeting, each party presents its position and receives the DRA's or DRB's recommendation orally on the same day the dispute is heard.

You and the Department may ask for clarification of the DRA's or DRB's recommendation within 5 days of the dispute meeting.

The DRA or DRB will not be bound by its informal recommendation if a dispute is later heard in a traditional dispute meeting.

If the dispute is not settled using the informal dispute meeting process, continue to comply with section 5-1.43E(2)(d).

**5-1.43E(1)(e) Recommendations**

Recommendations resulting from the alternative dispute resolution process are nonbinding.

If you and the Department resolve the dispute with the aid of the DRA's or DRB's recommendation, implement the resolution.
5-1.43E(1)(f) Completion of Alternative Dispute Resolution
All alternative dispute resolution activities must be completed before Contract acceptance. Accelerated timeframes may be used if you, the Department, and the DRA or DRB agree.

If a dispute becomes an unresolved claim after Contract acceptance, comply with section 9-1.17D(2).

Neither you nor the Department may call the DRA or DRB members who served on the Contract as a witness in arbitration or other proceedings that may arise from the Contract.

You and the Department must jointly indemnify and hold harmless the DRA or DRB members from and against all claims, damages, losses, and expenses, including attorney's fees, arising out of and resulting from the findings and recommendations of the DRA or DRB.

5-1.43E(1)(g) Payment
Pay the DRA or each DRB member $1,500 per day for the DRA's or DRB's participation at each on-site meeting except if the DRA or a DRB member serves on more than one Department DRA or DRB, the $1,500 must be divided evenly among the contracts:

On-site meetings include:

1. Meeting at the start of the project
2. Scheduled progress meetings for a project with a DRB
3. Dispute meetings

This payment includes full compensation for onsite time, travel expenses, transportation, lodging, travel time, and incidentals for each day or portion thereof the DRA or DRB member is at a DRA or DRB meeting.

Before a DRA or DRB member spends any time reviewing plans and specifications, evaluating positions, preparing recommendations, or performs any other off-site DRA- or DRB-related tasks, you and the Department must agree to pay for the tasks. Pay the DRA or DRB member $150 per hour for these tasks. This payment includes full compensation for incidentals such as expenses for telephone, fax, and computer services.

The Department reimburses you for 1/2 of the invoiced costs to the DRA or DRB and 1/2 of the costs of any technical services agreed to. Submit a change order bill and associated invoices with original supporting documents in the form of a cancelled check or bank statement to receive reimbursement. Do not add mark-ups to the change order bill.

The Department does not pay for any DRA- or DRB-related work performed after Contract acceptance.

The Department does not pay your cost of preparing for and attending a dispute resolution meeting.

5-1.43E(2) Dispute Resolution Advisor
5-1.43E(2)(a) General
Section 5-1.43E(2) applies to a contract with a total bid from $3 million to $10 million.

The DRA is a single-member board you and the Department establish.

5-1.43E(2)(b) DRA Selection
Within 30 days of Contract approval, you and the Department must select the DRA using the following procedure:

1. You and the Department each nominates 3 DRA member candidates. Each candidate must be (1) on the Department's Dispute Resolution Advisor Candidates List at the Department's Division of Construction Web site or (2) must:
   1.1. Be knowledgeable in the type of construction and contract documents anticipated by the Contract
   1.2. Have completed training by the Dispute Resolution Board Foundation
1.3. Have served on at least 3 dispute resolution boards on a Department contract as a member or at least 2 dispute resolution boards on a Department contract as the chairman
1.4. Have no prior direct involvement on this Contract
1.5. Have no financial interest in the Contract or with the parties, subcontractors, suppliers, consultants, or associated legal or business services within 6 months before award and during the Contract except for payments for Department DRA or DRB services or payments for retirement or pensions from either party not tied to, dependent on, or affected by the net worth of the party

2. You and the Department must request a disclosure statement from each nominated DRA candidate and must furnish the 3 statements to the other party. Each statement must include:
   2.1. Resume of the candidate's experience
   2.2. Declaration statement that describes past, present, anticipated, and planned professional or personal relationships with each of the following:
       2.2.1. Parties involved in the Contract
       2.2.2. Parties' principals
       2.2.3. Parties' counsel
       2.2.4. Associated subcontractors and suppliers

3. You and the Department must select 1 of the 6 candidates to be the DRA. If you and the Department cannot agree on 1 candidate, you and the Department each must select 1 of the 3 nominated by the other and the DRA is decided between the 2 candidates by a coin toss.

5-1.43E(2)(c) DRA Replacement
The services of the DRA may end at any time with notice of at least 15 days if:
   1. The DRA resigns.
   2. Either you or the Department replaces the DRA for failing to fully comply at all times with the required employment or financial disclosure conditions of the DRA as described in the Contract and the Dispute Resolution Advisor Agreement.

A DRA replacement is selected the same way as the original DRA. The selection of a replacement DRA must start upon determination of the need for replacement and must be completed within 15 days. The Dispute Resolution Advisor Agreement must be amended to reflect the change of the DRA.

5-1.43E(2)(d) DRA Traditional Dispute Meeting
If you choose to pursue a potential claim, refer the dispute to the DRA within 5 days after receiving the Engineer's response to your Supplemental Potential Claim Record. The dispute meeting must be scheduled no later than 25 days after the DRA receives the referral unless you and the Department otherwise agree.

At least 10 days before the scheduled dispute meeting, each party must furnish the DRA documentation that supports its position and any additional information requested by the DRA.

If the DRA requests additional information within 5 days after the dispute meeting, the party receiving the request must furnish this information within 5 days of receiving the request.

The DRA provides a written recommendation report within 10 days of the dispute meeting unless you and the Department agree to allow more time.

Within 5 days of receiving the DRA's recommendation report, either you or the Department may request clarification of any part of the report. Only one request for clarification from each party is allowed per dispute.

Within 10 days after receiving the DRA's recommendation report, each party must furnish a written response to the DRA indicating acceptance or rejection of the recommendation. If a party rejects the recommendation and has new information that supports its position, the party may request reconsideration. The reconsideration request must be made within 10 days after receiving the DRA's recommendation report. Only one reconsideration request from each party is allowed per dispute.
If both you and the Department accept the DRA's recommendation but cannot agree on the time or payment adjustment within 30 days of accepting the recommendation, either party may request that the DRA recommend an adjustment.

5-1.43E(3) Dispute Resolution Board

5-1.43E(3)(a) General
Section 5-1.43E(3) applies to a contract with a total bid of over $10 million.

The DRB is a 3-member board that you and the Department establish.

5-1.43E(3)(b) DRB Member Selection

Within 45 days of Contract approval, you and the Department must select DRB members and establish the DRB using the following procedure:

1. You and the Department each nominates a DRB member candidate who is on the Department’s approved list. For the list of approved member candidates, go to the Department's Division of Construction Web site. If you or the Department nominates someone who is not on that list, the candidate must:
   1.1. Be knowledgeable in the type of construction and contract documents anticipated by the Contract
   1.2. Have completed training by the Dispute Resolution Board Foundation
   1.3. Have no prior direct involvement on this Contract
   1.4. Have no financial interest in the Contract or with the parties, subcontractors, suppliers, consultants, or associated legal or business services within 6 months before award and during the Contract, except for payments for Department DRA or DRB services, or payments for retirement or pensions from either party not tied to, dependent on, or affected by the net worth of the party

2. You and the Department must request a disclosure statement from each nominated DRB member candidate and must each furnish it to the other party. The statement must include:
   2.1. Resume of the candidate's experience
   2.2. Declaration statement that describes past, present, anticipated, and planned professional or personal relationships with each of the following:
      2.2.1. Parties involved in the Contract
      2.2.2. Parties’ principals
      2.2.3. Parties’ counsel
      2.2.4. Associated subcontractors and suppliers

3. You and the Department are allowed:
   3.1. A one-time objection to the other's candidate
   3.2. An objection to the other's candidate based on a specific breach of the candidate’s responsibilities or qualifications under items 1 and 2 above.

4. If you or the Department objects to the other's candidate, the party who's candidate was objected to must nominate another DRB candidate within 15 days.

5. The 1st candidate from a party that receives no objection becomes that party's DRB member.

6. You and the Department each provide written notification to your selected DRB member.

7. Within 15 days of their notifications, the selected DRB members recommend to you and the Department the 3rd DRB member candidate and provide that candidate's disclosure statement.

8. Within 15 days of the recommendation, you and the Department must each notify the first 2 DRB members whether you approve or disapprove of the recommended 3rd DRB member candidate.

9. If the 2 DRB members cannot agree on the 3rd DRB candidate, they will submit a list of candidates to you and the Department for final selection and approval.

10. If the 2 DRB members do not recommend a 3rd DRB candidate within 15 days of notification of their selections, or if you and the Department do not agree on the 3rd DRB member candidate within 15 days of the recommendation, or if you and the Department do not agree on any of the candidates on the list provided by the first 2 selected DRB members, you and the Department each must select 3 candidates from the current list of arbitrators certified by the Public Works Contract Arbitration Committee established by Pub Cont Code § 10245 et seq. who will be willing to serve as a DRB
member. The first 2 selected DRB members must select the 3rd member in a blind draw of these 6 candidates.

11. The 3 DRB members then decide which of the 3 will act as the DRB chairman. If you and the Department do not agree with the selected chairman, the 3rd member will act as the DRB chairman.

5-1.43E(3)(c) DRB Member Replacement
The service of a DRB member may end at any time with notice of at least 15 days if:

1. A member resigns
2. The Department replaces its selected member
3. You replace your selected member
4. The Department's and your selected members replace the 3rd member
5. You or the Department replace any member who fails to comply with specified employment or financial disclosure conditions of DRB membership

Replacing any DRB member must be accomplished by written notification to the DRB and the other party with substantiation for replacing the member.

A DRB member replacement is selected the same way as the original DRB member selection. Selecting a replacement DRB member must start upon determination of the need for replacement and must be completed within 15 days. The Dispute Resolution Board Agreement must be amended to reflect the change to the DRB.

5-1.43E(3)(d) DRB Progress Meetings
You and the Department must periodically meet with the DRB and visit the job site so the DRB members can keep abreast of construction activities and develop familiarity with the work in progress.

The progress meetings must occur at the start of the project and at least once every 4 months after that.

Both parties must attend each progress meeting.

You and the Department may agree to waive scheduled progress meetings when the only work remaining is plant establishment.

5-1.43E(3)(e) DRB Traditional Dispute Meeting
If you choose to pursue a potential claim, refer the dispute to the DRB within 21 days after receiving the Engineer's response to your Supplemental Potential Claim Record unless a facilitated dispute resolution is included in the signed original partnering charter, in which case, make the referral within 41 days after receiving the response. The dispute meeting must be held no later than 60 days after the DRB receives the referral unless you and the Department otherwise agree.

At least 15 days before the scheduled dispute meeting, each party must furnish the DRB documentation that supports its position and any additional information requested by the DRB.

If the DRB requests additional information within 10 days after the dispute meeting, the party receiving the request must furnish this information within 10 days of receiving the request.

The DRB provides a written recommendation report within 30 days of the dispute meeting unless you and the Department agree to allow more time.

Within 10 days of receiving the DRB's recommendation report, either you or the Department may request clarification of any part of the report. Only one request for clarification from each party is allowed per dispute.

Within 30 days after receiving the DRB’s recommendation report, each party must furnish a written response to the DRB indicating acceptance or rejection of the recommendation. If a party rejects the recommendation and has new information that supports its position, the party may request reconsideration. The reconsideration request must be made within 30 days after receiving the DRB’s recommendation report. Only one request for reconsideration from each party is allowed per dispute.
If both you and the Department accept the DRB's recommendation but cannot agree on the time or payment adjustment within 60 days of accepting the recommendation, either party may request that the DRB recommend an adjustment.
105.15 Claims for Adjustment and Disputes. In any case where the Contractor believes that extra compensation is due for work or material not clearly covered in the Contract or not ordered by the Engineer as an extra, or the Contractor feels that it has encountered unusual and unforeseen conditions beyond its control, as defined herein, not discoverable by reasonable inspection and diligence on the Contractor's behalf and if all other Contract provisions have been complied with, the Contractor shall notify the Engineer orally or in writing of its intention to make claim for such extra compensation before the Contractor begins the work on which the claim is based on. If written notification is not given within five working days and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual costs as required, then the Contractor waives the claim for extra compensation.

A. Contractor Written Notification. The written notification to the Engineer shall include:

1. the date of occurrence and the nature and circumstances of the occurrence that constitute a change;  
2. name and title of Department representatives knowledgeable of the claimed change; and  
3. particular elements of Contract performance for which additional compensation may be sought under this Section.

Such notice by the Contractor, and the fact that the Engineer has kept account of the cost as aforesaid, shall not in any way be construed as proving the validity of the claim. Nothing contained in this Subsection shall be construed as establishing any claim contrary to the terms of Subsection 104.05 or any other provision of the Specifications.

B. Engineer Response. Within ten calendar days after receipt of notice, the Engineer will respond in writing to the Contractor to:

1. confirm that a change occurred and, it shall be allowed and paid as an extra as provided herein; or  
2. deny that a change occurred and, direct the Contractor to follow the claims submittal procedure as outlined; or  
3. advise the Contractor that adequate information has not been submitted to decide whether B.1. or B.2. above applies, and indicate the need for more information for further review. The Department will respond to such additional information within ten calendar days of receipt from the Contractor; or  
4. advise the Contractor that the District will review the claim, after obtaining the claims submittal as described herein.

Any adjustments made to the Contract shall not include increased costs or time extensions for delay resulting from the Contractor's failure to provide requested additional information in accordance with this clause.

C. Claim Submittal. The Contractor must submit a formal claim in writing within 60 calendar days after the item claimed has been completed. The Contractor can only recover, and the formal claim shall only consist of those items allowed under Subsection 105.19 and must contain:

1. the precise nature and basis for the claim;  
2. each fact upon which the Contractor relies, to support the claim;  
3. the precise reason the Contractor believes the claim should be granted;  
4. the language in the Contract upon which the Contractor relies, in support of the claim;  
5. the amount of money or nature and extent of relief to which the Contractor believes it is entitled; and  
6. any other factors which the Contractor believes support the claim.

In complying with this requirement, the Contractor must certify the claim using the following form:

*The undersigned is duly authorized to certify this claim on behalf of (the Contractor).*

*(The Contractor) certifies that this claim is made in good faith, that the supporting data are accurate and complete to the best of the Contractor's knowledge and belief, and that the amount requested accurately reflects the Contract adjustment for which (the Contractor) believes that the Department is liable.*

*(THE CONTRACTOR)*
The Contractor agrees to follow the procedure described in this Section and that any claimed dollar amount and/or relief sought, not made pursuant to this Section, within the time limits prescribed shall be forever waived and not raised at any subsequent meeting or hearing dealing with the claim. The Department shall establish a claims procedure to be followed, consistent with these Specifications, which claims procedure shall provide the means and methods by which the Contractor and the Department shall process the claim.

Claims and disputes submitted in accordance with this Section, will be first reviewed fully at the District level. Within 30 calendar days after receiving the claim submittal, the District Engineer will respond, in writing, with the District's decision. If additional time is required by the District to review the claim, the District Engineer will notify the Contractor. Rejection of the claim or dispute by the District may be appealed to the Claims Committee for review. The Contractor shall give notice of the appeal, in writing, within ten calendar days of the rejection by the District Engineer. The Claims Committee will conduct a claim review meeting attended by representatives of the Contractor and the District. The Committee will conduct the claims review meeting within 45 calendar days after receiving the Contractor's notice of appeal. The proceedings of the Claims Hearing will be recorded by a Court Reporter. The cost associated with the Court Reporter will be shared equally by the Department and the Contractor. A copy of the record of the Claims Hearing will be made available to the Contractor.

Within 15 calendar days of the Hearing, the Committee's Chairperson will notify the Contractor, in writing, of the Committee's decision.

The Contractor may appeal the Claims Committee's decision to the Chief Engineer of the Department requesting to proceed with the arbitration process as outlined in Subsection 105.17. The Contractor shall give notice of the appeal to the Claims Committee's Chairperson, in writing, within ten calendar days after receiving the Claims Committee's decision.

**105.16 Chief Engineer's Decision.** After receiving the written notification from the Contractor, appealing the Claims Committee's decision and requesting an Arbitration hearing as outlined in Subsection 105.17, the Chief Engineer will notify the Contractor, in writing, within 30 calendar days of the receipt of the notice regarding the claim. The decisions upon all claims by the Chief Engineer shall represent the findings of the Department.

**105.17 Arbitration.** Any claim, properly presented pursuant to Subsection 105.15, processed through the claims procedure, and finally decided by the Chief Engineer pursuant to Subsection 105.16, in the absence of agreement by the Contractor and the Department as to the resolution thereof, and upon the demand of either party delivered in writing to the other within 30 calendar days from the date of the written decision by the Chief Engineer, as provided in the aforesaid Subsection 105.16; shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect; except as otherwise modified by these Specifications. The arbitration proceeding may involve presentation of facts or such portions thereof as have previously been presented at prior administrative hearings held pursuant to Subsection 105.15 herein or may be based entirely upon the record, as established therein. The record established at prior administrative hearings pursuant to Subsection 105.15 shall be specifically admissible at such arbitration proceedings and such facts as have been established shall be specifically binding upon the parties; with the exclusion of opinions and conclusions thereon. Such arbitration shall be specifically based upon the claim presented at prior administrative hearings and no material, information, fact, and/or claim not presented at such hearings held pursuant to said Subsection 105.15 shall be admissible at any arbitration conducted pursuant to this Section. The arbitrators, in their final ruling on the claim shall include a summary of the evidence, findings of fact based upon the evidence, conclusions of law, and a concise statement of the relief awarded. This agreement to arbitrate shall be strictly enforceable as provided under Chapter 57, Title 10 of the Delaware Code, as amended.

**105.18 Contractor and Subcontractor/Supplier Disputes.** Any dispute arising between the Contractor and its subcontractor/supplier concerning payments held in trust, as required by Chapter 8, Title 17 of the Delaware Code, shall be resolved by arbitration. The Department shall not serve as the arbiter of such disputes, but shall, in the absence of agreement between the parties, designate the American Arbitration Association to resolve the matter.

**105.19 Claims.** All claims shall be submitted according to the procedure established in Subsection 105.15. Submit a written claim notification a maximum of five working days after the original oral notification. Provide in the written notification a brief statement of the reason and basis for the claim and a list of the items for which additional
compensation is being claimed in order to permit the Engineer to keep a strict account of actual costs incurred. Within 60 calendar days after that portion of the work upon which the claim is based is completed, the Contractor shall submit to the Department an itemized list of labor, equipment, and materials used and such other costs as specifically allowed pursuant to this Subsection.

The Contractor shall not be entitled to recover any costs other than those contained and allowed herein. As described below, A. through G. shall cover all direct and indirect costs allowed and H. identifies all non-allowable costs.

F. Subcontractor Claims. Any claim submitted by the Contractor on behalf of a subcontractor shall be submitted according to Subsection 105.15 and shall be solely limited to the list of all direct or indirect costs permitted by A. through D. above. For work approved by the Department, the subcontractor will be allowed a percentage markup as permitted by Subsection 109.04 D.6. and 109.04 D.7. The Contractor will be allowed an additional percentage markup as permitted by Subsection 109.04 D.8. to be computed on the final sum total of such subcontractor cost claimed under A. through D. above for portions of subcontractor work approved by the Department.

G. Waiver of Liquidated Damages. A claim, not for additional costs, but for a waiver by the Department of an assessment of liquidated damages, in whole or in part, may also be made by the Contractor as part of this Subsection.

H. Non-allowable Damages or Expenses. The expenses listed above as A. through G. shall constitute the sole cost(s) and expense(s) to which the Contractor shall be entitled on any claim submitted for additional compensation or settlement of any claim made under these Specifications, except as further provided in Subsection 105.21. The parties agree that the Department will have no liability for the following items of damage or expense:

1. Profit in excess of that provided herein,
2. Loss of profit,
3. Labor and equipment inefficiencies,
4. Home office overhead in excess of that provided herein,
5. Consequential damages, including but not limited to loss of bonding capacity, loss of bidding opportunities and insolvency,
6. Indirect costs or expenses of any nature,
7. Attorneys fees, claim preparation expenses or costs of litigation, and
8. Interest on any claimed amounts.

I. Any claim submitted shall not affect in any manner the imposition or waiver of liquidated damages, except that any liquidated damages shall be waived for any delay for which a time extension is granted in accordance with Subsection 108.07.

J. The Contractor agrees to make its accounting records and cost information available at the time of submission of the claim and such other records as the Department may require, in order to determine the validity and amount of each item claimed. They shall be open to inspection or audit by representatives of the Department during the life of the Contract and for a period of not less than three years after the Contractor's acceptance of Final Payment as set forth in Subsection 109.10 and the Contractor shall retain such records for that period. Where payment for materials, equipment, or labor is based on the cost of forces other than the Contractor's, the Contractor shall make every reasonable effort to ensure that the cost records of such other forces are open to inspection and audit by representatives of the Department on the same terms and conditions as the cost records of the Contractor. Payment for the cost of such forces may be deleted if the records of such third parties are not made available to the Department's representatives. If an audit is to be commenced, the Contractor is to be provided with a reasonable notice of the time when such audit is to begin. In case all or a part of such records are not made available, the Contractor understands and agrees that any items not supported by reason of such unavailability of the records will not be allowed, or if payment therefore has already been made, the Contractor shall refund to the Department the amount so disallowed.
105.21 Claims for Delay Damages. The Department may grant time extensions in the performance of work for delays caused by acts of God, acts of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or other causes, only when these delays are not the fault or responsibility of the Contractor, are beyond the Contractor's control, and could not have been anticipated by the Contractor. For such delays that are also beyond the control and not the fault of the Department, the Contractor shall be entitled to a time extension, but shall not be entitled to recover any damages resulting from such delays.

In the event a delay is not caused by the Contractor's fault or negligence but is caused wholly by actions of the Department, or determined by an arbitrator and/or judicial proceeding to be the Department's sole responsibility, an extension of time shall be granted in an amount equivalent to the actual critical delay caused by the Department, and the Contractor shall not be entitled to any additional compensation except as allowed herein.

All direct and indirect costs allowed are covered in A. below, and B. below identifies all non-allowable costs. Compensation provided by A. below shall not be duplicative of compensation already provided as part of Subsection 105.19 or 109.04:

A. Allowable Direct and Indirect Expenses. Only the additional costs associated with the following items will be recoverable by the Contractor for delay compensation:

1. Extended Field Overhead. Field overhead costs necessary for the prosecution of the work during the delay period, as follows:
   a. General Field Supervision. Such costs include but are not limited to general field supervision, assistants, watchman, clerical and other field support staff. Compute these labor costs in accordance with Subsection 109.04 D.1. For salaried personnel, calculate the rate of wage (or scale) actually paid by dividing the weekly salary by seven days per week.
   b. Field Office Facilities and Supplies. Such costs include but are not limited to field office trailers, tool trailers, office equipment rental, temporary toilets, and other incidental facilities and supplies. Compute these costs on the basis of the actual added costs incurred by the Contractor to provide these services as a result of the delay.
   c. Maintenance of Field Operations. Such costs include but are not limited to telephone, electric, water, and other similar expenses. Compute these costs on the basis of the actual added costs incurred to maintain these services as a result of the delay. These extended field overhead costs are not duplicative of those compensated in Subsection 109.04 D.7.

2. Labor. For all necessary, non-salaried, idle labor that must remain on the Project during such periods of delay due to collective bargaining contracts or other reasons approved by the Engineer, compute the labor costs in accordance with Subsection 109.04 D.1.


4. Equipment. For any idle equipment other than small tools that must remain on the Project site during delays, the Contractor is to receive compensation at the rate calculated in Subsection 109.04 D.4. Should it not be necessary for machinery or equipment to remain on the Project during delays, the Contractor is to receive transportation costs to remove the machinery or equipment and return it to the Project at the end of the delay period.

5. Materials. Costs for material escalation due to the delay or the cost of storage of materials due to the delay are recoverable. Obtain the Engineer's approval prior to storing any material due to a delay.

6. Percentage Markups. An additional 10% markup of the total of 1., 2., 3., and 4. above will provide full compensation for home office overhead and any other costs attributed to the delay for which no specific allowance is herein provided. Payment under this Subsection constitutes full compensation for all items of expense related to such delay. No profit is allowed under this Subsection. The markup is not duplicative of those provided in Subsections 105.19 E., 109.04 D.6., and 109.04 D.7.

7. Records. Payment will not be made for delays until the Contractor has furnished the Engineer with duplicate itemized statements of the cost as herein above specified and detailed as follows:
   a. Name, classification, date, daily hours, total hours, rate, and extension for each worker and foreman.
   b. Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.
   c. Transportation costs.
Cost of bonds, property damage, liability, and workers compensation insurance premiums; unemployment insurance contributions; and social security taxes.

The Engineer will compare the Department's records with those furnished by the Contractor and make any necessary adjustments. When these records are agreed upon and signed by both parties, said records become the basis of payment for the expenses incurred, but do not preclude subsequent adjustment based on a later audit by the Department.

The Contractor's cost records pertaining to expenses under this Subsection shall be open to inspection or audit by representatives of the Department as provided in Subsection 105.19 J.

B. **Non-Allowable Damages or Expenses.** The expenses listed in A. above shall constitute the sole cost(s) and expense(s) to which the Contractor shall be entitled on any delay claim submitted for additional compensation or settlement of any claim made under these Specifications. The parties agree that the Department will have no liability for the items listed in Subsection 105.19 H.1 through H.8.
NOTICE OF AVAILABILITY

The FEBRUARY 25, 2010, SUPPLEMENTAL SPECIFICATIONS to the STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES and the APRIL 2003, SUPPLEMENTAL DRAWINGS to the 1996 METRIC CONSTRUCTION AND TRAFFIC STANDARD DETAILS and the 1977 CONSTRUCTION STANDARDS (ENGLISH) are applicable to this project and are available from the Cashier's Office located at the following address:

MassDOT Highway Division
Cashiers Office, Room 6261
10 Park Plaza, Boston, Massachusetts
Telephone Number (617) 973-7695

SPECIAL PROVISIONS FOR RIGHT-TO-KNOW ACT REQUIREMENTS

The Contractor's attention is directed to Massachusetts General Laws, Chapter 111F, commonly known as the Right-To-Know Act, and to the regulations promulgated pursuant thereto. Among the provisions of the Right-To-Know Act is a requirement that employers make available to employees Materials Safety Data Sheets (MSDS) for any substance on the Massachusetts Substance List (MSL) to which employees are, have been, or may be exposed.

To ensure prompt compliance with these regulations and legislation, the Contractor shall:

1. Deliver to the Department, prior to the start of any work under this contract, copies of MSDS for all MSL substances to be used, stored, processed or manufactured at the worksite by the Contractor.

2. Train employees of the Department, who may be exposed to MSL substances as a result of the Contractor's work under this contract, with regard to those specific substances in accordance with requirements of the Right-To-Know Act.

3. Observe all safety precautions recommended on the MSDS for any MSL substance to be used, stored, processed, or manufactured at the worksite by the Contractor.

4. Inform the Department in writing regarding specific protective equipment recommended in the MSDS for MSL substances to which employees of the Department may be exposed as a result of the Contractor's work under this contract.

The Department shall not be liable for any delay or suspension of work caused by the refusal of its employees to perform any work due to the Contractor's failure to comply with the Right-To-Know Act. The Contractor agrees to hold the Department or the Commissioner of the Department harmless and fully indemnified for any and all claims, demands, fines, actions, complaints, and causes of action resulting from or arising out of the Contractor's failure to comply with the requirements of the Right-To-Know Act.

ALTERNATIVE DISPUTE RESOLUTION

Forum, Choice of Law and Mediations:

Any actions arising out of a contract shall be governed by the laws of Massachusetts and shall be brought and maintained in a State or federal court in Massachusetts which shall have exclusive jurisdiction thereof. The Department, with the approval of the Attorney General's Office, and the Contractor may agree to voluntary mediation through the Massachusetts Office of Dispute Resolution (MADR) of any Contract dispute and will share the costs of such mediation. No legal or equitable rights of the parties shall be limited by this Section.
The Design-Build Team shall also meet, coordinate, and determine with the U-4763B Design-Build Team all work necessary to design, install, and construct all the required features for aesthetics along the Triangle Expressway. Reference the Aesthetic Design Scope of Work.

Reference the ORT Infrastructure Scope of Work and Communication/ITS Network Conduit System Scope of Work for more information regarding the separate contracts.

**DISPUTE REVIEW BOARD (DRB)**

**GENERAL**

**A. Definitions**

Dispute – A contractual issue that involves cost and/or time (either credits or additions) that remains unresolved following good faith negotiations between authorized representatives of the Design-Build Team and the North Carolina Turnpike Authority (NCTA).

Dispute Review Board (DRB) – three neutral individuals mutually selected by the Design-Build Team and the NCTA to review Disputes and render findings and recommendations based on the Contract.

**B. Formal DRB Review**

This provision provides for a formal DRB review process.

Any of the procedures for the formal DRB Review established by this provision may be altered or modified by mutual written agreement of the Design-Build Team and the NCTA to better suit the needs of a particular Dispute.

**C. Summary**

A DRB will be established to assist in the analysis of Disputes that arise between the Design-Build Team and the NCTA, to include, but not limited to, Articles 104-4, 104-8(B) or 108-10 of the Standard Special Provision, Division One, contained elsewhere in this RFP.

It is not intended for the NCTA or the Design-Build Team to default on their normal responsibilities to cooperatively and fairly settle their differences by indiscriminately assigning them to the DRB. It is intended that the DRB encourage the NCTA and Design-Build Team to resolve potential disputes without resorting to this alternative resolution procedure.

Utilization of the DRB does not relieve the Design-Build Team or NCTA from complying with all Contract terms and conditions, and does not waive any notice or timeliness requirements of the Standard Specifications for Roads and Structures. However, if a Dispute is referred to the DRB, the claim submittal and review time frames may be superseded by time frames established by the DRB, and agreed to in writing by both the Design-Build Team and the NCTA.
Either the Design-Build Team or the NCTA may refer a Dispute to the DRB. Such referral should be initiated as soon as it appears that the normal NCTA-Design-Build Team dispute resolution effort is not succeeding. However, prior to referring a Dispute to the DRB, the NCTA and Design-Build Team must agree on the central or core issue to bring before the DRB.

Promptly thereafter, the DRB will impartially consider the Dispute(s) referred to it. The DRB will provide **non-binding** written findings and recommendations to the Design-Build Team and the NCTA.

Although the findings and recommendations of the DRB should carry great weight for both the Design-Build Team and the NCTA, they are **not binding** on either the Design-Build Team or the NCTA. However, the findings and recommendations are admissible in subsequent claim resolution proceedings as per the Dispute Review Board, Review of Disputes, Admissibility section contained elsewhere in this provision.

The Dispute Review Board is a condition of this Contract. The NCTA and the Design-Build Team agree that the submission of any unresolved dispute or claim to the DRB is a condition precedent to the Design-Build Team having the right to proceed with its final claim.

**D. Scope**

This provision describes the purpose, procedure, function, and features of the DRB. A Three-Party Agreement among the NCTA, Design-Build Team, and the selected DRB members will formalize creation of the DRB and establish the scope of its services and the rights and responsibilities of the Design-Build Team and the NCTA. In the event of a conflict between this Specification and the Three-Party Agreement, the latter governs. The form of the Three-Party Agreement will be provided by the NCTA.

**E. Purpose**

The purpose of the DRB is to provide an independent and impartial review of the Dispute and provide **non-binding** written findings and recommendations, in accordance with the 2006 *NCDOT Standard Specifications for Roads and Structures*, based on the Contract, applicable contract law, industry practices, and the facts presented.

It is not the purpose, or responsibility, of the DRB to resolve the Dispute. That responsibility remains with the Design-Build Team and the NCTA. However, it is anticipated that the DRB review will assist the Design-Build Team and the NCTA in resolving the Dispute.

Creation of the DRB is not intended as a substitute for NCTA or Design-Build Team responsibility to make a good-faith effort to settle the Dispute. Indiscriminate referral of disputes to the DRB without prior attempts by the Design-Build Team and the NCTA to resolve them shall be avoided. The Design-Build Team or NCTA shall exhaust resolution through the escalation process defined in the formal partnering process prior to escalating an issue to the DRB.
F. Continuance of Work

Both the Design-Build Team and the NCTA shall proceed diligently with the work and comply with all applicable Contract provisions while the DRB considers a Dispute.

G. Tenure of DRB

The DRB will be deemed established after the NCTA, the Design-Build Team and the DRB execute the Three-Party Agreement.

The DRB will be dissolved as of the end of the warranty period to the Design-Build Team unless earlier terminated or dissolved by mutual agreement of the Design-Build Team and the NCTA. If mutually agreed upon by the Design-Build Team and the NCTA, the DRB may be dissolved on the date of final payment to the Design-Build Team and a new DRB established as outlined herein to serve for the life of the warranty period.

MEMBERSHIP

A. General

The DRB will consist of three members selected jointly by the Design-Build Team and the NCTA. One member will serve as Chairperson.

B. Criteria

Experience:

1. It is desirable that all DRB members be experienced with the construction process including design, construction, contract administration, contract law, and resolution of construction disputes.

2. It is not necessary that the DRB members be intimately familiar with the specific type of construction involved in the Dispute. The DRB may consult technical experts if the need arises under provisions provided for elsewhere in this Special Provision. See the Dispute Review Board, Review of Disputes, Admissibility section contained elsewhere in this provision.

Neutrality:

1. It is imperative that the DRB members be neutral, act impartially, and be free of any conflict of interest.

2. For purposes of this subparagraph, the term “member” also includes the member’s current primary or full-time employer, and “involved” means having a contractual
relationship with either the Design-Build Team or the NCTA, such as a subcontractor, architect, engineer, or construction manager.

3. Prohibitions; disqualifying relationships for prospective members:

(a) An ownership interest in any entity involved in the Project or Contract, or a financial interest in the Contract, except for payment for services on this Dispute Review Board;

(b) Previous employment by, or financial ties to, any party involved in the Contract within a period of eighteen (18) months prior to award of the Contract, except for fee-based consulting services on other projects;

(c) A close professional or personal relationship with any key member of any entity involved in the Contract which, in the judgment of either the Design-Build Team or the NCTA, could suggest partiality; or

(d) Prior involvement in the project of a nature that could compromise the prospective member’s ability to participate impartially in the DRB’s activities.

4. Prohibitions; disqualifying relationships for members:

(a) Employment, including fee-based consulting services, by any entity involved in the construction contract except with the express approval of both the Design-Build Team and the NCTA;

(b) Discussion concerning, or the making of, an agreement with any entity involved in the Contract regarding employment after the Contract is completed.

5. Any of the provisions of 1 through 4 above may be waived by mutual written agreement of the Design-Build Team and the NCTA.

C. Disclosure Statement

As a part of the selection process, all prospective DRB members will be required to submit complete disclosure statements for the approval of both the Design-Build Team and the NCTA. Each statement shall include a resume of experience, together with a declaration describing all past, present, and anticipated or planned future relationships, including indirect relationships through the prospective member’s primary or full-time employer, to this project and with the Design-Build Team or the NCTA, or others involved in the Contract, including subcontractors, suppliers, design professionals, and consultants. Disclosure of close professional or personal relationships with all key members of the Design-Build Team or the NCTA or other parties involved in the construction Contract shall be included.
D. Selection Process

Within 30 calendar days of Notice to Proceed, or as otherwise mutually agreed upon by the Design-Build Team and NCTA, the Design-Build Team and the NCTA will jointly select the DRB using the following procedure:

1. To form a DRB, the NCTA will provide to the Design-Build Team a copy of the resume and references of the person proposed for the DRB. Likewise, the Design-Build Team will provide NCTA the resume and references for their proposed DRB Member. The Design-Build Team and the NCTA will confirm the availability, neutrality, experience, and expertise of the nominees. Both the NCTA and Design-Build Team will have the ability to reject the others nominee. The parties shall continue to exchange nominee information until each party has selected a nominee which is agreeable to the other party. The NCTA shall be responsible for notifying the nominees of their selection.

2. Once the two mutually agreeable nominees have confirmed their participation within the DRB, they shall be responsible for selecting a third DRB member, who shall become the DRB Chairperson that is mutually agreeable to the Design-Build Team and the NCTA.

3. This DRB should serve for the life of the Contract. Should the need arise to select a replacement DRB member, the remaining DRB members shall be responsible for selecting an additional member that is mutually agreeable to the Design-Build Team and the NCTA.

E. Three-Party Agreement

The DRB members and the authorized representatives of the Design-Build Team and the NCTA shall execute the Dispute Review Board Three-Party Agreement within 2 weeks after the selections are made.

OPERATION

A. General

In general, the DRB will operate in accordance with this provision. However, it is not desirable to adopt hard-and-fast rules for the functioning of the DRB. The entire procedure shall be kept flexible to adapt to changing situations. The DRB may initiate, with the NCTA’s and Design-Build Team’s concurrence, new procedures or modifications to existing procedures whenever this is deemed appropriate.

B. Contract Documents, Reports and Information

The NCTA will provide a set of the Contract Documents to each DRB member.

The DRB members will be kept informed of construction activity and other developments by means of timely transmittal of relevant information requested by the DRB and prepared by the
Design-Build Team and the NCTA in the normal course of construction, including, but not limited to, periodic reports and minutes of progress meetings. At any time, the DRB may request copies of documents that are normally generated by the Design-Build Team or the NCTA during the course of business throughout the Project. Only during the resolution of a specific dispute may the DRB request reports, documents or other information that is not normally generated during the course of business, and this information shall be limited to that which is specific to this dispute.

C. Periodic Meetings and Visits

If requested, the DRB may participate in the formal partnering process as outlined in the contract. Additional meetings or site visits may be needed as mutually agreed among the NCTA, the Design-Build Team, and the DRB.

Site visits should cover all active segments of the work. Representatives of both the Design-Build Team and the NCTA shall accompany the DRB during project meetings or site visits.

The DRB shall be provided “issue logs” and “Supplemental Agreement/Change Order Logs” throughout the life of the contract.

REVIEW OF DISPUTES

A. General

The Design-Build Team and the NCTA will cooperate to ensure that the DRB considers Disputes promptly, taking into consideration the particular circumstances and the time required to prepare appropriate documentation.

Procedures and time periods may be modified by mutual agreement.

B. Prerequisites to Review

A Dispute is subject to referral to the DRB when either the Design-Build Team or the NCTA believes that bilateral negotiations have reached an impasse. However, the NCTA and Design-Build Team must agree on the central or core issue to bring before the DRB prior to referring a dispute to the DRB.

C. Requesting Review

Either the Design-Build Team or the NCTA may refer a dispute to the DRB. Requests for DRB review shall be submitted in writing to the Chairperson of the DRB. The Request for Review shall state clearly and in full detail the specific core issue of the Dispute to be considered by the DRB. A copy of the request shall be simultaneously provided to the other party.

After conferring with both the Design-Build Team and the NCTA, the DRB Chairperson will establish a submittal/presentation schedule.
Concise written position statements shall be prepared by both the Design-Build Team and the NCTA, with page number references to any supporting documentation, and submitted to each DRB member and simultaneously to the other party 30 days prior to presentation, unless both parties mutually agree otherwise.

Any rebuttals information to the position statements shall be submitted to each DRB member and simultaneously to the other party 14 days prior to presentation, unless both parties mutually agree otherwise.

D. Presentation

Unless otherwise agreed by the DRB, the Design-Build Team and the NCTA, the presentation will be conducted at the NCTA office. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory. Private deliberations of the DRB may be held at any convenient location.

The Design-Build Team and the NCTA shall have representatives in attendance at all presentations. The party which brought the dispute before the DRB will make its presentation first. A full presentation of the dispute shall be allowed without interruption, except from the DRB. Once all information is presented the other party may provide a rebuttal, at which time each party will be allowed successive rebuttals until all aspects of the dispute are fully covered. The DRB members, the Design-Build Team and the NCTA may ask questions, request clarification, or ask for additional data. In difficult or complex cases, additional presentations may be necessary in order to facilitate full consideration and understanding of all the evidence presented by both the Design-Build Team and the NCTA. Both the Design-Build Team and the NCTA shall be provided adequate opportunity to present their evidence, documentation, and statement regarding all issues before the DRB. No documents, materials, reports, analysis or other information of any type shall be referenced in the presentations or considered by the DRB in its review unless the same was previously provided to the other party as supporting documentation for the position statement.

Unless otherwise agreed by the Design-Build Team and the NCTA, presentations will relate to issues of entitlement only. Contract time extensions and compensation will be resolved between NCTA and the Design-Build Team, in accordance with the provisions of the Standard Special Provision entitled “Division One” contained elsewhere in this RFP.

Normally, a formal transcript of the presentations will not be prepared. When requested by either the Design-Build Team or the NCTA, the DRB may allow recordation and transcription with the cost to be allocated to the party requesting such documentation. Such transcript, when prepared, shall not constitute the official record of the DRB Review. The record prepared by the DRB shall be the official record of the DRB Review. The DRB may provide for audio or video recordings of the presentations for the use of the DRB only.

The Design-Build Team and the NCTA shall not have their attorneys in attendance at the presentations to counsel and/or advise them.
If either the Design-Build Team or the NCTA fails to appear before the DRB on the date scheduled for the presentations, without justifiable cause, the dispute will continue under the applicable provisions of the 2006 NCDOT Standard Specifications for Roads and Structures and this RFP to include, but not limited to, Articles 104-8, 108-10 107-25 and 109-10 of the Standard Special Provision, Division One found elsewhere in this RFP.

E. Deliberations

After the presentation is concluded, the DRB will confer to formulate its findings and recommendations. All DRB deliberations shall be conducted in private, with all individual views kept confidential.

If the DRB desires technical assistance, the DRB will make a request in writing to both parties (Design-Build Team and NCTA) briefly defining the scope and estimated budget for the services. **Direct attorney advisement or assistance is prohibited.** If mutually agreeable, the Design-Build Team and NCTA will execute an agreement with a service provider. The Design-Build Team and NCTA will equally share the costs for the service provider. In the typical situation the special services provider will respond to the DRB’s questions in private consultation between the provider and the DRB and no permanent record of the questions or responses will be required by the Design-Build Team or the NCTA. However, if mutually agreeable, these typical operating procedures may be modified. In arriving at its findings and recommendations the DRB will not be bound by any information provided by the special service provider.

F. Findings and Recommendations

The findings and recommendations of the DRB concerning any dispute are **non-binding** but admissible (see Admissibility section included in this provision).

It is **not** the responsibility of the DRB to resolve the Dispute, only to make a recommendation based upon the contract documents and information supplied and presented before them. It shall remain the responsibility of the Design-Build Team and the NCTA to resolve all Disputes.

The DRB’s findings and recommendations will be provided in writing, by certified mail, return receipt requested, to both the Design-Build Team and the NCTA within 14 calendar days of the completion of the presentations. The DRB should set forth, as clearly as possible, the logic and reasoning behind its findings and recommendations. The findings and recommendations will address entitlement only. In difficult or complex cases, and in consideration of the DRB’s schedule, this time may be extended by mutual agreement of the DRB, the Design-Build Team and the NCTA.

If the three person DRB is unable to reach unanimity in its findings and recommendations, the DRB will so advise the Design-Build Team and the NCTA in the report of the DRB. The dissenting member shall prepare a minority report to be included with the DRB report.
G. Acceptance or Rejection

Within 30 calendar days of the date of the DRB’s findings and recommendations, or such other time specified by the DRB, both the Design-Build Team and the NCTA shall provide, by certified mail return receipt requested, written notice to the other and to the DRB of acceptance or rejection of the DRB’s findings and recommendations.

If, with the aid of the DRB’s findings and recommendations, the Design-Build Team and the NCTA are able to resolve their Dispute, the NCTA will promptly process any required Contract changes.

If either the Design-Build Team or the NCTA rejects the findings and recommendations of the DRB, the Dispute will continue under the applicable provisions of the NCDOT Standard Specifications for Roads and Structures and this RFP to include, but not be limited to, Articles 104-8, 108-10 107-25 and 109-10 of the Standard Special Provision, Division One found elsewhere in this RFP.

H. Clarification and Reconsideration

Should the dispute remain unresolved because of a request for clarifications of the recommendation or new information or material becomes available which was not available at the time of the presentation, either the Design-Build Team or the NCTA may within the 7 calendar day period following the date of the DRB’s findings and recommendations, request in writing, by certified mail return receipt requested, that the DRB clarify or reconsider its findings and recommendations. This information shall be supplied simultaneously to the other party.

Should new information be made available, the other party shall have an opportunity to review such information and respond appropriately.

I. Admissibility

If the DRB’s findings and recommendations do not resolve the Dispute, the Contract, the written findings and recommendations, including any minority report, and the qualifications of the DRB members will be admissible as evidence to the extent permitted by law in any subsequent dispute resolution proceeding or forum to establish (a) that a DRB considered the Dispute, (b) the qualifications of the DRB members, and (c) the DRB’s findings and recommendations that resulted from the process.

J. Legal Relations

Each DRB member, in the performance of his or her duties on the DRB, is acting in the capacity of an independent agent and not as an employee of either the Design-Build Team or the NCTA.

Each DRB member is acting in a capacity intended to facilitate resolution of Disputes. Accordingly, the Design-Build Team and the NCTA agree that to the fullest extent permitted by law, each DRB member shall be accorded quasi-judicial immunity for any actions or decisions
associated with the review and findings and recommendations of Disputes referred to the DRB. No DRB member may be called as a witness by either the Design-Build Team or the NCTA in subsequent proceedings on the dispute. The DRB shall, upon completion of their findings, turn all records of the DRB over to the NCTA for storage and preservation.

By execution of the Three-Party Agreement, the Design-Build Team and the NCTA agree not to pursue legal proceedings against a DRB member for activities related to or consequences resulting from their participation in the DRB.

**PAYMENT**

**A. Method of Measurement**

The Design-Build Team and the NCTA shall equally bear the costs and expenses of the DRB.

The DRB members should not engage in activities related to the project, for which compensation is expected, unless requested by either the NCTA or Design-Build Team.

Time spent at formalized meetings or Reviewing the Dispute – Each DRB member will be compensated for actual time spent at the rate of $250 per hour with a maximum of $2,000 per day. This rate shall include all normal incidental expenses such as telephone, fax, postage, courier, printing, and computer services. The DRB activity must be preauthorized by both the Design-Build Team and the NCTA.

Travel Time to and from Preauthorized Meetings – Each DRB member will be compensated for actual travel time to and from DRB meetings at the rate of $50 per hour with a maximum of $200 each way.

Travel Expenses – Travel expenses will be reimbursed at standard NC state rates for transportation, lodging, and meals for each day, or portion thereof, that the DRB member is traveling to or from, or attending, an authorized DRB activity. Expense receipts are required.

The NCTA will provide, at no cost to the Design-Build Team, administrative services such as conference facilities, meeting rooms and copying services during DRB presentations.

The Three Party Agreement and the Special Provisions contain all of the provisions for compensation and expenses of the DRB. All DRB members shall be compensated at the same daily and hourly rate.

Each DRB member may submit invoices for payment for work completed and qualified expenses no more often than once per month during the progress of work. Such invoices shall be in a format approved by the NCTA, and accompanied by a general description of activities performed during that period. The value of work accomplished for payment shall be established from the billing rate and hours expended by the DRB member together with qualified expenses incurred.
The cost records and accounts pertaining to this Agreement shall be kept available for inspection by representatives of the NCTA or Design-Build Team for 5 years after final payment.

No additional compensation for services associated with the DRB, beyond that detailed above, will be provided to the DRB members.

**B. Basis of Payment**

Payment for accepted work will be made as follows:

The Design-Build Team shall pay the invoices of all DRB members after approval by both the Design-Build Team and the NCTA. The Design-Build Team shall then bill the NCTA for one-half of such invoices, which shall be processed in accordance with Article 104-7 of the Standard Special Provision, Division One, located elsewhere in this RFP.

There shall be no markups applied to expenses connected with the DRB, either by the DRB members or by the Design-Build Team. Regardless of the DRB recommendation, neither the NCTA nor the Design-Build Team shall be entitled to reimbursement of DRB costs from the other party.

If the DRB desires special technical services, both the Design-Build Team and the NCTA must agree to provide the special services, following the procedures included in the Dispute Review Board, Review of Disputes, Deliberations section, contained elsewhere in this provision. If such services are approved and rendered, payment will be made under these provisions in accordance with the Dispute Review Board, Review of Disputes, Deliberations section, contained elsewhere in this provision.

These special provisions and the Three Party Agreement contain all of the provisions for compensation and expenses of the DRB. All DRB members shall be compensated at the same daily and hourly rate.

**TRAINING REQUIREMENTS** (7-1-95)

The Design-Build Team's attention is directed to the Standard Special Provision "Training Special Provision" included elsewhere in this Request For Proposal.

The number of trainees to be trained on this project shall be thirty (30).

The training requirements for this Contract are entirely independent of the NCDOT Training Program. Trainees used in the performance of this Contract cannot be used to satisfy NCDOT training requirements. Likewise, trainees employed on NCDOT projects cannot be used to offset the training requirements of this Contract.
March 13, 2010

COUNTY: Wake

DISPUTE REVIEW BOARD AGREEMENT

This AGREEMENT, made and entered into this 15th day of March, 2010, by and among the NORTH CAROLINA TURNPIKE AUTHORITY (hereinafter called the “NCTA”), Raleigh Durham Roadbuilders (hereinafter called the “Design-Build Team”) and herein named members to serve on the Dispute Review Board (hereinafter called the “DRB”).

GENERAL RECITALS

WITNESSETH:

WHEREAS, the NCTA has executed a Contract for the construction of Project R-2635 A, B & C with the Design-Build Team for the design and construction of the Western Wake Freeway from NC 55 at SR 1172 in Apex to NC 55 near SR 1630 in Wake County (“Contract”); and

WHEREAS, the NCTA and the Design-Build Team desire the assistance of herein named DRB members in the performance of certain services (hereinafter called “SERVICES”) in conjunction with the resolution of potential Disputes; and

WHEREAS, the herein named DRB members have exhibited evidence of experience, ability, competence, and reputation to perform such SERVICES; and

NOW THEREFORE, the NCTA, the Design-Build Team and herein named DRB members, for consideration hereinafter stipulated, mutually agree as follows:

At the mutual consent of the NCTA and the Design-Build Team, the herein named DRB members agree to perform the required professional SERVICES necessary to act as the DRB for the R-2635 A, B & C, Western Wake Freeway, from NC 55 at SR 1172 in Apex to NC 55 near SR 1630 in Wake County.

I. DRB Members

1. Marion L. Caldwell, Jr.
2. Philip Bonanno (Chair)
3. John O'Rourke

II. Situation

A. The Design-Build Team and the NCTA are now engaged in the construction of the Western Wake Freeway (R-2635 A, B & C) from NC 55 at SR 1172 in Apex to NC 55 near SR 1630 in Wake County.

B. The Contract provides for the establishment and operation of a DRB to assist in resolving Disputes as defined therein.
III. Purpose of the DRB

A. The purpose of the DRB is to provide an independent and impartial analysis and review of such Disputes as are presented to the DRB by either the Design-Build Team or the NCTA and to provide non-binding, written findings and recommendations to the Design-Build Team and the NCTA, in accordance with the NCDOT Standard Specifications for Roads and Structures, based on the Contract, applicable contract law, industry practices and the facts presented. It is not the purpose, or the responsibility, of the DRB to resolve Disputes; that responsibility remains with the Design-Build Team and the NCTA. However, it is anticipated that the DRB’s review, findings and recommendations will assist in the resolution of Disputes.

IV. Scope of Work

The scope of work of the DRB includes, but is not limited to, the following:

A. Project Site Visits

The DRB shall keep abreast of construction activities and become familiar with the work in progress. The frequency, time, and duration of any site visits shall be mutually agreed upon among the DRB, the NCTA, and the Design-Build Team.

B. Establish Procedures

1. Operating procedures will be in accordance with the Dispute Review Board Special Provisions contained in the Contract, a copy of which is attached and incorporated herein by this reference, and this AGREEMENT, except as modified or altered by the mutual agreement of the Design-Build Team and the NCTA.

2. The DRB will consider the facts and conditions forming the basis for a referred Dispute impartially, and independently evaluate the merits of the Dispute based on careful consideration of all Contract requirements, applicable law and regulations, and the facts and circumstances of the Dispute.

C. Findings and Recommendations

1. Upon receipt by the DRB of a written Request for Review of a Dispute, either from the Design-Build Team or the NCTA, the DRB shall schedule a time for presentations by the Design-Build Team and the NCTA and review and consider the Dispute, and thereafter issue written findings and recommendations to the Design-Build Team and the NCTA.

2. It is expressly agreed that all DRB members are to act neutrally, impartially and independently in the consideration of facts and conditions surrounding any Dispute as provided in the Contract. Prior to the deliberation of the DRB after the presentation, no DRB member shall express any opinion concerning the merits of any facet of the Dispute.

D. Other

1. The DRB members shall become familiar with the Contract documents, review periodic reports, and maintain a current file.
2. It is the expressed continuing responsibility of each member of the DRB to notify the Design-Build Team and the NCTA, and disclose immediately any and all existing or potential conflicts of interest, and/or inappropriate contact with either the Design-Build Team or the NCTA that may exist or develop during the term of this AGREEMENT, including but not limited to the conflicts of interest and prohibitions set forth in the Contract.

3. Except for providing the SERVICES required in the AGREEMENT, the DRB and its individual members shall refrain from giving any advice to either the Design-Build Team or the NCTA concerning conduct of the work or the resolution of problems which might compromise the integrity of the DRB.

4. The DRB members will be kept informed of construction activity and other developments by means of timely transmittal of relevant information requested by the DRB and prepared by the Design-Build Team and the NCTA in the routine course of construction, including, but not limited to, periodic reports and minutes of progress meetings. At any time, the DRB may request copies of documents that are routinely generated by the Design-Build Team or the NCTA during the course of business throughout the Project. Only during the resolution of a specific dispute may the DRB request reports, documents or other information that are not routinely generated during the course of business, and this information shall be limited to that which is specific to this Dispute.

5. The DRB shall perform services not specifically listed herein to the extent necessary to achieve the purpose of this AGREEMENT as agreed upon by the Design-Build Team and the NCTA. The DRB members shall not be compensated for services performed which are not required under this Agreement or approved in advance by NCTA and the Design-Build Team.

V. Design-Build Team Responsibilities

A. Except for its participation in the DRB’s activities as provided in the Contract and in this AGREEMENT, the Design-Build Team shall not solicit advice or consultation from the DRB or its members on matters dealing with the conduct of the work or resolution of problems which might compromise the integrity of the DRB.

B. The Design-Build Team shall:

1. Furnish each DRB member with pertinent Design-Build Team-prepared documents, such as progress schedules, to supplement the documents provided by the NCTA.

2. In cooperation with the NCTA, coordinate the operation of the DRB.

VI. NCTA Responsibilities

A. Except for its participation in the DRB’s activities as provided in the Contract and in this AGREEMENT, the NCTA shall not solicit advice or consultation from the DRB or its members on matters dealing with the conduct of the work or resolution of problems which might compromise the integrity of the DRB.
B. The NCTA shall:

1. Furnish each DRB member with one copy of all Contract documents, including but not limited to the specifications, plans, addenda, minutes of progress meetings, change orders, and other documents pertinent to the performance of the Contract and necessary to the DRB’s work.

2. In cooperation with the Design-Build Team, coordinate the operations of the DRB.

3. Furnish conference facilities and provide secretarial and copying services.

VII. Time for Beginning and Completion

A. The DRB shall begin operation following execution of this AGREEMENT and shall terminate its activities as specified in Article IX below. Unless earlier terminated, the DRB will be terminated as of the end of the warranty period.

B. The DRB members shall not begin any work under the terms of this AGREEMENT until authorized in writing by the Design-Build Team and the NCTA.

VIII. Compensation and Payment

Payment to the DRB member(s) for their service hereunder shall be made in accordance with the “PAYMENT” section of the Dispute Review Board Special Provisions attached. This payment will be considered full and complete payment for the SERVICES performed. No additional payments will be made.

IX. Termination of Agreement

A. This AGREEMENT may be terminated by mutual agreement of the Design-Build Team and the NCTA at any time upon written notice to the members of the DRB.

B. A DRB member may withdraw from the DRB by providing 28 calendar days written notice to both the Design-Build Team and the NCTA. The Design-Build Team or the NCTA may request the removal of any DRB member from the DRB at any time by providing a request thereof to the other party with the rationale for its request. Removal of a DRB member shall not occur without mutual agreement of the Design-Build Team and the NCTA.

C. Should the need arise to appoint a replacement DRB member, the replacement DRB member shall be selected in a similar manner as the original DRB member being replaced. The selection of a replacement DRB member shall begin promptly upon notification of the necessity for replacement and shall be completed within 14 calendar days. This AGREEMENT will be amended to indicate changes in DRB membership.

X. Legal Relations

A. Each DRB member, in the performance of his or her duties on the DRB, is acting in the capacity of an independent agent and not as an employee of either the Design-Build Team or the NCTA.

B. Each DRB member is acting in a capacity intended to facilitate resolution of Disputes. Accordingly, the Design-Build Team and the NCTA agree that to the fullest extent permitted by
law, each DRB member shall be accorded quasi-judicial immunity for any actions or decisions associated with the review and findings and recommendations of Disputes referred to the DRB. No DRB member may be called as a witness by either the Design-Build Team or the NCTA in subsequent proceedings on the Dispute. Subject to the North Carolina Public Records Act, N.C. General Statute, Chapter 132, other than the findings and recommendations of the DRB, all records, proceedings and deliberations of the DRB are to be kept confidential to the fullest extent permitted by law. The DRB shall, after completion of the project and the end of the warranty period, turn all records of the DRB over to the NCTA for storage and retention, and shall provide one certified copy of the documents to the Design-Build Team.

C. To the extent permitted by the North Carolina Tort Claims Act, N.C. Gen. Stat. §143-291, et seq., the NCTA and The Design-Build Team, jointly and severally, shall indemnify, defend and hold harmless each DRB member from and against claims, losses, demands, costs, and damages, including but not limited to attorneys’ fees, for bodily injury, property damage, or economic loss arising out of or related to a DRB member carrying out his DRB activities. Provided, however, the foregoing indemnification shall not apply to indemnify a DRB member from and against claims, losses, demands, costs, and damages caused by the negligence of that DRB member.

D. The obligations and responsibilities of the DRB members under this Agreement shall not be assignable.

XI. Funding Agency Review

The funding agencies for this project have the right to review the DRB findings and recommendations and to attend but not present evidence or argument in DRB meetings and presentations. Funding agencies may not present evidence or argument at or attend private DRB deliberations related to Disputes. Subject to the North Carolina Public Records Act, N.C. General Statute, Chapter 132, other than the findings and recommendations of the DRB, all records, proceedings and deliberations of the DRB are to be kept confidential to the fullest extent permitted by law.

XII. Effective Date

EXECUTED by the NCTA this 15th day of March, 2010.

North Carolina Department of Transportation/ North Carolina Turnpike Authority

By: ____________________________

Steven D. DeWitt, PE, Chief Engineer

Approved as to form: ____________________________

5
Title:  

Raleigh Durham Roadbuilders  

(Address as prequalified)

Attest:  

Secretary or Assistant Secretary  
(Delete inappropriate title)

Saud C. Walsh  
(Print or Type Signer's Name)

By:  

President or Vice President  
(Delete inappropriate title)

David B. Casey  
(Print or Type Signer's Name)

Affix Corporate Seal

EXECUTED by DRB Members as follows:

DRB Members  

By:  

Date 3/15/10

Philip Bonanno (Chair)

By:  

Date 3/15/10

Marion L. Caldwell, Jr.

By:  

Date 3/15/10

John O'Rourke

6
SECTION 105

CONTROL OF WORK

105.01 Authority of the Engineer.  The Engineer will decide all questions which may arise as to the quality and acceptability of materials furnished and work performed and as to the rate of progress of the work; all questions which may arise as to the interpretation of the plans and specifications; all questions as to the acceptable fulfillment of the contract on the part of the Contractor.

The Engineer will have the authority to suspend the work wholly or in part due to: the failure to correct conditions unsafe for the workmen or the general public; the failure to carry out the provisions of the contract; for failure to carry out orders; unsuitable weather; unsuitable conditions for the prosecution of the work; or any other condition or reason deemed to be in the public interest.

The Engineer has executive authority to enforce orders and his decision will be final. In the event of failing to execute work ordered within a reasonable period of time, the Engineer may, after giving notice in writing, proceed to have such work performed as deemed necessary and the cost thereof will be deducted from compensation due or which may become due.

Decisions of the Engineer shall be subject to appeal to the Contract Claims Review Board, whose decisions shall be final and conclusive. Make such appeal in writing and within 10 days of the Engineer’s decision, but in the meantime diligently proceed with the work.

105.02 Plans and Working Drawings.  Plans will show location and general details of structures, lines, grades, typical cross sections of the roadway, and a summary of items appearing on the proposal. Keep one set of plans available on the work at all times.

Supplement plans with working drawings (shop drawings) as necessary to adequately control the work. Furnish working drawings for structures including, but not limited to; demolition and removal plans, shoring and cofferdam plans, falsework plans, shop fabrication details, erection procedures, prestressing details and other required information specified herein. Unless otherwise specified, submit 6 sets of working drawings for review and approval a minimum of 30 days before start of related work. Submit the working drawings a minimum of 90 days before start of related work which is within Railroad right of way. Additional contract time will not be given for working drawings requiring changes and re-submittal. Approval of working drawings shall not operate to relieve the responsibility under the contract for the successful completion of the work. It is mutually agreed that the Contractor shall be responsible for agreement of dimensions and details as well as for conformity of his working drawings with the approved plans and specifications.

For English unit contracts, furnish working drawings in English units or both English and metric units. For metric unit contracts, furnish working drawings in metric units or both metric and English units. For working drawings which require Railroad approval, furnish the working drawings in English units only.

The contract price will include the cost of furnishing all working drawings.

105.03 Conformity With Plans and Specifications.  Perform work and furnish materials in reasonably close conformity with the lines, grades, cross sections, dimensions and materials requirements, including tolerances, shown on the plans or indicated in the specifications.

If the materials or the finished product in which the materials are used are found not within
reasonably close conformity with the plans and specifications but that reasonably acceptable work has been produced, then a determination will be made if the work will be accepted and may remain in place. In this event, the basis of acceptance will be documented by contract modification which will provide for an appropriate adjustment in the contract price for such work or materials as deemed necessary to conform to the determination based on engineering judgment.

If the materials or the finished product in which the materials are used or the work performed are found not in reasonably close conformity with the plans and specifications and have resulted in an inferior or unsatisfactory product, remove and replace or otherwise correct the work or materials.

105.04 Coordination of Plans, Specifications, Supplemental Specifications and Special Provisions. The specifications, supplemental specifications, plans, special provisions and all supplementary documents are essential parts of the contract, and a requirement occurring in one is as binding as though occurring in all. They are intended to be complementary and to describe and provide for a complete work. In case of discrepancy, calculated dimensions will govern over scale dimensions; plans will govern over specifications; supplemental specifications will govern over specifications; special provisions will govern over both specifications and plans.

Take no advantage of any apparent error or omission in the plans or specifications. In the event of the discovery of such an error or omission, immediately give notification. Such corrections and interpretations will then be made as may be deemed necessary for fulfilling the intent of the plans and specifications.

105.05 Partnering. For the benefit of both the Contractor and the Department, the formation of a “Partnering” relationship will be established in order to effectively complete the contract. The purpose of this relationship is to maintain cooperative communication and mutually resolve conflicts at the lowest responsible management level.

The Department strives to work cooperatively with all contractors and partnering is our way of doing business. The Department encourages partnering utilizing a partnering team. The partnering team consists of significant contributors from the Contractor, Department, and invited stakeholders.

For contracts with a total bid up to $10 million, professionally facilitated partnering is encouraged. For a contract with a total bid greater than $10 million, professionally facilitated partnering is required.

The establishment of the Partnering relationship will not change or modify the terms and conditions of the contract.

A written invitation to enter into a partnering relationship will be sent after contract award. Respond within 15 days to accept the invitation and request the initial and additional partnering workshops. After the Engineer receives the request, the Contractor and the Engineer shall cooperatively select a partnering facilitator that offers the service of a monthly partnering evaluation survey, schedule the initial partnering workshop, select the initial workshop site and duration, and agree to other workshop administrative details.

Additional quarterly partnering workshops will be required throughout the life of the contract.
When requested by either party, a partnering trainer will conduct a 1-day training session in partnering skills development for Contractor and Department representatives before the initial partnering workshop.

The Contractor and the Engineer will cooperatively schedule the training session, obtain a professional trainer, and select a training site.

This training session shall be a separate session from the initial partnering workshop and shall be conducted locally.

In implementing partnering, the Contractor and the Engineer shall manage the contract by:

1. Using early and regular communication with involved parties.

2. Establishing and maintaining a relationship of shared trust, equity, and commitment.

3. Identifying, quantifying, and supporting attainment of mutual goals.


5. Implementing timely communication and decision making.

6. Resolving potential problems at the lowest possible level to avoid negative impacts.

7. Holding periodic partnering meetings and workshops as appropriate to maintain partnering relationships and benefits throughout the life of the contract.

8. Establishing periodic joint evaluations of the partnering process and attainment of mutual goals.

The partnering team shall create a team charter that includes mutual goals (core project goals which may also include project specific goals and mutually supported individual goals), a partnering maintenance and closeout plan, dispute resolution plan with a dispute resolution ladder, and team commitment statement and signatures.

The partnering team shall participate in monthly partnering evaluation surveys to measure progress on mutual goals and short-term key issues as they arise, hold a contract closeout partnering session, and document lessons learned before contract acceptance.

The Department encourages the partnering team to exhaust the use of partnering in dispute resolution and the use of the escalation ladder for dispute resolution. Whenever a dispute cannot be resolved by the use of the partnering process, the provisions of Subsection 105.18 will remain in effect except the notification required under Subsection 104.02 will be satisfied by the completion of the "Conflict Resolution Form."

The costs for providing the Partnering Facilitator, Partnering Trainer, and Workshop Sites will be borne by the Department. The Contractor shall pay all initial costs incurred. The Department will reimburse the Contractor all of the costs as evidenced by copies of invoices from the Facilitator, Trainer, and Workshop Site provider. Markup or profit added to invoices will not be allowed. All other costs associated with Partnering shall be borne separately by the party incurring the cost.
105.065 **Cooperation by Contractor.** A minimum of 4 sets of approved plans and contract assemblies including special provisions will be supplied. Additional copies of plans and special provisions may be obtained upon written request to the Department, for which payment may be required.

Give the work constant attention necessary to facilitate the progress thereof, and cooperate with the Engineer, his inspectors and other contractors in every way possible.

Have on the work at all times, as your agent, a competent superintendent capable of reading and thoroughly understanding the plans and specifications and thoroughly experienced in the type of work being performed, who shall receive instructions from the Engineer. Designate such superintendent in writing before starting work. The superintendent shall have full authority to execute orders or directions of the Engineer without delay, and to promptly supply such materials, equipment, tools, labor and incidentals as may be required. Furnish such superintendence irrespective of the amount of work sublet.

Whenever the Contractor or his authorized representative is not present on any particular part of the work where it may be desired to give direction, orders will be given by the Engineer to the Contractor’s superintendent, foreman, or other person in charge of the operation, who is present, and these orders shall have the same force and effect as if given to the Contractor or his designated representative.

Any order given by the Engineer, not otherwise required by the specifications to be in writing, will on request be given or confirmed in writing.

105.076 **Cooperation with Utilities.** The Department will notify all utility companies, all pipeline owners, or other parties affected, and endeavor to have all necessary adjustments of the public or private utility fixtures, pipelines, and other appurtenances within the limits of construction, made as soon as practicable.

Water lines, gas lines, wire lines, service connections, water and gas meter boxes, water and gas valve boxes, light standards, cable ways, signals and all other utility appurtenances within the limits of the proposed construction which are to be relocated or adjusted are to be moved by the owners at their expense, except as otherwise provided for in the Special Provisions or as noted on the plans.

Possible underground facilities may exist that are not known to the State or in a location different from that which are shown on the plans or in the Special Provisions. Take steps to ascertain the exact location of all underground facilities before doing work that may damage such facilities or interfere with their service. Locating of underground facilities is the sole responsibility of the Contractor. No reliance may be placed upon the location of underground facilities as noted on the plans.

Where it is determined by the Engineer that the rearrangement of an underground facility, the existence of which is not shown on the plans or in the Special Provisions, is essential in order to accommodate the highway improvement, the rearrangement of such facility will be provided for by other forces or by the Contractor as extra work as provided in Subsection 104.03.

Any delays to the Contractor’s operations as a direct result of utility or other nonhighway facilities not being rearranged as herein provided (other than delays in connection with rearrangements made to facilitate construction operations) will be considered right of way delays within the meaning of Subsection 108.12.

Compensation for such delay will be determined according to Subsection 108.12, and no further compensation will be allowed therefore. See Subsection 107.17.
105.087 Cooperation Between Contractors. The Department reserves the right at any time to contract for and perform other or additional work on or near the work covered by the contract.

When separate contracts are let within the limits of any one project, each Contractor shall conduct his work so as not to interfere with or hinder the progress or completion of the work being performed by other Contractors. Contractors working on the same project shall cooperate with each other as directed. Join work with that of the others in an acceptable manner and perform it in proper sequence to that of the others. In the event of concurrent work, coordinate operations with the other Contractors in such a manner that all requirements, restrictions and stipulations specified in the specifications are met.

Each Contractor involved shall assume all liability, financial or otherwise, in connection with his contract and shall protect, indemnify, defend and hold harmless the Department from any and all damages or claims that may arise because of inconvenience, delay or loss experienced by him because of the presence and operations of other Contractors working within the limits of the same project.

105.098 Construction Stakes, Lines and Grades. Construction stakes establishing lines, slopes, and continuous profile-grade in road work, and centerline and bench marks for bridge work, culvert work, protective and accessory structures and appurtenances will be set as deemed necessary, and all necessary information relating to lines, slopes, and grades will be furnished. These stakes and marks shall constitute the field control by and in under which the Contractor shall establish other necessary controls and perform the work.

Preserve construction stakes and marks. If any of the construction stakes or marks have been carelessly or willfully destroyed or disturbed by the Contractor, the cost of replacing them will be charged against him and will be deducted from the payment for the work.

The Department will be responsible for the accuracy of line, slopes, grades, and other engineering work which is set forth under this Section.

After initial slope staking of horizontal and vertical controls, give 72 hours written notice for any additional required controls. Saturdays, Sundays, and holidays will not be counted as part of the 72 hours.

105.100 Authority and Duties of the Resident Engineer. As the direct representative of the Director of the Department of Transportation, the resident engineer has immediate charge of the engineering details of each construction project. He is responsible for the administration and satisfactory completion of the project. The resident engineer shall have the authority to reject defective materials and to suspend any work that is being improperly performed.

105.110 Duties of the Inspector. Inspectors employed by the Department will be authorized to inspect all work done and all materials furnished. Such inspection may extend to all or any part of the work and to the preparation, fabrication or manufacture of the materials to be used. The inspector will not be authorized to alter or waive the provisions of the contract. The inspector will not be authorized to issue instructions contrary to the plans and specifications, or to act as foreman for the Contractor; however, he shall have the authority to reject work or materials until any questions at issue can be referred to and decided by the Engineer.

105.121 Inspection. All materials and each part or detail of the work shall be subject to inspection by the Engineer. Provide the Engineer acceptable access to all parts of the work and furnish him with such information and assistance as required to make a complete and detailed inspection.
If requested, at any time before final acceptance of the work, remove or uncover such portions of the finished work as may be directed. After examination, restore said portions of the work to the standard required by the specifications. Should the work thus exposed or examined prove acceptable, the uncovering, or removing and the replacing of the covering, or making good of the parts removed will be paid for as extra work according to Subsection 104.03; but should the work so exposed or examined prove unacceptable, the uncovering, or removing and replacing of the covering, or making good of the parts removed will not be paid for.

Any work done or materials used without inspection by the Engineer may be ordered removed and replaced at own expense, unless the Engineer failed to inspect after having been given reasonable notice in writing that the work was to be performed.

When facilities of any unit of government, political subdivision, railroad corporation, or public utility corporation are adjusted or constructed as a part of the work covered by this contract, its respective representatives shall have the right to inspect the work. Such inspection shall in no sense make any unit of government, political subdivision, railroad corporation, or public utility corporation a party to this contract, and shall in no way interfere with the rights of either party thereunder.

105.132 Removal of Unacceptable and Unauthorized Work. Work which does not conform to the requirements of the contract will be considered as unacceptable work, unless otherwise determined acceptable under the provisions in Subsection 105.03.

Immediately remove and replace unacceptable work, whether the result of poor workmanship, use of defective materials, damage through carelessness, or any other cause, found to exist before the final acceptance of the work in an acceptable manner.

Work done contrary to the instructions of the Engineer, work done beyond the lines shown on the plans, or as given, except as herein specified, or any extra work done without authority, will be considered as unauthorized and will not be paid for under the provisions of the contract. Work so done may be ordered removed or replaced at own expense.

Upon failure to comply forthwith with any order of the Engineer, made under the provisions of this Subsection, the Engineer will have authority to cause unacceptable work to be remedied or removed and unauthorized work to be removed and to withhold the costs from any money due or to become due.

105.143 Load and Speed Restrictions. Do not damage the work when hauling.

When hauling material for incorporation in portions of highways under construction or reconstruction, hereinafter called the project, do not haul loads which are in excess of the limits set by the Department on any new or existing bridge or new and existing bituminous base and surface, cement treated base, or Portland cement concrete paving which is to remain in place for vehicular traffic within the project or between the project and the material deposits or other sources of materials. Comply with load limits established by the Department for the project regardless of the source of materials, whether from designated or non-designated deposits or approved commercial sources. Unless otherwise permitted in writing, do not exceed the maximum loads limits set forth in NRS Chapter 484.

The Engineer may, for the protection of the traveling public, establish speed limits on or adjacent to the project. Strictly observe such limitations of speed.
Reduce truck loads in excess of 450 kg (1,000 lb) of the maximum gross mass to the legal mass immediately after weighing and before hauling to the placement site. For failure to reduce the load and subsequent hauling of it to the placement site, a 50% reduction in the contract unit price bid for that load will be made, not as a penalty, but as liquidated damages.

Gross construction vehicle weight in excess of legally permitted highway loads will not be allowed on any portion of the cement treated base, roadbed modified base, Portland cement concrete pavement, cold milled bituminous surface or any new or existing base or surface which may become damaged.

105.154 Maintenance During Construction. Maintain the contract work during construction and until the project is accepted, except as provided for in Subsections 104.04 and 107.15. This maintenance shall constitute continuous and effective work prosecuted day by day, with adequate equipment and forces so that the roadway and structures are at all times kept in a satisfactory condition. Take maintenance responsibility for any work performed or to be performed under the contract. Correct or repair all damage attributable to Contractor's operations.

In the case of a contract for the placing of a course upon a course or subgrade previously constructed, maintain the previous course or subgrade during all construction operations.

Except as provided for in Subsections 404.04 and 107.15, include all costs of maintenance work during construction and before the project is accepted in the unit prices bid on the various pay items and an additional payment will not be made for such work.

105.15 Failure to Maintain Roadway or Structure. Immediate notification will be given in writing for failure to comply with the provisions of Subsection 105.14. If failing to remedy unsatisfactory maintenance within 24 hours after receipt of such notice, the Engineer may immediately proceed to maintain the project, and the entire cost of this maintenance will be deducted from money due or to become due.

105.16 Final Inspection and Acceptance. Upon due notice or presumptive completion of the entire project, inspection will be made and if all construction and final cleanup provided for and contemplated by the contract is found satisfactorily completed, that inspection shall constitute the final inspection. See Subsection 104.06.

If, however, the inspection discloses any work, in whole or in part, as being unsatisfactory, necessary instructions will be given for correction of same, and immediately comply with and execute such instructions.

Upon correction of the work another inspection will be made which shall constitute the final inspection provided the work has been satisfactorily completed. In such event notification will be given in writing and the Department will assume maintenance responsibilities for the project as of the date of final inspection.

After final inspection has been established as provided above, the publication of a notice of the date of final acceptance of the contract will be made.

For contracts in Clark County, final acceptance will not be made until a copy of the final inspection and release from the Clark County Department of Air Quality Management has been provided, as specified in Section 637.
105.17 **Claims Requests for Equitable Compensation and Adjustments and Disputes.**

If, believing that additional compensation is due for work or material not clearly covered in the contract or not ordered as extra work as defined herein, give notification in writing of intention to request make claim for such additional compensation before beginning the work on which basing the request claim. If such written notification is not given, and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost as required, then the Contractor shall be deemed to waive any rights claim for such additional compensation. Such notice and the accounting of the cost as aforesaid, shall not be construed as proving or substantiating the validity of the request claim. If the request claim is found to be just, it will be paid pursuant to Subsection 104.03 Extra Work as provided herein for force account work. Nothing in this Subsection shall be construed as establishing any claim contrary to the terms of Subsection 104.02.

Subcontractor requests claims will not be considered except as submitted and certified by the Contractor as the Contractor’s request claim.

For all requests claims originating with a Subcontractor, thoroughly evaluate the request claim and either admit or deny its validity in a statement sworn to under oath. If denying the request claim, do not present the request claim to the Department. If the Subcontractor sues the Contractor for payment, the Contractor shall not sue the Department for indemnity, contribution, or under any other theory for participation in the payment of the Subcontractor’s request claim. The Contractor specifically acknowledges that Subcontractor requests claims are the contractor’s responsibility, and that they are contractually obligated not to involve the Department in such request claims as they believe are not valid.

For all requests claims, certify in writing that the request claim is made in good faith, that the supporting data are accurate and complete to the best of knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the Department is believed liable.

By signing the Contract, the contractor agrees to waive all rights to any requests for additional compensation not submitted within one year of the date of the Director’s acceptance.

105.18 **Disputes Review Team.** A Disputes Review Team (DRT) will be established to assist in the resolution of disputes, claims, and other controversies arising out of the work of this contract.

The DRT will assist in, and facilitate, the timely and equitable resolution of disputes between the Engineer and the Contractor in an effort to avoid construction delay and litigation.

The intent is that the DRT be utilized only after the partnering dispute resolution process has been exhausted. It is intended that the DRT encourage the Engineer and Contractor to resolve potential disputes without resorting to the hearing of disputes by the DRT. It is not intended for the Engineer or the Contractor to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately assigning them to the DRT.

Either the Engineer or the Contractor may request a dispute be heard by the DRT. Such a request may be made as soon as it appears that the partnering dispute resolution process is not succeeding. The DRT shall fairly and impartially consider disputes referred to it, and shall provide written recommendations to the Engineer and the Contractor, to assist in the resolution of these disputes.
Although the recommendations of the DRT should carry great weight for both the Engineer and the Contractor, they are not binding on either Party.

If the DRT recommendation does not resolve the dispute, the written recommendation, including any minority report, will be admissible as evidence, to the extent permitted by law, in any subsequent proceeding or forum to establish: (a) that a DRT considered the Dispute; (b) the qualifications of the DRT members; and (c) the DRT recommendation that resulted from the process.

At all times during the course of the dispute resolution, the Contractor shall continue with the work as directed, in a diligent manner and without delay, or shall conform to the Engineer’s decision or order, and shall be governed by all applicable provisions of the contract. Records of the work shall be kept in sufficient detail to enable payment in accordance with applicable provisions in the contract.

The DRT will consist of one member selected by the Engineer and approved by the Contractor, one member selected by the Contractor and approved by the Engineer, and a third member selected by the first two members and approved by both the Engineer and the Contractor. Normally, the third member will act as Chairman for all DRT activities.

DRT members may be proposed from a variety of sources including, but not limited to, industry experts, engineering experts, The American Arbitration Association, The Dispute Resolution Board Foundation and the NDOT Contract Claims Review Board.

The purpose of the DRT is to provide knowledgeable expertise to assist in avoiding and resolving construction conflicts. Toward that purpose, each of the first two members should be acknowledged and experienced experts in the means, methods, and practices of Engineering and construction in the type of construction involved in the project. The goal in selecting the third member is to act as chairman of the DRT and provide leadership for the DRT's activities.

The DRT members shall show no partiality to either the Contractor or the Engineer; or have any conflict of interest. Before their appointments are final, the first two prospective members shall submit complete disclosure statements for the approval of both the Engineer and the Contractor. Each statement shall include a resume of experience together with a declaration describing all past, present, and anticipated or planned future relationships to the contract and with all Parties involved in the construction contract. Disclosure of recent, close, professional, or personal relationships with all key members of all Parties to the contract shall be included. The third DRT member shall supply such a statement to the first two DRT members and to the Engineer and Contractor before his/her appointment is final. The Engineer and the Contractor shall each have the opportunity to interview any prospective DRT member before their appointment is final.

If a DRT is established as provided for herein, the Engineer, Contractor, and all three members of the DRT shall execute the Disputes Review Teams Controlling Document (DRT Controlling Document) within six weeks after the selection of the third member. Contact the Department’s Construction Division for a copy of the DRT Controlling Document.

The DRT shall operate in accordance with the DRT Controlling Document.

Disputes shall be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. Steps in the procedure for
dispute resolution may be omitted as agreed to by both parties in writing, and the time periods stated in the DRT Controlling Document may be shortened to hasten resolution.

"Allowable DRT Costs" are the actual invoice costs for the Team, including the DRT members' expenses, and facilities cost, for DRT meetings. Contractor’s labor, overhead, and profit are not Allowable DRT Costs. The Engineer and the Contractor shall share equally the Allowable DRT Costs associated with the DRT, including, but not limited to, costs and expenses of the hearing and DRT members’ time billed for considering a dispute. These costs will be the actual invoiced cost and include no markup.

The Contractor shall pay all fees and expenses associated with the DRT and may bill and thereafter be reimbursed for one half the costs by the Department for all Allowable DRT Costs which the Engineer is responsible for as determined above.

Payment for members’ services shall be as provided in the DRT Controlling Document. The Engineer will provide administrative services associated with assembly of and communication with the DRT, and will solely bear the costs of these Engineer services.

105.1918 Value Engineering Proposals. Value Engineering Proposals (VEP) may be submitted in writing for modifying the plans, specifications or other requirements of the contract for the purpose of reducing the total cost of construction without reducing design capacity or quality of the finished product. The proposal must be submitted as such to allow timely review by the Department before commencing work. If accepted, net savings resulting from a VEP will be shared by the Department and the Contractor on a 50-50 basis.

The requirements herein apply to all VEPs initiated and developed by the Contractor and which are identified as such at the time of submission. Nothing herein shall be construed as requiring consideration or approval of a VEP submitted hereunder.

Each VEP shall result in a net savings over the contract costs without impairing essential functions and characteristics of the item(s) or of any other part of the project, including but not limited to environmental considerations, service life, reliability, economy of operation, ease of maintenance, desired aesthetics and safety.

Submit the following information with each VEP:

(a) A statement that the proposal is submitted as a VEP;

(b) A statement concerning the basis for the VEP and benefits to the Department together with an itemization of the contract requirements affected by the VEP;

(c) A detailed estimate of the cost under the existing contract and under the VEP;

(d) Proposed specifications and recommendations as to how such VEP changes are to be accomplished; and

(e) A statement as to the time by which a contract change order adopting the VEP must be issued so as to obtain the maximum cost effectiveness.

The VEP will be processed in the same manner as prescribed for any other proposal which would necessitate issuance of a contract change order. The Department may accept in whole or in part any VEP
by issuing a contract change order which will identify the VEP on which it is based. The Department will not be liable for failure to accept or act upon any VEP submitted pursuant to these requirements nor for any delays to the work attributable to any such proposal. Until a proposal is effected by contract change order, remain obligated to perform under the terms and conditions of the existing contract. If an executed contract change order has not been issued by the date upon which the proposal specifies that a decision thereon should be made, or such other date as the Contractor may have subsequently specified in writing, such proposal shall be deemed rejected.

The contract change order effecting the necessary contract modification will establish the net savings agreed upon, will provide for adjustment in the contract prices and will indicate the new savings to be equally divided between the Contractor and the Department. Absorb all costs incurred in preparing a VEP for submission. All reasonably incurred costs of reviewing and administering the VEP will be borne by the Department. The Department reserves the right to include in the agreement any conditions it deems appropriate for consideration, approval, and implementation of the proposal. The Contractor’s 50% share of the net savings shall constitute full compensation to him for effecting all changes pursuant to the agreement.

Acceptance of the VEP and performance of the work thereunder will not change the contract time limit as a result of the VEP, unless specifically provided for in the contract change order authorizing the VEP.

The Department expressly reserves the right to adopt a VEP for general use in contracts administered by the Department when it determines that said proposal is suitable for application to other contracts. VEPs identical or similar to previously submitted proposals will be eligible for consideration and compensation under these provisions if such proposals were not previously adopted for general application to other contracts administered by the Department. When a VEP is adopted for general use, compensation pursuant to these requirements will be applied only to those contracts awarded and for which the subject VEP has been submitted before the date of adoption of the specific VEP.

Proposed changes in the basic design of a bridge or pavement type, traffic control plan, or changes which require different right of way limits, will not normally be considered as an acceptable VEP.

The elimination or changes to the required marination of plantmix bituminous aggregates will not be considered as an acceptable VEP.

The Engineer shall be the sole judge of the acceptability of a VEP.

Subject to the provisions contained herein, the Department or any other public agency shall have the right to use all or part of any accepted VEP without obligation or compensation of any kind to the Contractor.

In the event a VEP is accepted by the Department, the provisions of Subsection 104.02 which pertain to adjustment of contract unit prices due to alterations of contract quantities will not apply to items adjusted or deleted as a result of effecting the VEP by contract change order.
CLAIMS PROCEDURE

1. **Scope of Procedure**
   
   The following claims procedure covers all claims for additional time or compensation arising under this contract. The claims procedure is non-binding and is a condition precedent to litigation or any other form of dispute resolution. All communications testimony and all documents prepared for this procedure by either party from the time of filing the claims request to the conclusion of the procedure shall be deemed to be settlement negotiations and not admissible in litigation or any other dispute resolution procedure. The parties shall execute a written agreement to this effect prior to the submission of testimony or other evidence before the Dispute Review Board.

2. **Continuation of Work**
   
   At all times during the pendency of a claim under this procedure, the contractor shall continue work pursuant to the contract and as directed by the engineer as provided by the contract. If the contractor fails to continue work, it may be declared delinquent in its work as provided by §108.08 of the South Carolina Standard Specifications for Highway Construction (“Standard Specifications”).

3. **Submission of Claim**
   
   The notice of claim and claim shall be submitted in accordance with §105.16 of the Standard Specifications. The notice of claim does not trigger this claims procedure. The claims procedure is initiated when the contractor submits a written fully detailed claim to the resident construction engineer (“RCE”). The claim shall contain, at a minimum, the information required by §105.16F of the Standard Specifications. The RCE shall immediately forward a copy of the claim to the District Engineering Administrator (“DEA”) for resolution. If the DEA is unable to resolve the claim within thirty (30) days of receipt, the DEA shall forward it immediately to the Director of Construction (“DC”), together with documents supporting the Department's position. The DEA shall also submit the supporting documents to the contractor at this time. The DC shall investigate the claim and attempt to resolve it by mutual agreement with the contractor. If it cannot be resolved, then the DC shall make a decision and forward it to the contractor, no later than thirty (30) days after receipt by the DC. The contractor shall notify the DC within five (5) days of receipt of the DC's decision whether the contractor accepts or rejects the decision.

   For all claims under Fifty Thousand Dollars ($50,000.00) the DC's decision shall be final and shall conclude the claims procedure. For the purpose of determining if a time only claim may be submitted to the Board, the value of a time only claim shall be deemed to be the number of days requested multiplied by the contract daily rate for liquidated damages. The contractor does not have a right to submit claims under $50,000.00 to the Dispute Review Board. If the contractor does not accept the DC's decision on its claim of less than $50,000.00, then its remedy is litigation or other mutually agreeable dispute resolution procedures.

   For all claims in excess of $50,000.00, if the contractor rejects the DC's decision or fails to respond to the decision, the DC shall forward the claim to the Dispute Review Board.

4. **Dispute Review Board**
   
   On designated contracts an Ad Hoc Dispute Review Board will be established to hear claims on that contract. On other contracts, claims will be heard by a Standing Dispute Review Board. All Board Members shall be neutral and unbiased. No party shall have any ex parte communication with any Board Member.

   a. **Ad Hoc Dispute Review Board**
      
      On designated contracts a Dispute Review Board shall be established within sixty (60) days after the Preconstruction Conference. The Ad Hoc Dispute Review board shall consist of one member selected by the Department, one member selected by the contractor, and a third member selected by the first two members. The third member shall be the chairperson of the Ad Hoc Dispute Review Board. The selection of qualified Ad Hoc Dispute Review Board members shall be made in accordance with the Dispute Review Board rules and procedures. (See Section 6).

   b. **Standing Dispute Review Board**
A Standing Dispute Review Board shall be established upon implementation of this claims procedure. The Standing Dispute Review Board shall consist of one member selected by the Department, one member selected by the Director of Heavy and Highway Division of the Associated General Contractors (Carolina’s Branch), and a third member selected by the first two members. The third member shall be the chairperson of the Standing Dispute Review Board. The selection of qualified Standing Dispute Review Board members shall be made in accordance with the Dispute Review Board rules and procedures. (See Section 6). Each member shall serve a three (3) year term and the terms shall be staggered. The terms for the initial Board members shall be as follows:

- Department Member - 1 year
- AGC member - 2 years
- Third member - (Chairperson) 3 years

The term for the initial members begins January 1997. Each member is limited to two (2) terms. The initial abbreviated terms of the Department and AGC members do not count as a term.

5. **Hearing Procedure**

When the DC forwards the claim to the Dispute Review Board, the DC shall provide three (3) copies of the claim and three (3) copies of all documents submitted by the contractor and the DEA. The DC shall notify both parties that the claim has been submitted to the Board.

Within fifteen (15) days of notice of submission of the claim to the Board, the contractor may submit to the DC four (4) copies of any additional documentation supporting its claim. The DC shall immediately forward three (3) copies to the Board and one (1) copy to the DEA.

Within fifteen (15) days of receipt of the contractor’s supplemental documentation, the DEA may submit to the DC four (4) copies of its additional documentation. The DC shall immediately submit three (3) copies to the Dispute Review Board and one (1) copy to the contractor. Upon submission of supplemental documentation, the party shall notify the Board whether it requests a hearing.

The Dispute Review Board shall review all documents and notify the parties of what additional documents, if any, it requires. The Dispute Review Board shall schedule a hearing at either party’s request or may schedule a hearing at its own discretion. However, if a hearing is requested, it must be held no later than sixty (60) days after the DC submits the claim to the Dispute Review Board. The location of the hearings shall be determined by the Board. While extensions of these deadlines are discouraged, the Dispute Review Board shall have authority to extend any of the above deadlines for just cause.

The Dispute Review Board shall have full authority to establish guidelines and procedures for the investigation of a claim. The entire process is intended to be flexible and the Board is encouraged to adapt the process to individual circumstances presented by particular disputes.

In the interest of timely resolution of all claims, the Board shall conduct all hearings and issue its final decision within ninety (90) days of receipt of the claim.

The Dispute Review Board Chairperson shall direct all meetings and hearings. Presentation of evidence shall be in accordance with the Dispute Review Board’s rules and shall not be bound by judicial rules of evidence. Documents and testimony shall be presented in the order, manner and degree of detail that the Dispute Review Board deems most efficient and probative. Each party shall be allowed to make a brief initial presentation and to rebut any factual assertion by another party; however, the Dispute Review Board shall determine when enough evidence has been presented and it may limit the presentation of any documentation or testimony that it deems not relevant or redundant. At the Board’s option, testimony may be required to be given under oath and the oath shall be administered by the Chairperson.
Legal counsel for either party may be present at meetings or hearings as observers only. If a party intends to have its counsel present at a hearing, it must provide at least ten (10) days notice prior to the meeting or hearing. Legal counsel may not speak on behalf of a party, unless requested by the Board. Counsel may not examine or cross-examine witnesses, object to questions or statements during meetings or make legal motions or arguments during meetings or hearings. The Board, by majority vote, may suspend legal counsel's privilege to attend meetings or hearings.

The Dispute Review Board shall issue to the contractor and the State Highway Engineer a written recommendation with an explanation of the results as soon as reasonably possible following the conclusion of the hearing. However, in no event shall the Board take more than ninety (90) days from receipt of claim to conduct hearings and issue a recommendation. The Board is encouraged to reach a unanimous decision; however, it may provide a majority recommendation. The minority Board Member may provide a written explanation of his position. The Board shall provide further explanation of its decision if requested by either party within ten (10) days of the receipt of the decision. Issuance of the Board's recommendation concludes the claims procedure.

The parties may settle at any time during the procedure. If the dispute is resolved prior to issuance of a recommendation, the DC shall immediately notify the Board.

6. Dispute Review Board Rules and Procedures

7. Qualifications of Dispute Review Board Members

(1) All Dispute Review Board Members shall have substantial experience in highway or bridge design and construction. This experience may be technical, administrative or legal. The goal is to have a Board with the technical and administrative skills and experience that will promote confidence in its decisions.

(2) No Dispute Review Board Member shall be employed currently or within the last three (3) years with the Department, any contractor (currently or in the past pre-qualified with the Department), or any design consultant that has worked for the Department within the last three (3) years.

(3) No Dispute Review Board Member shall have any financial or ownership interest in any party to the contract nor any design consultant or major subcontractor.

b. Selection of Dispute Review Board Members

(1) Ad Hoc Dispute Review Board

Within twenty (20) days after the Preconstruction Conference, the contractor and Department shall each submit a list of three (3) proposed Dispute Review Board Members to each other.

The contractor shall send its list to the DC. The Department shall send its list to the contractor's designated representative. Within ten (10) days after receipt of the list, the contractor shall select one member from the Department's list and the Department shall select one member from the contractor's list and notify the other party of their selection. The DC shall notify the two selected members that they must select a third member within twenty (20) days. The DC shall also provide a copy of the claims procedure to the two (2) selected members. Within twenty (20) days of the selection of the first two members, the first two members shall select the third member and the third member shall be the chairperson of the Dispute Review Board. The third member does not have to come from the lists provided by the parties.
If the first two members are not able to agree on a third member within twenty (20) days of their selection, then the third member shall be selected by the American Arbitration Association, within ten (10) days after it is determined that the first two members cannot agree on a third member. Upon selection of the third member, the DC shall provide a copy of the claims procedure to the third member.

(2) Standing Dispute Review Board

The selection process for Standing Dispute Review Board Members shall begin at the appropriate time in order to allow completion of the Member selection by beginning of the term. The selection process shall be as provided in Section 4(b); otherwise it shall be the same as for the Ad Hoc Board.

c. Replacement of Board Members

Each party may elect to replace its Board Member at any time with a showing of reasonable justification. The Chairperson of the Board may be replaced at any time with the consent of both parties. If any Board Member is replaced, the new member shall be selected in the same manner in which the original appointment had been made.

If disputes are pending at the end of a member's term, the existing Board shall complete its hearing on the disputes and issue a decision.

d. Costs

Board Members shall be paid a reasonable hourly rate or salary for their services. Each party shall negotiate the fee arrangements with the Member it selects, however, the other party must agree on the rate. Both parties shall agree on the fee arrangement for the Chairperson.

Board Members shall be reimbursed for out-of-pocket expenses including, but not limited to, travel, copying, telephone, clerical services, and mailings. The Board Members shall be allowed $55.00 per diem for meals and actual lodging costs provided they stay in hotels approved by the Department and they obtain a government rate. Board Members must provide documentation for all expenses.

The parties shall share all Board Members' fees and expenses equally. The total fees and expenses to hear each claim shall not exceed the following maximum amounts (one claim shall constitute all issues submitted to the Dispute Review Board at one (1) time):

- $50,000 - $499,999.99 .......................................................... $10,000.00
- $500,000.00 - $999,999.99 .................................................. $15,000.00
- $1 million - $4,999,999.99 .................................................... $25,000.00
- over $5 million ..................................................................... $50,000.00

The Department shall pay the Board Members and deduct the Contractor's share from the retainage. If retainage is not sufficient, the Contractor shall pay the Department directly for its share of the fees and expenses.