

## STATE OF MICHIGAN - DEPARTMENT OF TRANSPORTATION DISPUTE REVIEW BOARD (DRB) AGREEMENT

This Dispute Review Board Agreement, hereinafter called "AGREEMENT", made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, between the State of Michigan Department of Transportation, an agency of the State of Michigan, hereinafter called "DEPARTMENT"; and \_\_\_\_\_, hereinafter called the "CONTRACTOR"; and the Dispute Review Board, hereinafter called the "DRB", and consisting of the following members: \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

WITNESSETH, that

WHEREAS, the DEPARTMENT is now engaged in the construction of contract:

\_\_\_\_\_, hereinafter called "the CONSTRUCTION CONTRACT" and

WHEREAS, the Contract provides for the establishment and operation of a DRB panel to assist in reviewing claims; and

WHEREAS, the DRB is composed of three members, one selected by the DEPARTMENT, one selected by the CONTRACTOR, and the third member selected by the first two members;

NOW THEREFORE, in consideration of the terms, conditions, covenants, and performance contained herein, or attached and incorporated and made a part hereof, the parties hereto agree as follows:

### SECTION I - Description of Work

In order to assist in the review of claims between the CONTRACTOR and the DEPARTMENT, the DEPARTMENT has provided in the CONSTRUCTION CONTRACT for the establishment of a DRB panel. The purpose of the DRB is to fairly and impartially consider claims placed before it and to provide documented recommendations for the entitlement of these claims to both the DEPARTMENT and the CONTRACTOR. The members of the DRB shall perform the services necessary to participate in the DRB's actions as designated in Section II, Scope of Work.

### SECTION II - Scope of Work

The Scope of Work of the DRB includes, but is not limited to, the following:

1. The DRB will formulate its own rules of operation, based on the Dispute Review Board Procedures as published by the DEPARTMENT. Because it is not desirable to adopt inflexible rules for the internal operation of the DRB, the procedures will be kept flexible to adapt to changing situations.
2. Procedures and scheduling of DRB events will be conducted per the DRB procedures document as published by the DEPARTMENT.
3. The time and location of a DRB hearing or appeal hearing shall be determined by the DRB in consultation with the DEPARTMENT and the CONTRACTOR.
4. It is expressly understood that the DRB members are to act impartially and independently in the consideration of the CONSTRUCTION CONTRACT provisions, and the facts and conditions surrounding any documented referral of a claim presented to the DRB by the DEPARTMENT or the CONTRACTOR, and that the DRB's recommendations concerning any such claim are advisory in nature. DRB members shall not discuss or communicate any matters relating to any aspect of the construction project except at duly scheduled hearings/meetings of the DRB except for communications between the Chairperson and other parties on administrative matters relating to the operation of the DRB.
5. During the hearings, no DRB member will express any opinion concerning the merit or entitlement of any facet of the case. It must be noted that unsolicited opinions, comments and general commentary on project specifications, day to day operations, etc., are not appropriate and is grounds for dismissal.
6. At the conclusion of a hearing, the DRB panel members will meet in confidence to formulate a recommendation(s), which must be supported by two or more members. All DRB deliberations will be conducted in private, with all individual views kept strictly confidential. The DRB's recommendations and discussions of its reasoning will be submitted as a document to the DEPARTMENT, the CONTRACTOR, and the Region Construction Engineer. The recommendations will be based on the pertinent Construction Contract provisions and the facts and circumstances involved in the claim. Timeframes shall be adhered to per the Special Provision for Dispute Review Board and the DRB procedures document.
7. If any DRB panel member is thought to have violated the confidentiality of panel discussions and hearings, they will be notified by the DEPARTMENT and the CONTRACTOR, and the allegations will be investigated. The DEPARTMENT'S Chief Operations Officer or their designee will preside over any confidentiality claims, actions, and appeals. If the allegations are substantiated, and the panel member has been determined to have violated confidentiality, the DEPARTMENT and the CONTRACTOR will remove the panel member from the DRB. A new panel member will then be nominated by the appropriate party or the two remaining members if the chairperson is the removed party. The DRB panel member will be provided reasons for the removal.
8. Should the need arise to appoint a replacement DRB member, the replacement DRB member shall be appointed in the same manner as the original DRB member was appointed. The selection of a replacement DRB member shall begin promptly upon notification of the necessity for a replacement and shall be completed within 14 calendar days. This AGREEMENT will be supplemented to indicate change in DRB membership.

**SECTION III - Contractor Responsibility**

Except for its participation in the DRB's activities as provided in the CONSTRUCTION CONTRACT, this AGREEMENT, and the DRB documents, the CONTRACTOR will not solicit advice or consultation from the DRB or any of its members on matters dealing in any way with the project, the conduct of the work, or resolution of problems.

**SECTION IV - Department Responsibilities**

Except for its participation in the DRB's activities as provided in the CONSTRUCTION CONTRACT and in this AGREEMENT, the DEPARTMENT will not solicit advice or consultation from the DRB or any of its members on matters dealing in any way with the project, the conduct of the work, or resolution of problems.

The DEPARTMENT shall furnish the following services and items:

1. Contract Related Documents: The DEPARTMENT shall furnish the BOARD three copies of all Construction Contract documents, supplemental agreements, documented instructions issued by the DEPARTMENT to the CONTRACTOR, or other documents pertinent to the performance of the Construction Contract and necessary for the DRB to perform its function unless such documentation is available for viewing on the internet.
2. Coordination and Services: The DEPARTMENT, in cooperation with the CONTRACTOR, will coordinate the operations of the DRB. The DEPARTMENT, through the Engineer or Region Construction Engineer, will arrange or provide conference facilities generally at or near the project site in a state facility.

**SECTION V - Time for Beginning and Completion**

The DRB is to remain in operation throughout the life of the active CONSTRUCTION CONTRACT and, if needed, for a reasonable post-construction period following final acceptance of the project, but not to exceed the date the DEPARTMENT administratively closes the CONSTRUCTION CONTRACT.

**SECTION VI - Payment**

The DRB panel members shall be paid by the CONTRACTOR for services rendered under this AGREEMENT as provided hereinafter. Such payments shall be full compensation for work performed or services rendered, and for all labor, materials, supplies, equipment, and incidentals necessary to the operation of the DRB.

Payment for DRB panel members is described in the Special Provision for Dispute Review Board.

**SECTION VII - No Assignment of Tasks of Work**

The DRB members shall not assign any of the work of this AGREEMENT that the panel has no control over and without approval of all parties.

**SECTION VIII - Termination of Agreement**

This AGREEMENT may be terminated by mutual agreement of the DEPARTMENT and the CONTRACTOR at any time, upon not less than four weeks documented notice to all other parties. DRB members may withdraw from the DRB by providing four weeks documented notice to all other parties. This AGREEMENT will remain in force until another Dispute Review Board Agreement to replace it has been fully executed. A DRB member, including the Chair, may be terminated without cause by joint agreement between the DEPARTMENT and CONTRACTOR. In the event that the CONTRACTOR and the DEPARTMENT cannot agree on a new DRB panel within 60 days of a DRB member(s) termination, the new DRB member(s) will be selected by the Department's Chief Operations Officer or their designee.

**SECTION IX - Legal Relations**

The parties hereto mutually understand and agree that each DRB member in the performance of duties on the DRB is acting in the capacity of an independent consultant and not as an agent or employee of either the DEPARTMENT or the CONTRACTOR.

The DEPARTMENT and the CONTRACTOR agree that no DRB member shall be personally liable for any act or omission in the scope of his/her capacity as a DRB member pursuant to this AGREEMENT, unless such DRB member acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of his/her responsibilities hereunder.

This AGREEMENT creates no third-party rights on behalf of any person or entity.

**SECTION X - Venue, Applicable Law**

In the event that any party deems it necessary to institute legal action or other proceedings to enforce any right or obligation under this AGREEMENT, the parties hereto agree that any such action against the DEPARTMENT shall be brought in the Court of Claims in Ingham County. The parties hereto agree that this AGREEMENT shall be interpreted in accordance with Michigan law.

**SECTION XI - No Bonus**

The parties hereto agree that they shall not agree to pay or receive any commission, percentage, bonus, or consideration of any nature, other than the payment provided for in Section VI above, for their performance and services under this AGREEMENT.

**SECTION XII - No Conflict**

The DRB panel members agree that they will provide documented disclosure to both the DEPARTMENT and CONTRACTOR if they were, in the two years prior to this CONSTRUCTION CONTRACT: (1) an employee, subcontractor, or consultant to the CONTRACTOR, the CEI consulting or subconsulting firms selected for this CONSTRUCTION CONTRACT, any subcontractor, distributor, or supplier of this CONSTRUCTION CONTRACT, or as another DRB panel member (except as a DRB panel member on other MDOT let projects); or (2) employed by the DEPARTMENT or as a consultant for the DEPARTMENT serving in any role for any phase of the CONSTRUCTION CONTRACT. The DRB panel members further agree that they will identify and provide documentation to the DEPARTMENT and CONTRACTOR of any conflicts of interest that may arise during the term of the CONSTRUCTION CONTRACT, as self-identified or as identified by others. Reporting of conflicts of interest must be provided to the DEPARTMENT and CONTRACTOR or the DRB panel member(s) may be subject to actions up to, and including, removal from the DRB panel and/or the DEPARTMENT's DRB candidate list.

The DRB panel members agree they will not testify against the DEPARTMENT in any legal proceeding and/or administrative claim hearings, unless otherwise directed by court order, including, but not limited to, Region Office Review hearings and/or Central Office Review hearings, that may arise on any MDOT let project that they are, or were, a DRB member. In addition, the DRB panel members agree that they will not testify against the DEPARTMENT in any other legal proceedings, whatsoever unless otherwise directed by court order, for at least one year after serving as a DRB member on any MDOT let project.

The DRB panel members agree to follow the five fundamental canons of the Dispute Resolution Board Foundation, which are as follows:

1. Board members shall disclose any interest or relationship that could possibly be viewed as affecting impartiality or that might create an appearance of partiality or bias. This obligation to disclose is a continuing obligation throughout the life of the DRB.
2. Conduct of Board members shall be above reproach. Even the appearance of a conflict of interest shall be avoided. There shall be no ex parte communication with the parties.
3. Board members shall not use information acquired during DRB activities for personal advantage or divulge any confidential information to others unless approved by the parties.
4. Board members shall conduct meetings and hearings in an expeditious, diligent, orderly, and impartial manner.
5. The DRB shall impartially consider all disputes referred to it. Reports shall be based solely on the provisions of the contract documents and the facts of the dispute.

**SECTION XIII - Federal Review**

The Federal Highway Administration shall have the right to review the work in progress.

**SECTION XIV - Certification of the DRB Members and the Department**

Attached hereto as Exhibits are the "Certification of the DRB Members" and "Certification of the Michigan Department of Transportation".

**SECTION XV - Prohibition of Discrimination in State Contracts & Fair Labor Practices**

In connection with the performance of work under this Agreement, the parties agree, to the extent applicable to them, as follows:

In accordance with Public Act 453 of 1976, MCL 37.2101 et seq. (Elliott-Larsen Civil Rights Act), a party shall not discriminate against an employee or applicant for employment with respect to hire, tenure, treatment, terms, conditions, or privileges of employment or a matter directly or indirectly related to employment because of race, color, religion, national origin, age, sex, height, weight, or marital status. A breach of this covenant will be regarded as a material breach of this Agreement. Further, in accordance with Public Act 220 of 1976, MCL 37.1101 et seq., (Persons with Disabilities Civil Rights Act), as amended by Public Act 478 of 1980, a party shall not discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment or a matter directly or indirectly related to employment because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position. A breach of any of the above covenants will constitute a material breach of this Agreement.

The parties shall not enter into a contract with a subcontractor, manufacturer, or supplier whose name appears in the register compiled by the Michigan Department of Labor pursuant to 1980 PA 278, as amended, MCL 423.321 et seq. (Employers Engaging in Unfair Labor Practices Act). The Department may void this Agreement if any party or any subcontractor, manufacturer, or supplier of the party appears in the above register.

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the day and year first documented above.

BOARD MEMBER		
NAME		TITLE
SIGNATURE		DATE

BOARD MEMBER		
NAME		TITLE
SIGNATURE		DATE

BOARD MEMBER - CHAIRPERSON		
NAME		TITLE
SIGNATURE		DATE

CONTRACTOR		
NAME		TITLE
SIGNATURE		DATE

MICHIGAN DEPARTMENT OF TRANSPORTATION		
NAME		TITLE
SIGNATURE		DATE

<p>APPROVED AS TO FORM ONLY THIS _____, DAY OF _____, 20____</p> <p>ATTORNEY GENERAL REPRESENTATIVE</p>
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**EXHIBIT A - Certification of DRB Members**

The undersigned hereby certify that he/she represents the firm located at the indicated address and that neither the undersigned nor the firm represented has:

- a) employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for him/her, or the firm indicated below) to solicit or secure this AGREEMENT; or
- b) agreed, as an express or implied condition for obtaining this AGREEMENT, to employ or retain the services of any firm or person in connection with carrying out this AGREEMENT; or
- c) paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for him/her, or the firm indicated below) any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out this AGREEMENT; except as here expressly stated (if any):

I acknowledge that this certification is to be furnished to the Michigan Department of Transportation and the Federal Highway Administration, U.S. Department of Transportation as requested, in connection with this AGREEMENT involving participation of federal-aid highway funds, and is subject to applicable state and federal laws, both criminal and civil.

NAME	TITLE	
SIGNATURE	DATE	
FIRM ADDRESS		
FIRM REPRESENTED		

NAME	TITLE	
SIGNATURE	DATE	
FIRM ADDRESS		
FIRM REPRESENTED		

NAME	TITLE	
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