

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

DIVISION OF HIGHWAYS

SPECIAL PROVISION

FOR

STATE PROJECT NUMBER: _____

FEDERAL PROJECT NUMBER: _____

FOR

**SECTION 105
CONTROL OF WORK**

105.18-Dispute Resolution: If specified in the plans, a Dispute Resolution Board will be established for this project. The purpose of this Board is to provide a method to assist in the timely and equitable resolution of disputes and avoid further disagreements that may hinder the progress of the project. A disagreement on any aspect of the contract can be considered a dispute. This Board will act as an impartial and independent third party to assist in administering the contract.

Both parties will follow procedures established in Section 105.17 before referring an issue to the Dispute Resolution Board. After either party determines that further negotiations will not be productive or the parties have reached an impasse either party may refer the dispute to the Dispute Resolution Board. All disputes must be presented to the board in writing as described in Section 105.18.3. The Dispute Resolution Board will promptly schedule a hearing and notify the parties. The Dispute Resolution Board will provide both parties a written recommendation based on the evidence presented at the hearing. The recommendation will be non-binding but may be admissible in subsequent proceedings. Alternative dispute resolution procedures or litigation may not be pursued until this process is complete.

All work is to continue during the dispute resolution process as indicated in the contract documents or as directed by the Department,. The Department and the Contractor must keep records as described in Section 109.4 for the work in dispute.

105.18.1 - Dispute Resolution Board

Immediately after award the parties will initiate the procedure provided herein to select the Dispute Resolution Board member(s), and the parties will cooperate in the selection process so that the Dispute Resolution Board may be established within 60 calendar days of the award date. Upon completion of the selection process, the Board will

be created by a multi-party Agreement between the parties and the board member(s). The Department and the Contractor must agree to a draft of the multi-party Agreement prior to nominating candidates for selection to the Board. The multi-party Agreement may thereafter be amended by the mutual consent of all the parties to the multi-party Agreement. The scope of the Board's work and compensation will be addressed in the multi-party Agreement. The Board will continue to exist and perform its duties throughout the life of the contract or until dissolved in writing by mutual agreement of the Department and the Contractor.

105.18.1.1-Dispute Resolution Board Members: As called for in the plans, the Board will have one or three members. The board members should have experience in highway construction and contract administration. Board members must remain neutral and have no conflict of interest. Before proposing a candidate, a party may provide the candidate with a copy of the contractor's bid proposal and this specification and a copy of the multi-party Agreement proposed to be entered, but may not otherwise communicate with the candidate concerning substantive matters related to the project without the consent of the other party. A disclosure statement in a form approved by the Department will be required from all candidates at the time the candidate is proposed. A brief resume and a summary of any involvement in any aspect of the project will be included in the disclosure statement. Except as necessary to address administrative issues, the members must not communicate with any person or entity associated with the dispute, including without limitation the Department and the Contractor, concerning any matter related to the project or any dispute related to the project.

When a three member Board is specified, the following selection procedure will be initiated. The Department and the Contractor will each propose a candidate for selection to the Board. Each party will notify the other party of their proposed candidate in writing and include the nominee's disclosure statement. Each party has seven (7) calendar days to accept or reject the other party's proposed member. The Department and Contractor will advise the other party of acceptance or rejection of the nominee in writing. A candidate will be considered accepted if this notice is not provided. Any candidate can be rejected without cause. If a candidate is rejected or is unwilling or unable to serve, the party proposing the candidate will propose a new candidate. This process will be repeated until two members are approved.

Upon acceptance, the two members will select a third member from the list of prequalified candidates maintained by the Department. In order to be prequalified, the third member will be required to have completed formal Dispute Resolution training approved by the Department. The two members proposing a third member must notify the Department and the Contractor in writing and include the disclosure statement of the proposed third member. The Department and the Contractor have seven (7) calendar days from receipt of the nomination and disclosure statement to accept or reject the proposed member. The Department and Contractor must advise the other party in writing of acceptance or rejection of the nominee. A candidate will be considered accepted if this notice is not provided to the other party to the construction contract within seven days.

The candidate may be rejected without cause. If the third candidate is rejected, a new nominee will be submitted. This process will be repeated until a third member is approved. The third member will serve as the chairman and be responsible for the administrative procedures of the Board.

The following procedure will be used for selection of a single member Board. The Department and Contractor will each select five names from the prequalified candidates list described above and forward their selections to the other party. Each party may provide its proposed candidate with a copy of the contractor's bid proposal and this specification and a copy of the multi-party Agreement proposed to be entered, but may not otherwise communicate with the candidate concerning substantive matters related to the project without the consent of the other party. Each proposed member must submit a disclosure statement to both parties within seven calendar days of being notified. The Department and Contractor will identify any single candidate that is common to each parties list. This candidate will be selected as the single Board member provided each party accepts the disclosure statement. Any candidate may be rejected without cause. The Department and Contractor will advise the other party and the candidate of acceptance or rejection of the candidate in writing within seven calendar days of receiving the disclosure statement. A candidate will be considered accepted as the single Board member if this notice is not provided.

If there is no candidate common to both lists, multiple candidates common to both lists, or the single common candidate is rejected, the lists will be combined. The rejected candidate will be removed from the list. The Department and the Contractor will rank proposed members on the combined list in order of preference with the most preferred choice ranked one. Each party's ranked list will be delivered to the other party within seven calendar days of receiving notice a candidate has been rejected. The candidate with the lowest combined numerical ranking will be selected as the single Board member. In the event of a tie , the Director of Contract Administration will choose the single Board member from the combined list. The draft three- party Agreement provided to the candidate nominee prior to selection will be executed by the candidate, the Department and the Contractor within seven calendar days of the member being selected. The draft three-party agreement may be amended prior to execution by mutual consent of all three parties.

For purposes of this specification all notices will be deemed to be issued or sent when postmarked, documented as received by a carrier for delivery or documented as transmitted by facsimile transmission or e-mail, and all notices will be deemed delivered or received the earlier of actual delivery or receipt as documented or proved or three days after documented transmission.

105.18.2 - Dispute Resolution Board Operation: Immediately after the Dispute Resolution Board has been established the Board will meet to discuss operating procedures and exchange information. The procedures in this section are intended to be flexible and may be revised by the Board. Any modification should be generally consistent with the existing procedures. The Board must advise the Department and the Contractor of any revisions in writing. All Board members and representatives of

the Department and Contractor must attend the initial meeting. The initial meeting location will be arranged by the Department. The Department will supply a copy of the plans and proposal to each board member at the initial meeting.

The Board is to be kept informed by the Department and the Contractor of critical issues on the project and be involved early in disputes. Except at hearings or scheduled meetings or as mutually agreed in writing by the Department and the Contractor, all communications by the Department or the Contractor with any board member must be in writing, and complete copies must be provided to the other party to the construction contract. Copies of progress meeting notes and change orders will be supplied to the Board members by the Department. The Department and the Contractor will copy each board member on any correspondence that refers to a dispute. Members of the Board will not offer advice or comment on any issue that is, or may be, in dispute.

There may be regularly scheduled periodic meetings at the job site during construction. The schedule for these meetings will be included in the Three-Party Agreement. Additional meetings may be requested, in writing, by the Board during critical phases of work. Any unscheduled meeting must be approved by both the Department and Contractor. All meetings are to be attended by representatives of both the Department and Contractor and a majority of the Board. Failure of any involved attendee to attend a meeting or hearing at the date, time and location scheduled will not be a reason to delay the meeting or hearing, and the meeting or hearing may be conducted as scheduled at the discretion of those attending. .

The agenda for the periodic meetings will be set by the Board chairman. The agenda may include a field review and a discussion of the progress of the project. Any potential problems and proposed solutions should be discussed in order to keep the Board advised of pending issues. The Board chairman will be responsible for sending the agenda to the Department and Contractor seven days prior to the meeting. Prior to the next regularly scheduled meeting, the Board chairman will prepare and distribute minutes from the previous meeting. Any comments concerning the minutes are to be addressed to the Chairman, in writing, with copies sent to all parties. If the comments are deemed valid by the Board, the chairman will revise and redistribute the minutes.

105.18.3 – Dispute Review:

105.18.3.1 Requesting Review: A dispute can be referred to the Board by either party. A request for the Board to review an issue will be submitted to the chairman in writing with five copies delivered to the other party and one copy to each Board member. The request will include a concise summary of the issue(s) in dispute. The other party may also submit, in writing, a summary of their view of the dispute to the Chairman with five copies delivered to the referring party and one copy to the other Board members.

105.18.3.2 Prehearing Submittals: All documents that are required, or requested by the Board, will be delivered to the Board chairman 14 calendar days

prior to the hearing. One copy of this information will be sent to all other board members and five copies to the other party within the same time frame.

Each party will submit a justification of the party's position with evidence and any documentation it intends the Board to consider. This will include all correspondence previously submitted by either party that addresses the dispute. The Board will determine if late submittals are accepted or if the hearing will be delayed. Both parties will identify documents that are common to the issue(s) and jointly submit the information to the Board. The requesting party will deliver any joint submissions to the chairman and Board members.

A list of proposed attendees will be submitted by each party. The Board will determine if a proposed attendee is unacceptable and advise both parties, in writing, of this determination. Only previously submitted and approved attendees will participate in the hearing. Any expert on the list will be identified and a summary of their qualifications will be included.

105.18.3.3 Hearing Procedures: The Chairman will schedule a hearing within 28 calendar days after receiving the request unless all parties agree otherwise. The hearing may be scheduled to coincide with the next regularly scheduled site visit. The hearing will be scheduled as soon as practical if an issue is deemed critical by the Board chairman. All prehearing submittals must be received prior to scheduling the hearing. The hearing will be conducted at the project field office or an alternate location selected by the Department. The chairman will advise all parties, in writing, of the location and time of the hearing 14 calendar days prior to the event. The hearing will be conducted as scheduled if any attendee fails to appear, unless all those present agree to a postponement. The dispute can be resolved at any time by the Department and Contractor without approval of the Board.

The hearing is intended to be informal and will be directed by the chairman. The chairman will determine if there is an official record of the hearing, other than the recommendation. The chairman will be responsible for arranging for a qualified person to keep and distribute the record to all parties. All costs associated with keeping and distributing the record will be equally shared by the Department and Contractor.

The Board is not required to follow specific judicial rules. The Board's recommendation is to be based on the contract documents and evidence provided prior to the hearing. Additional evidence will not be considered at the hearing unless the information did not exist at the time of the original submittal. Additional information or clarification of an issue may be requested by the Board prior to or during a hearing.

The hearing will begin with the Contractor's representative giving a brief overview of the project and status of the work completed. The Chairman may determine the order in which issues are considered. Respecting each issue for which the hearing was requested, each party will be given the opportunity to present their position on the issue. The party requesting the hearing on that issue will make the initial presentation. The other party will follow. After the presentations are complete, all parties will be given the opportunity to ask

questions. The Board members will direct questions to either party first. The party that gave the initial presentation will follow with the other party asking questions last. All questions are to be directed to the Chairman. The Chairman will decide if the question is relevant and then ask for a response. This rotation will continue until the Board Chairman decides all parties have been given ample opportunity to make their respective position clear on the issue.

When all issues for which review was requested have been addressed, the Board may then meet in private to consider a recommended decision. All recommended decisions must be communicated by or by leave of the Chairman to both the Department and the Contractor. A recommended decision may be issued orally at any time after the Board considers the arguments. A written recommended decision will be delivered to both parties within 28 calendar days of the hearing. The recommended decision will include the logic behind the Board's decision but individual views of the Board members will not be disclosed. The Chairman shall notify the parties if the Board's decision is not unanimous, in which case the recommendation of the Board may include the opinion of the dissenting member, without that member being identified.

Each party will accept, reject, or request a clarification of the Board's recommended decision by a written communication sent to the Board Chairman and the other party within 14 calendar days of the date the recommended decision was issued. The recommended decision will be considered accepted if the notification is not provided as described above. If the Board receives a request for clarification, the Board will respond in writing to both parties within 14 calendar days. The parties must then accept or reject the Board's final decision within 14 calendar days of the date the response was issued. This notification must be in writing and delivered to the Chairman and other party. If no response to the final decision is delivered as provided above, the final decision will be considered accepted by the party failing to make delivery. Each party is permitted only one request for clarification of any recommended decision. A request for clarification based on previous arguments will not be accepted.

105.18.4 – Basis of Payment: The cost of any general administrative expense and payment to Board members as described in the three-party or multi-party Agreement shall be equally shared by the Department and Contractor. Each Board member will submit an itemized list of fees and expenses to the Contractor, with a copy delivered to the Department, within 14 calendar days of a Board function. The Department and Contractor must each approve all costs submitted and the costs must be submitted in a format acceptable to both parties. The Contractor will pay each Board member the total approved amount of their respective fees and expenses. The Department will reimburse the Contractor for 50% of the amount paid to the Board members by a contract adjustment. The Department will be responsible for supplying minimal clerical services and meeting facilities at no additional cost. Any special services the Board feels is necessary must be requested, in writing, and approved by the Department and Contractor. The Department and Contractor shall each be responsible for its own respective costs.