

## **PN 109 - 4/18/2008 - DISPUTE RESOLUTION AND ADMINISTRATIVE CLAIM PROCESS**

The Department's Dispute Resolution and Administrative Claim Process is premised on the partnering approach to construction administration and must be adhered to by the Contractor in order to resolve disputes on the project and in order to seek additional compensation or contract time from the Department in the form of an Administrative Claim.

### **Disputes and Claims**

Disputes include disagreements, matters in question, and differences of opinion between the Department's personnel and the Contractor. Claims are disputes that are not settled through Steps 1 and 2 of the Dispute Resolution and Administrative Claim Process and for which the Contractor has documented costs or time incurred as a result of such disputes.

Disputes and claims by subcontractors and suppliers may be pursued by the Contractor on behalf of subcontractors or suppliers. Disputes and claims of subcontractors and suppliers against the Contractor will not be reviewed by the Department. Disputes and claims by subcontractors and suppliers against the Department but not supported by the Contractor will not be reviewed by the Department.

Disputes and claims subject to review by the Department include:

1. Interpretation of specifications, standard drawings, plans, proposal, working drawings, change orders, and orders by Department personnel having authority over the project.
2. Differing site conditions as defined in 104.02.B.
3. Cost and time incurred by:
  - a. Suspension of work pursuant to 104.02.C.
  - b. Significant changes in character of work pursuant to 104.02.D.
  - c. Utility interference with the work pursuant to 105.07 and Utility notes.
  - d. Extra work ordered pursuant to 104.02.F and the policy on Change Orders.
  - e. Acts or inaction of the Department or other government agencies.
4. Adequacy and constructability of the plan design.
5. Contract time extensions due to weather, shortages of labor, equipment, or materials, or other causes beyond the Contractor's control as defined in 108.06 and the current Policy 27-012(P) -Time Extensions and Waiver of Liquidated Damages.

6. Other subjects mutually agreed upon by the Department and Contractor to be within the scope of the Dispute Resolution and Administrative Claim Process.

### **Process**

The Contractor must exhaust the Department's Dispute Resolution and Administrative Claim Process prior to seeking additional compensation or contract time by filing an action in the Ohio Court of Claims. The following procedures do not compromise the Contractor's right to seek relief in the Ohio Court of Claims.

All parties to the dispute must adhere to the Dispute Resolution and Administrative Claim process. Department personnel involved in second or third tier reviews will not consider a dispute until the previous tier has properly reviewed the dispute and issued a decision. The Contractor's personnel shall not contact Department personnel involved in a second or third tier review until a decision has been issued by the previous tier.

Failure to meet any of the timeframes outlined below or to request an extension may terminate further review of the dispute and may serve as a waiver of the Contractor's right to file a claim.

### **Continuation of Work.**

The Contractor shall continue with all Work, including that which is in dispute. The Department will continue to pay for Work.

### **Step 1 (On-Site Determination).**

The Engineer and Area Engineer shall meet with the Contractor's superintendent within two (2) working days of receipt of the Contractor Written Early Notice set forth in 104.02.G. They shall review all pertinent information and contract provisions and negotiate in an effort to reach a resolution according to the Contract Documents. The Engineer or Area Engineer will issue a written decision of Step 1 within fourteen (14) calendar days of the meeting. If the dispute is not resolved, the Contractor must either abandon or escalate the dispute to Step 2.

### **Step 2 (District Dispute Resolution Committee).**

Within seven (7) calendar days of receipt of the Step 1 decision, the Contractor must submit a written request for a Step 2 meeting to the District Construction Engineer (DCE). The DCE will assign the dispute a dispute number. The dispute number will consist of the District number, followed by a hyphen, the project number, followed by a hyphen and then the number of disputes on this project that this dispute represents. Within fourteen (14) calendar days of receipt of the request for a Step 2 meeting, the Contractor shall submit the Dispute Documentation as follows:

1. The Contractor shall submit three (3) complete copies of the documentation of the dispute to the DCE.

2. The Dispute Documentation shall be identified on a cover page by county, project number, Contractor name, subcontractor or supplier if involved in the dispute, and dispute number.
3. The Dispute Documentation shall be an original document that clearly and in detail gives the required information for each item of additional compensation and time extension requested.
4. A narrative of the disputed work or project circumstance at issue. This section must include the dates of the disputed work and the date of early notice.
5. References to the applicable provisions of the plans, specifications, proposal, or other contract documents. Copies of the cited provisions shall be included in the Dispute Documentation.
6. The dollar amount of additional compensation and length of contract time extension being requested.
7. The cost and supporting documents that served as the basis for the requested compensation stated in number six (6) above.
8. A detailed schedule analysis must be included in the Dispute Documentation for any dispute concerning additional contract time, actual or constructive acceleration, or delay damages. At a minimum, the schedule analysis must include the Schedule Update immediately preceding the occurrence of the circumstance alleged to have caused delay and must comply with accepted industry practices. Failure to submit the required schedule analysis will result in the denial of that portion of the Contractor's request.
9. Copies of relevant correspondence and other pertinent documents.

Each District shall establish a District Dispute Resolution Committee (DDRC) which shall be responsible for hearing and deciding disputes at the Step 2 level. The DDRC shall consist of the District Deputy Director, District Highway Management Administrator and District Construction Engineer or designees (other than the project personnel involved).

To prepare for the DDRC meeting, the DCE will create a file on the dispute and assign a person to review and manage the dispute. This manager will advise the Division of Construction Management on the status of the dispute.

The DDRC shall meet with personnel from the Contractor's headquarters and consider the dispute within fourteen (14) calendar days of receipt of the Contractor's Dispute Documentation. The DDRC will issue a written decision of Step 2 within fourteen (14) calendar days of the meeting. If the dispute is not resolved, the Contractor must either abandon or escalate the dispute to Step 3.

### **Step 3 (Director's Claims Board).**

Within fourteen (14) calendar days of receipt of the Step 2 decision, the Contractor must submit a written *Notice of Intent to File a Claim* to the Claims Coordinator in the Division of Construction Management . This notice shall state the Contractor's request for either a Director's Claim Board hearing on the claim or an acceptable Alternative Dispute Resolution (ADR) practice.

The dispute becomes a claim when the Claims Coordinator receives the *Notice of Intent to File a Claim*.

The Director's Claim Board (the Board) will consist of the Deputy Director of the Division of Construction Management, Deputy Director of the Division of Highway Operations, and the Deputy Director of Production Management. The Board will appoint a Secretary who will facilitate the hearing. The Office of Chief Legal Counsel will provide legal advice to the Board.

#### **Director's Claims Board Hearing.**

The Contractor shall submit five (5) complete copies of its Claim Documentation to the Claims Coordinator within thirty (30) calendar days of receipt of the *Notice of Intent to File a Claim*. This timeframe may be extended upon mutual agreement of the parties and with approval of the Claims Coordinator. In addition to the documentation submitted at Step 2, the narrative shall be enhanced to include sufficient description and information to enable understanding by a third party who has no knowledge of the dispute or familiarity with the project. This documentation must also include a discussion of the efforts taken to partner the dispute. The Claims Coordinator will forward one (1) complete copy of this documentation to the District.

When submitting the Claim Documentation, the Contractor must certify the claim in writing and under oath. Such certification shall attest to the following:

1. The claim is made in good faith.
2. To the best of the Contractor's knowledge, all data offered to support the claim is accurate and complete.
3. The claim amount accurately reflects the Contractor's actual incurred costs and additional time impacts.

This claim certification shall also be notarized pursuant to the laws of the State of Ohio.

The following is an example of the correct form for a claim certification:

*(The Contractor) certifies that this claim is made in good faith, that all supporting data is accurate and complete to the best of (the Contractor's) knowledge and*

*belief, and that the claim amount accurately reflects the contract amendment for which (the Contractor) believes the Department is liable.*

By: \_\_\_\_\_  
(The Contractor, Name and Title)

Date of Execution: \_\_\_\_\_

Within thirty (30) calendar days of receipt of the Contractor's Claim Documentation, the District shall submit five (5) complete copies of its Claim Documentation to the Claims Coordinator. In the event that the Contractor is granted a time extension for the submission of its Claim Documentation, the District will be granted an equal time extension for submission of its Claim Documentation. At a minimum, the District's Claim Documentation must include:

1. A narrative of the disputed work or project circumstance at issue with sufficient description and information to enable understanding by a third party who has no knowledge of the dispute or familiarity with the project. This section must include the dates of the disputed work and the date of early notice. The narrative must also discuss the efforts taken to partner the dispute.
2. References to the applicable provisions of the plans, specifications, proposal, or other contract documents. Copies of the cited provisions shall be included in the claim document.
3. Response to each argument set forth by the Contractor.
4. Any counterclaims, accompanied by supporting documentation, the District wishes to assert.
5. Copies of relevant correspondence and other pertinent documents.

Within fourteen (14) calendar days of receipt of the District's Claim Documentation, the Claims Coordinator will forward one (1) complete copy to the Contractor and will schedule a hearing on the dispute. Once a hearing date has been established, both the Contractor and District shall provide the Claims Coordinator with the list of names and telephone numbers of each person who may present information at the hearing. Reasonable time, generally not to exceed 60 days, will be provided for submission and review of additional documentation by either party prior to the hearing date. However, unless otherwise permitted by the Board, the exchange of documentation and all disclosures specified in this step of the process shall be completed at least fourteen (14) calendar days prior to the hearing.

Upon request or at the Board's discretion, the Board may delay the hearing one (1) time to allow more time for review and requests for more documentation.

In the event of multiple claims, the Board may order that they be considered in a single hearing. The Board may schedule this hearing after the completion of the project or at such time that it is assured that all disputes on the project have been processed through Steps 1 and 2 of the Dispute Resolution and Administrative Claim Process and these issues are before the Board.

The Board will hear the entire claim on behalf of the Director. The Board may have technical advisors at the hearing for assistance in reviewing the claim. The Contractor and District will each be allowed adequate time to present their respective positions before the Board. The Contractor and District will also each be allowed adequate time for one (1) rebuttal limited to the scope of the opposing party's presentation. The Contractor's position will be presented by a Contractor's representative who is thoroughly knowledgeable of the claim. Similarly, the District's position will be presented by a District representative who is thoroughly knowledgeable of the claim. Additionally, each party may have up to four others assist in the presentation.

The Board may, on its own initiative, request information of the Contractor in addition to that submitted for the hearing. If the Contractor fails to reasonably comply with such request, the Board may render its decision without such information.

Upon completion of the hearing and consideration of any additional information submitted upon request, the Board will submit a written recommendation on the disposition of the claim to the Director. The Director will ratify, modify, or reject the recommendation of the Board and render a decision within forty-five (45) calendar days of the hearing. Within thirty (30) calendar days of receipt of the Director's decision, the Contractor must either accept or reject the Director's decision in writing. In the event the Contractor fails to do so, the Department may revoke any offers of settlement contained in the decision.

The decision of the Director is the final step of the Department's Dispute Resolution Process and may not be appealed within the Department. The Board is not bound by any offers of settlement or findings of entitlement made during Steps 1 and 2 of the Dispute Resolution Process.

### **Interest on Claims.**

The Department shall pay interest on any amount found due on a claim, which is not paid within 30 days of the Department's receipt of the certified claim. Such interest shall be paid to the Contractor for the period beginning on the thirty-first (31st) day after the Department's receipt of the certified claim, and ending on the day that the payment of the amount due is made. Interest payments provided for in this provision shall be at the rate per calendar month that equals one-twelfth of the rate per annum prescribed by

ORC 5703.47 for the calendar year that includes the month for which the interest charge accrues.

**Alternative Dispute Resolution (ADR).**

In lieu of the Board hearing, the Contractor may request that the claim proceed through the Alternative Dispute Resolution Process. The Department may agree to binding arbitration as defined by ORC 5525.23 or mediation in the manner in which those methods are practiced by the Department and allowed by law.

The Claims Coordinator will coordinate the agreement of the parties to the ADR method, the selection of a neutral third party or technical expert, and the sharing of fees of the neutral third party or technical expert equally. The Claims Coordinator will obtain a written agreement, signed by both parties, that establishes the ADR process. The neutral third party or technical expert will have complete control of the claim upon execution of the ADR agreement.

**DESIGNER'S NOTE:** For use with the 2005 or 2008 C&MS. This note must be used on all projects, **except** for those projects that use PN 108 – Dispute Review Board Process. Any questions on this note should be directed to the Division of Construction Management [614-466-3957].