

Reviewing Construction Claims

INDOT Contracts



Why do we have claims?

- **Changed Conditions** – Causes the work to substantially differ in kind or nature from the work as required in the original contract. (104.02)



Types of Changed Conditions

- Differing Site Conditions
- Errors and omissions in the contract
- Suspension of Work Ordered by the Engineer
- Significant Changes in the Character of Work



What is a claim?

- A Claim is an unresolved change.
- Exists when the Contractor believes there is a change but the owner disagrees, or
- Both agree that a change exists but cannot agree on the impacts or costs
- If there is agreement it is not a claim!



When Change is found

- Follow 105.16 Notice of Changed Conditions and Claims
- Contractor must notify the Engineer of the changed condition in writing.
 - Must be done before any extra work occurs or cost are incurred.
 - Gives the Engineer the opportunity to remedy the changed condition.
 - No adjustment is made for any costs incurred before the notice is received.



Engineer Determines a remedy.

- 2 business days
- New plan of attack for the work
- New design
- Nothing, proceed with work as is
- Adjustment of pay
- Adjustment of time
- Both adjustment of pay and time



- If the Contractor disputes the remedy...
 - Contractor provides written notice of claim to the Engineer
 - Must be submitted within **15** days of receipt of the Engineers notice of remedy.



- If the total impact of the disputed remedy will not be known for some time....
 - Contractor shall keep separate daily records
 - The Engineer will keep separate daily records
 - Contractor and Engineer shall meet weekly to discuss the daily records
 - Contractor has **3** workdays to disagree with the Engineers records
 - **Communication is essential!!!!**



See Construction Memo 07-07

* WEEKLY CLAIM SUBMITTAL FORM

(This form is to **ONLY** to be submitted if Specification 105.16 is invoked.)

Contract # : _____ Date Submitted : _____

Claim for week of : _____ Estimated Cost of Claim : _____

Controlling Operation Affected : _____

Brief Description of Delay or Problem That Caused This Claim : _____

Breakdown of Costs Associated With Claim (Time, Materials, Manpower, Equipment, etc.):

Submitted By : _____ Contractor : _____
Name & Title Prime or Sub

Date Discussed with Project Engineer/Supervisor (PE/PS) : _____

Does PE/PS Agree With This Weekly Claim Submittal ? _____ (Yes or No)

If No explain why : _____

*** Note:** This claim form **must** be submitted every week to PE/PS to document an on going claim on a project. It then **must** be included in the final claim packet submitted to INDOT for any claims associated with the above contract. The controlling operation stated above **must** match the controlling operation shown on the IC-124 form filled out by the PE/PS.



Claim Submission

- Contractor has **30 days** from the end of the affected work to submit a formal claim.
- PE/S provides Contractor written acknowledgement of receipt of claim.
- Log Claim into SiteManager now!
- Start project level review, **30 days**
- Request additional information, if needed.



Required Documentation

- Required Documentation 105.16(b)1.
- 12 required elements
- Factual History of the claim
- Supporting contract provisions
- Actions taken to mitigate the claim
- Specific amount and basis of costs including a separate calculation for markup



Required Documentation

- Time extension sought and basis for the request with schedules
- A notarized statement signed by an officer of the Contractor, under penalty of perjury, that the claim is made in good faith...true, accurate and reflect what the Contractor believes to be the Department's liability.



Claim Review

- Do not be distracted by size of the claim
- Do not be distracted by complexity of the claim
- Do not be distracted by the volumes of information supplied



Claim Review

- Changed condition?
- Entitlement?
- Impact?
- Auditable costs?



Changed Condition

- What is the changed condition?
- What is being claimed?
- Agree or disagree



Entitlement

- The specific provisions of the contract which supports the claim.
- In other words what in the contract gives the contractor the right to request the extra money or time.



Entitlement

- Know what is being claimed
- What are the facts?
- Agree or disagree



Impact

- Affect that the changed condition had on the items of work or schedule on the contract.



Impact

- What are the impacts if any?
- Were the impacts mitigated?
- Is there an appropriate and accurate measure of the impacts?
- Agree or disagree



Costs

- Do not look at this until after entitlement and impacts are defined and agreed with.
- Costs should be defined and calculated.
- Were the costs mitigated?
- Was the impact compensable?



Delays

- Excusable, Non-Compensable
 - Not the fault of Contractor or INDOT
- Excusable, Compensable
 - The fault of INDOT
- Non-Excusable
 - The fault of the Contractor
- Concurrent
 - Separate delays occurring at the same time



Allowable Delay Costs 109.05

- Labor
- Insurance
- Equipment
- Field office Costs
- Escalation Costs, NO MARKUPS
- Directed Acceleration
- Constructive Acceleration
- Contractor Inefficiency



Items Not Eligible

- Loss of Anticipated Profits
- Loss of Bonding Capacity
- Missed Bids
- Expense of Claim Preparation
- Interest
- Markup on Escalation
- Material Escalation if covered by an index
- Home Office Overhead



Unacceptable Calculations

- Total cost methods – Contractor's costs as bid vs. Contractor's as built costs
- Calculation of home office overhead using the Eichleay Formula or others



Auditable Information

- Payrolls
- Material invoices
- Invoices for Rented Equipment
- Piece Specific Information for Contractor Owned Equipment to be used with the Rental Rate Blue Book
- If Escalation Claim Information for both the time period the work should have occurred and did occur is required.



Auditable Information

- Canceled checks for labor, materials or equipment



Schedules

- Schedules shall be submitted for the original base line and the as-built
- They can be bar charts or critical path method schedules depicting the affected work.
- A narrative is very helpful.



Ruling

- Prepare Written Ruling
- If any portion of the claim is resolved, prepare Change Order or Time Extension
- Give an account of the history, summary and conclusions.



FHWA

- Promotes early coordination and involvement.
- Direct involvement on oversight contracts.
- INDOT acts as FHWA on non-oversight contracts.
- Is involved in settlements.
- Reviews participation on a case by case basis.



FHWA continued

- The burden of proof to document the reasonableness of a claim and thus FHWA participation is the responsibility of the State and LPA.
- Does not normally participate in claim reimbursement that results from Utility delays, right-of-way delays, railroad delays, gross negligence



Claim Resolution Process

- Project Level Review, 30 days
- District Office Review, 45 days
 - District Claim Review Board, 30 days
- Central Office Review, 60 days
 - Claims over \$150K, 100 day extension or 20% of original contract have to come to Central Office for review
- Mediation, 60 days
- Litigation, ?

