



INDIANA DEPARTMENT OF TRANSPORTATION

Driving Indiana's Economic Growth

Memorandum

May 29, 2008

CONSTRUCTION MEMORANDUM
08-08

TO: District Deputy Commissioners
District Highway Operation Directors
District Construction Engineers
District Testing Engineers
District Area Engineers
Project Engineers/Supervisors

FROM: Mark A. Miller, Director *Mark Miller*
Division of Construction Management

SUBJECT: Procedure for How to Handle Existing Construction Claims

Currently INDOT has claims for various dollar amounts that could have some age on them or have just been filed in the last 6 months. In either case, until our current specification 105.16 which deals with claims for adjustment or disputes is revised, the attached 3 page document needs to be followed by the district construction personnel in each district so that there is consistency within districts on how these older claims will be handled and so contractors will know the procedures INDOT will follow to resolve a claim.

The attached document was generated by INDOT in conjunction with meetings with FHWA and is fairly detailed. Once you read it you will see that there has been a dollar limit established where the District's decision will be considered the final decision of INDOT for that specific claim concern. Currently our specifications state that the Engineer will work with the contractor to resolve all claims. This memorandum clarifies that up to the established dollar limit the "Engineer" means the District Construction Engineer. Higher dollar claims that cannot be resolved by a District will be moved to Central office for further review.

If you have any questions please feel free to contact Mr. Jack Riggs at (317) 232-5324 or Mr. Dennis Kuchler at (317) 232-5502.

DAK:dak
Attachment

CLAIM PROCESS UNDER CURRENT SPECIFICATIONS

To be used whenever the contractor believes it is entitled to additional compensation, whether due to delay, extra work, breach of contract or other causes. The PE/PS should assure that the following information is provided, preferably on a week-by-week basis, in accordance with Construction Memorandum 07-07:

1. A detailed factual statement of the claim, including all necessary dates, locations, and items of work affected.
2. Identification of the contract provisions which support the claim, why such provisions support the claim, or alternatively, identify the provisions of the contract which have allegedly been breached.
3. Specify the dates allegedly affected, the potential effect to the schedule, and exact number of calendar days sought for a time extension (if applicable), the basis of entitlement for each day, all documentation of delay, and a breakout of the number of days for each identified event or circumstance.
4. Identification of any documents or oral representations which support the claim.
5. Detailed documentation of amount of additional compensation sought, including:
 - a. Identification of each employee for whom costs are being compiled.
 - b. Identification of supplies or materials affected.
 - c. Identification of all additional equipment cost, including the manufacturers numbers and the rental rate for each item of equipment for which costs are being compiled.
 - d. Specify any other additional direct or indirect costs claimed and how such costs were determined.

INFORMAL PROJECT LEVEL REVIEW

Once a notice of potential claim has been presented, PE/PS and AE should meet with contractor representatives at the earliest opportunity to discuss the causes of the claim, how to most efficiently resolve or minimize the cause or impact of the claim and how best to document the time and costs involved. The first step in the claim review process will be a ruling by the PE/PS and AE regarding any time extension portion of the claim. If the PE/PS and AE determine that a portion or all of the delay cited in the claim is beyond the control of the Contractor, the DCE/AE will decide whether it is in the Department's best interest to accelerate the remaining work to maintain the current intermediate and contract completion date schedule or to grant a time extension to mitigate the delay. If the District decides acceleration is appropriate, the Project Manager must be consulted to assure that additional funds are available. A detailed outline of costs to be paid for by the Department must be prepared which shall indicate all costs and mark ups associated with accelerating the project. The outline of costs must be accepted and signed by the Contractor and the District prior to having the Contractor proceed. All of the above decisions should be made as soon as possible to ensure that the Contractor is given direction regarding the Department's expectation concerning the remaining contract schedule.

In situations where a claimed time extension or claimed additional monies exceed the AE approval level, the PS/PE and AE shall consult with the appropriate personnel in the District Office or Construction Management Division to obtain approval of the proposed ruling, prior to issuing the decision. If applicable, all pending claims, including those for which a notice has been sent, but have not yet been

fully calculated, should be discussed at each partnering meeting. Items of agreement and of disagreement, respectively, should be included in the minutes. Once the potential claim has been calculated, an intensive effort should be made to resolve the claim at the project level. Where possible, strategies for resolving any disagreements should be explored and documented. If agreement cannot be reached at the project level within 30 days after the claim is finalized, the claim is forwarded to the District for review. After referral to the District, the contractor's request for additional time or payment is considered a "Formal Claim".

DISTRICT REVIEW

The District should review the Formal Claim to determine if all the appropriate documentation has been included. Notice of the Formal Claim review at the District will be sent to the contractor and that an additional fifteen days will be allowed to supplement the documentation. If the District desires additional information or documentation, the request will be included in the notice of review. After all the additional information, if any, has been received, DCE or designate is allocated an additional 30 days to reach a settlement informally. If no settlement is reached, the District will notify the contractor that the claim is being set for a Claims Meeting.

DISTRICT CLAIMS MEETING

The contractor will be given an opportunity for a meeting to discuss the merits of the claim. Written ground rules will be provided. Normally, the meeting will be attended by the DCE and two Field Engineers from Construction Management Division, one of which should be the Field Engineer assigned to that District. Both parties' written and oral presentations, as well as any other relevant information shall be considered. A decision may or may not be rendered by the DCE at the meeting. If not, the DCE will have 30 days to provide a written decision to the contractor. The decision shall be rendered by the DCE; the other members are only advisory. The meeting will be scheduled as soon as practicable and within thirty days after failure to reach informal resolution, whenever possible. The time period may be extended in unusual circumstances. [Schedule at least 2-3 matters in one day session; hold these at District Office every 1-2 months.] The decision will include the following:

1. A precise description of the claim.
2. A clear contractual basis for the decision and if appropriate, specific references to language regarding the bid items in question.
3. Other facts relied upon to make the decision.
4. A concise statement of the circumstances surrounding the claim and the reason for the decision. If the claim is rejected in whole or in part, the District will explain why the claimed work is not compensable under the contract.
5. The amount of time, money or other relief, if any, the District will grant to the contractor.

Every effort will be made to reach a decision within 30 days; however, failure to do so, shall not affect the validity of the claim. The contractor may accept or reject the decision of the District in its entirety. If the claim exceeds \$150,000 (excluding liquidated damages), the contractor has 30 days to request a review by the State Construction Engineer (or designate.) For claims under \$150,000, the District decision is the final decision of INDOT. In situations where a claimed time extension exceeds the District approval level, the DCE shall consult with the appropriate personnel in Construction Management Division to obtain approval of the proposed time extension, prior to issuing the decision.

REVIEW BY SCE

If the Formal Claim exceeds \$150,000 and the contractor has rejected the District's decision for settlement, a request for a review by the SCE may be made by the contractor. A written notice requesting this review shall be submitted to the SCE and he shall schedule a Claims Meeting as soon as practicable and preferably within 30 days of receipt of the request. Written ground rules will be provided. The SCE shall preside and designate two other INDOT persons to attend; however, the final decision shall be made by the SCE or designee.

DECISION BY SCE

After the conclusion of the meeting, the SCE will render a written decision. Every effort will be made to reach a decision within 30 days; however, failure to do so, shall not affect the validity of the claim. The SCE will consider both parties' written and oral submissions and may consider other relevant information. The SCE may affirm, overrule, or modify, in whole or in part, the District's decision. The decision will specify the portions of the district's decision that is being overruled or modified and the rationale supporting the portions overruled or modified. The decision will also include the rationale for upholding the District's decision to the extent the rationale differs from that expressed in the District's decision. The contractor may accept or reject the decision of the SCE in its entirety. If not accepted, the contractor may request a non-binding mediation by an agreed upon mediator.

MEDIATION

If the contractor does not accept the decision rendered by the SCE, a written request for mediation shall be submitted to the SCE within 30 days of the decision. Upon receipt of the request for mediation, the parties will select a mediator from the list of mediators eligible to perform civil mediations in the State of Indiana. By requesting mediation the contractor agrees to pay 50% of the cost of mediation. INDOT will pay the other 50%. The mediator should be familiar with the highway and bridge construction industry but may not have any financial interests in either of the parties. The mediation shall be conducted pursuant to the rules in effect for civil mediators in the State of Indiana. If the parties are unable, after reasonable efforts, to select a mediator, a list of mediators shall be obtained from the Marion Superior Courts, and the parties will alternately strike names from such list until one person remains. This person becomes the mediator. The mediator will schedule the mediation as soon as practicable, preferably within 60 days of selection. In the event settlement is reached, a summary of the agreement will be prepared. Either party or the mediator may declare the mediation to be not successful. As with other civil mediations, the discussions and proceedings at mediation are considered part of settlement negotiations and are inadmissible in any civil proceeding.