



CHAPTER 27

DISAGREEMENTS, DISPUTES and CLAIMS

As stated in Subsection 00140.30, changes in Plans, quantities, or details of construction are inherent in the nature of construction. The Plans may not work as well as expected when applied to the actual site, traffic, location of utilities, freight mobility, etc.

As stated in Subsection 00140.40, Differing Site Conditions may be discovered, or Extra Work may be necessary as discussed in 00140.60. Construction Work involves things that are hidden beneath the ground that may be unanticipated. When changes occur, or when Contract language is interpreted, there is the potential for disagreement.

Because of the potential for disagreement on construction projects, the Resident Engineer (RE) and project staff need to, among other things:

- Establish and maintain a working relationship with the Contractor that allows all individuals to work together to resolve problems.
- Plan proactively to anticipate as many problems as possible so that solutions or alternate Plans can be developed before the problem is actually encountered.
- Develop an issue resolution process to allow the parties to work through issues at the lowest possible level.
- Analyze the issue(s) objectively and openly to reach resolution.
- Document the issue(s) and any resolution on the matter.

The Contract recognizes this potential for disagreement in three areas that are summarized as follows:

1. Section 00180 applies to disagreements that only involve Contract Time specifically in 00180.60 Notice of Delay and 00180.80 Adjustment of Contract Time. [Refer to Chapter 13 - Contract Time'] If the disagreement is not resolved by the RE, the disagreement can be escalated by the Contractor according to 00199.40.
2. Section 00195.95 applies to errors in final quantities and amounts. These specialized disagreements and claims are allowed up to 90 days after final voucher and, if not resolved, also follow the escalation described in 00199.40.
3. Section 00199 discusses the contractual process for resolution of all disagreements and disputes encountered at the RE level, and when a claim escalates beyond the RE level. The intent of this specification is that disagreements would be resolved in a timely fashion, at the lowest possible administrative level, and that the Contractor is treated fairly in any disagreement. Combinations of Contract Time and compensation or compensation only are covered by this Section.

27-1 Section 00199 Disagreements, Protests and Claims

The processes in Section 00199 can be summarized as follows:

A. Notification Requirements

The Contractor must notify the RE, both orally and in writing, if they believe that the Agency has ordered them to perform Work beyond what is described in the Contract.

This includes a change in the Work including additional costs incurred due to unreasonable delay, which has occurred or is about to occur.

In addition to 00199.20 (Protest Procedure), the following Subsections also have notice requirements:

- 00140.40– Differing Site Conditions
- 00180.60 – Notice of Delay

For Projects Bid on or after September 23, 2013, the Contractor will use the Contractor's Notice of Differing Site Conditions, Delay, or Protest, form 734-2887 or equivalent for Notice of protest related to these provisions.



Print Form

Contractor's Notice of Differing Site Conditions, Delay, or Protest

Completed by Contractor

Instructions: If you have more than one notice, use a separate form for each. See Section 00150.30 for general requirements for delivery of written notice. See 00140.40, 00180.60 or 00199.20, whichever is applicable for the notice content, timing and other requirements that must be met for timely and proper notice.

Project Name (Section)

Contract No.

Notice No.

Contractor Name

Date Oral Notice Given,
If Required

Date of This Notice

Date Mailed/Delivered to
Agency Project Manager

Check the box for which section this notice applies:

☐ **Differing Site Conditions** (Section 00140.40)
in the field below provide all of the
information required by 00140.40.

☐ **Notice of Delay** (Section 00180.60) in the
field below provide all of the information
required by 00180.60.

☐ **Notice of Protest** (Section 00199.20) in the
field below provide all of the information
required by 00199.20.

(Attach additional sheets if necessary.)

Signature of Person Signing for Contractor

Name and Title of Person Signing for Contractor (please print)

Date

For Agency Use Only

Date Notice Was Received

Date of Meeting to Discuss Notice

If meeting was not held, please state why.

Date of Written Response to Contractor

Distribution: Area Manager; Contract Administration Engineer

Once notified, both parties need to look at potential changes in Work processes, causes of the problem, impacts to the Work, etc.

If the Work is progressing, both the Contractor and the RE will:

- Agree to and record the resources (i.e., labor, Equipment and Materials) that are involved in the Work that is in dispute.
- Record or document only the resources that are in dispute. The Daily Force Account Record, form 734-3428 may be used to document the disputed work if the form is clearly marked "DISPUTED WORK".
- Review the recorded information with the Contractor daily to assure agreement on the disputed resources and work.

The RE and Contractor representatives must sign this form daily to indicate agreement, and also provide a copy to the Contractor.

Additionally, the RE shall:

- Record general information related to this disputed work on the General Daily Progress Report, Daily Diary, or other document.
- Review the Contractor's current Project schedule in order to determine whether or not the disputed Work impacts the critical path or may contribute to a delay.

The Contractor must provide its own complete records of all costs and time incurred throughout the disputed Work on a weekly basis or on a schedule agreed to by the RE. [See 00199.20(c)].

B. Analyzing the Submitted Protest Request

If the issue cannot be resolved through negotiation, the Contractor must submit their analysis and request for compensation in writing. The RE must analyze the written request and provide a written response. The RE may request additional information or clarification from the Contractor.

Once the RE agrees that a change in the Contract Work has occurred and that the Agency is responsible for the change in costs, the RE should try to negotiate the costs with the Contractor and process a CCO to settle the matter.

Again, if the Work is progressing, both the Contractor and RE should record and agree on the resources involved in the Work that is in dispute. If negotiations fail, or if the RE cannot justify

the requested amount, the RE should make a fair and equitable adjustment. If the RE agrees that the Agency is responsible for a change, this may result in processing a unilateral CCO.

If the Contractor and RE cannot resolve the dispute, the Contractor can, after exhausting all procedures in 00199.10 and 00199.20, file a claim per 00199.30.

If the Agency has incurred additional costs because of failure of a Utility to timely modify or relocate its facilities, the Agency may be able to recover some or all of those additional costs from the Utility. [Refer to Chapter 24 – Work Done By Utilities and Railroads.] The RE should contact the Region and the Contract Administration Engineer (CAE) for guidance.

C. Formal Claim Submittal

If dispute issues remain unresolved and the Contractor decides to file a formal claim, that formal, fully-documented claim must be submitted no later than 45 Calendar Days after Second Notification in accordance with Subsection 00199.30(b).

When the RE receives a certified claim, as described in 00199.30, the RE will need to do the following:

- Make two exact copies of the claim.
- Send one copy to the CAU, attention: ODOT Construction Contracts Engineer.
- Preserve the originally submitted claim in the RE Project files. Do not make any marks or edits in the original documents.
- Use the second copy as the working document for the RE's evaluation of the claim.

The claim must include the information that is necessary for the Agency to evaluate the issue and the costs associated with it. A detailed listing of required items is shown in Subsection 00199.30(b) along with the required format.

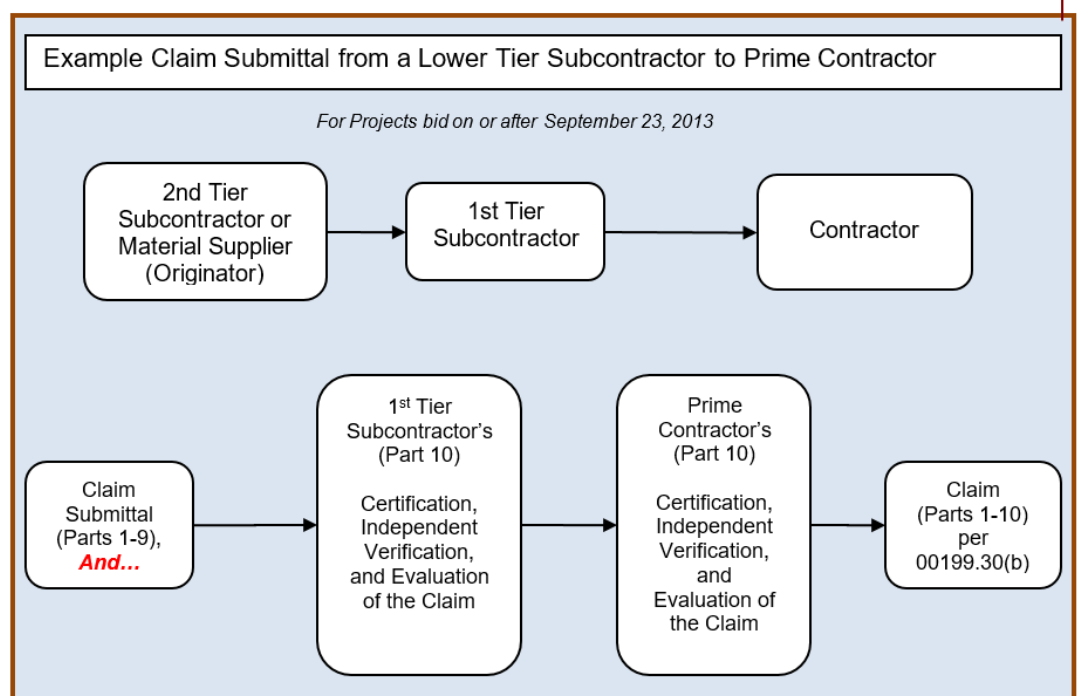
D. Acceptance of the Claim Submittal

The RE must not accept the claim submittal if it is incomplete or not in the proper format. This submittal must include all the parts listed in 00199.30(b) Parts 1 – 9. If the submittal is from a lower tier Subcontractor, Supplier or Entity other than the Contractor, the Contractor must also include a separate evaluation and certification of the claim.

If the Subcontractor (or Materials Supplier or other Entity other than the Contractor) originates a "pass-through" claim, the RE must ensure that the submittal has the following items also included in the claim submittal:

- Certifications
- Independent verifications
- Evaluations of the amount of damages sought

According to 00199.30(b), this information should be included in the submittal from not only the claim submittal originator, but from the Subcontractors at all tiers, as well as the Contractor.



If the Contractor fails to submit the needed information, the RE should discuss this matter with the CAE.

The RE will:

- Inform the Contractor that the claim is incomplete as submitted, and request the Contractor resubmit the claim with the required information and/or documentation.
- Establish a date by which the perfected claim must be resubmitted; typically no more than an additional 15 Calendar Days.

If the Contractor does not provide the requested information, the RE will again discuss this with the CAE and likely notify the Contractor of the failure to comply, the claim will be considered "rejected" and the issue will be considered closed.

E. RE Level Claim Review

Once the claim has been accepted as a properly submitted claim, the RE must hold a claim review meeting with the Contractor to review the submitted claim document and to have the Contractor explain their claim to the RE. It is important that the RE understand both the theory of entitlement for the claim, as well as the method and supporting documents used to calculate the claimed costs.

The costs may be calculated as shown in 00199.30(b) (Part 7) direct and indirect or may be calculated on the basis of Section 00197. The claim cannot be a mix of both methods. Contact the CAE if questions arise.

The RE must review the claim and request additional information if necessary. The Contractor must provide additional information within 14 days after the RE makes the request. [See 00199.40(a).]

The RE should provide a written response to the claim within 30 Calendar Days after the RE has received all needed information. If the RE needs additional time, the RE should inform the Contractor in writing.

Again, if the RE agrees that for all or part of the claim a change in the Contract Work has occurred, and that the Agency is responsible for the change in costs, the RE should make a fair and equitable adjustment with a unilaterally processed CCO for that portion of the Work. If the Agency believes the Contractor has some entitlement, but cannot reach agreement, the Agency must still pay a fair, justifiable amount for the change. The RE should contact the CAE with any questions.

If the Contractor does not accept the RE's findings, they may request, within 10 days, a review (Step 1) at the Region level.

F. Step 1 – Region Level Review

At Step 1, the Contractor would present their claim to the Region for the Region Level Review. This is normally done by the ODOT Area Manager (AM).

By Contract, the presentation must occur within 21 Calendar Days of the Contractor's request for the hearing unless agreed otherwise. The AM may request additional information and the Contractor must provide the information within 14 days of the request. [See 00199.40(b).]

The AM must provide a written decision within 30 Calendar Days.

If the Contractor does not accept the AM's findings, they may request, within 10 days, a review (Step 2) at the Agency level.

G. Step 2 – Agency Level Review

At Step 2, the Contractor would present their claim to the CAE for the Agency Level Review. By Contract, the presentation must occur within 21 Calendar Days of the Contractor's request for the hearing unless agreed otherwise. The CAE may request additional information and the Contractor must provide the information within 14 days of the request.

The CAE must provide a written decision within 30 Calendar Days.

If agreement is not reached, the Contractor may request, within 10 days, to escalate the claim to the appropriate portion of Subsection 00199.40(d), either Step 3 or Step 4. The CAE will initiate the actions of 00199.40(d). Contact the CAE if you have any questions.

The intent of the Contract is to settle disagreements in a timely manner and at the lowest possible administrative level.

The RE should consult with the Region AM or the CAE if needed.

The RE must inform the Contractor of the reason that payment is being withheld, as well as what actions the Contractor must fulfill to allow payment to be made. Send a copy of the written correspondence to the CAU.

If the amount due to the Contractor is less than \$1,000, the RE office may delay payment until the next estimate becomes more than \$1,000, as specified in 00195.50(a), unless requested by the Contractor. Good communication is essential. [Refer to Chapter 9 - Responsibilities of Project Manager.]

If it is determined that a progress payment will be withheld, do not submit the progress estimate to the CAU. All payments submitted through CPS will be processed.

Do not withhold payment because of claims made by the Contractor or against the Contractor's bond. [Refer to Chapter 26 - Prompt Payment/Claims Against Contractor's Bond.]

Contact the CAU if there are questions about withholding payments to the Contractor.