

Section 7.5

CONSTRUCTION CONTRACT CLAIMS

7.5.1 Purpose

To describe the contract administration procedure to be followed for documenting and analyzing construction contract claims to ensure comprehensive and supportable recommendations are developed for use in the resolution of claims.

7.5.2 Authority

Sections 20.23(3)(a) and 334.048(3), Florida Statutes

7.5.3 References

337.11(8), 337.185 and 337.221, Florida Statutes

Federal Aid Policy Guide (23 CFR 635.124)

FHWA Approved: May 11, 2015

7.5.4 Definitions

Refer to the Introduction section of this *Manual*.

7.5.5 Notice

Project Level Responsibilities

Specification 5-12 requires that the Contractor provide notification in writing to the Project Administrator (PA) when the Contractor intends to file a claim and documentation of the work effort resulting from such claims. The notice must be given before the Contractor begins any work on which the claim is based. The notification by the Contractor allows the PA the opportunity to mitigate the impacts of the claim or begin documenting the impacts and actual costs associated with the claim. Failure of the Contractor to notify the PA before beginning work on disputed items of work waives the Contractor's right to claim (refer to **Specification 5-12**). If the Contractor has failed to afford the Engineer the opportunity to keep strict account of the actual labor, material, equipment and time used by failing to provide written notice of intent to file claims before

beginning the work on which the claim is based, the Contractor will be paid no claim settlement costs (see definition of **Statement of Claim Settlement Costs CPAM Section 7.5.4**). Specifically, the Contractor will be paid no more for each claim issue than the amount calculated by multiplying the amount of the most recent Engineer's Estimate for that issue multiplied by the percentage shown for that issue in the most recent Entitlement Analysis. Refer to **Guidance Document 7-3-A** for a description of an Engineer's Estimate and an Entitlement Analysis.

Enforcement of the written notice requirement is important in effective management of claims. If the Contractor indicates verbally during the prosecution of the work that added costs are being incurred, or changes to the contract document are occurring, the PA should instruct the Contractor to provide the required written notice of the intent to file any claims. A record of any verbal notices or possible notices should be recorded on the **Daily Work Report** in the "Comments" section. It should be made clear to the Contractor that adequate written notice of intent to file a claim is required if the claim or any portion of the claim is to be considered by the Department.

The PA can accept a notification of intent to file a claim only from the prime Contractor. The notice of intent should contain:

- (1) A statement as to what changed, including a description of the nature and extent of the change.
- (2) An indication of who directed or what caused the change.
- (3) A description of how the change has or will impact the Contractor, including reference to any impacted critical activities on the Contractor's latest accepted schedule update.
- (4) A statement of damages, or an estimate of damages, if available, detailing the amount of compensation, time and/or other adjustment to the contract that is being requested.

7.5.6 Claim Recognition

Project Level Responsibilities

The PA is responsible for recognizing a claim situation, and usually makes the initial determination whether an adjustment or a demand made by the Contractor is contested and processed as a claim, or is resolved by a routine **Supplemental Agreement**. The recognition of a claim or an adjustment with the potential to escalate to a claim is

extremely important so that steps can be taken to resolve the claim in a timely manner. Although claims occur for many different reasons, they are usually based upon an adjustment or alleged adjustment in the Contractor's operation.

7.5.7 Coordination

Project Level Responsibilities

After receiving the Contractor's written notice of intent to claim or becoming aware of a possible claim, the PA will notify the Resident Engineer.

Resident Level Responsibilities

The Resident Engineer will inform the District Construction Engineer (DCE) of the notice of intent to claim. When a written notice of intent to claim is received, a copy of the notice should be sent to the DCE immediately,

When a written notice of an intent to claim is received, the Resident Engineer shall immediately send a copy of the notice to any Third Party involved (County, Utility owner or others).

District Level Responsibilities

The DCE will inform the FHWA Transportation Engineer when a notice of intent to claim and/or when a written claim has been received from the Contractor on FHWA Project of Division Interest (PODI) projects. A copy of the notice of intent to claim and/or a copy of the written claim received from the Contractor on FHWA PODI projects will also be sent to the State Construction Office.

The DCE will inform the State Construction Office, the Office of General Counsel (attention: Special Counsel to Construction), District Chief Counsel and the Office of Inspector General on all projects where the DCE has received the notice of intent to claim and the amount of the claim is estimated to be \$150,000 or more.

7.5.8 Claims Involving a Utility

Project Level Responsibilities

If a claim involves a utility, the PA must also immediately notify the affected utility owner that the Contractor has notified the Department of its intention to file a claim. This notification may be verbal, but must be immediately followed by a letter signed by the

Resident Engineer as described below.

Resident Level Responsibilities

The Resident Engineer must immediately notify by letter the affected utility owner that the Contractor has notified the Department of its intention to file a claim (refer to **Sample Letter No. 1, Utility Company Notification, Guidance Document 7-5-A**).

7.5.9 Assistance

(A) District Utilities Office

Resident Level Responsibilities

If a claim involves a utility, the District Utilities Office shall be asked to provide a review of all pertinent documents to assist with determining if the claimed changed condition was caused by the Utility's failure to perform work in accordance with the utility work schedules or other relocation agreements.

(B) Office of General Counsel

Resident Level Responsibilities

The Office of General Counsel shall be asked to provide legal review of all pertinent documents and to identify potential legal liabilities, rights, obligations and confidentiality. For additional assistance on difficult claims, the Office of the General Counsel may be contacted in accord with the district's guidelines on such contacts. The DCE shall approve any request for review by the Central Office.

District Level Responsibilities

The DCE will set the district's guidelines on when such contacts are appropriate. The Office of the General Counsel can be contacted as follows:

Telephone: Voice: (850) 414-5265
Fax: (850) 414-5264
FDOT Office of the General Counsel
Attention: Special Counsel to Construction
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458

7.5.10 Coordinating Claim Response Development with FHWA and State Construction Office Staff on Federal Aid Participation (F.A.P.) Projects

Resident Level Responsibilities

On Federal Aid projects, the extent of Federal Aid participation is determined on a case-by-case basis. For this reason, it is important that early coordination be made with the FHWA. The Resident Engineer should discuss the merits of the claim and the basis for the Department's position on the claim, with the FHWA Transportation Engineer and the State Construction Office. For more on F.A.P. dollar amount determinations see **CPAM Claim Settlement, Section 7.5.21**.

7.5.11 Minimum Documentation

Justification for all contract claims for which payment includes Claim Settlement Costs, requires, at a minimum, three (3) pieces of written documentation. The first two are drafted by the project level staff while the last is drafted by the resident engineer's staff. Justification for contract claims for which payment does not include Claim Settlement Costs, requires at a minimum the Entitlement Analysis and Engineers Estimate.

Project Level Responsibilities

- 1) An Entitlement Analysis showing the percentage entitlement for each of the various claim issues and the reasons supporting the contractor's entitlement (refer to **CPAM Guidance Document 7-3-A**). For those claims in excess of \$150,000 draft Entitlement Analysis should be prepared and submitted to the DCE for review prior to finalization of the claim documentation.
- 2) An Engineer's Estimate, which will be stated in dollars for extra work and days for any impacts to controlling items of work or critical path activities (see definitions in **CPAM, Section 7.3.4 and CPAM Guidance Document 7-3-A**), For those claims in excess of \$150,000 draft Entitlement Analysis should be prepared and submitted to the DCE for review prior to finalization of the claim documentation.

Resident Level Responsibilities

- 3) A **Statement of Claim Settlement Cost**, identifying those costs the Department does not believe it owes the Contractor but is willing to pay to avoid the risks

associated with not resolving the claim (see definitions in **CPAM, Section 7.5.4**).

For all claims, the Entitlement Analysis and the Engineer's Estimate shall be done before starting negotiations with the Contractor. It is advisable, but not mandatory, that the Entitlement Analysis and the Engineer's Estimate be committed to writing before starting negotiations with the Contractor. It is mandatory that the Entitlement Analysis, the Engineer's Estimate and a **Statement of Claim Settlement Cost** (if there are any) shall be committed to writing before sending the contract change document to the Contractor for signature.

District Level Responsibilities

For those claims in excess of \$150,000 the draft Entitlement Analysis and Engineer's Estimate will be prepared and submitted to the DCE by the Resident Engineers staff and shall be submitted to the District Chief Counsel for review prior to finalization of the claim documentation.

7.5.12 Comprehensive Documentation

Project Level Responsibilities

To be worthwhile, documentation must include all relevant facts and be objective in its coverage. Frequently the most valuable sources of information are the daily and weekly construction project reports of the **Project Diary** which are produced by the Department's CEI project staff. **CPAM Section 5.1** provides guidance for completing these reports and should be reviewed by the project CEI staff carefully when a claim situation arises to ensure that they are complete and factual.

Specifications 5-12 and **100** require specific content in the Contractor's written notice of intent to claim including information on equipment, delays, and the reason for the claim. In addition to the normal, required daily documentation specified above, a claim file should be established for every "Notice of Intent" filed by the Contractor. The PA shall review these notices along with **Specifications 5-12** and **100**. Where the contractor's notice of intent to claim is incomplete or untimely the PA shall notify the contractor of that defect in writing. Both the Contractor's notice of intent to claim and the PA's response shall be included in the claim file. The weekly statements of cost provided by the Contractor pursuant to **Specification 5-12** should also be reviewed as received, with notations indicating any conflicts or inconsistencies with the Department's project records or observations of project personnel. The weekly statements of cost with appropriate notations should be placed in the claim file along with the independent records maintained by project personnel. If the Contractor fails to provide the weekly statements of cost, the

PA or designee shall notify the Contractor in writing of their obligation under the contract documents to keep such records and provide them weekly to the Department. Copies of this correspondence shall be included in the claim file. The claim file is also to include any notifications to utilities or property owners that are affected by the claim as well as any correspondence received from the Contractor relating to the identified claim issue(s).

Resident Level Responsibilities

The Resident Engineer should also review the *Project Diary* documents for completeness when a claim or disputed work is involved. For a list of the *Project Diary* documents see the definition of *Project Diary* in *CPAM Section 5.1.4, Project Diary*.

7.5.13 Concurrent Documentation

Project Level Responsibilities

Concurrent documentation is often a major factor in determining the weight or impact of a given document during administrative and legal considerations. A brief note on the *Daily Work Report*, which was made at the time of a particular occurrence, will often have more validity than a carefully worded, memo to the file prepared weeks or months after the fact. Project personnel are to make notes and comments on the *Project Diary* reports and documents (see definition *CPAM Section 5.1.4*) to describe events or record their observations of the situation at the time of occurrence, and take dated photographs or video records of the conditions. These notes should be objective and professional, relating to the facts, without bias or opinions.

7.5.14 Record of Contractor's Equipment, Labor and Material

Project Level Responsibilities

When the PA receives a notice of intent to make a claim from the Contractor, the Contractor's equipment, labor and material used on the disputed work must be documented. The PA must keep an accurate record of the types of equipment, including equipment serial numbers, and lengths of time each piece of equipment is used in performing disputed work, required to be on standby, or idled because of the disputed work. The number of workers, their job classification and time spent in performing the work related to the claim must be recorded as well as material types and quantities of each material type used. On larger projects, with multiple claims, location of crews by foreman and station number should be recorded on the daily construction project report. Accurately tracking this information will allow the Contractor's statement of damages to

be verified upon submittal.

7.5.15 Claim File

Project Level Responsibilities

Once a claim situation has been identified by receipt of a written notice from the Contractor of the Contractor's intention to make a claim, the PA should establish a separate file and keep copies of all documents related to the claim.

Resident Level Responsibilities

The Resident Engineer and PA may share the same file if they work in the same office. These claim files will serve as the primary source of information relating to the claim. These files should be kept current and orderly, such that a review of the files will provide a full understanding of the claim and a logical progression of events. Contact the District Chief Counsel or the Office of the General Counsel to determine if and how these claim files or other related files should be stamped or marked to be treated as "Attorney's Work Product." Such claim files are privileged information to assure the confidentiality of the Department's claim analysis and recommendations during certain claim settlement investigations undertaken with direction of legal counsel.

7.5.16 Sources of Documentation

Project Level Responsibilities

Good documentation comes from many sources and in various forms. Some of the most important types of documentation are excerpts from the contract documents specifically related to the claim issue. These should be made part of the supporting documentation in the claim file. When notice of intent to file a claim is given to the Department, the first thing that the PA must do is research the contract documents to determine exactly what the contract says with respect to the claim. All pertinent drawings, notes, specifications, and special provisions should be included or referenced in the claim file. Project personnel must remain aware of the many sources, which can provide information regarding a claim, and make the required effort to review those sources and document the findings. **Guidance Document 7-5-B** provides a listing of these sources.

7.5.17 Contractor's Submission of Claim

Project Level Responsibilities

The Contractor's notice requirements and the content of the Contractor's written claim submission, including the Contractor's certification of the truthfulness of that written claim submission, are stated in **Specification 5-12**. These requirements are to be enforced. Refer to **CPAM Section 7.5.5** for a discussion of the calculation of compensation when the Contractor has failed to file a timely notice of intent to claim. At some point, either after completing the work or resolving the situation over which the Contractor has submitted a notice of intent to file a claim, the Contractor should submit a claim package to the PA stating the amount of compensation and contract time or other adjustments to the contract that are being requested.

- (1) The PA should encourage the Contractor to submit the claim package for review as soon as possible. It is the prime Contractor's responsibility to submit claims. Claim packages will not be accepted from a subcontractor.
- (2) It is incumbent upon the Contractor to provide a complete claim package. The claim package should state the Contractor's position and the alleged reasons for the claim. The claim package should explain how the Contractor was impacted and what the costs associated with the impacts were. The impacts and cost should be certified in accordance with **Specification 5-12** to be accurate and complete to the best of the Contractor's knowledge and stated in enough detail to support the resolution of any claim determined to have merit.
- (3) If adequate detail is not provided in the Contractor's submission of the claim package, the PA should clearly specify the additional information needed, and return the claim package to the Contractor. If the PA finds the claim to be without merit, the reasoning for this determination should also be clearly provided to the Contractor. The Contractor should determine the amount of damages asserted due in a claim situation and present those damages to the PA for review.
- (4) For claims against utilities, upon receipt of any written notice of intent to claim or any written claim package materials from the Contractor: the PA shall immediately discuss the merits of the claim with the Resident Engineer. A copy of the written notice of intent to claim and or any written claim package materials from the Contractor shall be sent to the Resident Engineer.

Resident Level Responsibilities

- (5) For claims against utilities, upon receipt of any written notice of intent to claim or any written claim package materials from the Contractor: The Resident Engineer shall forward a copy of the Contractor's intent to claim notice and any related claim

materials received from the Contractor to the utility owner. Refer to **Sample Letter No. 1, Utility Company Notification, (Guidance Document 7-5-A)**. After discussing the merits of the claim with the PA, a copy shall also be sent to the DCE.

- (6) For claims against utilities, upon receipt of a complete claim package, the Resident Engineer should consult with the District Utility Engineer and shall notify the utility owner in writing that the claim package has been received. The intent of this letter is to allow the utility owner the opportunity to investigate and negotiate a settlement directly with the Contractor if desired. Refer to **Sample Letter No. 2, Utility Company Notification, (Guidance Document 7-5-C)**. With that notification letter the Resident Engineer shall also forward a copy of the Contractor's claim package to the utility owner.

7.5.18 Analysis of Claim Packages

Project Level Responsibilities

Upon receipt of a complete claim package, the PA will review the claim and compile any additional documents deemed relevant and forward to the Resident Engineer for review.

Resident Level Responsibilities

On claims of \$150,000 or more, informational copies of the complete claims package shall also be sent to the Office of the General Counsel, the Office of the Inspector General, and the State Construction Office through the appropriate channels. The reviewer should first prepare a draft Entitlement Analysis to determine if the claim is valid, and then, if entitlement is recognized, prepare a draft Engineer's Estimate to determine the extent of compensation. To perform these two steps, the reviewer must have all necessary facts relating to the claim available. Refer to **Guidance Document 7-3-A** for a description of an Engineer's Estimate and an Entitlement Analysis.

District Level Responsibilities

The DCE shall approve any request for review by the Central Office, in accordance with the guidelines of **CPAM 7.5.9(B)**, described herein.

(A) Establishing the Facts

Project Level Responsibilities

The availability of facts will vary depending on the level of review. As a claim is processed for higher level review, all pertinent facts must be provided to the next level. The first level of review for a claim will usually be at the PA's level. It is at this level that all facts are documented from project records and the original Entitlement Analysis and Engineer's Estimate are produced.

The initial source of information and facts are contained in the Contractor's claim package. The project records must be reviewed to determine if the facts presented by the Contractor can be verified, and to determine if the Contractor's information is incomplete or misleading. Relevant additional information and any conflicting information should be identified. The reviewer should separate the facts into three categories: those the Department and the Contractor agree on; those which are unsubstantiated or incomplete; and those which are disputed by the Department.

For facts, which are disputed, the reviewer should identify what the correct facts are believed to be, with references to backup documentation.

Gathering and establishing of the facts should be done before beginning the two-step review process. The facts will need to be available to adequately perform each step.

(B) Entitlement Analysis

Project Level Responsibilities

The reviewer must first determine whether the claim has any basic merit, or whether it should be denied because there is no basis for entitlement. Input from the Office of the General Counsel should be obtained at this point to assess the potential legal liability. The reviewer should make this determination on the individual merits and available facts pertaining to the claim situation. When determining claim entitlement, the reviewer should address the following questions for each claim issue.

- (1) Did the Contractor provide the required notice of intent to claim?
- (2) Was there a change to the original contract requirement that led to the claim?
- (3) Who or what caused the identified change?
- (4) What were the impacts to the Contractor due to each identified change?
- (5) Were the impacts unexpected or unreasonable?

- (6) Could the Contractor have avoided any adverse impacts through proper action?
- (7) Was it reasonable to have anticipated the identified changes at the time of bid?
- (8) Did the Contractor attempt to mitigate the claim or its effects?
- (9) Was complete claim documentation provided in the timeframe outlined in the contract or in accord with **Specification 5-12**?
- (10) Determine any percentage of entitlement on each claim issue as follows:

When the items above completely support the Contractor's position, percent entitlement would be one hundred percent. When the items above completely refute the Contractor's position, the percent entitlement would be zero percent. When items above support only a partial entitlement based on the fact that the Contractor was partially responsible for the claim issue state the partial percentage of the total cost and time impacts the Contractor is entitled to recover along with the reasons supporting the contractor's entitlement.

(C) Extent of Compensation

Project Level Responsibilities

Determining the extent of compensation is the second step in the analysis of a claim package after it has been determined that the Contractor has some entitlement for the claim. In this step, the reasonable costs the Contractor incurred must be determined.

The Contractor is responsible for providing a claim package, which includes a detailed breakdown of the costs incurred. These costs should relate to the impacts on the construction identified in step one which established the basis for eligibility. The State Construction Office's State Contract Administration Specialist may be contacted if the reviewer is unfamiliar with the Contractor's method of cost justification.

In determining the extent of compensation due in a claim situation, only the actual costs incurred by the Contractor are reimbursable, up to a reasonable amount. Compensation is not computed on a force account basis unless expressly provided for in the contract documents. The following costs are frequently included in claim submissions:

Operating Equipment Costs: Compensation must be based on a supportable length of time for the equipment operation cost. The Contractor should provide the basis for the

ownership or rental costs, and the operating costs. Equipment costs are to be determined as per **Specification 4** of the applicable contract specifications.

Idle Equipment Costs: If idle equipment was identified as an impact in the eligibility step, then compensation must be based on a supportable length of time that required equipment was idle, and the actual ownership or rental costs incurred by the Contractor. Based upon the situation, it may be cheaper to keep idled equipment on the project site if demobilization and remobilization of that equipment will cost more than the idle equipment charges. Idle equipment charges must be determined in accord with **Specification 4** of the applicable contract specifications. Idle asphalt plants should only be compensable for delays if the plant is dedicated to the project. If the asphalt plant provides asphalt to multiple projects or sells commercially and not dedicated to the project, it would not be compensable for delays. If a claim includes costs for a non-dedicated idle asphalt plant, the costs should be removed from the subject claim.

Labor Costs: Compensation will be paid for actual costs based on documented work hours and certified payroll statements. Lost labor efficiency based on work elements performed out of sequence or over longer time frames than originally scheduled may be considered with proper documentation. Labor costs are to be determined as shown in **Specification 4** of the contract specifications.

Material Costs: Compensation will be paid for the actual cost of materials being used, based on a supportable quantity of materials and invoices showing the materials costs. A markup may be allowed as shown in **Specification 4** of the contract specifications.

Unit Price Costs: Compensation may be based on a unit price including material, labor, equipment overhead, and profit. If this method is used, the number of units involved should be verifiable and the unit price should be reasonable. The Contractor should be required to provide a breakdown of the unit price. Items priced at a unit price must be separated from other items in the claim since overhead and profit cannot be included twice. Lump sum items shall not be accepted without detailed itemization stating the quantities and unit prices the lump sum item was based upon.

Delay Damages: If delay was identified as an impact in the eligibility step, then compensation will be paid in accord with **Specification 4-3** for the delay. The Contractor should separately identify all associated delay costs so they can be verified and a determination made as to their reasonableness. The granting of additional contract time must be reasonable and supportable based on delays in the controlling items of work.

Indirect Costs, Expenses and Profit: Compensation for all indirect costs, expenses and profit of the Contractor, including but not limited to overhead of any kind, whether

jobsite, field office, division office, regional office, home office, or otherwise will be paid in accord with **Specification 4-3**. Care should be used to ensure that profit is not allowed more than once, such as applying a profit markup to total cost which includes unit price items already allowing for profit. Anticipated profits should not be allowed due to the difficulty in verifying whether or not such profits are under the realm of Contractor risk. Profits or markups on the additional expenses Contractor's incur as a result of a disruption/delay claim are not allowed.

These costs are to be provided by the Contractor and may be subject to audit by either the Department's Inspector General's staff.

Prime Contractor Markups on Subcontract Invoices: Markups are to be allowed as per **Specification 4-3**.

Interest: Compensation should not be allowed for any interest added to a Contractor's claim except as provided in the **Specification 9-9** for interest payments after the settlement of the claim.

Insurance and Bond Premium: General Liability Insurance and Bond will be allowed as per **Specification 4-3**.

7.5.19 Negotiations and Resolution Processing

For any contract change involving monetary compensation see **CPAM Section 7.3**.

7.5.20 Claims Against Utility Performance

Project Level Responsibilities

This section applies only to claims against the utility owner or its agents.

(1) If the utility owner, having been notified under **CPAM Section 7.5.8** of this procedure, fails to reach an agreement with the Contractor by 60 days after receipt of such notice, the Resident Engineer should schedule negotiations with the Contractor. Prior to negotiations the Resident Engineer shall notify the utility owner of time and location of the scheduled negotiations. Refer to **Sample Letter No. 3, Utility Company Notification, (Guidance Document 7-5-D)**. A copy of the **Utility Company Notification** letter shall be sent to the Office of Comptroller-General Accounting Office, Locally Funded Agreement Section.

(2) Representatives of the utility owner who may be in attendance at the negotiations

meeting may present facts relating to the conditions that existed.

(3) If necessary following negotiations, the Resident Engineer will initiate a request for funds and a **Supplemental Agreement** as appropriate to settle the claim and, within 60 days, make any necessary demands against the utility owner for reimbursement of costs for which the Utility was found to be responsible. Refer to **Sample Letter No. 4, Utility Company Notification of Demand for Reimbursement**, (**Guidance Document 7-5-E**). A copy of the **Supplemental Agreement** and **Utility Company Notification** letter shall be sent to the Office of Comptroller-General Accounting Office, Locally Funded Agreement Section.

(4) If the claim is not settled within 60 days, the matter shall be referred to the District Counsel for litigation. A copy of the referral notification to the District Counsel shall also be sent to the Office of the Inspector General and to the Office of Comptroller-General Accounting Office, Locally Funded Agreement Section.

(5) The collection of all funds due to the Department must be in accordance with the collection effort provisions outlined in **Procedure No. 350-060-303, Accounts Receivable**.

7.5.21 Claim Settlement

(A) Federal Aid Participation (F.A.P.) Projects With Claim Settlements Less Than \$200,000

Claims on F.A.P. projects having claim settlements less than \$200,000, which do not involve claims for acceleration or delay, and are not the result of arbitration, court judgment or administrative review, shall be proposed for Federal Aid participation.

The Office of Inspector General, if asked by the FHWA Division Administrator, must review and evaluate any claim submitted to the FHWA for participation with an audit.

(1) FHWA Projects of Division Interest

District Level Responsibilities

The DCE shall prepare a letter asking for FHWA concurrence with the District's recommendations on PoDI projects. Refer to **Sample Letter** to FHWA Requesting Concurrence and Participation in a Claim Settlement, (**Guidance Document 7-5-F**).

The FHWA will stamp a copy of the Department's request letter. On the stamped portion,

they will indicate their disposition of the Department's request. This will be expressed in days and dollars. The stamped copy of the letter will be returned to the DCE with a copy to the State Construction Office. The DCE shall note reasons for non-concurrence and any appeal made on the district copy.

(2) Delegated Projects

District Level Responsibilities

The District Construction Engineer will determine FHWA participation on delegated projects. This will be done at the time of recommending approval for the Supplemental Agreement. The guidelines contained in the latest version of the ***Florida Federal Aid Partnership Agreement, Procedure No. 700-000-005***, as well as past precedents and ***CPAM Section 7.3.11*** shall be used in determining Federal Aid participation.

(B) F.A.P. Projects With Claim Settlements of \$200,000 or More

F.A.P. projects that have delay and/or acceleration claims, claim settlements totaling \$200,000 or more and claims involving arbitration, court judgments, or administrative board review shall be submitted to the FHWA for concurrence. The Office of Inspector General, if asked by the FHWA Division Administrator, must review and evaluate any claim submitted to the FHWA for participation with an audit.

Resident Level Responsibilities

For claims over \$200,000 and claims the district anticipates will be over \$200,000, the Resident Engineer will notify the State Construction Office of the claim by memo as soon as the Resident Engineer becomes aware of it.

District Level Responsibilities

The DCE will keep the Director, Office of Construction advised of the progress in resolving the claim by forwarding to the State Construction Office copies of the Contractor's correspondence on the claim and copies of all letters from district personnel to the Contractor, offering or confirming a resolution of the claim.

The DCE shall prepare a formal request for FHWA participation, setting forth in writing the legal and contractual basis for the claim, together with the cost data and other facts supporting the settlement. The request will be sent to the Director, Office of Construction

for concurrence. The Director will either send the claim back to the District for further review/clarification or forward the claim package to the FHWA with a letter of concurrence.

(C) Claim Settlement Greater Than \$500,000

District Level Responsibilities

For each claim resolution resulting in a **Supplemental Agreement** or other contract modification that increases the value of the contract by more than \$500,000, the District Director of Operations will certify in writing that there are no facts or circumstances relating to the settlement, **Supplemental Agreement**, or other contract modification that would indicate that such was affected by any improper influences or by any improper intervention on behalf of the Consultant or Contractor by any state officer, state employee or any other person outside the Department. Place a copy of this certification in all the contract claim files mentioned in **CPAM 7.5.11** and attach a copy of it to all copies of the contract change used to pay the claim settlement which are distributed with back-up documentation in accord with **CPAM 7.3**. On Federal-Aid contracts only send a copy to the District Federal-Aid coordinator. Refer to **Sample Letter, Claims Settlement Certification, (Guidance Document 7-5-F)**.

If a written request is submitted to the Department's Inspector General by the District Secretary or the Director, Office of Construction, then the Inspector General shall perform an independent audit on a claim which results in a settlement, **Supplemental Agreement** or other contract modification which increases the value of the contract by more than \$500,000 and shall determine whether the claim has been processed in accordance with all applicable laws, rules and procedures.

Claim Settlements greater than \$500,000 require the advance approval of the Chief Engineer.

7.5.22 Settlement Supplemental Agreement

Resident Level Responsibilities

Once the Department has agreed on a resolution, participation has been solicited from FHWA and the availability of funds has been certified by the Comptroller's Office, the Resident Engineer's staff shall process a supplemental agreement to pay the claim in accord with **CPAM Section 7.3**.

7.5.23 Court Ordered Claim Settlement

District Level Responsibilities

Upon receipt from the Department's attorney of a properly executed "Final Judgment" related to a court ordered payment, the DCE will produce a **Receiving Report and Invoice Transmittal (RRIT), Form No. 350-060-02**. The date of the Judge's signature of the "Final Judgment Against FDOT" must be placed on the line labeled "DATE SERVICES RECEIVED." The words "FINAL JUDGMENT MADE AGAINST FDOT" shall be typed in above the "DATE SERVICES RECEIVED" line. **Note:** the RRIT for a Claims Settlement must be properly coded for FHWA participation and non-participation by FHWA or the DCE's staff personnel. The RRIT will be executed by the DCE's staff personnel on the "SUBMITTED BY" line and by the DCE or his delegate on the "APPROVED FOR PAYMENT" line. The executed RRIT, the properly executed Final Judgment, and a cover memorandum from the DCE to the Department's Comptroller stating that this is an "URGENT CLAIM SETTLEMENT RESULTING FROM A FINAL JUDGMENT AGAINST FDOT" will then be submitted. The DCE will also send a copy of this package to the Department's attorney who had advised the district on this claim settlement.

Upon receipt of the package of documents from the DCE, the Department's Comptroller will calculate the amount of any post-judgment interest due and forward the package to the State Comptroller for payment with a letter stating the judgment amount and the amount of any post-judgment interest which may be due. A copy of this cover letter will also be sent to the Department's Attorney and the DCE.

7.5.24 Claim Denial

District Level Responsibilities

The DCE shall send a letter to the Contractor denying the claim after consulting with the Office of General Counsel.

If any issues contained in the Contractor's claim merit full or partial pay but the Contractor refuses to settle that portion of the claim; then a unilateral supplemental agreement may be used to make that payment as outlined in the discussion of unilateral payments or supplemental agreements in **CPAM 7.3**.

7.5.25 Claim Appeal

District Level Responsibilities

When the Contractor will not accept the District's denial or settlement offer on a claim, then the appeal process will be governed by the contract.

Note: If the contract contains **Specification 8-3.7 Disputes Review Board**, then the appeal process must be handled by the Disputes Review Board before the Contractor can take the issue to arbitration or litigation as outlined in **Specification 8-3.7**.

7.5.26 Claim Records Storage and Retention

Resident Level Responsibilities

All of the claim files mentioned in **CPAM 7.5.11** are to be combined into a single claim file and any of the following items not already included in that file are to be added to it including the claim package, the Entitlement Analysis, the Engineer's Estimate, the **Statement of Claim Settlement Costs**, any related supplemental documentation, any related review analysis, any related recommendations, any related settlement or denial documentation, any related letters, any related certifications and any other related correspondence. This claim file shall be stored with the other project records. If a Consultant CEI was used on the project, the file should be given to the Construction Program Manager for storage. File retention, disclosure, exemptions, and privileges are subject to existing Florida law.

A flow chart of the claims process is shown on the State Construction Office website section for **CPAM**.

Guidance Document 7-5-A

SAMPLE LETTER NO 1 UTILITY COMPANY NOTIFICATION

XYZ Utility Company

DATE:

RE:

Financial Project ID: XXXXXX-X-XX-XX

FAP No.: XXX-X (XX)
Contract No.: XXXXXXXX
Local Description:
County: XXXXXXXXXXXXX

Dear Sir or Madam:

Please be advised that the Florida Department of Transportation has been notified by (Contractor's Name), the Contractor for the above referred project that they intend to submit a claim for additional compensation due to a changed condition caused by your company's alleged failure to perform work in accordance with the utility work schedules or other relocation agreements.

Pursuant to Florida Law your company may be responsible for these additional costs. This office will furnish you additional information in regard to the circumstances the Contractor is claiming. The Department will keep records to document the conditions we observe during the period in question.

Sincerely,

Resident Engineer

cc: Contractor
Project Administrator
District Construction Engineer
District Utilities Engineer
Director, Office of Construction
Office of General Counsel
District Chief Counsel

Guidance Document 7-5-B

RESOURCES OF INFORMATION AND DOCUMENTATION

1. CONTRACT DOCUMENTS

1. Special Provisions
2. Plan Notes
3. Plan Drawings
4. Roadway and Traffic Design Standards
5. Developmental Specifications
6. Supplemental Specifications
7. Standard Specifications
8. Contract Bid Proposal and Bid Tabulations

2. PROJECT RECORDS

1. Daily and Weekly Reports of Construction
2. Test Reports
3. Progress Estimates
4. Daily Ledger
5. Weekly Estimate Worksheets
6. Utility Diaries
7. Record of Preconstruction Reports and Records
8. Various Construction Reports and Records for Items of Work
9. Time Extensions
10. Change Orders
11. Supplemental Agreements
12. Shop Drawings
13. Work Progress Schedules and Revisions
14. Records of Equipment, Labor and Material Used on Claim Related Work

3. CONTRACTOR'S RECORDS

1. Time Sheets
2. Certified Payrolls
3. Material Invoices
4. Equipment Rental Invoices
5. Subcontracts
6. Prequalification Records

Guidance Document 7-5-B

4. CORRESPONDENCE

1. Contractor's Notice of Intent to File Claim
2. Correspondence to and from Contractor
3. Correspondence to and from Designer
4. Inter-Department Correspondence and Memos
5. Correspondence to and from FHWA
6. Inspection Reports

5. MISCELLANEOUS

1. Phone Records
2. Meeting Minutes
3. Photographs
4. Statements of Witnesses
5. Weather Data
6. As-Built Schedules
7. Estimates Desk Review
8. Designer's Files
9. Specifications and Estimates File
10. Utility Files
11. Video Tapes

Guidance Document 7-5-C

**SAMPLE LETTER NO. 2
UTILITY COMPANY NOTIFICATION**

XYZ Utility Company

DATE:

RE: Financial Project ID: XXXXXX-X-XX-XX

FAP No.: XXX-X (XX)

Contract No.: XXXXXXXX

Local Description:

County: XXXXXXXXXXXXX

Dear Sir or Madam:

By letter dated _____ from _____, you were advised that (Contractor's Name), the Departments Contractor for the referenced project, had notified us of its intent to submit a claim for additional compensation due to a changed condition caused by your company's alleged failure to perform work in accordance with the utility work schedules or other relocation agreements. The Department has received a detailed statement of claim from the Contractor. We, request that you respond directly to the Contractor to settle the matter, and notify this office within 15 days as to your position concerning this claim.

If both you and the Contractor agree that negotiations are progressing but a final settlement has not been reached within 60 days, then a time extension (up to 60 days, 120 days total) may be requested.

If you and the Contractor fail to reach a settlement within 60 days and any requested time extension or fail to reach a settlement within 120 days, the Department will negotiate a settlement with the Contractor and seek reimbursement from your company of any costs that you are responsible for.

Sincerely,

Resident Engineer

cc: Contractor
Project Administrator
District Construction Engineer
District Utility Engineer
Director, Office of Construction
Office of General Counsel
District Chief Counsel

Guidance Document 7-5-D

**(a) SAMPLE LETTER NO. 3
UTILITY COMPANY NOTIFICATION**

Date

XYZ Utility Company

RE: Financial Project ID: XXXXXX-X-XX-XX
FAP No.: XXX-X (XX)
Contract No.: XXXXXXXXX
Local Description: XXXXXXXXXXXXX
County: XXXXXXXXXXXXX

Dear Sir or Madam:

By letter dated _____ we advised your company that _____ (Contractor's Name), the Departments Contractor for the referenced project, has submitted a detailed statement of claim for additional compensation due to a changed condition caused by your company's alleged failure to perform work in accordance with the utility work schedules or other relocation agreements.

INSTRUCTION: **USE ONLY 1** OF THE 2 FOLLOWING PARAGRAPHS

Sixty days from the date of that letter have elapsed and we have not received any notification that your company has reached an agreement with the Contractor on a settlement of this claim. During this period we have not received a time extension request from your Company, stating that your company and the Contractor agree that negotiations are progressing and that a settlement is expected within the next 60 days. Accordingly, we intend to proceed with the negotiation of a settlement with the Contractor on this claim.

- OR -

Since 120 days from the date of that letter have elapsed and we have not received any notification that your company has reached an agreement with the Contractor on a settlement, we intend to proceed with the negotiation of a settlement with the Contractor on this claim.

Please be advised that representatives of the Department and the Contractor will meet at (Time) on (Date) at (location of meeting) to negotiate a settlement with the Contractor. We urge your attendance since the Department will seek reimbursement from your company of any costs that you are responsible for.

Sincerely,

Resident Engineer

cc: Contractor
Project Administrator
District Utility Engineer
District Construction Engineer
Director, Office of Construction
Office of General Counsel
District Chief Counsel
Office of Comptroller, Attention: General Accounting Office, LFA Section

Guidance Document 7-5-E

**SAMPLE LETTER NO. 4
UTILITY COMPANY NOTIFICATION OF DEMAND FOR REIMBURSEMENT**

XYZ Utility Company

DATE:

RE: Financial Project ID: XXXXXX-X-XX-XX
FAP No.: XXX-X (XX)
Contract No.: XXXXXXXXX
Local Description: XXXXXXXXXXXXX
County: XXXXXXXXXXXXX

By letter dated (____) your company was advised that (Contractors Name) the Departments Contractor for the referenced project, has submitted a detailed statement of claim for additional compensation due to a changed condition caused by your company's alleged failure to perform work in accordance with the utility work schedules or other relocation agreements.

A settlement meeting was held on (Date) between representatives of your firm, the Contractor and the Department's representatives in an attempt to settle the claim. The meeting resulted in an impasse between your firm and the Contractor.

The Department has reviewed the claim from the Contractor and has determined that the Contractor's claim is justified. The Department has entered into an Agreement with the Contractor to provide additional compensation in the amount of (\$ AMOUNT) to resolve the Contractor's claim associated with the changed condition caused by your company's failure to perform work in accordance with the utility work schedules or other relocation agreements.

The Department has also determined that your company is liable for costs in the amount of (\$ AMOUNT) and hereby demands reimbursement to the Department.

Sincerely,

Resident Engineer

cc: Contractor
Project Administrator
District Utility Engineer
District Construction Engineer
Director, Office of Construction
Office of General Counsel
District Chief Counsel
Office of Comptroller, Attention: General Accounting Office, LFA Section

Guidance Document 7-5-F

SAMPLE LETTER TO FHWA REQUESTING CONCURRENCE AND PARTICIPATION IN A CLAIM SETTLEMENT

Date

FHWA Division Administrator
Federal Highway Administration
545 John Knox Road, Suite 200
Tallahassee, Florida 32303

Attention: _____ (Transportation Engineer)

Subject: Recommendation for FHWA participation in a claim settlement
Financial Project ID.: XXXXXX-X-XX-XX

Contract No.: XXXXXXXX
F.A.P. No.: XXXX-XXX-X
County: XXXXXXXXXXXXX
Contractor's Request No.: XXXXXXXXXXXXX

Enclosed is a copy of the Department's evaluation of the subject claim. Our analysis concludes the following claim for \$ _____ is justified.

We respectfully request FHWA concurrence and participation.

Sincerely,

District Construction Engineer

cc: Director, Office of Construction
Resident Engineer
District Federal-Aid Coordinator

Guidance Document 7-5-G

**SAMPLE LETTER
CLAIMS SETTLEMENT CERTIFICATION**

Pursuant to Section 337.221, Florida Statutes, the following certification is made as to the terms of Supplemental Agreement No. _____, dated Month XX, XXXX, on the Florida Department of Transportation Contract No. XXXXX:

I, _____ (NAME) _____, District Director of Operations, hereby acknowledge, attest and affirm that I have made reasonable inquiry and, based upon my personal knowledge as to the negotiations and circumstances; there are no facts or circumstances relating to Supplemental Agreement No. _____ that would indicate that the agreement was affected by any improper influences or by any improper intervention on behalf of the Contractor, by any state officer, state employee, or any other person outside the Department.

(NAME)
District Director of Operations

Sworn to and subscribed to me this _____ day of _____, XXXX.

Notary Signature

Commission Expires on _____, XXXX.

Distribution: District Federal-Aid Coordinator (on Federal-Aid contracts only)
All contract claims files mentioned in CPAM Section 7.5.7.4
Attach to all copies of the contract change used to pay the claim settlement
which are distributed with back-up documentation

Attachment 7-5 CONSTRUCTION CLAIMS FLOWCHART

