

November 21, 2000

This Bulletin has Expired

CONSTRUCTION BULLETIN NO. 03-00

**TO: DISTRICT CONSTRUCTION ENGINEERS
DISTRICT CPAM COORDINATORS**

FROM: Greg Xanders, State Construction Engineer

COPIES: Ken Morefield, Freddie Simmons, Charles Goodman, Archie Montgomery
James St. John, Ron Gressel, Task Team Members

SUBJECT: CPAM REVISIONS TO CHAPTER 4 IN RESPONSE TO OIG REPORT 04G-9005

A cross functional task team was convened to resolve 9 issues raised by the Florida Department of Transportation's Office of the Inspector General (OIG) in its June 2000 report on Construction Contract Claim Settlements (Report 04G-9005). The team met 3 times, in Tallahassee, starting on August 2, 2000. On August 7, 2000 the Federal Highway Administration (FHWA) stated the federal-aid funds could not be used in paying the costs of any more construction contract claims until the issues raised in the OIG's report had been resolved and the FHWA had reviewed the results. At the conclusion of the third meeting of the claims task team on August 30, 2000, eight of the nine issues were resolved by consensus. On October 4, 2000 the final issue was resolved at a meeting with the Assistant Secretary, the Department's Inspector General and several task team members. On, October 27, 2000 the Secretary confirmed his support for the task team's resolutions and the FHWA agreed that when the required changes to the CPAM are implemented by this Construction Bulletin, claims prepared with the documentation outlined in this bulletin will again be eligible for Federal Aid with one exception. The exception is the cost paid to the Contractor in excess of the value of the work estimated by FDOT for the sole purpose of avoiding the risk of failing to settle the claim, these costs will be defined as "claim settlement costs" and the FHWA has stated these costs will **NOT** be eligible for federal aid. The FHWA has also stated that the federal aid eligibility for claim costs would again be revoked if the changes outlined in this construction bulletin are not written into the CPAM within the 6 months for which this bulletin is a valid amendment to the Contract Project Administration Manual (CPAM). Finally, the FHWA stated that claim settlement payments approved by the Department from August 7, 2000 to November 21, 2000 will be federal aid ineligible. The following required changes will be incorporated into the CPAM (procedure topic 700-000-000) within 90 working days (by March 26, 2001). Please share a copy of this bulletin with your Resident Engineers and implement these changes immediately.

Section 4.4.4

Delete definition of "Construction Contract Claim (Claim)" and substitute the following:

A written demand submitted to the Department by the Contractor, in compliance with the Standard Specifications, seeking additional monetary compensation, time or other adjustments to the contract, the entitlement or impact of which is disputed by the Department.

Section 4.4.5

Add the following sentence at the end of the first paragraph:

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; then, the Contractor will be paid no more than the engineer's most recent estimate multiplied by the percentage of entitlement from the most recent "Entitlement Analysis". See section 4.4.8 for a description of an "Engineer's Estimate" and an "Entitlement Analysis".

Section 4.4.7.2

Revise title of section 4.4.7.2 as follows:

Change section number 4.4.7.2 to 4.4.7.2.1

Then add new section 4.4.7.2. Assistance

Add New Section 4.7.2.2 State General Counsel's Office

For additional assistance on difficult claims the Special Counsel for Construction Claims at the Office of the General Counsel may be contacted in accord with the district's policy on such contacts. The District Construction Engineer will set the district's policy on when such contacts are appropriate. The Special Counsel for Construction Claims can be contacted as follows:

FDOT Office of the General Counsel
Attn: Special Counsel for Construction Claims
605 Suwannee St. Mail Station 58
Tallahassee, FL 32399-0458

Telephone Voice: (850) 414-5265 or SunCom 994-5265
 Fax: (850) 488-4412 or SunCom 278-4412

Add New Section 4.4.7.2.3 Office of the Inspector General

For additional assistance on difficult claims the Construction Claims Audit Coordinator at the Office of the Inspector General may be contacted in accord with the district's policy on such contacts. The District Construction Engineer will set the district's policy on when such contacts are appropriate. The Construction Claims Audit Coordinator can be contacted as follows:

FDOT Office of the Inspector General
Attn: Construction Claims Audit Coordinator
605 Suwannee St. Mail Station 44
Tallahassee, FL 32399-0450

Telephone Voice: (850) 488-2501 Ext. 129 or SunCom 278-2501 Ext. 129
 Fax: (850) 488-4417 or SunCom 278-4417

Section 4.4.8

Revise title of section as follows:

4.4.8 Minimum Documentation by The Department's Construction Staff

Add following paragraphs at end of section 4.4.8

All contract claims need 3 pieces of written documentation. The first is an "Entitlement Analysis" stating the percentage entitlement up to 100%. The second is a cost and time analysis called the "Engineer's Estimate" which will be stated in dollars for extra work and contract days for delays. The third is a "Statement of Claim Settlement Cost", which are those costs the Department does not believe it owes the Contractor but is willing to pay to avoid the risks associated with not settling the claim. The first 2 analyses may be amended until the end of negotiations.

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.

The "Entitlement Analysis" should state the claim issues as follows: for each issue it should state the reason for the Contractor's full or partial entitlement. If the statement of an entitlement reason can be accomplished or clarified by referencing an explanation in previous project correspondence this should be done. A copy of that project correspondence will be attached to and made a part of the "Entitlement Analysis". In the case of partial entitlement the analysis must state the numeric percentage entitlement the Contractor is due. This analysis should be labeled "Entitlement Analysis" and it should be signed and dated by the engineer producing it. It may subsequently be amended by adding a cover sheet to the original analysis. This cover sheet must state the new percentage of entitlement for one or more of the issues covered in the analysis and the reason for each such change. This amendment should be labeled "Amendment to Entitlement Analysis" and signed and dated by the engineer producing it. Before beginning negotiations, the Department's negotiators should have full knowledge of the Department's entitlement position on each of the issues.

The "Engineer's Estimate" must state all the issues, the justifiable cost for each and the basis for each of the justifiable costs. The minimum elements of an engineers estimate must include the Contractor's quote where one is available. Where the unit prices in the Contractor's quote are reasonable, a simple summary of quantities times unit price is required. Where the Contractor has already done this it will be acceptable for the Department's engineer to note on the Contractor's quote, that it has been checked and is reasonable. The FDOT's engineer should sign and date the notation and it will become the "Engineer's Estimate" amount although the basis of the estimate must still be attached.

The basis for "Engineer's Estimate" is an integral part of and must always be attached to the "Engineer's Estimate". That basis must show the justifiable costs for the various issues covered. A justifiable cost can be anything delivered as an overrun at a unit price included in the original contract, or at cost which does not exceed the costs determined for that type of work by the most applicable State or District AKBAR CES/CAS Pay Item Search for the most recent twelve to twenty-four months.

The justifiable costs may also be based on a resource use approach. Although the AKBAR CES/CAS Pay Item Search is simpler and preferable where data is available. In the resource approach, additional contract time should be based on the delays to the critical items of work; the price should be based on the costs of equipment, labor, material and supplies used; as well as, General Liability Insurance and Bond, subcontracted work and mark-ups for each shown in *Standard Specifications, Section 4-3*. The Department's current policy is to grant only justifiable contract time.

In a claim negotiation, no contract time beyond that determined by the Department as required to perform the contract work contemplated in the claim will be granted in order to induce the Contractor to settle the claim. In the case of a disagreement with the Contractor on the justifiable quantity of time the Contractor will be instructed to handle the matter as a monetary claim. Where additional information comes to light through this process the Department may amend its justifiable quantity of time to reflect the new information. Where the resource approach is used to justify an increase the original "Engineer's Estimate" after the work is complete, it must be based on actual rather than estimated resource quantities.

The "Engineer's Estimate", including the attached basis, should be labeled "Engineer's Estimate", and it should be signed and dated by the engineer producing it. The "Engineer's Estimate" may subsequently be amended by adding a cover sheet to the original estimate. This cover sheet must state the new justifiable amount of contract days and/or dollars for one or more of the issues covered in the estimate and the reason for each such change. This amendment should be labeled "Amendment to Engineer's Estimate" and it should be signed and dated by the engineer producing it.

The "Statement of Claim Settlement Cost" is a required part of any contract change documentation where the Department is willing to pay more than it believes it owes the Contractor to avoid the risks associated with not settling the claim. Such "Claim Settlement Costs" will always be Federal Aid Non-Participating (FANP). The claim settlement cost is defined as that amount paid to the Contractor to settle a claim in excess of the summation (for all issues) of the "Engineer's Estimate" for each issue multiplied by the corresponding "Entitlement Analysis" percentage for each issue. Where claim settlement costs are paid, the individual deciding that payment is justified will attach a signed and dated cover sheet to a package containing the most recently amended "Engineer's Estimate" and the most recently amended "Entitlement Analysis". This cover sheet will be labeled "Statement of Claim Settlement Cost". This sheet will show the total amount of the claim settlement costs for all issues covered by the contract change and state the reasons for its payment. This package and its cover sheet will comprise the minimum required back up documentation for a claim settlement.

Where no claim settlement cost are incurred, and the Contractor agrees to accept the contract time and monetary compensation offered as a complete settlement of the issues, the contract change will be considered a negotiated settlement and a package containing the most recently amended "Engineer's Estimate" and the most recently amended "Entitlement Analysis" will comprise the minimum required back up documentation.

Section 4.4.9

Add the following at the beginning of the first paragraph of this section;

For contracts subject to the year 2000 edition of the Standard Specifications or any subsequent revision of those specifications, the Contractor's notice requirements and the content of the Contractor's written claim submission is stated in Standard Specification 5-12. These requirements are

to be enforced. See section 4.4.5 of the CPAM for a discussion of the calculation of compensation when the Contractor has failed to file a timely notice of intent to claim.

Section 4.4.10.1

Delete last sentence of first paragraph and substitute following sentence;

It is at these levels that all facts are documented from project records and the original “Entitlement Analysis” and “Engineer’s Estimate” are produced.

Section 4.4.10.2

Substitute the word entitlement for the word eligibility in the paragraph of this section.

Section 4.4.10.3

Delete first paragraph and substitute following;

Determining the extent of the 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 has incurred or will incur must be determined.

Section 4.4.10.3 (7)

Delete first sentence of first paragraph and substitute following sentence;

A reasonable profit, in accord with the markups allowed in Standard Specification 4-3, may be considered on a claim for extra work performed.

Section 4.4.10.3 (8)

Delete first sentence of first paragraph and substitute following sentence;

Compensation for unabsorbed fixed overhead costs on the project may be considered, in accord with the markups allowed in Standard Specification 4-3.

Section 4.4.10.4

Delete first sentence of first paragraph and substitute following paragraphs;

For any contract change involving monetary compensation:

1. If, for all issues covered in the change, the “Entitlement Analysis” percentage multiplied by the “Engineer’s Estimate” of the maximum reasonable value of the work and or delay (with out regard to risk arising from failure to settle) is larger than the Contractor’s request for compensation and contract time, this is a negotiated settlement. It is not considered a contract claim and the “Entitlement Analysis” and “Engineer’s Estimate” will be sufficient to document this contract change.

2. As soon as a need for additional work is established, the district's construction staff should prepare an "Entitlement Analysis" and an "Engineer's Estimate" (this can be as simple as an AKBAR pay item listing showing that the Department has paid that price on that item in the district or the state in the last 6 to 24 months. They should then immediately request an encumbrance.

3. The district's construction staff should then begin negotiations for the work, but should not authorize it until funds are encumbered. At this time the district staff should also encumber any additional funds required for a quickly concluded negotiated settlement, or the amount of the most recently amended "Entitlement Analysis" percentage multiplied by the most recently amended "Engineer's Estimate".

4. If negotiations have not been concluded by the time funds are encumbered the district construction staff **should not** immediately process a unilateral SA.

5. The district construction staff should then direct the Contractor to perform the work while continuing to negotiate a supplemental agreement to cover it until the work is completed.

6. If the work has been completed and neither the AKBAR pay item analysis or resource use analysis based on the manpower, equipment, materials and time used (including additions and markups allowed by Std. Spec 4-3), will justify the minimum amount requested by the Contractor then:

A. Where the Resident Engineer or higher district management personnel, as determined by the district, agrees that claim settlement costs are to be paid, they will attempt to negotiate a settlement in excess of the justified costs. If the Contractor accepts the Department's offer, the individual authorizing that decision for the district will attach a signed and dated cover sheet to a package containing the most recently amended "Engineer's Estimate" and the most recently amended "Entitlement Analysis". This cover sheet will be labeled "Statement of Claim Settlement Cost". This sheet will show the total amount of the claim settlement costs for all issues covered by the contract change and state the reasons for its payment. This package and its cover sheet will comprise the minimum required back up documentation for a claim settlement. Any additional funds required will be encumbered and an SA to settle the issue will then be prepared. Or...

B. If the Contractor refuses to accept the maximum amount developed in A. above, the district staff will prepare a unilateral SA to pay the Contractor the amount of the justified costs. For contracts subject to the year 2000 edition of the Standard Specifications or any subsequent revision of those specifications, the method to calculate these costs is stated in Standard Specification 4-3 and the "Engineer's Estimate" and "Entitlement Analysis" must be adjusted accordingly. For these contracts the methods of calculating any claim settlement costs beyond those developed under Standard Specification 4-3 are covered in Standard Specification 5-12, and it should be noted that only delay costs will be considered. For contracts subject to a version of the Standard Specifications prior to the year 2000 edition, these costs are the summation, for all issues, of the "Engineer's Estimate" for each issue multiplied by the corresponding "Entitlement Analysis" percentage for each issue. The Contractor will then be required to handle any further request for compensation as a claim.

Section 4.4.11

Add the following sentence at the end of the first paragraph:

At a minimum, this consists of the original “Entitlement Analysis” and any amendments to it; the original “Engineer’s Estimate” and any amendments to it; and, finally (if it exists) the original “Statement of Claim Settlement Cost” and any amendments to it.

Section 4.4.11.1

Delete section 4.4.11.1

Section 4.4.11.2

Renumber as section 4.4.11.1

For questions on these changes please contact Randy Borgersen (SunCom 994-4168 E-mail CN982RB).

GX/bc