

MICHIGAN DEPARTMENT OF TRANSPORTATION
CONSTRUCTION CONTRACTOR CLAIMS PROCEDURE
(Revised September, 2018)

Contractor Notice of Intent to Claim

A claim occurs when the Contractor does not agree with the decision of the Engineer in regards to compensation for work performed and/or the time required to complete work operations including requests for extension of time. In these disagreements the Contractor must provide a notice of intent to file a claim to the Engineer before the work begins if not based on the assessment of liquidated damages. The Contractor's Notice of Intent to File Claim must conform to the requirements of subsection 104.10 or 108.09 of the Standard Specifications for Construction. Upon receipt of the Contractor's Notice of Intent to File Claim, the Engineer will:

1. Sign and date the Contractor's Notice of Intent to File Claim.
2. Return a signed copy of such notice to the Contractor.
3. Send a copy of the signed notice to the following individuals:
 - a. TSC Manager
 - b. Region Construction Engineer

On local agency projects the Contractor must:

1. Submit the Notice of Intent to File Claim to the Local Agency Project Engineer.
2. Send a copy of the notice to the TSC Construction Engineer.

On local agency projects, the TSC Construction Engineer or their designee will:

1. Upon receipt, sign and date the Contractor's Notice of Intent to File Claim.
2. Return a signed copy of such notice to the Contractor.
3. Send a copy of the signed notice to the Local Agency Project Engineer.
4. Send a copy of the signed notice to the following individuals:
 - a. TSC Manager
 - b. Region Construction Engineer

Claims Process

Upon the Contractor filing a Notice of Intent to File Claim, the Contractor and the Engineer will work to resolve the potential claim issue before (if possible) the disputed work begins. Efforts should be made to resolve disputes at the lowest possible level. When the Engineer receives Form 1953, Claim Content and Certification, they will issue a documented response to the Contractor's official claim within 30 days. This documented response is to be provided to the Contractor after discussion with the TSC Manager on the respective claim issue. A copy of Form 1953, Claim Content and Certification, and the Engineer's response is to be provided to the Region Construction Engineer and the CFS Construction Contracts Engineer. The claim information is to be entered in the central office claim database after receiving Form 1953.

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Upon completion or final acceptance of the claimed work, if the matter described in the Notice of Intent to File Claim is not resolved, the Contractor may pursue the matter using the following procedures.

Region Office Reviews (ROR)

After Engineer denial of a compensation request or an extension of time request the Contractor may submit a documented request for a ROR to the TSC Construction Engineer. This request must be received by the TSC Construction Engineer within 30 days of the denial of the compensation or time request. The Contractor must send a copy of the documented ROR request to the Local Agency Project Engineer on all local agency projects. The documented request must include the claim package and statements as to why the Engineer decision is being contested.

The Engineer will assemble all documents and records deemed relevant or necessary to support the Engineer's position on the claim and provide the documentation to the TSC Construction Engineer. The TSC Construction Engineer will compile the claim information from the Contractor and the Engineer and submit it to the Region Construction Engineer within fourteen (14) days of receipt of the ROR request.

Upon receipt of the claim information from the TSC Construction Engineer, the Region Construction Engineer will:

1. Create a claim file that will include all documents submitted by the Contractor and all documents supporting the position of the Engineer.
2. Facilitate the ROR meeting. The ROR panel will be determined by the Region Engineer who may also chair the ROR at their discretion. The panel will be comprised of Engineers (TSC Managers, Associate Region Engineers, TSC Construction Engineers, TSC Project Engineers, etc.) in the region who have not been involved with the project. It is recommended that the ROR panel be comprised of at least three members including the chair.
3. Review the claim file for completeness and discuss with the ROR chair. If the ROR chair deems additional information is necessary to better understand the Contractor's claim or the Engineer's position, the ROR chair will provide a documented request for additional information to the Contractor or the Engineer. Any additional information submitted will be provided to the other party by the Region Construction Engineer. Requested information must be submitted in the timeframe specified by the ROR chair. When the claim file has been deemed complete, the ROR chair will determine whether the claim issues are independent or related. A copy of the claim file will be provided to the Contractor no less than seven (7) days prior to the ROR if all claim issues are independent or if all claim issues are related and are included in the claim file. If the claim issues are determined to be related to another claim where the claim information has not been submitted, the claim file is to be returned to the Engineer until the related claim is submitted.

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4. Provide a copy of the ROR package, letter, etc. to the CFS Construction Contracts Engineer.
5. Schedule the ROR for a date no later than 55 days following the Region Construction Engineer's receipt of the claim package from the TSC Construction Engineer.
6. Ensure that the ROR decision is issued to the Contractor within 30 days of the ROR. Any requests for information from the ROR panel will reset the 30 day time period.

The Engineer will present their position at the ROR.

The Region Engineer must either issue the ROR decision or document concurrence with the ROR decision prior to issuance of the ROR decision.

The ROR decision is to be distributed to the Contractor with copies of the letter provided to the following individuals:

1. All attendees of the ROR meeting
2. CFS Construction Contracts Engineer
3. Associate Region Engineer (Development)
4. Engineer of Design
5. FHWA Area Engineer (PoDI projects)
6. Administrator of the Office of Business Development (OBD) for claims involving DBE Contractors and companies.

Upon receipt of the ROR decision, the Contractor has 30 days to initiate one of the following options:

1. Accept the ROR decision in whole.
2. Accept the ROR decision on the independent, unrelated claim issues.
3. Accept the ROR decision on the related claim issues.
4. Appeal the ROR decision in whole.
5. Appeal the ROR decision on the independent, unrelated claim issues.
6. Appeal the ROR decision on the related claim issues.

If the Contractor accepts the ROR decision in whole or in part, the acceptance must be documented to the Region Construction Engineer. The Region Construction Engineer will inform the Engineer of receipt of the Contractor's letter of acceptance. If the ROR decision requires a contract modification, it will be submitted to the Contractor for signature within 30 days of the Region Construction Engineer's receipt of the Contractor's letter accepting the ROR decision.

If the Contractor does not accept the ROR decision, in whole or in part, the Contractor must submit a documented appeal to the Region Construction Engineer within 30 days of receipt of the ROR decision. The documented appeal must include the information required in subsection 104.10.E of the Standard Specifications for Construction, as well as the Contractor's argument for countering the ROR's decision.

If the Contractor fails to document acceptance or appeal of the ROR decision, in whole or in

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part, within 30 days of receipt of the ROR decision, that failure to respond will constitute

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acceptance of the ROR decision by the Contractor. If the ROR decision requires a contract modification, it will be submitted to the Contractor for signature within 30 days of default acceptance of the ROR decision.

Within 30 days of the documented appeal, the Region Construction Engineer will submit the Contractor's appeal, claim file and ROR decision counterarguments to the CFS Construction Contracts Engineer. If the submittal is not electronic up to ten (10) copies of the package must be provided to the CFS Construction Contracts Engineer as noted below.

1. Seven (7) copies for a MDOT project.
2. One (1) additional copy for a local agency project.
3. One (1) additional copy if the claim is over \$100,000.
4. One (1) additional copy if the claim involves force account documentation.

All requests (Department, Local Agency, or Contractor) to deviate from the time frames required for a ROR review must be approved by the Region Engineer.

Central Office Reviews (COR)

After submittal of the Contractor's appeal of the ROR decision, a COR will be scheduled.

Within 30 days of the CFS Construction Contracts Engineer's receipt of the Region Construction Engineer's submission of the claim file, the COR panel members will review the claim file to ensure that all of the information needed to respond to the issues raised in the claim are available for review at the COR. If it is determined that additional information is needed, the COR panel moderator will request that the Contractor or Region Construction Engineer supply the additional information.

The moderator of the COR will be selected by the Engineer of CFS. The moderator's role is to facilitate the COR meeting, guide the deliberative procedures, and provide procedural instructions to all parties where applicable. The moderator will not participate in the decision making process of the COR.

All requested information must be submitted to the COR panel moderator within 15 days of receipt of the moderator's request. If additional information is submitted by either party, the moderator will distribute the information packet to the opposite party at least 10 days prior to the date of the COR.

The COR will be scheduled and conducted no later than 90 days following the receipt of the Contractor's appeal of the ROR decision to the Region Construction Engineer.

The COR panel will be selected by the Engineer of CFS or their designee and will consist of three Department engineers who have had no prior involvement in the project and are not from the same region as the claim. The COR panel composition is:

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1. Region Engineer, serves as panel chair.
2. Lansing Division Engineer, Region Associate Engineer, TSC Manager, Region Construction Engineer, 1 to 2 per panel.
3. TSC Construction Engineer (minimum 3 years construction experience), up to 1 per panel.

If a member of the COR Panel or other participant is unable to attend the meeting, they must contact the Engineer of CFS or the COR panel moderator so that CFS can make alternate arrangements. If the COR panel is short one member on the day of the COR, a Bureau of Field Services Staff Engineer or Lansing Division Engineer with no involvement in the project may fill in as a substitute panel member.

The claim position at the COR will be presented by the Region, although Region Engineers are not to present the claim position. The Engineer is to be present to support the Region and be responsive to inquiries from the COR panel.

The COR will be limited to a review of the material in the claim file, the material submitted as part of the appeal, material provided to the moderator in writing at least 10 days prior to the COR, and the oral presentation made at the COR. New material may not be presented at COR without approval of the COR panel chair.

At the discretion of the COR panel chair, an MDOT technical expert may be assigned to the COR as a subject matter expert to assist the panel on complex topics. The expert will be available during the meeting to provide expertise, answer questions, or clarify technical issues.

The COR decision will be issued to the Contractor within 60 days of the COR date. The COR decision, signed by the Bureau Director of Field Services, will constitute the Department's final decision regarding the claim.

COR decision letters should be streamlined to focus on the COR panel's decision. The recommended format includes the following:

1. Brief statement of the claim with a reference to the COR packet for greater detail and documentation of the Engineer and Contractor's positions.
2. Statement of any new factors considered by the COR panel that were not previously considered and documented in the COR packet.
3. Explanation of the COR panel's decision.
4. There is no need to completely restate the ROR decision. When this abbreviated format is used, attach or reference the ROR decision letter.

Upon receipt of the COR decision, the Contractor has 30 days to complete one of the following options:

1. Accept the COR decision in whole.
2. Accept the COR decision on the independent, unrelated claim issues.

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3. Accept the COR decision on the related claim issues.
4. Non-acceptance of the COR decision.

If the Contractor accepts the COR decision, in whole or in part, the acceptance must be documented to the COR chair within 30 days of the date the COR decision is received.

If the COR claim decision requires a contract modification, it must be submitted to the Contractor for signature within 30 days of the COR chair's receipt of the Contractor's letter accepting the COR decision.

If the Contractor fails to document the acceptance of the COR decision, in whole or in part, within 30 days of receipt of the COR decision, the failure to provide a documented response will constitute acceptance of the COR decision by the Contractor. If the COR decision requires a contract modification, it will be submitted to the Contractor for signature within 30 days of default acceptance of the COR decision.

All requests (Department, Local Agency, Contractor) to deviate from the time frames required for a COR must be approved by the Bureau Director of Field Services.

If the Contractor does not accept the COR decision, the Contractor must document the non-acceptance within 30 days of the date the COR claim decision is received.

General Claim Provisions

1. Decisions made by the Department at any stage in the claim process will not constitute an admission of liability or set future precedent.
2. All claim packages (binders) for any claim level are to be of the following format:
 - a. Contractor position and documentation
 - b. Engineer position and documentation
 - c. ROR decision letter and documentation
3. Related claim issues cannot be separated as they move through the claim process. The Contractor cannot accept an approval of a decision on one of the related issues and appeal the decision on the other related issue. If the Contractor appeals either of the decisions, both issues must advance to the next level.
4. All review meetings (ROR and COR) should follow the following presentation format.
 - a. Contractor Presentation.
 - b. Engineer Presentation (ROR) / Region Presentation (COR)
 - c. Contractor Rebuttal
 - d. Engineer Rebuttal (ROR) / Region Rebuttal (COR)
 - e. Contractor Closing Statement

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5. All claim decisions do not constitute final Department action until all approvals required by the contract are properly obtained.
6. If the ROR or COR panel chair determines the claim package has changed or new claim issues have been introduced, the claim package will be remanded back one step. Claims will also be remanded if the claim amount increases at any review level from the previous level.
7. The Contractor's written acceptance of a ROR or COR panel's decision on a claim item(s) constitutes a settlement of the claim item(s) and bars the Contractor from pursuing further legal remedies against the Department on the settled claim item(s).
8. The term "day" used in these procedures means a calendar day. Should any specified time begin or end on a Saturday, Sunday, or legal holiday, the specified time will begin or end, as applicable, on the next business day following the Saturday, Sunday, or legal holiday.
9. A local agency has no appeal rights for claim decisions.
10. All claim packages submitted to CFS for COR meetings will be audited for compliance to the Standard Specifications for Construction applicable to the respective project. This may also include an audit by the Office of Commission Audit (OCA), which may add up to 60 days to the COR process.
11. It is the responsibility of the Contractor to provide a copy of any claim files or documentation to any subcontractor/supplier involved in the claim.
12. The Contractor must notify any subcontractors/suppliers with an interest in the claim of the scheduled ROR and/or COR time, date, and location.
13. The Contractor must notify the Region Construction Engineer for ROR meetings and the CFS Construction Contracts Engineer for COR meetings at least 10 days prior to the review, if the Contractor will have legal representation present at the ROR or COR.
14. If for any reason the Department will have a representative present from the Attorney General's Transportation Division at either the ROR or COR, the Region Construction Engineer for ROR meetings and the CFS Construction Contracts Engineer for COR meetings will notify the Contractor at least 10 days prior to the ROR or COR.
15. If the claim exceeds \$100,000, the ROR or COR chair has the option of hiring a "ghost writer" to write decision letters on claims at the ROR and COR levels. The chair will contact the CFS Construction Contracts Engineer to initiate the process. The ghost writer should be someone with previous MDOT construction experience and must participate in the claim review meetings as a non-voting panelist. MDOT will pay for the cost of the ghost writer's services.

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16. The ROR or COR chair also has the option of hiring consultants or technical experts to assist on complex claims involving issues with which they have little or no experience. For example, the construction of buildings, complex hi-tech electrical systems, or unique bridges. ROR and COR chairs should contact the CFS Construction Contracts Engineer for assistance in locating and hiring the needed expertise. MDOT will pay the cost of such technical expertise.
17. CFS will review data related to all ROR and COR decisions, and monitor the data for trends that require action. All COR decision letters will be circulated by CFS to Region Engineers, Region Construction Engineers, TSC Managers, TSC Construction Engineers, Division Engineers, and staff engineers for their review.
18. The Attorney General Transportation Office will notify the CFS Construction Contracts Engineer when a Contractor files any court or legal documentation as a result of a claim on any project. The CFS Construction Contracts Engineer will then notify the Engineer and the Region Construction Engineer.

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Federal Participation in Contractor Claims and Court Awards

For all Projects of Division Interest (PODI) and Non-PODI projects:

For any claim:

- The TSC and region may at any time seek the advice of the Federal Highway Administration (FHWA) Area Engineer on claim issues.
- All COR meeting notifications and decision letters for all federal aid projects, regardless of oversight responsibility, are to be sent to the Michigan Division FHWA official mailbox at Michigan.FHWA@dot.gov. FHWA may attend the COR meeting as an observer.
- Upon notice, the CFS Construction Contracts Engineer will provide FHWA's Engineering and Operations Manager and Field Operations Team Leader with any lawsuit or litigation documentation.
- After a lawsuit is settled, the CFS Construction Contracts Engineer will provide FHWA's Engineering and Operations Manager and Field Operations Team Leader with a copy of the court order.

For any claim that cannot be settled at the TSC level, the following claim documentation needs to be in the project file prior to requesting federal participation for both PODI and MDOT oversight projects:

- A statement regarding the legal and contractual basis for the claim.
- A detailed breakdown of all cost data and facts supporting award or settlement including:
 - Costs that are federal aid eligible.
 - Costs that are not federal aid eligible including but not limited to: punitive damages, anticipated profit, attorney's fees of the plaintiff (Contractor), work where an agent of the state acted in gross negligence and items of a claim not dealing with a contractual obligation.
 - Costs pending further evaluation (where further information is needed for a determination).
- A copy of any audit performed or requested by FHWA on the work.
- Justification of any indirect costs when applicable.
- Supporting claim information including but not limited to (as applicable):
 - Analysis of the project schedule or critical path method schedule.
 - Wage rate information
 - Equipment Watch (Blue Book) rates

For all PODI projects:

For any claim settled at the TSC level on a PODI project:

- The claim resolution will have the same approval and documentation requirements as a contract modification.

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For any claim that cannot be settled at the TSC level and proceeds further in the process on a PODI project:

- The FHWA Area Engineer is to be notified in advance of a ROR meeting or a Dispute Review Board hearing and will be sent a copy of the claim package.
- The Region Construction Engineer will send a copy of the ROR decision to the FHWA official mailbox as noted previously.
- The claim documentation (listed above e.g. legal and contractual basis for the claim, breakdown of costs, etc.) will be sent to the FHWA Area Engineer with the contract modification (if applicable from a ROR or COR decision), or be made available electronically.

For any claim that results in a lawsuit on a PODI project:

- The CFS Construction Contracts Engineer will provide a copy of any documentation (e.g. lawsuit, litigation, etc.) for all PODI projects to FHWA's Engineering and Operations Manager and Field Operations Team Leader. A cover letter must be included requesting FHWA review and determination of the extent of involvement in the litigation and participation in any settlement that may result.
- FHWA will send a letter addressing FHWA's participation in the claim to the CFS Construction Contracts Engineer. The letter will do one of the following:
 - Request a meeting with CFS and the Attorney General assigned to the case to discuss and reach agreement on the proposed course of action and level of FHWA involvement.
 - Request that MDOT continue to keep FHWA's Engineering and Operations Manager informed during the course of the litigation.
- The CFS Construction Contracts Engineer will notify the FHWA's Engineering and Operations Manager and Field Operations Team Leader when the Attorney General is involved in settlement discussions. If requested by FHWA, a meeting with the CFS Construction Contracts Engineer and the Attorney General will be scheduled to go over acceptance or rejection of the proposed settlement. At this meeting, the three groups will discuss the legal and factual aspects and reach concurrence on a course of action.
- After the lawsuit is settled, CFS Construction Contracts Engineer will send FHWA's Engineering and Operations Manager and Field Operations Team Leader a letter with the court order. If an award is made, a request for FHWA participation must be included.
- If participation is requested, FHWA will respond in writing to the CFS Construction Contracts Engineer, with a copy to MDOT's Financial Operations Division Administrator.
- If approved for federal participation, additional federal funds will be reimbursed using the normal financial reimbursement procedures.