NOTICE

This Standard Special Provision (SSP) revises or modifies CDOT’s Standard Specifications for Road and Bridge Construction. These are the official instructions for its use on CDOT construction projects, and the Construction Engineering Services Branch has reviewed, approved, and issued it. Use as written without change. Do not use modified versions of this SSP on CDOT construction projects. Do not use this special provision on CDOT projects in a manner other than specified in the instructions without approval by CDOT’s Standards and Specifications Unit. The instructions for use appear below.

Other agencies using the Standard Specifications for Road and Bridge Construction to administer construction projects may use this special provision appropriately and at their own risk.

**Instructions for use on CDOT construction projects:**

Use this standard special provision on all projects.

**Revision of Sections Of 105**

**Dispute Review Board and**

**Claims for Unresolved Disputes**

**Revise Section 105 of the Standard Specifications as follows:**

Delete and replace Section 105.23 (i) with the following:

1. *Dispute Review Board Recommendation*. The DRB shall issue a Recommendation per the following procedures:

1. The DRB shall not make a recommendation on the dispute at the meeting. Before the closure of the hearing, the DRB members and the Contractor and CDOT together will discuss the time needed for analysis and review of the dispute and the issuance of the DRB’s recommendation. The maximum time shall be 30 days unless otherwise agreed to by both parties.

2. After the meeting has been closed, the DRB shall prepare a written Recommendation signed by each member of the DRB. In the case of a three member DRB where one member dissents, that member shall prepare a written dissent and sign it. The DRB’s recommendation shall include the following:

1. A summary of the issues and factual evidence presented by the Contractor and CDOT concerning the dispute.
2. Recommendations concerning the validity of the dispute.
3. Recommendations concerning the value of the dispute as to cost impacts if the dispute is determined to be valid.
4. The contractual and factual bases supporting the recommendation(s) made including an explanation as to why each and every position was accepted or rejected.
5. Detailed and supportable calculations which support any recommendation(s).

3. The chairperson shall transmit the signed Recommendation and any supporting documents to both parties.

**105.24 Claims for Unresolved Disputes delete and replace with the following:**

* 1. **Claims for Unresolved Disputes.** The Contractor may file a claim only if the disputes resolution process described in subsections 105.22 and 105.23 has been exhausted without resolution of the dispute. Other methods of nonbinding dispute resolution, exclusive of litigation, can be used if agreed to by both parties.

This subsection applies to any unresolved dispute or set of disputes between CDOT and the Contractor with an aggregate value of more than $15,000. Unresolved disputes with an aggregate value of more than $15,000 from subcontractors, materials suppliers or any other entity not a party to the Contract shall be submitted through the Contractor per this subsection as a pass-through claim. Review of a pass-through claim does not create privity of Contract between CDOT and any other entity.

Subsections 105.22, 105.23 and 105.24 provide both contractual alternative dispute resolution processes and constitute remedy- granting provisions pursuant to Colorado Revised Statutes (CRS) which must be exhausted in their entirety.

Litigation proceedings must commence within 180-calendar days of the Chief Engineer's decision, absent written agreement otherwise by both parties.

The venue for all unresolved disputes with an aggregate value $15,000 or less shall be the County Court for the City and County of Denver.

Non-binding Forms of alternative dispute resolution such as Mediation are available upon mutual agreement of the parties for all claims submitted per this subsection.

The cost of the non-binding ADR process shall be shared equally by both parties with each party bearing its own preparation costs. The type of nonbinding ADR process shall be agreed upon by the parties and shall be conducted within the State of Colorado at a mutually acceptable location. Participation in a nonbinding ADR process does not in any way waive the requirement that litigation proceedings must commence within 180-calendar days of the Chief Engineer's decision, absent written agreement otherwise by both parties.

1. *Notice of Intent to File a Claim*. Within 30 days after rejection of the Dispute Resolution Board’s Recommendation issued per subsection 105.23, the Contractor shall provide the Region Transportation Director (RTD) with a written notice of intent to file a claim. The Contractor shall also send a copy of this notice to the Resident Engineer. For the purpose of this subsection, Region Transportation Director shall mean the Region Transportation Director or the Region Transportation Director’s designated representative. CDOT will acknowledge in writing receipt of Notice of Intent within seven days.
2. *Claim Package Submission*. Within 60 days after submitting the notice of intent to file a claim, the Contractor shall submit to the RTD five copies of a complete claim package representing the final position the Contractor wishes to have considered. All claims shall be in writing and in sufficient detail to enable the RTD to ascertain the basis and amount of claim. The claim package shall include all documents supporting the claim, regardless of whether such documents were provided previously to CDOT.

If requested by the Contractor, the 60-day period may be extended by the RTD in writing before final acceptance. At a minimum, the following information shall accompany each claim:

* 1. A claim certification containing the following language, as appropriate:
     1. For a direct claim by the Contractor:

CONTRACTOR’S CLAIM CERTIFICATION

Under penalty of law for perjury or falsification, the undersigned, (name) , (title) , of (company) , hereby certifies that the claim of $ for extra compensation and Days additional time, made for work on this Contract is true to the best of my knowledge and belief and supported under the Contract between the parties.

This claim package contains all available documents that support the claims made and I understand that no additional information, other than for clarification and data supporting previously submitted documentation, may be presented by me.

Dated /s/ Subscribed and sworn before me this day of .

NOTARY PUBLIC

My Commission Expires:

* + 1. For a pass-through claim:

PASS-THROUGH CLAIM CERTIFICATION

Under penalty of law for perjury or falsification, the undersigned, (name) , (title) ,

, of (company) , hereby certifies that the claim of $ for extra compensation and Days additional time, made for work on this Project is true to the best of my knowledge and belief and supported under the Contract between the parties.

This claim package contains all available documents that support the claims made and I understand that no additional information, other than for clarification and data supporting previously submitted documentation, may be presented by me.

Dated /s/ Subscribed and sworn before me this day of

NOTARY PUBLIC

My Commission Expires: Dated /s

The Contractor certifies that the claim being passed through to CDOT is passed through in good faith and is accurate and complete to the best of my knowledge and belief.

Dated /s/ Subscribed and sworn before me this day of\_

NOTARY PUBLIC

My Commission Expires:

* 1. A detailed factual statement of the claim for additional compensation, time, or both, providing all necessary dates, locations, and items of work affected by the claim. The Contractor’s detailed factual statement shall expressly describe the basis of the claim and factual evidence supporting the claim. This requirement is not satisfied by simply incorporating into the claim package other documents that describe the basis of the claim and supporting factual evidence.
  2. The date on which facts were discovered which gave rise to the claim.
  3. The name, title, and activity of all known CDOT, Consultant, and other individuals who may be knowledgeable about facts giving rise to such claim.
  4. The name, title, and activity of all known Contractor, subcontractor, supplier and other individuals who may be knowledgeable about facts giving rise to such claim.
  5. The specific provisions of the Contract, which support the claim and a statement of the reasons why such provisions support the claim.
  6. If the claim relates to a decision of the Project Engineer, which the Contract leaves to the Project Engineer’s discretion, the Contractor shall set out in detail all facts supporting its position relating to the decision of the Project Engineer.
  7. The identification of any documents and the substance of all oral communications that support the claim.
  8. Copies of all known documents that support the claim.
  9. The Dispute Review Board Recommendation.
  10. If an extension of contract time is sought, the documents required by subsection 108.08(d).
  11. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:
      1. These categories represent the only costs that, if applicable, are recoverable by the Contractor. All other costs or categories of costs are not recoverable:
         1. Actual wages and benefits, including FICA, paid for additional labor.
         2. Costs for additional bond, insurance, and tax.
         3. Increased costs for materials.
         4. Equipment costs calculated per subsection 109.04(c) for Contractor owned equipment and based on certified invoice costs for rented equipment.
         5. Costs of extended job site overhead (only applies if the dispute also includes a time extension).
         6. Salaried employees assigned to the project (only applies if the dispute also includes a time extension or if the dispute required salaried employee(s) to be added to the Project).
         7. Claims from subcontractors and suppliers at any level (the same level of detail as specified is required for all such claims).
         8. An additional 16 percent will be added to the total of items (1) through (7) as compensation for items for which no specific allowance is provided, including profit and home office overhead.
         9. Interest shall be paid per CRS 5-12-102 beginning from the date of the Notice of Intent to File Claim.
      2. In adjustment for the costs as allowed above, the Department will have no liability for the following items of damages or expense:
         1. Profit in excess of that provided in 12.A.(8) above.
         2. Loss of Profit.
         3. Additional cost of labor inefficiencies in excess of that provided in A. above.
         4. Home office overhead in excess of that provided in A. above.
         5. Consequential damages, including but not limited to loss of bonding capacity, loss of bidding opportunities, and insolvency.
         6. Indirect costs or expenses of any nature in excess of that provided in A. above.
         7. Attorney’s fees, claim preparation fees, and expert fees.

1. *Region Transportation Director Decision*. When the Contractor properly files a claim, the RTD will review the claim and render a written decision to the Contractor to either affirm or deny the claim, in whole or in part, per the following procedure.

The RTD may consolidate all related claims on a project and issue one decision, provided that consolidation does not extend the time period within which the RTD is to render a decision. Consolidation of unrelated claims will not be made.

The RTD will render a written decision to the Contractor within 90 days after the receipt of the claim package or receipt of the audit whichever is later. In rendering the decision, the RTD: (1) will review the information in the Contractor's claim; (2) will conduct a hearing if requested by either party; and (3) may consider any other information available in rendering a decision.

The RTD will assemble and maintain a claim record comprised of all information physically submitted by the Contractor in support of the claim and all other discoverable information considered by the RTD in reaching a decision. Once the RTD assembles the claim record, the submission and consideration of additional information, other than for clarification and data supporting previously submitted documentation, at any subsequent level of review by anyone, will not be permitted.

The RTD will provide a copy of the claim record and the written decision to the Contractor describing the information considered by the RTD in reaching a decision and the basis for that decision. If the RTD fails to render a written decision within the 60-day period, or within any extended time period as agreed to by both parties, the Contractor shall either: (1) accept this as a denial of the claim, or (2) appeal the claim to the Chief Engineer, as described in this subsection.

If the Contractor accepts the RTD decision, the provisions of the decision shall be implemented per subsections 108.08, 109.04, 109.05, or 109.10 and the claim is resolved.

If the Contractor disagrees with the RTD decision, the Contractor shall either: (1) accept the RTD decision as final, or (2) file a written appeal to the Chief Engineer within 30 days from the receipt of the RTD decision. The Contractor hereby agrees that if a written appeal is not properly filed, the RTD decision is final.

1. *Chief Engineer Decision*. When a claim is appealed, the RTD will provide the claim record to the Chief Engineer. Within 15 days of the appeal either party may submit a written request for a hearing with the Chief Engineer or duly authorized Headquarters delegates. The Chief Engineer or a duly authorized Headquarters delegate will review the claim and render a decision to affirm, overrule, or modify the RTD decision per the following.

The Chief Engineer will render a written decision within 60 days after receiving the written appeal. The Chief Engineer will not consider any information that was not previously made a part of the claim record, other than clarification and data supporting previously submitted documentation.

The Contractor shall have 30 days to accept or reject the Chief Engineer's decision. The Contractor shall notify the Chief Engineer of its acceptance or rejection in writing.

If the Contractor accepts the Chief Engineer's decision, the provisions of the decision will be implemented per subsections 108.08, 109.04, 109.05, or 109.10 and the claim is resolved.

If the Contractor disagrees with the Chief Engineer's decision, the Contractor shall either (1) pursue an alternative dispute resolution process per this specification or (2) initiate litigation per subsection 105.24(f).

If the Chief Engineer does not issue a decision as required, the Contractor may immediately initiate litigation per subsection 105.24(f).

For the convenience of the parties to the Contract it is mutually agreed by the parties that any merit binding or De Novo litigation shall be brought within 180-calendar days from the date of the Chief Engineer's decision. The parties understand and agree that the Contractor's failure to bring suit within the time period provided, shall be a complete bar to any such claims or causes of action.

1. *De Novo Litigation* If the Contractor disagrees with the Chief Engineer's decision, the Contractor may initiate de novo litigation to finally resolve the claim that the Contractor submitted to CDOT. Such litigation shall be strictly limited to those claims that were previously submitted and decided in the contractual dispute and claims processes outlined. This does not preclude the joining in one litigation of multiple claims from the same project provided that each claim has gone through the dispute and claim process specified in subsections 105.22 through 105.24. The parties may agree, in writing, at any time, to pursue some other form of alternative dispute resolution.

Any offer made by the Contractor or the Department at any stage of the claims process, as set forth in this subsection, shall be deemed an offer of settlement pursuant to Colorado Rule of Evidence 408 and therefore inadmissible in any litigation.

If the Contractor selected litigation, then de novo litigation shall proceed per the Colorado Rules of Civil Procedure and the proper venue is the Colorado State District Court in and for the City and County of Denver.

Contractor provides written notice of dispute to Project Engineer

Contractor provides written REA including the following:

1. Date of dispute
2. Nature of order and circumstances causing dispute
3. Contract provisions supporting dispute.
4. Estimated cost of dispute with supporting documentation
5. Analysis of progress schedule and disruption, if any.

Adjustment of payment/schedule in consultation with Program Engineer -

Dispute is resolved.

Dispute is unresolved.

Proj Eng/Res Eng & Supt/PM & Contractor’s rep with decision authority above the project level to meet regularly to discuss dispute.

PE denies merit of dispute.

DRB agreement signed.

PE determines dispute has merit.

DRB renders a recommendation.

DRB recommendation is accepted.

Either party rejects DRB recommendation

Up to 30 days – 105.22 (d)

**105.22 Project Issue – Verbal discussions between Proj. Eng. and Supt**

15 Days – 105.22(b)

CDOT Project Engineer and Contractor discuss merit of dispute.

15 Days – 105.22 (c)

Merit granted – Quantum negotiations.

30 Days – 105.22 (c)

10 days – 105.23 (j)

30 days – 105.23 (i)

DRB Hearing

14 days – 105.23 (k)

**Figure 105-1 DISPUTES AND CLAIMS FLOW CHART**

**(Note: If an audit is to be performed, durations in this flow chart are extended accordingly)**

Contractor rejects PE’s denial. Contractor provides written notice to PE.

Contractor accepts denial. Dispute is resolved.

7 days – 105.22 (c)

7 days – 105.22 (d)

30 days – 105.23 (e)

7 days – 105.22 (c)

**Figure 105-1 continued on next page**

Prehearing Submittal

5 days – 105.23 (a) (e)

Request for Clarification and Reconsideration

Disagree on quantum.

105.22(a) Proj Eng initiates DRB process

10 days – 105.23 (f)

**Figure 105-1 (continued)**

Adjustment of payment/schedule in consultation with Program Engineer - Dispute is resolved.

90 days – 105.24 (c)

Decision is implemented.

30 days – 105.24 (c)

60 days - 105.24 (d)

Contractor rejects and appeals RTD decision to CE.

15 days

105.24 (d)

Chief Engineer renders decision.

45 days –

105.24 (d)

30 days – 105.24 (d)

Contractor rejects CE decision.

Contractor accepts CE decision.

Decision is implemented.

Dispute is unresolved.

Dispute is resolved.

Resolution is implemented.

De Novo Litigation

Litigation

Contractor initiates

Optional Mediation

RTD renders a decision.

Contractor submits certified claim package w/RTD.

Request for hearing.

Contractor accepts.

Court Decision

|  |  |
| --- | --- |
| Either party rejects DRB | |
|  | 30 days – 105.24 (a) |

|  |  |
| --- | --- |
| 105.23 Notice of intent to file a claim | |
|  | 60 days – 105.24 (b) |