SECTION 8
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NOTICE OF INTENT TO FILE A CLAIM/CONTRACTOR CLAIMS

This section provides guidance for dealing with the receipt of a "Notice of Intent to File a Claim" (NOI) from a contractor and subsequent contractor claims. This section also provides guidance in the review, analysis, resolution and defense of contractor claims.

The Standard Specifications and the current Supplemental Specifications are a part of the contract and provide specifics for handling NOI's and contractor claims.

The procedures outlined in this section are intended to be used by North Dakota Department of Transportation (NDDOT) personnel and consultants responsible for handling and processing NOI's and contractor claims on NDDOT construction projects. These are meant to be general guidelines only. Each NOI and contractor claim is unique and may require variations of these procedures.

This section is not part of any NDDOT contract. In the case of a discrepancy between contract documents and this section, the contract documents shall govern.

NOTICE OF INTENT

Reasons for requiring an NOI include, but are not limited to, the following:

- Allows the engineer the opportunity to keep strict account of the actual costs of any alleged extra work. North Dakota Century Code requires that the contractor ". . . afford the engineer facilities and assistance in keeping strict account of actual costs. . ." on the work performed.

- Permits early investigation by the owner into the conditions identified in the notice while evidence is still readily available.

- Allows the owner to consider construction alternatives to limit, or altogether eliminate, additional costs.

1. Receipt of a Notice of Intent to File a Claim

A. Initial Response

North Dakota Century Code Title 24 and Section 104.06 A of the Standard Specifications requires submission of a written NOI if the contractor contends that additional compensation is due for work and/or material not clearly covered in the contract. Prior to beginning the work on which the claim will be based, the contractor must immediately notify the engineer in writing of the intent to make a claim for additional compensation. If the basis of the claim is not apparent until the contractor has started the work and it is not practical to

stop the work, the contractor will immediately notify the engineer that the work is continuing and a written NOI must be submitted within ten calendar days. NDDOT specifications require that the NOI be submitted on SFN 16743 Notice of Intent to File a Claim.

Upon receipt of an NOI, the project engineer will notify and send a copy of the submitted paperwork to the Construction Services Division. The project engineer will review the NOI to ensure it is complete and the notice items are clearly defined. The engineer should acknowledge receipt of the NOI from the contractor indicating the date it was received.

In some cases the claim items in the NOI may not be clearly defined or the NOI may be incomplete. This makes it difficult if not impossible for the engineer to monitor and investigate the situation. The NOI should then be returned to the contractor with a cover letter from the engineer indicating the date of receipt and requesting that the NOI be properly submitted with, if applicable, additional information. If appropriate, the engineer may want to address such issues as timeliness of filing the NOI, agreement, partial agreement or disagreement with the issues outlined in the NOI.

B. Documentation

Subsequent to an NOI being received from the contractor additional documentation of field conditions may be required to measure any possible impacts. Project personnel should be aware when conditions on the project have changed, are different from conditions anticipated in the plans, or are different from what would be expected in the normal course of performing a type of work. Project supervisors should keep the district administration informed about issues arising on the project.

Pictures and videos are important record keeping methods and should be utilized by project personnel whenever a claim or potential claim situation arises on a project. Sufficient photos and video footage should be taken of the area in question to completely describe the situation pictorially. The photos and videos may also include other work being performed by the contractor.

The date, time and location of pictures or video footage taken should be logged in the project records. The printed name, title and signature of the person taking the pictures or video footage should also be included in the applicable project records. A description of what each photo is showing, the date, time and project number should be noted on the back of each photo. Video footage should be narrated and should include the project number, date, time, location, a brief description of the situation and the name of the person taking the video. If the still and/or video camera have a date/time stamp, it should be set and incorporated into the media.

Thorough documentation of a claim includes a list of all the contractor's equipment, material and manpower. After notice is received, whether verbally or in writing, field personnel must immediately begin recording all aspects of the contractor's operation. At a minimum, these records should document exact working hours for the execution of the work by the contractor including any down time and should note any inefficiencies.

In addition to the normal diary entries, keeping a daily equipment list is recommended for documentation of the contractor's equipment and manpower. Important items in documentation of the contractor's equipment are:

- ► An accurate record of working hours
- ► The item of work performed during those hours by each piece of equipment
- ► The location of the work performed
- ► Any down time hours for idled equipment.
- ► Detailed information on the equipment to include type, year, make, and model.

Attachment 1 at the end of this section is a "Contractor Daily Equipment and Labor" worksheet. This worksheet may be used by project personnel to record the contractor's daily equipment usage and labor hours.

Claims that involve state optioned pits require extra documentation. If it becomes apparent that a state optioned pit may not yield the quality and/or quantity shown in the pit plats, field personnel should notify the Materials and Research Engineer and the Construction Services Division. In addition to keeping track of the contractor's operation as outlined previously, the District Materials Coordinator will immediately go to the pit and take samples of the material produced. If the problem in the pit continues, additional samples will be taken in order to document the quality of unprocessed and processed material. Attachment 2 at the end of this section, "Contractor Daily Equipment, Labor, and Materials – Crushing / Aggregate Production", can be used for recording the crushing operation.

If there is any question as to what needs to accounted for in keeping strict account of the contractor's work, section 104.06 B outlines how a contractor is to price out a claim when it is submitted to the department for consideration of payment.

C. Review of the NOI

The NOI should be reviewed using the 4 steps outlined in section 3.B "Detailed Review and Analysis of the Claim."

2. Response to the NOI

A. Agree/Partially Agree with the NOI Issue

If After the issues outlined are reviewed and analyzed it is determined that the contractor's NOI has merit, the NDDOT may choose to meet with the contractor to attempt negotiation of a settlement.

The authority to settle an NOI issue or contractor's claim is as follows:

- ► Project Engineer – Less than or equal to $10,000
- ► District Engineer – More than $10,000 but less than or equal to $50,000
- ► Director of Operations or Deputy Director of Engineering – Greater than $50,000

These authorities may be revised by a higher authority on a specific issue. Items that fall within the administrative authority of the Project Engineer, District Engineer or Director of Operations will be referred to higher levels when the proposed resolution is rejected by the contractor.

B. Settlement of the NOI Issue

If negotiations are successful and a settlement is reached, a change order is prepared detailing the terms of the settlement. Documentation for the change order must include sufficient detail to justify the amount of the settlement and at a minimum, must include the analysis used to assign and determine damages. The change order should include a release clause to protect the NDDOT from any further liability or claims regarding the issues outlined in the NOI. Attachments 3-5 at the end of this section show examples of different types of release clauses which have been used on NDDOT projects. These may be used by project personnel as a basic template but the wording may need to be modified to fit the given situation.

C. Disagree with the NOI Issue

After the issues outlined are reviewed and analyzed and it is determined that the contractor's NOI does not have merit, the engineer will respond appropriately to the contractor. The response should list each item in the NOI and the reason the NDDOT does not agree that additional compensation is due. This should be done by using the contract documents to justify the department's position. If the issues in the NOI are ongoing and NDDOT personnel must continue keeping strict account of the contractor's work to protect the state's interests, the engineer should request that the NOI be formally rescinded in writing by the contractor. If the contractor refuses to rescind the NOI, then the issues are not resolved and project personnel should continue keeping strict

account of the contractor's work until all work related to the issues outlined in the NOI are complete.

D. Unresolved NOI Issue

If an NOI remains unresolved, it is critical that project personnel continue keeping strict account of the contractor's work until all NOI related items of work are complete. Once this is done, the records should be filed and categorized so they are easily retrievable later. The file should also include copies of any previous correspondence, evaluation, analysis, or any other work done in connection with the NOI. If the contractor does file a claim related to the NOI, these records will be key in evaluating the contractor's claim, formulating the Department's position in response to the claim, and ultimately in preparing and executing the defense should the claim go to arbitration.

CLAIMS

Section 104.06 of the Standard Specifications is the governing specification for a contractor who submits a claim to the NDDOT. A contractor submitting a claim must do so no later than 90 days after receiving the final estimate from the department.

1. Receipt of a Claim

Upon receipt of a contractor claim the engineer should ask the following questions to assure that the contract provisions regarding a claim submittal have been met:

- ► Was a proper and timely NOI filed by the contractor which covered the issues outlined in the claim?
- ► Was the claim properly submitted in writing no later than 90 days after the final estimate was submitted to the contractor?
- ► Does the claim meet the requirements of a properly submitted claim as outlined in section 104.06 of the standard specifications?
- ► Were the bid documents submitted with the claim as required by specification 104.06 of the standard specifications?

If a claim is not properly submitted, the project engineer will respond immediately to the contractor stating that the claim has not been properly submitted and the reasons for that determination. The contractor should also be informed that the 60 day time period for the Department to respond will not begin until a claim is properly submitted. If the claim is properly submitted, the department must respond with its position within 60 days of receipt of the claim. The Construction Services Division should be notified when an NOI or claim has been submitted by a contractor.

2. Review and Analysis of the Claim

There are four basic steps to use in the review, analysis and resolution of a contractor claim. These steps should be used for all levels of review beginning with the project engineer. The four steps are:

A. Determine whether or not a change has occurred. Is there a difference between what was required by the contract and what was required during the course of construction? If the answer is no, then that is the owner's position. Go to step 2 if the potential answer is yes.

B. Determine who caused the change or who has liability for the change, the owner or the contractor. If it is determined that the owner caused or is liable for the change, go to step 3.

C. Determine the impacts of the change. Impacts include but are not limited to the following: extra work, delays, reduced efficiency, increase costs of material, unused material, etc.

D. Determine damages (dollar amount, increased contract time, etc.) to which the contractor may be entitled. If the impacts are clearly defined, determination of damages is much easier to do.

These four steps should always be followed in sequence. The contract documents (plans, proposal, specifications) should always be used in conjunction with the four step review. The decision on whether or not the contractor is due additional compensation or contract time depends on the deviation, or lack of deviation, between the work and requirements outlined in the contract documents and the work actually performed by the contractor.

The contractor's claim submittal should match the items that were identified in the original NOI for the claim. The claim is reviewed to check merit, validity and adherence to the contract documents. Any NOI related records kept during the project should be retrieved and used to facilitate the review.

3. Response to the Claim

In formulating a response to, and conducting negotiations of the claim the Construction Services Division should be kept informed of all details. Additionally, the Construction Services Division is available to provide guidance to the district in these matters.

A. Agree/Partially Agree With the Claim

If, after the review and analysis of the supplemental information submitted by the contractor, it is determined that the claim has merit, the NDDOT may

choose to meet with the contractor to attempt negotiation of a settlement. The intent is to negotiate the claim at the project or district level, if possible.

The authority to settle a claim is the same as that for an NOI. However, due to the statewide significance of any claim settlement and the importance of uniformity in decisions, all settlement agreements over $50,000.00 must be made in consultation with the Construction Services Division.

Claims referred to the Construction Services Division for review and action must be accompanied by the pertinent data, reports and findings. Additional meetings with the contractor, either with or without legal counsel, may be arranged. District personnel will be asked to attend these meetings and furnish any supporting data that may be needed. Any audits of the contractor's records necessary to verify submitted data will be arranged by the Construction Services Division.

Claims that cannot be resolved by the Director of Operations may be forwarded to the Deputy Director for Engineering or to the Director for a final attempt at resolution. If a claim that cannot be resolved, the contractor's next step is to file for arbitration in accordance with North Dakota law.

B. Settlement of a Claim

If negotiations are successful and a settlement is reached, a change order is prepared in the same manner as that for the settlement of an NOI. As with an NOI, documentation for the change order must contain sufficient detail to justify the amount of the settlement. The change order should include a release clause the same as that shown for the settlement of an NOI.

C. Disapproval of a Claim

When the issues outlined in the contractor's claim are found to be without merit, the NDDOT must respond in writing within 60 days of receipt of the claim and inform the contractor that the department disagrees with the items outlined in the claim. The response may include an itemized list of the issues contained in the claim and the department's justification for rejecting the contractor's request for additional compensation. The contractor's next option is to file for arbitration.

4. Arbitration

If the contractor does not accept the response by the department on the issues presented in the claim, a demand for arbitration may be filed by the contractor.

James Acret in the *"Construction Arbitration Handbook", Shepard's/McGraw-Hill, © 1985*, defines arbitration as:

"Arbitration is a system, voluntarily adopted by parties to decide their disputes, in which an impartial arbitrator, after hearings, issues a legally enforceable award."

Arbitration is required by North Dakota Century Code for:

"All controversies arising out of any contract for the construction or repair of highways entered into by the director (of the NDDOT)..."

North Dakota Century Code requires that in cases less than $50,000 dollars, one arbitrator will be appointed to hear the case. In cases of $50,000 or more, three arbitrators will comprise a panel to hear the case. If the contractor does choose to file for arbitration and legal counsel has not already been employed by either party, it is likely that both sides will now hire attorneys to assist in their case.

5. Claims Against Contractors – External Claims

External claims are defined as those made against a contractor by parties other than the NDDOT.

Claims made against a contractor by third parties for materials, supplies, services, equipment or labor shall be referred to the Construction Services Division. Other than informing the claimant that these claims should be submitted to Construction Services, district employees should not provide any advice.

When the Construction Services Division receives the written claim, a letter will be sent to the claimant citing the requirements of law which must be followed in filing a claim against the contractor. The letter shall provide the claimant with the name of the contractor's bonding company and the resident agent. Copies of the NDDOT's letter to the claimant along with a copy of the written claim shall be sent by the Construction Services Division to the contractor and the bonding company.

Contractor Daily Equipment and Labor

Project Number:
Contractor:

Date	Equipment							Labor				Remarks
	Type	Hours		Total Hours	Item of Work	Location	Standby Hours	Name	Hours		Total Hours	
		Begin	End						Begin	End		

Contractor Daily Equipment, Labor, and Materials – Crushing / Aggregate Production

Project Number:
Contractor:

Date	Equipment							Labor				Remarks
	Type	Hours		Total Hours	Item of Work	Standby Hours	Down Hours	Name	Hours		Total Hours	
		Begin	End						Begin	End		

Samples Taken (Y/N) _____ Sample Reference Number _____

Amount of Product Produced In 24 Hours _____

Amount of Waste Produced In 24 Hours _____

Inspector:

Attachment 2

NOTICE OF INTENT TO FILE A CLAIM SETTLEMENT AGREEMENT

The Contractor,_____, by the signing of this agreement certifies that: Upon execution of change order number ___ ___ any and all claims in any manner arising out of, or pertaining to, the attached Notice of Intent dated _____, filed on Project No._____, including but not limited to such issues as;

have been satisfied in full and the State of North Dakota is released and discharged from any claims or extra compensation in any manner arising out of the referenced Notice of Intent.

NDDOT Representative	Date	_____ Representative	Date
Printed Name		Printed Name	

Attachment 3

NOTICE OF INTENT TO FILE A CLAIM SETTLEMENT AGREEMENT

The Contractor,_____, by the signing of this agreement certifies that: Upon execution of change order number ___ ___ in the amount of $_____ any and all claims in any manner arising out of, or pertaining to, Project No. _____ (including but not limited to the notice of intent to file a claim in regards to;

)

have been satisfied in full and the State of North Dakota is released and discharged from any claims or extra compensation in any manner arising out of Project No._____.

NDDOT Representative	Date	Representative	Date
Printed Name		Printed Name	

Attachment 4

NOTICE OF INTENT TO FILE A CLAIM SETTLEMENT AGREEMENT

The Contractor,_____, by the signing of this agreement certifies that: Upon execution of change order number ___ ___ reducing the total days of liquidated damages charged to ___ days any and all claims in any manner arising out of, or pertaining to, Project No._____ (including but not limited to the notice of intent to file a claim and time extension in regards to;

)

have been satisfied in full and the State of North Dakota is released and discharged from any claims or extra compensation in any manner arising out of Project No.

NDDOT Representative	Date	Representative	Date
Printed Name		Printed Name	

Attachment 5

FOR A COPY OF THE LATEST NOTICE OF INTENT TO FILE A CLAIM

Click on the following link NOTICE OFINTENT TO FILE A CLAIM - SF 16743

LIST OF CLASSIFICATIONS OF CONSTRUCTION CLAIMS

The following is a list of the classifications of construction claims as shown in the 'Construction Claims Guide' published by Wagner, Hohns, Inglis, Inc.

CONSTRUCTIVE CHANGES
Changes resulting from acts attributable to the owner which cause more work or more time on the job than planned, but for which the owner refuses to execute formal change orders.

1. Work out of Sequence
   Work in a different order than originally planned.

2. Change in Method
   A change in the way of doing the work on a project.

3. Over Inspection
   Inspector demands work quality higher than normal industry standard or requires special operations.

4. Defective Drawings
   Errors, omissions, or ambiguities occurring in the drawings.

5. Higher Standards
   Requires higher quality work than called for in the specifications.

6. Non-Disclosure
   Failure to provide all available information. Ususally relates to information known by the designers but not made a part of the contract documents.

7. Impractical or Impossible
   Work physically impossible to perform or economically impractical.

ACCELERATION
When the owner orders completion of the project sooner than required by the contract or orders work finished on the original completion date failing to grant time extensions which are due.

1. Directed Acceleration
   Order to complete prior to contract completion date.

2. Constructive Acceleration
   Insistence on the original schedule despite entitlement to time extension.

CHANGED CONDITIONS
Conditions other than what a prudent person would have expected.

1. Type I
   Subsurface of latent physical conditions differing materially from those indicated in the contract.

2. Type II
   Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered in work of the character provided for in the contract.

SCHEDULE CHANGE
A change in the time or sequence of the schedule to complete a project.

1. Suspension
   Work stoppage for one party's benefit.

2. Termination
   Defaulted for bad work or failure to perform. If for Owner's convenience, profits on work completed and cost of demobilization permited.

DELAYS
There are three types of delays: delays which are the responsibility of the owner, delays which are the responsibility of the other party, and delays which are beyond the control of either party.

1. Owner Caused
   a. Lack of access
   b. Owner interference
   c. Directed reduction in manpower
   d. Directed slowdown

2. Designer Caused
   a. Late shop drawing approval
   b. Design error
   c. Failure to accept

3. Contractor Caused

a. Rework
b. Lack of productivity
c. Procurement failures

4. Force Majeure
   a. Hurricanes
   b. Tornadoes
   c. War

MISCELLANEOUS
Claims which do not fall into any of the above categories.

1. Material Breach
   Violation of an important contract obligation

2. Refusal to Accept Completed Work
   Owner refuses to takeover completed work and Contractor is forced to maintain and protect the work.

3. Early Occupancy
   Owner moves into facility and interferes with the Contractor.

4. Change in Scope
   Project's purpose is altered or increased significantly.

5. Cardinal Change
   Owner alters a project radically.

It is important to become familiar with the different types of claims to better recognize a claim situation as it is happening.