



THE HIGHWAYS AGENCY

HA 12/81



THE SCOTTISH OFFICE DEVELOPMENT DEPARTMENT



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THE DEPARTMENT OF THE ENVIRONMENT FOR
NORTHERN IRELAND

Management of Contractual Claims

Summary: This Note distributes a document: “Notes for Guidance on the Submission and Consideration of Contractual Claims Arising on Department of Transport Trunk Road Contracts”.

VOLUME 5	ASSESSMENT AND PREPARATION OF ROAD SCHEMES
SECTION 2	PREPARATION AND IMPLEMENTATION

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**MANAGEMENT OF CONTRACTUAL
CLAIMS**

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1. SCOPE

1.1 In order to promote good contract management practices for the prompt resolution of claims the Department of Transport and the Federation of Civil Engineering Contractors have prepared a joint document: "NOTES FOR GUIDANCE ON THE SUBMISSION AND CONSIDERATION OF CONTRACTUAL CLAIMS ARISING ON DEPARTMENT OF TRANSPORT TRUNK ROAD CONTRACTS" dated October 1980. A copy of the joint document is appended to this Advice Note.

2. STATUS

2.1 The joint document is advisory only and it does not circumscribe in any way the contractual provisions, including the powers given to the Engineer to the Contract, as established by the Conditions of Contract.

2.2 The joint document is a statement of what the Department and the Federation consider to be good contract management practice which when followed will lead to the speedy resolution of claims and which, furthermore, both parties wish to be the norm.

2.3 The Department commends the joint document to all its own officials, officials of Agent Authorities and Consulting Engineers who are engaged in the management of contracts for trunk road works.

2.4 The Federation is likewise commending the document to its members through its own arrangements for dissemination.

3. ENQUIRIES

NOTES FOR GUIDANCE ON THE SUBMISSION AND CONSIDERATION OF CONTRACTUAL CLAIMS ARISING ON DEPARTMENT OF TRANSPORT TRUNK ROAD CONTRACTS

NOTES FOR GUIDANCE

1. BACKGROUND

1.1 The Department of Transport (DTp) and the Federation of Civil Engineering Contractors (FCEC) hold regular meetings of a Joint Road Construction Liaison Committee (RCLC) to keep under constant review road construction contract practice. FCEC at a meeting of the RCLC queried how payments for variations and cost claims could be speeded up bearing in mind that for measured work, for which a rate existed in the Contract, payment is made within a month to five weeks from the end of the period in which work was executed. DTp responded by stating that it had no wish to see Contractors' cash flow adversely affected by variations or changed circumstances, and its policy was to pay promptly any money certified, but it could not make payments without an Engineer's Certificate.

1.2 In consequence at its meeting on 6 March 1980 the RCLC decided to form a sub-committee which adopted the following terms of reference:-

"To consider ways of obtaining prompt resolution of claims, and to draft Notes for Guidance on principles to be followed when submitting and considering claims in accordance with the ICE Conditions of Contract, and to make recommendations thereon".

1.3 The following Notes for Guidance have been prepared in accordance with the above terms of reference.

2. GENERAL

2.1 These notes have been prepared with the object of promoting the prompt resolution of claims on trunk roads contracts. DTp and FCEC recognise that on occasions, claims can be complicated and that satisfactory resolution can be a time consuming process. Both organisations are anxious to ensure that the time scale in which claims are settled is kept to a minimum consistent with the need for claims to be fully supported and documented and, after submission, properly considered.

2.2 The formal contractual provisions are set out in the Conditions of Contract. These notes do not supplant or modify the contractual provisions in any way but have been prepared as a guide to good practice. Meaningful dialogue between the Contractor and the Engineer at appropriate times as the work proceeds is important and can reduce the possibility of misunderstandings which may give rise to time consuming effort in submitting and considering claims and can also facilitate decisions on matters arising while the work is in progress.

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- 2.3 Prompt and proper compliance both by the Contractors and the Engineer with the procedures laid down in the Conditions of Contract can also reduce the incidence of claims, especially in respect of changes in rates and quantities and variations which may affect other rates. Keeping variations to an absolute minimum will assist in this process. Where variations must be ordered and new rates are appropriate in accordance with Clauses 52(1) and (2), and 56(2)* of the Conditions of Contract, these should be agreed wherever possible before the variation is ordered. Where either impossible or impracticable to agree rates before the variation is ordered, consultation by the Engineer with the Contractor should continue until the Engineer decides that he should determine rates as required by the Conditions of Contract. These matters should not be left to be notified as claims to be dealt with later under Clause 52(4) but should be resolved whilst events are fresh in the minds of all concerned.
- 2.4 A clear understanding of the two aspects of claims under Clause 52(4) (b) is important. These are their contractual validity and the quantification of any payment. Clearly those concerned should not become immersed in the complexities of quantification without first establishing that there is a contractual basis for payment. This pitfall should be avoided by both Contractor's and Engineer's staff.

3. SUBMISSION OF CLAIMS BY CONTRACTORS UNDER CLAUSE 52(4)

3.1 GENERAL

- 3.1.1 If the Contractor intends to claim any additional payment under Clause 52(4), he is required to provide sufficient information for the Engineer to judge both principle and valuation. However, the Engineer, in the absence of full information, should consider that which is in his possession, certify accordingly, and if he considers that further particulars are required to enable him to complete his consideration, it would be helpful if he informed the Contractor of the particulars required. Meantime it may be possible to fix provisional rates.
- 3.1.2 The requirements listed in paragraph 3.2 below are a guide only, and in certain circumstances the Engineer may request such particulars as are reasonably required to enable him to determine the amount due. Also, they neither absolve the Contractor from following the procedures laid down in the Contract in respect of giving notice of and submitting claims, nor prejudice his rights under the contract.
- 3.1.3 Well conceived, well presented realistic submissions on claims, based on a clear understanding of the Conditions of Contract, forwarded by the Contractor as soon as the information is known to him will assist the Engineer in his impartial and prompt assessment and certification of them within the framework of the Conditions of Contract. Conversely, poor submissions on claims with inadequate substantiation forwarded long after events to which they relate and claims submissions with little or no contractual basis can cause considerable delay in such an assessment. The list below is prepared with the object of assisting the communication between the Contractor and Engineer in dealing with claims.
- 3.1.4 Providing the Engineer with, or giving him access to substantiating information as listed below need not be delayed until submission of the claim. Where the Engineer considers the Employer liable, substantiation of additional costs at the time they are being incurred or within a short period thereafter, will facilitate the Engineer's consideration of interim account, and the eventual resolution of the claims.

3.2 The following information would help the Engineer when considering claims:-

3.2.1 Notice of Claim

A letter to the Engineer giving notice of the Contractor's intention to claim. The letter should:

1. explain the circumstances giving rise to the claim;
2. explain why the Contractor considers the Employer to be liable;
3. state the Clause of the Conditions of Contract under which the claim is being made.

Inclusion of the above information in the notice will enable the Engineer to consider the principle of the claim at the earliest possible time.

Inclusion of the amount in the Contractor's monthly statement is in itself insufficient for the Engineer to process the claim.

3.2.2 Submission of Claim

1. A statement of the Contractor's contractual reasons for believing that the Employer is liable for the extra costs etc., with reference to the Clause(s) under which the claim is being made;
2. A statement of the relevant events giving rise to the claim including a statement of how circumstances etc., have changed from those the Contractor could reasonably have foreseen;
3. Copies of all relevant documents, for example:
 1. Contemporary records kept by the Contractor (or access to them) which substantiate the additional costs caused by the event(s) leading to the claim. They should include the allocation of all labour, plant and materials involved, including standing and broken down time of plant and inclement weather time. (The Contractor should keep sufficient records to substantiate his claim whether or not the Engineer has given instructions in the terms of Clause 52(4) (c) of the Conditions of Contract);
 2. Details of his original plans in relation to the use of plant, and mass haul diagrams, where revised locations or access problems, haulage etc, are involved;
 3. Relevant extracts from the original tender programme and the actual programme, and make-up of all major Bills of Quantities rates etc., which are necessary in order to substantiate the amount of the claim;
 4. Information demonstrating the individual or cumulative effect of site instructions and/or variation orders on costs where these are referred to in the claim. Site Agents and Resident Engineers should be encouraged to meet on a regular basis to judge and record these effects.
 5. A detailed calculation of entitlement claimed by the Contractor with copies of relevant substantiating information, records, invoices etc, which relate to specific figures, amounts and percentages used in the calculation.

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4. CONSIDERATION OF CLAIMS BY THE ENGINEER

4.1 Contractual Position

4.1.1 Under the ICE Conditions of Contract, the Engineer is independent of both the Employer and the Contractor and is empowered to settle disputes between them. It is not open to either party to the contract to dictate to the Engineer how he will exercise his powers under the contract, or put any constraint on the Engineer in the exercise of his powers. He alone must discharge the responsibilities placed upon him by the conditions in an independent and impartial manner.

4.1.2 The following paragraphs do not and are not intended to circumscribe in any way the powers given to the Engineer by the contract or any actions he takes in accordance with these powers. The Department considers it useful however for those exercising the role of Engineer, (Consultants, its own officials, or officials of agent authorities) to be aware of its policy towards the payment of amounts which may become payable on trunk road contracts.

4.2 Departmental Policy

4.2.1 Departmental policy requires that all sums which are due to the Contractor in accordance with the Conditions of Contract should be paid without delay: the Department's practice is to ensure that all sums for which the Engineer has issued certificates are paid promptly. The Department encourages Engineers to adopt the same approach to the determination and certification of all amounts due under the contract.

4.2.2 In particular the Department encourages the Engineer to certify payments on account up to the level that payments have been substantiated to his satisfaction.

4.3 Consideration

4.3.1 As indicated above, neither Employer nor Contractor may seek to determine how the Engineer should exercise his powers under the Contract. However, with a view to considering claims expeditiously in the interest of both parties to the contract, Engineer(s) may find the following notes helpful:

1. to consider first and wherever possible decide whether a claim is acceptable in principle and notify the Contractor accordingly;
2. if rejecting the claim, to indicate the reasons for doing so;
3. if further elucidation of the grounds of the claim is necessary, to say so promptly;
4. when requiring the Contractor to keep contemporary records or further contemporary records as may be reasonable and material to the claim, to do so promptly, and to arrange for such records to be inspected at regular intervals and signed "for record purposes only" - both Contractor and Engineer retaining a copy;
5. if a claim is acceptable in principle to certify promptly such amount as the particulars supplied by the Contractor substantiate;
6. if not certifying a claim in full to indicate the reasons but if prepared to reconsider the matter to say so and indicate what further information might assist him;
7. to ensure that, in respect of the final account, all information reasonably required for its verification is made known to the Contractor and when submitted is considered without delay so that the Final Certificate can be issued within the period stated in Clause 60(3) of the Conditions of Contract.

8. exceptionally, where this is not possible, to consider, in consultation with the Contractor, special arrangements to minimise the delay. These might include authoritative members of the Engineer's and Contractor's staffs being nominated to resolve any outstanding matters, the setting up of a time table or other appropriate steps.