

New Jersey Department of Transportation

1035 Parkway Avenue, PO Box 600, Trenton, New Jersey 08625-0600

Baseline Document Change Announcement



Claims Procedure

BDC02S-22

December 17, 2003

Subject: Revision to Sections 101, 103, 107, and 109 of the 2001 Standard Specifications in English and Metric units
Revision to Standard Inputs SI2001 Subsection 103.06

Sections 101, 103, 107, and 109 of the Standard Specifications and Subsection 103.06 as it appears in the Standard Inputs (SI2001E1 and SI2001M1) have been revised to incorporate specifications for the revised claims procedure.

The following revisions have been incorporated in the English Unit Standard Input SI2001E1 and the Metric Unit Standard Input SI2001M1 dated December 17, 2003:

SECTION 101 – GENERAL INFORMATION

101.03 Terms.

THE FOLLOWING TERMS ARE ADDED:

ADDITIONAL COMPENSATION. A monetary payment(s), sought by the Contractor, premised upon (1.) an adjustment or modification to the Contract pay item(s) for particular work or (2.) any or all forms of compensation over and above that which is specifically provided under the various individual Contract Pay Items or Contract payment provisions.

COMPLETION OF THE CONTRACT. The event termed “Completion of the Contract”, under the Specifications and the Contractual Liability Act NJSA 59:13-1 *et seq.*, shall be deemed to have occurred as of the date the Contractor accepts or accepts with reservation of specific claims, in writing in accord with forms supplied by the Department, the Final Certificate issued by the Department or the 31st day after issuance of said Final Certificate by the Department, whichever event may be the first to occur.

CLAIM. The Contractor has reason to believe it is entitled to additional compensation and/or an extension of contract time, in accordance with and subject to the Contract Documents and the provisions of the Contractual Liability Act, N.J.S.A. 59:13-1 *et seq.*, arising out of or relating to the happening of an event, thing or occurrence or an act or failure to act by the Engineer. A claim accrues when it arises, meaning when a situation or occurrence takes place or comes about which has or possesses the potential to support or become the basis for additional compensation and/or an extension of time.

DISPUTE (AS TO A CLAIM). A disagreement between the Department and the Contractor with regard to the Work or Contract Documents arising out of a claim by the Contractor for additional compensation or an extension of time.

FINAL CERTIFICATE. It is the final payment document that sets forth the total amount payable to the Contractor, including therein an itemization of said amount segregated as to Pay Item quantities, Extra Work, and any other basis for payment; it also includes therein any retainage to be released and all deductions made or to be made from prior payments as required pursuant to the provisions of the

Contract Documents, which may result in either a Final Payment to the Contractor or a Credit (payment) due the Department.

NON-BINDING MEDIATION. The fourth and final step in the Department's Contractual Claim Resolution Process for claims arising under the Contract utilizing a non-binding mediation forum wherein an independent mediator is engaged in an attempt to resolve a claim presented by a Contractor.

SECRETARY, DEPARTMENT CLAIMS COMMITTEE. The individual employed by the Department who gathers information and provides administrative assistance to the members of the Department Claims Committee. This individual is the conduit between the Department Claims Committee members and the Contractor. Contact by the Contractor regarding any issue involving the Claims Committee or Mediation shall be through the Secretary.

THE FOLLOWING TERMS ARE REVISED:

DEPARTMENT CLAIMS COMMITTEE. A contractual body available to review and resolve claims that arise under the Contract. The Committee consists of three voting members with the Director of Design Services as the chairperson, one member is the Department's Chief Financial Office, and one member is selected from the other directors within Capital Program Management. Additional non-voting members are a Deputy Attorney General, the Secretary of the Department Claims Committee, and a member of the Federal Highway Administration (for federally funded projects).

REGIONAL DISPUTE BOARD. A three-member Board, comprised of one member from the Division of Project Management, one member from the Bureau of Construction Engineering, and the Regional Construction Engineer (Chairperson), that is available under the terms of the Contract to review Disputes which have not been resolved by the Resident Engineer.

THE FOLLOWING TERMS ARE DELETED:

CLAIMS REVIEW BOARD

DISPUTE

SECTION 103 – AWARD AND EXECUTION OF CONTRACT

103.06 Execution and Approval of Contract.

THE HEADING AND THE ENTIRE TEXT IS CHANGED TO:

103.06 Execution and Escrow of the Contract.

- 1. Execution.** The successful Bidder shall properly and duly execute a Contract in accord with Contract Documents and return same, together with the Performance Bond and Payment Bond, within ten State Business Days of the date of Award or Conditional Award. The successful bidder shall also provide the Department, within the same ten State Business Day period, proof of a valid business registration with the Division of Revenue in the New Jersey Department of Treasury. The Contract will not be entered into by the Department unless the Bidder first provides proof of a valid business registration in compliance with N.J.S.A. 52:32-44 (P.L. 2001, c134). For FHWA funded projects, the successful bidder shall also provide proof of valid, current registration with the New Jersey Department of Labor, Division of Wage and Hour Compliance as required by "Public Works Contractor Registration Act," N.J.S.A. 34:11-56.48 et seq. (P.L. 2003, c. 91). If said Contract is not executed by the Commissioner within 45 State Business Days following receipt from the Bidder of the executed Contract and Performance Bond and Payment Bond, the Bidder may within its discretion withdraw its bid without penalty; where the Bidder chooses not to withdraw prior to the Commissioner executing said Contract, the Bidder shall be deemed to have waived any claim for Additional Compensation or for an extension of time. The Contract shall not become effective until it has been fully executed by all parties.
- 2. Escrow.** The successful Bidder who would like to participate in the Non-Binding Mediation of any and all claims arising under the Contract, as provided in Subsection 107.02, shall, within the same ten State Business Day period, escrow all of its bid preparation documents, which are dated prior to or as of

submission of the bid proposal to the Department, in sealed boxes with a Custody Agent, and return to the Department a Custody Agreement fully executed by the Bidder and the Custody Agent. The Bidder shall also certify under oath that the escrowed documents have not been modified changed or corrected in any manner since the date appearing on said documents and that the documents escrowed constitute all related documents relied upon in preparing the proposal. The Custody Agreement Form will be provided by the Department at the time of Award and shall be completed in its entirety and include a detailed list of all documents contained in the boxes of bid documents placed in escrow.

A failure by the Bidder to escrow its bid preparation documents and to return to the Department the fully executed Custody Agreement within ten State Business Days shall constitute a waiver by the Bidder of any ability or opportunity to participate in the Non-Binding Mediation of claims arising under the Contract. The use and preservation of escrowed bid documents shall be governed by the terms of the escrow agreement that is to be executed by the Contractor and the escrow agent, which agreement shall be in accord with the form provided by the Department. Upon Completion of the Contract, the Contractor may apply to the Department to release any escrowed documents so long as there are no pending claims.

SECTION 107 -- LEGAL RELATIONS AND RESPONSIBILITY TO PUBLIC

107.01 Legal Jurisdiction.

THE ENTIRE TEXT IS CHANGED TO:

1. **Applicable Law.** This Contract shall be construed and shall be governed according to the Constitution and laws of this State.
2. **Sovereign Immunity.** The State by entering into this Contract does not waive its Sovereign Immunity, except as provided by the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 *et seq.* The rights or benefits provided the Contractor in this Contract which exceed those provided under the Act are contractual in nature and shall not be deemed to expand the waiver of Sovereign Immunity as set forth in that Act.
3. **Litigation of Claims by Contractor.** The Contractual Claims Resolution Process is not an administrative procedure but is contractual in nature, intended to review properly filed and documented claims. Pursuant to N.J.C.A. 16:45-1.3, exhaustion of the Claims Resolution Process as set forth under the Specifications is not a prerequisite to the filing of a legal action against the Department or State. The Contractor, however, must fully comply with all of the terms and conditions of the Contractual Liability Act, N.J.S.A. 59:13-1 *et seq.* prior to commencing a legal action. Therefore, where a Contractor brings a legal action, arising out of a Contract, against the Department or State or any officials or employees, thereof, arising out of or related, directly or indirectly, to a claim pending against the Department; the Contractual Claims Resolution Process, at any step, shall terminate as to that claim(s) or related claims being litigated, no matter which level of review the claim may be at when the legal action is filed. Furthermore, once the Contractor files a legal action any claim(s), related to that legal action will no longer qualify to be reviewed by the Claims Committee or to have the same claim(s) resolved under the Non-Binding Mediation Procedure or at any other Level of review. Such claim(s) will, thereafter, be resolved under the legal action subject to the provisions of the Contractual Liability Act, N.J.S.A. 59:13-1 *et seq.* unless and until the legal action is dismissed with or without prejudice. The Contractor may submit to the Department for processing through the various steps of the Contractual Claims Resolution Process any claims that are unrelated to the pending litigation subject to the terms of the Specifications and the Contractual Liability Act N.J.S.A. 59:13-1 *et seq.*
4. **Completion of the Contract.** The Completion of the Contract shall control as to any issue that may arise regarding the particular point in time when a Contractor may be barred from recovering against the State as provided under N.J.S.A. 59:13-5 *et seq.* The Contractual Claims Resolution Process and the various steps thereof may continue beyond the Completion of the Contract; however, the Contractual Claims Resolution Process will not in any manner, expressed or implied, extend any statute of limitation that may apply as to a claim. The Contractor by entering into the Contract with the Department agrees no further notice to the Contractor regarding the provisions stated in this Section are required. The Contractor also agrees to be responsible for compliance with all statutes of limitation and compliance with the various provisions of the Contractual Liability Act, N.J.S.A. 59:13-1 *et seq.*
5. **Subcontractor(s).** Pursuant to Subsection 108.02, the Department will not process or review any claims submitted by a subcontractor(s) or supplier(s) at any tier. All claims submitted by the Contractor must be an obligation or liability of the Contractor and cannot be merely a pass through of a claim by a subcontractor or by a supplier.

107.02 Notice of Potential Claim and the Administrative Process for the Resolution Contract Disputes.
THE HEADING AND THE TEXT IS CHANGED TO:

107.02 Notice of Claim and the Contractual Claim Resolution Process.

1. Notice.

- a. Obligations.** The various notice provisions set forth in this Contract are contractual obligations assumed by the Contractor by the act of executing the Contract. The Contractor shall be responsible to notify the Department in writing within the time frame as may be mandated in an applicable Subsection of the Specifications as well as within 90 days of any situation or occurrence which may potentially result in or be the basis of a belief that additional compensation or an extension of time is due from the State, except where permission to file a “late notice of claim” has been obtained by the Contractor from the Superior Court in accordance with N.J.S.A. 59:13-6. The Department is not authorized to expand, reduce or waive either the contractual or statutory time limitations within which a notice of claim is to be filed with the Department. Any required notice shall be given only on the Contractual Notice Form provided by the Department. Submission of a Contractual Notice Form is required in order to comply with the notice requirements of the New Jersey Contractual Liability Act, N.J.S.A. 59:13-5 *et seq.*, provided such notices are given within the time limits established by that Act. The Contractor, by executing the Contract, agrees that the only evidence of compliance with the notice provisions of the Contractual Liability Act, N.J.S.A. 59:13-5 *et seq.*, and the Specifications shall be the filing of a fully completed (except that the amount of the claim need not be stated when unknown) Contractual Notice Form with the Department, and that no other documents sent or delivered to the Department or any of its officers or employees shall satisfy the statutory and/or contractual notice requirements.
- b. Time.** The Contractor, by the act of executing the Contract, acknowledges that it will be forever barred from recovering against the State if it fails to give timely notice in accordance with N.J.S.A. 59:13-5 *et seq.*, on the Contractual Notice Form required under this Subsection of any happening of an event, thing, or occurrence or of an act or failure to act, by the Department and that the Contractor is solely responsible for complying with the various notice requirements and the timeliness of a claim as set forth under the Contractual Liability Act, N.J.S.A. 59:13-5 *et seq.* and the Specifications.
- c. Notice Form.** The Contractual Notice Form shall be completed in its entirety for each and every claim and shall be signed by an authorized representative of the Contractor. Any Contractual Notice Form filed which does not provide all of the minimum information listed in this Subsection will be considered incomplete for the purpose of processing the claim under the Contractual Claim Resolution Process and no formal discussions or meetings concerning a claim filed on an incomplete Form will take place. A Contractual Notice Form which identifies the amount of the claim as being unknown may be considered by the Department as only satisfying the notice requirements as set forth under the Contractual Liability Act, N.J.S.A. 59:13-5 *et seq.*, as long as the notice of claim is timely filed and provides all of the other minimum information on or attached to a properly executed Contractual Notice Form. However, for any claim requesting Additional Compensation, it shall not be sufficient to begin the Claim Resolution Process until the exact amount is provided according to 3.j. below. The Contractor’s act of executing the Contract shall be construed to be an acknowledgment by the Contractor that it understands that the processing of a claim by the Department at any step of the Contractual Claims Resolution Process shall not constitute a waiver by the State of any defense that a claim was filed out of time and is thereby barred under the terms of the Contractual Liability Act or of any defense that there is no merit to the “claim being asserted by the Contractor”.

2. Steps of Review. The Contractual Claim Resolution Process is sequential in nature and is composed of the following steps:

- Step I: Review by the Resident Engineer;
- Step II: Review by the Regional Dispute Board;
- Step III: Review by the Department Claims Committee;
- Step IV: Non-Binding Mediation.

Processing through the steps is subject to the following conditions:

- a.** No claim will be accorded a particular level of review unless and until the claim has been reviewed at the preceding step. Additionally, there will be no further review of the claim, unless and until the Contractor provides, in writing, that the decision of a review step within the specified timeframe is unacceptable and further requests that the claim be forwarded to the next step. Absent the written submittal of this information the claim will be considered withdrawn from the Contractual Claim Resolution Process. If at any step in the process, a

claim is resolved, the Contractor must sign an unconditional release, furnished by the Department, as to any and all matters arising from the claim.

- b. In order to begin the Contractual Claim Resolution Process the Contractor must state in writing that all documentation in support of the claim, as required under this Subsection, has been provided to the Department as part of or attached to the contractually required Contractual Notice Form and that the Contractor has requested that the review process, as outlined above, begin. The Resident Engineer will take no formal action until this notification is received and the Resident Engineer independently determines that the Contractor has in fact satisfied the requirements of this Subsection. If the documentation submitted by the Contractor is determined to be incomplete, the Resident Engineer will notify the Contractor that the review process cannot begin and include a list of missing components required to start the process. When the additional material is submitted, the Contractor is required to again notify the Resident Engineer in writing that all documentation in support of the claim has been provided and the Contractual Claim Resolution Process should begin. The Contractor shall be limited to the documentation provided to the Resident Engineer at the beginning of Step I, in support of a claim, throughout all steps of the Claim Resolution Process. The submission of additional information by the Contractor at any step beyond Step I, shall be cause for the claim to revert back to Step I for review at each and every Step. The Resident Engineer will provide written notice to the Contractor when Step I was begun.
- c. When the value of the claim submitted by the Contractor is \$20,000 or less, the Step II review will be the final step in the Contractual Claim Resolution Process. In such a case, the decision of the Regional Dispute Board will be final and there will be no further contractual review.
- d. Where there has been a determination, at both Step I and Step II, that the specifications do not provide a contractual basis for the resolution of the claim submitted by the Contractor or that the Notice of Claim was filed late without obtaining permission of the Superior Court, the Department reserves the right to conclude the Contractual Claim Resolution Process at the end of the Step II review. In such instance, the Secretary of the Department Claims Committee will provide the Contractor with the reason(s) for the no further review determination and rejection of the claim. However, where the Claims Committee does review a claim, there shall not be deemed a waiver by the Department of any defense that the Notice was filed late or that there does not exist a contractual basis for resolution.

3. Information Required. As a minimum, all of the following information must accompany each claim and be incorporated into or attached to the contractually required Contractual Notice Form:

- a. A detailed factual statement of the claim providing all necessary dates, locations, and items of work affected by the claim.
- b. The date on which facts arose that gave rise to the claim.
- c. A copy of any notice given to the Department pursuant to any other Subsection of the Contract which relates to the matter giving rise to the claim.
- d. The name, function, and activity of each State individual, official, or employee involved in or knowledgeable about the claim.
- e. The specific provisions of the Contract which support or mitigate against the claim and a statement of the reasons why such provisions support or mitigate against the claim.
- f. If the claim relates to a decision of the Department which the Contract leaves to the Department's discretion or as to which the Contract provides that the Department's decision is final, the Contractor shall set out in detail all facts supporting its contention that the decision of the Department was fraudulent, arbitrary or capricious.
- g. The identification of any documents and the substance of any oral communications relating to such claim attaching same to the Form.
- h. A statement as to whether the additional compensation or extension of contract time sought is based on the operation of the provisions of the Contract or an alleged breach of contract.
- i. If an extension of contract time is sought, the specific days sought and the basis for such claim, supported by the Contractor's approved baseline progress schedule and updates, as well as a fragment, which will include a time impact evaluation, depicting the delay according to Subsection 108.04.
- j. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:
 - (1) Direct Labor
 - (2) Direct Materials
 - (3) Direct Overhead as specified in Subsections 109.03 and 109.04.
 - (4) Subcontractor's Work
 - (5) Other categories as specified by the Contractor.

- (6) The basis and manner of the Contractor's calculations of the additional compensation claimed.

The Department will not determine liability separate and apart from damages. The Contractual Claims Resolution Process shall not be bifurcated. The Department shall review liability and damage valuation issues at the same time.

4. The Procedures for the Process.

- a. Step I, Resident Engineer Review.** The Resident Engineer will render a written decision regarding the claim presented within 30 State Business Days of the Resident Engineer's determination that the information provided by the Contractor on the Contractual Notice Form in support of the claim satisfied the requirements to begin Step I. This time limit may be extended by mutual agreement of the parties. Within 15 State Business Days of the receipt of the decision by the Resident Engineer, the Contractor shall either accept or reject the decision in writing; or upon failure to complete this, the claim will be considered withdrawn from the Contractual Claim Resolution Process and there will be no further review of the claim. If the Contractor accepts the decision, such acceptance shall include execution of an unconditional release furnished by the Department effective upon payment.
- b. Step II, Regional Dispute Board Review.** If the Contractor provides a written rejection of the Resident Engineer's decision and a request to forward the claim to Step II, the Resident Engineer will forward the claim and supporting information previously submitted by the Contractor to the Regional Dispute Board within five State Business Days. The Regional Dispute Board will schedule and hold a meeting to review the claim with the Contractor within 30 State Business Days of receipt of the said claim information from the Resident Engineer. This time limit may be extended by mutual agreement of the parties. The Regional Dispute Board will issue a written decision regarding the claim within 20 State Business Days of the meeting.

Within 15 State Business Days of receipt of the Regional Dispute Board decision, the Contractor shall either accept or reject it in writing; or upon failure to complete this, the claim will be considered withdrawn and the Contractual Claim Resolution Process shall be considered to be concluded for that particular claim. If the Contractor accepts the decision, such acceptance shall include execution of an unconditional release furnished by the Department effective upon payment.

The Director, Construction Services and Materials, may request an informal meeting with the Contractor to discuss the then pending claim(s) after the Step II decision has been issued and sent to the Contractor, but prior to the matter being reviewed at the next step, subject to the mutual consent of the Contractor and the Department.

- c. Step III, Claims Committee Review.** A written request for a Step III review of the claim is to be made to the Secretary of the Department Claims Committee, P.O. Box 600, Trenton, New Jersey 08625-0600 with a copy to the Director, Construction Services & Materials. The Contractor may request that the Department Claims Committee immediately review claims, which are unresolved after review by the Regional Dispute Board,, when the following conditions are met:

1. A claim or the combination of claims exceed \$250,000; or
2. It is mutually agreed to by the Contractor and the Department.

However, when a project becomes 75 percent complete by contract time or dollar amount, which ever first occurs, claims that are unresolved at Step II will be reviewed at a single session of the Department Claims Committee after the Completion of the Work.

Additionally, the Contractor may request at the time of issuance of the Final Certificate that all unresolved claims, with the exception of the exclusionary cases as provided for in this Subsection, that have gone through the Steps I and II of the Contractual Claim Resolution Process, and which have not been presented at Step III of the Contractual Claim Resolution Process, be reviewed by the Department Claims Committee as provided for in this Subsection. The Contractor's written request must accompany its exceptions to the Final Certificate, with a copy sent to the Secretary of the Department Claims Committee and shall be made no later than 30 State Business Days after the issuance of the Final Certificate.

The Secretary of the Department Claims Committee will schedule a Claims Committee meeting with representatives of the Contractor and the Region, to be held within 45 State Business Days of the receipt of the claim information. This time limit may be extended by mutual agreement of the parties. The Department Claims Committee will notify the Contractor in writing of its decision on the claim(s) within 45 State Business Days of the meeting, stipulating the terms of any resolution of the claims. If the Department Claims Committee determines after review of the claims that no resolution and no further payment is

warranted, it shall notify the Contractor in writing of its decision. Within 15 State Business Days of the receipt of the Department Claims Committee decision, the Contractor shall either accept or reject it in writing, or upon failure to complete this, the claim will be considered withdrawn and the Contractual Claim Resolution Process shall be considered to be concluded for that particular claim. If the Contractor accepts the decision, such acceptance shall include execution of an unconditional release furnished by the Department effective upon payment. If the Contractor rejects the decision, there will be no further review of the claim unless the Contractor submits a written request for the utilization of Non-Binding Mediation.

d. Step IV, Non-Binding Mediation.

(1) Conditions. The Contractor may request at any time during the Project, but no later than 30 State Business Days after issuance of the Final Certificate, that any claim unresolved by the Department Claims Committee be elevated to Step IV. The request must be in writing to the Secretary, Department Claims Committee, P.O. Box 600, Trenton, New Jersey 08625-0600. No claim will be elevated to Step IV unless all of the following conditions are satisfied:

- (a) The claim has been reviewed by the Department Claims Committee.
- (b) The Contractor has escrowed its bid preparation documents as required under Subsection 103.06 and the documents are still being held in escrow.
- (c) The Contractor has entered into a Non-Evidential agreement to the effect that any statement or information provided during the Non-Binding Mediation proceedings shall not be evidential in any legal proceeding unless obtained by other discoverable means.
- (d) The Contractor has entered into a cost sharing agreement to equally share the cost of using Non-Binding Mediation in accord with Department issued forms.
- (e) The utilization of Non-Binding Mediation has been mutually agreed to by the Department and the Contractor; and
- (f) Prior to the commencement of the Non-Binding Mediation the parties shall confer with one another for the purpose of resolving the format of presenting the claim summary, supporting information, opening statements, and responses.

Failure by the Contractor to request Non-Binding Mediation within the required time period shall constitute a waiver by the Contractor of any utilization of the Non-Binding Mediation Step.

(2) Forms. Where the Contractor requests that Non-Binding Mediation be conducted, the Department will forward to the Contractor the required Non-Evidential and cost sharing agreement forms which shall be executed by the Contractor and returned to the Department within ten State Business Days. The failure by the Contractor to return the fully executed Non-Evidential and cost sharing agreements to the Department within the ten-day period shall constitute a waiver by the Contractor of the availability of Step IV.

(3) Mediator. The Department will select the Mediator to be utilized for the Non-Binding Mediation from a list of candidates submitted by the Contractor. The Contractor shall submit the names of six proposed Mediators, along with a biographical background listing the experience and qualifications of each candidate. Candidates may be from the same employment category or disciplines, such as construction, mediation, partnering facilitation, consulting engineer, attorney, judiciary (retired), accountant, architect, etc.

A candidate may have been used for mediation purposes for this Project or another project but shall not have any other relationships with either the Department or the Contractor for a period of two years preceding the request for Step IV. If the Department determines that none of the candidates submitted are acceptable, the Department will request and the Contractor shall submit four additional Mediator candidates. The Contractor shall submit this additional list within five State Business Days of the receipt of the written request. Upon mutual agreement, the Mediator can be an individual proposed by the Department.

(4) Escrow Documents. Once the Contractor has fully executed the required Non-Evidential and cost sharing agreements, its escrowed bid documents will be released upon request of the Department Claims Committee Chairperson solely for the exclusive use of the Mediator, the Department's selected Negotiator(s), the Department Regional Representative(s) and the Contractor Representative(s) participating in the Mediation session. These documents will be used by the Department as part of the Contractual Claims Resolution Process only to resolve the pending claims except it may seek such documents through the discovery process in the event mediation is not successful and litigation ensues.

- (5) **Meeting.** The Secretary of the Department Claims Committee will schedule a meeting for the Non-Binding Mediation of the submitted claims to be held within 30 State Business Days of the return of the executed Non-Evidential and cost sharing agreements. The meeting time limit may be extended by mutual agreement of the parties. The Secretary of the Department Claims Committee will issue the recommendations of the Department's Negotiator to the Commissioner for action within 15 State Business Days of the Non Binding Mediation session. The Commissioner, or their designee, will accept, reject, or modify the recommendation of the Department Negotiator and notify the Contractor of the decision within 15 State Business Days.
- (6) **Decision.** The Contractor shall accept or reject the decision within 15 State Business Days of notification of the Commissioner's decision. If the Contractor accepts the decision of the Commissioner, or their designee, such acceptance shall be in writing and include execution of an unconditional release furnished by the Department effective upon payment. If the Contractor fails to accept or reject the Commissioner's decision within 15 State Business Days, the decision of the Commissioner will be withdrawn and the Contractual Claims Resolution Process shall be deemed concluded as to that particular claim under review.

After submission of the recommendation to the Commissioner, the bid documents released from escrow will be returned to the escrow agent for continued escrow in the designated repository.

SECTION 109 -- MEASUREMENT AND PAYMENT

109.07 Payments Following Substantial Completion

THE LAST PARAGRAPH IS CHANGED TO:

All monies retained subsequent to the first estimate following Substantial Completion may be released as specified in Subsection 109.11.

109.09 Payment Following Acceptance

THE ENTIRE TEXT IS CHANGED TO:

All Partial payments by monthly estimate will be processed prior to acceptance. Final payment will be made as specified in Subsection 109.11.

109.10 As-Built Quantities.

THE FIRST AND SECOND SENTENCE OF THE SECOND PARAGRAPH ARE CHANGED TO:

The Resident Engineer may from time to time, before Substantial Completion, prepare as-built quantities and incorporate these quantities into monthly estimate certificates through an appropriate Field Order or Change Order. Such interim as-built quantities are subject to recalculation in completion of the Final Certificate.

THE THIRD PARAGRAPH IS DELETED.

109.11 Final Payment and Claims.

THE ENTIRE TEXT IS CHANGED TO:

1. **Final Certificate.** All prior estimates and payments made by the Department are subject to correction in the Final Certificate, which will be completed as follows:
 - a. After Acceptance is completed as specified in [Subsection 105.23](#) and the As-Built quantities finalized, the Department will make an estimate of the total amount of Work done under the Contract, and prepare and issue the Final Certificate to the Contractor.
 - b. Within 30 State Business Days after said Final Certificate has been issued to the Contractor, the Contractor shall submit to the Department either a written acceptance of the Final Certificate without exception together with an executed release in the form provided with the Final Certificate or a written acceptance of the Final Certificate with a reservation of specific claims, but otherwise releasing all claims not specifically reserved, by executing a conditional release in

the form provided with the Final Certificate. The Contractor's failure to submit any written acceptance or acceptance with reservation within said 30 days will be construed by the Department as an acceptance by the Contractor of the Final Certificate without exception or reservation of Claims.

- c. Upon receipt of the Contractor's written acceptance of the Final Certificate with unconditional or conditional release, or when the Contractor fails to provide any written acceptance of the Final Certificate within 30 State Business Days of issuance, the Department will pay the entire sum due thereunder as provided by the New Jersey Prompt Payment Act NJSA 52:32-32 *et seq.*, provided the Final Certificate indicates a payment is due the Contractor. However, where the Final Certificate indicates a Credit (payment) is due the Department, the Contractor shall remit said Credit (payment) to the Department in the amount set forth in the Final Certificate.
- d. If the Contractor fails to remit the Credit (payment) due the Department, as indicated on the Final Certificate, within 30 State Business Days of issuance of the Final Certificate, the Department may pursue all legal means available to recover the amount due the State, including but not limited to, deducting the amount from payment due the Contractor on this or other Department Contracts or from retainage and/or the sale of bonds held in lieu of retainage for the Contract or for other Contracts, even where the credit is being contested by the Contractor.

Neither the failure of the Contractor to accept the tendered Final Payment nor the failure of the Contractor to remit the credit (payment) due the Department shall affect when the "Completion of the Contract" shall be deemed to have occurred for any reason. Where there is a remaining monetary balance due to the Contractor by the Department, Final Payment will be made after the "Completion of the Contract". Retainage shall be released to the Contractor upon completion of the contract unless a credit (payment) is due to the Department, which shall be deducted or adjusted in accord with the Specifications.

2. Conditions for Claims. Conditional acceptance of the Final Certificate will be permitted only where all of the following are met:

- a. When the Contractor submits a Release conditioned with exception or reservation, the release shall state the specific monetary amounts and category of the claims being reserved. The Contractor acknowledges, by the act of executing the contract, that the failure to state specific monetary amounts and specific categories shall result in a waiver of such claims lacking as to amounts or specific categories thereof. The Contractor may reserve only those claims properly filed with the Department pursuant to Subsection 107.02 and not previously resolved. The Contractor waives all claims for which the required notice has not been filed with the Department.
- b. The Contractor further understands and agrees, by the act of executing the Contract that neither the procedures established under this Subsection nor the review of claims by the Department pursuant hereto shall in any way modify the requirements applicable to the filing of a Contractual Notice Form or the filing of a suit pursuant to the provisions of N.J.S.A. 59:13-1 *et seq.*
- c. If the Contractor conditions its acceptance of the Final Certificate by reserving particular claims, the Contractor shall at the same time state in writing whether it would like to submit its reserved claims for review by the Department Claims Committee. Only those claims properly reserved, as provided for in Subsection 107.02, and which are unresolved after completing Steps I and II of the Contractual Claim Resolution Process for the resolution of contract claims, are eligible for review by the Department Claims Committee to the extent provided in that Subsection. If the Contractor states that it does not want Department Claims Committee review of the reserved claims or if it fails to request Department Claims Committee review of reserved claims when it conditions its acceptance of the Final Certificate or if it files suit in a court of law regarding those claims, the Contractor shall be deemed to have waived any ability to have its reserved claims reviewed by the Department Claims Committee.
- d. If the Contractor requests review of its reserved claims when it conditions its acceptance of the Final Certificate, it shall send at the same time a copy of its request for review to the Secretary of the Department Claims Committee, PO Box 600, Trenton, NJ 08625-0600. Department Claims Committee review will then take place according to Subsection 107.02.
- e. At the election of the Contractor upon completion of the Contract, claims that are unresolved after review by the Department Claims Committee may be submitted to Non-Binding Mediation according to Subsection 107.02.
- f. Interest shall neither be paid nor shall it accrue upon the amount of any additional compensation paid in resolution or settlement of a claim resolved through the various steps of the Contractual Claims Resolution Process.

Distribution and Announcement Access Information

This announcement is being distributed electronically to our in-house staff and various public agencies based on our Construction Details BDC distribution list maintained by the Engineering Documents Unit.

Internet access to this BDC Announcement can be downloaded and viewed from the following New Jersey Department of Transportation Web Page:

<http://www.state.nj.us/transportation/cpm/BaselineDocuments/>

Hard copies of this document can be acquired on a limited basis by contacting:

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Trenton, New Jersey 08625-0600
Phone: (609) 530-5587
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Implementation Code R (ROUTINE)

Changes must be implemented in all applicable Department projects scheduled for Final Design Submission at least one month after the date of the BDC announcement. This will allow designers to make necessary plan, specifications, and estimate/proposal changes without requiring the need for an addenda or postponement of advertisement or receipt of bids.

Recommended By:

Approved By:

Brian Strizki
Director,
Quality Management Services

F. Howard Zahn
Assistant Commissioner,
Capital Program Management

BJS:KS: GL
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