

# CONSTRUCTION PROCEDURES HANDBOOK

SECTION IV	SUBSECTION C	DATE
CONSTRUCTION CHANGES	CLAIMS AND CONTRACTUAL NOTICE	06/05/18

## General

The Contract provides for the resolution of claims through its administrative process described below.

A contractual claim is initiated by submission of Contractual Notice as specified in Subpart 104.03.04 of the 2007 Specifications. This notice can be accomplished two ways. They are:

1. Written submission of the claim stating the following:
  - a. A statement that this is a notice of a change
  - b. The date when the circumstances believed to be a change were discovered
  - c. A detailed and specific statement describing the nature and circumstances of the change
  - d. If the change will or could affect costs to the Department
  - e. If the change will or could affect Contract Time as specified in 108.11.01.C (i.e. a Time Impact Evaluation)
2. Submission of Contractual Notice form [DC-161](#) (See Attachment A)

The Contractual Claim Resolution Process is detailed in Subsection 107.12 of the 2007 Specifications, but is also part of the [Department's Policies & Procedures \(Policy 810\)](#) and the Administrative Code N.J.A.C 16:45. The contractual process has four (4) steps. They are:

- |          |  |
|----------|--|
| STEP I   | Review by the RE                           |
| STEP II  | Review by the Regional Claims Review Board |
| STEP III | Review by the Claims Committee             |
| STEP IV  | Non-Binding Mediation                      |

Attached is a flow chart (See Attachment B) which provides a summary of the process.

Often the Contractor will provide Contractual Notice of a claim, simply to protect its rights, and for many claims the issue does not involve contention and an agreeable resolution is quickly reached. When claims arise, the Contractual Claim Resolution Process is to be followed in a quick and professional manner without prejudice or animosity.

In addition to the contractual claims resolution process, the Contractor and the Department have rights inscribed under N.J.S.A 59:13-1 et seq, "The New Jersey Contractual Liability Act".

If a claim arises, the RE will maintain a separate project file to retain all documentation related to the claim. Documentation of the claim, or an issue which could become a claim, is very important in order to accurately determine the veracity of a claim and the actual damages. Documentation should include photos, video, written direction, diary entries and all other information.

## **Contractual Notice**

Contractual Notice (sometimes referred to as a Notice of Change) is a notice of a claim. This is true even if the Department does not dispute the claim. One of the major reasons Contractual Notice is important is that it allows the Department to make decisions, which mitigate the cost of the Contract.

Contractual Notice may be incomplete to the extent that the full impact of cost and time has not been determined. However, a Contractual Notice must be clear, sufficiently descriptive and specific to allow the RE to reasonably understand the issue and its impact to the Contract. If the RE receives a Contractual Notice that has insufficient information or provides vague or otherwise non-specific information it is to be rejected by the RE.

The RE will review the Contractual Notice, and determine if the notice was received within 90 days of when the Contractor discovered the alleged change *or should have reasonably discovered* the change. If the 90 day timeframe is exceeded, the RE will reject the notice as not being timely. The RE should not solely rely upon the date provided in the notice to make this determination. The date of claim accrual is when the condition is discovered, not when the RE rejects a request for compensation (time and or money).

If Contractual Notice is filed because of a protest to a Change Order, the protest must be received within 15 days of issuance of the Change Order to the Contractor. Submitting a Contractual Notice does extend the 15 day time requirement for protesting a Change Order as specified in Subpart 104.03.02 of the 2007 Specifications. If the Contractor protests a Change Order, because it adjusts quantities of an Item for which the Contractor wants to file a claim, the Contractual Notice must be received within the 90 days as described above. If a Contractor having previous knowledge of an issue waits until a Change Order that adjusts quantities for the item to protest the Change Order, the Contractor may have exceeded the allowable time.

If Contractual Notice is specific, and meets the time requirements, the RE must respond in one of two ways:

- a. Acknowledge that the notice was received, and state that the Department has not determined whether the circumstances constitute a change that may be eligible for additional payment and /or extension of Contract Time.
- b. Acknowledge that the notice was received, and confirm that the circumstances constitute a change that may be eligible for additional payment and/or extension of Contract Time.

If when reviewing the Contractual Notice the RE finds that the claim issue was caused or alleged to be caused by an error or omission made by the Design Consultant, the RE will notify the Project Manager of the potential involvement of the Design Consultant so that the Project Manager can notify the Consultant. Similarly, if the RE finds that the claim issue was caused or alleged to be caused by the Construction Inspection Consultant, the RE will notify the Regional Contract Manager so that the Regional Contract Manager can notify the Consultant Inspection Consultant.

If the circumstances identified may result in additional cost or may result in an impact to the Contract Time, the RE will discuss the issue with the Field Manager and the Project Manager. The Department must determine if it wants to proceed with the Contract, understanding the potential additional costs to the project and/or impact to Contract Time, or if it wants to direct the Contractor to do something differently to mitigate or eliminate the situation.

For Full-Oversight Federal Projects, the RE will inform the FHWA Area Engineer of all Contractual Notices as they are received.

The Contractor may submit additional information to supplement its Contractual Notice. Indeed, for claims involving on-going issues, it is expected that the Contractor will provide a final accounting of cost and time. The Contractor cannot amend a claim to include costs for a different issue. The Contractor must submit separate Contractual Notices for different issues.

### **Resolving Claims Pre-Step I**

The RE should endeavor to resolve claims quickly, but only do so within the framework of the Contract. The RE can only negotiate the settlement of a claim within the framework of the Contract, and not offer to waive requirements of the Contract to reach a settlement. The RE should note that Subpart 104.03.04 of the 2007 Specifications bars the Contractor from recovering costs incurred prior to providing Contractual Notice.

The RE is to review the claim with the Project Manager and the Field Manager to determine how the issue is addressed in the Contract, and then meet with the Contractor to discuss the issue. While the RE may have established a preliminary position, the discussion should be conducted with an open mind. Ideally, the RE and the Contractor should discuss the issue, not be adversarial, but to honestly understand each other's position and perspective.

The RE may need additional information, and should ensure that detailed records are maintained.

If the RE believes a claim has merit, it can be too resolved, even if the issue is on-going. Additionally, even if all of the issues of a claim can be resolved, the RE may elect to resolve portions of the claim.

### **Step I Review – Review by the RE**

Upon receipt of a completed Contractual Notice Form DC-161 that requests the Contractual Claims Resolution Process to begin, along with all supporting documentation, the RE will review the Contractor's complete claim package along with the RE's claim/issue file. The RE will then conduct a documented meeting and/or negotiation session with the Contractor. The RE will issue a written response providing a decision within 20 days of receiving the Contractual Notice. If additional time is needed for proper analysis and review of the claim, the time may be extended by mutual agreement.

For FHWA Full Oversight projects, the RE is to discuss the claim with the FHWA Area Engineer to keep the FHWA informed for financial participation purposes (See CPH Section IV-B) and if the claim is rejected, the RE will send a copy of the rejection letter to the FHWA Area Engineer.

If the Contractor accepts the decision of the RE, and the decision requires compensation, the RE will initiate a Change Order in accordance with [CPH Section IV-B](#), which will include the unconditional release as to any and all matters arising from the claim. This Change Order cannot be processed with a Contractor protest or unsigned “Contractual Notice Release form DC-161R (see Attachment C). If a portion of the claim is resolved, a Contractual Notice Release form DC-161R detailing what issues or costs are unresolved must be signed by the Contractor. A conditional release must be carefully tailored to restrict the nature and extent of the unresolved portion of the claim. RE should confer with the RCE to ensure the Contractual Notice Release form DC-161R is worded correctly. If necessary, the RE and the RCE will confer with the DAG.

If the Contractor rejects the decision of the RE, and provides a written request for the claim to be forwarded to Step II, the RE will forward the claim and supporting information (3 copies) to the RCE and request a review by the Regional Claims Review Board (copies sent to all three members). The RE also prepares and submits a fact sheet, providing the following information:

- a. A summary of the Contractor’s claim.
- b. The RE’s position concerning entitlement (e.g. to what extent is the claim valid - does the Department have liability) along with the supporting basis and documents for the RE’s Step I determination. A claim may have multiple issues, and some parts of a claim may be considered to have merit while others are considered to be unsupported by the Contract.
- c. The RE’s assessment of the Contractor’s calculation of the value of the claim – i.e. The RE should review the Contractors calculations and identify aspects, which are disputed by the RE. For claims having large and/or complex cost calculations, the RE should discuss the necessity of performing a detailed analysis with the FM. In many cases, especially where the issue of entitlement is in question, it may be that the RE performs a cursory review to identify the more obvious issues, or simply notes that a detailed analysis has not been performed.

### **Step II Review – Review by the Regional Claims Review Board**

For the Division of Construction & Materials, the Regional Claims Review Board is a three-member board comprised of the RCE, the project’s Executive Regional Manager and an engineer from the Bureau of Construction Management. The RCE acts as the chairperson for the Regional Claims Review Board.

The RCE will schedule and hold a meeting of the Regional Claims Review Board with the Contractor within 30 days of receipt of the claim information from the RE. A meeting with the DOT staff may be necessary before, and/or after the meeting with the Contractor to formulate the Department’s position and the disposition of the claim.

Unless specifically requested by the Department, the submission of additional information by the Contractor at any step of the review process is cause for the process to revert to Step I.

For PODI Projects, FHWA participation must be obtained before a settlement offer is made. The RE will send the FHWA Area Engineer a copy of the claim package, and the RCE will inform the FHWA Area Engineer of the Regional Claims Review Board's meeting date.

For NON PODI (Delegated Projects) Funded Projects, the FHWA does not require specific notice of a claim. If a claim is for more than \$500,000, the FHWA is to be apprised of the issue through their involvement with the Change Control Board. However, for claims having significant value or impacts, the RCE is encouraged to seek FHWA guidance if the RCE has any question about the appropriateness of assigning federal participation if a settlement is reached.

Within 20 days of the meeting, the Regional Claims Review Board will make a determination, and the RCE will issue its written decision, which will explain the Department's position and if appropriate tender a settlement offer. The RCE sends a copy of the decision letter to all members of the Regional Claims Review Board, the FM, the PM, and the RE.

If the Contractor accepts the Regional Claims Review Board's decision, the RE will initiate a Change Order in accordance with CPH Section IV-B, which will include an unconditional release as to any and all matters arising from the claim. This Change Order cannot be processed with a Contractor protest or unsigned [Contractual Notice Release Form DC-161R](#) (See Attachment B). If a portion of the claim is resolved, a conditional release detailing what issues or costs that remain unresolved must be signed by the Contractor. The Contractual Notice Release Form DC- 161R must be carefully tailored to restrict the nature and extent of the unresolved portion of the claim. The RE should confer with the RCE to ensure the release is worded correctly. If necessary, the RE and the RCE will confer with the DAG.

If the Contractor rejects the Regional Claims Review Board's decision and the value of the claim is more than \$20,000, the contractor may request review by the Department Claims Committee. If the value of the claim is less than \$20,000, the Regional Claims Review Board is the final review level.

### **Step III/Step IV Review by the Claims Committee or Non-Binding Negotiation Team**

The procedure for review by the Claims Committee and for Non-binding Mediation Negotiation is provided in Policy & Procedure No. 810 and is not repeated here.

If the Contractor accepts an offer made by the Claims Committee or the Mediation Negotiation Team, prior to the issuance of the Final Change Order, the RE will initiate a Change Order in accordance with [CPH Section IV-B](#), which will include the Contractual Notice Release Form DC-161R, which will address all matters arising from the claim. This Change Order cannot be processed with a Contractor protest or unsigned "Contractual Notice Release Form DC-161R.

If the Contractor accepts an offer made by the Claims Committee or the Mediation Negotiation Team, after the issuance of the Final Change Order, the settlement will be processed through the issuance of a Department Action, Form AD-12, by the Department Claims Secretary.

For FHWA PODI and NON PODI (Delegated) contracts, the FHWA must be contacted if Federal participation is sought for the Change Order.

### **Litigation**

At any time after providing Contractual Notice, the Contractor has the right to institute litigation in Superior Court in lieu of using the Contractual Claim Resolution Process. If a claim is filed with the Court, the suit will be handled by the Division of Law, Transportation Section, and the Contractual Claim Resolution Process will be terminated. All negotiations or settlement discussions with the Contractor must cease, unless otherwise advised by the Deputy Attorney General assigned to the litigation.

ATTACHMENT "A"

Form DC-161 for 2007 Specifications- 11/09/2016

Project Claim Reference #

NEW JERSEY DEPARTMENT OF TRANSPORTATION  
CONTRACTUAL NOTICE FORM

THE CONTRACTOR IS ADVISED THAT THERE ARE SPECIFIC TIME LIMITS FOR FILING NOTICES UNDER BOTH THE CONTRACT SPECIFICATIONS AND THE NEW JERSEY CONTRACTUAL LIABILITY ACT, N.J.S.A. 59:13-1, ET SEQ. (THE CONTRACTUAL LIABILITY ACT). THE CONTRACTOR MUST COMPLY WITH THE TIME REQUIREMENTS OF BOTH THE SPECIFICATIONS AND THE CONTRACTUAL LIABILITY ACT IN ORDER TO FULLY RESERVE THIS CLAIM. THE CONTRACTOR UNDERSTANDS THAT IF IT FAILS TO GIVE NOTICE AS REQUIRED BY THE SPECIFICATIONS WITHIN THE TIME PROVIDED, ANY CLAIM MAY BE FOREVER BARRED OR LIMITED AS PROVIDED BY THE SPECIFICATIONS. THE CONTRACTOR ALSO UNDERSTANDS THAT IT MAY BE BARRED FROM RECOVERING AGAINST THE STATE IF IT FAILS TO GIVE NOTICE OF ANY ACT OR FAILURE TO ACT BY THE NEW JERSEY DEPARTMENT OF TRANSPORTATION, OR THE HAPPENING OF ANY EVENT, THING OR OCCURRENCE WITHIN 90 DAYS OF SUCH ACT, FAILURE TO ACT, OR HAPPENING OF SUCH EVENT, THING OR OCCURRENCE IN ACCORDANCE WITH THE CONTRACTUAL LIABILITY ACT, EXCEPT IF PERMISSION TO FILE A LATE NOTICE OF CLAIM IS OBTAINED FROM THE SUPERIOR COURT WITHIN ONE YEAR OF THE ACCRUAL OF THE CLAIM.

_____ <i>Name of Contractor</i>		_____ <i>Street Address</i>		
_____ <i>Business Phone Number</i>	_____ <i>Fax Number</i>	_____ <i>City</i>	_____ <i>State</i>	_____ <i>Zip Code</i>

\_\_\_\_\_  
*Project Name, Section, Location and Description*

1. Is this the first written notice made to the Department regarding this claim?  
 Yes; please reference as Contractor's Project Claim # \_\_\_\_\_ or  
 No; this supplements the previous written notice submitted \_\_\_\_\_, referenced as Contractor's Project Claim # \_\_\_\_\_
2. State (in a narrative) the nature of and circumstances/reasons of the act, failure to act, event, thing, occurrence, condition, cause of delay, or alleged suspension, which gives rise to this claim (include the name, function, and activity of each individual involved in or knowledgeable about the claim and the identification of documents and the substance of communications relating to the claim):  
\_\_\_\_\_
3. State the specific beginning date of such act, failure to act, event, thing, occurrence, condition, cause of delay, or alleged suspension which gives rise to this claim: \_\_\_\_\_ (date)
4. State (in a narrative) the detailed actions taken by the Contractor to mitigate the claim:  
\_\_\_\_\_
5. Will/could the change affect Contract Time?  
 No; or  
 Yes, but the extent of the impacts on Contract Time are not known but affects the following activity(ies): \_\_\_\_\_ (list); or  
 Yes, the change impacts Contract Time by \_\_\_\_\_ days and affects the following activity(ies): \_\_\_\_\_ (list);  
*(select one) A Time Impact Evaluation (TIE) Form DC-186:  is attached; or  was submitted on: \_\_\_\_\_ (date)*  
*(A TIE, CPM fragment, and an approved progress schedule is required as per Subsection 108.11.01.C of the 2007 Specifications)*
6. Will/could the change affect costs to the Department?  
 No; or  
 Yes, but the amount is unknown at this time; a non-binding estimate is (check applicable box):  less than \$20,000;  
 between  \$20,000 - \$250,000;  \$250,000 - \$500,000;  \$500,000 - \$1,000,000;  more than \$1,000,000; or  
 Yes; the amount of this claim is \$ \_\_\_\_\_ *(Provide the basis for the calculation, including all types of all costs incurred)*
7. State the Pay Item(s) that will/could be affected by this claim: (list)  
\_\_\_\_\_

Form DC-161 for 2007 Specifications- 4/08

Project Claim Reference #

- 8. Is the Contractor notifying the Department to begin the Contractual Claims Resolution Process?
  - ( ) **Yes**; this Form is complete in its entirety, including all supporting documentation, costs and proof(s) thereof submitted.
  - ( ) **No**; this Form is incomplete; it is submitted to provide notice under N.J.S.A. 59:13-1, et seq. and specification 104.03.04, with the costs of the claim unknown or partially unknown at this time.

**I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are knowingly, deliberately or willfully false, I am subject to such punishment as may be provided by all applicable laws including the False Claims Act.**

DATED: \_\_\_\_\_

\_\_\_\_\_  
*Signature-Prime Contractor's Authorized Representative*

\_\_\_\_\_  
*(Type - Name and Title)*

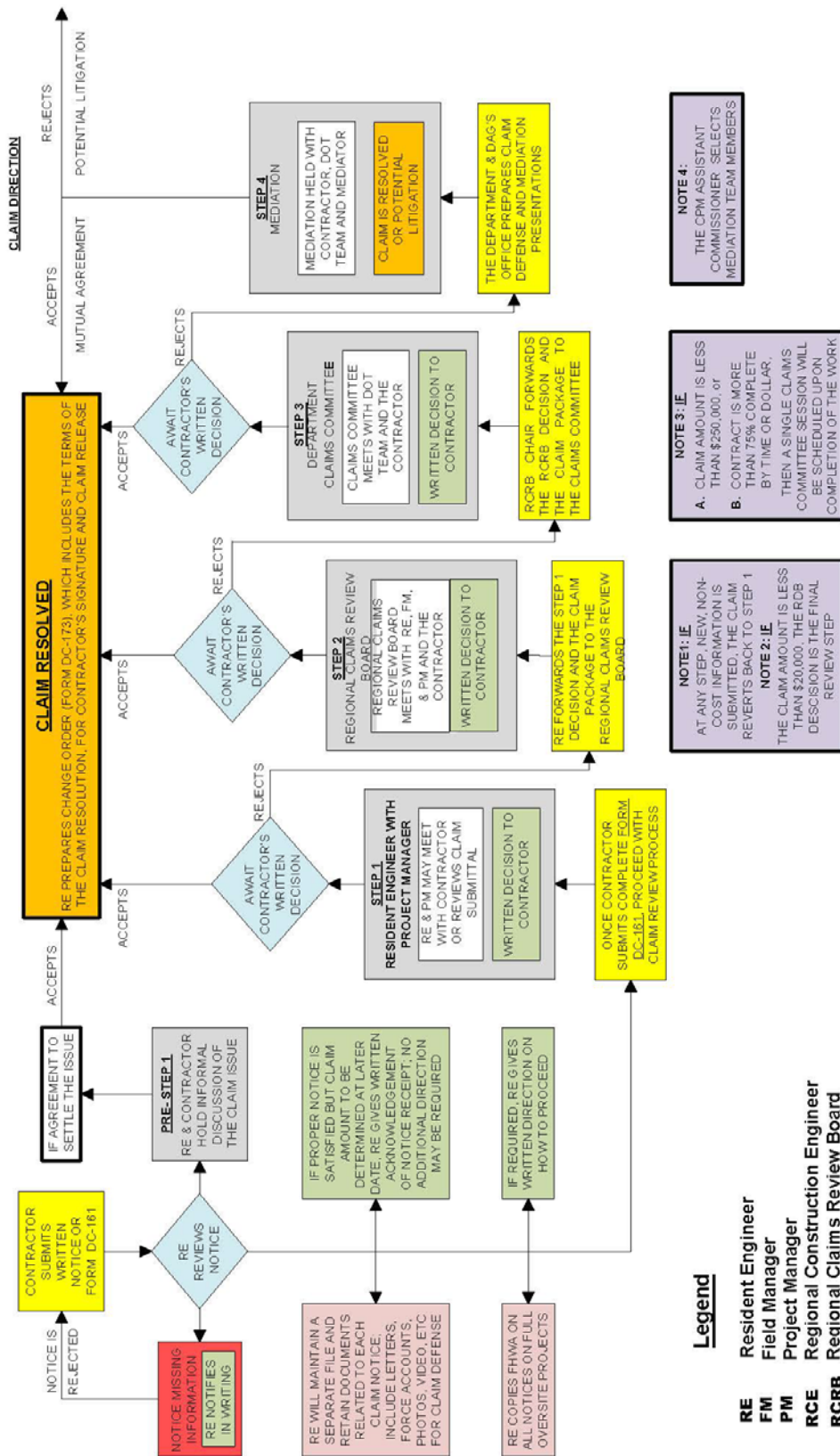
If correspondence relative to this form should be sent to someone other than the Contractor, please state Name and Address:

**THE ORIGINAL OF THIS NOTICE MUST BE SIGNED AND DELIVERED TO THE RE**



ATTACHMENT "B"

**CONTRACTUAL CLAIM RESOLUTION PROCESS**



**Legend**

- RE** Resident Engineer
- FM** Field Manager
- PM** Project Manager
- RCE** Regional Construction Engineer
- RCRB** Regional Claims Review Board
- FHWA** Federal Highway Administration

**ATTACHMENT "C"**

DC-161R (01/2013)

**CONTRACTUAL NOTICE RELEASE FORM**

Contract Description: [REDACTED]  
Federal Project Number: [REDACTED]  
0% State  
UPC [REDACTED]  
DP Number: [REDACTED]

In consideration of payment and/or terms and conditions stipulated in the attached Change Order (Form DC-173A) Number: [REDACTED] dated January 1, 2011, I hereby release the State of New Jersey, the Commissioner of the Department of Transportation, the Department, their agents, officers and employees, from all liability and claims asserted now or in the future, set forth in this Contractual Notice Form filed on January 1, 2011, regarding [REDACTED].

By acceptance of this Change Order, the Contractor agrees that the compensation provided by this Change Order constitutes the full extent of payment and modification of Contract Time as settlement for the above noted claims, and waives its right to any additional compensation associated with the above noted claims. Furthermore, the Contractor waives its right to file suit for the above noted claims. If the Contractor files suit for these claims after the execution of this Change Order, it further agrees to reimburse the Department for any and all legal expenses incurred by the Department associated with these claims.

Furthermore, I acknowledge that I have full power and authority to execute this release and bind the Contractor and that all approvals and actions necessary in connection with my execution of this release have been obtained and are in full effect as of the release execution date.

Firm: [REDACTED]	Date: [REDACTED]
Authorized Representative:	Witness To:
Name: [REDACTED]	Name: [REDACTED]
Title: [REDACTED]	Title: [REDACTED]