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Section 4 Disputes

5-401 General

The objective of this section is to provide guidance to the contract administrative team so that requests for information, protests, contract disputes, potential claims, and claims are addressed and resolved expeditiously and consistently. The contract administrative team includes the resident engineer, the construction engineer, and other California Department of Transportation (Caltrans) personnel with the responsibility to analyze and resolve disputes.

The contract administrative team, represented by the resident engineer, administers the dispute resolution process. Subject matter experts are consulted to help evaluate the technical aspects of a dispute.

Contractors submit requests for information to the resident engineer when there is discrepancy or confusion in the contract, to ask for a time extension, or to protest a resident engineer's decision. The resident engineer responds to the request within the specified time. A contract dispute results when the contractor does not agree with the response.

A contract dispute is a disagreement between the contractor and Caltrans over the interpretation of plans, specifications, bid proposals, material handouts, and other documents. When a dispute occurs, the contractor provides notice of the dispute using the three-part Potential Claim Record process. The resident engineer acknowledges receipt of the dispute and begins analysis and potential resolution. Try to resolve disputes as early as possible, in accordance with the contract, and at the lowest responsible level. Determine the relevant facts and responsibilities. Compensate the contractor where merit exists, even in part, and deny compensation with clear reasons when no merit exists.

Take this action within your authority as described in Section 5-311, "Change Order Approval Process," and Table 5-4.2., "Disputes Resolution Authority—Entitlement," in Section 5-417, "Dispute Resolution Authority," of this manual.

If you lack the authority to resolve the dispute, discuss the dispute with the rest of the contract administrative team and the Division of Construction field coordinator. Promptly issue and obtain approval of a change order for the portions of the dispute that have merit.

Disputes that have not been resolved before issuing the proposed final estimate may become claims if the contractor lists them as exceptions to the proposed final estimate. Caltrans reviews the contractor's claims and issues its final determination of claims in an expeditious manner. Caltrans has 240 days from contract acceptance to issue its final determination of claims. The contractor can initiate arbitration by filing a complaint with the Office of Administrative Hearings within 90 days of the receipt of the district director determination of claims letter or 240 days after contract acceptance if no district director determination of claims letter was issued. The district director determination of claims

letter is Caltrans' final written decision on the claims under Public Contract Code Section 10240.1. Caltrans' Legal Division is the lead for representing Caltrans in arbitration. The districts and the Division of Construction support the Legal Division in arbitration proceedings. Refer to Section 5-412, "Arbitration," of this manual for additional information.

Provisions for contract claims are incorporated into Minor B contracts based on California Government Code. Resident engineers must follow Section 5-407, "Minor B Contracts," of this manual, when resolving disputes on Minor B contracts.

5-402 Disputes and Claims Prevention

There are many things that the contract administrative team can do to minimize the number and size of disputes and claims. Be proactive, professionally communicate with the contractor, and properly administer the contract. Partner with the contractor, within the confines of the contract, and maintain a respectful relationship through completion of the project. Be knowledgeable about the contract documents, policies, procedures, and federal and state laws applicable to the proper administration of the contract. Knowing the contractual responsibilities of each party will help in the timely resolution of the dispute.

Take the following actions to minimize claims:

- Partner with the contractor
- Expeditiously investigate the issue
- Consider the facts
- Define the critical issues
- Review the appropriate contract specifications
- Communicate your position as soon as possible
- Work within the contractual constraints
- Document resolution and elevate to a greater authority, if appropriate

5-403 Requests for Information and Potential Claim Records

The contractor may ask questions and make requests for additional compensation. Sections 5-1.42, "Requests for Information," and 5-1.43, "Potential Claims and Dispute Resolution," of the *Standard Specifications* include provisions and requirements for the contractor and the resident engineer to follow to document the request and move toward resolution if a dispute occurs. The contract administrative team must respond without delay to the contractor's requests. Timeframes for the responses are included in these sections.

Requests for information must be submitted by the contractor to the resident engineer during the course of the project and until receiving the proposed final estimate. Requests for information that pertain to the resident engineer's decisions or orders may have specified timeframes for the contractor submittal. The resident engineer's response may lead to a dispute if the contractor protests the response. Section 5-1.43, "Potential Claims and Dispute Resolution," of the *Standard Specifications* outlines the three-part potential

claim record process, which includes an initial potential claim record, a supplemental potential claim record, and a full and final potential claim record. Note the date and time these documents were received and the name of the person who received them. For contracts with internet potential claim record requirements, the contractor's submittal using the Caltrans electronic potential claim record system is mandatory. For additional information on the electronic system see related information at:

<https://dot.ca.gov/programs/construction/epcr>

Disputes become claims when the contractor lists them as exceptions to the proposed final estimate.

5-403A Requests for Information

The contractor submits a request for information upon recognition of any event or question of fact arising under the contract in accordance with Section 5-1.42, "Requests for Information," of the *Standard Specifications*. Respond to requests for information within the time specified.

Make every effort to provide a complete response to the contractor's request. If it is unclear about what is being requested, ask the contractor to clarify the request. If more information is needed from the contractor, be specific about what is needed, request that it be provided, and let the contractor know that you cannot respond until it is received. Notify the contractor when unable to provide an answer because more information is forthcoming from other sources. Provide a date when the information will be available. For additional information, refer to Section 3-521, "Requests for Information and Potential Claim Records," of this manual.

5-403B Potential Claim Records

Section 5-1.43A, "Potential Claims and Dispute Resolution—General," of the *Standard Specifications* outlines the three-part potential claim record procedure and informs the contractor that failure to comply with it is a waiver of the potential claim, a waiver of the right to a corresponding claim for the disputed work in the administrative claims process, and is a bar to arbitration.

A unique identification number must be assigned to each potential claim and the nature and circumstances of the potential claim must not change throughout the submittal of all 3 potential claim record components:

- Initial Potential Claim Record
- Supplemental Potential Claim Record
- Full and Final Potential Claim Record

Make sure that the contractor is aware of and complies with the contractual responsibility to minimize and mitigate the effects of potentially claimed work or events.

5-403C Documentation

Place copies of all documents related to every dispute on the project in Category 62, “Disputes,” of the project records. This information provides the basis for preparing position papers in the alternative dispute resolution process and development of the preliminary construction claim findings. Follow the procedures outlined in Section 5-102, “Organization of Project Documents,” of this manual for documenting claims. Refer to Section 3-521D, “Documentation Guidelines for Disputes,” of this manual for more information.

5-404 Alternative Dispute Resolution

The purpose of the alternative dispute resolution process is to provide a means for Caltrans and the contractor to resolve disputes at the project level with the help of a neutral party who has no financial interest in the outcome of the dispute. The alternative dispute resolution process is not allowed for disputes solely between the contractor and a subcontractor, because those disputes are outside of the scope of the contract that Caltrans has with the contractor. Additionally, the alternative dispute resolution process is not allowed for overhead-type disputes. Refer to Section 5-410, “Overhead Claims,” of this manual for information regarding overhead-type disputes.

The contractor is required to use alternative dispute resolution in order to pursue a claim. Partnering-facilitated dispute resolution, dispute resolution ladder, dispute resolution advisor, and dispute resolution board (DRB) are different types of alternative dispute resolution processes available. Refer to Section 3-522, “Alternative Dispute Resolution Processes,” of this manual for more information.

5-405 Claims

The contractor submits a written claim statement for each unresolved potential claim record, administrative issue, and overhead adjustment by listing them as exceptions to the proposed final estimate as described in Section 9-1.17D, “Final Payment and Claims,” of the *Standard Specifications*.

All claims included in the exceptions to the proposed final estimate should be considered. Exceptions to the proposed final estimate that were not previously submitted in accordance with Section 5-1.43, “Potential Claims and Dispute Resolution,” of the *Standard Specifications* are considered new claims. Exceptions for administrative or overhead claims are not considered new claims. Overhead claims are addressed in Section 9-1.17D(2)(b), “Overhead Claims,” of the *Standard Specifications*. Refer to Section 5-410, “Overhead Claims,” of this manual for information regarding overhead-type disputes.

Analyze the merit of new claims and document the claims as outlined in Section 3-521D, “Documentation Guidelines for Disputes,” of this manual. Include the analysis in the preliminary construction claims findings.

Examples of claims correspondence are listed at Construction’s Claims Correspondence Examples intranet page.

5-406 Claims Resolution Process

The following claims processing milestones were established to assure that the claims process is completed within the statutory requirement of 240 days after contract acceptance. The number of days is calculated from the date of contract acceptance.

Districts are responsible for populating and updating the Division of Construction's claims database with the actual milestone dates to verify that milestones, events, dates, and stated costs, are current and correct. See the following Table 5-4.1., "Required Post Acceptance Event Codes and Dates."

Project claims information should be updated by the 15th of each month to maintain reliability of the data.

Table 5-4.1. Required Post Acceptance Event Codes and Dates (1 of 2)

Event Code	Definition	Applicable Date
ACF	Arbitration case filed	Use the date that the contractor filed a complaint with the Office of Administrative Hearing.
CED	Construction expenditures done	Input the date that all construction expenditures were completed.
DCS	District claim settlement memorandum sent to Headquarters Construction	Use the date that the district sent the memorandum to Headquarters Construction.
DDD	District director determination sent to contractor	Use the date that the district sent the final district director determination of claims letter to the contractor, regardless of who signed the letter.
DDS	Review of claims by the deputy district director of Construction sent to the contractor	Use the date that the district sent the letter to the contractor.
DMM	Department management meeting	Use the date of the Department management meeting.
DMMR	Department management meeting findings	Use the issuance date of the management meeting findings or board of review recommendation.
LCFC	Legal case file closed	Use the date that the Legal Division arbitration attorney returns the legal case files to the district and no longer charges against the expense authorization.

Table 5-4.1. Required Post Acceptance Event Codes and Dates (2 of 2)

Event Code	Definition	Applicable Dates
PFEAE	Proposed final estimate (PFE) returned with administrative exceptions, including item of work exceptions, change order work, and extra work bill exceptions	Use the date that the contractor returned the PFE designated by the earliest date stamp by the mailroom or resident engineer. Internal routing time is not considered in this event date code.
PFEC	Proposed final estimate returned with claims	Use the date that the contractor returned the PFE designated by the earliest date stamp by the mailroom or resident engineer. Internal routing time is not considered in this event date code.
PFENE	Proposed final estimate returned without claims and administrative exceptions	Use the date that the contractor returned the PFE designated by the earliest date stamp by the mailroom or resident engineer. Internal routing time is not considered in this event date code.
PFER	Proposed final estimate received	Use the date that the contractor received the PFE.
PFES	Proposed final estimate sent to the contractor	Use the date that the contractor is sent the PFE by certified mail.

Prepare and obtain approval of change orders compensating the contractor for claims found to have merit pursuant to Tables 5-4.2., “Disputes Resolution Authority—Entitlement,” and 5-4.3., “Disputes Resolution Authority—Settlement Before District Director’s Determination of Claims,” in Section 5-417, “Dispute Resolution Authority,” of this manual.

5-406A Proposed Final Estimate Received by Contractor—Target Day 40

The resident engineer issues a proposed final estimate that is received by the contractor within 40 days after contract acceptance. Issue the proposed final estimate with the understanding that the estimate represents the final payment to the contractor. If the proposed final estimate shows money due to the contractor, do not wait for the contractor’s response, process a semifinal estimate as described in Section 3-907C, “Semifinal Estimate,” of this manual.

Do not postpone issuing the proposed final estimate to await additional information from the contractor. Make sure that all quantity calculations and adjustments are completed in time to process the proposed final estimate within the target date. Send the proposed final

estimate by certified mail with return receipt requested. Refer to Section 3-907B, "Proposed Final Estimate," of this manual for additional information.

5-406B Proposed Final Estimate Returned—Target Day 70

The contractor has 30 days after receiving the proposed final estimate to review, sign, and respond either with or without a written claim statement. Document the receipt of the contractor's response by postal receipt or written receipt if hand delivered.

Process the final estimate when the contractor returns the proposed final estimate indicating acceptance, or when the contractor does not return the proposed final estimate within the required 30-day period.

When the contractor returns the proposed final estimate with a written claim statement within the 30-day period, district Construction sends a copy of the contractor's claim package to the resident engineer, construction engineer, and district Construction claims engineer.

5-406C Written Claim Statement - Initial Review Completed—Target Day 80

If claims are submitted after the 30-day period, the entire submittal must be returned to the contractor with a cover letter stating that Caltrans will not address the claims because they were not submitted in accordance with the contract requirements, and the final estimate must be processed. The cover letter is signed by the district director and serves as Caltrans' final written decision on the claims under Public Contract Code Section 10240.1.

The resident engineer, construction engineer and district Construction claims engineer review the contractor's written claim statement for conformance with procedural requirements. This review checks that each claim is a continuation of a previously submitted potential claim. Overhead claims or administrative disputes that occur after issuance of the proposed final estimate do not need to be a continuation of a previously submitted potential claim. Document the contractor's failure to comply with the potential claim process, and file the detailed findings in Category 62, "Disputes," of the project records. Detail any procedural failures by each claim for inclusion in the preliminary construction claim findings. The detailed procedural findings may include, but are not limited to:

- Failure to provide the identification number corresponding to the supporting full and final documentation of the potential claim record and the final amount of requested additional compensation.
- Failure to provide documentation in support of the final amount of the claim if different from that stated in the full and final potential claim record.

If the contractor submits a claim without the corresponding identification number, or if there is a disparity in the identification number, notify the contractor of the omission or disparity. The contractor has 15 days after receiving the notification to correct the omission or disparity. Assign an identification number if the contractor fails to correct the omission or disparity.

The resident engineer, construction engineer and district Construction claims engineer segregate the claims into the following 3 categories:

- Administrative
- Entitlement
- Management referral

Administrative claims occurring or recognized after issuance of the proposed final estimate may include the following:

- Contract item quantity payments
- Changed item quantity payment adjustments
- Administrative deductions and withholds
- Extra work payments

If the written claim statement includes claims for overhead, such as subcontractor field or home office, these claims must be supported with an audit by an independent certified public accountant. Projects with a time-related overhead bid item that have exceeded 149 percent of the quantity shown in the bid item list may require an audit report as part of the item adjustment, but this is not considered a claim for overhead. Send these types of claims to the deputy district director of Construction as part of the preliminary construction claim findings. The Independent Office of Audits and Investigations may review the audit. For additional details, refer to Section 5-410, “Overhead Claims,” of this manual.

5-406D Administrative and Entitlement Claims Addressed—Target Day 90

Review administrative claims. If administrative claims have merit, payment is made through item payments, change orders, or by releasing withholdings. Accompany payment of those claims in writing that the payment resolves the respective claim in its entirety. If the contractor does not accept the payment as full resolution, refer to Section 5-409, “Claim Payments,” of this manual, for more information.

Review claims with entitlement, and process payments in a similar manner. Support payment with independent cost analysis that will be filed and maintained in the project records.

The results of the attempted resolution of these claims must be sent to the district Construction claims engineer no later than day 200 for incorporation into the construction claim findings.

5-406E Preliminary Construction Claim Findings Completed—Target Day 100

By target day 100, the resident engineer or construction engineer completes the preliminary construction claim findings for claims that have been segregated for referral to management, including those claims for which the contractor has failed to comply with procedural requirements. Claims segregated for referral include a compilation of the existing information and documents that are filed in Category 62, “Disputes,” of the contract records. The construction engineer sends the preliminary construction claim findings to the deputy district director of Construction. Refer to Section 5-413, “Preliminary

Construction Claim Findings and Category 62 Preparation and Guidelines,” of this manual for detailed format, content, and suggestions in preparing this document.

5-406F District Construction Review of Preliminary Construction Claim Findings Completed—Target Day 120

The deputy district director of Construction, region division chief of Construction, or delegated authority completes the review of the preliminary construction claim findings for the claims designated for management review and determines whether a Caltrans management meeting with the contractor is needed. The Caltrans meeting will consist of either of the following:

- Meeting with the contractor and the deputy district director of Construction, region division chief of Construction or delegated authority
- Caltrans management meeting

The deputy district director of Construction, region division chief of Construction, or delegated authority may determine that some claims previously identified as “management referral” have entitlement and should be paid. The district Construction claims engineer finalizes the preliminary construction claim findings and authorizes payment for claims with entitlement.

5-406G Caltrans Management Meeting and Findings—Target Days 150 and 190

A Caltrans management meeting convenes when the deputy district director of Construction, region division chief of Construction, or a delegated authority decides that certain claims may warrant further analysis in a management meeting. The target date to hold a management meeting is 150 calendar days after contract acceptance. Notify the contractor of the date, time, and location of the meeting as soon as all the necessary arrangements have been made. In the notification letter, state that both the contractor and Caltrans will be allowed to make presentations in support of their previously submitted written information and that no additional written information will be accepted at the meeting. Identify only those claims that will be presented and heard at this meeting. Refer to the example “Department Management Meeting Notification Letter” on the Claim Correspondence Examples intranet page.

The resident engineer, supported by Caltrans personnel, is responsible for preparing and delivering the presentation at the meeting. The management meeting is an informal meeting allowing the contractor and Caltrans staff the opportunity to make presentations in support of their claim positions. Only those claims identified within the notification letter will be presented. If requested, Caltrans personnel, including district and structure personnel involved with the contract, may attend the meeting to assist in presenting the claims. Arrange to have other personnel involved in the project available to answer questions during the meeting regarding complex claims or for firsthand knowledge of events. If the contractor has indicated they will have legal counsel attend, make arrangements to have a Legal Division representative attend. Mock presentations in advance of the management meeting are encouraged for complex issues and offer an opportunity for critical feedback.

At the meeting, the contractor's position is followed by the resident engineer's position. Caltrans then may discuss the potential claim records, responses, relevant documents, schedules, specifications, and dispute resolution advisor or dispute resolution board recommendations for clarification and attempted resolution. Additional support information may also be requested within an abbreviated time period to clarify a party's stated position.

The results of the management review meeting should be documented for inclusion within the construction claim findings within 190 days after contract acceptance. If the contractor did not attend a scheduled Caltrans management meeting, the results will be based on the information contained in the preliminary construction claim findings. Because the contractor did not attend the meeting, the claims to be heard cannot be filed in arbitration as stated in Section 10240.2, of the Public Contract Code. If this happens, identify the claims within the district director determination of claims that failed to follow the contractual claims process. For an example of the letter, refer to the example "District Director Determination of Claims," on the Claim Correspondence Examples intranet page.

5-406H Construction Claim Findings and Draft District Director Determination of Claims Completed—Target Day 220

The construction claim findings will name each of the contractor's claims in summary form including the items below:

- References to the supporting documents
- Resolution of the administrative claims by the resident engineer
- Resolution of claims with entitlement
- Caltrans management meeting findings

For detailed information on preparing the construction claim findings, refer to Section 5-414, "Construction Claim Findings Preparation and Guidelines," of this manual.

In addition to preparing the construction claim findings, the district Construction claims engineer prepares a draft district director determination of claims. For detailed information on preparing the draft district director determination of claims, refer to Section 5-415, "District Director Determination of Claims Preparation and Guidelines," of this manual.

Send the construction claim findings and the draft district director determination of claims to the deputy district director of Construction by day 220.

The deputy district director of Construction approves the construction claim findings, and then sends the findings and the draft determination of claims to the district director for signature.

Prepare and obtain approval of a change order compensating the contractor for claims found to have merit based on the construction claim findings. The change order must state that the payment is for full resolution of the claim specified. Refer to Section 5-3, "Change Orders," of this manual for more information.

Run a semifinal estimate to make payment and add any time for approved change orders.

5-406I District Director Determination of Claims—Target Day 230

The district director determination of claims is the final determination of claims and completes the claims resolution process. The determination concludes Caltrans' administrative claims process, triggers preparation of the final estimate, and opens the contractor's 90-day arbitration filing window.

The district director reviews and approves the final determination of claims. If all issues have been resolved, this approval may be delegated to the deputy district director of Construction or region division chief of Construction. The district Construction claims engineer sends the approved final determination of claims letter to the contractor within 230 days after contract acceptance. The region director may delegate the authority for approval to the district director in a district served by a region. Refer to the example "District Director Determination of Claims" on the Claim Correspondence Examples intranet page.

When all the claims are resolved, the district director may delegate signature authority for determination letters to the Construction deputy district director, who may further delegate this authority to the construction manager.

After the district director final determination of claims letter is sent, do not have any further discussion of claims with the contractor.

District construction processes a final estimate within 30 days of sending the district director determination of claims. For information on the final estimate, refer to Section 3-907D, "Final Payment and Claims," of this manual.

Before submitting a request for the final estimate, verify that change order payment has been made for all claim determinations.

The district must store all project records in accordance with the procedures outlined in Section 5-104, "Final Construction Project Records," of this manual.

If the contractor has diligently pursued and exhausted the administrative procedures specified in the contract, the contractor is entitled to file for arbitration of its claims 240 days after contract acceptance, even if the district director determination of claims has not been issued.

If the contractor files for arbitration and the final determination of claims has not yet been issued, the district must nevertheless send a final determination of claims letter to the contractor. The format of the final determination of claims may be similar to the example "District Director Determination of Claims" on the Claim Correspondence Examples intranet page.

Consult the Division of Construction field coordinator and the designated attorney for guidance. Send a draft copy of the final determination of claims to the designated attorney for concurrence. After the designated attorney provides concurrence, the district director approves the final determination of claims, and it is sent to the contractor. Do not have any further contact or discussion with the contractor concerning the merit of claims.

Do not try to resolve claims after issuing the district director determination of claims. If the contractor files for arbitration, any resolution is handled by Caltrans Legal Division,

according to the delegated settlement authority shown in Table 5-4.4., “Claims Resolution Authority—Settlement After Arbitration Filing,” in Section 5-417, “Dispute Resolution Authority,” of this manual.

5-407 Minor B Contracts

By law, the contractor has a maximum of 1 year from contract acceptance to file a claim with the Department of General Services, Government Claims Program for Minor B contracts. If a contractor submits a potential claim record, alternative dispute resolution will help resolve disputes and mitigate damages. Use the concepts and levels of the dispute resolution ladder as described in Section 3-522B, “Dispute Resolution Ladder,” of this manual to assist the potential claims record process.

5-407A Contract Accepted—Target Day 0

When the contract is accepted, the resident engineer discusses and attempts to resolve any disputes. This will begin the dispute resolution process at Level 1.

5-407B Claim and Invoice Submission—Target Day 30

Within 30 calendar days following acceptance of the contract, the contractor must submit a written claim for an unresolved dispute as part of the fully itemized invoice covering the actual work performed. Process payment to the contractor for the undisputed portion of the invoice. Immediately request additional information for the unresolved claims. When the written claim is received, this ends Level 1 of the dispute resolution process. Elevate the unresolved claims to the construction engineer, beginning Level 2. Use Form DOT CEM-6209, “Elevation of a Dispute,” to define the unresolved claims when elevating to this level.

5-407C Additional Information Received—Target Day 45

When the additional information is received for the unresolved claims, begin preparation of the preliminary construction claim findings and refer to Section 5-413, “Preliminary Construction Claim Findings and Category 62 Preparation and Guidelines,” of this manual. Concurrently, the district Construction claims engineer prepares a draft district director determination of claims. Refer to Section 5-414, “Construction Claim Findings Preparation and Guidelines,” of this manual.

5-407D Preliminary Determination of Claims—Target Day 50

If the construction engineer cannot resolve the claims, finalize the construction claims findings and provide a copy to the contractor; this ends Level 2 of the dispute resolution process. This will serve as a preliminary determination of claims and notifies the contractor of the opportunity to present any unresolved claims within 30 days to the construction manager, or deputy district director of Construction depending on the district’s preference. This begins Level 3 of the dispute resolution process.

5-407E Presentation of Unresolved Claims—Target Day 80

Any unresolved claims are presented, merits of the claims are discussed, and an attempt is made to resolve the claims by the respective representatives at Level 3.

5-407F Final Determination of Claims—Target Day 85

The final determination of claims is completed by the district claims engineer and submitted to the deputy district director of Construction for approval. The approved final determination of claims is sent to the contractor by day 85 and ends Level 3 of the dispute resolution process. The contractor can accept the district's decision, thereby ending the process, or continue the process through the Department of General Services, Government Claims Program or Superior Court, as applicable.

5-407G Department of General Services, Government Claims Program and Superior Court

The Division of Construction arbitration engineer is responsible for coordinating Minor B claims with the Legal Division and for updating the database that includes tracking, monitoring, and reporting on all Minor B claims filed with the Department of General Services, Government Claims Program, Superior Court, or Division of Construction. The arbitration engineer is the point of contact regarding the status of and providing statistics for all Minor B claims filed with Department of General Services, Government Claims Program, Superior Court, or Division of Construction.

The contractor has 6 months to file a complaint in Superior Court after the Department of General Services, Government Claims Program or the chief of the Division of Construction rejects the contractor's claim. The Legal Division is responsible for representing Caltrans in court and expects district and headquarters Construction staff to provide assistance upon request.

5-408 Claim Settlement

A claim settlement is defined as a compromise of the contract requirements to settle a dispute in Caltrans' best interest. Settlements of claims may arise when both Caltrans and the contractor contributed to the disputed issue, and total responsibility is difficult to attribute to either party. In these situations, district management, or Caltrans Legal Division will explore the possibility of settlement with the contractor.

A claim settlement request must be approved by the district director, Division of Construction chief, or the deputy director for Project Delivery depending on the settlement amount. The region director may delegate the authority for approval to the district director in a district served by a region. Refer to Table 5-4.3., "Disputes Resolution Authority—Settlement Before District Director's Determination of Claims," of this manual for the claim settlement authority and responsible parties.

No claim can be addressed between the district director determination of claims and the contractor's filing for arbitration.

5-408A Claim Settlement Process

When considering a decision to settle a claim, analyze Caltrans' exposure to help determine potential liability. This will serve as a guide for the settlement. The Division of Construction field coordinator provides assistance on all settlement analyses and should be consulted early in the process.

For consideration of settlements before arbitration, the field coordinator engages the Legal Division. The Legal Division will provide direction to the district for preparing a claim settlement request memorandum. For consideration of settlements during arbitration, the case attorney prepares this memorandum for approval.

The claim settlement request memorandum is an internal, confidential document protected under attorney-client communication privilege and must not be given to the contractor or included in the project files. The original claim settlement request memorandum with signatures will be kept by Legal. Delete or destroy all other drafts and copies of claim settlement request memoranda. The claim settlement request memorandum must be approved before any negotiations with the contractor.

5-408A (1) Claim Settlement Request Memorandum

The claim settlement request memorandum must include certain items and follow an executive summary format. Refer to the example “Claim Settlement Request Memo” on Construction’s Claim Settlement Examples intranet page.

5-408A (2) Claim Settlement Agreement

A fully executed change order is considered the claim settlement agreement for claims settled before the district director determination of claims is issued. The change order must be written in sufficient detail so that it clearly describes the claims being settled, adjustments in contract time, disposition of liquidated damages, and compensation amount. Refer to Section 5-3, “Change Orders,” of this manual for guidance and see standard change order clauses on Construction’s Claim Settlement Examples intranet page.

The change order memorandum must refer to the approved claim settlement request memorandum. Do not substitute a change order memorandum for a claim settlement request memorandum.

During arbitration, the Caltrans case attorney prepares and signs a claim settlement agreement. Agreement is reached when the opposing counsel signs the document. To complete the administrative process, the Division of Construction’s arbitration engineer prepares a unilaterally approved change order for payment.

5-408B Contract Time Settlements

Time adjustments for reasons other than those specifically enumerated in the contract are considered contract time settlements. Prepare a claim settlement request memorandum and settlement agreement as described for contract time settlements.

5-409 Claim Payments

If adequate funding is available, make payment immediately when you reach agreement with the contractor or find entitlement on a claim. Prepare and process a supplemental funds request if there are insufficient funds for payment.

When a change order is necessary to make payment for disputed work and the contractor refuses to sign it, issue a unilaterally approved change order in accordance

with Section 4-1.05, “Changes and Extra Work,” of the *Standard Specifications*, and Section 5-3, “Change Orders,” of this manual.

Claim payments are made in accordance with Table 5-4.2., “Disputes Resolution Authority—Entitlement”; Table 5-4.3., “Disputes Resolution Authority—Settlement Before District Director’s Determination of Claims”; and Table 5-4.4., “Claims Resolution Authority—Settlement After Arbitration Filing,” in Section 5-417, “Dispute Resolution Authority,” of this manual depending on the resolution type and the timing of the resolution. For detailed information on contract payments, refer to Section 3-9, “Payment,” of this manual.

5-410 Overhead Claims

Overhead claims generally fall into two categories: home office overhead and field office overhead. Overhead claims generally occur when there have been delays to the completion of the contract. Delays caused by Caltrans to the controlling operation on contracts with a time-related overhead bid item are compensated through bid item quantity adjustments to the time-related overhead item. Refer to Section 3-905, “Time-Related Overhead,” of this manual.

All other overhead claims must be supported by an audit. The contractor must provide the required audit in accordance with Section 9-1.17D(2)(b), “Overhead Claims,” of the *Standard Specifications*. Provide a written response regarding Caltrans’ consideration of the overhead claim to the contractor before issuing the proposed final estimate. If the resident engineer determines that a compensable delay exists, evaluate the overhead claim through the audit process.

When a claim for overhead expenses is received without an audit by a certified public accountant (CPA) to justify the claimed amount, notify the contractor that the submittal is incomplete and will not be considered until an independent CPA audit report is received. Failure to comply with the requirements justifies denying the overhead claim.

5-410A Home Office Overhead

Home office overhead, or general and administrative expenses, consists of indirect costs that are not associated with a specific project but are the costs of general facilities and administration necessary for the contractor’s performance on all contracts.

5-410B Field Office Overhead

Field office overhead consists of indirect costs that are associated with a specific project. These costs do not include costs for labor, materials, or equipment used in performing the work.

5-410C Contractor Submitted Audits

The Independent Office of Audits and Investigations will assist the resident engineer by performing a preliminary check of the independent audit report’s compliance with the requirements of the American Institute of Certified Public Accountants Attestation Standards.

Audits and Investigations will perform an audit of contractor submitted audits if the following conditions exist:

- The deputy district director of Construction and the Division of Construction field coordinator have made a determination that an audit is warranted.
- The contractor has submitted an independent CPA audit report that conforms to the American Institute of Certified Public Accountants Attestation Standards.
- The Division of Construction has received and prioritized the audit request.
- The contractor has fulfilled the provisions of Section 9-1.17D, “Final Payment and Claims,” of the *Standard Specifications*.

A systematic review of the contractor’s claim and audit is required to decide if there is reason to proceed with a detailed analysis of the costs contained within the contractor submitted audit.

The audit process is initiated by the contractor’s written request for a Caltrans audit review of home office overhead and field office overhead by submitting exceptions to the proposed final estimate.

If determination has been made to consider the overhead claim, verify that the contractor’s claim for home office overhead or field office overhead is submitted along with a supporting independent CPA audit report in accordance with Section 9-1.17D and the policies in the *CPA Desk Guide for Overhead Audits*, available at the Division of Construction’s Audits intranet page. Unallowable expenses including those relating to other businesses of the contractor must be excluded from the claimed expenses for field office overhead and home office overhead. For typical unallowable expenses, refer to the Code of Federal Regulations, Title 48, Section 31.205 (48 CFR 31.205), “Selected Costs.” The independent CPA audit report may be faxed to the Independent Office of Audits and Investigations for assistance. Deny the audit request if the audit report does not comply with Section 9-1.17D.

The Division of Construction field coordinator decides if the facts and circumstances warrant a detailed analysis requiring a state audit review. This determination may involve significant analysis of many variables, including concurrent delays as evidenced by the critical path method schedule and time impact analyses. The Division of Construction field coordinator will inform the resident engineer to deny the claim and audit request if there is no justification.

If the audit report complies with Section 9-1.17D, “Final Payment and Claims,” of the *Standard Specifications* and the Division of Construction field coordinator decides an audit request is warranted, draft the audit request memorandum. Refer to Section 5-411A, “Audit Request Procedure,” of this manual for guidance on requesting an audit.

5-411 Audits

The Independent Office of Audits and Investigations provides a service to Construction by performing audits. Their audit services include:

- Reviewing contractor-submitted audits for overhead claims.

- Reviewing contractor-submitted audits for full and final potential claim records that exceed \$500,000.
- Reviewing the contractor's project files.
- Auditing the contractor's records.
- Reviewing cost escalation claims.
- Reviewing costs for contract termination.
- Reviewing costs for complicated work-character changes.
- Reviewing costs for complicated item adjustments.
- Reviewing costs for differing site conditions.

5-411A Audit Request Procedure

When it is determined that an audit by the Independent Office of Audits and Investigations is needed, the deputy district director of Construction gets concurrence from the Division of Construction field coordinator and submits the audit request memorandum to the Division of Construction. For guidance, refer to the example "Audit Request Memorandum" on Construction's Claim Correspondence Examples intranet page.

The memo must include the following information, as appropriate:

- Contract number
- Contractor name
- District contact person's name, title, and phone number
- A justification

The justification must explain the reasons the contractor has entitlement on the claims and the associated costs that a Caltrans audit needs to verify. If appropriate, the justification must be accompanied by a summary of delay-related claim descriptions, a chronology of events, and amounts. For a sample summary of delay-related claims, refer to the examples "Summary of Delay-Related Claims" and "General Contract Information and Contract Chronology" on Construction's Claim Correspondence Examples intranet page.

Upon receipt of the district's audit request memorandum, the Division of Construction sends a memorandum to the audit manager of the Independent Office of Audits and Investigations requesting an audit. The policy of Audits and Investigations is to complete audits within 100 days after receiving an audit request memorandum.

5-411B Construction Response to Audit Reports

The initiator of the request for the audit must provide an acceptable corrective action plan in response to audit findings and recommendations.

The Division of Construction is responsible for the corrective action plans for force account audits authorized under Section 5-1.27, "Records," of the *Standard*

Specifications. Approval of the district corrective action plans may not be delegated below the level of district division chief of Construction.

A corrective action plan must be submitted to the external audit chief for the Independent Office of Audits and Investigations.

The district will use the final audit report or draft audit findings to decide if the contractor is due any payment adjustments. The final audit report is a matter of public record, and its distribution is not limited.

If compensation is due, the Division of Construction field coordinator will request that district Construction processes a change order for payment in accordance with the overhead claim administration delegation of authority in Table 5-4.2., “Disputes Resolution Authority—Entitlement,” in Section 5-417, “Dispute Resolution Authority,” of this manual. Note the name of the person authorizing the change order in the change order memorandum.

Other delay-related expenses besides overhead, such as escalated materials, equipment, and labor costs, may be included in the contractor’s claim. The escalated costs may be included in the audit request if complex. Account for simple cases of escalated costs because of delays caused by Caltrans, unless they are easily combined into an audit for overhead. Unlike audits for overhead, escalated cost audits may be performed before receiving the contractor’s written claim statement. An independent CPA audit is not required to support escalated cost claims because of delays caused by Caltrans.

Force account markups are not included in any escalated cost calculation. Recovery of additional overhead incurred because of escalated costs requires submittal of an overhead claim with an independent CPA audit report.

5-412 Arbitration

The contractor is entitled by law to file a complaint in arbitration no later than 90 days after receipt of the written district director final determination of its claims. If the contractor has diligently pursued and exhausted the administrative procedures specified in the contract, the contractor is entitled to file for arbitration of its claims 240 days after contract acceptance if the district director determination of claims has not been issued. The arbitration process is initiated by filing a complaint with the Office of Administrative Hearings.

The Caltrans Legal Division handles all construction contract arbitrations. When a contractor files for arbitration, all contacts with the contractor regarding the specific project must go through the designated attorney. The resident engineer, the construction engineer, and other personnel involved with the contract must assist in the arbitration process. This assistance may be preparing calculations, performing technical analyses, preparing documents, assisting in the discovery process, or providing testimony. Keep project records at a single location for ease of discovery by the Legal Division.

The arbitration payment process includes the Division of Construction, the Legal Division, the district, the Division of Budgets, and the Division of Accounting. The Division of Construction arbitration engineer is responsible for updating the database that includes

tracking, monitoring, and reporting all arbitration cases. The Division of Construction arbitration engineer is the point of contact regarding status of ongoing arbitration cases, coordinating arbitration payments, and providing statistics on all arbitration cases.

5-413 Preliminary Construction Claim Findings and Category 62 Preparation and Guidelines

Preparation of the preliminary construction claim findings can be completed quickly by compiling documents in Category 62, "Disputes," of the project records. Complete the preliminary construction claim findings when you receive exceptions to the proposed final estimate from the contractor. Refer to the example "Construction Claim Findings" on Construction's Claim Correspondence Examples intranet page.

5-413A Preliminary Construction Claim Findings Format

The preliminary construction claim findings includes the same sections and follows the same format of the construction claim findings identified in Section 5-414, "Construction Claim Findings Preparation and Guidelines," of this manual.

A well-organized Category 62, "Disputes," of the project records is imperative for preparing the construction claim findings. Refer to Section 5-102C, "Description of Categories," of this manual for more details about the file categories. For each claim, Category 62 should include:

- Claim checklist, refer to the example "Claim Checklist" on Construction's Claim Correspondence Examples intranet page
- Request for Information (RFI)
- Form DOT CEM-6201D, "Initial Potential Claim Record" and Caltrans' response
- Form DOT CEM-6201E, "Supplemental Potential Claim Record" and Caltrans' response
- Form DOT CEM-6201F, "Full and Final Potential Claim Record" and Caltrans' response
- Independent CPA cost audit report if stated cost is greater than \$500,000, and the Independent Office of Audit's review
- All correspondence
- District's position paper for the dispute resolution board (DRB)
- Contractor's position paper for the DRB
- DRB recommendation
- Resident engineer daily reports
- Assistant resident engineer daily reports
- Applicable parts of plans and specifications
- Relevant change orders

- Photographs
- Calculations and analysis
- Weekly Statements of Working Days
- Critical path method schedules
- Other pertinent information

Refer to Section 5-406F, “District Construction Review of Preliminary Construction Claim Findings Completed—Target Day 120,” of this manual for more information.

5-414 Construction Claim Findings Preparation and Guidelines

Caltrans management meeting findings are incorporated into the construction claim findings. The construction claim findings provide the basis for the district director determination of claims. The district Construction claims engineer prepares the construction claim findings by refining the preliminary construction claim findings. Incorporate claims resolved and list the status of unresolved administrative claims addressed by the resident engineer, and claims addressed in a Caltrans management meeting. When preparing the construction claim findings document, consider that the document is used by a Caltrans attorney if claims are filed in arbitration.

Concurrently, the district construction claims engineer prepares the draft district director determination of claims. Refer to Section 5-415, “District Director Determination of Claims Preparation and Guidelines,” of this manual.

The district Construction claims engineer transmits the construction claim findings to the deputy district director of Construction for approval.

The district construction claims engineer then transmits the construction claim findings and the final district director determination of claims to the district director for approval.

The following sections provide format, content, and guidelines for preparing the construction claim findings. For an illustrative sample of the format and content of construction claim findings, refer to the example “Construction Claim Findings” on Construction’s Claim Correspondence Examples intranet page.

5-414A Format

Construction claim findings use the following format:

5-414A (1) Title Page

The title page states the following:

- “Construction Claim Findings”
- Contract identification data such as contract number, district, county, route, postmile, and federal project number, if applicable
- Applicable *Standard Specifications* and *Standard Plans* sections
- Names of the contractor, resident engineer, and other personnel with significant involvement

- Date

5-414A (2) Table of Contents

Number all pages in the table of contents.

5-414A (3) Project Chronology

The project chronology includes:

- Advertisement date
- Bid opening date
- Contract award date
- Contract approval date
- Contract time start date and working day number
- Date contractor began work
- Number of working days specified
- Computed completion date and working day number
- Number of days for a change order time adjustment
- Number of nonworking days
- Number of working days not worked on controlling operation
- Extended date for completion and working day number
- Project completion date
- Contract acceptance date
- Overrun in contract time by number of working and calendar days

5-414A (4) General Information

The general information section should be presented in a narrative format, and include:

- Description of the work
- Contractor's bid amount
- Proposed final estimate amount
- Date the proposed final estimate was sent to the contractor
- Date the contractor returned the proposed final estimate with exceptions
- Total number and amount of claims submitted

5-414A (5) Summary of Claims

Provide:

- Identification numbers and titles

- Claimed amounts
- Recommended payments
- Remaining amounts

5-414A (6) Claim Categories

Show the segregation of claims into categories:

- Administrative claims
- Claims heard at the Caltrans management meeting
- Claims not heard at the Caltrans management meeting

5-414A (7) Claim Number, Title, and Claim Amount

A boldfaced, underlined title bar will be used for each claim. In the left-hand column, place the claim number. In the middle column, position the claim title. In the right-hand column locate the claim amount, including days claimed.

5-414A (8) Description of the Claim

Provide:

- An explanation of what caused the claim.
- Pertinent statements of facts, not beliefs or opinions.
- A reference to the applicable specifications relating to the claim. You may include a separate section titled “Applicable Specifications,” listing the section numbers and excerpts.
- The circumstances leading to each claim. Use facts supported with exhibits that include daily reports or letters.
- Relevant dates if the claim includes time considerations.
- A statement of actions and responses made by Caltrans and the contractor.
- The method and time of notification of the claim.

5-414A (9) Contractor’s Position

Quote directly from the contractor’s RFI, potential claim records, or written claim statement. Add any other pertinent information provided in other documentation. Do not interpret the contractor’s position. If the contractor has not stated the basis for the claim, note that the basis was not stated. State whether a cost analysis was submitted.

Provide the information in the following order:

- Full and Final Potential Claim Record with reference to the independent CPA audit report if stated cost exceeds \$500,000
- Supplemental Potential Claim Record
- Initial Potential Claim Record

- Contractor's RFI pertaining to the claim
- Reference table to contractor's supporting exhibits

5-414A (10) District's Position

The district's position must be compiled from the responses to potential claim records, and supported by exhibits including related correspondence. Additional arguments supporting the district's position are not required. If the contractor provides reasons for changing the amount of requested additional compensation from that stated in the full and final documentation, additional opposing statements may be included.

Provide the information in this order:

- Resident engineer's response to the Full and Final Potential Claim Record.
- Resident engineer's response to the Supplemental Potential Claim Record.
- Resident engineer's response to the RFI.
- A list of exhibits including change orders for partial resolution of the potential claim, photographs, critical path method analysis, cost analysis, audit report review, correspondence, and daily reports.

Include a separate section stating deficiencies if the contractor did not comply with Section 9-1.17C, "Proposed Final Estimate," of the *Standard Specifications*.

5-414A (11) Findings and Recommendations

State the district's conclusions on the merit of the claim in bullets, following the format of a board of review report.

Briefly state the reason for the conclusions based on the information provided.

Recommend denial if there is no merit, but do not deny the claim. Only the district director has the authority to deny the claim.

5-414A (12) Tabular Reference to Supporting Information

5-414A (13) Summary of Resolved Claims in Tabular Format for All Claims

5-414A (14) Deputy District Director of Construction Signature Block

5-414A (15) Exhibits

Include exhibits as appropriate:

- Copy of the contractor's written claim statement
- Correspondence
- Cost data
- RFIs and potential claim records
- Detailed chronology of correspondence, other documents, or events

- Critical path method schedule, time impact analysis, or revised schedule
- Photographs

5-414B Helpful Hints

These suggestions may be helpful when preparing the construction claim findings:

- Identify specific references in the following manner: “Section [xx] of the special provisions requires . . .”
- Quote all excerpts. Avoid paraphrasing them.
- Include all pertinent correspondence.
- Include pertinent photographs.
- Identify the central issue, identify irrelevant contentions, and provide a response to every relevant contention that the contractor has made.
- Use exact dates and numbers.
- State whether days are working or nonworking.
- When referring to days, when applicable, include the month, day number, and year.

5-414C Things to Avoid

When preparing the construction claim findings, avoid:

- Using the words “denied,” “rejected,” or “determined.” Only the district director can use these terms in the district director determination of claims.
- Including a copy of Sections 1 through 9 of the *Standard Specifications*.
- Making the background section of the district’s position a chronology of letters or events. Write the background as a narrative, referencing relevant letters or events, if appropriate.
- Including correspondence, photographs, or other exhibits that have no direct bearing on the claim.

5-415 District Director Determination of Claims Preparation and Guidelines

The district director makes the final determination of claims. The district director determination of claims is Caltrans’ final written decision on the claims under Public Contract Code 10240.1. The district director determination of claims is a stand-alone document and does not reference the management meeting findings or construction claim findings. The district director determination is presented in a bulleted format, listing the construction claim findings.

For a sample district director determination of claims, refer to the example “District Director Determination of Claims—Major and Minor A Contracts” on Construction’s Claim Correspondence Examples intranet page.

Once the district director determination of claims is completed, send it to the contractor by hand delivery or deposit in the U.S. mail. Issue the final estimate in writing.

Once the district director determination of claims is submitted to the contractor, there should be no further contact or discussion concerning merits of claims. If the contractor pursues unresolved claims in arbitration, Caltrans' Legal Division coordinates necessary responses.

5-416 Copy Distribution of Claim Documents

The district must process and distribute copies of claims documents produced during the claims resolution process. The district is also responsible for retaining copies in the project files.

5-417 Dispute Resolution Authority

Disputes that the contractor is entitled to in accordance with the contract can be resolved at any time during construction, during the claims resolution process, or after arbitration has been filed. Table 5-4.2., "Disputes Resolution Authority—Entitlement," shows dispute resolution authority from the start of work to the district director's determination of claims for notices, protests, potential claims, and claims, based on entitlement. Table 5-4.3., "Disputes Resolution Authority—Settlement Before District Director's Determination of Claims," shows dispute resolution authority from the start of work to the district director's determination of claims for notices, protests, potential claims, and claims, based on settlement amount. Table 5-4.4., "Claims Resolution Authority—Settlement After Arbitration Filing," shows arbitration settlement authority for requests for settlement, from filing of arbitration to before the arbitrator's decision. The deputy district director of Construction is responsible for obtaining FHWA concurrence if warranted.

Table 5-4.2. Disputes Resolution Authority—Entitlement

Period	Items	Entitlement Authority
Before issuance of proposed final estimate	Notices, protests, and potential claims	Authority to approve change orders resolving entitlement may be delegated under the authority to approve change orders.
From return of proposed final estimate to district director determination of claims	Claims	Deputy district director of Construction or region division chief of Construction approves. Authority may be delegated to construction managers, but not to construction engineers.
District director determination of claims	Claim denial	District director

Table 5-4.3. Disputes Resolution Authority—Settlement Before District Director’s Determination of Claims

Responsible Party	Settlement ≤\$200,000 per issue	Settlement >\$200,000 to \$5 million (or ≤10% of bid more than \$50 million)	Settlement >\$5 million (or >10% of bid more than \$50 million)
District, in consultation with Legal Division	Prepares claim settlement request	Prepares claim settlement request	Prepares claim settlement request
Deputy district director of Construction or region division chief of Construction	Recommends approval and submits claim settlement request for approval	Recommends approval and submits claim settlement request for approval	Recommends approval on claim settlement request
District director or region director	Approves claim settlement request	No action	Recommends approval and submits claim settlement request for approval
Division of Construction field coordinator	Reviews claim settlement request for consistency for region- or district-level approval	Recommends approval on claim settlement request	Recommends approval on claim settlement request
Division of Construction chief	No action	Approves claim settlement request	Recommends approval on claim settlement request
Project Delivery deputy director	No action	No action	Approves claim settlement request

Table 5-4.4. Claims Resolution Authority—Settlement After Arbitration Filing

Responsible Party	Settlement ≤ \$5 million (or ≤10% of bid more than \$50 million)	Settlement > \$5 million (or >10% of bid more than \$50 million)
Legal Division	Prepares claim settlement request and submits it for approval	Prepares claim settlement request and submits it for approval
Deputy district director of Construction or region division chief of Construction	Recommends approval on claim settlement request	Recommends approval on claim settlement request
Division of Construction field coordinator	Recommends approval on claim settlement request	Recommends approval on claim settlement request
District director or region director	No action	Recommends approval on claim settlement request
Division of Construction chief	Approves claim settlement request	Recommends approval on claim settlement request
Project Delivery deputy director	No action	Approves claim settlement request