



MANUAL CHANGE TRANSMITTAL		NO. 04-2
TITLE: Department of Transportation <i>Construction Manual</i>	APPROVED BY: Robert Pieplow Chief, Division of Construction	DATE ISSUED: December 24, 2004
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SUBJECT AREA Section 5-4 , "Disputes," of the <i>Construction Manual</i>	ISSUING UNIT Division of Construction	
SUPERSEDES CPB 01-2, CPB 01-3, CPB 02-1, CPB 02-2, CPB 02-3, and CPD 03-5	DISTRIBUTION All Manual Holders	

The purpose of this manual change transmittal is to provide updates and corrections to the 2001 edition of the Caltrans *Construction Manual*. Please update your manual in accordance with the table below. The relevant pages are indicated in the table.

Section(s)	Remove Old Page(s)	Insert New/Revised Page(s)
Update: Golden Rod, Chapter 5, Section 4, "Disputes"	5-4.i thru 5-4.iii	5-4.i thru 5-4.iv
Update: Chapter 5, Section 4, "Disputes," is replaced with a revised section.	5-4.1 thru 5-4.38	5-4.1 thru 5-4.77

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Section 5-4 Disputes

Section 4 Disputes

5-401 General

5-401 General

The objective of this section is to provide a valuable aid to the contract administrative team, including the resident engineer, the construction engineer, and other Caltrans personnel to ensure that contract disputes are addressed and resolved timely and consistently.

A contract dispute is a disagreement between the contractor and Caltrans over the need to revise the contract. Contractors submit disputes as written notices, protests, potential claims, or claims to the resident engineer. Begin the process of addressing and resolving the dispute upon receiving written notice of a dispute. Resolving a dispute involves ascertaining the relevant facts, determining responsibilities, and compensating the contractor if merit exists, or refusing compensation with clear reasons when no merit exists.

The resident engineer, with the support of the construction engineer, other Caltrans resources, and district management, is responsible for administering the dispute resolution process. Consult with additional subject matter experts to aid in the evaluation of a dispute.

Contractors must provide documentation to the resident engineer for full analysis of a contract dispute. If the contractor fails to provide a clear understanding of the disputed issue and supporting documentation, the resident engineer will find it difficult to determine the merits of the dispute.

On some projects, formal partnering and dispute review boards are available to the resident engineer and the contractor to assist in resolving disputes. If a dispute remains unresolved after contract acceptance, the dispute is administered through the claims resolution process and, potentially, arbitration.

To document contract disputes and claim resolution activities on your timesheet, use Activity Code 1290 for federal aid projects, or Activity Code 2290 for non-federal aid projects. For more information on these activity codes, refer to Chapter 6, “Activity Codes,” of the *Coding Manual*.

5-402 Types of Disputes

5-402 Types of Disputes

Disputes are divided into four categories: notice, protest, potential claim, and claim. The *Standard Specifications* and special provisions outline each category.

During the course of the project and up to receiving the proposed final estimate, the contractor must submit a contract dispute in the form of a written notice, protest, or a potential claim to the resident engineer. Disputes become claims when the contractor lists them as exceptions to the proposed final estimate.

5-402A Notice

The contractor submits a written notice when unforeseen conditions are encountered on the project that were not shown in the plans or detailed in the specifications. Notices are required with unforeseen conditions described in Section 5-1.116, “Differing Site Conditions,” Section 8-1.07, “Liquidated Damages,” and Section 8-1.10, “Utility and Non-Highway Facilities,” of the *Standard Specifications*.

5-402B Protest

The contractor submits a written protest when a dispute concerns the terms or conditions of a contract change order or the determination of contract time. For a protest of a contract change order, see Section 4-1.03A, “Procedure and Protest,” of the *Standard Specifications*. For a protest in connection with change in character of work, see Section 4-1.03C, “Changes in Character of Work,” of the *Standard Specifications*. For a protest of contract time, see Section 8-1.06, “Time of Completion,” of the *Standard Specifications*. For additional information about protests, refer to Section 3-403A, “Procedure and Protest,” Section 3-511, “Differing Site Conditions,” and Section 3-805, “Time of Completion,” of the *Construction Manual*.

5-402C Potential Claim

The contractor submits a written potential claim when the contractor believes additional compensation is due. In accordance with Section 9-1.04, “Notice of Potential Claim,” of the *Standard Specifications*, the contractor must submit a potential claim on the following forms:

- Form CEM-6201A, “Initial Notice of Potential Claim”
- Form CEM-6201B, “Supplemental Notice of Potential Claim”
- Form CEM-6201C, “Full and Final Documentation of Potential Claim”

The contractor, in addition to providing an identification number for each potential claim submitted, must certify each form with reference to the False Claims Act, Government Code Section 12650–12655. Follow the potential claim process when notice and protest issues are not resolved.

5-402C (1) Initial Notice of Potential Claim

The initial notice of potential claim provides an early notice to Caltrans of a dispute issue. It states the nature and circumstances of the dispute and gives the parties the opportunity to mitigate the associated costs, allowing for an early resolution. The initial notice of potential claim must be received within five (5) days of the event, activity, occurrence, or other cause giving rise to the claim.

5-402C (2) Supplemental Notice of Potential Claim

The supplemental notice of potential claim provides complete justification for additional compensation and adjustments referencing the appropriate provisions of the contract along with the estimate of the costs. The contractor must submit the supplemental notice of potential claim within fifteen (15) days of submitting the initial notice of potential claim, and provide the following information:

- The complete nature and circumstances of the dispute causing the potential claim;
- The contract provisions that provide the basis of the potential claim;
- The estimated and itemized cost of the potential claim;
- A time impact analysis illustrating the effect of the potential claim on the scheduled completion date of the contract, if requesting a contract time adjustment.

The contractor must update the cost estimate or the effect on the scheduled date of contract completion as soon as a change is recognized.

5-402C (3) Full and Final Documentation of Potential Claim

The full and final documentation of potential claim quantifies all costs after completion of the disputed work. The contractor must provide the full and final documentation of the potential claim within thirty (30) days of completing the dispute-related work. The documents must contain the following:

- A detailed factual narration describing the nature and circumstances that caused the dispute, including, but not limited to, dates, locations, and items of work affected by the dispute.
- A reference to the specific contract provisions supporting the potential claim, and the reasons for entitlement of the potential claim.
- Supporting documentation in accordance with Section 9-1.03, “Force Account Payment,” or Section 8-1.09, “Right of Way Delays,” of the *Standard Specifications* when additional compensation is in dispute, and an itemized breakdown of costs categorized as follows:
 1. Labor – A listing of personnel, classifications, regular hours and overtime hours worked, dates worked, and other pertinent information related to the requested reimbursement of labor costs.
 2. Materials – Invoices, purchase orders, location of materials either stored or incorporated into the work, dates materials were transported to the project or incorporated into the work, and other pertinent information related to material costs.
 3. Equipment – Dates and hours of use, equipment rental rates, and a detailed description including make, model, and serial number. Equipment rental rates are at the applicable state rental rates in effect when the work in dispute was performed. The applicable state rental rates are listed in the Caltrans publication entitled “Labor Surcharge and Equipment Rental Rates.”
 4. Other categories as specified by the contractor or engineer.
- When an adjustment of contract time is requested:
 1. The dates the contractor believes the work was delayed because of the disputed issues and the reasons for entitlement for a contract time adjustment.
 2. The specific contract provisions providing the basis for a contract time adjustment.
 3. A detailed time impact analysis showing the effect of changes or disruptions on the scheduled completion date.
- Copies of documents or records, including oral communications, which support the potential claim.

5-402D Claim

The contractor submits a written claim for an unresolved dispute by listing it as an exception to the proposed final estimate. In addition, certain administrative and overhead claims may occur as exceptions to the proposed final estimate as described in Section 9-1.07B, “Final Payment and Claims,” of the *Standard Specifications*.

5-403 Dispute Resolution Process

5-403 Dispute Resolution Process

Dispute resolution begins by gathering facts and determining the responsibilities of the parties involved to achieve a thorough understanding of the dispute. Contractors must provide complete information in support of the dispute or risk losing the right to pursue the dispute as a claim and in arbitration.

Analyze the dispute and provide a timely response in accordance with contract requirements and Caltrans policy and procedure after the contractor provides the necessary information. Take appropriate actions within the scope of the contract and within your authority to resolve the dispute. If you lack the authority to resolve the dispute, discuss the issue with the construction engineer, structure construction engineer, or both. Promptly issue and obtain approval of a contract change order if the dispute has merit. Advise the contractor in writing, explaining in detail, the reasons for the lack of merit if the contractor's dispute has no merit.

5-403A Response Guidelines

When receiving a written dispute notice, protest, or potential claim from the contractor, note the date and time of receipt and the name of the person receiving the written notice on the written notice of dispute. Ensure that the notice of dispute is complete and timely. If the information is incomplete, notify the contractor of the deficiencies and request the contractor to resubmit the notice with the complete information. Sample dispute response clauses are located in Example 5-4.1, "Sample Dispute Response Clauses," of the *Construction Manual*.

5-403 A (1) General

Dispute Background - The background must explain the circumstances that led to the dispute. Include information such as events, dates, discussions, meetings, memos, and letters.

Contractor's Position - Base the contractor's position on supplied information. Use direct quotes from the information the contractor provided. Do not modify the contractor's information by attempting to interpret or clarify it.

Resident Engineer's Position - The resident engineer's position must clearly and concisely state the merits of the dispute, using contract specifications to support the findings. The response letter must also request the contractor to state if the contractor agrees or disagrees with the resident engineer's position on the dispute. Request the contractor to clarify those areas where disagreement exists.

5-403A (2) Potential Claim

If a potential claim form is received without certification, notify the contractor, in writing, that it was not submitted in accordance with Section 9-1.04, "Notice of Potential Claim," of the *Standard Specifications* and that the contractor is allowed 15 days to certify or withdraw the potential claim. If certification is not provided in the required time, notify the contractor in writing that Caltrans will not consider the potential claim. Discuss this latter notification with the construction engineer.

For an illustration of the potential claim process, see Table 5-4.1, "Notice of Potential Claim Process," of the *Construction Manual*.

5-403A (2a) Resident Engineer's Response to the Initial Notice of Potential Claim
Upon receipt of Form CEM-6201A, "Initial Notice of Potential Claim," start a folder in Category 62 of the project records to document the potential claim. Additional information including related notices, protests, and correspondence should be included in this folder. Although a response to the initial notice of potential claim is not necessary, take appropriate action if the contractor's potential claim has merit.

5-403A (2b) Resident Engineer's Response to the Supplemental Notice of Potential Claim
Upon receipt of Form CEM-6201B, "Supplemental Notice of Potential Claim," analyze the contractor's potential claim. This may involve discussing the potential claim with subject matter experts and involving the district or the Division of Construction management. Some districts have formalized district management reviews to assist resident engineers with responses to potential claims. Other less formal processes, such as reviews by peers of the resident engineer or the construction engineer, may be beneficial in developing the engineer's response to the supplemental notice of potential claim.

Potential claims involving differing site conditions that lack merit must also include an internal review by a management review committee as referenced in Section 3-511, "Differing Site Conditions," of the *Construction Manual*.

Provide a detailed response letter to the contractor within twenty (20) days of the receipt of the supplemental notice of potential claim. The response letter must include the following sections:

- Background - Explains the circumstances that led to the dispute. Include only information such as events, dates, discussions, meetings, memos, and letters.
- Contractor's Position – Base the position on the information provided in the contractor's supplemental notice of potential claim. Use direct quotes from the information provided by the contractor without attempting to interpret or clarify them.
- Resident Engineer's Position – State the merits of the potential claim clearly and concisely. Fully document the contract requirements such as permits, plans, specifications, and other requirements supporting the findings.

In addition, include a statement requesting the contractor to provide a reply that supports agreement or disagreement with the resident engineer's analysis of the claim.

When the potential claim has no merit, remind the contractor of the option to further pursue the potential claim as specified in the contract. Advise the contractor of the consequences of not following the specified dispute resolution procedures.

When properly prepared as required, the response letter serves as the basis for the preliminary construction claim findings, if the potential claim becomes a claim.

5-403A (2c) Resident Engineer's Response to the Full and Final Documentation of Potential Claim

Upon receipt of Form CEM-6201C, "Full and Final Documentation of Potential Claim," determine if the full and final documentation of the claim has the same nature, circumstances, and basis as those specified in the initial and supplemental notices of potential claim, and begin drafting your response. Otherwise, do not consider the issue and notify the contractor in writing.

Provide a response to the contractor's full and final documentation of potential claim within thirty (30) days of its receipt. . In most cases, this response will not vary greatly from the response provided to the supplemental notice of potential claim with the exception that analysis of additional information provided by the contractor may require further response. The format of the resident engineer's response to the full and final documentation of potential claim is outlined in Section 5-403A (2b), "Resident Engineer's Response to the Supplemental Notice of Potential Claim," of the *Construction Manual*.

Issue and obtain approval of a contract change order when the dispute has merit.

A response is not required when the contractor has submitted the timely full and final documentation of potential claim after contract acceptance. In that case, review and consider the information before processing the proposed final estimate.

Information submitted after receipt of the full and final documentation of potential claim will not be considered.

5-403B Documentation Guidelines

The following are guidelines for keeping records and providing information when responding to notices, protests, and potential claims:

- Ensure that reports and documents are factual and accurate. Use specific statements in daily reports. An entry such as, "Told the contractor that . . ." is not satisfactory, whereas "I told Foreman Smith that..." is satisfactory. A general conclusion about the effect of a conversation is not helpful; a statement of the conversation is better.
- Answer letters containing questionable or erroneous statements made by the contractor in writing by refuting or correcting the contractor's statement.
- Do not hesitate to put orders and decisions in writing. Confirm any important statement about the unacceptability of the work in writing. Before ordering the contractor to proceed with extra or additional work, obtain approval from your supervisor. If the contractor verbally informs you of a dispute, advise the contractor to comply with Section 9-1.04, "Notice of Potential Claim," of the *Standard Specifications*. Include this verbal discussion in the resident engineer's daily report.
- On projects with a dispute review board, the response to the contractor's supplemental notice of potential claim will serve as the basis for the resident engineer's position paper.
- Focus on costs specific to the dispute, but do not discuss any funding availability, such as project contingency balance, with the contractor.

- If a dispute arises during the work's progress, keep accurate records of the operations to eliminate subsequent arguments related to work costs. During the progress of the disputed work, make regular agreements for the labor, equipment, or material quantities involved.
- Take preconstruction and project progress photographs. Photographs and videos establish job conditions at a particular point in time. Dated pictures of areas where work is not underway may be as important as pictures of construction operations or completed work.
- Record the full names of all the contractor's personnel involved in any dispute. These individuals may need to be located later. Information contained in the certified payrolls may be useful.
- Record equipment information such as description, model number, contractor's equipment number, size, and capacity to help determine and confirm costs associated with disputes.
- Category 62, "Disputes," of the project records must contain copies of all documents related to every dispute on the project. This information provides the basis for preparing the preliminary construction claim findings. Follow the procedures outlined in Section 5-1, "Project Records and Reports," of the *Construction Manual* to provide a good basis for documenting claims.
- Require the contractor to promptly submit an update or revise the progress schedule, as appropriate.

5-404 Alternative Dispute Resolution Processes

The two alternative dispute resolution processes used to resolve potential claims are partnering and dispute review board. These processes are used based on size, duration, and complexity of the contract. Read Section 5 of the special provisions before the preconstruction conference to determine which alternative dispute resolution process is included in the contract and whether or not they are optional or mandatory.

5-404A Partnering

Partnering allows all parties and stakeholders to establish and maintain cooperative communication channels and mutually resolve conflicts at the lowest responsible level. Read Section 5 of the special provisions to understand the process, allowable costs, and the method of payment. Include a topic on partnering for the preconstruction conference.

To establish the formation of formal partnering, the contractor must submit a request to the resident engineer upon contract approval. If the request is not in the best interest of Caltrans, discuss it with the construction engineer before responding to the contractor's request. Both parties should agree to the scheduling of a partnering workshop, selection of a partnering facilitator, workshop site, and other administrative details. Additional partnering workshops are subject to the agreement of both parties and as specified in the contract.

On large contracts, the partnering provisions may also include a mandatory one-day "training in partnering concepts" session regardless of whether the contractor requests the formation of a partnering or not.

Consult the "Field Guide to Partnering on Caltrans Projects," available on the Division of Construction's internet site for an in depth discussion of partnering concepts, formations, and benefits.

5-404 Alternative Dispute Resolution Process

5-404B Dispute Review Board

A dispute review board (DRB) consists of three members nominated and approved jointly by the contractor and Caltrans. A DRB allows knowledgeable and experienced board members, not directly involved with the contract, the opportunity to review and analyze a dispute and provide their recommendations. Although these recommendations are not binding, they are valuable in trying to resolve a dispute before it becomes a claim. These recommendations become important if the dispute is carried over to arbitration.

5-404B (1) Dispute Review Board – General

Depending on the size and duration of the contract, either mandatory or optional DRB contract provisions are included in the contract specifications.

Once a DRB is established, resolution of disputes through the DRB process becomes a prerequisite for the contractor to pursue a dispute as a claim or in arbitration.

DRB specifications are found in Section 5 of the special provisions. The resident engineer's initial task in the administration of the DRB specifications should be to identify whether the formation of a DRB is optional or mandatory.

Become familiar with integrating the DRB process with the potential claim process. See Table 5-4.2, "Dispute Review Board Process," in the *Construction Manual* for illustration of this integration. Include a topic on the DRB process at the preconstruction conference.

Assist in evaluating the DRB process by completing the following forms throughout the progress of the contract:

- Form CEM-6202, "Dispute Review Board Establishment Report;"
- Form CEM-6203, "Dispute Review Board Update Report,"
- Form CEM-6204, "Dispute Review Board Issue Report,"
- Form CEM-6205, "Dispute Review Board Completion Report"

Consult the DRB coordinator in the Division of Construction for clarification.

5-404B (2) Dispute Review Board – Establishment

Early establishment of the DRB is important for resolution of disputes as they occur. Delayed DRB formation, on the other hand, may affect the ability of the DRB to accurately analyze disputes without a baseline reference.

- Establishment of mandatory DRB- To ensure early establishment of the mandatory DRB, contract specifications include a time frame for nominating and approving the first two DRB members. The contract specifications also include a retention clause to alert the contractor of the importance of timely formation of the DRB. The retention clause cannot be applied when Caltrans has not fulfilled its obligation in the formation of the DRB. Submit the name of Caltrans' DRB nominee to the contractor at the preconstruction conference. Request the contractor's approval or rejection of that nomination and submittal of the name of the contractor's nominee within seven days after the preconstruction conference. See Example 5-4.2, "Sample Dispute Review Board Nomination Letter," in the *Construction Manual*.
- Establishment of optional DRB- On contracts with the optional DRB provisions,

the contractor decides whether or not a DRB is established. Be proactive in the DRB establishment. Follow the aforementioned establishment process at the preconstruction conference, emphasizing that Caltrans supports the DRB process and is committed to its timely establishment.

Optional DRB provisions do not include a retention clause because the contractor is not obligated to enter into a DRB agreement. The DRB process only becomes a prerequisite to pursue a claim and arbitration when the optional DRB has been established in accordance with the contract provisions.

The resident engineer must select Caltrans' DRB nominee from the prequalified list available on the Division of Construction's intranet site. In evaluating prospective candidates, consider the nominee's knowledge and experience to correspond with the type of work specified in the contract. Pay attention to any potential conflict of interest the nominee may have with either party. Contact the nominee and verify that the nominee is willing and able to serve on the DRB and obtain the nominee's project specific disclosure statement. Provide written notification including the disclosure statement to the contractor after the nominee is selected. This process is repeated if the nomination is rejected by the contractor. Contact the Division of Construction's DRB coordinator for assistance.

The nominee's disclosure statements must include a resume of the nominee's experience and a declaration statement that describes any past, present, anticipated and planned personal or financial relationship with the parties to the contract, including subcontractors and suppliers. Review the nominee's resume and the disclosure statement for proper qualifications and possible conflict of interest.

Each party may reject the other's nominee one time without cause. Contact the Division of Construction's DRB coordinator before rejecting a nominee proposed by the contractor. There is no limit to the number of rejections based on specific breach or violation of nominee's responsibilities or nominee's qualifications.

After the two DRB members are approved, request that the DRB members provide the name of the nominee for DRB chairperson and the project specific disclosure statement to both parties for consideration. Send a copy of this information to the DRB coordinator in the Division of Construction. The Division of Construction field coordinator informs the DRB coordinator when Caltrans approves or rejects the DRB chairperson nominee. Provide a copy of the approval or rejection notification to the other two DRB members. Submit a written request to the DRB chairperson to schedule the initial DRB meeting after both the contractor and Caltrans approve the nominee. If the nominee is rejected, submit a written request to the two DRB members to nominate another candidate.

The DRB agreement contained in the contract special provisions must be signed by each DRB member, the contractor, and the resident engineer before the initial DRB meeting. Additionally, issue and obtain approval of the required contract change order.

5-404B (3) Dispute Review Board – Operation

Establishment of the dispute review board is only the beginning of the DRB process. In addition to the specific dispute resolution meetings, there are mandatory initial and follow up progress meetings.

5-404B (3a) Dispute Review Board Progress Meetings

The DRB progress meetings give members the opportunity to gain knowledge of the progress of work. Hold the first meeting at the start of the project. Each progress meeting must include a site visit allowing the DRB members to view construction operations, construction work completed, and areas where construction work must begin before the next meeting. A representative from both the contractor and Caltrans must accompany the DRB members on all progress meetings. The minimum frequency of the progress meetings is stated in the DRB agreement, however; the frequency of meetings may require adjustment if the work is proceeding quickly. In addition, if the contract is suspended for a significant period, reconsider the frequency of the progress meetings.

The agenda of a typical progress meeting is contained within the DRB agreement. At a minimum, the presentation should include a discussion of the following:

- Status of the work in terms of expended time and dollars,
- Summary of potential claims,
- Status of contract change orders.

Prepare and circulate progress meeting minutes to the parties for revision and approval.

5-404B (3b) Dispute Review Board Dispute Issue Meetings

When a dispute issue is referred to a DRB, prepare the position paper for submittal to the contractor and the DRB in advance of the oral presentation at the meeting. Present an effective position paper to the DRB since the DRB recommendations may be introduced in arbitration proceedings.

The contractual time period for both submitting the position paper, and holding a dispute issue meeting are located in the DRB specifications and agreements. Follow the suggested position paper format below:

- Description of the dispute – A summary paragraph defining both the nature of the contractor's dispute and the basis for refusing compensation with clear reasons when no merit exists.
- Background or chronology of the dispute – The history of the issue in a narrative format including the facts, presented in a non-judgmental manner. This section must include a description of any partial or attempted resolutions.
- Contractor's stated position – As stated in the contractor's notice of potential claim, other written materials, or oral communications. Quoted segments are most effective when supplemented by exhibits. Present this section in a non-judgmental fashion and do not elaborate on the contractor's previously stated position.
- Caltrans' position– State the logical flow of information and the relevant contractual requirements that resulted in the determination of no merit. All supporting information must be referenced within this section and included in the exhibit section.

- **Summary** – A concluding paragraph stating why contractually and factually there is no merit to the contractor’s dispute. The summary must be a strong absolute statement of the Caltrans’ position requesting the DRB find in Caltrans’ favor. Avoid subjective language such as feelings or beliefs within this section.
- **Exhibits** – A number of exhibits for illustrating and clarifying the contractual and technical requirements. Include a table of contents for easily locating individual exhibits that are tabbed and numbered. Provide complete information related to the dispute including those exhibits used within the oral presentation at the DRB issue meeting when compiling the written position paper. Failure to provide certain exhibits may result in the DRB disallowing related items within the oral presentation. Distribute written position papers to the contractor and DRB members one or two days in advance of the deadlines.

Submit a draft written position paper to the construction engineer and peers for review and comment in advance of the formal exchange with the contractor and the DRB. These internal reviews provide an opportunity to improve the position paper, and benefit Caltrans by informing management of dispute issues.

The oral presentation given during the dispute issue meeting is important in effectively presenting Caltrans’ position to the DRB. Begin preparing for your presentation well in advance of the issue meeting. Hold a mock presentation at least a week in advance of the issue meeting to allow incorporation of comments from attendees. Attendees at the mock presentation should include the resident engineer, construction engineer, structure representative, area bridge engineer, and construction field personnel. Other attendees may include technical experts, district construction claims engineer, construction area manager, Division of Construction field coordinator, and others with dispute review board experience, depending on the size and complexity of the issue under consideration.

The objectives of the meeting are to further examine the contractor’s position, review the basis of Caltrans’ determination of no merit, and to rehearse Caltrans’ presentation including potential rebuttal statements. During the mock presentation, it is advisable that an experienced participant, not directly involved in the contract provides constructive criticism of Caltrans’ position and the rebuttal of the contractor’s position.

Either the resident engineer or structure representative gives the presentation to the DRB depending on the dispute issue. Other Caltrans personnel associated with the project may provide additional evidence depending on the dispute and the circumstances involved. Use of experts not associated with the contract is discouraged unless the dispute issue is complex and requires a technical specialist. The contractor can also request to use a technical specialist. The DRB must agree to these requests in advance and allow the other party to provide a technical specialist.

The DRB issue meeting is an informal meeting without testimony, cross-examination, transcripts or “bench” decisions. The order of events is as follows:

- Party filing the dispute will begin with a presentation to be followed by the other party’s presentation.
- Rebuttal statements will follow.
- DRB members may ask questions or make requests for additional information or clarifications.

5-404B (3c) Dispute Review Board Recommendations and Responses

Begin preparing Caltrans' response once the DRB issues its recommendation to the parties. A request for clarification of the DRB recommendation will only be considered if made within 10 days of receipt of the recommendation. Any request for clarification of a DRB recommendation needs to be discussed with the Division of Construction field coordinator before its submittal to the DRB. Requests for clarification are warranted when the DRB recommendation fails to thoroughly explain the rationale for the recommendation, when the DRB has not stated Caltrans' position accurately, or when the contractual provisions have been disregarded without explanation.

A request for reconsideration of an issue may be made to the DRB and will only be considered if new evidence concerning the dispute is provided and the request is made within 30 days of the receipt of the DRB recommendation. Reconsideration requests must be discussed with the Division of Construction field coordinator before submittal to the DRB.

Coordinate and complete Caltrans' response to the DRB recommendation within 30 days of the receipt of the DRB recommendation. Failure to respond within the 30-day period results in acceptance of the DRB recommendation by default. Acceptance or rejection of a DRB recommendation is in accordance with the following:

1. Acceptance of a DRB recommendation in favor of Caltrans does not require the approval of the Division of Construction. Notify the construction manager and the Division of Construction's DRB coordinator of the contractor's acceptance or rejection of the DRB recommendation when received.
2. Acceptance of a DRB recommendation in favor of the contractor will require the Division of Construction's approval if the issue is precedent setting, or if the resulting contract change order approval is not within the district's delegation of authority. Consult the DRB coordinator in the Division of Construction to determine if a DRB recommendation is precedent setting. Coordinate the response with the Federal Highway Administration (FHWA) representative on full oversight projects to ensure their participation in any related contract change order. The FHWA representative will also want notification when any issue has been referred to the DRB, the date of any DRB issue meetings, and of any DRB recommendations. Notify the construction manager and the Division of Construction's DRB coordinator of the contractor's acceptance or rejection of the DRB recommendation regardless of whether or not the response requires Division of Construction's approval.
3. Rejection of any DRB recommendation requires the approval of the chief, Division of Construction. Send a copy of the DRB recommendation to the Division of Construction field coordinator when the resident engineer, construction engineer, construction manager, and deputy district director of construction believe a DRB recommendation should be rejected. The deputy district director of construction and the Division of Construction field coordinator will review and discuss the reasoning for the rejection, and make a recommendation to the chief, Division of Construction. Approval to reject a DRB recommendation will be transmitted through the Division of Construction field coordinator to the deputy district director of construction.

5-405 Claims Resolution Process

The following established claims processing milestones ensure that the claims process is completed within the statutory requirement of 240 days of contract acceptance. The number of days referenced below refers to the number of calendar days elapsed after contract acceptance. For each contract accepted, the district must record actual milestone dates and monitor the progress of the claims resolution process. For an illustration of the claims resolution process, see Table 5-4.3, “Claims Resolution Process,” of the *Construction Manual*.

5-405A Issue Proposed Final Estimate—Target Day 40

The district must issue a proposed final estimate within 40 days after contract acceptance. Issue the proposed final estimate with the understanding that the estimate represents the final payment to the contractor. To ensure compliance with this target date, the resident engineer’s supervisor must make a written request to the district progress payment section that the proposed final estimate be processed for the contract.

Issuance of the proposed final estimate should not be postponed while waiting for additional information from the contractor because delays might later be attributed to Caltrans. Ensure 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 since the contractor’s receipt of the proposed final estimate must be evidenced by postal receipt.

5-405B 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 statement of claims. Document the receipt of the contractor’s response by postal receipt or written receipt if hand delivered.

No further action is required other than processing the final estimate if the contractor returns the proposed final estimate indicating acceptance, or the contractor does not return the proposed final estimate within the required 30 day period. 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.

If the contractor returns the proposed final estimate with a written statement of claims within the 30-day period, district construction must send a copy of the contractor’s claim package to the resident engineer, construction engineer, and district construction claims engineer.

5-405 Claims Resolution Process

5-405C Preliminary Construction Claim Findings Completed—Target Day 110

By target day 110, the resident engineer completes the preliminary construction claim findings which includes the compilation of the existing information and documents in Category 62 of the contract records. The construction engineer sends the preliminary construction claim findings to the deputy district director of construction. See Section 5-410, “Preliminary Construction Claim Findings and Category 62 Preparation and Guidelines,” of the *Construction Manual* for detailed format, content, and suggestions in preparing this document.

Review the contractor’s statement of claims for conformance with procedural requirements. This review ensures that each claim, excluding overhead claims or administrative disputes that occur after issuance of the proposed final estimate, is a continuation of a previously submitted notice of potential claim. If the contractor fails to comply with the contract requirements for submitting the statement of claims, document the failure in the preliminary construction claim findings for each claim issue. Failures identified within the potential claim process should be documented in detail in Category 62 of the project records, and should only be referenced in the preliminary construction claim findings. Contractor failures identified in the claims process must be fully detailed within the preliminary construction claim findings and may include, but are not limited to the following:

- Failure to provide a statement of claims within the 30-day time period.
- Failure to provide the identification number corresponding to the supporting full and final documentation of potential claim 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 documentation of potential claim.

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 the identification number if the contractor fails to correct the omission or disparity.

If the contractor’s statement of claims includes administrative disputes that occurred or were recognized after issuance of the proposed final estimate, include these items in the preliminary construction claim findings. Administrative disputes occurring or recognized after issuance of the proposed final estimate may include the following:

- Quantity disputes
- Administrative deductions for missing documents
- Adjustment in compensation for overrun or underrun of items
- Interest to be paid by Caltrans on late payments made on progress payments or properly submitted daily extra work bills
- Resolution of disputed labor, equipment, and materials

If administrative claims have merit, payment is made through item payments, contract change orders, or by releasing withheld deductions. Accompany payment of these types of claims with a letter stating that the payment resolves the respective claim in its entirety. If the contractor does not accept the payment as full resolution, refer to Section 5-406, “Claim Payments,” of the *Construction Manual*. The results of the attempted resolution of these administrative disputes must be sent to the district construction claims engineer by day 200 for incorporation into the construction claim findings.



If the statement of claims includes claims for overhead, such as field or home office, and cost escalation associated with delays caused by Caltrans, these claims must be supported with an audit by an independent certified public accountant (CPA). Send these types of claims to the deputy district director of construction as part of the preliminary construction claim findings. Caltrans Office of Audits and Investigations may review the audit. For additional details, refer to Section 5-407B, “Overhead Claims,” of the *Construction Manual*.

5-405D District Construction Review of Preliminary Construction Claim Findings Completed—Target Day 130

The deputy district director of construction, or delegated authority, must complete the review of the preliminary construction claim findings and segregate the claims into the following three categories:

- Claims of an administrative nature requiring further review by the resident engineer
- Claims that would not benefit from a board of review process
- Claims that may warrant further analysis by a board of review

The deputy district director of construction uses the written information previously provided by the contractor and the resident engineer to determine if a claim would or would not benefit from the board of review process.

By day 130, send a “Review of Claims by Deputy District Director of Construction” notification letter to the contractor explicitly stating the claims resolved, claims of administrative nature returned to the resident engineer for further review, claims that will not be heard at a board of review, and claims that will be heard at a board of review meeting. See Example 5-4.3, “Sample Review of Claims by Deputy District Director of Construction Notification Letter,” of the *Construction Manual*.

The district construction claims engineer should continue refining the preliminary construction claim findings submitted by the resident engineer towards construction claim findings document.

5-405E Board of Review Meeting—Target Day 160

The board of review convenes when the deputy district director of construction or a delegated authority determines that certain claims may warrant further analysis by a board of review. The target date to hold a board of review meeting is 160 calendar days from contract acceptance. The board of review secretary must notify the contractor of the date, time, and the location of the board of review meeting as soon as the board members have been selected and all the necessary arrangements have been made. In the “Board of Review” notification letter, state that both the contractor and Caltrans will be allowed to make only oral presentations in support of their previously submitted written information and that no additional written information will be accepted by the board of review. See example 5-4.4, “Sample Board of Review Notification Letter” of the *Construction Manual*. The resident engineer, supported by Caltrans personnel, is responsible for preparing and delivering the oral presentation at the board of review meeting.

The board of review is an informal meeting allowing the contractor and Caltrans the opportunity to make only oral presentations in support of previously submitted written information for claims identified within the board of review notification letter to the contractor. The board of review must listen to the presentations made by both the contractor and Caltrans, and provide objective recommendations within the board of review report. The board of review report should be issued within 200 days from contract acceptance.

If requested, district and structure personnel involved with the contract must attend the board of review meeting to assist in presenting the claims under review by the board. Arrange to have other personnel involved in the project available to the board to answer questions during the meeting regarding complex claims or for firsthand knowledge of events.

5-405E (1) Board of Review Secretary

The district assigns a secretary for the board of review. Generally, the district construction claims engineer serves as the board secretary. Other personnel that have organizational and writing skills may also serve as board secretary. The secretary must do the following:

- Arrange the meeting date, time, and location and notify the contractor by certified mail at least 15 days before the meeting. In the notification letter to the contractor, request the contractor inform Caltrans of any intentions to have legal representation at the board of review meeting. If the contractor plans to have legal representation at the meeting, the district should consider having a legal representative attend as a legal advisor. A Legal Division representative is present only to advise and counsel the board on significant legal issues. Contact the Division of Construction field coordinator for advice on legal representation.
- Notify respective Caltrans staff of the meeting date, time and location, and verify their attendance.
- Verify the attendance of the contractor, subcontractors, district and structure personnel involved with the project, and any other Caltrans personnel before the meeting.
- Ensure board members have copies of the preliminary construction claim findings, review of claims by deputy district director of construction notification letter, board of review notification letter, project plans, and special provisions, two weeks before the meeting.

5-405E (2) Board of Review Member Selection

The deputy district director of construction is responsible for selecting the board of review members. The number of members of a board of review should be based on the following guidelines:

- Total claims up to \$250,000, at least one member
- Total claims between \$250,000 and \$1,000,000, two members
- Total claims more than \$1,000,000, three members

Exceptions to these guidelines can be made depending on the complexity of claims. Proposed exceptions to the general guidelines must be discussed and concurred with the chief, Office of Contract Administration in the Division of Construction. Board of review members must be selected based on the following criteria:

- The board of review members should not have been involved in the administration of the project under consideration.
- The board of review chairperson should be either the deputy district director of construction or a delegated manager at a supervising engineer level or above, with a minimum of five years experience in construction. The chairperson should be sourced to the district where the claim originated.

- The other two members of the board of review will either be a supervising engineer level or above with a minimum of five years construction experience, or a senior engineer level with a minimum of eight years construction experience. The members may be sourced to the project's district or selected from the statewide board of review member list.
- The expertise of each board of review member should be considered relative to the disputes under consideration.

The Division of Construction maintains and manages a statewide list of available board of review member candidates, and provides a project-specific, member-candidate list to the district upon request. Candidates on the board of review member list are construction managers, retired annuitants, Division of Construction field coordinators, or other Caltrans personnel meeting the minimum experience requirements.

5-405E (3) Board of Review Operation

The board of review will hear only those claims identified in the review of claims by deputy district director of construction notification letter sent to the contractor. The board will not hear or address other claims. Caltrans prohibits recording the meeting by tape, court reporter, or video. The meeting is informal, allowing the contractor and the district personnel to present their positions, and for all parties to exchange questions and answers. All questions, except those of the chairperson, are directed to the chairperson first. The meeting attendees must recognize that the chairperson controls the meeting.

The members of the board of review must conduct the meeting as follows:

- The board of review chairperson informs the meeting attendees of the procedures and the format of the meeting.
- The chairperson states that the meeting is being conducted in accordance with the *Standard Specifications*, allowing a person or a board appointed by the district to review those claims that would benefit from further review by a board of review.
- Each claim issue begins with a district representative giving a brief description of the project and the subject of the claim.
- The contractor is given the opportunity to present the claim in detail as supported by previously submitted information and documentation.
- The district presents its detailed position as supported by the preliminary construction claim findings
- After both the contractor and the district oral presentations and rebuttals, attendees must only respond when board members request a response.
- If the contractor attempts to submit new information regarding a claim, the board chairperson must inform the contractor that the board does not permit additional claims or additional information regarding claims.
- If the contractor attempts to discuss a claim other than those to be heard by the board as stated in the review of claims by deputy district director of construction notification letter, the board chairperson informs the contractor that the board will not hear the issue and will not accept any additional information.

The board of review will not make decisions on claims at the meeting. After the meeting, the board of review members and the secretary will discuss further analysis and review of the claims and issuance of the board of review report by day 200.

The board of review must make decisions on claims, after reviewing the preliminary construction claim findings and the information presented by both the contractor and the district personnel at the board of review meeting. The board secretary compiles the board of review report under the direction of the board chairperson, with suggestions from the other board members. See Section 5-411, “Board of Review Report Preparation and Guidelines,” of the *Construction Manual*.

The board members and other Caltrans personnel involved in the claims resolution process must review drafts of the board of review report. Once all comments and corrections have been made, the board secretary will finalize the board report and obtain the signatures of the board of review members. For complex claims or claims with significant statewide impact, the board members must consult with the Division of Construction before sending the report to the district construction claims engineer.

5-405E (4) Board of Review Settlements

The board of review may determine that a negotiated settlement of the claims is appropriate. The board secretary prepares the claim settlement report. The board of review chairperson submits negotiated settlements as a claim settlement report directly to the Division of Construction. The board of review chairperson should submit the claim settlement report to the district director after it has been approved by the chief, Division of Construction. For information on preparing a claim settlement report, see Section 5-406B, “Claim Payments Based on Negotiated Settlements,” of the *Construction Manual*.

5-405F Board of Review Report Completed —Target Day 200

After the board members have signed the board of review report, the board secretary prepares a letter of transmittal and transmits the report and the supporting documents to the district construction claims engineer by target day 200. The board of review report will contain a determination of claims heard and the board’s conclusions. If the contractor fails to attend the board of review meeting, the claims cannot be filed in arbitration as stated in Section 10240.2, “Administrative Review,” of the Public Contract Code. If this happens, attach a letter with the district director determination of claims explaining the situation, referencing the above noted section. See Example 5-4.5, “Sample Final Estimate Letter – Board of Review Held, Not Attended by Contractor,” of the *Construction Manual*.

If the contractor did not attend a scheduled board of review meeting, the board of review report will be based on the information contained in the preliminary construction claim findings.

5-405G Construction Claim Findings Completed —Target Day 220

By day 200, the district construction claims engineer must receive all information necessary to complete the construction claim findings. This information should include the resolution of the administrative claims by the resident engineer, claims that were not heard by a board of review, and claims heard by a board of review. The construction claim findings will identify each of the contractor’s claims in summary form, listing references to the supporting documents. For detailed information on preparing the construction claim findings, see Section 5-412, “Construction Claim Findings Preparation and Guidelines,” of the *Construction Manual*.

In addition to the preparation of 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, see Section 5-413, “District Director Determination of Claims Preparation and Guidelines,” of the *Construction Manual*.

The construction claim findings and the draft district director determination of claims must be sent to the deputy district director of construction by day 220 for consideration.

Prepare and obtain approval of a contract change order compensating the contractor for claims determined to have merit based on the construction claim findings. The contract change order must state that the payment is for full resolution of the claim specified.

Reflect the additional working days in the request for any semifinal payment estimate if the contractor is granted additional working days beyond those shown on the proposed final estimate. For information on time extensions, refer to Section 3-8, “Prosecution and Progress,” of the *Construction Manual*.

5-405H District Director Determination of Claims—Target Day 230

The deputy district director of construction finalizes and approves the construction claim findings. The deputy district director of construction forwards the approved construction claim findings and the draft determination of claims to the district director for consideration.

The district director determination of claims is the final determination of claims, and completes the claims resolution process. The district director determination of claims should be delivered to the contractor no later than 230 days after contract acceptance.

The district director finalizes and approves the determination of claims. The district construction claims engineer sends the approved determination of claims to the contractor by day 230. The district construction claims engineer requests that the resident engineer prepare and obtain approval of unilateral contract change order for the final payment in consideration of the district director determination of claims.

Submit a request for the final estimate after preparing and obtaining approval of the contract change order. Other than forwarding the final estimate with a cover letter to the contractor, no further contact or discussion is necessary with the contractor.

District construction issues the final estimate within 30 days of issuing the district director determination of claims. For information on the final estimate cover letter, see Section 3-914, “Final Estimate,” of the *Construction Manual*.

The district must store all project records in accordance with the procedures outlined in Section 5-104, “Final Construction Project Records,” of the *Construction 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 240 days has elapsed since the acceptance of the contract, and a final determination on all claims has not been issued, the district must consult with the Division of Construction field coordinator and the Legal Division on how to proceed.

For more information regarding the arbitration process, refer to Section 5-409, “Arbitration,” of the *Construction Manual*.

5-406 Claim Payments

Make payments as described below and in accordance with Table 5-4.4, “Delegation of Authority,” of the *Construction Manual*. For detailed information on contract payments, refer to Section 3-9, “Measurement and Payment,” of the *Construction Manual*.

5-406A Claim Payments Based on Entitlement

If all claims are resolved before a board of review meeting, issue and obtain approval of the contract change order for the claims resolution, and request the issuance of the final estimate.

If only some of the claims are resolved, issue and obtain approval of the contract change order for those claims that have been resolved, and process a semifinal estimate.

5-406B Claim Payments Based on Negotiated Settlements

Negotiated 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. The district or the board of review will explore the possibility of settlement with the contractor.

Write a draft claim settlement report before presenting a negotiated settlement offer to the contractor. The draft claim settlement report must include the following items:

- A background of the contract and claims
- The scope of the settlement, including terms and conditions
- Identification of the specific claims or potential claims to be settled
- Compromises made in the best interest of Caltrans
- Reasons for the compromises
- Consequences of not settling
- Method of payment

Table 5-4.4, “Delegation of Authority,” of the *Construction Manual* lists requirements for recommendations and approvals of a claim settlement report. After approval, present the negotiated settlement offer to the contractor. Prepare and obtain approval of a contract change order if the contractor agrees to the negotiated settlement offer. The contract change order memorandum must reference the corresponding claim settlement report. Do not substitute a contract change order memorandum for a claim settlement report. The contract change order must state that the contractor accepts the compensation provided for in the contract change order as full resolution and settlement of the claim. The contractor must sign the negotiated settlement contract change order.

The claim settlement report is an internal document covered by the confidential attorney-client communication privilege and must not be given to the contractor or included in the project files. File the original claim settlement report in Division of Construction’s confidential files. Destroy all hardcopies and electronic drafts once the final claim settlement report has been approved. Do not distribute copies of the final claim settlement report.

5-407 Overhead

5-407 Overhead

Overhead is the general cost of running a business. It is not attributed to a specific part of the work operation. Overhead of construction contractors can be separated into two general categories: time-related overhead and overhead that is not time-related. Time-related overhead consists of costs that are associated with the normal recurring operations of the construction project, including home office overhead and field office overhead. Home office overhead, consist of indirect costs that are not associated with a specific project, but are costs of general facilities and administration necessary for the contractor's performance on all contracts. Field office overhead consists of indirect costs associated with a specific project. These costs do not include costs for labor, materials, or equipment used in performing the work.

Overhead that is not time-related could consist of mobilization, permits, profit, bonding, and liability insurance.

5-407A Methods of Overhead Payment

The contractor recovers the cost of overhead based on the following contract criteria:

- Contracts without an item for time-related overhead - The contractor includes overhead costs in the price of various items of work. The contractor recovers overhead cost of performing contract change order work by applying the markups referenced in Section 9-1.03, "Force Account Payment," of the *Standard Specifications* to the direct cost of performing the work. If the contract change order work is paid at contract item prices, the overhead cost of performing the work is compensated through the overhead cost already included in the contract item prices.
- Contracts with an item for time-related overhead - The contractor includes time-related overhead costs in the time-related overhead item of work and overhead not related to time in the various other items of work. The overhead cost of performing contract change order work is included in the reduced markups specified in the contract special provisions and through increasing the time-related overhead item when the work extends the project completion date. For delays caused by Caltrans that are not a result of contract change order work, the contractor is also compensated for overhead through commensurate increases in the time-related overhead item.

5-407B Overhead Claims

Section 7102, "Delays, Recovery of Damages," of the Public Contract Code states that public agencies cannot limit the damages incurred by a contractor due to unreasonable, state-caused delay, to an extension of contract time only. The process of addressing overhead claims may involve multiple groups within Caltrans. Meeting the final determination timeframe requires the judicious handling of an overhead claim. Many claims involving overhead are relatively complex and may require the assistance of the Division of Construction field coordinators.

The contractor must provide proof of a delay caused by Caltrans or suspension of contract performance for an uncertain or unreasonable duration which disrupts the contractor's stream of revenue needed to pay its fixed overhead costs, and show an inability to take on additional work which would provide a substitute stream of revenue to pay for those fixed overhead costs.

The key element in considering overhead claims is that the revenue stream that the contractor expects to cover overhead expenses in a normal business plan is interrupted, or significantly curtailed, and cannot be immediately replaced.

The issuance of numerous contract change orders is not sufficient proof for an overhead claim. In accordance with Section 4-1.03, “Changes,” of the *Standard Specifications*, changes from the plans and specifications are expected. In addition, Section 9-1.03, “Force Account Payment,” of the *Standard Specifications*, provides for markups on contract change orders that constitute full compensation for all overhead costs associated with the change. When a contractor is delayed in completion of the work, an extension of time commensurate with the delay in completing the work is allowed as specified in Section 8-1.07, “Liquidated Damages,” of the *Standard Specifications*. If a delay caused by Caltrans causes a project to be suspended or delayed by a stoppage of all or the critical part of the work, the contractor’s revenue stream could be interrupted or significantly curtailed, possibly exposing Caltrans to an overhead claim.

Compensable delays caused by Caltrans to the controlling operation are compensated through time-related overhead contract item quantity adjustments for contracts with a time-related overhead contract item. Make prompt adjustments in overhead compensation based on the bid price supplied by the contractor. Support all overhead claims with an audit report prepared at the contractor’s expense. The contractor must provide the required information in accordance with Section 9-1.04, “Notice of Potential Claim,” of the *Standard Specifications*. Provide a written response regarding Caltrans’ consideration of the overhead claim to the contractor before issuing the proposed final estimate.

To accurately respond to an overhead claim, examine the project schedule to determine if Caltrans has caused any delays. Separate the delays caused by Caltrans attributed to supplemental work that was specified within the original contract. When there is no delay caused by Caltrans other than delays attributed to supplemental work, deny the potential claim without further analysis of the contractor’s written request.

Involve the construction engineer, construction manager, and the Division of Construction field coordinator when responding to overhead claims.

5-408 Audits

If the resident engineer has informed the contractor that Caltrans will consider the request for additional overhead, evaluate the request through the audit process.

5-408A Contractor Submitted Audits

Section 9-1.07B, “Final Payment and Claims,” of the *Standard Specifications*, requires that an independent audit report by a certified public accountant (CPA) accompany and support any claim for overhead expenses. The audit report must be prepared at the contractor’s expense. When a claim for overhead expenses is received without an independent audit 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.

The Caltrans 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 (AICPA) Attestation Standards. In addition, the Office of Audits and Investigations, may review project files and audit the contractor’s records.

The Office of Audits and Investigations will perform the Caltrans audit only 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 AICPA Attestation Standards
- The Division of Construction has received and prioritized the audit request
- The contractor has fulfilled the provisions of Section 9-1.07B, “Final Payment and Claims,” of the *Standard Specifications*

A systematic review of the contractor’s claim and audit is required to determine if there is reason to proceed with a detailed analysis of the costs contained within the contractor submitted audit. Refer to Table 5-4.5, “Audit Process,” of the *Construction Manual* illustrating the review of the audit process.

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 9-1.07B, “Final Payment and Claims,” of the *Standard Specifications* and with those policies contained within the CPA Audit Desk Guide available at Division of Construction’s intranet site. 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, see the Code of Federal Regulations, Title 48, Part 31.205 (48CFR31.205). The independent CPA audit report may be faxed to the Office of Audits and Investigations for assistance in these regards. Deny the audit request if the audit report does not comply with Section 9-1.07B, “Final Payment and Claims,” of the *Standard Specifications*.

5-408 Audits

The Division of Construction field coordinator determines 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 progress 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 9-1.07B, “Final Payment and Claims,” of the *Standard Specifications* and the Division of Construction field coordinator determines an audit request is warranted, draft the audit request memorandum. Refer to Example 5-4.6, “Sample Audit Request Memorandum,” which includes the following information:

- Contract number
- Contractor’s name
- District contact person’s name, title and phone number
- Board of review secretary’s name, if applicable
- Justification

The justification must explain both the reason why a further analysis of the contractor’s claim is warranted, as determined and provided by the Division of Construction field coordinator and the associated costs that a Caltrans audit must verify.

Attach the following documents to the drafted audit request memorandum:

- Summary of delay-related claims,
- General contract information and delay-related chronology, and
- Independent CPA audit report.

Refer to Examples 5-4.7, “Sample Summary of Delay-Related Claims,” and 5-4.8, “Sample General Contract Information and Delay-Related Chronology.”

Forward the draft audit request memorandum and the attachments to the deputy district director of construction for consideration. If the deputy district director of construction concurs with the draft package, the deputy district director of construction forwards it to the Division of Construction field coordinator for approval. If the Division of Construction field coordinator approves the request, the Division of Construction field coordinator transmits the audit request memorandum and attachments to the chief, Office of Contract Administration.

The Office of Contract Administration provides a memorandum prioritizing the audit request and transmits the complete package to the audit manager, Office of Audits and Investigations. The final audit reports are due back to the Office of Contract Administration within 45 days from the date of transmittal. The Division of Construction field coordinator will use the final audit report or draft audit findings to determine if the contractor is due any overhead compensation. 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 process a contract change order for payment in accordance with the overhead claim administration delegation of authority in Table 5-4.4, “Delegation of Authority,” of the *Construction Manual*. Note the name of the person authorizing the contract change order in the contract change order memorandum. The Division

of Construction will keep the final audit report and the audit request for four years. 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 due to 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 statement of claims. An independent CPA audit is not required to support escalated cost claims due to delays caused by Caltrans. Force account markups are not included in any escalated cost calculation. Recovery of additional overhead incurred due to escalated costs requires submittal of an overhead claim with an independent CPA audit report.

5-408B Special Audits

Audit requests for terminations, complicated changes in character, extremely large item adjustments, and differing site conditions must follow the guidelines described in Table 5-4.4, "Delegation of Authority," of the *Construction Manual*. Specific concerns with these special audits may be discussed with the Office of Contract Administration of the Division of Construction.

5-409 Arbitration

The arbitration process is initiated by filing a complaint with the Office of Administrative Hearing within 90 days from receipt of the district director determination of claims as specified in Section 10240.1 of the Public Contract Code, and Section 9-1.10, "Arbitration," of the *Standard Specifications*.

In accordance with Section 10240.2 of the Public Contract Code, 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.

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 in the form of preparing calculations, performing technical analysis, preparing documents, assisting in the discovery process, or providing testimony. Keep project records at one location for ease of discovery by the Legal Division.

5-409A Arbitration Process

Refer to Table 5-4.6, "Arbitration Process," for a flowchart diagram showing the area of responsibility for various internal and external organizations involved with the arbitration process.

5-409 Arbitration

5-409B Arbitration Payment Process

The arbitration payment process is a joint effort involving the Division of Construction, the Legal Division, the district, the Division of Budgets, and the Division of Accounting. The following is the arbitration payment process initiated by the contract specialist responsible for arbitration payments within the Division of Construction. The process is also illustrated by the flowchart in Table 5-4.7, “Arbitration Payment Process.”

1. After receiving the approved request for arbitration award or arbitration settlement approval memo, and the release agreement from the office assistant for the chief, Division of Construction; the contract specialist responsible for arbitration payments investigates the availability of necessary funds. To do this, the contract specialist responsible for arbitration payments inquires with the district point of contact for arbitration and the Division of Accounting, Highway Appropriation Management section.

If funds are insufficient, the contract specialist responsible for arbitration payments informs the district point of contact for arbitration to request additional funds in accordance with Section 5-203, “Obtaining Additional Funds,” of the *Construction Manual*. The contract specialist responsible for arbitration payments provides the district point of contact for arbitration with supporting documentation for the additional funds request. When the requested funds have been approved and transferred into the contract, the district point of contact for arbitration informs the contract specialist responsible for arbitration payments that the funds are available. A G-11 or G-12 referenced in Section 5-201, “General,” of the *Construction Manual*, supplemental funds request approval will typically take 20 to 25 business days, while those requiring a California Transportation Commission supplemental vote will generally take 30 to 40 business days.

2. The contract specialist responsible for arbitration payments issues and approves the arbitration payment contract change order and contract change order memorandum based on the terms in the approved request for arbitration award or arbitration settlement approval memo from the Legal Division.
3. The contract specialist responsible for arbitration payments sends the arbitration payment contract change order and contract change order memorandum, and the contract change order telecopy to the district point of contact for arbitration.
4. The district construction estimate section enters the contract change order and the extra work bill into the progress payment system, then runs and flags the estimate. The district construction estimate section will inform the progress payment administrator within the Office of Engineering Management in the Division of Construction, when this work is complete.
5. The Division of Construction’s progress payment administrator forwards the estimate run, the voucher, and other required documents for payment to the accounting specialist at the Division of Accounting, Highway Appropriation Management section. The progress payment administrator informs the contract specialist responsible for arbitration payments when the payment is forwarded to the Division of Accounting, Highway Appropriation Management section.

6. Based on instructions from the Legal Division, the contract specialist responsible for arbitration payments e-mails the following payment information to the accounting specialist:
 - Payee's name
 - Payee's mailing address
 - Method of mailing
7. The accounting specialist processes the payment and requests issuance of a check from the State Controller's Office. After receiving the check, the accounting specialist mails the check to the contractor, and sends a copy of the check to the contract specialist responsible for arbitration payments for the project records.
8. After receiving a copy of the check, the contract specialist responsible for arbitration payments enters the information into the arbitration tracking system database and sends an e-mail indicating the completion of the arbitration payment process to the following:
 - Chief, Division of Construction
 - Deputy district director of construction
 - District construction claims engineer
 - Division of Construction field coordinator
 - Construction engineer
 - Project manager
 - Chief, Office of Contract Administration
 - Legal Division, assistant chief counsel, contract law
 - Legal Division, attorney assigned to the case
 - Legal Division, engineering support

5-409C Arbitration Tracking, Monitoring, and Reporting

The Division of Construction's contract specialist responsible for arbitration management is responsible for updating the database which includes tracking, monitoring, and reporting all arbitration cases. The contract specialist responsible for arbitration management is the point of contact regarding status of ongoing arbitration cases, coordinating arbitration payments, and providing statistics on all arbitration cases.

5-410 Preliminary Construction Claim Findings and Category 62 Preparation and Guidelines

5-410 Preliminary Construction Claim Findings and Category 62 Preparation and Guidelines

Preparation of the preliminary construction claim findings can be completed quickly by incorporating documents contained in Category 62 of the project records. When you receive exceptions to the proposed final estimate from the contractor, complete the preliminary construction claim findings for the entire project consisting of the information contained in Category 62 and the following:

- Title page
- Table of contents
- Project chronology
- General information
- List of claims
- Contractor's exceptions to the proposed final estimate

A well-organized Category 62, "Disputes," of the project records is imperative for preparing the construction claim findings, and meeting the statutory requirement for completing the claim process within 240 days of contract acceptance. For each claim, Category 62 must include:

- Claim checklist, see example 5-4.9, "Sample Claim Checklist" of the *Construction Manual*
- Notification details
- Written notice or protest
- Form CEM-6201A, "Initial Notice of Potential Claim" and Caltrans' response
- Form CEM-6201B, "Supplemental Notice of Potential Claim" and Caltrans' response
- Form CEM-6201C, "Full and Final Documentation of Potential Claim" and Caltrans' response
- All correspondence
- District's position paper for the dispute review board (DRB)
- Contractor's position paper for the DRB
- DRB recommendation
- Resident engineer diaries
- Assistant resident engineer diaries
- Applicable parts of plans and specifications
- Relevant contract change orders
- Photographs
- Calculations and analysis
- Weekly Statement of Working Days
- Critical path method schedules
- Other pertinent information



The deputy district director of construction reviews the information contained in the preliminary construction claim findings to determine how to proceed with the resolution of the claims.

5-411 Board of Review Report Preparation and Guidelines

The district construction claims engineer and deputy district director of construction use the board of review report to complete the construction claim findings that is the basis of the district director determination of claims.

In preparing the board of review report, the board members should follow the guidelines below:

- State opinions, facts, positions, conclusions, determinations, and recommendations in the report. However, the important items to be presented are facts, contract language, and the results of applying the contract to the facts.
- Do not use words such as “think,” “feel,” and “believe.”
- Quantify all items. If the contractor was inefficient, state that conclusion’s basis. If such inefficiency occurred frequently, state how many times and over what time frame.
- Do not use tables within the board recommendations.
- Begin each individual claim on a new page.
- Do not include any language indicating that the report’s findings comprise the final determination. For all claims, the district director makes the final determination.

The following establishes the format, content, and guidelines for writing the board of review report and a board of review recommendations.

5-411A Format

A board of review report follows the general format below:

5-411A (1) Introduction

The board of review report will start with an introductory paragraph describing the board meeting attendees and date of occurrence.

5-411A (2) Items that are common to all claims

List items such as the chronology and general information

5-411A (3) Summary of settled claims

Reference claims that were entirely or partially settled

5-411A (4) Individual Claim Information

Reference each individual claim number, title, and the amount

5-411A (5) General description of the claim

Briefly describe the nature of the claim

5-411A (6) Contractor’s position

Quote directly from the contractor’s protest, notice, notice of potential claim, or written statement of claims. Add any other pertinent information provided in other documentation.

5-411

Board of Review Report Preparation and Guidelines

5-411A (7) District's position

The district's position must be compiled from the responses to potential claim submittals, and supported by exhibits including related correspondence.

5-411A (8) Comments of the Board

In this section of the report, include the following:

- Any new material or change in position if raised by the contractor at the board meeting.
- Any board requests for additional information or analysis and any general discussion of that information or analysis.
- Other information the board considers relevant to the issue.

The following are some examples of clauses that may be used in this section:

- "At the board of review meeting, the contractor informed the board that..."
- "At the board of review meeting, the contractor submitted additional information to support the contractor's claim."
- "At the request of the board, the resident engineer reviewed the contractor's submittal and noted..."
- "The resident engineer informed the board..."
- "At the request of the board..."

5-411A (9) Findings of the Board

Format this section of the board of review report as a series of bullets listing the board's conclusions and providing the board's findings. The bullets will convey the board's reasoning and follow a progression that illustrates what was required, what happened, and what the board concluded was relevant to its recommendation. The following are some examples of phrases that may be used in this section, beginning with the statement, "The board concluded...":

- that the contract provided for...
- that the work included...
- that based on item number xx, description...
- that the contract further provided...
- that the contract time is subject to extensions for...
- that work began on (date)
- that by correspondence dated (date)... the contractor directed the resident engineer's attention to...
- that the contractor requested issuance of a contract change order to provide compensation for...
- that the resident engineer disputed the contractor's request and directed the contractor's attention to Section xx of the *Standard Specifications*.
- that on (date) the contractor submitted an initial notice of potential claim, dated (date).

- that on (date) the contractor submitted a supplemental notice of potential claim, dated (date)... at an estimated cost of \$ value.
- that on (date) the resident engineer responded to the contractor's supplemental notice of potential claim and directed the contractor's attention to Section xx of the *Standard Specifications*.
- that on (date) the contractor submitted the full and final documentation of claim, dated (date)... with the requested cost of \$ value.
- that on (date) the resident engineer responded to the contractor's full and final documentation of potential claim and again referred the contractor's attention to Section xx of the *Standard Specifications*.
- that with the return of the proposed final estimate, the contractor included a corresponding claim for \$ value.
- that the contractor has been compensated for the work of item number xx and that the contractor is not entitled to any additional compensations for that work.

For each claim, the conclusions will be ended with a recommendation statement such as, "Therefore, it is recommended that the claim be denied (or allowed) in the amount of \$ value."

Findings and facts about what actually occurred, including only facts the board knows with certainty. Guesses or unverified information should not be used in the conclusion.

The board of review report should specifically address any dispute review board findings and recommendations pertaining to the claim, and provide its conclusions. Particular attention must be paid when the board of review's conclusion disagrees with the findings and recommendations of the dispute review board.

5-411A (10) Board of review member signature block

Include signature blocks for the board members. Place all signature blocks on the same page as the final portion of the report's text.

After the board of review report is complete, a draft final determination pertaining to those claims heard by the board of review will be prepared by the board secretary and forwarded to the district construction claims engineer. The draft will consist of the introductory paragraph and the board's conclusions and recommendations taken from the board of review report. However; the board's recommendations will be modified to state, "That the claim is denied," or, "That the claim is allowed in the amount of \$value."

Upon completion of the board of review report, the board's secretary transmits the report to the district construction claims engineer for incorporation into the construction claim findings.

Only the district director's signature will appear on the final determination that will address all claims.

For a sample electronic file of a board of review report, contact the Office of Contract Administration in the Division of Construction.

5-412 Construction Claim Findings Preparation and Guidelines

5-412 Construction Claim Findings Preparation and Guidelines

The board of review report is incorporated as a part of the construction claim findings. The construction claim findings provide the basis of the district director determination of claims. The district construction claims engineer prepares the construction claim findings by refining the preliminary construction claim findings and incorporating claims resolved prior to completing the preliminary construction claim findings, administrative claims addressed by the resident engineer, claims addressed by the board of review, and the other remaining claims. 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. See Section 5-413, “District Director Determination of Claims Guidelines,” of the *Construction 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 a construction claim finding refer to Example 5-4.10, “Sample Construction Claim Findings,” of the *Construction Manual*.

5-412A Format

The construction claim findings follows the format below:

5-412A (1) Title Page

The title page states the following:

- “Construction Claim Findings”
- Contract identification data such as contract number, district, county, route, kilopost, and federal project number, if applicable
- Applicable *Standard Specifications* and *Standard Plans*
- Names of the contractor, resident engineer, structure or district representative, construction engineer, structure construction engineer, construction manager, board of review members, district construction claims engineer, and deputy district director of construction
- Date

5-412A (2) Table of Contents

Number all pages in the table of contents.

5-412A (3) Project Chronology

The project chronology includes the following:

- Advertisement date
- Bid opening date

- Contract award date
- Contract approval date
- First working day (date and working day number)
- Date contractor began work
- Working days specified (number of days)
- Computed completion date (date and working day number)
- Contract change order time adjustment (number of days)
- Other days extension (number of days)
- Nonworking days (number of days)
- Suspension days (number of days)
- Working days not worked on controlling operation (number of days)
- Extended date for completion (date and working day number)
- Project completion date
- Contract acceptance date
- Overrun in contract time (number of working and calendar days)

5-412A (4) General Information

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

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

5-412A (5) Summary of Claims

Provide the following information:

- Identification numbers and titles
- Claimed amounts
- Recommended payments
- Remaining amounts

5-412A (6) Claim Categories

Show the segregation of claims into the following categories:

- Administrative claims
- Claims heard by board of review
- Claims not heard by board of review

5-412A (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.

5-412A (8) Description of the Claim

Provide the following information:

- An explanation of what caused the claim
- Pertinent statements of facts related to the issue, not beliefs or opinions
- A reference to the applicable specifications relating to the claim. You may include a separate section entitled “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.

5-412A (9) Contractor’s Position

Quote directly from the contractor’s protest, notice, notice of potential claim, or written statement of claims. 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 stated.

Provide the information in the following order:

- Full and final documentation of potential claim
- Supplemental notice of potential claim
- Initial notice of potential claim
- Written notice or protest if applicable
- Contractor’s initial written correspondence pertaining to the claim
- Reference table to contractor’s supporting exhibits

5-412A (10) District's Position

The district's position must be compiled from the responses to potential claim submittals, 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 the following order:

- Resident engineer's response to the full and final documentation of potential claim
- Resident engineer's response to the supplemental notice of potential claim
- Resident engineer's initial written correspondence pertaining to the claim
- A list of exhibits including contract change orders for partial resolution of the potential claim, photographs, critical path method analysis, cost analysis, correspondence, and diaries.

Include a separate section stating deficiencies if the contractor has failed to comply with Section 9-1.07B, "Final Payment of Claims," of the *Standard Specifications*.

5-412A (11) Findings and Recommendations

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

5-412A (12) Tabular reference to supporting information

5-412A (13) Summary of construction claim findings in tabular format for all claims

5-412A (14) Deputy district director of construction signature block

5-412A (15) Exhibits

Include the following exhibits as appropriate:

- Copy of the contractor's written statement of claims
- Correspondence
- Cost data
- Notices, protests, or notices of potential claims
- Detailed chronology of correspondence, other documents, or events
- Critical path method schedule or time impact analysis
- Photographs

5-412B Helpful Hints

When preparing the construction claim findings, the following hints may be helpful:

- 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.
- Provide a response to every relevant contention that the contractor makes.
- Use exact dates and numbers.
- State whether days are working or calendar.
- When referring to days, when applicable, include the month, day number, and year.

5-412C Things to Avoid

When preparing the construction claim findings, avoid the following:

- 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 any relevant letters or events, if appropriate.
- Including correspondence, photographs, or other exhibits that have no direct bearing on the claim.

5-413 District Director Determination of Claims Preparation and Guidelines

5-413 District Director Determination of Claims Preparation and Guidelines

The district director makes the final determination of claims in consideration of the construction claim findings and supporting documents. The district director determination of claims is a stand-alone document and does not reference the board of review report, 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 see Example 5-4.11, “Sample District Director Determination of Claims,” of the *Construction Manual*.

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. If the contractor is due any monies, pay the entire sum within 30 days.

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, the Caltrans’ Legal Division coordinates any necessary responses.

Example 5-4.1 - Sample Dispute Response Clauses

Use the following sample clauses in response to disputes. Edit the clauses to fit the specific situation.

5-4.1A Notice

For a discussion of notices, see Section 5-402A, “Notice,” of the *Construction Manual*. Use the following information in your response to a notice.

5-4.1A (1) General

“I have received your written notification dated May 4, 2003 of a differing site condition encountered at (give location). It is my understanding that you are of the opinion that the material encountered differs materially from that shown on the plans or is considered to be of an unusual nature...”

5-4.1A(2) If no merit

“I have investigated the material and the contract documents, (specify which documents) and have found that the material does not vary from that shown on the contract documents. Therefore, no additional cost or extension of contract time is warranted to complete the work. If you still feel a differing site condition exists, please provide me with any additional information you may have.”

5-4.1A (3) If merit

“I have investigated the material and the contract documents, (specify which documents) and have found that the material does vary from that shown on the contract documents. Therefore, additional cost or extension of contract time is warranted to complete the work. Please furnish me with the additional costs that may result from the increased work as a result of this differing site condition.”

5-4.1B Protest

For a discussion of protests, see Section 5-402B, “Protest,” of the *Construction Manual*.

5-4.1B (1) Contract Change Order Time Adjustment

Use the following clauses in your response to a protest of time determination in a contract change order:

5-4.1B (1a) General

“I have received your letter of protest, dated May 4, 2003, regarding the time adjustment under contract change order No. 16. I understand that you are protesting the determination of (x) working days time extension for this change and you believe you are entitled to (y) working days time extension.”

5-4.1B (1b) If no merit

“My review of the contract change order, anticipated work, and the progress schedule indicates that the work required by contract change order No. 16 does not impact the controlling operation [if a CPM review was performed substitute “critical path” for “controlling operation”]. Therefore you are not entitled to an extension of contract time. If you still believe that a time extension is warranted, please provide documentation, either in narrative form or an analysis showing the impact of this work on the completion date of the project.”

Example 5-4.1- Sample Dispute Response Clauses (continued)

5-4.1B (1c) If merit

“My review of the change order, anticipated work, and the progress schedule indicates that the work associated with contract order No. 16 impacts the controlling operation [if a CPM review was performed substitute “critical path” for “controlling operation”]. Therefore you are entitled to a time extension. I have determined a time extension of (x) days associated with the work. The contract change order will be revised to reflect this change in the adjustment of contract time. Please review and sign the revised contract change order if you agree with the change.”

5-4.1B (2) Weekly Statement of Working Days

Use the following clauses in your response to a protest related to determination of contract time in a weekly statement of working days:

5-4.1B (2a) General

“I have received your letter of protest, dated May 4, 2003, regarding weekly statement of working days No. 8. It is my understanding that you are protesting the charging of (specify day or days protested) as a working day because (specify the contractor's reasons for protesting the days in question).”

5-4.1B (2b) If no merit

“Our records indicate that you were working on the controlling operation for the entire day. If you believe that you did meet the requirements of Section 8-1.06, “Time of Completion,” of the *Standard Specifications*, please provide me with documentation in support of your protest. In the absence of the required documentation, the weekly statement of working days No. 8 stands unchanged.”

5-4.1B (2c) If merit

“I have reviewed the project records and have determined that April 22, 2003, should be revised to indicate a non-working day. I will send you a revised weekly statement of working days No.8.”

5-4.1C Notice of Potential Claim

For a discussion of the notice of potential claim, see Section 5-402C, “Potential Claim,” of the *Construction Manual*. Use the detailed format and response guidelines in Section 5-403A, “Response Guidelines,” of the *Construction Manual* in conjunction with the following clauses in response to a notice of potential claim:

5-4.1C (1) General

“I have received your notice of potential claim (specify which of the three forms) dated May 4, 2003, regarding (state the issue). It is my understanding that this potential claim is the result of a dispute over (state the dispute and give background of the dispute).

I understand your position to be ...(quote the contractor's position as described in the notice of potential claim).”

5-4.1C (2) If no merit

“I have reviewed your potential claim (specify which of the three forms) and based on the information you provided I find that it has no merit. (Explain why in detail.)”

Example 5-4.1 - Sample Dispute Response Clauses (continued)

5-4.1C (3) If merit

“I have reviewed your potential claim (specify which of the three forms) and based on the information you provided I find that it has merit. (Explain why.) Please provide me with the cost associated with your notice of potential claim for review and determination of compensation.”

5-4.1C (4) Request for Information

“I have reviewed your notice of potential claim (specify which of the three forms), and I am unable to make a determination based on the information you provided. Please provide me with the following information so I can make a determination regarding your potential claim.”

Example 5-4.2 - Sample Dispute Review Board Nomination Letter

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF TRANSPORTATION

DISTRICT X CONSTRUCTION

(ADDRESS)

(PHONE)

(FAX)



*Flex your power!
Be energy efficient!*

(date)

(Dist-EA)

(Dist-Co-Rte-PM/KP)

Federal Aid Project: (FA#)

(Contractor)

(Address)

Subject: Dispute Review Board Establishment

Gentlemen:

In conformance with Section 5-1.xx__ of the special provisions of the contract referenced above, Caltrans is nominating Mr. (nominee's name) to the Dispute Review Board. The nominee's project specific disclosure statement is attached for your consideration. Please provide your written response accepting or rejecting this nomination within seven days of the date of this notification.

In addition, please provide your nomination to the Dispute Review Board, including the nominee's project specific disclosure statement within seven days of the receipt of this letter.

Sincerely,

(NAME)

Resident Engineer

Attachment

"Caltrans improves mobility across California"

Example 5-4.3 - Sample Review of Claims by Deputy District Director of Construction Notification Letter

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF TRANSPORTATION

DISTRICT X CONSTRUCTION

(ADDRESS)

(PHONE)

(FAX)



*Flex your power!
Be energy efficient!*

CERTIFIED MAIL RETURN RECEIPT REQUESTED

(date)

(Dist-EA)

(Dist-Co-Rte-PM/KP)

Federal Aid Project: (FA#)

(Contractor)

(Address)

Subject: Review of Claims

Gentlemen:

I have reviewed your exceptions to the Proposed Final Estimate and have made the following determination:

- Resolved claims

<u>Claim ID</u>	<u>Title</u>	<u>Amount</u>
(List claims that have been resolved)		

- Administrative claims being further reviewed by the resident engineer

<u>Claim ID</u>	<u>Title</u>	<u>Amount</u>
(List administrative claims sent to the resident engineer for further review)		

- Claims that will not benefit from a review by a board of review

<u>Claim ID</u>	<u>Title</u>	<u>Amount</u>
(List claims that will not be heard by a board of review)		

- Claims that will be heard by a board of review

<u>Claim ID</u>	<u>Title</u>	<u>Amount</u>
(List claims that will be heard by a board of review)		

You will be notified of the date, time and the location of the board of review meeting in a follow up letter.

"Caltrans improves mobility across California"

**Example 5-4.3 - Sample Review of Claims by Deputy District Director of Construction Notification Letter
(continued)**

In accordance with Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications*, your attendance at the board of review meeting is mandatory.

Sincerely,

(NAME)
Deputy District Director of Construction

cc:

- Board of review secretary
- Resident engineer
- Structure representative
- Construction engineer
- Area bridge engineer
- Construction manager
- District construction claims engineer
- District construction office
- Division of Construction Field Coordinator
- Division of Construction – Office of Contract Administration

"Caltrans improves mobility across California"



Example 5-4.4 - Sample Board of Review Notification Letter

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF TRANSPORTATION
DISTRICT X CONSTRUCTION
(ADDRESS)
(PHONE)
(FAX)



*Flex your power!
Be energy efficient!*

CERTIFIED MAIL RETURN RECEIPT REQUESTED

(date)

(Dist-EA)

(Dist-Co-Rte-PM/KP)

Federal Aid Project: (FA#)

(Contractor)

(Address)

Subject: Board of Review Meeting

Gentlemen:

Following up on the "Review of Claims by Deputy District Director of Construction" notification letter sent to you on (date), the district construction has scheduled a board of review meeting to be held at (time) on (date) at (location) to hear the following claims:

<u>Claim ID</u>	<u>Title</u>	<u>Amount</u>
(List claims to be heard by the board of review as shown on the "Review of Claims by Deputy District Director of Construction Notification Letter")		

Both the contractor and Caltrans will be afforded the opportunity to make verbal presentation in support of their previously submitted written positions on the claim(s) listed above.

Caltrans policy requires that an attorney from the Legal Division be present if the contractor intends to be represented by legal counsel at the board of review. Please advise in writing if you plan on having legal representation in this matter.

In accordance with Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications*, your attendance at the board of review meeting is mandatory.

Sincerely,

(NAME)

Board of Review Secretary

"Caltrans improves mobility across California"

Example 5-4.4 - Sample Board of Review Notification Letter (continued)

cc: Resident engineer
Structure representative
Construction engineer
Area bridge engineer
Construction manager
District construction claims engineer
District construction office
Board of review members
Division of Construction Field Coordinator
Deputy district director of construction
Division of Construction – Office of Contract Administration

“Caltrans improves mobility across California”



Example 5-4.5 - Sample Final Estimate Letter - Board of Review Held, Not Attended by Contractor

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF TRANSPORTATION

DISTRICT X CONSTRUCTION

(ADDRESS)

(PHONE)

(FAX)



*Flex your power!
Be energy efficient!*

CERTIFIED MAIL RETURN RECEIPT REQUESTED

(date)

(Dist-EA)

(Dist-Co-Rte-PM/KP)

Federal Aid Project: (FA#)

(Contractor)

(Address)

Gentlemen:

On (date of board of review meeting), the district convened a board of review meeting for the purpose of reviewing the following claim(s):

<u>Claim ID</u>	<u>Title</u>	<u>Amount</u>
(List claims referenced in the Board of Review Meeting Notification Letter)		

Your absence at that meeting, an administrative procedure set forth in the contract as part of the Caltrans claim process, has nullified those claims.

The final estimate is being issued as authorized by Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications* in accordance with the district director's final determination of claims sent to you on (date). Payment in the amount of (dollars) on claim numbers (1, 2, etc) is included on the final estimate. This amount fully resolves claim numbers (1, 2, etc). Enclosed is a copy of the final estimate.

The claims resolution process under the contract is now concluded.

Sincerely,

(name)

District Director

Attachment

"Caltrans improves mobility across California"

Example 5-4.6 - Sample Audit Request Memorandum

State of California

Business Transportation and Housing Agency

Memorandum

To: (NAME), Chief
Division of Construction

Date: [Month day, year]

(NAME), Chief
Office of Contract Administration

File: [Optional]

From: [NAME]
Deputy District Director of Construction

Subject: Request for State Audit

The contractor, (name) returned exceptions to the proposed final estimate, dated (date), and specified (overhead, escalated cost, or impacted item work) claims due to a state-directed suspension as shown on the attached summary of delay related claims. The contractor was permitted to work on non-controlling items of work during the period of suspension. Caltrans directed the suspension for a redesign of most of the project.

Project work involved the removal and replacement of concrete pavement with fast-setting hydraulic cement concrete.

It is requested that Caltrans audit determine if additional compensation for overhead and escalated costs is owed to the contractor for this project. The justification for this request is as follows:

- Contract time was extended by the suspension by more than 15 percent, and
- The contractor worked an additional season (as evidenced by the effect on the scheduled completion date) due to the suspension.

The district contact for project information will be (name), (resident engineer or claims engineer), at (telephone number).

Attached is an independent certified public accountant audit report, submitted by the contractor in conformance with Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications*. Summary of delay related claims, general contract information, and the delay related chronology of the project is also attached. The Division of Construction field coordinator has included a signature of concurrence with this request as shown below.

(NAME), Field Coordinator
Division of Construction

(NAME), Deputy District Director
Construction

"Caltrans improves mobility across California"

Example 5-4.7 - Sample Summary of Delay-Related Claims

Contract No.:

Contractor:

<u>Claim No.</u>	<u>Claim Description</u>	<u>Amount Claimed (A)</u>	<u>District Analysis (B)</u>
<u>Delay Claims</u>			
3	Field Office Overhead	\$22,011.06	\$0.00
4	Home Office Overhead	\$11,655.88	\$0.00
5	Labor Cost Increases	\$5,987.00	\$0.00
6	Material Cost Increases	\$7,685.00	\$7,685.00
7	Material Storage Costs	\$3,877.00	\$0.00
<u>Impacted/Unproductive Item Work</u>			
8	Item #4 - Traffic Control	\$8,012.98	\$0.00
9	Item #9 - Roadway Excavation	\$4,409.76	\$4,409.76
<u>Subcontractor Claims</u>			
12	WWW Fence Co. Material Costs	\$9,894.03	\$9,894.03
13	Electrical Experts, Inc. Labor Cost Increases	<u>\$2,288.09</u>	<u>\$0.00</u>
TOTALS		\$75,820.80	\$21,988.79

(A) Amounts claimed are those indicated by contractor.

(B) Amounts which district staff can research and analyze for possible entitlement

(C) Amounts should be audited for possible entitlement.

Example 5-4.8 - Sample General Contract Information and Summary of Delay-related Chronology

GENERAL CONTRACT INFORMATION

The bridge work to be done consists, in general, of constructing earthquake retrofit modifications on the following bridges as shown on the project plans and briefly described below:

Bridge Description and Bridge Numbers

New CIDH piles with connecting pile extensions and anchor heads constructed at every fourth bent (148 new piles), and 3,520 composite column casings installed on existing pile extensions.

The bid amount was: \$ 4,899,362.00

The final cost was: \$ 5,204,479.07

The proposed final estimate (PFE) was mailed to the contractor on September 30, 1999, and was returned with exceptions on November 3, 1999. The total amount claimed was \$1,636,903.82.

CHRONOLOGY (DELAY-RELATED)

<u>EVENT</u>	<u>CALENDAR DATE</u>	<u>WORKING DAY NO.</u>	<u>NO. OF DAYS</u>
Contract Approved	10/8/1997		
Working Day Begin	10/9/1997	160	
Begin Work	5/26/1998	314	
Working Days Specified or Bid			180
CCO Days Extension			0
Other Days Extension			4
Non-working Days, Weather			89
Suspension Days			210
Extended Completion Date	9/20/1999	643	
Work Completed	8/17/1999	621	
Contract Accepted	8/25/1999	627	

Contract Overran 0 Working Days (0 Calendar Days)

"Caltrans improves mobility across California"

Example 5-4.9 - Sample Claim Checklist

Identification Number _____

Title _____

Notification Details

	Date	On Time		Amount Claimed
Written notice/protest	_____	Yes___	No___	_____
Initial NOPC	_____	Yes___	No___	_____
Supplemental NOPC	_____	Yes___	No___	_____
Full & Final Doc	_____	Yes___	No___	_____

State Response

	Date	Merit		On Time	
To Supplemental	_____	Yes___	No___	Yes___	No___
Comments	_____				

To Full and Final Doc	_____	Yes___	No___	Yes___	No___
Comments	_____				

Background _____

Contractor Position _____

District Position _____

Example 5-4.9 - Sample Claim Checklist (continued)

DRB Information (if applicable)

DRB held Yes___ No___ Date_____
DRB Recommendation in favor of: State___ Contractor___
DRB Accepted by: State: Yes___ No___ Contractor: Yes___ No___
Payment detail CCO No.____ Amount_____
Comments_____

Exhibits

x = included

- Contractor's exceptions to PFE _____
- Written notice or protest _____
- Initial NOPC (6201 A) _____
- Supplemental NOPC (6201 B) _____
- Full & Final Documentation (6201 C) _____
- State response
 - To Supplemental NOPC _____
 - To Full and Final Documentation _____
- Other correspondence _____
- Dispute Review Board
 - State position paper _____
 - Contractor position paper _____
 - DRB recommendation _____
- Diaries
 - Resident Engineer _____
 - Assistant _____
- Plan sheets _____
- Specifications _____
- Contract Change Orders _____
- Photographs _____
- Calculations & analysis _____
- Weekly Statement of Working Days _____
- CPM Schedules _____
- Other (list) _____

**DEPARTMENT OF TRANSPORTATION
CENTRAL REGION**

**10-123454
10-ALP-88-0.2**

**CONSTRUCTION CLAIM FINDINGS
FOR PROJECT IN DISTRICT 10
ON STATE ROUTE 88
LOCATED IN
ALPINE COUNTY ABOUT 90.4 KM EAST OF JACKSON AT KIRKWOOD CREEK
January 1, 2004**

Applicable Standard Specifications -	1999 Edition
Applicable Standard Plans-	1999 Edition
CONTRACTOR	Contractor's Corporate Identification
RESIDENT ENGINEER	RE's Name
STRUCTURE REPRESENTATIVE	SR's Name
CONSTRUCTION ENGINEER	CE's Name
BRIDGE CONSTRUCTION ENGINEER	BCE's Name
CONSTRUCTION MANAGER	CM's Name
DISTRICT CLAIMS ENGINEER	Claims Engineer's Name
BOR CHAIRPERSON	BOR Chairperson's Name
BOR MEMBER	BOR Member's Name
BOR MEMBER	BOR Member's Name
DEPUTY DISTRICT DIRECTOR OF CONSTRUCTION	Deputy District Director of Construction's Name

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District’s Position.....	6
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Claim #2 – Differing Site Condition Claim - CIDH Piling at Kirkwood Creek Bridge (ID #34).....	
Background.....	
Applicable Specifications.....	
Notification of Claim.....	
Contractor’s Position.....	
District’s Position.....	
Board of Review Findings.....	
Administrative Claims:	
Claim #3 – Item 27 – Reconstruct Fence – 11.6M.....	
Background.....	
Contractor’s Position.....	
District’s Position.....	
Findings.....	
Claim #4 – Item 124 – Rock Slope Protection – 10M3.....	
Background.....	
Contractor’s Position.....	
District’s Position.....	
Findings.....	
Claim #5 – CCO #11 – DEWR’s 6 and 8.....	

Example 5-4.10 - Sample Construction Claim Findings (3 of 10)

Background.....	
Contractor's Position.....	
District's Position.....	
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Summary of Resolved Claims.....	
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Claim #1 – PCC Pavement Grinding Claim (ID #46) Exhibits

Exhibit 1 Contractor's Letter Dated March 12, 2003.....	1 Sheet
Exhibit 2 Resident Engineer's Letter Dated March 18, 2003.....	2 Sheets
Exhibit 3 Contractor's Initial Notice of Potential Claim.....	1 Sheet
Exhibit 4 Contractor's Supplemental Notice of Potential Claim.....	2 Sheets
Exhibit 5 Resident Engineer's Response	2 Sheets
Exhibit 6 Contractor's Full and Final Documentation of Potential Claim.....	10 Sheets
Exhibit 7 Resident Engineer's Response.....	3 Sheets
Exhibit 8 Contractor's DRB Position Paper.....	8 Sheets
Exhibit 9 District's DRB Position Paper.....	7 Sheets
Exhibit 10 DRB's Recommendation.....	5 Sheets
Exhibit 11 Contractor's Response to DRB Recommendation.....	1 Sheet
Exhibit 12 Resident Engineer's Response to DRB Recommendation.....	1 Sheet
Exhibit 13 Specification Excerpts.....	2 Sheets
Exhibit 14 Plan Sheet Excerpts.....	3 Sheets
Exhibit 15 Resident Engineer's Photographs.....	3 Sheets
Exhibit 16 Diaries.....	9 Sheets

Claim #2 – Differing Site Condition Claim – CIDH Piling at Deer Creek Bridge (ID #34) Exhibits

Exhibit 1 Contractor's Differing Site Condition Notice.....	1 Sheet
Exhibit 2 Resident Engineer's Determination Letter.....	2 Sheets
Exhibit 3 Contractor's Initial Notice of Potential Claim.....	1 Sheet
Exhibit 4 Contractor's Supplemental Notice of Potential Claim.....	2 Sheets
Exhibit 5 Resident Engineer's Response.....	2 Sheets
Exhibit 6 Contractor's Full and Final Documentation of Potential Claim.....	5 Sheets
Exhibit 7 Resident Engineer's Response.....	5 Sheets
Exhibit 8 Contractor's DRB Position Paper.....	8 Sheets
Exhibit 9 District's DRB Position Paper.....	7 Sheets
Exhibit 10 DRB's Recommendation.....	5 Sheets
Exhibit 11 Contractor's Response to DRB Recommendation.....	1 Sheet
Exhibit 12 Resident Engineer's Response to DRB Recommendation.....	1 Sheet
Exhibit 13 Materials Information Handout.....	9 Sheets
Exhibit 14 Log of Test Borings.....	2 Sheets

Example 5-4.10 - Sample Construction Claim Findings (4 of 10)

Exhibit 15 Resident Engineer's Photographs.....	3 Sheets
Exhibit 16 Diaries.....	9 Sheets
Exhibit 17 Contractor's Basis for Changed Amount of Compensation	1 Sheet
Exhibit 18 Board of Review Report.....	9 Sheets

Claim #3 – Item 27 – Reconstruct Fence - Exhibits

Exhibit 1 – Contractor's Written Statement of Claim for Item 27.....	2 Sheets
Exhibit 2 – Resident Engineer's Response Letter.....	1 Sheet

Claim #4 – Item 124 – Rock Slope Protection - Exhibits

Exhibit 1 – Contractor's Written Statement of Claim for Item 124.....	1 Sheet
Exhibit 2 – Resident Engineer's Response Letter.....	1 Sheet

Claim #5 – CCO #11 – DEWR's 6 and 8 – Exhibits

Exhibit 1 – Contractor's Written Statement of Claim for CCO #11 – DEWR's 6 and 8.....	1 Sheet
Exhibit 2 – CCO #11 - DEWR 6	1 Sheet
Exhibit 3 – CCO #11 – DEWR 8.....	1 Sheet
Exhibit 4 – Resident Engineer's Response Letter.....	2 Sheets

Example 5-4.10 - Sample Construction Claim Findings (5 of 10)**PROJECT CHRONOLOGY**

EVENT	DATE	WORKING DAY NO.	NO. OF DAYS
Advertisement date	03/20/02		
Bid opening date	05/15/02		
Contract award date	06/11/02		
Contract approval date	06/24/02		
First working day	07/09/02	342	
Begin work	07/10/02		
Working days specified			300
Computed completion date	09/22/03	641	
Contract change order time adjustment			8
Non-working days			6
Suspension days			14
Working days that contractor did not work on the controlling operation			11
Extended date for completion	10/31/03	669	
Date work completed	10/22/03	662	
Contract acceptance date	10/22/03	662	
Overrun in contract time		0 working days (= 0 calendar days)	

Example 5-4.10 - Sample Construction Claim Findings (6 of 10)

GENERAL INFORMATION

This project consisted of constructing a cast-in-place, prestressed, concrete box girder bridge supported on cast-in-drilled-hole concrete piling. Also, existing highway 88 was realigned with portland cement concrete pavement over aggregate base over imported borrow.

The bid amount was \$12,654,308.00. The proposed final estimate was \$13,013,459.85.

The proposed final estimate was mailed to the contractor on December 9, 2003, and was returned with five (5) exceptions on December 31, 2003. The total amount of the exceptions is \$48,302.62.

SUMMARY OF CLAIMS

<u>Claim ID No./Title</u>	<u>Claimed Amount</u>	<u>Recommended Payment</u>	<u>Remaining Amount</u>
1 (ID #46) PCC Pavement Grinding Claim	\$ 25,209.00	\$ 0.00	\$ 25,209.00
2 (ID #34) Differing Site Condition Claim	\$ 18,482.00	\$ 0.00	\$ 18,482.00
3 Item 27 Reconstruct Fence – 11.6M	\$ 2,030.00	\$ 0.00	\$ 2,030.00
4 Item 124 Rock Slope Protection – 10M3	\$ 1,925.00	\$ 1,925.00	\$ 0.00
5 CCO #11 – DEWR's 6 and 8	<u>\$ 656.62</u>	<u>\$ 314.67</u>	<u>\$ 341.95</u>
Total Claim Amounts	\$ 48,302.62	\$ 2,239.67	\$ 46,062.95

NON-ADMINISTRATIVE CLAIMS:

CLAIM #1 PCC PAVEMENT GRINDING CLAIM (ID #46) \$25,209.00

Background (Utilize background from resident engineer's response to full and final documentation of potential claim in conjunction with guidelines in Section 5-410B (7), "Background," of the *Construction Manual*)

Section 10-1.01, "Order of Work," of the special provisions and Sheet SC-1 of the project plans require the contractor to construct this project in multiple stages and describe PCC pavement of variable widths and orientations relative to the lane lines.

On March 10, 2003, the contractor completed profilographing the PCC pavement surface from stationing 10+240 to 12+010 and found that multiple areas exceeded the profile index requirements of Section 40-1.10, "Final Finishing," of the *Standard Specifications*. The contractor proposed that a contract change order be executed to modify the profile index requirements (see Exhibit 1). The resident engineer required the contractor to remedy the deficient areas to conform to the final finishing requirements (see Exhibit



Example 5-4.10 - Sample Construction Claim Findings (7 of 10)

2). The contractor submitted an initial notice of potential claim on March 21, 2003 (see Exhibit 3) followed by a supplemental notice of potential claim (see Exhibit 4). The resident engineer provided a response to the supplemental notice of potential claim finding no merit in the contractor's potential claim (see Exhibit 5).

The contractor referred this dispute issue to the dispute review board. The dispute review board heard the subject of this claim and issued a unanimous recommendation on June 10, 2003 in Caltrans' favor (see Exhibit 10).

This issue was not heard by a board of review.

Applicable Specifications

Special provisions: Section 10-1.01, "Order of Work"
(see Exhibit 13)

Standard Specifications: Section 40-1.10, "Final Finishing"
Section 40-1.14, "Payment"
(see Exhibit 13)

Notification of Claim

Date of Event: March 18, 2003 (see Exhibit 2)

Initial Notice of Potential Claim: March 21, 2003 (see Exhibit 3)

Supplemental
Notice of Potential Claim: April 2, 2003 (see Exhibit 4)

Full and Final
Documentation of Potential Claim: May 2, 2003 (see Exhibit 6)

Notification was timely?: Yes

Contractor's Position (Utilize the contractor's potential claim submittals in conjunction with guidelines in Section 5-410B (8), "Contractor's Position," of the *Construction Manual*)

Exhibits 1, 3, 4, 6, 8, and 11 are documents in which the contractor has stated their position on this dispute. These exhibits provide the contractor's consistent basis for claim in this matter. The contractor's detailed position in this matter is taken verbatim from their supplemental notice of potential claim dated April 2, 2003:

Example 5-4.10 - Sample Construction Claim Findings (8 of 10)

“We should be compensated for the additional cost of grinding the PCC pavement between stationing 10+240 and 12+010. Due to the staging requirements that provide necessary traffic handling throughout the contract’s duration, we were required to utilize a variety of construction methods in constructing the PCC pavement that consisted of variable widths and orientations. This non-standard construction has caused numerous irregularities in the finished surface of the PCC pavement. It is obvious that the profile index requirements of Section 40-1.10, “Final Finishing,” of the *Standard Specifications* did not contemplate such constraints as experienced on this contract. It is therefore unreasonable for us to absorb the grinding costs in obtaining the profile index demanded by the State.”

District’s Position (Utilize the resident engineer’s responses in conjunction with guidelines in Section 5-410B (9), “District’s Position,” of the *Construction Manual*)

The district’s position in this matter is stated in exhibits 2, 5, 7, and 9. The following compilation provides the district’s position on this issue:

The contractor’s claim for additional compensation associated with grinding of PCC pavement to meet the profile index requirements of Section 40-1.10, “Final Finishing,” is without merit. The contractor has stated that the staging requirements of the contract in conjunction with construction of PCC pavement in variable widths and orientations created the non-compliant profile index of the finished surfaces in question. District maintains that the primary cause leading to the remedial grinding of PCC pavement was due to the contractor’s lack of quality control in placing PCC pavement.

The contract specified the staging requirements within Section 10-1.01, “Order of Work,” of the special provisions and on the Sheet SC-1 of the Project Plans. While the staging requirements of this contract may have influenced the contractor’s means and methods utilized in constructing the PCC pavement, these constraints were not unknown at time of bid and were not changed during the course of the contract. In addition, the contractor’s own profilographs show many areas where PCC pavement surfaces were produced within the profile index requirements and that many of these areas involved pavement of variable widths along multiple orientations. These results along with satisfactory results from other contracts with similar constraints and construction methods verify that profile index requirements can be met without remedial grinding if proper care is taken during the placement operations. The contractor was informed of these facts by the resident engineer on multiple occasions as evidenced in exhibits 2, 5, and 7.

Profile index requirements on finished PCC pavement surfaces are contractually defined in Section 40-1.10, “Final Finishing,” of the *Standard Specifications*. The contractor’s argument that these requirements should not be applied to the PCC pavement for this contract is without merit. The department has consistently utilized the profile index requirements on finished PCC pavement surfaces constructed in stages. The only exception to this practice is when portions of the existing pavement are to remain in the finished contract. In such cases, the department will contractually exclude those areas and related transitions from the profile index requirements. On this contract there is no existing PCC pavement that remained in the final PCC pavement from stationing 10+240 to 12+010.

Example 5-4.10 - Sample Construction Claim Findings (9 of 10)

In summary, the remedial grinding of PCC pavement performed by the contractor to meet the contractual profile index requirements is due to the contractor's own means and methods utilized in constructing said pavement. Had the contractor exercised additional quality control during placement of the PCC pavement, the need for remedial grinding would have been significantly reduced or eliminated in its entirety. The contract payments made per cubic meter for PCC pavement constitute full payment for pavement meeting all contract requirements including profile index requirements. The contractor's claim in this matter is without merit.

Findings

- That the contract details the PCC pavement work to be performed including staging requirements shown on project plan sheet SC-1 and as specified in Section 10-1.01, "Order of Work," of the special provisions.
- That the contractor constructed PCC pavement between stationing 10+240 and 12+010 between the dates of September 17, 2002 and March 5, 2003.
- That this PCC pavement was constructed in multiple stages of variable widths and multiple orientations relative to the lane lines.
- That the contractor profilographed the completed PCC pavement surfaces on March 10, 2003.
- That the contractor's profiling results showed that multiple finished surface areas of PCC pavement exceeded the profile index requirements in Section 40-1.10, "Final Finishing," of the *Standard Specifications*.
- That the contractor requested a contract change order on March 12, 2003 to modify profile index requirements for the PCC pavement.
- That on March 18, 2003 the resident engineer denied the contractor's request for a contract change order to modify the profile index requirements for the PCC pavement and requested the contractor provide details for how the non-compliant areas of the PCC pavement would be remedied.
- That on March 21, 2003 the contractor submitted an initial notice of potential claim for grinding PCC pavement along with a proposal for remedial work.
- That on March 24, 2003 the resident engineer accepted the contractor's proposal for correcting the non-compliant PCC pavement.
- That the grinding of PCC pavement areas to meet profile index requirements occurred between the dates of April 2, 2003 and April 4, 2003.
- That the contractor submitted each potential claim document in conformance with timeframes specified in the contract.
- That the contractor submitted this dispute as an exception to the proposed final estimate within the contractual timeframe specified in the contract.
- That the contractor requested \$25,209.00 for this claim issue which corresponds to the full and final documentation of potential claim.
- That the resident engineer's letter dated March 18, 2003 and resident engineer's responses to the supplemental notice of potential claim and full and final documentation of potential claim

Example 5-4.10 - Sample Construction Claim Findings (10 of 10)

correctly reference the contract requirements with respect to final finishing surface requirements (profile index) of the PCC pavement (Section 40-1.10 of the *Standard Specifications*).

- That Section 40-1.14, “Payment,” of the *Standard Specifications* provides the payment provisions for PCC pavement, which includes full compensation for doing all the work involved in constructing the PCC pavement, complete in place, as shown on the plans, and as specified in the specifications.
- That the contractor’s means and methods utilized in constructing the PCC pavement were the cause for the non-compliant finished surfaces of PCC pavement.
- That the contractor was capable of meeting the required finish surface requirements as demonstrated at other locations with similar geometric constraints that met the required profile index.
- That additional quality control on the contractor’s part would have reduced or eliminated the need for remedial grinding of PCC pavement surfaces.
- That remedial costs associated with grinding PCC pavement surfaces to meet required profile index requirements specified in the contract are to be borne by the contractor in their entirety.
- That the contractor has been properly paid through bid item payments and no further compensation is due.
- That it is recommended the claim be denied.

SUMMARY OF RESOLVED CLAIMS

<u>Claim No.</u>	<u>Title</u>	<u>Amount Claimed</u>	<u>Recommended Payment</u>
1 (ID #46)	PCC Pavement Grinding Claim	\$25,209.00	Unresolved
2 (ID #34)	Differing Site Condition Claim	\$18,482.00	Unresolved
3	Item 27 Reconstruct Fence – 11.6M	\$ 2,030.00	\$ 0.00
4	Item 124 Rock Slope Protection – 10M3	\$ 1,925.00	\$ 1,925.00
5	CCO #11 – DEWR’s 6 & 8	\$ 656.62	\$ 314.67

SIGNATURES

Respectfully Submitted,

DISTRICT CONSTRUCTION CLAIMS ENGINEER’S NAME
Claims Engineer

Findings Approved,

DEPUTY DISTRICT DIRECTOR OF CONSTRUCTION’S NAME
Deputy District Director, Construction



Example 5-4.11 - Sample District Director Determination of Claims

DEPARTMENT OF TRANSPORTATION

DISTRICT X

(ADDRESS)

(PHONE)

(FAX)



Flex your power!

Be energy efficient!

CERTIFIED MAIL RETURN RECEIPT REQUESTED

(date)

(Dist-EA)

(Dist-Co-Rte-PM/KP)

Federal Aid Project: (FA#)

(Contractor)

(Address)

Subject: District Director Determination of Claims

Gentlemen:

Caltrans District (district number) has completed its review of claims submitted to the proposed final estimate on (date).

On (date), (contractor's employees names) of (contractor's name) and District (district number) staff met with the Board of Review and supported their positions on claims submitted to the Board of Review as identified in the "Review of Claims by Deputy District Director of Construction" notification letter dated (date). The board of review subsequently issued its findings and recommendations and submitted its report.

In addition, claim identified in "Review of Claims by Deputy District Director of Construction" notification letter dated (date) as not benefiting from a board of review hearing have been separately investigated by district personnel and referred to me within the construction claim findings. Having considered the information submitted to me, I have made the following determination, in accordance with the authority vested in me under provisions of the contract:

<u>Claim No. X</u>	<u>Claim Description</u>	<u>\$ (Amount Claimed)</u>
--------------------	--------------------------	----------------------------

1. That.....
2. That.....
3. Etc.

<u>Claim No. Y</u>	<u>Claim Description</u>	<u>\$ (Amount Claimed)</u>
--------------------	--------------------------	----------------------------

1. That.....
2. That.....
3. Etc.

"Caltrans improves mobility across California"

Example 5-4.11 - Sample District Director Determination of Claims (continued)

Summary

The payment of each of the various claims is summarized as follows:

<u>Claim No.</u>	<u>Description</u>	<u>Amount Claimed</u>	<u>Amount Paid</u>
X		\$(Amount)	\$(Amount)
Y		\$(Amount)	\$(Amount)
	TOTAL	\$(SUM)	\$(SUM)

Sincerely,

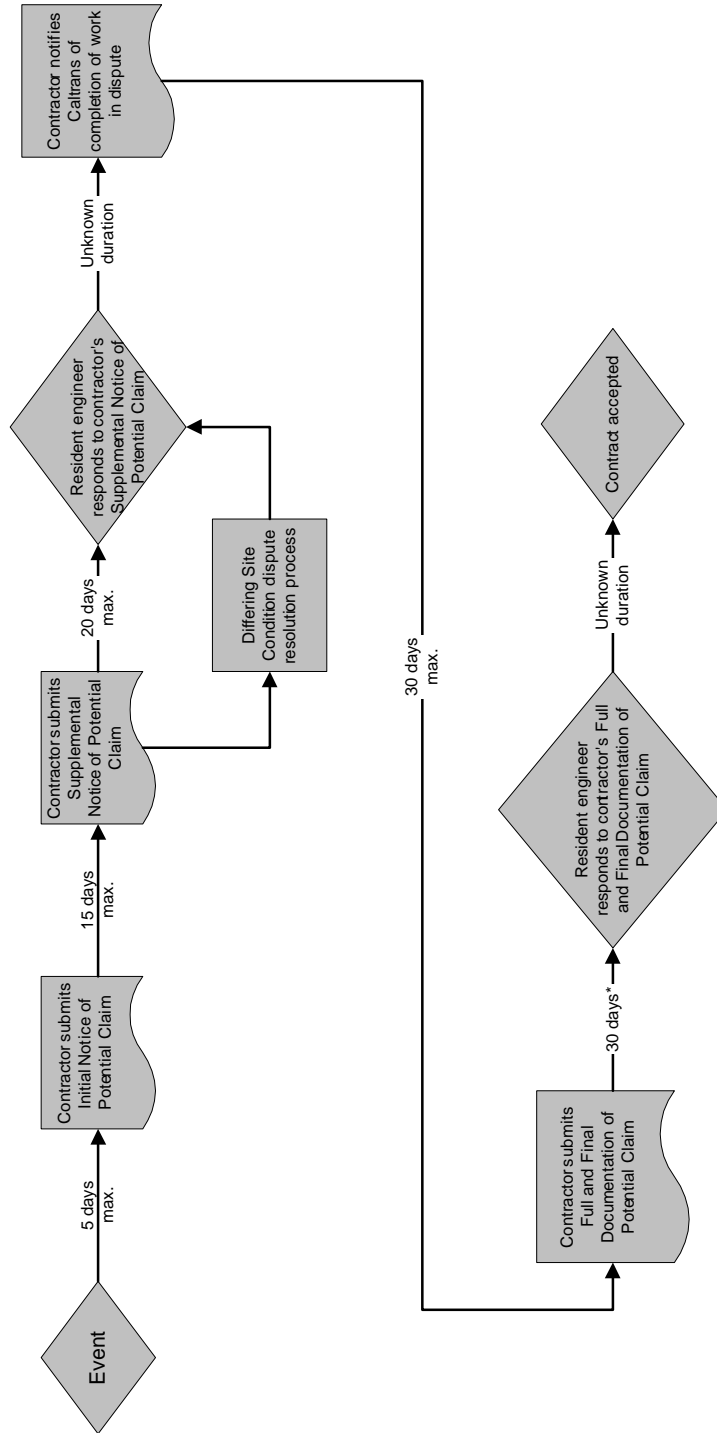
(NAME)
District X Director

cc: District construction office

"Caltrans improves mobility across California"



Table 5-4.1 - Notice of Potential Claim Process

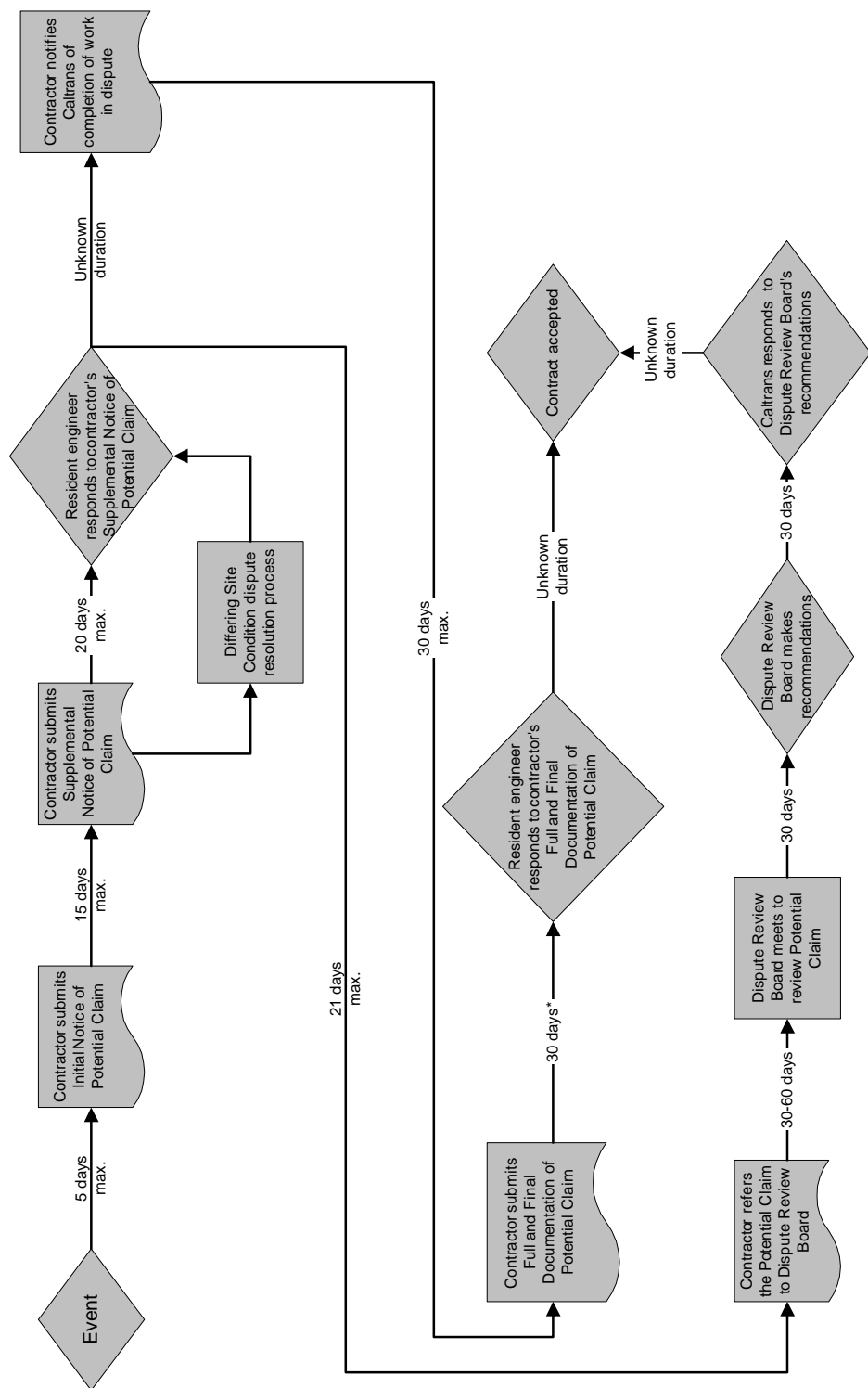


* If contractor's full and final documentation of potential claim is submitted after contract acceptance, resident engineer's response is not necessary.

Division of Construction

December 2004

Table 5-4.2 - Dispute Review Board Process

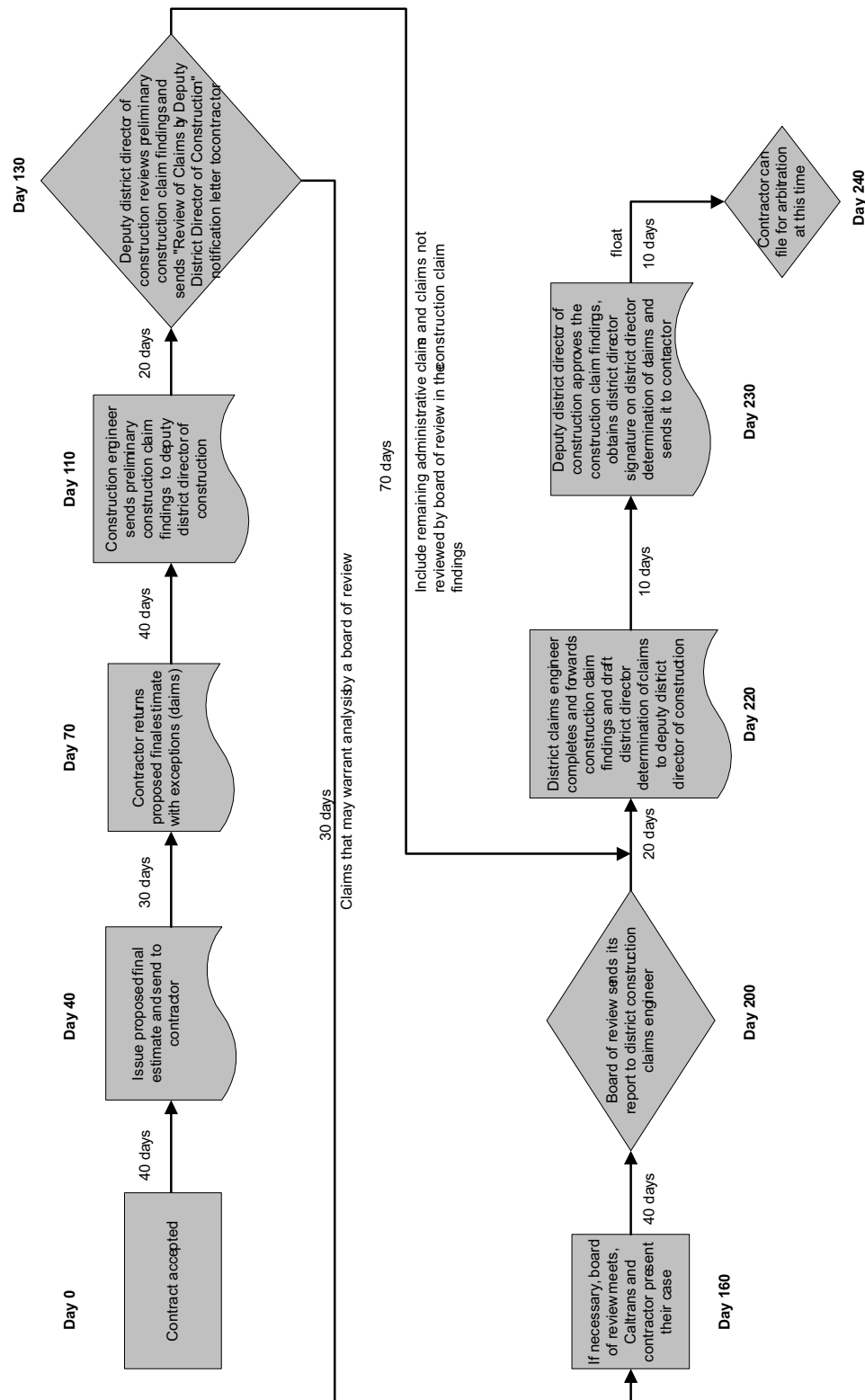


* If contractor's full and final documentation of potential claim is submitted after contract acceptance, resident engineer's response is not necessary.

Division of Construction

December 2004

Table 5-4.3 - Claims Resolution Process



December 2004

Division of Construction

Table 5-4.4 - Delegation of Authority (1 of 3)

Claims Resolution		
PERIOD	ITEM(S)	Entitlement Authority (Note 1)
Before issuance of the Proposed Final Estimate	Notices, Protests, and Potential Claims	Authority to approve contract change orders resolving entitlement may be delegated as per the authority to approve contract change orders (Note 2).
<i>From:</i> Return of the Proposed Final Estimate <i>To:</i> Board of Review Meeting	Claims	<p>Authority to approve contract change orders resolving entitlement may be delegated as per the authority to approve contract change orders (Note 2), but may not be delegated to a senior transportation engineer or below.</p> <hr/> <p>For contract change orders subject to district approval (see Note 3 for overhead claims):</p> <ul style="list-style-type: none"> Deputy district director or region division chief of construction approves; authority may be delegated to construction managers, but not construction engineers. Fax copy to the Division of Construction contract change order engineer. <hr/> <p>For contract change orders subject to Division of Construction approval (Note 3 for overhead claims):</p> <ul style="list-style-type: none"> Deputy district director or region division chief of construction signs under "submitted by" on contract change order memorandum (Note 4). Division of Construction field coordinator provides signature of approval on contract change order memorandum (Note 4).
<i>From:</i> Board of Review Meeting <i>To:</i> District Director Determination of Claims (Note 5)	Claims	<p>Approvals of contract change orders resolving entitlement are subject to the district director's determination of claims and the delegation authority for contract change orders (Note 2), but may not be delegated to a senior transportation engineer or below.</p> <hr/> <p>For contract change orders subject to district approval (see Note 3 for overhead claims):</p> <ul style="list-style-type: none"> Deputy district director or region division chief of construction approves; authority may be delegated to construction managers, but not construction engineers. Fax copy to the Division of Construction contract change order engineer. <hr/> <p>For contract change orders subject to Division of Construction approval (see Note 3 for overhead claims):</p> <ul style="list-style-type: none"> Deputy district director of construction or region division chief of construction signs under "submitted by" on contract change order memorandum (Note 4). Division of Construction field coordinator provides signature recommending approval on contract change order memorandum (Note 4). Division of Construction chief provides signature of approval on contract change order memorandum (Note 4).

Notes:

- Entitlement – merit, even partial, requiring compensation per Public Contract Code section 10227, and Section 3-403, "Changes," of the *Construction Manual*.
- Section 5-311, "Contract Change Order Approval," of the *Construction Manual*.
- Approval authority on contract change order memorandum for overhead entitlement:
Field office overhead: <\$200K, Division of Construction field coordinator; \$200K to \$1.0M, Division of Construction chief; >\$1.0M, deputy director, Project Delivery.
Home office overhead: ≤\$1.0M, Division of Construction chief; >\$1.0M, deputy director, Project Delivery.
- Revise the contract change order memorandum as appropriate.
- The district director determination is Caltrans' final written decision of the claims contained therein. After the district director determination of claims is issued, no further contact or discussion with the contractor regarding the addressed claims is permitted.

Table 5-4.4 - Delegation of Authority (2 of 3)

Claims Resolution											
PERIOD	ITEM(S)	Negotiated Settlement Authority (Note 1)									
<i>From:</i> Start of Work <i>To:</i> Board of Review Meeting	Notices, Protests, Potential Claims, and Claims	Approval authority and responsibilities for claim settlement reports depend on the settlement amount, as follows (Note 2): <table> <tr> <th><u>Settlement</u></th><th><u>Responsible Party</u></th><th><u>Action</u></th></tr> <tr> <td>≤ \$1.0M</td><td> <ul style="list-style-type: none"> - district - deputy district director or region division chief of construction - Division of Construction field coordinator - Legal Division - Division of Construction chief </td><td> <ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Note 4) recommends approval recommends approval approves </td></tr> <tr> <td>> \$1.0M</td><td> <ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief - deputy director, Project Delivery </td><td> <ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Note 4) recommends approval recommends approval recommends approval approves </td></tr> </table>	<u>Settlement</u>	<u>Responsible Party</u>	<u>Action</u>	≤ \$1.0M	<ul style="list-style-type: none"> - district - deputy district director or region division chief of construction - Division of Construction field coordinator - Legal Division - Division of Construction chief 	<ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Note 4) recommends approval recommends approval approves 	> \$1.0M	<ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief - deputy director, Project Delivery 	<ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Note 4) recommends approval recommends approval recommends approval approves
<u>Settlement</u>	<u>Responsible Party</u>	<u>Action</u>									
≤ \$1.0M	<ul style="list-style-type: none"> - district - deputy district director or region division chief of construction - Division of Construction field coordinator - Legal Division - Division of Construction chief 	<ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Note 4) recommends approval recommends approval approves 									
> \$1.0M	<ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief - deputy director, Project Delivery 	<ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Note 4) recommends approval recommends approval recommends approval approves 									
<i>From:</i> Board of Review Meeting <i>To:</i> Claim Settlement Report (Note 6)	Claims	Approval authority and responsibilities for claim settlement reports depend on the settlement amount, as follows (Note 2): <table> <tr> <th><u>Settlement</u></th><th><u>Responsible Party</u></th><th><u>Action</u></th></tr> <tr> <td>≤ \$1.0M</td><td> <ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief </td><td> <ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Notes 4 & 5) recommends approval recommends approval approves </td></tr> <tr> <td>> \$1.0M</td><td> <ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief - deputy director, Project Delivery </td><td> <ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Notes 4 & 5) recommends approval recommends approval recommends approval approves </td></tr> </table>	<u>Settlement</u>	<u>Responsible Party</u>	<u>Action</u>	≤ \$1.0M	<ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief 	<ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Notes 4 & 5) recommends approval recommends approval approves 	> \$1.0M	<ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief - deputy director, Project Delivery 	<ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Notes 4 & 5) recommends approval recommends approval recommends approval approves
<u>Settlement</u>	<u>Responsible Party</u>	<u>Action</u>									
≤ \$1.0M	<ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief 	<ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Notes 4 & 5) recommends approval recommends approval approves 									
> \$1.0M	<ul style="list-style-type: none"> - district - district director - Division of Construction field coordinator - Legal Division - Division of Construction chief - deputy director, Project Delivery 	<ul style="list-style-type: none"> prepares report (Note 3) submits report for approval (Notes 4 & 5) recommends approval recommends approval recommends approval approves 									

Notes:

1. Negotiated Settlement – per Public Contract Code section 9201 and Section 5-406B, "Claim Payments Based on Negotiated Settlements," of the *Construction Manual*
2. Submit claim settlement reports to the Division of Construction (no exceptions). The contract change order memorandum does not replace the claim settlement report. Attach the contract change order and contract change order memorandum to the report before submitting to the Division of Construction. Attach Form CEM-2702, "Overrun in Contract Time," to the claim settlement report if recommending action related to time extensions, liquidated damages, or engineering costs and inspection costs. Approval of the contract change order is subject to the normal delegation of authority. The Division of Construction contract change order engineer will provide a contract change order authorization or notify the district or region to authorize the contract change order. File the approved claim settlement report in the Division of Construction's confidential files. Destroy all drafts.
3. The Division of Construction field coordinator, deputy district director or region division chief of construction, Legal Division representative, Division of Construction chief, and FHWA transportation engineer will meet to discuss the settlement offer. If the offer is greater than \$1.0M, the deputy director of Project Delivery may also attend.
4. The deputy district director or region division chief of construction is responsible for obtaining FHWA concurrence with the settlement on full oversight projects.
5. The chairperson of the board of review negotiates the settlement and submits the claim settlement report to the district director.
6. The claim settlement report is Caltrans' final written decision of the claims contained therein. After the claim settlement report is issued, no further contact or discussion with the contractor regarding the settled claims is permitted.

Table 5-4.4 - Delegation of Authority (3 of 3)

Arbitration																													
PERIOD	ITEM(S)	Negotiated Settlement Authority (Note 1)																											
From: Filing of Arbitration To: Arbitration Hearing	Request for settlement	<p>Approval authority and responsibilities for claim settlement reports resolving claims in arbitration depend on the settlement amount, as follows (Note 2):</p> <table><thead><tr><th><u>Settlement</u></th><th><u>Responsible Party</u></th><th><u>Action</u></th></tr></thead><tbody><tr><td>≤ \$1.0M</td><td>- Legal Division (Note 3)</td><td>prepares report & recommends approval</td></tr><tr><td></td><td>- Division of Construction field coordinator</td><td>recommends approval (Note 4)</td></tr><tr><td></td><td>- deputy district director or region division chief of construction</td><td>recommends approval</td></tr><tr><td></td><td>- Division of Construction chief</td><td>approves</td></tr><tr><td>> \$1.0M</td><td>- Legal Division (Note 3)</td><td>prepares report & recommends approval</td></tr><tr><td></td><td>- Division of Construction chief</td><td>recommends approval (Note 4)</td></tr><tr><td></td><td>- district director</td><td>recommends approval</td></tr><tr><td></td><td>- deputy director, Project Delivery</td><td>approves</td></tr></tbody></table> <p>Division of Construction issues the contract change order and notifies the district to process estimate.</p>	<u>Settlement</u>	<u>Responsible Party</u>	<u>Action</u>	≤ \$1.0M	- Legal Division (Note 3)	prepares report & recommends approval		- Division of Construction field coordinator	recommends approval (Note 4)		- deputy district director or region division chief of construction	recommends approval		- Division of Construction chief	approves	> \$1.0M	- Legal Division (Note 3)	prepares report & recommends approval		- Division of Construction chief	recommends approval (Note 4)		- district director	recommends approval		- deputy director, Project Delivery	approves
	<u>Settlement</u>	<u>Responsible Party</u>	<u>Action</u>																										
≤ \$1.0M	- Legal Division (Note 3)	prepares report & recommends approval																											
	- Division of Construction field coordinator	recommends approval (Note 4)																											
	- deputy district director or region division chief of construction	recommends approval																											
	- Division of Construction chief	approves																											
> \$1.0M	- Legal Division (Note 3)	prepares report & recommends approval																											
	- Division of Construction chief	recommends approval (Note 4)																											
	- district director	recommends approval																											
	- deputy director, Project Delivery	approves																											
	Award	<ul style="list-style-type: none">– If needed, the district processes request for additional funding.– The Division of Construction issues the contract change order and notifies the district to process estimate.																											

Notes:

1. Negotiated Settlement — per Public Contract Code section 9201 and Section 5-405B, "Claim Payments Based on Negotiated Settlements," of the *Construction Manual*.
2. Attach Form CEM-2702, "Overrun in Contract Time," to the claim settlement report if recommending action related to time extensions, liquidated damages, or engineering and inspection costs.
3. The Division of Construction field coordinator, deputy district director or region division chief of construction, Legal Division representative, Division of Construction chief, and FHWA transportation engineer will meet to discuss the settlement offer. If the offer is greater than \$1.0M, the deputy director of Project Delivery may also attend.
4. The Division of Construction field coordinator is responsible for obtaining FHWA concurrence with the settlement on full oversight projects.

Table 5-4.5 - Audit Process

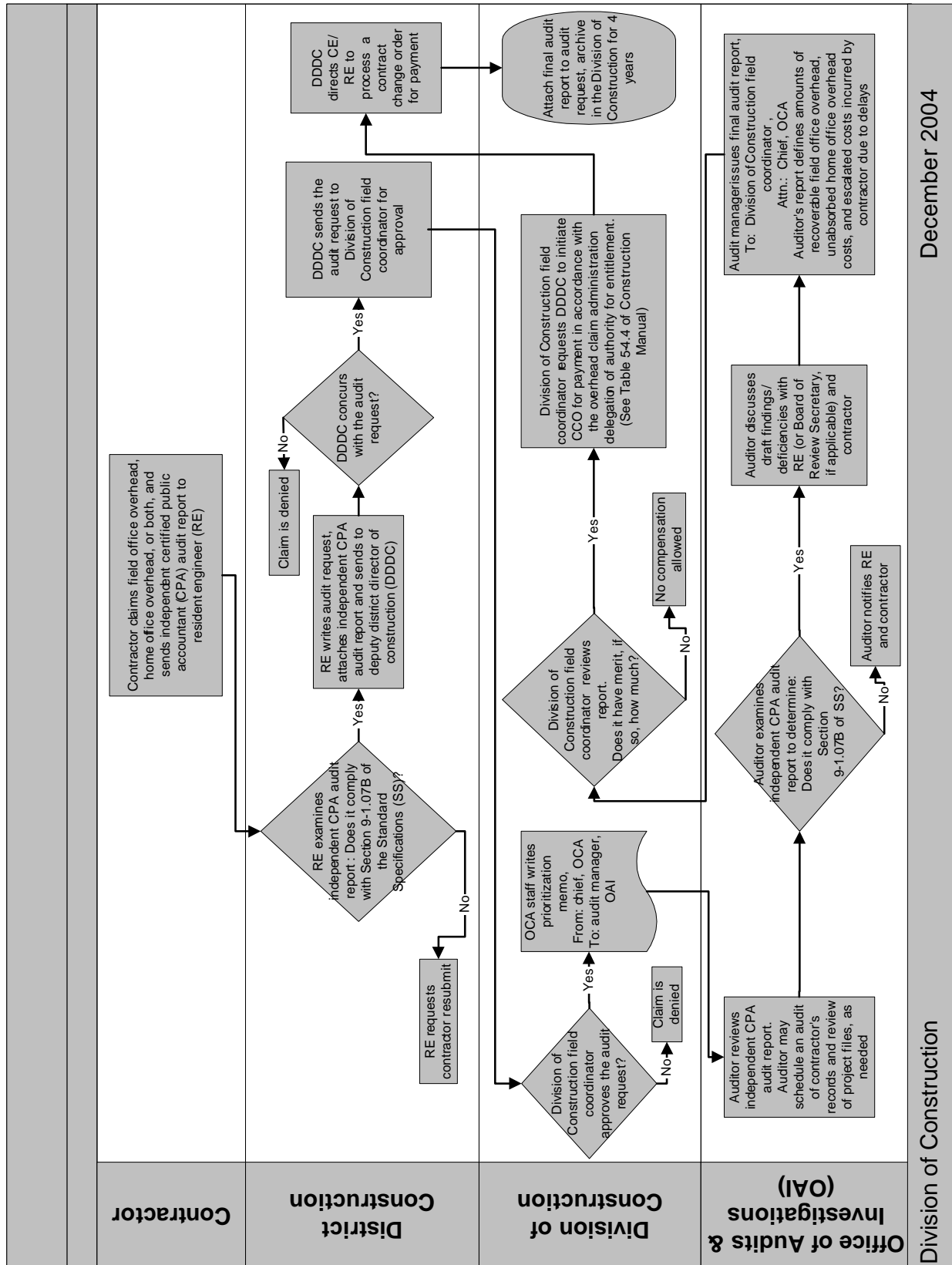


Table 5-4.6 - Arbitration Process

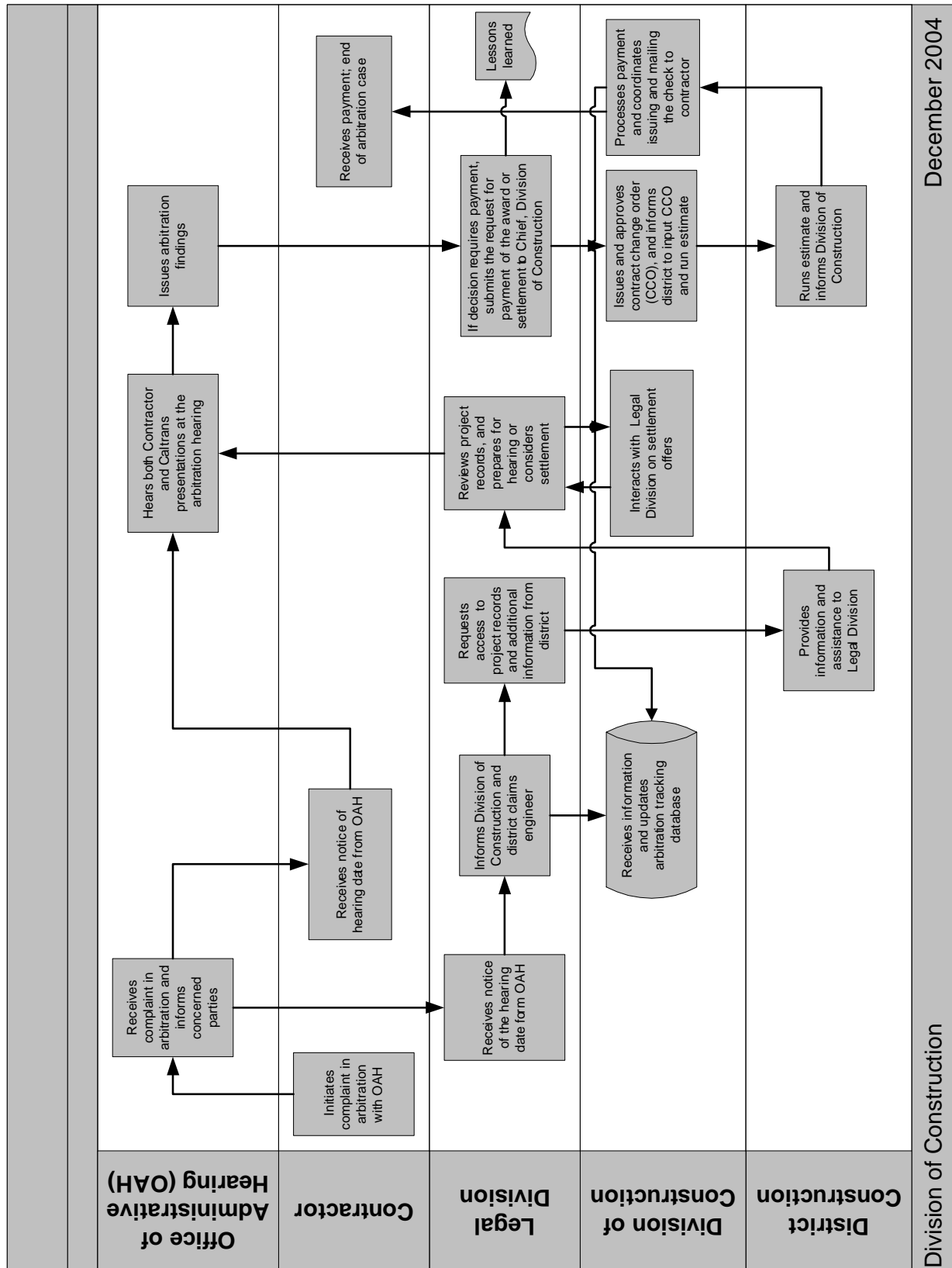


Table 5-4.7 - Arbitration Payment Process

