



Claims Update

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What is a Claim?

- Regarding 1517, “Claims for Compensation Adjustment”
- A claim is an unresolved dispute.
- Do not let things get to a claim if you don't have to. Settle your issues under 1402 if possible.

What are the Parts of a Claim?

- Entitlement – answers the question...was there a change to the Contract?
- Impact – the effect or consequence of the change in non-monetary terms.
- Cost – the price or value assigned to the impact.

Impacts

- The need for more or different materials
- The need for more labor or labor with different skills
- The need to operate equipment longer or the need for different equipment
- Delays
- Inefficiencies

Delays

- Two causes

- Addition of work
- Suspension of work

- Two types

- Non-critical
- Critical

- Several “flavors”

- Excusable
- Non-excusable
- Compensable
- Non-compensable
- Concurrent

1806.2A, Excusable, Non-compensable Delays

Delays that are not the Contractor's or the Department's fault or responsibility, and that could not have been foreseen by the Contractor.

- Fires, floods, tornadoes, ...cataclysmic phenomena of nature
- Extraordinary delays in material deliveries resulting from freight embargoes, gov't acts, nationwide mat'l shortages
- Civil disturbances
- Acts of the public enemy
- Labor strikes
- Acts of gov't or political subdivision other than the Dept.
- Weather – if the Contractor is entitled to time extension IAW 1806

1806.2B, Excusable, Compensable Delays

Delays that are not the Contractor's fault or responsibility, and are the Department's fault or responsibility, or are determined by judicial proceeding to be the Department's sole responsibility.

- Revised work IAW 1402
- Utility or railroad interference not anticipated as concurrent by the Contract
- Engineer-ordered suspension IAW 1402.4
- Neglect of the Department or its failure to act in a timely manner

1806.2C, Non-excusable Delays

Delays that are the Contractor's fault or responsibility. All non-excusable delays are non-compensable.

- Contractor's, sub's, or supplier's insolvency or mismanagement
- Slow delivery of mat'l from supplier or fabricator when mat'l was available in warehouse stock
 - Delivery delay for reasons of priority, late ordering, financial considerations, or other
- Contractor's failure to provide sufficient forces and equipment
 - Plant/equipment failure due to failure to maintain

1806.2D, Concurrent Delays

Separate delays to Critical Activities occurring at the same time.

- When a non-excusable delay is concurrent with an excusable delay, the Contractor is not entitled to an extension of Contract Time for the period the non- excusable delay is concurrent with the excusable delay.
- When a non-compensable delay is concurrent with a compensable delay, the Contractor is entitled to an extension of Contract Time, but not entitled to compensation for the period the non- compensable delay is concurrent with the compensable delay.

1904.6, Compensation for Delay

- Allowable
 - Extended Field Overhead
 - Idle Labor
 - Escalated Labor
 - Idle Equipment or Equipment Mobilization and Demobilization
 - Materials Escalation or Materials Storage
 - Extended or Unabsorbed Home Office Overhead

1904.5, Non-allowable Charges

The Department will not pay the Contractor for the following, regardless of the method of payment for the revised Work:

- Loss of anticipated profits
- Consequential damages, including loss of bonding capacity, loss of bidding opportunities, and insolvency;
- Indirect costs; and
- Attorneys fees, claims preparation expenses, or costs of litigation.

1517, Claims for Compensation Adjustment

- The Contractor shall not file a claim until the Contractor has exhausted the requirements of:
 - 1402, “Contract Revisions,” and
 - 1403, “Notification for Contract Revisions.”
- The Contractor is not entitled to compensation or time extensions for disputed work under this section (1517) unless the compensation or time extension is required or provided for elsewhere in the Contract.

1517.1, Notification

The Contractor shall not be entitled to compensation or a time extension if:

- The Contractor fails to notify the Department.
- The Contractor's actions or inactions prevent the Department from keeping strict account of the impacts and costs of the disputed work.
- The Contractor's actions or inactions prevent the Department from mitigating the impacts and costs of the disputed work.

1517.2 Claim Submittals

- Entitlement
 - The Department requires that the Contractor establish entitlement for all claims before the Department will consider impact and cost.
- Impact and Cost
 - If the Department determines that the Contractor has established entitlement, the Contractor shall submit documentation to the Department to determine impact and cost.
- The Contractor may not submit a claim that fails to establish the causal link between the Department's responsibility and the Contractor's impacts and costs.

1517.3 Required Certification of Claims

The Contractor shall certify the claim attesting to the following:

- The claim is made in good faith, based on documented fact and the value is not knowingly overstated.
- Supportive data is true, accurate, and complete to the Contractor's best knowledge and belief.

1517.4 Review of Claim Submittals

- All claim submittals filed will be subject to review by the Department at any time following the filing of the claim submittal.
- The Contractor and Department shall exhaust the claim process reflected in this section (1517) before seeking compensation or extension of the Contract Time by filing an action in the courts of this State.

Latest Resolved Claims

- Redwing Mississippi River Crossing Project
- TH 55 River Crossing Eliminated Work
- TH 29 and TH 75 Joint Settlement
- TH 59 Haul Road Case

Redwing Mississippi River Crossing Project Background

- District 6 – Winona Resident Office
- Zenith Tech Inc. (ZTI) – Prime Contractor
- Cooperative Agreement with Wisconsin DOT
- Bid Amount: \$63,436,184.23
- 3 Year Construction timeframe with an additional season to remove old bridge

Redwing Mississippi River Crossing Project Contractor Claim

- \$1,939,884.00 Original Claim Amount which included the following:
 - Waive LD's and MD's that were over \$1M
 - \$49,223.36 – Shaft Coring
 - \$27,743.44 - Diesel Tanks in Retaining Wall
 - \$15,000.00 – Erosion Control Inspections Deduction
 - \$1,188,257.11 – Bridge Asbestos and associate delay costs
 - \$98,500.00 – Deck Curing Deduct
 - \$3,654.00 – Torching Containment
 - \$67,650.36 - Pier 2 Boulder Obstructions
 - \$178,564.81 – Structural Steel (P) Quantities
 - \$30,407.05 – Straw and Compost Logs
 - \$7,689.05 – Extended Administrative Support
 - \$193,216.80 – MMA Flood Seal
 - \$10,789.13 – Colored Caulk
 - 17,913.09 – Seeding/Erosion Control
 - \$16,060.39 – Box Culvert
 - \$10,000.00 – Salvage Control Structure
 - \$11,400.37 – Bulkhead
 - \$10,000.00 – Install Control Structure
 - \$20,000.00 – Erosion Control Mobilizations

Redwing Mississippi River Crossing Project Claim Timeline

- ZTI first claim was submitted in August 2020
- 2nd claim submitted in January 2021
- Claim meeting held in February 2021(no real negotiation)
- Lawsuit filed in March 2021
- Depositions, Third Party report were complete in 2022
- Mediation was held in September 2022(successful)
- Settlement: \$650,000 plus waiver of LD/MD's

Redwing Mississippi River Crossing Project Challenges/Risks/Uncertainties

- Relationship breakdown – trust was lost early
- ZTI Experience – very little with MnDOT and 1517 process
- Mississippi River Flooding – added risk to the schedule
- Asbestos Discovery – schedule risk to bridge removal
- Lawsuit initiated during active construction
- Ongoing costs for litigation/third party expert
- Successful Mediation = Both parties go away unhappy!

TH 55 River Crossing Eliminated Work Background

- District 4 – Morris/Detroit Lakes Resident Offices
- Central Specialties Inc. (CSI) – Prime Contractor
- Riley Bros. Const. (RBC) – Sub-Contractor
- Bid Amount: \$4,248,680.65
- 1 Season Construction of Full Depth Reclamation and Paving Project with Removal of Existing Bridge and Replacement with Triple Boxes

TH 55 River Crossing Eliminated Work Background

- Contractor alleges that differing site conditions necessitated redesign
- MnDOT views the change to the original contract as elimination of work
- October 31, 2019, MnDOT eliminated the box culvert work
- CSI/RBC submitted a claim alleging a differing site condition on August 13, 2020
 - seeking damages of \$240,000 for CSI and \$1.2 million for RBC

TH 55 River Crossing Eliminated Work Breakdown

- Change Order 9 Compensated \$520,549.60 for Box Culvert Materials
- Change Order 13 addressed CSI claim portion for \$80,390.28
- Mediation was scheduled for remaining RBC issues and time impacts
- One day of mediation in August, 2020 that did not lead to settlement
 - Next day a mediator's proposal in the amount of \$466,311 was proposed, which both parties accepted
 - included the elimination of liquidated damages of \$92,500
- Elimination of Work Total Cost Summary: \$1,067,250.88
 - To NOT do the work!!

TH 29 and TH 75 Joint Settlement Background

- Both constructed in 2014 by Central Specialties Inc. (CSI)
- TH 29 was from Alexandria to TH 210
 - \$8,375,279 bid amount
- TH 75 was from Moorhead to the North Clay County Line
 - \$7,427,291.38 bid amount
- Both Projects had a laundry “list” of items at the end that were ultimately whittled down and required a certified claim

TH 29 and TH 75 Joint Settlement Claim List

- TH 29 List

- \$324,419.92 Original Claim Amount which included the following:
 - \$54,921.22 – Common Excavation
 - \$82,818.50 – Class 5
 - \$111,805.41 – Additional Bituminous Mix
 - \$4,900.00 – CLSM
 - \$69,974.79 – Interest

- TH 75 List

- \$536,556.61 Original Claim Amount which included the following:
 - \$8,992.00 – Aggregate Surfacing Class 1 Mod
 - \$220,485.02 – Blow-up Repairs
 - \$284,451.17 – Inefficiencies due to eliminated work and no staking
 - \$9,651.50 – Class 5 Gradation Hold-up
 - \$14,976.92 – Extraordinary Enforcement

TH 29 and TH 75 Joint Settlement Claim Timeline

- Original issues lists were submitted in 2015
- Certified claim letters were submitted in July 2019
- Lawsuit initiated in January 2020
 - After putting CSI on the clock for the final
- Both sides agreed to mediate the two projects together
- Mediation was conducted in July 2021
- Successful agreement of \$430,000 total for both projects

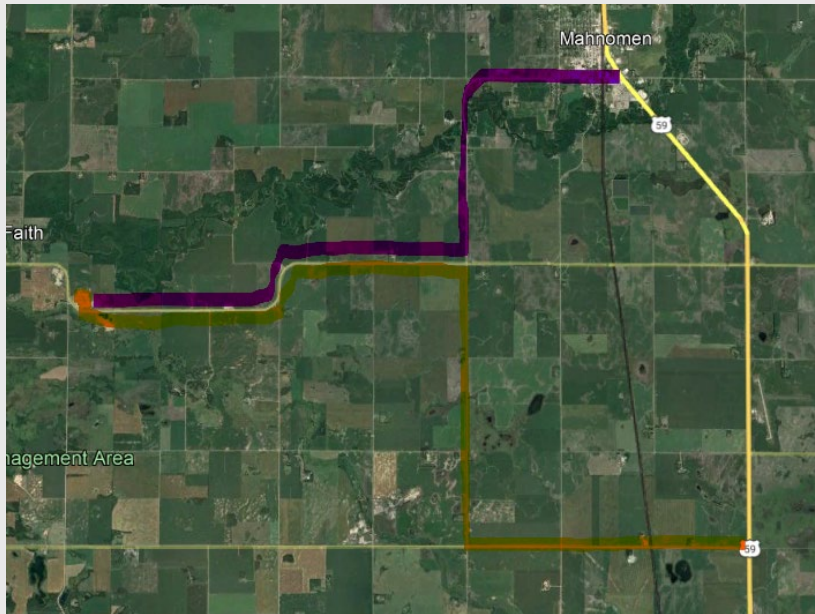
TH 59 Haul Road Case Background

- Limits were from North of Callaway to Winger – 36 miles
- Majority of the project included Mill and Overlay
 - 134,000 ton of bituminous paving
- Project constructed in 2017 by CSI
- Bid amount: \$9,827,082.06
- Let by District 4 and administered by District 2

Project Information and Background

- Preconstruction Meeting Held on April 26th, 2017
 - Haul Roads Requested at the Preconstruction Meeting (CSAH 6, CSAH 5, CSAH 10)
 - First learned that the Mahnomen County Engineer had concerns with the routes that were requested to be designated. CSAH 5/10 had construction scheduled (KRM) during that time and CSAH 6 was a concern with current condition.
- D4 and D2 Project Staff started having conversations regarding haul roads immediately after Preconstruction Meeting.
- It was decided to assess haul roads with an FWD test on CSAH 6, CSAH 5, and CSAH 10. Results of test did show many areas of concern with strength capacity. Test results confirmed decision to deny haul road requests (CSAH 6).
- Meeting held with D4 Management, D2 Construction staff, and Mahnomen County Engineer on May 9th, 2017 to not designate CSAH 6 and Portions of CSAH 5/10 due to acceptability of Haul Roads (CSAH 6) and County construction (CSAH 5/10).
- CSAH 6 had a weight restriction of 7tons for the entirety of the year. CSAH 6, CSAH 5, and CSAH 10 was designated for unloaded trucks that could maintain the 7ton capacity.

Haul Road Requests and Designation



- Purple – Designated route for most of the project.
- Orange – Not originally designated but was designated when construction on CSAH 10 was complete. Orange was designated for empty trucks returning to the pit and was below the 7 ton weight restriction.

Contractor Claim

- Total Cost Claim was submitted to MnDOT on February 14, 2018.
 - Total cost claim included the as built hauling cost versus the as bid hauling cost for all the hauling on the project. The additional cost amount, as claimed, was \$490,100.34.
- MnDOT denied the claim on March 8, 2018.

In response to your letter dated February 24, 2018 and the attached breakdown for hauling costs for SP 0305-34; MNDOT is hereby denying the claim for extra compensation. MNDOT had followed specification 1515 for control of haul roads. Spec 1515 states that: in preparing its proposal, the contractor is not entitled to assume that the department will designate a haul road, or that the haul road designated will be the most convenient and direct route or not subject to reduced weight limits.

Pretrial Litigation

- Litigation was initiated on March 5, 2019 prompted by submitting final.
- Court Ordered Mediation was conducting on July 30, 2019(unsuccesful).
- SRF was brought onboard on August 26, 2019 as an Expert Witness
 - AG's office requested review of the Claim Amount by a third party
 - Third Party review included determining the average haul changes. Some items including Bituminous actually decreased while others increased. Overall the review showed a net increase in costs but was less than a quarter of the claimed amount.
- Depositions held in the summer and fall of 2019

Pretrial Litigation-continued

- Motion for Summary Judgment was held on December 12, 2019
 - Judge Denied Motion on March 11, 2020
- 3 Party Mediation with Contractor, County and MnDOT held on July 30, 2020
 - Contractor sued Mahnommen County for the same amount in Federal Court
 - Ultimately the Federal case was dismissed and denied to be heard by the Supreme Court
 - This mediation was also unsuccessful
- Trial was scheduled and rescheduled many times due to Covid
 - Jury Trial finally scheduled for the week of November 28, 2022

Trial Information

- Trial was held on November 28th to December 1st
 - 5 years after the project construction.
- State Counsel: Mr. Gross and Mr. Young
- Face of MnDOT (Resident Engineer) – Sitting with the State’s attorney the entire trial.
- CSI’s Counsel- Mr. Brown and Mr. Hart
- Over 150 plus exhibits (contract, email correspondence, claim letters, etc.)

Trial Information

- CSI's main argument was that the selected haul routes were acceptable. They didn't argue that MnDOT was trying to harm CSI by deciding not to accept the requested haul routes but by placating the County Engineer, MnDOT caused them damages therefore acted in bad faith due to having an ulterior motive.
- MnDOT argued that no one acted in bad faith by not accepting the haul routes and that the MnDOT 1515 contract language was followed that specifically addresses this situation.
- Jury decided in favor of CSI and the judge further decided not to overturn the verdict citing the ulterior motive angle.
- MnDOT has won on appeal this spring and it's expected to go to the State Supreme Court for final ruling.

Questions???

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