Engineering Policy 165

Guidance on the Preparation of Contractual Claims

October 2020

Queensland Government

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Contents

1 Policy statement

In recent years, Transport and Main Roads (the department) has seen a significant drop in the quality of claim submissions from civil construction contractors. In some cases, the standard of presentation and documentation is poor. In other cases, there is a lack of proper or sufficient:

- reasoning and logic to demonstrate an entitlement under the contract, and / or
- substantiation to demonstrate that the claim has been valued in accordance with the contract.

This policy is intended to provide Contractors with guidance to improve the likelihood that legitimate claims will demonstrate proper entitlement, thereby avoiding wasted time and effort on the part of the Contractor and the Administrator.

2 Applicability and background

This Engineering Policy applies to all departmental construction contracts. Notwithstanding the guidance provided below, if there is ambiguity between information provided in this document and a specific contract provision or provisions, the specific contract provisions shall take precedence.

3 Objectives

The purpose of this policy is to provide some guidelines for Contractors on the preparation of contractual claims to be submitted to the Administrator or to the department as the Principal.

4 The Do's and Don'ts

The following provides some guidance on what the department considers to be acceptable practice with respect to the preparation and submission of contractual claims. The department expects that in all cases, claims must provide proper and sufficient reasoning and logic to demonstrate contractual entitlement as well as substantiation to demonstrate that the claim has been valued in accordance with the contract. The department does not negotiate settlements outside the contract.
NOTE: Non-compliance with the guidance below may affect the outcome of Contractor's performance assessment and could impact prequalification or future tendering opportunities.

Table 4 – The Do's and Don'ts on claim submissions

Do's	Don'ts	Why
Do submit claims in accordance with all contract requirements.	**Don't** treat the contract requirements as being optional or for guidance only.	The contract sets out the rules which protect the interests of both parties. The department has an obligation to demonstrate its accountability for spending public money, and compliance with the contract conditions is one part of demonstrating this. Not following the contract requirements is also unfair to the other tenderers as it may provide an unreasonable advantage to the successful tenderer.

Do's	Don'ts	Why
Do provide notices of claims within any time frame specified in the contract. For any other potential claim or issue, do provide notification as soon as the potential claim or issue becomes known. This is good practice regardless of whether there is a contractual obligation to do so.	**Don't** wait until late in the contract and submit claims with minimal or no warning, causing an unexpected surprise for the Administrator or the department.	Notifications are required to be given strictly in accordance with the contract. Delayed notification of claims can prejudice the department by delaying approval for additional funds, causing community reputational impacts and by not being able to provide accurate reporting on the contract status. Early notification of claims also gives the department the opportunity to mitigate the time and cost impacts of the event underlying the potential claim. Delayed notification denies the department this opportunity.
Do expect time bars to be enforced.	**Don't** assume the Principal will relax time bars.	Time bars are included in contracts to require the Contractor to give timely notification of claims and issues and allow the department an opportunity to mitigate the impacts of the event underlying the potential claim. If time bars are not included, then there is no obligation for the Contractor to give timely notice to the department. Clearly, late notification of a potential claim can prejudice the department's ability to potentially mitigate against delays and costs that may flow from the underlying issue. Time bars are not included in the contract as a mechanism for the department to avoid paying legitimate claims made by Contractors. The Administrator is obliged to enforce time bars; only the Principal can relax time bars but is not obliged to do so.
Do understand the contract conditions and provide reasons for, and reference to, the relevant clause which provides entitlement to a claim. It is the Contractor's responsibility to substantiate its entitlement to a claim in accordance with the contract.	**Don't** submit claims referencing numerous contract clauses, including irrelevant ones, hoping that one of them might be relevant.	This causes difficulties for the Administrator in understanding the basis of the claim and often results in further clarification being necessary which is then likely to cause a delay to the assessment of the claim. These types of claims can also damage trust, as there is no clear basis to the claim. The Contractor is expected to read and understand the contract and make its claim based on the relevant contract provision. If in doubt, discuss with the Administrator in advance of formally submitting the claim.
Do clearly provide reasoning and logic to demonstrate contractual entitlement. Substantiation to demonstrate that the claim has been valued in accordance with the contract. This is an essential first step to progressing the claim.	**Don't** submit claims where there is no proper entitlement. The Contractor must bear the time and cost effect of events for which it has no proper entitlement under the contract.	For a delay claim, the Contractor must be able to demonstrate a causal nexus between a qualifying cause of delay, and actual delay. What is meant by this is that you must clearly identify the cause of the delay, and that the cause of the delay is something that gives rise to contractual entitlement. If there are overlapping Principal and contractor caused delays, all of these must be identified separately but with a clearly stated relationship to the Principal caused delay along with any other.

Do's	Don'ts	Why
Do include only relevant documentation in support of a claim. It is essential that the Contractor maintains thorough and accurate records to support any claim. Records include: • daily plant and labour demonstrating activity or inactivity (as applicable) • regularly updated programs with correct logic, critical path, completed and planned work • accurate costing data including invoices • photographic and video evidence, and / or • diary records. Claims should be presented with reasoning and logic to demonstrate an entitlement under the contract and substantiated to demonstrate that the claim has been valued in accordance with the contract.	**Don't** include irrelevant documentation or documentation that merely supports an opinion or attempts to give the impression of entitlement but is not factually based or contractually sound. Don't include irrelevant documents that merely add bulk to the claim in an attempt to give the impression that the claim is more complex than it really is. Don't engage in 'paper warfare' by loading the Administrator up with largely irrelevant information. This will only require related claims to need to be scrutinised more closely and are likely to take longer to evaluate.	Inclusion of irrelevant information / documentation causes confusion and increases the difficulty for the Administrator in assessing the claim. This is likely to cause the evaluation of such claims to take longer.
Do submit claims that are reasonably priced in accordance with the contract. The value of the claim must be determined using the methodology required by the contract.	**Don't** submit inflated claims hoping that it can then be used as a base to negotiate down to the amount actually sought.	Inflated claims damage trust and relationships. The department does not negotiate settlements and there is no merit in submitting inflated claims. If entitlement is demonstrated and the claim is valued in accordance with the contract, they will be approved and paid. Otherwise, the Administrator has the authority to derive a reasonable valuation. If that valuation is then disputed, the claim will be escalated in accordance with the contract to resolve by other means such as expert determination, arbitration or litigation.

Do's	Don'ts	Why
Do agree on variation valuations as early as possible and preferably before any work commences. An exception to this would be a latent condition where it may not always be possible to immediately quantify prior to commencing work. In such cases, investigations should be carried out as soon as practicable and best endeavours made to quantify. An upper bound estimate of time and cost impacts should be provided in advance with regular updates to minimise unexpected outcomes.	**Don't** submit an initial 'loose' estimate if a firm estimate can be provided, which then 'grows' over time.	It is important that, if possible, a variation valuation be pre-agreed preferably before any work commences. However, Transport and Main Roads contracts generally provide that if a variation price is not pre-agreed, then it is to be valued by the Administrator. If a Contractor is directed to perform a variation then it must proceed with the variation with due expedition and without delay, irrespective of whether a variation price has been pre-agreed. Providing a low estimate for a variation is not helpful to the department. For example, in some circumstances, if the department had been provided with an accurate estimate up-front, it may have elected not to proceed with the variation. Also, providing a low estimate for a variation and then making a claim for a much higher amount will often require the claim to be verified and substantiated in more detail than a variation claim for an amount that was anticipated. Variation claims for amounts that are much greater in value than anticipated will therefore be scrutinised more closely and are likely to take longer to evaluate.
Do submit claims progressively as entitlement arises. Do submit final valuation of claims as soon as the valuation is known.	**Don't** submit global claims unless there are exceptional reasons. Aggregation of claims is not acceptable in almost all cases.	Australian case law does not support the use of global claims. Claims should be submitted, agreed and finalised progressively to give cost and time certainty to all parties. 'Surprises' should be minimised. Good claims administration reduces the likelihood of conflict and deterioration of relationships. Refer also to comments on time bars above.
Do ensure that sufficient effort and rigour is expended in the preparation of a claim to avoid the time and effort required to re-submit the claim (perhaps multiple times) to properly demonstrate entitlement and substantiate valuation.	**Don't** duplicate cost recovery by attempting to claim the same item through multiple claims. Don't duplicate overhead recovery through inclusion of specific costs in variation valuations that are already captured by on-site overheads.	Duplication of cost recovery is not only unscrupulous but also erodes trust and damages relationships. It significantly increases the workload of the Administrator in having to identify and separate duplication and slows down the process of assessing and approving claims.
Do ensure that tenders are accurately priced and include sufficient risk allowance and contingency.	**Don't** low-bid tenders and then seek to recover costs through aggressive claim strategies.	Such practice is unfair to Tenderers that have offered a reasonable price to complete the work. This practice is unsustainable and not supported by the department or by industry. Unusually low-bid provisions in tender conditions will be enforced by the department to minimise the occurrence of this practice.

Do's	Don'ts	Why
Do ensure that when disputes arise the dispute resolution process in the relevant contract is adhered to. (This includes following any processes prescribed in the contract for selecting an Issue Resolution Advisor (IRA) or Dispute Resolution Board (DRB) members.)	**Don't** bypass the dispute resolution process provided in the contract and approach Transport and Main Roads senior management for resolution.	The dispute resolution process in the contract has been agreed by the parties at the time of execution of the contract and it is not appropriate for the contractor to then bypass these arrangements when a dispute arises post award. For transparency, Transport and Main Roads requires that all claims in dispute follow the dispute resolution escalation mechanism in the contract. In the case of the TIC contract, this involves an independent assessment by the IRA or DRB (or other agreed independent process) before disputes are escalated to the CEO delegates to ensure that the CEO delegates are appropriately informed with respect to contractual entitlement and value.

5 Consultation

The department has consulted with the following stakeholders in the development of this policy:

- Infrastructure Delivery Services, Program Management and Delivery.
- Representatives from Construction Industry (Queensland Major Contractors Association (QMCA), Civil Contractors Federation (CCF) and Consult Australia (CA)).

6 Evaluation

The responsible officer for support or advice on claims submission is:

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7 References

Contract Administration System (CAS)

https://www.tmr.qld.gov.au/business-industry/Technical-standards-publications/Contract-administration-system.aspx

8 Review

The Executive Director (Program Management and Delivery) is accountable for the annual review of this policy. Feedback to tmr.techdocs@tmr.qld.gov.au is welcomed at any time.