

**WSDOT/APWA  
Standard Specifications  
for Road, Bridge, and  
Municipal Construction  
2008**

**Section 1-09 Measurement and Payment  
1-09.11 Disputes and Claims**

- **Current Specification (2008 Book)**
- **Current GSP (January 7, 2008)**
- **Appendix to the GSP (January 5, 2004)**

**APWA WA Chapter Spring 2008 Conference  
Technical Session – Disputes Review Board  
Handout**

5. All claims, as provided by law, filed against the retainage have been resolved. In the event claims are filed and provided the conditions of 1, 2, 3 and 4 are met, the Contractor will be paid such retained percentage less an amount sufficient to pay any such claims together with a sum determined by the Contracting Agency sufficient to pay the cost of foreclosing on claims and to cover attorney's fees.

#### **1-09.10 Payment for Surplus Processed Materials**

After the Contract is completed, the Contractor will be reimbursed actual production costs for surplus processed material produced by the Contractor from Contracting Agency-provided sources if its value is \$3,000 or more (determined by actual production costs).

The quantity of surplus material eligible for reimbursement of production costs shall be the quantity produced (but an amount not greater than 110-percent of Plan quantity or as specified by the Engineer), less the actual quantity used. The Contracting Agency will determine the actual amount of surplus material for reimbursement.

The Contractor shall not dispose of any surplus material without permission of the Engineer. Surplus material shall remain the property of the Contracting Agency without reimbursement to the Contractor if it is not eligible for reimbursement.

#### **1-09.11 Disputes and Claims**

When protests occur during a Contract, the Contractor shall pursue resolution through the Project Engineer. The Contractor shall follow the procedures outlined in Section 1-04.5.

If the negotiations using the procedures outlined in Section 1-04.5 fail to provide satisfactory resolution of protests, then the Contractor shall provide the Project Engineer with written notification that the Contractor will continue to pursue the dispute in accordance with the provisions of Section 1-09.11. The written notification shall be provided within 7-calendar days after receipt of the Engineer's written determination that the Contractor's protest is invalid pursuant to Section 1-04.5. The Contractor's written notice of dispute shall indicate whether the Contractor prefers to resolve the dispute through the use of a Disputes Review Board as outlined in Section 1-09.11(1), or to submit a formal claim directly to the Contracting Agency pursuant to Section 1-09.11(2).

If a Disputes Review Board is requested by the Contractor, the Contracting Agency will notify the Contractor in writing whether the use of a Disputes Review Board is agreed upon within 7-calendar days after receiving the Contractors written notice of dispute. If both parties to the dispute agree, then the dispute will be referred to a Disputes Review Board according to Section 1-09.11(1). If the parties do not mutually agree to establish a Disputes Review Board then none shall be used, and the Contractors shall submit a formal claim directly to the Contracting Agency as outlined in Section 1-09.11(2), Claims.

In spite of any protest or dispute, the Contractor shall proceed promptly with the Work as the Engineer orders.

**1-09.11(1) Disputes Review Board**

In order to assist in the resolution of disputes arising out of the Work of this project, the Contract provides for the establishment of a Disputes Review Board, hereinafter called the "Board." The Board is created when negotiations using the procedures outlined in Section 1-04.5 fail to provide a satisfactory resolution and the Contracting Agency and Contractor mutually agree to use a Board as part of the disputes resolution process prior to the Contractor filing a formal claim pursuant to Section 1-09.11(2).

The Board will consider disputes referred to it and furnish recommendations to the Contracting Agency and Contractor to assist in the resolution of the differences between them. The purpose of the Board response to such issues is to provide nonbinding findings and recommendations designed to expose the disputing parties to an independent view of the dispute.

The Board members will be especially knowledgeable in the type of construction involved in the Project and shall discharge their responsibilities impartially and independently considering the facts and conditions related to the matters under consideration and the provisions of the Contract

**1-09.11(1)A Disputes Review Board Membership**

The Board shall consist of 1 member selected by the Contracting Agency and 1 member selected by the Contractor, with these 2 members to select the third member. The first 2 members shall be mutually acceptable to both the Contracting Agency and the Contractor. If 1 or both of the 2 members selected are not acceptable to the Contracting Agency or Contractor, another selection shall be made.

The Contracting Agency and Contractor shall each select their respective Board member and negotiate an agreement, separate and apart from this Contract, with their respective Board member within 14-calendar days after the parties have agreed to establish a Board, as outlined in Section 1-09.11(1).

The agreements with these 2 Board members shall contain language imposing the "Scope of Work" and "Suggested Administrative Procedures" for Disputes Review Boards available at [www.wsdot.wa.gov/Consulting/](http://www.wsdot.wa.gov/Consulting/). These negotiated agreements shall also include clauses that require the respective selected members to immediately pursue selection of a third member. The goal is to obtain a third Board member who will complement the first 2 by furnishing a needed expertise, which will facilitate the Board's operations.

In case a member of the Board needs to be replaced, the replacement member will be appointed in the same manner as the replaced member was appointed. The appointment of a replacement Board member will begin promptly upon determination of the need for replacement and shall be completed within 30-calendar days.

Service of a Board member may be terminated at any time with not less than 30-calendar days notice as follows:

1. The Contracting Agency may terminate service of the Contracting Agency appointed member.
2. The Contractor may terminate service of the Contractor appointed member.
3. The third member's services may be terminated by agreement of the other 2 members.
4. By resignation of the member.

Termination of a member will be followed by appointment of a substitute as specified above.

No member shall have a financial interest in the Contract, except for payments for services on the Board. The Contracting Agency-selected member and the Contractor-selected member shall not have been employed by the party who selected them within a period of 1-year; except that, service as a member of other Disputes Review Boards on other contracts will not preclude a member from serving on the Board for this Contract.

Compensation for the Board members, and the expenses of operation of the Board, shall be shared by the Contracting Agency and Contractor in accordance with the following:

1. The Contracting Agency will compensate directly the wages and travel expense for its selected member.
2. The Contractor shall compensate directly the wages and travel expense for its selected member.
3. The Contracting Agency and Contractor shall share equally in the third member's wages and travel expense, and all of the operating expenses of the Board. These equally shared expenses shall be billed to and paid by the Contracting Agency. The Contractor's share will be deducted from monies due or coming due the Contractor.
4. The Contracting Agency, through the Engineer, will provide administrative services, such as conference facilities and secretarial services, to the Board and the Contracting Agency will bear the costs for this service.

#### **1-09.11(1)B Disputes Review Board Procedures**

The Board, the Contracting Agency, and the Contractor shall develop by agreement the Board's rules of operation and procedures to be followed for the Project. In developing the Agreement, the parties shall take into consideration their respective duties and responsibilities set forth in the "Scope of Work" section of their agreements.

The parties may also consider the "Suggested Administrative Procedures" for the Board's operation included in their agreements. These Procedures express, in general terms, the policy for the creation and operation of the Board.

No dispute shall be referred to the Board unless the Contractor has complied with the requirements of Section 1-04.5 and Section 1-09.11 and the parties have mutually agreed to refer the dispute to the Board in an attempt to resolve the dispute prior to the Contractor filing a claim according to Section 1-09.11(2). If the dispute is referred to the Board, then the Board will consider the matter in dispute and provide recommendations concerning:

1. The interpretation of the Contract
2. Entitlement to additional compensation or time for performance
3. The amount of additional compensation or time for performance following a recommendation of entitlement by the Board provided that; (1) the parties were not able to reach a resolution as to the amount of the equitable adjustment or time; (2) the Engineer has made a unilateral determination of the amount of compensation for time; and (3) the Contractor has protested the Engineer's unilateral determination.
4. Other subjects mutually agreed by the Contracting Agency and Contractor to be a Board issue.

Once the Board is established, the dispute resolution process shall be as follows:

1. Board hearing dates will be scheduled by agreement of the parties.
2. The Contractor and the Contracting Agency shall each be afforded an opportunity to be heard by the Board and to offer evidence. Either party furnishing any written evidence or documentation to the Board must furnish copies of such information to the other party a minimum of 15-calendar days prior to the date the Board sets to convene the hearing for the dispute. Either party shall produce such additional evidence as the Board may deem necessary to an understanding and determination of the dispute and furnish copies to the other party.
3. After the hearing is concluded, the Board shall meet in private and reach a conclusion supported by 2 or more members. Its findings and recommendations, together with its reasons shall then be submitted as a written report to both parties. The recommendations shall be based on the pertinent Contract Provisions and facts and circumstances involved in the dispute. The Contract shall be interpreted and construed in accordance with the laws of the State of Washington. The Board shall make every effort to reach a unanimous decision. If this proves impossible, the dissenting member may prepare a minority report.
4. Within 30-calendar days of receiving the Board recommendations, both the Contracting Agency and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. Although both parties should place weight upon the Board recommendations, the recommendations are not binding.

In the event the Board's recommendations do not lead to resolution of the dispute, all Board records and written recommendations, including any minority reports, will be admissible as evidence in any subsequent litigation.

If the Board's assistance does not resolve the dispute, the Contractor must file a claim according to Section 1-09.11(2) before seeking any form of judicial relief.

#### **1-09.11(2) Claims**

If the Contractor claims that additional payment is due and the Contractor has pursued and exhausted all the means provided in Sections 1-04.5 and Section 1-09.11(1) to resolve a dispute, including the use of a Disputes Review Board if one was established, the Contractor may file a claim as provided in this section. The Contractor agrees to waive any claim for additional payment if the written notifications provided in Section 1-04.5 are not given, or if the Engineer is not afforded reasonable access by the Contractor to complete records of actual cost and additional time incurred as required by Section 1-04.5, or if a claim is not filed as provided in this section. The fact that the Contractor has provided a proper notification, provided a properly filed claim, or provided the Engineer access to records of actual cost, shall not in any way be construed as proving or substantiating the validity of the claim. If the claim, after consideration by the Engineer, is found to have merit, the Engineer will make an equitable adjustment either in the amount of costs to be paid or in the time required for the Work, or both. If the Engineer finds the claim to be without merit, no adjustment will be made.

All claims filed by the Contractor shall be in writing and in sufficient detail to enable the Engineer to ascertain the basis and amount of the claim. All claims shall be submitted to the Project Engineer as provided in Section 1-05.15. As a minimum, the following information must accompany each claim submitted:

1. A detailed factual statement of the claim for additional compensation and time, if any, providing all necessary dates, locations, and items of Work affected by the claim.
2. The date on which facts arose which gave rise to the claim.
3. The name of each Contracting Agency individual, official, or employee involved in or knowledgeable about the claim.
4. The specific provisions of the Contract which support the claim and a statement of the reasons why such provisions support the claim.
5. If the claim relates to a decision of the Engineer which the Contract leaves to the Engineer's discretion or as to which the Contract provides that the Engineer's decision is final, the Contractor shall set out in detail all facts supporting its position relating to the decision of the Engineer.
6. The identification of any documents and the substance of any oral communications that support the claim.
7. Copies of any identified documents, other than Contracting Agency documents and documents previously furnished to the Contracting Agency by the Contractor, that support the claim (manuals which are standard to the industry, used by the Contractor, may be included by reference).
8. If an extension of time is sought:
  - a. The specific days and dates for which it is sought,
  - b. The specific reasons the Contractor believes a time extension should be granted,
  - c. The specific provisions of Section 1-08.8 under which it is sought, and
  - d. The Contractor's analysis of its progress schedule to demonstrate the reason for a time extension.
9. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:
  - a. Labor;
  - b. Materials;
  - c. Direct equipment. The actual cost for each piece of equipment for which a claim is made or in the absence of actual cost, the rates established by the AGC/WSDOT Equipment Rental Agreement which was in effect when the Work was performed. In no case shall the amounts claimed for each piece of equipment exceed the rates established by that Equipment Rental Agreement even if the actual cost for such equipment is higher. The Contracting Agency may audit the Contractor's cost records as provided in Section 1-09.12 to determine actual equipment cost. The following information shall be provided for each piece of equipment:
    - (1) Detailed description (e.g., Motor Grader Diesel Powered Caterpillar 12 "G," Tractor Crawler ROPS & Dozer Included Diesel, etc.);
    - (2) The hours of use or standby; and
    - (3) The specific day and dates of use or standby;
  - d. Job overhead;
  - e. Overhead (general and administrative);

- f. Subcontractor's claims (in the same level of detail as specified herein is required for any Subcontractor's claims); and
  - g. Other categories as specified by the Contractor or the Contracting Agency.
10. A notarized statement shall be submitted to the Project Engineer containing the following language:

Under the penalty of law for perjury or falsification, the undersigned,

\_\_\_\_\_, \_\_\_\_\_  
(name) (title)

of \_\_\_\_\_  
(company)

hereby certifies that the claim for extra compensation and time, if any, made herein for Work on this Contract is a true statement of the actual costs incurred and time sought, and is fully documented and supported under the Contract between the parties.

Dated \_\_\_\_\_ /s/ \_\_\_\_\_

Subscribed and sworn before me this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

It will be the responsibility of the Contractor to keep full and complete records of the costs and additional time incurred for any alleged claim. The Contractor shall permit the Engineer to have access to those records and any other records as may be required by the Engineer to determine the facts or contentions involved in the claim. The Contractor shall retain those records for a period of not less than three years after final acceptance.

The Contractor shall pursue administrative resolution of any claim with the Engineer or the designee of the Engineer.

Failure to submit with the Final Contract Voucher Certification such information and details as described in this section for any claim shall operate as a waiver of the claims by the Contractor as provided in Section 1-09.9.

Provided that the Contractor is in full compliance with all the provisions of this section and after the formal claim document has been submitted, the Contracting Agency will respond, in writing, to the Contractor as follows:

1. Within 45-calendar days from the date the claim is received by the Contracting Agency if the claim amount is less than \$100,000;
2. Within 90-calendar days from the date the claim is received by the Contracting Agency if the claim amount is equal to or greater than \$100,000; or

3. If the above restraints are unreasonable due to the complexity of the claim under consideration, the Contractor will be notified within 15-calendar days from the date the claim is received by the Contracting Agency as to the amount of time which will be necessary for the Contracting Agency to prepare its response.

Full compliance by the Contractor with the provisions of this section is a contractual condition precedent to the Contractor's right to seek judicial relief.

#### **1-09.11(3) Time Limitation and Jurisdiction**

For the convenience of the parties to the Contract it is mutually agreed by the parties that any claims or causes of action which the Contractor has against the State of Washington arising from the Contract shall be brought within 180-calendar days from the date of final acceptance (Section 1-05.12) of the Contract by the State of Washington; and it is further agreed that any such claims or causes of action shall be brought only in the Superior Court of Thurston County. The parties understand and agree that the Contractor's failure to bring suit within the time period provided, shall be a complete bar to any such claims or causes of action. It is further mutually agreed by the parties that when any claims or causes of action which the Contractor asserts against the State of Washington arising from the Contract are filed with the State or initiated in court, the Contractor shall permit the State to have timely access to any records deemed necessary by the State to assist in evaluating the claims or action.

#### **1-09.12 Audits**

##### **1-09.12(1) General**

The Contractor's wage, payroll, and cost records on this Contract shall be open to inspection or audit by representatives of the Contracting Agency during the life of the Contract and for a period of not less than 3-years after the date of final acceptance of the Contract. The Contractor shall retain these records for that period. The Contractor shall also guarantee that the wage, payroll, and cost records of all Subcontractors and all lower tier Subcontractors shall be retained and open to similar inspection or audit for the same period of time. The audit may be performed by employees of the Contracting Agency or by an auditor under contract with the Contracting Agency. The Contractor, Subcontractors, or lower tier subcontractors shall provide adequate facilities, acceptable to the Engineer, for the audit during normal business hours. The Contractor, Subcontractors, or lower tier subcontractors shall make a good faith effort to cooperate with the auditors. If an audit is to be commenced more than 60-calendar days after the final acceptance date of the Contract, the Contractor will be given 20-calendar days notice of the time when the audit is to begin. If any litigation, claim, or audit arising out of, in connection with, or related to this Contract is initiated, the wage, payroll, and cost records shall be retained until such litigation, claim, or audit involving the records is completed.

##### **1-09.12(2) Claims**

All claims filed against the Contracting Agency shall be subject to audit at any time following the filing of the claim. Failure of the Contractor, Subcontractors, or lower tier subcontractors to maintain and retain sufficient records to allow the auditors to verify all or a portion of the claim or to permit the auditor access to the books and records of the Contractor, Subcontractors, or lower tier subcontractors shall constitute a waiver of a claim and shall bar any recovery thereunder.

