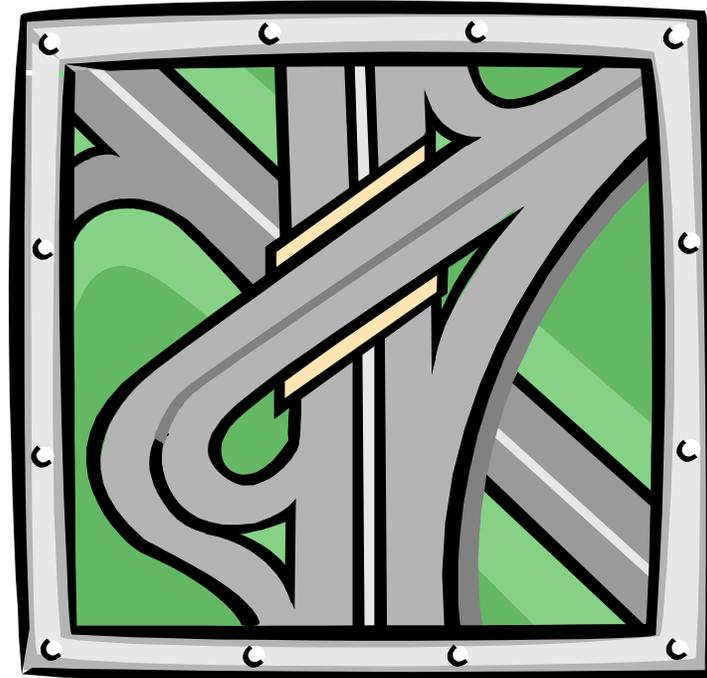


# **Construction and Maintenance Claims**

**And**

**Notice of Intent to File Claim (NOI)**

**May 2006**



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## PREFACE

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This manual serves as a guide for VDOT personnel who may be involved in the documentation and administration of construction and maintenance Claims and Notice of Intent to File Claim (NOI). It defines the terms “Claim”, “NOI” and “attorney/client privilege” material and explains the handling of these documents. Analyzing a Claim or NOI is an on going process from submission of the Claim or NOI by the Contractor through final disposition by payment or rejection. There are example letters of response to the Contractor and flow charts for Claim submittals and time frames for necessary actions. Emphasis is placed on specific actions required of the Contractor and of VDOT by Section 33.2-1101 through 33.2-1105 of the *Code of Virginia* as well as the current Virginia Department of Transportation *Road and Bridge Specifications*.

This Claims Manual supersedes all previous instructions concerning the handling of “Notices of Intent to File Claim” and “Claims”.

**5-5-2006**

## INTRODUCTION

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The Virginia Department of Transportation (VDOT) awards hundreds of contracts each year for the construction and maintenance of the Commonwealth's extensive transportation network. Ideally, each contract is developed so that all factors have been considered. Unfortunately, the construction process is not an exact science. Uncertainties are a fact of life in the construction industry and contractual agreements must be flexible enough to address changes or unanticipated conditions as they occur.

The Virginia Department of Transportation *Road and Bridge Specifications*, which are an integral part of construction and maintenance contracts awarded by VDOT, has specific language that addresses changes or unforeseen conditions as they occur. Usually, VDOT and the Contractor are able to agree on the impact of a change or changed conditions. The matter may be resolved by work order or force account for additional compensation or time extension. Occasionally, VDOT and the Contractor do not agree on the impact or even the actual occurrence of an unanticipated condition. In such instances, the Contractor may submit a written, documented request for additional time for contract performance or additional monetary compensation for performance of work or both. Depending on the time of submission, this request is called a "Notice of Intent to File Claim" or a "Claim".

## TERMS

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In this manual the following terms and pronouns used in place of them shall be interpreted as follows:

**Attorney/Client Privilege Material** – Correspondence, reports and evaluations identified as Attorney/Client Privilege Material prepared in anticipation of litigation for a notice of intent to file Claim or a Claim. This material is privileged and is exempt from the Freedom of Information Act (FOIA). Example: A Contractor would not be permitted to view or make copies of attorney/client privilege material or work product (see definition) held by VDOT.

Normally any correspondence to VDOT’s attorney falls within this privilege. Typically, internal correspondence discussing matters raised by a Contractor in a Notice of Intent to file a Claim or as to matters or issues that the inspector or author deems to be a prelude to litigation are privileged material. To become attorney/client material, however, the correspondence must be addressed directly to VDOT’s attorney. Correspondence on which the attorney is copied only has, in some instances, been considered not to be attorney/client privilege material. Correspondence generated after a Notice of Intent to file Claim that is not directed to the attorney, direct or copied, may be considered as work product and afforded, some protection from disclosure. The attorneys’ review of the material sent to them is to see if VDOT’s analysis or review makes sense or is consistent with the contract or law.

Email addressed to VDOT’s attorney is privileged and does not have to be disclosed under FOIA. However, if this type email is “forwarded” to others in an unprotected email, then it will be produced with the other email under FOIA. Also, it is harder to file “Attorney/Client” email separately; therefore, it may be produced unintentionally under a FOIA request. A hard copy of the e-mail should be placed with the other attorney/client privilege material.

**Certification of Claims** – The Contractor shall submit a certification with the notice of claim using the format provided in the Special Provision Copied Note dated 10-29-04 modifying Section 105.16 of the Specifications (all Contracts after November, 2004 advertisement). This certifies that the claim is a true and accurate representation of additional costs and /or delays incurred by the Contractor in the performance of the required Contract work. Any statements made, known to be false, shall be considered a violation of the Virginia Governmental Frauds Act, punishable as allowed by the Virginia Code for a Class 6 Felony. (See Appendix A-10)

**Claim** – A written request submitted by a Contractor for additional time for completion of the contract for additional monetary compensation for performance of work. A request is not a Claim unless filed within 60 days after final estimate

date. The final estimate date is the date set forth in a letter from the Construction Engineer to the Contractor.

**Claim Analysis** – Term describing the procedure of investigating and documenting the validity of a Contractor’s Claim. This procedure begins after payment of the final estimate and consists of reviewing data from the notice of intent analysis and any new data that may be available. Residency, District and Scheduling and Contract Division representatives perform this analysis. It may include a hearing before the Commissioner.

**Contract** – The written agreement executed between VDOT and the Contractor that sets forth the obligations of the parties involved, including, but not limited to, the performance of the work, furnishing of materials and labor, and basis of payment. The contract includes the *Road and Bridge Specifications*, supplemental specifications, special provisions, special provision copied notes, plans, standard drawings; change orders; and work orders and agreements that are required to complete the construction of the specified work in an acceptable manner, including any authorized extensions. All of which constitute one instrument. Oral representations or promises are not considered a part of the contract.

**Contract Documents (Order of Priority)** – The plans, standard drawings, *Road and Bridge Specifications* book, plans, supplemental specifications, special provisions, special provision copied notes, and supplementary documents are part of the contract. A requirement occurring in one is as binding as though occurring in all. They are intended to be complimentary and to describe and provide for a complete work. In case of a discrepancy, the following will apply in ascending order:

1. Calculated dimensions, unless obviously incorrect, will govern over scaled dimensions.
2. Supplemental specifications will govern over the *Road and Bridge Specifications*.
3. Plans will govern over the *Road and Bridge Specifications*, supplemental specification and the standard drawings. (Standard drawings are a part of the plans.)
4. Special provisions will govern over the *Road and Bridge Specifications*, supplemental specifications and plans.
5. Special provision copied notes will govern over the *Road and Bridge Specifications*, supplemental specifications, plans and special provisions. The pay items and pay units listed in the proposal have the same status as special provision copied notes.

**CPM** – Critical Path Method of scheduling contract work.

**Disincentive** – A monetary deterrent used to discourage the Contractor from exceeding the Contract time limit.

**Engineer** – The Chief Engineer, who acts directly or through his authorized representative. The representative acts within the scope of the particular duties or authority given to him. This may include the Responsible Charge, Assistant Responsible Charge, Area Construction Engineer, Construction Project Manager or Inspector.

**Extra Work** – An item of work that is not provided for in the contract as awarded but that is found to be essential to the satisfactory fulfillment of the contract within its intended scope.

**Final Estimate Date** – For the purpose of filing Claims, the final estimate date is the date set forth in a letter from the Scheduling and Contract Division 3333 to the Contractor.

**Force Account Work** – Prescribed work of a contractual status performed by the Contractor and compensated for as specified in Section 109.05 of the Specifications.

**Freedom of Information Act (FOIA)** – A law that ensures that the public has ready access to records. There are a number of exceptions, two of which are particularly applicable: written opinions of attorneys and any other writing protected by the attorney/client privilege and memoranda, working papers and records compiled specifically for litigation (work product). The second exception is the reason that the diary must be disclosed; it is not prepared in anticipation of litigation. However, comments on Notice of Intent to file a Claim and analysis of Claims and notices do not have to be disclosed because they are prepared after a response to threatened litigation (legal proceedings).

**Hearing** – Contractor's forum to appeal to Commissioner and present data that may or may not have been previously submitted.

**Incentive** – A monetary amount used to encourage the Contractor to complete work prior to the time limit specified in the Contract.

**Liquidated Damages** - Compensatory damages, as set forth in the contract, paid by the Contractor to VDOT when the Contractor fails to complete the project within the time frame specified in the contract. For courts to support liquidated damages, the following conditions must be met:

1. The contract must make time an essential part of the contract by explicit reference to the stated time requirement. Failure to complete the project on time is a breach of contract and can make the Contractor liable to the Department for damages. (See Sections 108.11 and 108.12 of the Specifications.)
2. Liquidated damages must represent a reasonable forecast of damages incurred by VDOT. These damages include additional costs of items such as administration, engineering, supervision and inspection of the project.

**Material Information** – Any data, knowledge, or facts that identify physical characteristics, limitations, restrictions or other pertinent information related to the project site or construction of a proposed project. Prospective bidders as well as the successful Contractor shall have ready access to any material information of which VDOT has knowledge, unless it is attorney/client privilege material or otherwise exempt from the Freedom of Information Act.

**Notice of Intent to File Claim** – A written statement by a Contractor that informs the Engineer of their intent to seek additional time and/or monetary compensation. It must be given to the Department at the time of occurrence of the event or beginning of the work upon which the claim is based and state the nature of the claimed damages and the act or omission by VDOT that caused the damage.

**Notice of Intent Analysis** - The term “Notice of Intent Analysis” describes the procedure of investigating and documenting the validity of a Contractor’s notice of intent. The procedure begins with the initial investigation of the notice of intent by the Responsible Charge, District, and Scheduling and Contract Division as may be required and continues until the notice is resolved or payment of the final estimate is made.

**Payment of the Final Estimate** – Final payments will become due and the final estimate voucher for payment within 90 calendar days after final acceptance.

**Plans** – The approved plans and standard drawings and profiles, typical cross sections, computer output listings, supplemental drawings or exact reproductions thereof, and all subsequent approved revisions thereto that show location, character, dimensions and detail of the work specified in the contract.

**Responsible Charge** – For the purpose of this manual, the Responsible Charge is the person responsible for project administration and decision-making.

**Revisions** - For the purpose of this manual, a change to the contract, which may or may not be negotiated by a work order.

**Specifications** – A general term that includes all directions, provisions and requirements contained in the *Road and Bridge Specifications* and those that may

be added or adopted as supplemental specifications, special provisions or special provision copied notes. All are necessary for the proper fulfillment of the contract.

**Work Order** – A written order issued by the Engineer or his designee to the Contractor that specifies changes in the plans, quantities or both, within the scope of the contract and that establishes the basis of payment and time adjustments for the work affected by the changes.

**Work Product or Privilege** – Material developed in anticipation of litigation, including the Notice of Intent Analysis.

## **CLAIM AVOIDANCE AND PRECAUTIONARY MEASURES**

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Contractors and taxpayers generally are better served by resolving potential contract disputes at an early stage. **VDOT representatives need to be objective** and avoid personality conflicts in an effort to arrive at a satisfactory resolution of a problem, rather than “laying blame.” Personnel connected with projects administered by VDOT are encouraged to regard each project as a potential producer of Claims, and to maintain complete and accurate project records in accordance with Appendix C of the Construction Manual. VDOT representatives should not instruct a Contractor on the advisability of submitting a Claim, nor indicate in any manner an opinion on possible favorable action by higher authority. If the Contractor indicates intention to file a Claim, his attention should be directed to the General Provision of the contract, particularly the changes, differing site conditions, time extensions, and suspension of work and Claim clauses. The Contractor should also be reminded of the time limitations for filing. Any significant deviations from the approved sequence in the approved progress schedule or CPM schedule can provide VDOT personnel with an indication of difficulties on the project, allowing investigation of a potential problem at the earliest possible time.

The following suggestions are offered to VDOT personnel for their guidance and action on construction projects:

1. VDOT personnel should keep in mind that the Contractor determines the method of construction, unless the plans or specifications specify a particular method to be followed. VDOT personnel should avoid making statements such as “I made this concrete placement in four hours.” Or, “We built a special form.” This conversation habit suggests that VDOT has taken over and directed the Contractor’s operations. A better way to phrase this information is “The Contractor made the concrete placement in four hours.” Or, “The Contractor built a special form.”
2. Where it is mandated or implied by the plans and specifications that the Engineer will give direction, VDOT must act promptly. For example, a standard note that appears on construction plans states that, “If during construction, the culvert invert elevations shown on the plans are found to differ significantly from the elevations of the stream or swale in which the culvert is to be placed, the VDOT Drainage Designer must be consulted before installing the culvert.” As another example, Section 105.02 of the *Road and Bridge Specifications* requires that VDOT complete the review of shop drawings submitted by the Contractor within a designated time. In all such cases, VDOT personnel must make every effort to respond promptly so that the Contractor does not incur any unnecessary delays.
3. Work performed by the Contractor should be inspected in a timely manner. Unacceptable work must be rejected without delay, indicating to

the Contractor exactly what is being rejected and why. Delay or inaction resulting in a failure to reject non-complying work within a reasonable time may imply acceptance by VDOT.

4. The Engineer should put his directives in writing. Difficulties often arise when verbal orders regarding items such as additional or extra work, or concerning the acceptability of work or materials, are not verified in writing. VDOT personnel must be careful to obtain all necessary approvals before issuing such directives.
5. A Contractor who makes a verbal Claim should be advised in writing to proceed with the contract and that he may file a Notice of Intent to file Claim as set forth in the Specifications.
6. Project financing **should never** be discussed with the Contractor.
7. Correspondence from the Contractor in which a questionable statement is made should be answered in writing. The questionable statement should be denied or corrected. This procedure should be followed when correspondence makes a Claim or apparently is written to form the basis of a Claim.
8. The Contractor and project personnel should be properly briefed on the plans and specifications of projects that have unusual or unique materials methods of construction. The preconstruction conference is an excellent opportunity to review key contract requirements with both project personnel and the Contractor.
9. Settlement in the form of work orders and time extensions should be made promptly for valid changed conditions and delay situations. Sometimes settling valid issues is left until project completion. Normally, such delay of settlement is not in VDOT's best interest. If a Contractor is not granted a time extension for a valid delay when it occurs, he later may submit a Claim for additional costs incurred for acceleration of work in order to meet the original completion date.
10. The Department should disclose all information relevant to a proposed or on-going project as it becomes available. This information may be any data, knowledge, facts, etc., that identify physical characteristics, limitations, restrictions, or other pertinent information related to the project site or constructability of the proposed project. Examples are soil borings, utility agreements, R/W agreements, requirements specifying exclusive source (proprietary) materials, and coordination of work with other Contractor's sharing the work site. It is critical that prospective bidders (prior to the receipt of bid) as well as the successful Contractor

(after contract award) have ready access to any information VDOT possesses that is relevant to the construction of a project.

When disclosing this information, please be sure to make necessary disclaimers, if appropriate. For example, if the perspective bidder/Contractor asks to see all information VDOT has on soil testing and the information VDOT has is not complete or is estimated only, or was performed several years prior, VDOT needs to make the perspective bidder/Contractor aware that it is not “guaranteeing” the information.

VDOT personnel must always act promptly and responsibly. When a problem is encountered during the course of construction, every effort must be made to address and resolve the problem as quickly as possible. At the same time, VDOT’s representative must be careful not to give direction in such a manner that it appears that VDOT has assumed responsibility for or dictated the Contractor’s operations. All important issues should be addressed in writing, and prospective bidders and parties to on-going contracts should be made aware of relevant information as it becomes available to VDOT.

**VDOT personnel must always act promptly and responsibly to resolve problems as quickly as possible as outlined in CD-2004-1.**

## **WHAT IS A NOTICE OF INTENT TO FILE CLAIM?**

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The Specifications and the Code of Virginia provide the Contractor with a procedure to seek additional time and/or monetary compensation for the performance of extra work, changed conditions or disagreements due to interpretation of the contract requirements.

A Notice of Intent to file Claim is a written notification by the Contractor of his intention to seek extra time and/or additional monetary compensation due to a changed condition, delay, or other related event. The Contractor must submit this initial written request in accordance with Section 105.16 of the Specifications. An oral Notice of Intent by the Contractor is not sufficient. The Contractor's written Notice of Intent should be addressed to the Responsible Charge. The Notice of Intent should be prepared and delivered by the Contractor to the Responsible Charge as soon as the Contractor becomes aware of a changed condition or problem situation. The Contractor's Notice of Intent to file Claim should follow this format:

1. Label the written request "Notice of Intent to File Claim."
2. Summarize the act or omission.
3. List the specifications, plans, or contract items that are in question.
4. Indicate the type of damages (time and/or monetary compensation).
5. This itemized summary should be as detailed as possible. (Refer to the section on "Project Documentation" for a description of the type of information that should be provided.)

Acknowledgement should be made to the Contractor in writing within 5 days of the receipt of a Notice of Intent. (See flow chart for Submission and Disposition of Notices of Intent.) If the Notice of Intent lacks sufficient detail, the Contractor should be advised of any additional information that must be provided. The Contractor should be made aware that all necessary information should be provided promptly so VDOT can properly document and resolve the problem. Sample letters acknowledging receipt of a Notice of Intent are in the Appendix. Copies of the Responsible Charge's acknowledgement letter should be sent to the following parties:

District Administrator  
Construction Project Manager  
Project Inspector  
Assistant Attorney General (AAG)  
Scheduling & Contract Engineer

In the letter acknowledging a Notice of Intent, the Responsible Charge should explain to the Contractor the position of VDOT concerning the issue in question. (See example in the Appendix.) The acknowledgement letter should advise that the Contractor is required to maintain daily records concerning the Notice of Intent. The

necessary types of records submitted to VDOT should be discussed with the Project Inspector. These records shall be submitted to the Project Inspector on a daily basis for comparison. The Responsible Charge will send follow-up correspondence to the Contractor if the Contractor does not submit required documentation.

The documentation and investigation of a Notice of Intent is referred to as “Notice of Intent Analysis.” This analysis determines the validity of the Contractor’s Claim that a changed condition, delay, or disagreement of interpretation of the contract requirements has occurred. It is important to note that the Project Inspector should immediately begin keeping written notes and records of everything affected by a changed condition, delay, or differing interpretations of contract requirements even before he becomes aware of the Contractor’s intention to file a Notice of Intent.

It is VDOT’s goal to resolve legitimate Notices of Intent as soon as possible, and compensate the Contractor if appropriate. Resolution and compensation may be handled by work orders.

## **TYPES OF NOTICES OF INTENT TO FILE CLAIMS AND CLAIMS**

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This section covers situations or events for which Notices of Intent to file Claim and Claims might be submitted. The specifications, in most cases, will cover the situation. Occasionally, a special provision copied note will be inserted into the proposal documents to inform bidders of an unusual situation. The following referenced specification should be consulted for further information.

When Notices of Intents are received they should be acknowledged and forwarded as outlined in “What is a Notice of Intent to File Claim?” Claims should be acknowledged and handled as outlined in “What is a Claim?” Further, documentation and record keeping must begin immediately if not started already, as outlined in “Project Documentation”.

## Time Extensions

Extra Work	Additional time for work that was not anticipated.	Section 104.03 & Section 109.05
Coordination Delays By Other Contractors	Additional time for third party interference that resulted from work being performed by others within or adjacent to the project under which the Notice of Intent or Claim is being submitted. (Example: A grading Contractor does not complete his contract on time, thus delaying the paving Contractor.)	Section 105.08
Coordination Delays by Other Entities	Additional time based on interference or delays within or adjacent to the project by others such as utilities, cities, counties or railroads.	Section 105.07
Approvals	Additional time based on delays in processing shop drawings, plan revisions, work orders or other Contractor submittals requiring VDOT decisions.	Section 105.02
Right of Way Access	Additional time based on a lack of access to the project or portions of the project.	Sections 108.05 & 518.03 or Special Provision
Material Shortage	Additional time based on a national shortage or national unavailability of materials needed to complete the project.	Section 108.04
Weather	Additional time based on unusually severe weather for which a shutdown was not issued.	Section 108.09 or Special Provision Copied Note

## Changed Conditions

Differing Site Conditions	If subsurface or ground conditions are encountered that were not anticipated in the contract. (Example: Underground storage tanks or contaminated soil found during construction.)	Section 104.03
Suspensions of Work Ordered by the Engineer	If work is suspended or delayed by the Engineer for an unreasonable length of time or not originally anticipated. (Example: Inspection delays that are unreasonable.)	Section 108.10
Significant Changes in the Character of the Work	The term “significant change” is to be construed to apply to circumstances such as the following: Where the character of work changed due to the use of different materials or procedures. (Example: A bridge repair contract calls for Class 1 surface preparation and latex overlay. Once work starts, the deck is discovered to be more deteriorated than anticipated and will require extensive Class 3, full depth surface preparation. The required additional work is time consuming and labor intensive.)	Section 104.02
Major Items	A major item of work, as defined in the contract, increases or decreases more than 25% of the original contract quantity. (Example: Borrow excavation is shown by the contract to be a major item. Based on a contract quantity of 20,000 cubic yards, the Contractor located a suitable borrow site. As work progresses, a larger than expected amount of regular excavation is found to be unsuitable for use as embankment material. The actual required quantity of borrow excavation is 30,000 cubic yards. The Contractor has to locate an additional borrow site to supply the extra 10,000 cubic yards of borrow excavation. The result is a contract overrun of a major item by 50 percent. The Contractor incurs unanticipated costs in locating an additional borrow site.)	Section 104.02
Piling	When overruns and underruns of piling amount to more than 25% of the original bid quantity, even if such item has not been designated as a major item.	Section 104.02
Impact and Delay	Unforeseen conditions beyond the control of the Contractor and beyond what a prudent Contractor could have anticipated. (Example: Striking of the railroad industry would cause time delays and impact other areas as well in a domino effect.)	

Acceleration	Extra costs associated with attempting to maintain a project on or ahead of schedule in spite of unforeseen conditions or delays. The Contractor may accelerate his operations due to the Engineer's insistence that the project be completed as soon as possible. Extra costs could include labor, equipment or work hours (overtime wages).	Directive by the Responsible Charge
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## **NOTICE OF INTENT ANALYSIS**

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Once the Responsible Charge has acknowledged receipt of a Notice of Intent to file a Claim from the Contractor, several important steps should be taken immediately. These steps are summarized below:

1. Notification of the Notice of Intent should be given to the appropriate VDOT personnel, FHWA (if Federal Oversight Project) and Assistant Attorney General. (See “What is Notice of Intent to File Claim” for more specifics.
2. Ensure the project staff is informed of the Notice of Intent and is proceeding to provide adequate documentation of all events related to the issue in question. (Refer to “Project Documentation”)
3. Perform a Notice of Intent analysis. (See Flow chart for “Notice of Intent Analysis”)

Notice of Intent analysis is a general term used to describe the procedure of investigating and documenting the validity of the Contractor’s Notice of Intent. All available data related to the problem is gathered and studied, and a recommendation is developed detailing VDOT’s position concerning the Contractor’s request. The Responsible Charge or his designee develops the initial investigation and recommendations.

The first step of the investigation should be the identification of the basis of the Contractor’s Notice of Intent. The next step involves a thorough review of all contract documents. Such documents include the applicable Road and Bridge Specifications, the plans, contract, minutes of the project showing and all other pre-bid meetings. During the review of the contract documents, all plan notes, special provisions, and specifications that address the basis of the Notice of Intent should be listed. While examining the contract documents, the reviewer should address the following questions:

1. Was the Notice of Intent filed properly and in a timely manner?
2. Is the contract language clear and specific?
3. Is the language open to different interpretations?
4. Are there conflicting contract requirements?
5. What should a prudent Contractor have anticipated when bidding?

The investigation should continue with a review of all documentation related to the issue in question. Documentation should include the project diary, correspondence, memos, reports, change orders, and any field directives. Interviews with project

personnel may be necessary. During the documentation review, anything that supports or refutes the Contractor's Notice of Intent should be noted. Any deficiencies in project documentation should be brought to the attention of the Project Inspector, Construction Manager or Responsible Charge.

Once review of the contract documents and project documentation is completed, the reviewer should proceed to form a chronological summary of all events related to the issue. The following points should be covered in the summary:

1. What does the Contractor claim?
2. What is required by the contract?
3. Notices of Intent requesting a time extension:
  - Who or what is responsible for the delay?
  - Could the delay have been anticipated?
  - Is the type of delay addressed by the specifications?
  - What items of work will be affected by the delay?
  - How will the delay affect the overall completion of the project?
  - Are there other concurrent delays?
  - What does the Contractor's schedule of operations indicate?
4. For Notices of Intent requesting monetary compensation:
  - What is the cost to the prime Contractor?
  - What is the cost to the subcontractor?
  - What is the cost to the material suppliers?

After completing a summary of the issue in question, the reviewer should make a recommendation concerning the Notice of Intent. A determination is made of whether or not there is a valid basis to the Contractor's request. The initial Notice of Intent analysis may yield one of the following recommendations:

1. The Contractor's request is both *reasonable* and *proper*, and a work order for money or time extension is processed immediately to correct the situation. The result is a prompt resolution of the conflict.
2. There appears to be merit to the Contractor's Notice of Intent. However, all details are not readily available and VDOT and the Contractor may not agree concerning the impact of the problem of the project. For example, when unanticipated foundation conditions are encountered on a project, additional soil borings, analysis, and foundation redesign may be required. If a definitive scope of work for the changed condition cannot be determined, It may be necessary to process all additional work related to the problem situation on a force account basis and an appropriate time extension may be granted to the Contractor. When there appears to be merit to the Notice of Intent but compensation will be delayed,

the Contractor should be notified of VDOT's intentions in order to preserve a good working relationship.

3. The Contractor's Notice of Intent *does not* appear to be *justified*. A review of the situation indicates that the problem as outlined in the Contractor's request is within the scope of work as detailed by contract agreement.

The Responsible Charge's initial investigation of the Contractor's Notice of Intent should be completed within 15 days from receipt of a Notice of Intent from the Contractor. Input should be sought from the Assistant Attorney General if necessary. Once this review is completed, the Responsible Charge may settle all valid issues by work order within his approval authority. Otherwise, the completed review should be forwarded to the District Administrator, the Assistant Attorney General and Scheduling and Contract Division Engineer. The District Administrator should complete a review of the Notice of Intent within 30 days after receipt from the Contractor. The District Administrator has the authority to settle valid issues within his approval authority. If the issue remains unresolved, the District investigation is to be forwarded to the Assistant Attorney General and the Scheduling and Contract Engineer. (Attention: Claims Analyst.)

The Claims Analyst will investigate and advise Scheduling and Contract Engineer of his findings. Within 45 days from the receipt of the Notice of Intent from the Contractor, the Scheduling and Contract Engineer will prepare a response to the District Construction Engineer. In the response, the Scheduling and Contract Engineer may recommend that they settle all valid issues through work order or force account. Copies of the Scheduling and Contract Engineer's review should be co-addressed to the Assistant Attorney General. If the Notice of Intent issues are resolved at any step of this process, all appropriate persons (AAG, District Administrator, Scheduling and Contract Engineer) should be notified.

On Federal Oversight Projects, the Responsible Charge is responsible for informing the Federal Highway Administration (FHWA) of impending changes in the contract work as soon as it is practical after the need for the change has been recognized. Effort should be made to obtain a commitment from the FHWA's Engineer for concurrence before any work orders are processed on federal-aid projects. Terms of third party agreements should also be in compliance. In addition, VDOT personnel should be aware that their work order and force account approval authority is subject to procedures designed to control contract cost overruns.

The Notice of Intent analysis is an on-going process. The procedure begins with the initial investigations of the Notice of Intent by the Responsible Charge, District, Scheduling and Contract Division and should be reviewed periodically as new information becomes available. The Notice of Intent analysis continues until the matter is resolved or the Final Estimate Date has passed. After the Final Estimate Date, any analysis of a Claim that may result from any unresolved issues is referred to as "Claim Analysis".

VDOT and the Contractor may have disagreements concerning the initial submission of a Notice of Intent and the impact of the problem on the project. However, as work proceeds and documentation is compiled, it sometimes becomes apparent there is merit to the Notice of Intent. In such cases, VDOT should continue to work for a resolution of the issue. It is desirable to settle all valid Notices of Intent promptly.

Remember, *all documents and correspondence related to the Notice of Intent Analysis is VDOT's work product.* These documents and correspondence should be sent to the appropriate Assistant Attorney General for legal questions and assistance. All this correspondence should be addressed to the appropriate person at VDOT and the Assistant Attorney General and marked "Attorney/Client Privilege". No document marked Attorney/Client Privilege should be sent to anyone outside of VDOT and/or its legal counsel. The Responsible Charge, District, Scheduling and Contract Division and Assistant Attorney General should be kept informed of relevant changes in status of the Notice of Intent. When corresponding with the Scheduling and Contract Division concerning a Notice of Intent, refer to the Notice of Intent number. The Notice of Intent number is the Order Number + the next numerical number of Notice of Intents filed on the Project.

The Scheduling and Contract Division has established a database in order to document construction Notices of Intent and Claims. It is used to track all Notices of Intent from their origination to resolution. Resolution may be in the form of a work order or force account, settlement of a formal Claim within VDOT, court settlement, or the Contractor may decide to withdraw the Notice of Intent or Claim.

In addition to documentation of the Notice of Intent, the database is used to gather general data relevant to all Notices of Intent. Each Notice of Intent is given a classification code that indicates the nature of the problem encountered. Reports can be generated easily, summarizing such things as recurring causes of Notices of Intent, and counties or districts where Notices of Intent are filed frequently. Reliable current information must be entered into the system in order for the system to be of value. The Scheduling and Contract Division must be informed promptly of all Notices of Intent and changes in their status. The Responsible Charge or District may resolve Notices of Intent by work order and the Scheduling and Contract Division and the Attorney General's office are to be notified.

To summarize, the following steps outline a Notice of Intent analysis:

1. Establish the basis of the Contractor's Notice of Intent.
2. Investigate the Notice of Intent. Review all bid documents and project documentation. If project documentation is inadequate, the project inspector should be advised of necessary corrective measures.

3. Develop a chronological summary of all facts and events that pertain to the issue under review.
4. Make a recommendation.
  - Resolve all valid Notices of Intent up to the maximum approval authority allowed. Resolution (money or time) may involve a work order or force account.
  - If the Notice of Intent does not appear valid or approval would exceed authority, promptly forward the completed Notice of Intent analysis to the next level of authority for review.
5. Keep all parties to the process informed of correspondence, changes, possible resolution, etc. that relate to the Notice of Intent. These parties are the Responsible Charge, District, Scheduling and Contract Division, and the Assistant Attorney General. For federal oversight-aid projects, the FHWA should be advised of NOIs and pending changes in contract work, and the FHWA Engineer's approval should be sought before any work orders are processed.
6. All correspondence related to the Notice of Intent analysis should be addressed or co-addressed to the Attorney General's Office (Steve Owens) and clearly labeled "Attorney/Client Privilege" and filed separately from other project records.

## NOTICE OF INTENT ANALYSIS

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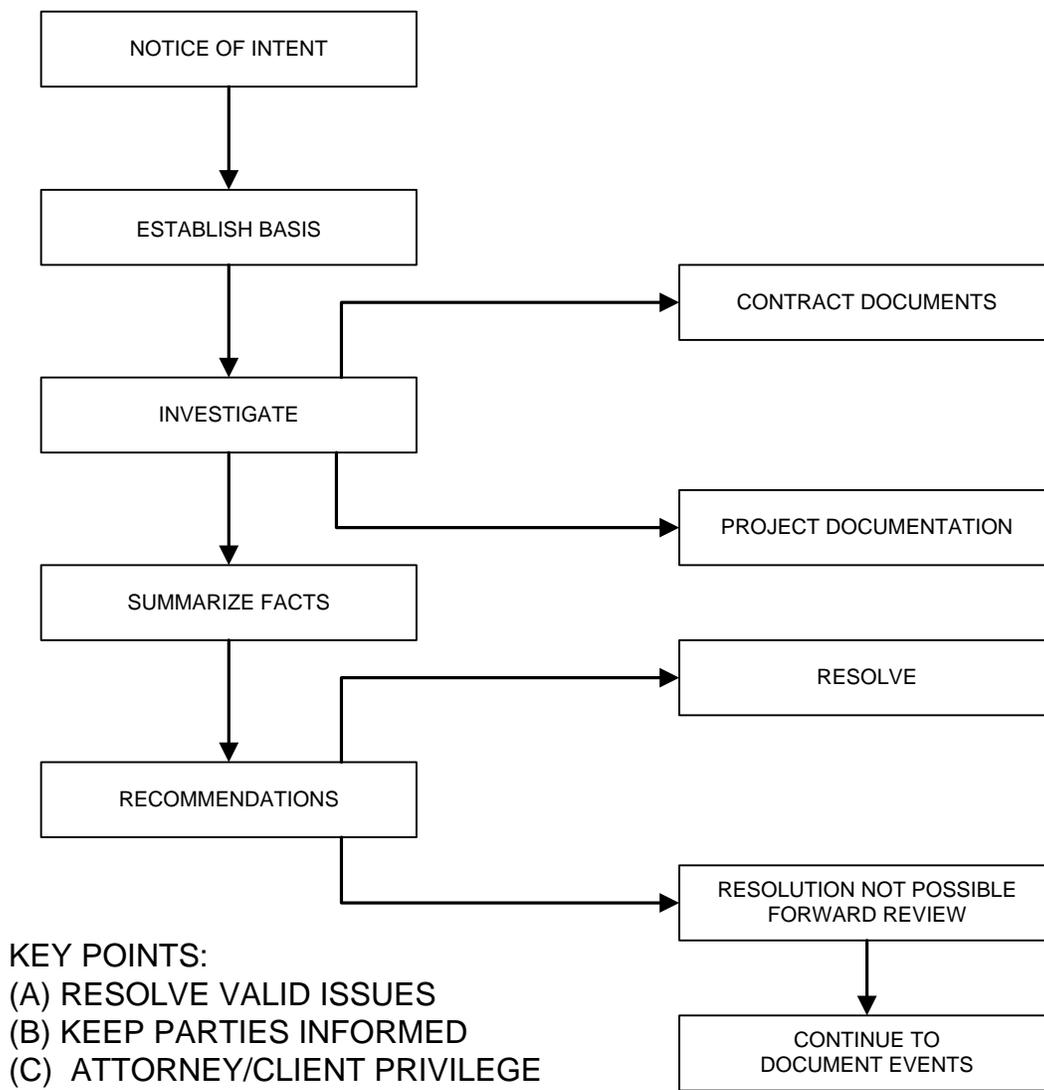
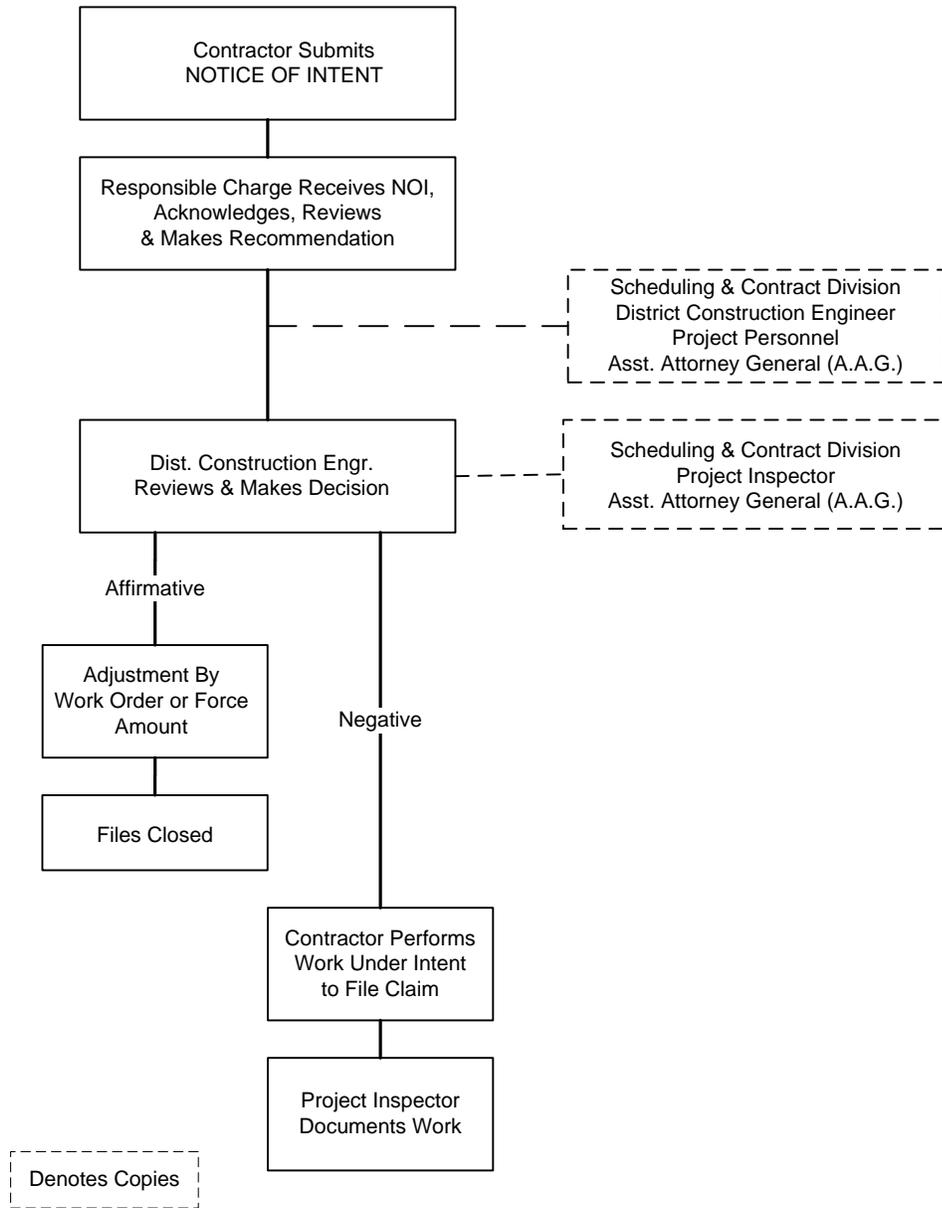


Figure 1: Notice of Intent Analysis

## SUBMISSION AND DISPOSITION OF NOTICE OF INTENT (NOI) TO FILE CLAIM



**Figure 2: Submission and Disposition of Notice of Intent to File a Claim**

## PROJECT DOCUMENTATION

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The need for clear, factual documentation of project events cannot be overemphasized and becomes even more critical on a project when a Contractor submits a Notice of Intent to file a Claim. It should be kept in mind that Contractors sometime submit vague, non-specific Notices of Intent that do not comply with the timely submission requirements set forth in Section 105.16 of the *Road and Bridge Specifications*. Even though an improperly submitted Notice of Intent to file Claim may not be acknowledged as acceptable by VDOT, the Contractor may still attempt to pursue the issue. The standard practice of “*put everything in writing*” applies here. To be effective, documentation must be prepared during the construction process. Records created after the fact generally will not receive consideration. Reliable, detailed documentation is essential in the review of a Contractor’s Claim. Without proper documentation, VDOT has no way to verify or refute a Contractor’s request for additional time and/or monetary compensation. If the Contractor is not providing records as required by the Specifications, the Responsible Charge should give him written notification of the problem.

Once the Responsible Charge has acknowledged receipt of a Contractor’s Notice of Intent to file a Claim, the project inspector should be advised promptly. The project inspector and/or the residency staff should then meet with the Contractor’s representative to discuss the disputed item of work or delay. The purpose of meeting is to obtain an understanding of the issues involved and to discuss the records to be maintained and how often records are to be compared. The minutes of the meeting will be part of the initial investigation of the Notice of Intent and will become a part of the Claim’s Documentation Process. The type of records maintained will be dictated by the nature of the Claim or Contractor’s request. For this reason, only general guidelines for documentation can be made. Regardless of the specific nature of a Notice of Intent, there are certain procedures that should always be observed when documenting such requests. These procedures are summarized as follows:

- Attorney/Client Privilege Material and Work Product – Under the Freedom of Information Act (FOIA), project files are subject to review by the Contractor or his legal counsel. Documents, records, or correspondence initiated by the Department as a result of a Claim or Notice of Intent to file a Claim submitted by the Contractor are considered to be VDOT’s work product. These documents are to be submitted to the Attorney General’s office and are considered Attorney/Client Privilege Material. Documents co-addressed to the Attorney General expressing opinions by VDOT personnel (Inspector, Construction Manager, Responsible Charge, etc.) as to the merits of a Notice of Intent or Claim is also Attorney/Client Privilege Material. For example, opinions on whether or not there were enough personnel and equipment on the project, whether the Contractor could have expended more effort, or an opinion that VDOT was liable or responsible for the issues in the controversy should be made attorney/client privilege material. Opinions **should not** be placed in the Diary or in correspondence that is not marked Attorney/Client privileged. These are not

exempt from FOIA. Comments that state facts such as weather conditions, labor and equipment summaries, materials used, test reports, etc., normally are not considered attorney/client privilege material and should be incorporated into the project diary or project files. Correspondence addressed to or received from the Contractor also does not fall under this classification.

Attorney/client privilege material is confidential and is not subject to disclosure under FOIA. To ensure that all attorney/client privilege material remains confidential and is not subject to review by a Contractor or his attorney, all such material should be clearly identified "Attorney/Client Privilege" when drafted. Correspondence should be addressed to the Assistant Attorney General and other appropriate parties. Further, all such correspondence should be filed independently from other project records and should not be placed in other files. These independent files should be maintained at the Residency, District, and Central Office. By maintaining these separate files, VDOT does not run the risk of accidentally turning over confidential material to the Contractor or his legal counsel. Eliminating the need to separate Attorney/Client Privilege Material from routine project correspondence at a later date also saves a great deal of time and effort.

- **Claim Diary** – On complex projects, a construction Claim can become quite involved. Once a Notice of Intent to file a Claim is acknowledged by VDOT, consideration should be given to the complexity of the issue. If the matter appears to be complicated and will be an on-going issue for more than 30 days, the Attorney General's office asks that consideration be given to establishing a diary solely for Claim's Documentation to assist in Claim review. In order to save time and avoid duplicate record keeping, cross-referencing to the project diary is acceptable.
- **Numbering** – Once a Notice of Intent is received, the Inspector or Construction Manager is to assign a number to the notice. The Notice of Intent number is the Order Number + and the next numerical number of Notice of Intents filed on the Project. All correspondence should refer to this number, except correspondence sent to the Contractor.

As discussed earlier, the Contractor's request is usually for additional time, additional compensation, or a combination. The following documentation recommendations are general and may not apply, depending on the particular circumstances involved:

1. The cause of all delays should be noted. Detailed observations of the impact of any delay on the Contractor's operations should be noted. A summary should be made of all idled equipment and labor when appropriate, as well as noting what other items of work are incomplete and could be performed during the delay.
2. Often project delays are such that work is allowed to continue, but at a slower rate than anticipated due to unexpected restrictions. In such cases, a study should be conducted of production rates and job efficiency during

unhampered production for comparison with disrupted periods of work. Production rates should be recorded in work units such as cu yd/hr or cu yd/day. Labor, equipment and material involved in the study should be recorded.

3. When extra work is required, there should be a daily accounting of labor, equipment and material used to perform the work in question. These records should be reconciled daily with those of the Contractor's and initialed by the Contractor's representative. Labor accounting should include a description of work performed, where it was done, as well as a comprehensive summary of labor classifications used and the total personnel hours for each classification. Labor rates and hours worked should be verified with the Contractor's payroll records. Equipment accounting should include the type, model and serial number, date of manufacture, hours operated, hours idle, where it was working, and type of work done. Equipment owned by the Contractor and rented equipment should be differentiated. It is important to verify that rental rates are representative of actual costs. For force account work, rental rates should be in accordance with Section 109.05(d) of the Specifications. All relevant purchase orders, delivery tickets, and test reports should be retained. This type of accounting should also be kept for all appropriate subcontract activity.
4. Statement in the diary should be specific. An entry such as "Told Contractor that ..." is not satisfactory or "The Contractor seems to feel that there is no cause for delay" should be written "Jones said that he is now worried; he will make up for lost time in June or July with more men on the job." A general conclusion as to the effect of a conversation is not helpful. A statement of the conversation and the participants involved is invaluable.
5. Photographs or videotapes should be used whenever deemed appropriate. To emphasize the size or magnitude of an item being photographed, use a hard hat, tape measure, or other device to give the picture scale. Photographs should be clearly labeled to indicate the date taken, photographer and location. Negatives should be stored carefully for future use.
6. Minutes or memoranda of all project related meetings should be maintained. Internal VDOT correspondence and notes from relevant telephone conversations also should be kept as well as all correspondence between the Contractor and VDOT.
7. Deviations in approved and updated progress schedules as they compare with actual progress should be noted when they become apparent. Changes in the logic or sequence of work should be recorded. Maintaining a log of progress schedule changes could be useful if a detailed analysis is required.

8. Failure of the Contractor to install work in accordance with the Plans and Specifications should be documented. Specific details related to the nonconformity of the work in question should be given. For example, rather than stating that a section of curb and gutter has been rejected because it was too rough, give the actual straight edge results as they compare to the requirements of the specifications.
9. A log should be kept on shop drawings in accordance with CD-2004-01. The log documents the date the drawings were received and their disposition as well as all revisions.
10. A project visitors' log should be maintained on projects. The name, title, date, time in and time out, and purpose of the visit should be recorded.
11. If project supervision is obviously inadequate, it should be noted. Once again, an opinion or general conclusion is not helpful. Be specific, citing only the facts and conversations as they actually occurred. Comparison of the number of supervisor hours and the number of supervisors to the total personnel hours is helpful.
12. Detailed descriptions of site conditions should be given; emphasizing how they differ from what normally had been encountered or expected on the project.
13. Evidence of mechanics liens and unpaid subcontractors and suppliers should be noted.
14. Actual results of material tests, field density tests, concrete cylinder compression tests, etc. should be referred to as necessary. Samples should be retained for future use when deemed appropriate.
15. A list of witnesses for VDOT, including their title, home address, phone number and a summary of their expected testimony will be a valuable asset in investigating any Notice of Intent to file Claim or any subsequent formal Claim.
16. A copy should be maintained of all original bid documents. This would include the plans, proposal, addenda and minutes of the project showing and any other pre-bid meetings.

Effective documentation creates a clear, factual record of project events as they occur. With such records readily available for review, a Contractor's Notice of Intent or any subsequent Claim can be evaluated objectively. Reasonable requests can be approved without delay and unreasonable requests can be successfully denied.

**Two Rules for Effective Project Documentations:**

1. When in doubt, put it in writing.
2. Stick to the facts.

## **WHAT IS A CLAIM?**

---

The Contract includes procedures for a Contractor is provided with a procedure to seek additional time and/or monetary compensation for disagreement in interpretation of contract requirements and/or the performance of extra work or due to changed conditions. This procedure is called a “Claim”. To initiate a Claim, the Contractor must give VDOT prompt written notice at the time of the occurrence of the changed conditions or situation or disagreement in question. Notice of Intent to file Claim makes VDOT aware of a questionable situation or disagreement and allows VDOT to obtain documentation. Notices of Intent unresolved after payment of the final estimate may continue to be pursued by the Contractor by the submission of a.

Within 60 days after the final voucher date, the Contractor may submit to VDOT a written Claim for such amount as he deems he is entitled, setting forth the facts upon which the Claim is based. (See Claims Procedures.)

The primary differences between the Notice of Intent and a Claim are in the details and support documentation provided. A Notice of Intent is submitted at the onset of the problem. The Contractor may only be able to indicate the type of additional costs he believes will be incurred as well as the labor, equipment and material that will be required to perform extra work. The total cost impact of the problem may be unknown at the time. With a Claim, the project is complete and the Contractor should be able to provide all the support documentation of events as they actually took place in order to substantiate the Claim.

Although the Specifications and state law require timely submission of a Notice of Intent as a prerequisite to submitting a Claim, Contractors occasionally don’t comply with this requirement. Claims are submitted to VDOT even though the Contractor failed to give VDOT a written Notice of Intent at the time of occurrence of the problem.

Field personnel are reminded that Claims, unlike Notices of Intent, can only be resolved by the Commissioner’s Chief that is designated to review and settle Claims, or the Commissioner (or his designee), with concurrence from FHWA. Therefore, it is important to communicate the issues to Construction Management Engineer along with field recommendations immediately. This process is called Claims Analysis and consists of reviewing Notice of Intent data and any new data that has surfaced. (Claims review and analysis are covered in detail in “Claims Analysis”.)

## **CLAIMS PROCEDURES**

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Upon completion of the contract and within 60 days after the final estimate date the Contractor may submit a Claim in writing to VDOT through the Responsible Charge. The final estimate date shall be that date set forth in a letter from the Construction Engineer to the Contractor at the time the final estimate is submitted to the Fiscal Division for vouchering. Only the Commissioner's Chief that is designated to review and settle Claims, or the Commissioner (or his designee) can actually settle a Claim. The Responsible Charge should check the Claim for the following elements.

1. Make sure proper Notice of Intent was filed.
2. Accompanied by "Certification of Claim", if required.
3. The written request should be labeled "Claim".
4. The act or omission should be summarized.
5. Specifications, plans or contract item for the disagreement, act of omission or commission item should be listed.
6. Type and amount of damage requested (time/monetary compensation) should be indicated.
7. Equipment, labor and materials used should be itemized.

When a Claim submission has not been filed in accordance with VDOT guidelines, the Responsible Charge should confer immediately with the District and the Claims Analyst of the Scheduling and Contract Division. The Claims Analyst will respond promptly to the District and Responsible Charge concerning action that should be taken.

For an incomplete Claim submission, the Responsible Charge should acknowledge the receipt of the Claim (within 5 days of receipt) with a request for additional information and a statement detailing the Claim as he understand it. Copies should be sent to:

Scheduling and Contract Division (Construction Management Engineer)  
District Administrator  
Assistant Attorney General

For a complete request, the Responsible Charge should acknowledge the receipt of the Claim (within 5 days of receipt) from the Contractor and furnish copies to those listed above. The Claims Analyst will coordinate the investigation of the Claim upon receipt by the Scheduling and Contract Engineer. The District Administrator will be

responsible for the direct investigation and written recommendations to the Construction Management Engineer and the Assistant Attorney General within 40 days of the receipt of the Claim from the Contractor.

This final submittal from the District Administrator must include a complete evaluation of each item: Notices of Intent, progress charts (if time involved), supporting documentation and specification references justifying the recommendations.

The Claims Analyst will review the Claim and recommendations of the District Administrator and will obtain necessary assistance from other divisions and the Assistant Attorney General before making a determination regarding the Claim. The Claims Analyst should make his report to the Construction Management Engineer within 54 days after the Department's receipt of the Claim including his recommendation and the District's recommendations regarding the Claim. Copies of this report should be furnished to the persons who received copies of the Claim.

The Construction Management Engineer will review the Claims Analyst's report and make a recommendation to the Commissioner's Chief that is designated to review and settle Claims.

After consultation with the Construction Management Engineer, the Claims Analyst may, modify the time frames and procedures described to assure the most complete and thorough analysis of the Claim for the Commissioner's Chief that is designated to review and settle Claims review.

Within 90 days of receipt of the Claim, the Commissioner's Chief that is designated to review and settle Claims must advise the Contractor by registered mail regarding VDOT's decision concerning the Claim. This 90-day period may be extended another 30 days by agreement between VDOT and the Contractor.

If the Contractor is dissatisfied with VDOT's decision, he may request an appearance before the Transportation Commissioner to present the Claim and discuss material previously submitted. The Contractor has 30 days from the date of receipt of VDOT's decision to request a hearing. However, the Commissioner and Contractor may schedule the meeting to be held after 30 days but before the 60<sup>th</sup> day.

If a hearing before the Commissioner is requested, the Management Services Division (MSD) coordinates any review process that the Commissioner deems appropriate for his analysis including, but not limited to, additional reviews by the project staff, Responsible Charge, District Administrator, and the Construction Management Engineer. MSD compiles a "Claim Briefing" from documentation in Central office files; District files Scheduling and Contract Division files, and the Contractor's Claim. (This briefing is helpful when discussing the hearing with those who will be attending.) MSD presents the briefing to the Commissioner and Assistant Attorney General before the hearing, coordinates the time of the hearing with the Commissioner's office, notifies the persons who will be attending and records the minutes of the hearing.

After the hearing, the Commissioner will respond by notifying the Contractor of his decision, within 45 days of the date of the hearing. This time limit may be extended up to 30 days by mutual consent of both parties. If the offer is accepted, the Assistant Attorney General and Governor may have to approve the settlement (depending on the dollar value) and payment will be made through appropriate channels. The case is then closed and no further action is taken.

If the Commissioner's offer is rejected, the Contractor may choose to litigate. The Contractor has one year from the receipt of the Commissioner's decision in which to decide to litigate.

## **CLAIMS ANALYSIS**

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Once the Contractor has submitted a Claim to the Responsible Charge and it has been acknowledged, the analysis process should begin immediately. (See “Claims Procedures” time frames.)

1. Notification of the Claim should be sent to the District Administrator, the Construction Management Engineer and the Attorney General’s Office.
2. Project staff should be informed of the Claim and should provide adequate documentation of all events related to the Claim including documents prepared for the Notice of Intent when it was analyzed.
3. Responsible Charge, District and Scheduling and Contract personnel should follow the same Claims Analysis procedure.

The Notice of Intent analysis (see “What is a Notice of Intent Analysis”) should be reviewed carefully for conclusions that were drawn, based on the information that was available and compared to any new data that has been presented or discovered since that time. Questions that should be asked include:

1. Does any new information change the conclusions drawn originally?
2. Is the contract language clear or subject to differing interpretations?
3. Are there conflicting contract requirements?
4. What should a prudent Contractor have anticipated when bidding and planning operations?

The project diary, correspondence, memos, reports, work orders, force accounts, field directives, work products, correspondence from the Attorney General’s Office and any available new data should be reviewed. Interviews with project personnel may be beneficial. When the document review and interviews have been completed, a chronological summary of all events related to the Claim should be made. At a minimum, the following information should be noted in the analysis (although the list is not exclusive).

1. Description and evaluation of what is Claimed by the Contractor for each item.
2. Original contract requirements including supporting documentation of specification references.
3. Progress charts for Claims requesting time extensions should answer these questions:

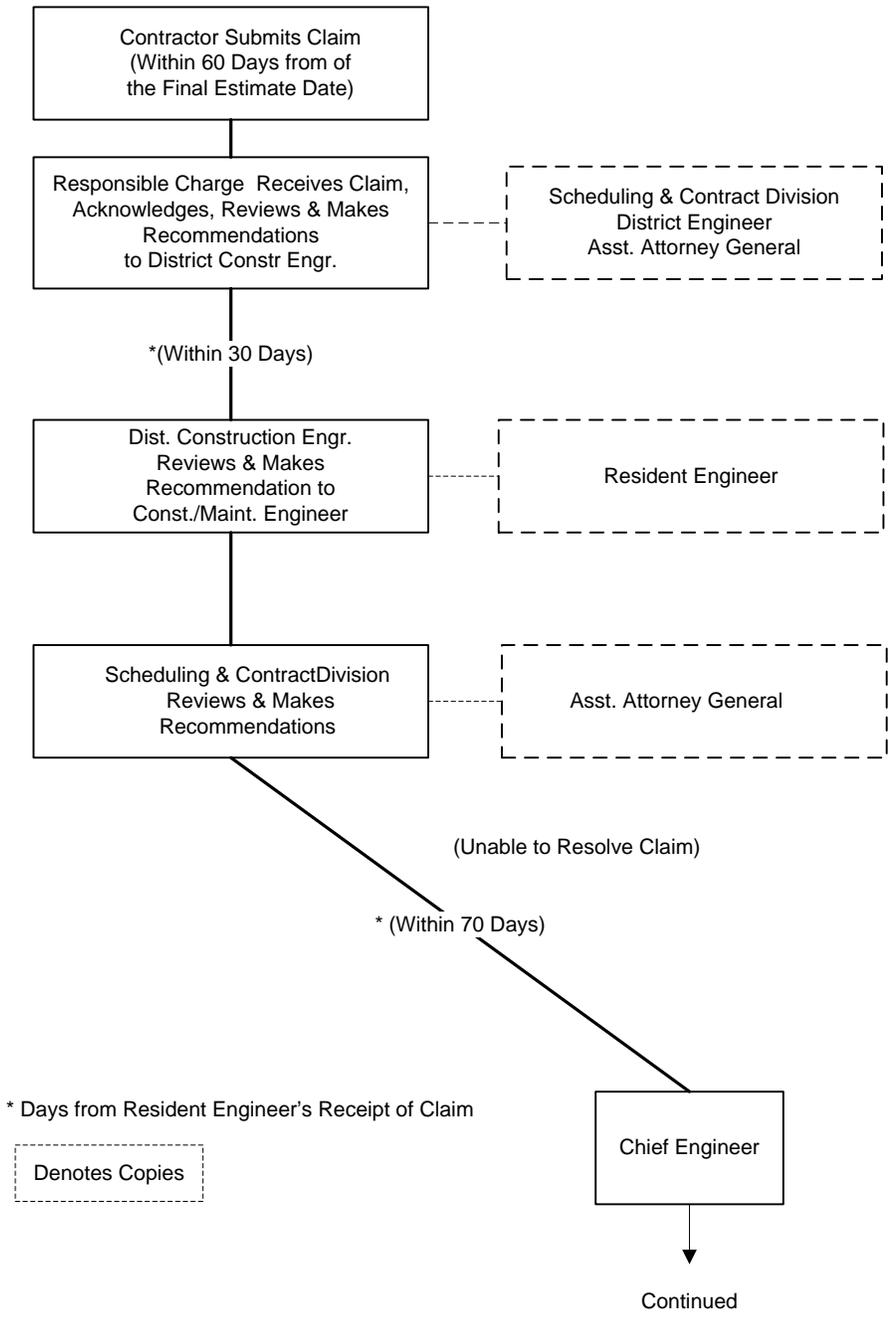
- Who or what is responsible for the delay?
- Could the delay have been anticipated?
- Is that delay addressed in the Specifications?
- What items of work were affected by the delay?
- How did the delay affect the overall completion of the project?
- How closely did the Contractor hold to the schedule of operations?
- How could the Contractor have used idle equipment and employees during delays?
- What did the Contractor do to mitigate the damages?

4. Statement of cost the Contractor is claiming.

After completing the Claim summary, the reviewer should make a recommendation by determining whether or not there is a valid basis to the Contractor's Claim. The result of the Claim analysis may yield one of the following recommendations:

1. The Claim is reasonable. The Scheduling and Contract Engineer will review, concur and recommend approval of time extension and/or payment to the Commissioner's Chief that is designated to review and settle Claims.
2. There is merit to the Claim but VDOT and the Contractor still differ on the time extension and/or monetary compensation. This may be resolved by Commissioner's Chief that is designated to review and settle Claims or may go to a hearing before the Commissioner. Concurrence is requested from FHWA at this time. (Agreement at the Commissioner level may require approval from the Assistant Attorney General and the Governor).
3. The Claim is not valid and is denied. The Contractor may accept this conclusion or may request a hearing before the Commissioner.
4. There is merit to only a portion of the Claim.

## SUBMISSION AND DISPOSITION OF CONSTRUCTION/MAINTENANCE CLAIMS



**Figure 3: Submission and Disposition of Construction/Maintenance Claims (Cont'd)**



## **TESTIFYING FOR THE DEPARTMENT**

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This discussion is based on testifying as a witness for VDOT in the event a Claim is not settled satisfactorily at the Commissioner level. Generally, two types of witnesses are called in court cases. The first is an expert witness called upon for general and expert knowledge in a particular field. This would not necessarily mean the witness had knowledge of the actual case or project being tried in court. The second type of witness, and the one discussed here, is the fact witness. A fact witness is one that has factual knowledge of the project.

When preparing for the trial, you, as the witness, must be made aware of the specific legal issues involved. You also should make the attorney aware of engineering aspects of the case if the attorney is not fully aware of them. It is important that you are prepared, but do not attempt to testify to anything for which you are not qualified or do not feel comfortable discussing. These concerns should be discussed with the attorney, in depth, prior to trial.

The VDOT witness should most importantly tell the truth. For a court appearance, you should be well groomed and dressed appropriately. Men should wear dress pants, shirt and tie as a minimum. Women should wear a suit or dress appropriate for a formal business atmosphere. As a VDOT witness, you should speak calmly, clearly and truthfully. Hostility or anger will not help your testimony. You should speak directly to the person addressing the question while maintaining eye contact. A more detailed explanation or long answer may be directed to the judge or jury.

Information that has not been asked should not be volunteered. When answering a question or explaining a position, keep your answers simple and in layman terms. Keep in mind that a judge probably does not have an engineering or construction background. Listening carefully to the questions and insisting on understanding them before answering is extremely important. Take a moment to collect your thoughts before answering if necessary. Always discuss with the attorney representing VDOT how your testimony should be presented. The attorney may have advice that differs from the recommendations in this section.

You have the right to view a written copy if you are being asked to verify a statement that had been previously written or spoken.

When a question is asked requiring a “yes” or “no” answer, it is usually permitted to add an explanation after answering. If a clear “yes” or “no” is not an accurate answer, be sure to clarify.

If an objection is raised, wait until a ruling has been made before answering the question. When being examined by the opposing attorney, you may politely point out if facts are being presented in a slanted manner. If you are asked to answer a hypothetical question, wait for VDOT’s attorney to object. If the attorney does not, explain that this is

a hypothetical answer and explain the assumptions you made. Avoid using words such as “always” and “never.”

You must determine if VDOT’s position is presented better with a simple answer or a detailed explanation. An answer such as “Not that I recall” or “To the best of my knowledge” may be best in some situations, instead of just “yes” or “no”.

If you have exhibits, be well prepared to answer questions or point out pertinent areas.

Depositions are taken outside the court area but are the same weight as if you were testifying in the presence of the judge. You have the right to read and sign the deposition transcript. The same caveats, which apply for court appearances, apply for depositions.

If you have given a deposition or court testimony in a case prior to trial, ask VDOT’s attorney if you may review a transcript of your statements, before the trial.

Communication between witnesses and the attorney is critical to presenting effective testimony. If you have questions, ask them at your earliest opportunity and pursue an answer that makes you comfortable. If you think the attorney needs additional information to fully understand the case, be sure to make your thoughts known.

Remember, it is important to be honest, answer only what is asked, remain in control and stay focused on the main points of the case. If you become confused, don’t answer until you understand what is expected of you. Ask for clarification.

## **SUGGESTION SHEET**

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It is recognized there will be areas in this manual that will need revisions and additions. Please send your suggestions to the Scheduling and Contract Engineer.

Your suggestion for change:

Your reason:

Example:

Thank you for taking the time to assist us in this endeavor.

Scheduling and Contract Division  
12<sup>th</sup> Floor  
Central Office

## **APPENDICES**

**Appendix 1 : Example of Notice of Intent Acknowledgment**

Department Letterhead

Date

Route  
Project  
FHWA #  
City or County

RE: Notice of Intent to File Claim

Contractor's Name  
Address

Dear :

This acknowledges receipt of your letter-dated \_\_\_\_\_, by this office on \_\_\_\_\_, indicating your intent to file Claim.

On the basis of your letter, we understand that your notice of intent to file Claim is for the following:

**DESCRIPTION/SUMMARY**

In accordance with Section 105.16 of the Road and Bridge Specifications, you are required to furnish the Project Inspector with an itemized list of equipment, labor and materials for which additional time or compensation will be requested; provide the Project Inspector every facility for keeping actual cost of the work, and compare records with the Project Inspector and bring them into agreement at the end of each day. Failure on your part to provide the Inspector with access for keeping strict accounts of actual cost will constitute a waiver of the Claim, except as is substantiated by VDOT records.

(This paragraph should be added if notice of intent is vague or does not provide information needed.)

It is necessary that you provide the following information immediately.

**LIST INFORMATION NEEDED**

If VDOT disagrees with the notice of intent, a paragraph should be added disputing the Contractor's notice citing specifications, etc., and stating it is not valid. (See example letter on page A5.)

Acknowledging your Notice of Intent to File Claim and the keeping of cost records shall in no way be construed to establish the validity of the Notice of Intent to File Claim.

Sincerely,

Responsible Charge

Initials

C: District Administrator  
Scheduling and Contract Engineer  
Construction Manager  
Project Inspector  
Assistant Attorney General

## Appendix 2 : Example of Notice of Intent From the Contractor to VDOT

XYZ CONSTRUCTION COMPANY

May 1, 2006

Project : 0000-000-000,C000

Commonwealth of Virginia  
Department of Transportation  
P. O. Box 249  
Derby, Virginia 22110

ATTENTION: Mr. Stone McNut  
Responsible Charge

Dear Sir:

Please be advised of our intent to submit a Claim, per Section 105.16 of the Road and Bridge Specifications, due to stop work order placed on Parcel 005 on November 14, 2005, from Station 244±00, by the Project Inspector. In order to complete the proposed Stage I construction and switch traffic over to start Stage II construction, the noted area must be completed immediately.

Due to stop work order issued on the above noted area, XYZ Construction Company will be submitting Claims for the following:

1. Field Overhead, including, but not limited to, survey crew time, office trailers and supplies, storage trailers, portable sanitary facilities, additional telephone, drinking water, custodial, trash removal and electric service, additional superintendent, foreman, project manager and Construction Project Manager, time, pickups for noted personnel, lease of trailer property; and additional support equipment such as, but not limited to, fuel truck, service truck, low-boy tractor trailer, water truck, pumps, compactors, lasers and generators.
2. Home Office overhead, as determined by the Eichleay Formula.
3. Material and Wage Escalations.
4. Lost productivity due to the revised methods of construction required to excavate, balance the onsite excavations, fine grade, and place stone base and base asphalt within the confined limits of the remaining area.

Please note that we will be asking your field personnel to verify on a daily basis the types of equipment, methods and quantities performed to complete the items of work noted above, per the procedures outlined in the specifications.

Should you be in need of additional information, please contact the undersigned.

Sincerely,

A. B. Cee  
Vice President  
Engineering

### **Appendix 3 : Example of Response from VDOT to Contractor**

Department LETTERHEAD

May 5, 2006

Project 0000-000-000,C000

Mr. A. B. Cee  
XYZ Construction Company  
1 Main Street  
Derby, Virginia 22110

Dear Mr. Cee:

This is to acknowledge receipt of your letter dated May 1, 2006, giving VDOT written notice of your intent to file a Claim on the above referenced project.

Your Claim is for stop work order on Parcel 005 on November 14, 2005, from Station 244±00 by the Project Inspector. The Project Inspector requested Mr. John Smith, Superintendent, not to begin work in this area until he had completed some of the other areas they have started.

Section 301.02 of the Specifications clearly states that, “Unless specifically authorized by the Engineer, the grubbing of root mat and stumps shall be confined to the area over which excavation is to be actively prosecuted within 30 days following the grubbing operation.” With the winter months coming on, I don’t believe XYZ Construction Company will complete the areas already open. There are cleared and grubbed areas from Station 185±00 to 204±00 and from Station 260±00 to 277±00.

Once these above mention areas have been completed through base asphalt, then XYZ Construction Company can work in the areas requested.

Please refer to Section 105.16 of the 2002 Road and Bridge Specifications regarding submission and disposition of Claims.

In the event you have any questions, please do not hesitate to contact this office.

Sincerely,

Jim Jones  
Construction Project Manager

Initials

C: Assistant Attorney General  
District Construction Engineer  
Responsible Charge  
Construction Management Engineer

**Appendix 4 : Example of Claim Acknowledgment for which Notice of Intent was Filed**

Department Letterhead

Date

Contractor's Name  
Address

Route  
Project  
FHWA #  
City or County

RE: Claim

Dear Sir/Gentlemen:

This acknowledges receipt of your Claim dated \_\_\_\_\_, by this office on \_\_\_\_\_, in accordance with Section 105.16 of the Specifications for which a "Notice of Intent" was filed on \_\_\_\_\_.

Your Claim is being processed in accordance with the Specifications and Section 33.2-1101 through 33.2-1105 of the Code of Virginia.

Sincerely,

Responsible Charge

Initials

C: District Administrator  
Construction Management Engineer  
Construction Manager  
Project Inspector  
Assistant Attorney General

**Appendix 5 : Example of Claim Acknowledged – Need More Information**

Department LETTERHEAD

Date

Contractor's Name

Address

Route

Project

FHWA #

City or County

RE: Additional Information Needed Prior to Processing Claim

Dear Sir/Gentlemen:

This acknowledges receipt of your Claim dated \_\_\_\_\_, by this office on \_\_\_\_\_.

Your Claim does not include sufficient information to be processed as submitted. It is necessary that you provide the following information immediately.

**LIST INFORMATION NEEDED**

Sincerely,

Responsible Charge

Initials

- C: District Administrator
- Construction Management Engineer
- Construction Manager
- Project Inspector
- Assistant Attorney General

**Appendix 6 : Example of Final Payment Letter**

Date

**Registered Mail – Receipt Requested**

Mr. Tom T. Anderson  
1 Main Street  
Salem, Virginia 23000

RE: Route 1 Chesterfield County  
Project 0001-000-000, C500

Dear Mr. Anderson:

The District Administrator has furnished you with a copy of the final estimate for the captioned project. The estimate has now been processed by the Scheduling and Contract Division and is being submitted to the Fiscal Division for vouchering. Therefore, the date of your final payment will be \_\_\_\_\_ for the purpose of filing Claims in accordance with Section 105.16 of the Specifications.

Sincerely,

Daniel R. Liston  
Construction Management Engineer

Initials

C District Administrator  
Responsible Charge  
Contract Administration Engineer (Central Office)

NOTE: date to be added will be 28 calendar days after the date of this letter.

**Appendix 7 : CERTIFICATION OF CLAIMS**

**Section 105.16 Submission And Disposition Of Claims** is amended to replace the last sentence of the fifth paragraph with the following:

If the Commissioner deems that all or any portion of a claim is valid, he shall have the authority to negotiate a settlement with the Contractor subject to the provisions of Section 2.2-514 of the Code of Virginia as amended.

And to add the following:

The Contractor shall submit a certification with the notice of claim using the following format:

Pursuant to Virginia Code § 18.2-498.4, I hereby certify that this contract claim submission for Virginia Department of Transportation Project \_\_\_\_\_ in \_\_\_\_\_ County, Virginia is a true and accurate representation of additional costs and/or delays incurred by (name of Contractor) in the performance of the required contract work. Any statements made, and known to be false, shall be considered a violation of the Virginia Governmental Frauds Act, punishable as allowed by the Virginia Code for a Class 6 Felony.

*(Company)*

*By:*

*As officer or duly appointed agent of (Company)*

*Title:*

*Date:*

*State Of:*

*City/County of \_\_\_\_\_, To-Wit:*

*I, the undersigned, a Notary Public in and for the City/ County and State aforesaid, do hereby certify that \_\_\_\_\_, whose name is signed to the foregoing instrument, bearing date of the \_\_\_\_\_ day of \_\_\_\_\_, 200\_, has this day acknowledged the same before me in my City/ County and State aforesaid.*

*Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_, 200\_.*

*Notary Public:*

*My commission expires:*

Claims submitted during the statutory period for submitting contract claims and submitted without the certification described above shall be returned to the Contractor. The Contractor shall be informed in writing that the submission was incomplete.

10-29-04c (SPCN)