Montana Department of Transportation	Date Issued: June17, 2021
	Date Effective: June 17, 2021
CONSTRUCTION MEMO	Related Specifications: 105.16
Subject: Construction Claims Process Update	

To: Distribution

From: Jake Goettle, P.E.
Construction Engineer

This memo rescinds and replaces the previous Construction Memos on this subject.

The intent of this Construction Memo is to explain the claims process, claims specification and our dispute resolution processes.

- Emphasis on the resolution of issues at the earliest stage possible.
- Discuss how the Partnering Process and Claims Process supplement each other.
- Define when the Partnering Process ends and the Claim Process begins.

MDT's Construction Dispute Resolution Processes:

An effective construction dispute resolution process is one which provides for the quick, cost-effective and fair resolution of disagreements between parties, and has a procedure that allows the issue to be elevated timely. This process means that it should provide timelines by which the parties are to outline the points of the dispute (including the responses to them). It should also describe the method the parties will use to resolve the conflict.

Our dispute resolution process begins in the field with our inspectors. Inspectors are constantly dealing with issues and problems with the contractor and they usually resolve the issue(s). The inspector will keep their EPM involved and elevate issues or problems to them as needed. The goal is to empower our field staff to make the necessary decisions on a project. Our dispute resolution process includes the Partnering Process and the Claims Process.

Attached is the current Claims Process flow chart.

Tools & Resources in Dispute Resolutions:

- Know your contract, special provisions and specifications
- Use your resources
    - CES Construction Reviewers
    - Claims Avoidance Teams
    - Claim Assistance Teams
    - Legal Staff
    - Subject specific experts & technical experts

The following are excerpts from the Claims specification, and commentary on those excerpts:

105.16.1 paragraph #1: "…disagreements that are to be the subject of a claim":

It is recognized that problems arise on projects routinely, and through the efforts of the MDT Project crew and the contractor these issues are usually resolved at the project level before they rise to the level of disagreement. When a problem is unresolved it becomes a disagreement and the written notice is to occur. The Project Manager is to continue to seek resolution after the written notice and has the responsibility of responding in writing to the written notice within 14 calendar days.

105.16.1 paragraph #1: "Attach to the notice of claim all documentation showing the history of the disagreement."

A primary intent of the claim process is to bring other Department resources into the process early so they may assist in mitigating the issue and the timely resolution and processing of claims. This documentation is intended to help those not involved on the project, on a daily basis, to understand the progression of a problem into a disagreement. It also documents that all parties followed contractual timeframes.

105.16.1 paragraph #3: "Failure to timely provide the written notice as required waives the Contractor's right to make any claim for the disagreement."

The written notice of a claim should not be the first step of a problem resolution. It is the point that a problem has escalated to a disagreement. The project crew and contractor are expected to work together to inform each other of problems and work towards solutions before it reaches the point of written notice of claim. If the project crew is not notified of a problem or issue in a timely manner the department does not have a chance to mitigate costs or resolve the issue in a manner that may be the most beneficial to all parties. The stage of issue resolution where evaluation, research, cost/benefit analysis and decision making is conducted is essential. See the below discussion on how the Partnering Process is included in the issue resolution process.

105.16.2 Submission of Certified Claims paragraph #1: "If an agreeable resolution is not reached within 14 calendar days of the written notice, the Contractor may submit a Certified Claim using the Certified Claim form MDT-CON-105-16-2 to the Project Manager…"

When a disagreement reaches a point of impasse the Certified Claim process begins to resolve the dispute.

105.16.2 paragraph #8: "Do not change the basis of a claim after submitting the written notice. Do not supplement a faulty submission to rebut or dispute a decision made by the Project Manager. Claims that have changed in basis or that have been supplemented due to an original faulty submission will not be considered, and are waived by the Contractor."

If the basis of the claim changes, a new certified claim must be submitted because it is in fact a different claim. This paragraph is intended to assure the Department has timely notification of a problem and has the opportunity to conduct an investigation to determine the best course of action and is working to resolve the actual issue. This is also to address an unclear, ambiguous or faulty written notice or Certified Claim being submitted, followed by a new written notice or Certified Claim that supplements the original submission with the intent of bypassing the specified timelines.

Claim Process Timeline Requirements:

The Claim's Process timelines can be modified by agreement of both parties in writing. If a disagreement is being worked on in the Partnering Process Issue Resolution Ladder and towards the end of the 11 days, the parties realize they still disagree, at that time the Contractor can inform MDT that they need additional days (I.e. 5 days) to submit their notice of claim instead of 3 days. The parties can agree to the extension at that time and put it in writing.

Construction Change Directive (CCD):

It is recognized in the highway construction industry that unexpected circumstances will arise during construction that will merit contractual relief and can be characterized as either "changes" or "extras".

This may result in a change of work type or amount which may ultimately impact the construction cost and/or schedule. In some cases, there may be a disagreement for the additional costs or contract time amount. To facilitate the timely completion of the work, the Owner (thru the EPM) may issue a Construction Change Directive (CCD) to pay the contractor a justified amount of money and/or time (equitable adjustment). The CCD is used to document and process this equitable adjustment.

If the contractor disagrees with the price for this additional/extra/changed work or is not timely in providing cost and/or schedule proposals for the change(s), the EPM may produce their own cost and/or schedule. The CCD is the mechanism to be proactive in processing these changes timely and is based on a fair and equitable adjustment to allow the work to continue and to pay the contractor an amount that can be justified.

When requested by the contractor, the EPM is to provide a copy of their cost breakdown.

If this disagreement cannot be resolved, the contractor may use the Partnering Processes Issue Resolution Ladder and the Claims Process. The positive result is the EPM paid a reasonable amount for a merited change based on an independent cost estimate of the proposed or completed changed work instead of paying nothing and this keeps the project moving to completion.

The CCD equitably adjusts the contract based on the EPMs analysis. The EPM is issuing a written change (CCD) to the contract that modifies the contract provisions, payment, time, or some combination in a situation where the contractor does not agree with the decision. The CCD

prevents the contractor from being damaged by not providing payment or time adjustments for a known contract change, protects the contractor's rights to disagree with the order and submit a claim in accordance with 105.16 and prevents MDT from being bound to damages and interest payments for late payment if the CCD is not issued.

The CCD also helps to manage the working relationship between the Project Manager and the contractor by accepting responsibility for changes outside the original contract.

In the event a claim is submitted per specification 105.16 after a CCD is issued, the basis of the claim should be that the CCD does not fully compensate the contractor for the entire impact of the change. This is a much better position to be in for MDT and the contractor rather than not issuing a CCD and not paying the contractor for directed work.

Furthermore, a CCD is a tool in the toolbox that helps make construction continue in a timely fashion when there is need for a contract change but a disagreement on cost or time impacts.

Partnering:

The updated Partnering Guide is on the internet and can be found at the following link:

https://www.mdt.mt.gov/other/webdata/external/const/manuals_guidelines/Montana_Partnering_Field_Guide.pdf

Following are excerpts from Chapter 3 of the Partnering Guide

What is a Dispute?
"When a disagreement continues for a given period of time without any movement toward solution, the two parties are at an impasse. Any party involved in the issue can tell the other party(s) that they feel that the issue has become a dispute and escalate the issue. Basically, this is an agreement to "agree to disagree." "

The issue is escalated to the Partnering Issue Resolution Ladder.

"It is the responsibility of upper management to ensure that a field team can safely and honestly work to resolve problems, and to encourage them to elevate the issue to the next level if they are unable to resolve it themselves. A meeting should be held each time an issue is elevated to the next higher level and continue through the process until the issue is resolved."

As the Partnering Issue Resolution Ladder is used, it is important that it is communicated to all parties involved in the Ladder what the results are. This needs to be documented in writing by a letter or email.

Escalation of an Issue
"One of the cornerstones of Partnering is the issue resolution ladder… The issue resolution ladder is designed to keep both parties from reaching an impasse."

Usually when the problem/disagreement reaches an impasse, the notice of claim is submitted. *"Each party to a dispute needs to understand the other side's position, and to understand it well enough that they can explain it to the other's satisfaction. The process starts at the lowest level possible for each organization and proceeds up through each side of the hierarchy until the issue is resolved."*

Being able to discuss issues, problems, disagreements and disputes professionally with each other allows us to see the other persons view and potentially come up with a resolution.

It is important to remember that escalating an issue is not a failure!
"Escalation to the next level in the issue resolution ladder should be done in a separate, face-to-face (when possible) meeting. All individuals involved in the issue should sit down with the individuals at the next level of the escalation ladder and discuss the issue."

"Any levels that have previously escalated the issue must be kept informed of the progress of the resolution and the reasoning behind any decisions made. It is important that any resolutions that have been made are communicated down to the previous levels, including the reasons behind the decisions…"

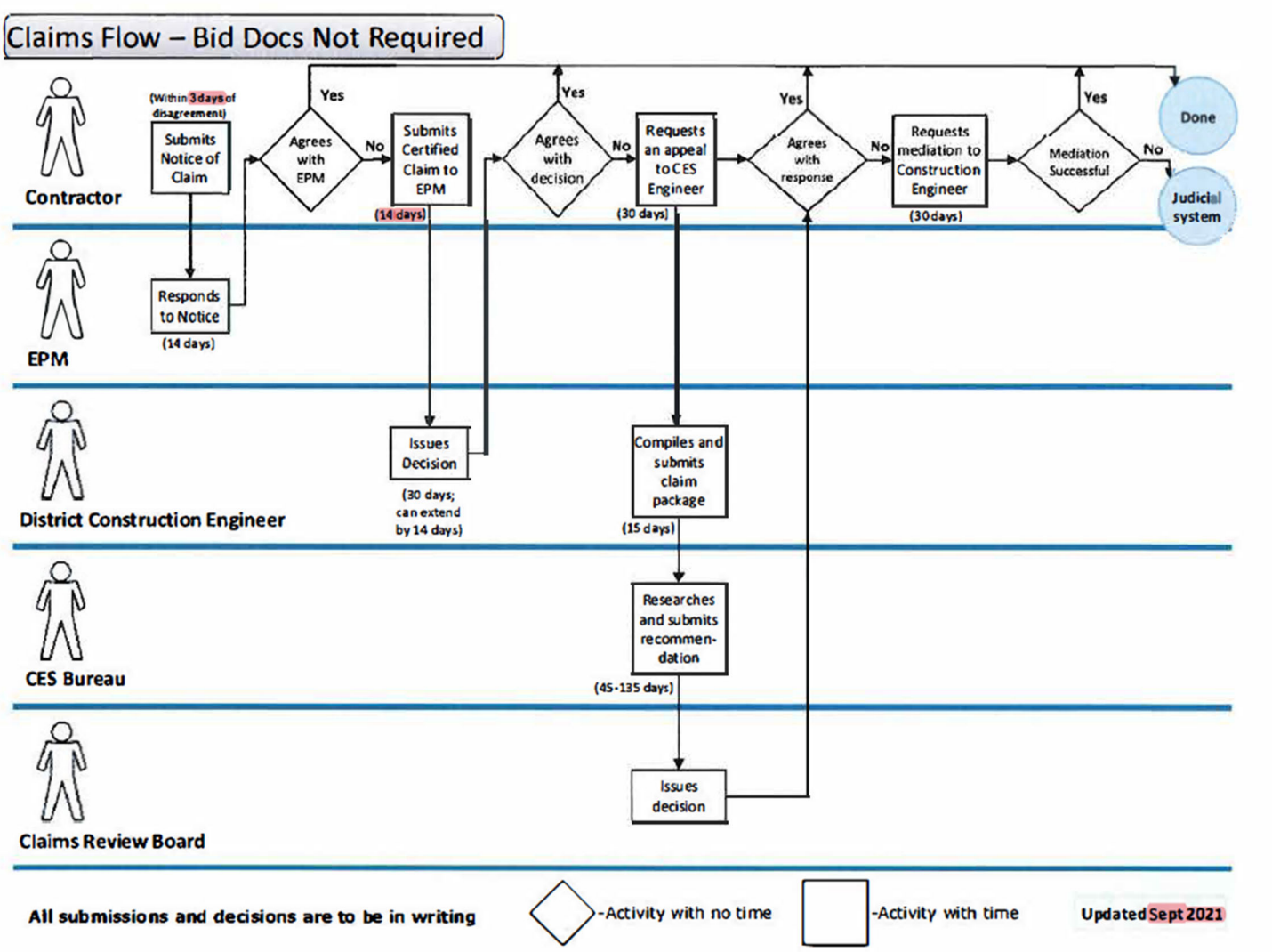
"If the issue is elevated to the top of the ladder without resolution, you may choose to submit a notice of claim…"

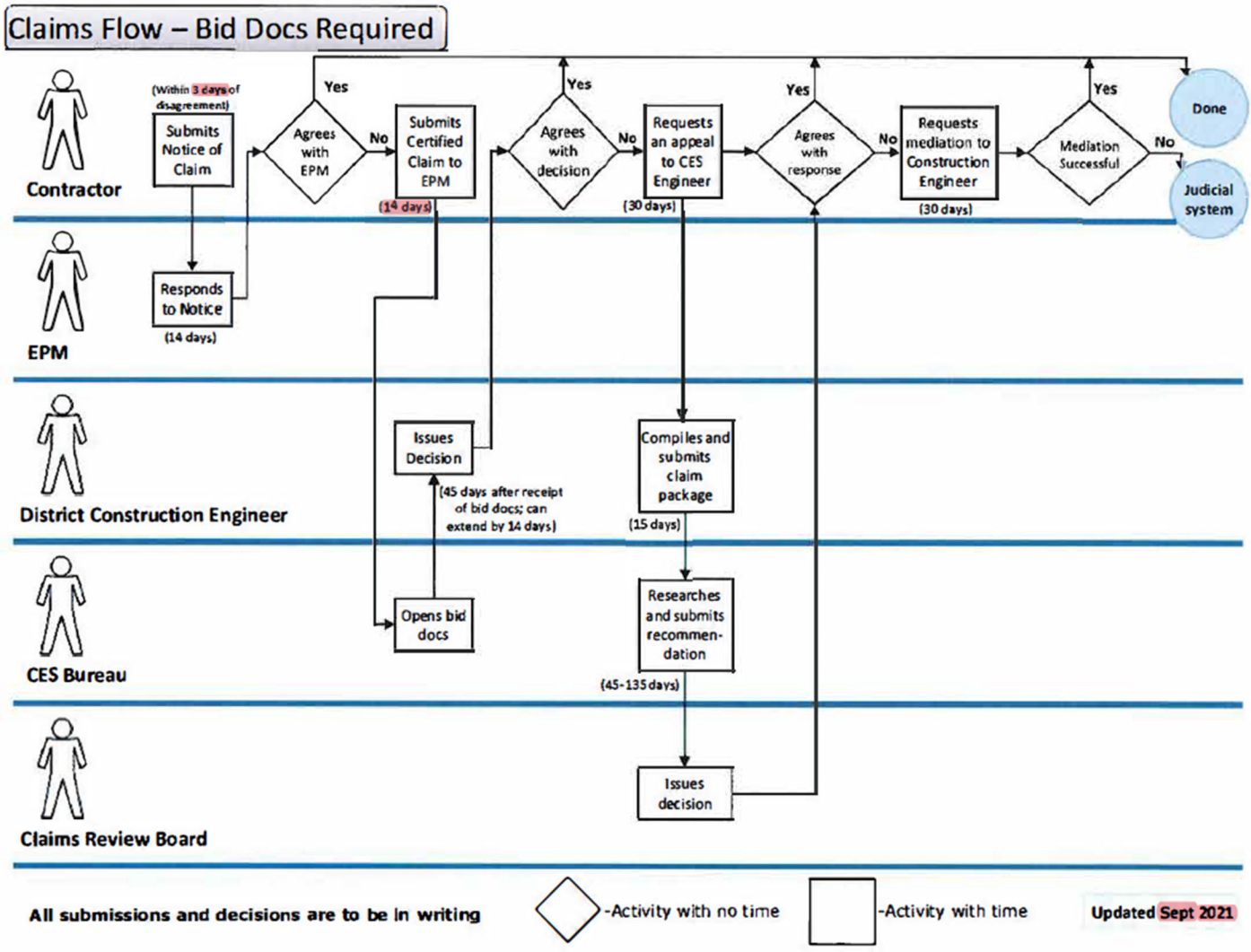
So, to answer the question, "When does the Partnering Process end and the claim process start?"

- When a problem is unresolved and becomes a disagreement, we have 11 days to resolve it using the Partnering Process. If it is not resolved in this timeframe we have reached an impasse and it becomes a dispute and the notice of claim is to be submitted to continue through the Claims Process (the contract's dispute resolution process).
    - The exception is when both parties agree in writing to extend a time frame due to gather additional information, a holiday, etc.

What happens if the contractor decides to by-pass the Formal Partnering Process and goes straight into the Claim Process, i.e. they submit a Notice of Claim without using the Partnering Issue Resolution Ladder?

- If this happens then they are not following the Partnering Agreement which is a part of their contract requirements


Claims Flow – Bid Docs Not Required
Contractor
(Within 3 days of disagreement)
Submits Notice of Claim
Agrees with EPM
Yes
No
Submits Certified Claim to EPM
(14 days)
Agrees with decision
Yes
No
Requests an appeal to CES Engineer
(30 days)
Agrees with response
Yes
No
Requests mediation to Construction Engineer
(30 days)
Mediation Successful
Yes
No
Done
Judicial system
EPM
Responds to Notice
(14 days)
District Construction Engineer
Issues Decision
(30 days; can extend by 14 days)
Compiles and submits claim package
(15 days)
CES Bureau
Researches and submits recommen-dation
(45-135 days)
Claims Review Board
Issues decision
All submissions and decisions are to be in writing
-Activity with no time
-Activity with time
Updated Sept 2021


Claims Flow – Bid Docs Required
Contractor
(Within 3 days of disagreement)
Submits Notice of Claim
Agrees with EPM
Yes
No
Submits Certified Claim to EPM
(14 days)
Agrees with decision
Yes
No
Requests an appeal to CES Engineer
(30 days)
Agrees with response
Yes
No
Requests mediation to Construction Engineer
(30 days)
Mediation Successful
Yes
No
Done
Judicial system
EPM
Responds to Notice
(14 days)
District Construction Engineer
Issues Decision
(45 days after receipt of bid docs; can extend by 14 days)
Compiles and submits claim package
(15 days)
CES Bureau
Opens bid docs
Researches and submits recommen-dation
(45-135 days)
Claims Review Board
Issues decision
All submissions and decisions are to be in writing
-Activity with no time
-Activity with time
Updated Sept 2021