



CLAIMS AGAINST THE TEXAS DEPARTMENT OF TRANSPORTATION

Until the case of *State v. Mid-South Pavers*, 246 S.W.3d 711 (Tex. App. – Austin 2007, pet. denied) (*Mid-South*), the Texas Department of Transportation (“TxDOT”) believed it was immune from having to pay interest and attorneys’ fees as allowed by the Prompt Payment Act (*TEX. GOV’T CODE* §2251.043). Many times that belief placed TxDOT in a position of not offering reasonable settlement amounts to contractors. A contractor then had to consider spending thousands of dollars and endure the lengthy claim process without much hope of recovering interest or attorneys’ fees. That appears to have changed under *Mid-South*.

While *Mid-South* has significantly helped the contractor, the claim process is still fraught with difficulty. If a potential claim is recognized the contractor should consider involving an attorney. At each step of the process there may be opportunities for the attorney to assist a

successful resolution and help to avoid many pitfalls.

One of the most common problems contractors face is signing the “*standard*” TxDOT change order. The TxDOT form waives any further claims associated with the impact if the contractor accepts the change order. A second problem is failing to give “*timely*” notice to TxDOT of potential claims. The Texas Standard Specifications, Section 4.4., requires that a contractor provide timely notice to TxDOT of potential claims or impacts. Failure to provide the required notice allows TxDOT to argue that the impact was waived. In either case, if the impact is waived, the contractor loses its claim. Contractors should review their project at least twice a month for potential impacts. This helps the contractor recognize a potential claim but also assists in resolving problems before they escalate.

A contractor should have a carefully prepared project schedule that it is reasonable and buildable and the contractor must manage and maintain that project schedule. It is imperative that the schedule be updated at least monthly and impact events be inserted into the schedule to place TxDOT on notice of impacts to the critical path. Keep in mind that the submitted and accepted baseline project schedule and *NOT* the original contract completion date is the basis for assessing delays.

The success or failure of the claim is largely dependent on the quality and completeness of the claim. The sooner the contractor places TxDOT on notice and begins to gather its information and engage its experts, the better chance the contractor will have.

A contractor should file an Open Records Request to acquire TxDOT's documents that apply to the claims that the contractor will submit. It is generally thought best to prepare the Open Records Request as issues arise, but wait to file them after the contractor receives final acceptance of the Project by TxDOT.

Again, *notice* of the claim must be given as soon as possible, otherwise TxDOT will argue that the claim is waived; however, the actual claim does not have to be submitted immediately. A claim must be submitted no later than one year following the earlier of:

- (1) Notice of default or termination of the contract; or
- (2) TxDOT issues final acceptance of the project.

Claims may be submitted to:

- (1) the Engineer of the District/Division in charge of the Project; or
- (2) Construction Divisions Claims Section in Austin; or
- (3) directly to the Contract claims Committee.

Most of the time, the claims should be submitted to the District/Division first. Many Districts are likely to resolve a claim at the District level.

Once a claim is submitted there is no specified time frame for TxDOT to

process the claim. Think of time in terms of months not days.

At all times during the process, take the time to prepare quality responses to TxDOT and provide supporting documentation. This includes utilizing outside information and experts to support the claim.

Claims available to contractors include the following:

- (1) Extra work;
- (2) Reduced work;
- (3) Acceleration;
- (4) Delay/Suspension; and
- (5) Inefficiency/Productivity Impacts.

“Extra Work” is defined as is an increase in work. If it is not major, the appropriate damage is the current price of the item times the number of additional units. If the increase is major, there is an opportunity for the contractor to negotiate a price. Extra Work often includes erosion control such as silt fence and seeding, and errors in the plan quantities.

“Reduced Work” is a reduction or underrun of twenty-five percent (25%) which allows negotiation with TxDOT.

“Acceleration” occurs when a contractor is forced to complete work in less time than planned based upon the approved project baseline project schedule.

If the contractor has unplanned overtime, shift work, increased crew sizes or changes of sequence, it should be thinking in terms of acceleration. There is also a “constructive acceleration” argument, but again, placing TxDOT on notice of the acceleration is important.

Many TxDOT projects contain constructive acceleration claims that go unaddressed because the parties don’t recognize that a constructive acceleration has even occurred. This raises the question as to what constitutes “an order to accelerate.” An expression of concern about progress [by TxDOT], combined with a refusal to issue extensions, can be the equivalent of an order to accelerate. The Court of Claims has held that denial of time extensions when the contract called for the assessment of substantial liquidated

damages was tantamount to an acceleration order. An acceleration order was found when the contracting officer denied sufficient time extensions to cover the excusable delays and the contract contained substantial liquidated damages. An order to accelerate, to be effective, need not be couched in terms of a specific command. A request to accelerate, or even an expression of concern about lagging progress, may have the same effect as an order.

The types of delays most important to the contractor are excusable/compensable and excusable/non-compensable. Non-compensable delays, such as weather days, entitle the contractor to an extension of time by not money for overhead and other costs. Compensable delays entitle the contractor to overhead and costs. Constructive suspensions are quiet common on highway projects and go missed by most contractors in their analysis of potential claims. However, keep in mind that we must rely on Federal case law to provide guidance regarding constructive suspensions of work.

“Inefficiency” and “unproductivity” may result from acceleration, delay, extra work or interference by TxDOT. All of these may be involved singularly or in combination, entitling the contractor to submit a claim.

The claims process is complicated. At least now, because of the *Mid-South* case, the contractor has the opportunity to recover the original claim plus attorneys’ fees and interest against TxDOT. *TEX. GOV’T. CODE* § 2251.043; *State of Texas v. Mid-South Pavers, Inc.*, 246 S.W.3d 711 (Austin 2008).

NOTE: CREDIT FOR THIS INFORMATION GOES TO BRIAN K. CARROLL OF SANDERFORD & CARROLL, P.C. FROM HIS ARTICLE IN THE 24TH ANNUAL CONSTRUCTION BAR CONFERENCE.

THIS INFORMATION IS MEANT TO GENERALLY BRING YOUR ATTENTION TO THE CLAIM PROCESS WITH TxDOT. EACH SET OF FACTS MUST BE ADDRESSED ON ITS OWN. YOU ARE ADVISED TO SEEK LEGAL COUNSEL IN A CLAIM PROCESS.