

**ADDENDUM TO THE
CITY OF AKRON
AKRON ENGINEERING BUREAU
CONSTRUCTION AND MATERIAL SPECIFICATIONS
2008 EDITION**

105 CONTROL OF WORK

The following paragraphs replace CMS General Provisions 105.18.

105.18 Claims for Adjustments and Disputes

Filing of Claims. The ENGINEER shall be notified in writing of all Claims arising under the Contract or its interpretation; Work directed to be performed by the ENGINEER which the CONTRACTOR considers to be extra Work; differing site conditions; Claims for an extension of time; and all Claims over alleged breach of Contract, within ten (10) calendar days of the occurrence giving rise to the Claim or within ten (10) calendar days after the CONTRACTOR first recognizes or discovers the condition giving rise thereto, whichever is later. The CONTRACTOR shall use its best efforts cooperate with the ENGINEER to mitigate any alleged consequences arising out of such condition. Such Notice need not detail the dollar amount of the Claim, but shall state the date on which the Claim purportedly arose and the facts surrounding the Claim in sufficient detail and with reference to the applicable Contract requirements to identify the Claim together with its character and scope. The CONTRACTOR shall not be entitled to, and hereby expressly waives, any Claim resulting from any condition or cause unless said Claim is made and supported, in writing, to the ENGINEER within the time periods specified herein.

Prior Notice to the ENGINEER by the CONTRACTOR is not required for Claims relating to an emergency endangering life or property. CONTRACTOR shall act at the CONTRACTOR's discretion to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the CONTRACTOR on account of an emergency shall be determined as provided in 109 Acceptance, Measurement and Payment, and 108 Prosecution and Progress, if necessary.

Unless otherwise agreed upon with the ENGINEER in writing, filing of a Claim will not delay performance of a change in the Work or the Work itself. CONTRACTOR shall continue to proceed diligently with performance of the Contract as directed, and the City shall continue to make payments in accordance with the Contract Documents.

The CONTRACTOR shall submit in detail to the ENGINEER its Claim and its proof thereof, including its purported justification and supporting evidence for entitlement, as soon as possible after providing the above Notice, but not later than thirty (30) calendar days after said Notice has been provided or emergency occurred. The responsibility to substantiate Claims shall rest with the CONTRACTOR. The ENGINEER may extend this time upon written request for extension by the CONTRACTOR. If the Claim is seeking an extension of time, it shall include all the documentation required by 108 Prosecution and Progress. In the case of continuing delay, only one Claim is necessary. If the Claim is seeking an increase in the Contract Sum, it shall include all of the documentation required by 109 Prosecution and Progress. If the Claim is due to Differing Site Conditions, it shall be made in conformance with the requirements of that section herein.

To the fullest extent allowed under law, CONTRACTOR waives claims for consequential damages arising out of or relating to this Contract. This waiver includes damages incurred by the CONTRACTOR for principal office expenses, including the compensation of personnel stationed there; for losses of financing, business and reputation; and for loss of profit, except anticipated profit arising directly from the Work. This waiver is applicable, without limitation, to all consequential damages due to termination in accordance with 108 Prosecution and Progress. Nothing contained herein, shall be deemed to preclude an assessment against the Contractor of liquidated damages and stipulated penalties, when applicable, in accordance with the requirements of the Contract Documents.

No Claim for an adjustment or any kind under 105.18 Claims for Adjustment or Disputes, or any other portion of the Contract Documents, including, but not limited to 104 Scope of Work, or 108 Prosecution and Progress, shall be allowed if asserted after Sub-Final Payment under this Contract or if the CONTRACTOR fails to comply with any provisions of 105.18 Claims for Adjustment or Disputes.

Initial Decision. The ENGINEER will take one or more of the following actions in writing within thirty (30) days after receipt of the last submittal of the CONTRACTOR:

1. Recommend denial of the Claim in whole or in part.
2. Recommend approval of the Claim in whole or part.
3. Notify the CONTRACTOR and City that the ENGINEER is unable to resolve the Claim if, in the ENGINEER's sole discretion, it would be inappropriate for the ENGINEER to do so. For purposes of further resolution of the Claim, such Notice shall be deemed a denial.

In evaluating Claims, the ENGINEER may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the ENGINEER in rendering a decision. The ENGINEER may request the City to authorize retention of such persons at the City's expense.

If the ENGINEER requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten (10) calendar days after receipt of such request, and shall either:

1. Provide a response on the requested supporting data.
2. Advise the ENGINEER when the response or supporting data will be furnished.
3. Advise the ENGINEER that no supporting data will be furnished.

Upon receipt of the response or supporting data, if any, the ENGINEER will take one or more of the actions provided under Initial Decision above.

The ENGINEER will respond to the Claim with an Initial Decision and accompanying documentation, in writing, within thirty (30) calendar days of receipt, and said response will be provided to the City and CONTRACTOR with any change in the Contract Sum and/or Contract Time. This Initial Decision (Decision) will constitute the official determination of the Claim and be final and binding on the parties, unless:

1. The CONTRACTOR requests reconsideration within ten (10) calendar days of receipt of the ENGINEER's Initial Decision. Said request for reconsideration will be sent to the ENGINEER. The ENGINEER will respond to the request for reconsideration within thirty (30) calendar days of receipt, and said response will again be provided to the City and CONTRACTOR.
2. The Claim is subject to Mediation.

If the CONTRACTOR does not agree with the Initial Decision of the ENGINEER, it shall in no case allow the dispute to delay the Work but shall notify the City within ten (10) calendar days after receipt of said Decision that it is proceeding with the Work under protest. Unless the CONTRACTOR files written protest within ten (10) days, it shall be deemed to have waived all grounds for further protest of such Decision and all Claims for additional compensation or damages occasioned thereby, and shall further be deemed to have accepted such Decision as being fair, reasonable and finally determinative of its obligations and rights under the Contract.

An Initial Decision shall be required as a condition precedent to Mediation of any Claim arising, prior to the date Final Payment is due, unless thirty (30) calendar days have passed after the Claim has been referred to the ENGINEER with no decision having been rendered.

Unless the ENGINEER and all affected parties agree, the ENGINEER will not decide disputes between the CONTRACTOR and persons or entities other than the City.

The intent of this Section is to provide a fair and expeditious method of resolving disputes and Claims arising pursuant to this Contract and the parties' interpretation thereof. Consequently, the time limitations established in this Section are for the benefit and protection of all parties under this Contract and will be strictly applied.

No Claim by the CONTRACTOR pursuant to this Section will be allowed if made after Final Payment under this Contract.

In the event of a Claim against the CONTRACTOR, the City may, but is not obligated to, notify the Surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a CONTRACTOR's default, the City may, but is not obligated to, notify the Surety and request the Surety's assistance in resolving the Claim.

If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien Notice or filing deadlines.

Mediation. Either party may request in writing that the other party participate in non-binding mediation with respect of an Initial Decision within 30 days of that Initial Decision. The other party, in its sole discretion, will respond to the request within 14 days of receipt. If no response is made the request will be deemed denied.

Unless the parties agree otherwise, mediation shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Proceedings in effect on the date of the Agreement.

The parties shall share the mediator's fee and any filing fees equally. The Mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in Mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Compensation for Claims. If the ENGINEER and/or the City determine that additional time is warranted pursuant to a Claim made pursuant to this section, the amount of such additional time will be calculated pursuant to 108 Prosecution and Progress. If the ENGINEER and/or the City determine that an increase or decrease in the Contract Sum is warranted, then the amount of such increase or decrease will be calculated pursuant to 109 Acceptance, Measurement and Payment.

Delay of Work. If the performance of all or any part of the Work is, for a period of time, suspended or stopped by an act of the ENGINEER in the administration of the Contract or act of the City, a Claim may be made for an increase in the actual time required for performance of the Work by the CONTRACTOR, due solely to the portion of such suspension or stoppage. Compensation for Claims includes any delay in issuing the Notice to Proceed or for delays that occur prior to the initiation of the Project and all Claims for an extension of time associated with these delays shall be made in conformance with the requirements of 108 Prosecution and Progress, and 105.18 Claims for Adjustment or Disputes. No adjustment to the Contract Time will be made to the extent that performance is, was or would have been so suspended by another cause for which the CONTRACTOR is responsible or to the extent that such extension of time is made or denied under another provision of the Contract.

In the event that the CONTRACTOR Claims additional costs associated with delay of Work as defined in Compensation for Claims above, recovery of such costs will be limited as set forth in 109 Acceptance, Measurement and Payment, and 105.18 Claims for Adjustment or Disputes. CONTRACTOR shall use its best effort to mitigate any costs associated with any recoverable suspension of time and expressly waives its right to Claim any direct costs that could have reasonably been mitigated.

Differing Site Conditions. If CONTRACTOR believes that any subsurface or physical condition at or contiguous to the Project Site either:

1. Differs materially from that shown or indicated in the Contract Documents; or
2. Is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract Documents;

then CONTRACTOR shall, within forty-eight (48) hours after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by 107 Legal Relations and Responsibility to the Public), notify ENGINEER in writing about such condition. CONTRACTOR shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

Upon Notice from CONTRACTOR of an alleged differing site condition, ENGINEER shall within forty-eight (48) hours cause an investigation of the conditions and if the conditions are found to be materially different and cause an increase or decrease in the cost or the time required for performance of the Contract an adjustment, as described below.

Possible Price and Times Adjustments

If CONTRACTOR believes that the differing site condition will cause an increase in the cost of the Project or the amount of time needed to complete the Project, CONTRACTOR shall file a Claim consistent with the provisions of 105.18 Claims for Adjustment or Disputes. The Contract Sum and/or Contract Time will be adjusted to the extent that the existence of such differing subsurface or physical condition causes an increase in CONTRACTOR's cost of or time required for performance of the Work. The amount of such adjustment will be consistent with the requirements of 105.18 Claims for Adjustment or Disputes and 109 Acceptance, Measurement and Payment.

No Claim of the CONTRACTOR under this provision will be allowed unless the CONTRACTOR has given the written Notice and provided the supporting data required in 105.18 Claims for Adjustment or Disputes.

END OF SECTION