

DB Section 199 - Disagreements, Protests, and Claims

DB199.00 General - This Section details the process through which the Parties agree to resolve any disagreement concerning additional compensation or concerning a combination of compensation and Contract Time. These provisions do not apply to disagreements concerning only Contract Time or return of liquidated damages. Agency will not consider direct disagreements, protests, or claims from Subcontractors, Materials suppliers, or any other Entity not a party to the Contract.

DB199.10 Procedure for Resolving Disagreements - When disagreements occur, Design-Builder shall first pursue resolution through Agency of all issues in the protest, including, without limitation, the items to be included in the written notice required herein. If the discussion fails to provide satisfactory resolution of the disagreement, Design-Builder shall follow the protest procedures outlined in below. If Agency denies all or part of Design-Builder's protest, and Design-Builder desires to further pursue the issues, Design-Builder must submit a claim for processing according to the claims procedures set out below.

DB199.20 Protest Procedure - If Design-Builder disagrees with anything required in a Change Order or other written or oral order from Agency, including any direction, instruction, interpretation, or determination that, in Design-Builder's opinion, entitles or would entitle Design-Builder to additional compensation, Design-Builder shall do all of the following in order to pursue a protest and preserve its claim:

(a) Oral Notice - Design-Builder shall give oral notice of protest to Agency and outline the areas of disagreement before starting or continuing the protested Work.

(b) Written Notice - Design-Builder shall file a proper written notice of protest with Agency within seven (7) Calendar Days after receiving the protested order. In the notice, Design-Builder shall:

- Describe the acts or omissions of Agency or its agents that allegedly caused, or may cause, damage to Design-Builder, citing specific facts, persons, dates, and Work involved.
- Describe the nature of the damages.
- Cite the specific Contract provision(s) that support the protest.
- Include the estimated dollar cost, if any, of the protested Work, together with a list of estimated Materials, Equipment, and labor for which Design-Builder might request additional compensation.
- If additional compensation is estimated to be due, the estimated amount of additional Contract Time required, if any.

Failure to timely file written notice or to include in the notice all of the required information renders the notice improper, and Agency will have no responsibility for evaluating the protest.

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(c) Records - Design-Builder shall keep complete records of all costs and time incurred throughout the protested Work, and allow Agency access to those and other supporting records. Design-Builder shall provide daily records of protested Work, on a weekly basis, on a schedule to be set by agreement with Agency.

(d) Comparison of Records - Design-Builder shall provide Agency adequate facilities for keeping cost and time records of the protested Work. Design-Builder and Agency will compare records and either bring them into agreement at the end of each day, or record and attempt to explain any differences.

(e) Work to Proceed - In spite of any protest, Design-Builder shall proceed promptly with the Work ordered by Agency.

(f) Evaluation of Protest - Agency has no responsibility for evaluating a protest that is not timely filed, or for which adequate supporting documentation has not been kept. Provided the procedures above are followed, Agency will promptly evaluate all protests and, if the protest is denied, advise Design-Builder in writing of the reasons for full or partial denial. If a protest is found to be valid, Agency will, within a reasonable time, make an equitable adjustment of the Contract. Adjustment of Contract Time will be evaluated according to **DB General Provisions**, Subsection 180.80.

DB199.30 Claims Procedures

(a) General - If Design-Builder believes that additional compensation is due, and has complied with, pursued, and exhausted all the foregoing procedures to resolve a disagreement and protest, Design-Builder may file a claim.

Agency's Contract is with Design-Builder. There is no contractual relationship between Agency and any Subcontractor. It is Design-Builder's responsibility to fully analyze any Subcontractor claim before presenting it to Agency. In addition, when a claim includes Work done or costs incurred by a Subcontractor, Materials supplier, or any Entity other than Design-Builder, Design-Builder remains solely responsible for presenting the claim to Agency.

Claims that include Work done or costs incurred by any Entity other than Design-Builder will not be considered by Agency unless Design-Builder has:

- Completed and provided its own written analysis and evaluation of the claim
- Verified by its own independent review and analysis the amount of compensation sought

(b) Claims Requirements - At any time during the progress of the Work, but not later than 15 Calendar Days following the date of Final Second Notification, Design-Builder shall submit to Agency claims for compensation additional to that specified in the Contract. For a claim not submitted within the 15 Calendar-Day limit, that has not met the requirements of Subsection 199.20, or is not filed as provided in Subsection 199.30, Design-Builder waives any claim for additional compensation or for a combination of additional compensation and Contract Time, and Agency may reject the claim.

To be considered, claims for compensation shall be completed according to Subsection 199.30 and shall be submitted with the information and in the format and labeled as required below for each claimed issue:

(1) Executive Summary (pages ES-1 through ES-?), e.g. (pages ES-1 through ES-5). In the Executive Summary include a detailed factual statement of the claim for additional compensation and Contract Time, if any, with necessary dates and locations of Work involved in the claim, the dates of when the event arose and when notice was given to Agency. Also include detailed facts supporting Design-Builder's position relative to Agency's decision (see Subsection 199.20(f));

(2) Copies of the Specifications that support Design-Builder's claim (pages Spec-1 through Spec-?).

(3) Theory of entitlement (pages TOE-1 through TOE-?). Include a narrative of how or why the specific Specifications support the claim and a statement of the reasons why such Specifications support the claim;

(4) Itemized list of claimed amounts (pages CDA-1 through CDA-?). Claimed damages that resulted from the event with a narrative of the theories and documents used to arrive at the value of the damages.;

(5) Contract Time Aspect (pages CTA-1 through CTA-?). If Contract Time is included in the claim, submit a copy of the schedule that was in effect when the event occurred and a detailed narrative which explains how the event impacted Contract Time. In addition, if an Agency-caused delay is claimed, the following information shall be included:

- The specific days and dates under claim
- Detailed facts about the specific acts or omissions of Agency that allegedly caused the delay, and the specific reasons why the resulting delay was unreasonable
- A schedule analysis that accurately describes the impacts of the claimed delay

(6) Copies of actual expense records (pages EXP-1 through EXP-?). Include documents that contain the detailed records and which support and total to the exact amount of additional compensation sought. Include the information and calculations necessary to support that amount. The amount may be calculated on the basis of Force Account Work, if applicable, or may be calculated using direct and indirect costs presented in the following categories:

- Direct Materials
- Direct Equipment. The rate claimed for each piece of Equipment shall not exceed the actual cost. In the absence of actual Equipment costs, the Equipment rates shall not exceed 75% of those calculated under the provisions of **DB General Provisions**, Subsection 197.20. For each piece of Equipment, Design-Builder shall include a detailed description of the Equipment and attachments, specific days and dates of use or standby, and specific hours of use or standby
- Direct labor
- Job overhead

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- General and administrative overhead
- Other categories specified by Design-Builder, or by Agency

(7) Copies of, or excerpts from, any documents that support the claim, such as manuals standard to the industry and used by Design-Builder, other than Agency documents and documents previously furnished to Agency by Design-Builder;

(8) If the claim includes Work done or costs incurred by a Subcontractor, Materials supplier, or any Entity other than Design-Builder, the following are required:

- All data required by other Subsections of 199.30(b)
- A copy of Design-Builder's separate analysis and evaluation
- A copy of Design-Builder's independent review and analysis of the amount of damages sought

(9) Include any daily reports or diaries related to the event, photographs or other media that help explain the issue or event (optional), or all other information Design-Builder chooses to provide (optional);

(10) A certified statement by Design-Builder, Subcontractor, or Materials supplier, as appropriate, as to the validity of facts and costs, containing the following language:

“Under penalty of law for perjury or falsification, the undersigned, (Name), (Title), (Company) certifies that this claim for additional compensation for Work on the Contract is a true statement of the actual costs incurred (in the amount of \$_____, exclusive of interest) and is fully documented and supported under the Contract between the Parties.

Signature:

Date: _____, 20 __

Subscribed and sworn before me this _____ day of _____, 20 __

Notary Public

My commission expires _____”

A person authorized to execute Change Orders on behalf of Design-Builder must countersign this statement.

Claims shall be made in writing, and shall include all information necessary for Agency to properly and completely analyze the claim. All pages shall have page numbers and be marked with the numbering system shown above. Agency reserves the right at any time to request additional information related to the claim or the Contract either directly or through Agents working toward resolution of the protested or claimed events and issues.

(c) Records Required - Design-Builder shall keep full and complete records of the costs incurred for the submitted claim. These records shall include all worksheets used to prepare the claim establishing the cost components for each item of the claim.

(d) Access to Records - Design-Builder shall provide Agency access to all Project Records required to determine the facts, contentions, and costs involved in the claim. Agency may perform an audit of these records. Design-Builder shall retain all Project Records for the Record Retention Period stipulated in the Design-Build Agreement or until all disputes, including litigation, if any, are resolved. Agency and/or its agents shall be provided full access to all Project Records during the Record Retention Period.

(e) Compliance Required - Full compliance by Design-Builder with the provisions of this Subsection is a condition precedent to the commencement of any lawsuit by Design-Builder to enforce any claim.

DB199.40 Claim Decision; Review; Exhaustion of Administrative Remedies - Agency intends to resolve claims at the lowest possible administrative level. If Agency denies the claim, in full or in part, Design-Builder may request review of the denial. The protested claim may then be resolved, in full or in part, at any of the four (4) progressive steps of claim review procedure set forth below. All of the actions and review under each step of the review process shall occur before the review can be advanced to the next higher step.

If, at any step in the claim decision or review process Design-Builder fails to promptly submit requested information or documentation that Agency deems necessary to analyze the claim, Design-Builder is deemed to have waived its right to further review, and the claim will not be considered properly filed and preserved.

(a) Decision by Agency - Agency will, as soon as practicable, consider, investigate, and evaluate a Design-Builder's claim for additional compensation, or for additional compensation and Contract Time, if submitted as required by Subsection 199.30.

If Agency determines that additional information or documentation is needed to allow proper analysis of the claim, Design-Builder shall meet with Agency within 14 Calendar Days, or as otherwise agreed by the Parties, to present the additional information or documentation, or make other arrangements with Agency to supply that material.

Agency will advise Design-Builder of the decision to accept or deny the claim, and the reasons for any full or partial denial of the claim, within 30 Calendar Days of receipt of Design-Builder's claim or the receipt of requested additional information or documentation regarding the claim, whichever is later, unless Agency and Design-Builder have agreed upon a longer response time. If Design-Builder does not accept Agency's decision, Design-Builder may, within 10 Calendar Days of receipt of the written decision, request in writing that Agency arrange a review at Step 1 (See (b) below).

(b) Step 1: Region Level Review - Design-Builder shall request that Agency arrange a meeting with the Region-level reviewer in order to present the denied or partially-denied claim for formal review and discussion. The meeting will take place within 21 Calendar Days of Agency's receipt of the request, or as otherwise agreed by the Parties.

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If the Region-level reviewer determines that Design-Builder must furnish additional information or documentation to allow proper analysis of the claim, the reviewer will schedule a second meeting, to be held within 14 Calendar Days, or as otherwise agreed by the Parties, at which Design-Builder shall present the requested information or documentation.

The Region-level reviewer will provide a written decision to Design-Builder within 30 Calendar Days of the last Region-level meeting.

If Design-Builder does not accept the Step 1 decision, Design-Builder may, within 10 Calendar Days of receipt of the written decision, request in writing that Agency arrange a review at Step 2 (See (c) below).

(c) Step 2: Agency Level Review - Design-Builder shall request a meeting with Agency's Contract Administration Engineer to present the claim for final Agency review. The presentation will take place within 21 Calendar Days of Agency's receipt of Design-Builder's written request or as otherwise agreed by the Parties.

If Agency's Contract Administration Engineer determines that Design-Builder must furnish additional information or documentation to allow proper analysis of the claim, the Contract Administration Engineer will schedule a second meeting, to be held within 14 Calendar Days or as otherwise agreed by the Parties, at which Design-Builder shall present the requested information or documentation.

Agency's Contract Administration Engineer will provide a written decision to Design-Builder within 30 Calendar Days of the final Step 2 meeting.

If Design-Builder does not accept the Step 2 decision, Design-Builder may, within 10 Calendar Days of receipt of the written decision, request in writing through Agency that the claim be advanced to Step 3 or 4 (See (d) and (e) below), as applicable.

(d) Step 3: Arbitration; Claims Review Board

(1) Claims Less Than \$25,000.00 (calculated in accordance with Subsection 199.30(b)(7) above) - At this step, the claim will be resolved by binding arbitration before a single arbitrator according to the Construction Industry Arbitration Rules of the American Arbitration Association or such other arbitration service and rules as agreed by the Parties.

Arbitration filing costs and any arbitrator's fees will be divided equally between Agency and Design-Builder.

(2) Claims of \$25,000.00 to \$250,000.00 (calculated in accordance with Subsection 199.30(b)(7) above) - Claims in excess of \$250,000.00 may be reviewed under this step only upon the agreement of Design-Builder and Agency pursuant to Subsection 190.40 (d)(3) below.

At this step, Design-Builder shall present the claim to a Claims Review Board ("Board") for consideration, review, and recommended resolution. The Board will be comprised of three (3) persons. Agency will establish and maintain, in consultation with

representatives of the construction industry, a panel of more than 12 qualified individuals available to serve on Boards.

If a claim within the scope of this step is properly referred for Board consideration and review, copies of biographies of all persons on the panel will be sent to Design-Builder. Within 20 Calendar Days after the biographies are mailed, Design-Builder and Agency will each nominate, in writing, three (3) individuals from the panel available to serve on the Board. Each Party shall affirm the availability of its nominees.

Within 10 Calendar Days after receipt of the nominations, Design-Builder and Agency will (a) each appoint to the Board one of the three nominated by the other, (b) inform each other of the appointment, and (c) advise their three nominees, in writing, of the appointments. The two appointees, now Board members, shall select one of the remaining members of the panel to serve as the Board Chair. If the two appointees cannot agree on the selection of the Board Chair, the Circuit Court in the county in which Agency's main office is located will resolve the protest. In that event, Agency will act through Agency's legal counsel to request the Circuit Court to appoint one of the remaining members of the panel to serve as the Board Chair.

The Board may request Agency to designate a person not associated with the Contract to act as the recording secretary for the Board. The recording secretary is not a Board member, and will only assist the Board with administrative tasks related to its consideration and review of the referred claim.

Agency and Design-Builder will equally share the costs of the Board members. Agency will pay the costs of the Board's recording secretary.

Members of the Board are to act impartially and independently in the consideration of facts and conditions surrounding the protest. Board recommendations concerning the protest are considered advisory only, shall not be binding on either Party, and shall not constitute evidence in any legal proceeding for any reason.

The Board will schedule and conduct an informal hearing, at which Design-Builder and Agency will each have an opportunity to present evidence and argument. Design-Builder and Agency will each submit a brief written summary of the claim to each Board member and the other Party at least 10 Calendar Days before the hearing. Unless directed otherwise by the Board Chair, the summary shall include the following for each issue under protest:

- A short statement describing the protested issue
- A short position statement by the Party making the claim on the issue
- A clear and concise explanation of the contractual basis for that position, including specific reference to Contract Documents
- A clear and concise description of the costs claimed for each issue, including, without limitation, specific documents demonstrating productivity, time, and costs
- Exhibits, including, without limitation, copies of plan sheets, extracts from the Contract Specifications, correspondence, photographs, or other evidence to support the position

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The proceedings will be conducted in a manner determined by the Chair, in consultation with the other Board members. Unless directed otherwise by the Board Chair, the hearing will be conducted according to the following guidelines:

- The hearing will be informal
- The witnesses will not be sworn
- Design-Builder will present its case first
- Agency will then present its case
- Both Parties will then have opportunity to present rebuttal
- The Board may ask questions and, to promote open discussion of the issues, both Parties may respond or emphasize issues
- The Parties' attorneys may observe the hearing and may respond to direct questions from the Board, but may not make factual presentations or legal arguments
- The Board will conclude the hearing when it appears to the Chair that each Party has had sufficient opportunity to support its case and the Board has no further questions

Within 10 Calendar Days after conclusion of the hearing, the Board will forward to Agency's Contract Administration Engineer and Design-Builder the Board's written recommendation for resolution of the claim. Within 10 Calendar Days of its receipt of the Board's recommendation, Agency will provide to Design-Builder Agency's written decision regarding the claim.

If Design-Builder does not accept Agency's decision regarding the claim, Design-Builder may proceed to litigation as described in Step 4 (See (e) below).

(3) Claims Over \$250,000.00 (calculated in accordance with Subsection 199.30(b)(7) above) - If Design-Builder and Agency agree, the Parties may employ the Step 3 Board review process set forth above. If not, Design-Builder may proceed to Step 4 (See (e) below).

(e) Step 4: Litigation - This step applies to:

- Claims over \$250,000.00 [calculated in accordance with Subsection 199.30(b)(7)]
- Appeals of arbitration awards issued in Step 3 at Subsection 199.40(d)(1) above, according to ORS 36.600 through ORS 36.740
- Appeals of Agency decisions on claims of \$25,000 to \$250,000 issued under Step 3

Design-Builder must follow each step in order and exhaust all available administrative remedies before resort to litigation. Lawsuits must be properly filed in a court of competent jurisdiction within six (6) months from the date of the final decision that exhausted Design-Builder's available administrative remedies under this Section.

In any litigation, the entire text of any order or permit issued by a governmental or regulatory authority, as well as any documents referenced or incorporated therein by reference, shall be admissible for the purpose of Contract interpretation.

The Contract shall not be construed against either Party, regardless of which Party drafted it. Other than as modified by the Contract, the applicable rules of contract construction and evidence shall apply. This Contract shall be governed by and construed in accordance with the Laws of the state of Oregon without regard to principles of conflicts of law.

Any dispute between Agency's and Design-Builder that arises from or relates to this Contract and is not resolved under the provisions of Section 199, shall be brought and conducted solely and exclusively within the Circuit Court for the state of Oregon in Marion County where Agency main office is located; provided, however, if a dispute must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this Section be construed as a waiver by the state of Oregon of any form of defense or immunity, whether based on sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the United States Constitution or otherwise, from any claim or from the jurisdiction of any court. DESIGN-BUILDER, BY EXECUTION OF THIS AGREEMENT, CONSENTS TO THE IN PERSONAM JURISDICTION OF THE COURTS REFERENCED IN THIS SECTION.

DB199.50 Mediation - Notwithstanding the formal claims procedure set forth above, the Parties may enter into nonbinding mediation by mutual agreement at any time, in which case the Parties may also agree to suspend the time requirements established herein pending the outcome of the mediation process. The rules, time, and place for mediation, as well as selection of the mediator, shall be established by mutual agreement. Costs shall be divided equally between Design-Builder and Agency. Either Party may terminate mediation at any time upon five (5) Calendar Days notice to the other, after which the time the requirements established herein shall be automatically reinstated.

