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Claims by 2nd Parties Procedure



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Claims by 2nd Parties Procedure

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Claims by 2nd Parties Procedure

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Claims by 2nd Parties Procedure

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Claims by 2nd Parties Procedure

1.0 PURPOSE

This procedure describes the process for analysis, evaluation, and resolution of 2nd Party claims for price or schedule adjustments.

2.0 SCOPE

This procedure applies to Contract activities conducted under the administration and management of the Contracts Management Department.

3.0 DEFINITIONS

Term	Definition
2nd Party	Contractor, Consultant, Engineer or Supplier who expresses interest in prequalifying for a specific package of Works or Services and upon Award becomes the entity contracted to perform such Works or Services
Agreement	Contract or Purchase Order (collectively "Agreement") between the Entity and a 2nd Party
Construction Contractor	The Main or Principal Contractor responsible for undertaking the Construction Works on the Project. Individual(s) or firm(s) engaged in the construction of buildings, either residences or commercial structures, as well as construction activities such as paving, highway construction, utility construction and landscape installation.
Enterprise Content Management System (ECMS)	An information management and collaboration platform for managing and controlling program documents and records.
Entity	A Saudi Government organization which is responsible for the delivery of government funded infrastructure construction projects.
Laws	Government Tenders and Procurement Law issued pursuant to Royal Decree No. (M/128) dated 13/11/1440 AH and the Implementing Regulations thereof issued pursuant to the Minister of Finance's Resolution No. (1242) dated 21/3/1441 AH and as amended thereafter.
Project	Project to be undertaken by an Entity that consists of single or multiple Agreements with 2nd Parties to perform Works or Services as part of the execution plan to deliver such Project. Scope of Work and/or services identified by Entity that needs to be executed.
Regulations	Are Authority imposed requirements, which specifies product, process or service characteristics, including the applicable administrative provision, with which compliance is mandatory, such as building codes.
RFI	Request for Information
Services	Provision of technical or consulting services for design, studies, investigations (geotechnical, surveying testing), specialist advice or the like that are not the Works but necessary to support them



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Site Construction Department	Department within the Project Management Company that is responsible for Construction activities/operations.
Contracts Management Department	Department within the Entity Project Management Organization (EPMO) or at corporate level authorized to conduct contracts formation and administration activities.
Site Document Control	Department within the Project Management Company that is responsible for the control of all project Documents using ECMS.
Site Engineering Department	Department within the Project Management Company that is responsible for Engineering or design activities/operations.
Works	Construction or supply of goods, facilities or the like of permanent and temporary nature as contracted by the Entity
Entity Consultant	Authorized 3 rd Party to supervise the construction activities and represent the Entity in managing the project at site level or as advised by the Entity.
Bid Evaluation Committee	

4.0 REFERENCES

Article One Hundred Thirteen (113) of the Implementing Regulation.

5.0 ROLES & RESPONSIBILITIES

The following defines the individual roles and responsibilities associated with the receipt, evaluation and recommendation of 2nd Party Claims:

Individual	Role
2nd Party's Authorized Representative	The individual from the 2nd Party's organization who is authorized to commit the 2nd Party to claims-related actions including final settlement.
Authorized Representative	The individual authorized to oversee negotiation of claims on behalf of the Entity where necessary, and to commit the to their final settlement.
Contracts Administrator	Responsible for the administration of the Agreement in full compliance with its requirements and determining the contractual entitlement for the Claim. The Contracts Administrator shall work with the Project Controls department in determining the quantum of costs applicable for the claim.
Contracts Management Department Manager	Responsible for the overall management of the Agreement in accordance with Project procedures and requirements
Lead Negotiator	Typically, the Contracts Management Department Manager or the Contracts Administrator. However, could be any individual assigned the lead role in the negotiation and settlement of claims.
Legal Counsel	Responsible for reviewing and concurring with the determination on the entitlement of any Claim prior to a recommendation for settlement. Legal Counsel will also support the Contracts Administrator and Lead Negotiator on principle of law and shall be present at all times when the 2nd Party is represented by its Legal Counsel
Project Planner	Responsible for determining and validating any claim relative to an extension of time.



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6.0 PROCESS

This process outlines the procedure for the identification and resolution of Claims made by 2nd Parties against an Entity in relation to the Works or Services under an Agreement.

For the purposes of this procedure and general guidance, a “Claim” shall mean:

“any request for an equitable adjustment (time and/or cost) from a 2nd Party that is initially rejected without merit by the Entity to which the 2nd Party considers unreasonable, it shall also include any request for an adjustment to a determination of a Change Order by the Entity that is disputed by the 2nd Party to which they pursue the disputed amount as a Claim”

For effective management, the mitigation of claims through correct identification and assessment of Variations or Change Orders in the initial instance can reduce the potential later exposure to Claims. Entities with the assigned Project Team should work to resolve and identify all Variations and Change Orders early as the cost and impact to resolution is significantly of lesser impact to the performance of the Project or the Parties if addressed early in the identification process.

A claim is a disputed demand for time and/or money that arises from a Contract Variation/Change or a 2nd Party’s perception of entitlement for something it believes to constitute a compensable change.

The 2nd Party is obligated to provide adequate explanation and documentation of claims, preferably at the time the claim arises, but sometimes ultimately in court.

The Entity will give fair, impartial and timely consideration of claims as well as clear, equitable response. The basis for the settlement of claims should be the Contract, law and the facts.

For the orderly administration of Contracts, all members of the project team should endeavor to avoid claims by:

- (i) Identifying potential claims and taking steps to mitigate
- (ii) Having open discussions with the 2nd Party to discourage spurious claims
- (iii) Applying Contract provisions for relief where justified
- (iv) Prompt resolution of acknowledged changes

The Contracts Administrator shall encourage the full and complete submittal of the factual causes, contractual basis, quantified impact, documentary evidence, and proposed resolution from the 2nd Party. The Entity is to stay informed of any claim received from the 2nd Party, or of any circumstances that it is believed may lead to the submission of a claim.

Any claim for time extension, with or without money, should be expeditiously resolved to conclusion by rejecting or negotiating the claim. The Entity should be invited and encouraged to attend the claim discussions so that they are fully appraised of the circumstances that have resulted in the claim.

Claims shall be logged, tracked and included in the monthly report.

Fact-finding discussions or correspondence should be undertaken whenever necessary to identify all of the circumstances applicable to the issues.

6.1 Typical Causes of 2nd Party Claims

By understanding the typical causes of claims, the Entity can readily identify the future occurrence and therein take measures to mitigate not only the occurrence but the exposure that may arise should the claim materialize. A primary objective should be to mitigate the occurrence of claims through proactive administration of the Agreements, meaning, working with 2nd Parties to resolve issues that may later, if left unattended, culminate in a Claim.

Some typical causes of Claims are outlined below:



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- (i) Impact from directed changes (pricing and effect on unchanged work)
- (ii) Constructive changes (not formally directed by Change Notice but required by the work or an Entity direction)
- (iii) Verbal Instructions from individuals not authorized or controlled
- (iv) Untimely direction and administration of changes
- (v) Deficient or tardy Entity supplied materials or equipment, specifications and drawings, design releases, facilities and utilities, or payments
- (vi) Delays, disruptions and interferences by others
- (vii) Unduly strict inspections, requiring more onerous tests than those specified in the Agreement
- (viii) Force majeure conditions
- (ix) Interference by the Entity on the 2nd Party's method or manner of performance of the Work
- (x) Failure to disclose relevant information to the 2nd Party
- (xi) Taking over/managing a 2nd Party's subcontractor
- (xii) Untimely clarification and approvals by the Entity
- (xiii) Unanticipated subsurface conditions (ground conditions)
- (xiv) The Entity's failure to act fairly and in good faith
- (xv) Change in direct material cost affecting 2nd party to perform adequately .

The 2nd Party will provide adequate explanation and documents of claims at the time the claim arises and provide notices as specified in the Agreement.

They are entitled to fair and timely consideration of their claims and clear, equitable replies. The basis for the settlement of claims by the Entity should be the contract, law, the facts and fundamental fairness.

For the orderly administration of contracts, all members of the project team should endeavor to avoid claims by:

- (i) Identifying potential claims and taking steps to mitigate early,
- (ii) Open discussions with 2nd Party to discourage spurious claims and seek solutions before they become issues
- (iii) Application of contract provisions for relief where justified
- (iv) Prompt resolution of acknowledged changes

6.2 Independent Assessors

The Entity may rely on the expertise of individuals (Subject Matter Experts) that are not "close" to the matter to perform an independent peer review of the claim, particularly if it's a dispute arising from a prior determination issued by the Entity.

6.3 Early Warnings of potential claims

The following are some early indicators or warning signs of potential claims:

- (i) Above average number of Request for Information (RFI)s received from the 2nd Party.
- (ii) Many of the RFIs ask questions that have already been addressed in the Agreement, the design documents and/or previous responses.



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- (iii) The 2nd Party is not cooperative and does not return phone calls.
- (iv) Curt attitude in communications with, and combative correspondence received, from 2nd Party.
- (v) Construction work slowdown or stoppage.
- (vi) Refusal by the 2nd Party to comply with directed Change/Variation Order.

6.4 Receipt of Claim from 2nd Party

If the 2nd Party believes that he is entitled to any financial compensation in the cases referred to in Article (68) and Article (69) of the Government Tender and Procurement Regulations, the 2nd Party must submit its claim supported by all necessary documents and evidences to the Consultant, or to the Entity directly in projects where the presence of a Consultant is not required, within the period specified in the Law.

In assessing entitlement for a Claim, the provisions or Contract Documents must be relied upon, including the prescriptive requirements for the submission, notification and lodgment by the 2nd Party of a Claim.

In order to establish that a valid claim exists, the 2nd Party must establish three elements: First, there must be a changed condition from the established contract conditions. Secondly, the 2nd Party must establish that the Entity is responsible for the changed condition. Finally, the 2nd Party must be able to quantify its impact as a result of the changed condition. Without all three of these elements, the 2nd Party has not established a valid claim.

The Entity should encourage the full and complete submittal of the factual causes, contractual basis, quantified impact, documentary evidence, and proposed resolution from the 2nd Party. Submittals should address:

- (i) Description of the work performed, delayed or impacted
- (ii) Cost and schedule quantification
- (iii) Contractual basis for entitlement
- (iv) Requested relief

In reaching a determination of the validity of the claim and the entitlement, if any, of the 2nd Party, the following elements are essential in achieving a thorough, balanced conclusion:

- (i) Reading and studying all pertinent parts of the contract documents. Becoming familiar with the language in the contract and any other related documents, such as schedules, manuals, and supplements that are made part of the contract.
- (ii) Identifying the proper parties.
- (iii) Determining the facts, using information from all relevant sources. Most claims are based upon factual disputes and a full knowledge of the true facts is essential in reaching a correct conclusion.
- (iv) Carefully examining the material presented by the 2nd Party as proof of causation to spot any inaccuracies or ambiguities that may discredit or negate all or part of the 2nd Party's claim. Requiring that the 2nd Party prove a cause and effect relationship.

When analyzing damages, it should be noted that claims are often calculated on the basis that the Entity has ample resources to compensate the 2nd Party. Analysis of claimed damages should:

- (i) Require the 2nd Party to provide proof of expenditures and detailed calculation of damages.
- (ii) Include an audit, if feasible.
- (iii) If possible, require the 2nd Party to provide actual cost information from its records as proof of damages.
- (iv) Include as a deduct/offset for any additional cost the Entity has incurred in repairing or completing deficient work.



6.5 Assessment of Claim Entitlement

Entity Consultant shall assesses the entitlement of the 2nd Party's claim within the period specified in the Law. There are three separate and distinct steps to be taken in evaluating claims. The steps below must be carried out and completed independently for the assessment of the Quantum to determine the validity of any claim.

6.5.1 Technical Validity Assessment:

In the first step, the scope of work, resources required and technical engineering or construction methods involved should be evaluated by the appropriately the Consultant to ensure that the claim has a sound technical basis and the 2nd Party has adequately demonstrated the technical basis upon which it relies to assert a claim.

6.5.2 Financial Assessment:

Unlike recognized changes where the 2nd Party's right to seek price or schedule relief is not in question, a go/no-go, accept or reject determination should be made based upon the terms and conditions of the Contract and applicable law. This is step two. The time and money involved should not be a factor in determining entitlement, while sympathy claims or nuisance settlements may, as a matter of management judgment, be considered. The contractual rights and obligations related to any claim should be analyzed and understood. The Entity's legal department will be available to assist in such determinations when requested.

6.5.3 Legal Assessment

Entity should ensure that all claims raised and requested by the 2nd Party are legally sound and don't contradict with any of the contracts terms and conditions or the Law.

6.6 Assessment of Claim Quantum

If, and when, it is determined that the 2nd Party is contractually entitled to Claim, the next step is the determination of the Quantum associated relative to the time and cost elements of the Claim.

6.6.1 Financial Assessment

For determination on the price component of the Quantum, the Contracts Administrator with support from Project Controls, Finance and Estimating shall review the submission of the 2nd Party in terms of determination of the acceptability of the alleged Costs forming the basis of the claim by analyzing:

- a) Labor, including fringe benefits, direct and indirect categories
- b) Material, including taxes and transportation
- c) Equipment, tools and supplies
- d) Overhead and General Administration (G&A) expense
- e) Bond and insurance costs
- f) Profit
- g) Actual time durations (planned and actual)
- h) existing Unit Rates or comparable Unit Rates to those claimed to have been impacted



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6.6.2 Technical Assessment

For the determination on the Technical assessment, Entity should analyze the technical requirement stated in the contracts against the claim submitted by 2nd Party. In addition, schedule or time element of the Quantum should also be assessed, the Contracts Administrator shall solicit from the Project Planner or Scheduler the Entity's assessment of the impact of the alleged Claim in terms of the impact to the critical path of the Works or Services. This assessment shall be prepared on the basis of an impacted schedule showing:

- a) Impact on the critical activities in the approved schedule
- b) The impact of the 2nd Party concurrent delays in both critical and non-critical activities to reasonably determine the respective party's concurrent liabilities
- c) Impact in working efficiencies or "loss of productivity" on the schedule durations
- d) Assessment of any 2nd Party concurrency in delays to other works that mitigate the liability of the Entity for the Delay.
- e) Validation against actual as-built schedule records to capture the actual impact on works in progress.

The Project Planner or Scheduler shall produce their assessment and summarize the overriding provisions of the alleged Claim on the schedule and summarize the position in respect to:

- a) The impact to the critical path and completion date, or milestone date as applicable, as determined by the delay impact analysis.
- b) The assessment of any concurrency in the other works to which the 2nd Party is liable
- c) The net impact to the schedule, taking into account item a and b above that corresponds either a recommended Extension of Time to the milestone or completion date (as defined in the Agreement) represented in Days or a justification as to why an Extension of Time is not granted.

6.7 Result of Claim Assessment

Following the determination and assessment of the Entitlement and Quantum described in Section 4.6, the Contracts Administrator shall prepare the summary of the Initial Assessment of the Validity of the Claim, and where it is deemed an entitlement exists for the 2nd Party to time and/or costs arising, the Contract Administrator shall prepare the Contract Administrator for authorization prior to presenting the determination to the 2nd Party.

In case of claims relevant to changes in the prices listed in the contracts, the determination of the claim with all supporting documentation shall be formally submitted to the Bid Evaluation Committee whom responsible to issue the recommendation based on the assessment and any reports generated.

he 2nd Party for its agreement under a signed letter from the Authorities Authorized Representative appointed under the terms of the Agreement.

6.8 Appointment of a Negotiator

The Bid Evaluation Committee shall be the authorized negotiator when claims are related to price changes as stated in the Law. Other claims requiring compensation without revising contracts rates shall be determined by Contracts Management Department. Should the technical, commercial and complexity of the Claim warrant a specific level of expertise or management authority involvement, the task of Lead Negotiator may be assigned to the person best qualified to lead the negotiations e.g. Project Manager, Engineering Management Department Manager, Construction Manager or Legal Counsel, supported by Subject Matter Experts.



6.9 Negotiation of Claims

If the analysis validates all aspects of a claim, a Contract Amendment incorporating the requested adjustments should be prepared and processed in accordance with the project procedures. If not, and some significant difference of opinion regarding validity, entitlement or quantification exist, a negotiation plan should be developed, documented and approved as a prerequisite to negotiations with the 2nd Party.

Negotiations should be conducted with the objective of reaching a fair and equitable resolution of the claim, not to coerce settlements that deny either party their full rights under the contract.

Unsuccessful negotiations should be governed by the disputes process of the contract or by escalation.

6.10 Determination of Claims

The Bid Evaluation Committee shall formally issue the final recommended entitlement for claims relevant to revision of contract prices. For other forms of compensation, the Contracts Management Department shall prepare for approval the recommended quantum and entitlement for approval by the Entity.

This recommendation shall include the values and time agreed as being attributable to the Entity, and as such, should be agreed and formalized to the 2nd Party.

It is important to mitigate the carryover of disputed claims. Even if a portion of the claim is agreed, that agreed amount should be settled and resolved so as to leave the least value of claim in the disputed category.

Certifying the agreed portions reduces the impact to the parties and complexity of the dispute later if it arrives at Council of Ministers / Ministry of Finance

6.11 Dispute on Determination of Claim

Occasionally it is not possible to resolve a claim through negotiation at the project level or within the powers of the Entity.

The Agreement contains a Disputes Article that provides a procedure for resolution of disputes. Such a procedure may indicate the steps and sequence of events to resolve the dispute, or may only provide that "the parties agree to attempt in good faith to resolve disputes". Detailed procedures, if provided, should be followed carefully in the resolution of the disputes when prescribed within the Contract or Agreement so as not to disadvantage a Party's rights under the Agreement.

The Entity's goal should be to resolve all 2nd Party claims at the project level through negotiations between parties who have the best knowledge of the facts and circumstances. Where this is not possible, it may be necessary for the dispute to be resolved through a third party. The most costly and time-consuming process is litigation and it should be avoided if at all possible. Alternative Dispute Resolution (ADR) processes (such as mediation, expert panels, and dispute review boards) can be considered where permitted under the Law.

6.12 Hierarchical Elevation on Disputes

Should a Claim not be resolved in accordance with the Terms and Conditions of the Agreement, and following Executive Management of the Entity's engagement in the resolution, then the Disputed Claim shall be elevated for resolution in accordance with the Laws and Regulations for settlement.

6.13 Claim Register

All claims by 2nd Parties, including any counter claims by the Entity, shall be recorded on a Claims Register and maintained by the Contracts Administrator (**Attachment 01**).



7.0 ATTACHMENTS

1. EPM-KD0-TP-000038 - Contract Claims Register Template



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Attachment 1 - EPM-KD0-TP-000038 - Contract Claims Register Template

PROJECT: [INSERT PROJECT NAME & NUMBER]												
CONTRACT No. [INSERT CONTRACT NUMBER]												
CONTRACTOR [INSERT CONTRACTOR]												
Register Date:												
CONTRACT CLAIMS REGISTER												
CONTRACTOR REFERENCE			SUBJECT	CONTRACT ARTICLE	ENTITY RESPONSE		ENTITY ASSESSMENT		RESOLUTION STATUS			
No.	Cover Letter Reference	Dated			Letter Reference	Letter Date	Estimated Costs	Estimated Time (Days)	Agreed Costs	Agreed Time (Days)	Disputed Amount	Disputed Time (Days)
1												
2												
3												
4												
5												
6												
7												
8												
9												
10												
11												
12												
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17												
18												
19												
20												
21												
22												
23												
24												
25												
26												
27												
28												
TOTAL VALUE OF AGREE/ DISPUTED CLAIMS								\$0.00	0.00	\$0.00	0.00	