

## Section 7.3

# SUPPLEMENTAL AGREEMENTS AND UNILATERAL PAYMENTS

### 7.3.1 Purpose

To provide a uniform procedure for District Construction Offices to initiate, document, execute and distribute construction contract changes by **Supplemental Agreements** and **Unilateral Payments**.

### 7.3.2 Authority

Sections 20.23(3)(a), 334.048(3) Florida Statutes (F.S.)

### 7.3.3 Reference

334.185, 337.11(9), 337.11(12), 337.185, 339.135(6)(a), Florida Statutes (F.S.)

Federal Aid Policy Guide (23 CFR 635)

FHWA Approved: February 26, 2015

Chapter 7, Section 4 - Contingency Supplemental Agreements

Procedure No. 375-020-010, Errors Omissions, and Contractual Breaches by Professional Engineers on Department Contracts

Procedure No. 700-000-005, Florida Federal-Aid Partnership Agreement

Section 4, Standard Specifications for Road and Bridge Construction

### 7.3.4 Identifying the need for a Supplemental Agreement or Unilateral Payment

#### 7.3.4.1 Supplemental Agreements or Unilateral Payments shall be used to:

- (A) Clarify the plans and specifications of a contract.
- (B) Provide for unforeseen work, grade changes, or alterations in plans that could not reasonably have been contemplated or foreseen in the original plans and

specifications.

- (C) Change the limits of construction to meet field conditions.
- (D) Provide a safe and functional connection to an existing pavement.
- (E) Settle contract claims (for **Supplemental Agreements** only).
- (F) Make the project functionally operational in accordance with the intent of the original contract.
- (G) Expand the physical limits of a project only to the extent necessary to make the project functionally operational in accordance with the intent of the original contract. The cost of any such additional work extending the physical limits of a project shall not exceed \$100,000.00 or ten (10) percent of the original contract price, whichever is greater.
- (H) Give effect to the negotiated settlement of a dispute.

#### **7.3.4.2 Unilateral Payments will be used to pay the Contractor for work performed on a project when:**

- (A) The Contractor agrees to perform the work at an agreed upon cost but refuses to timely execute a **Supplemental Agreement** to allow timely payment for the work by the Department or,
- (B) The Department and the Contractor cannot agree on the cost of additional work, and the Contractor refuses to execute a **Supplemental Agreement** or,
- (C) The Department determines it is in its best interest to make a **Unilateral Payment** for work the Department directed to be performed in lieu of pursuing a **Supplemental Agreement**.
- (D) The Department and Contractor cannot agree on the value of work deleted from the Contract. All unilateral payments should be 1 lump sum using the 9999 5 UNILATERAL PAYMENTS (S/M ONLY) pay item, except as indicated lump sum contracts below. It is recommended that all unilateral payments have a positive unit price to ensure the 230 funds are allocated properly. If the circumstances require a negative unilateral payment, contact the State Final Estimates Office and/or State System Section for further direction.

When work is deleted from a Lump Sum Contract, an encumbrance should be processed through the Contract Funds Management System to reduce the contractual obligation commensurate to the value of the negative Unilateral Payment. The estimate should be loaded into SiteManager with the 'reduced' regular work amount (total work less the negative Unilateral Payment amount).

The negative Unilateral Payment should not be loaded into SiteManager as it will be reflected in the reduced amount of regular work. Contact the State Final Estimates Office and/or State System Section for further direction. The supporting documentation for the negative encumbrance should be included as documentation for the negative Unilateral Payment.

### 7.3.5 Initiating Supplemental Agreements and Unilateral Payments

The District Operations staff will ensure that the terms of all **Supplemental Agreements and Unilateral Payments** are in the best interest of the Department and comply with procedures, specifications, and statutory requirements governing construction contract administration.

Before a **Supplemental Agreements** or **Unilateral Payment** can be issued against any Non-State Highway System (Off-System), federally funded project being constructed by the Department for a Local Government, the Project Administrator shall ensure that the Design Project Manager has obtained a Maintenance Agreement (MOA) between the Department and the Local Government (Refer to **Financial Provisions for All Department Funded Agreements, Procedure 350-020-301**). The Maintenance Agreement shall establish that the Local Government is responsible for additional project costs determined to be Federal Aid Non-Participating.

All **Supplemental Agreements and Unilateral Payments**, including those initiated in response to contract claims, will be supported and documented by an **Engineer's Estimate** and an **Entitlement Analysis** (see **Guidance Document 7-3-A**). Lump sum items shall not be used without detailed itemization stating the quantities and unit prices the lump sum item was based on.

For Lump Sum contracts, including Design-Build contracts, supplemental agreements should be included within the lump sum line item for the entire contract amount. When work is either deleted or added, the SA will address the original LS bid item by deleting it. Then, the SA will address the addition or deletion of additional work by adding the LS pay item 0999 2 LUMP SUM CONTRACT, ALTERNATIVE BIDDING with the new unit price. The new unit price is calculated by either subtracting or adding the dollar change to the bid unit price to come up with the new unit price. There may be several instances of this happening on a single contract depending on how much work is added or deleted throughout the life of the contract. Do not overrun the 1 LS pay item. See **CPAM 7.3.4.2** for more information credits on projects.

When a **Supplemental Agreement or Unilateral Payment** must be initiated on a project with consultant-prepared plans and contract documents, refer to **Procedure No. 375-020-010, Errors, Omissions, and Contractual Breaches by Professional Engineers on Department Contracts**.

### 7.3.5.1 Significant Changes

All significant changes causing an increase or decrease in the unit cost of a pay item must be documented with a completely executed **Supplemental Agreement or Unilateral Payment**. Note that either of these types of contract changes will require an **Entitlement Analysis** and an **Engineer's Estimate**. Certification of availability of funds must be obtained from the Comptroller's Office prior to directing the Contractor to perform the work when the change results in an increase in the cost of the project.

### 7.3.5.2 Project Limit and Construction Limit Extensions

#### (A) Resident Level Responsibilities

**Section 337.11(9)(b), F. S.** states that **Supplemental Agreements** may only be used to expand the physical limits of a project only to the extent necessary to make the project functionally operational in accordance with the intent of the original contract. The cost of any such agreement extending the physical limits of a project shall not exceed \$100,000, or ten (10) percent of the original contract amount, whichever is greater. For this section, the term physical limits means the length or width of any project and specifically includes drainage facilities not running parallel to the project.

Authorization from the Director, Office of Construction is required before extending the project limits (as depicted on the contract plans) to perform work other than feathering (milling and resurfacing), friction course placement, guardrail, drainage, signing, pavement marking, sidewalk, and transitions for maintenance of traffic. Authorization from the District Construction Engineer (DCE) is required before extending the project limits (as depicted on the contract plans) to perform feathering (milling and resurfacing), friction course placement, guardrail, drainage, signing, pavement marking, sidewalk, and transitions for maintenance of traffic. Authorization from the Director, Office of Construction is required before extending the construction limits (as depicted on the contract plans) on any project.

On FHWA Projects of Division Interest (PODI), FHWA concurrence for project limit and construction limit extensions must be obtained in accord with **CPAM Section 7.3.10.2**.

Prior to processing a project limit or construction limit extension, for Department-prepared plans, notify the Department's Engineer of Record. For consultant-prepared plans, notify the Department's Design Project Manager.

#### (B) District Level Responsibilities

The DCE shall approve project limit (as depicted on the contract plans) extension

requests to perform feathering (milling and resurfacing), friction course placement, guardrail, drainage, signing, pavement marking, sidewalk, and transitions for maintenance of traffic. The DCE recommendation must be included on all requests for extending project limits (as depicted on the contract plans) to perform work other than feathering (milling and resurfacing), friction course placement, guardrail, drainage, signing, pavement marking, sidewalk, and transitions for maintenance of traffic. The DCE recommendation must be included on all requests for extending construction limits (as depicted on the contract plans).

### **(C) Central Office Level Responsibilities**

The Director, Office of Construction will review project limit (as depicted on the contract plans) extension requests to perform work other than feathering (milling and resurfacing), friction course placement, guardrail, drainage, signing, pavement marking, sidewalk, transitions for maintenance of traffic, and construction limit extension (as depicted on the contract plans) requests to assure they have received the recommendation of the District Construction Engineer and that they comply with **Section 337.11(9)(b), F.S.**

#### **7.3.5.3 Plan or Specification Changes**

##### **(A) Resident Level Responsibilities**

All changes to the contract plans or specifications must be documented with a completely executed **Supplemental Agreement or Unilateral Payment**, with prior certification of availability of funds from the Comptroller's Office required.

Prior to initiating a plan or specification change, for Department-prepared plans, notify the Department's Engineer of Record. For consultant-prepared plans, notify the Department's Design Project Manager.

Prior authorization from the Director, Office of Construction shall be obtained before implementing any changes to contract specifications on all contracts (including District let contracts).

On FHWA PODIs, FHWA concurrence for plan and or specification changes must be obtained in accordance with **CPAM Section 7.3.10.2**.

When a **Supplemental Agreement or Unilateral Payment** documents plan changes, the plan sheets being revised and the date of revision for each must be listed in the document.

##### **(B) District Level Responsibilities**

The District Construction Engineer's recommendation must be included on all

requests for contract specification changes. The DCE may authorize a no-cost change which extends the material acquisition or flexible start time after issuance of the Notice To Proceed.

For projects on which the DCE has authorized the above change, the DCE also has the authority to revise, by no cost specification change, the submittal times for the Project Schedule and Quality Control Plan.

### **(C) Central Office Level Responsibilities**

The Director, Office of Construction will review and approve any changes to contract specifications.

#### **7.3.5.4 Quantity Overruns**

The passage and signing into law of **HB 1681 (2005)** eliminated the requirement of a **Supplemental Agreement** for major quantity differences resulting in the Contractor's work effort exceeding the original contract amount by more than five (5) percent. Therefore, to manage the potential overrun of quantities on contracts the Department has implemented the following procedure.

### **(A) Resident Level Responsibilities**

Without encumbering any additional funds, projects with an original contract amount of \$5 million or less, may incur overruns to the current contract amount up to the Allowable Unencumbered Overruns Amounts (AUOA) which is calculated as follows. To find the AUOA, the initial Contingency Pay Item amount is subtracted from the Original Contract amount and the result is multiplied by two and one-half (2.5) percent. Although overruns up to the AUOA may be paid as unencumbered disbursements, management encourages project managers to program and encumber additional funds for any outstanding unencumbered overrun amount prior to the expenditures exceeding the contract amount. Overruns in excess of the AUOA must have additional funds encumbered prior to the authorization of the work that will cause the contract (not pay item or project) to overrun.

Projects with an original contract amount more than \$5 million are required to have additional funds encumbered to cover overruns to the contract (not pay item or project) on regular work prior to the authorization of the work that will cause the contract (not pay item or project) to overrun. Contingency funds may not be used for overruns.

In the interest of proper construction contract administration, it is essential that dollar amounts of overruns and underruns be tracked in an overrun/underrun log throughout the life of the project.

Construction Project Managers are encouraged to keep this log as a Microsoft Excel spreadsheet file, however, a hard copy will be acceptable. For each overrun or underrun, this log should include the pay item, the quantity, the location, the dollar amount involved and a brief explanation of the reason for the overrun or underrun. An immediate, comprehensive analysis of the impact on the final contract amount of any substantial overrun or underrun in one or more pay items should also be made as soon as the probability of such a substantial overrun or underrun becomes apparent. Reasons for all overruns or underruns should be documented in the overrun/underrun log mentioned above when those overruns or underruns occur. An accumulation of overruns could result in a net overrun requiring justification and documentation to be included with a funds encumbrance request approved by the Comptroller's Office.

If funds are not approved/encumbered prior to overrunning the current contract amount on contracts greater than \$5 million, or the net overruns exceed the AUOA on contracts for \$5 million or less, then an after the fact memo to the Department's Comptroller from the Turnpike Executive Director or District/Assistant Secretary, as appropriate, will be required. The letter should request authorization for an after-the-fact funds approval detailing the situation, the cause of non-compliance, and the measures put into place to prevent a repeat occurrence of non-compliance.

**NOTE:** Any price adjustment for a significant change involving an increase in quantity to a Major Item of Work will apply only to that portion of the work in excess of one hundred twenty-five (125) percent of the original contract quantity for that item. In case of a decrease in the original contract quantity below seventy-five (75) percent of the original contract quantity, the price adjustment will apply to the actual amount of work performed. Such adjustments must be documented on a fully executed **Supplemental Agreement**.

## **(B) District Level Responsibilities**

The District Federal Aid Coordinator will request federal funds approval by initiating a federal authorization request through the Federal Aid Management Office in the Office of Work Program. The **Authorization Request** must be in one of the following status states: Reviewed, Certified, Transmitted or Approved in order to encumber the funds through the Contract Funds Management system (CFM). The CFM system will check Financial Management system (FM) daily to see if the authorization has been approved and if so, CFM will change the encumbrance to Status 10 (available for payment). Payments for contract overruns will not be made until the **Authorization Request** is approved by the Federal Highway Administration (FHWA). In order to ensure prompt payment on these projects, the Federal Aid Coordinator must be informed of the expected payout date. Function (work activity) code 240 must be used for monitoring and tracking expenditures related to overruns. Requests for additional funding must be based on an analysis

of the project and calculated estimated overruns.

**NOTE:** When projects are authorized with Federal Funds, the District Federal Aid Coordinator must submit an **Authorization Request** for changes to the project costs. A justification for these changes must be given to the Federal Aid Coordinator for all adjustments to the initial authorization. The justification does not need to be in detail but should include all major pay items that are overrun, such as asphalt, etc., (not 20 pcs of guardrail, 60 lag bolts, 30 posts). However, an analysis of the contract and an explanation of the work or material required shall be included for anticipated future overruns. In some cases, a FHWA PODI may require more detailed information in order for the **Authorization Request** to be approved by FHWA. Failure to comply with this will prolong the process for obtaining approval from FHWA, and reimbursement for costs could be jeopardized.

### 7.3.6 Establishing Fair and Equitable Value for Significant Change

#### Resident Level Responsibilities

Additional work of the type for which a contract unit price is provided shall be paid at such contract unit price unless the additional work constitutes a significant change.

Additional work of the type for which no contract unit price is provided will be paid at negotiated prices or pursuant to **Standard Specification 4-3.2**. After notification has been given by the Construction Project Manager to the Engineer of Record or to the Design Project Manager, the Engineer of Record should be invited to participate in negotiations/determinations of prices for the added work if the cost of the work involves potential premium costs. The Construction Project Manager should not delay the contract administration process with the Contractor waiting on the Engineer of Record to participate.

The Engineer will typically attempt to negotiate with the Contractor, as outlined below, to resolve all outstanding issues, including time adjustments and attempt to reach an agreement on fair and equitable prices for a significant change.

For any contract change involving monetary compensation:

(1) As soon as a need for additional work is established, the Resident Engineer's Project team should prepare an **Entitlement Analysis** and an **Engineer's Estimate** (Refer to **Guidance Document 7-3-A**).

(2) The Resident Engineer's Project team should then begin negotiations for the work. The Resident Engineer's Project team shall make an appropriate revision to the amount of the **Engineer's Estimate** if new information is recognized, supported, and documented during negotiations (See **Guidance Document 7-3-A** for revision details). **NOTE:** Where the dispute has been considered by a Disputes Review Board (DRB) acting in accord with



procedures established under the contract, the recommendations of the DRB should be given consideration in negotiations. However, the DRB recommendations are not binding on the Department or the Contractor and should be considered important, but not controlling, factors in negotiating revisions to the amount of the Engineer's Estimate.

(3) For additional assistance in valuing contract changes, the Office of Construction may be contacted in accordance with the District's guidelines on such contacts. The District Construction Engineer shall approve any request for review by Central Office staff. The District Construction Engineer will set the District's guidelines which establish when such contacts are appropriate.

The assistance of the Office of Construction may be requested by email from the DCE to the Director, Office of Construction.

(4) If the negotiations have not resulted in an agreement and the Department may be liable for delays, the Resident Engineer's Project team should then immediately request an encumbrance for the part of the total contract change costs estimated to be due to the Contractor. Certification of availability of funds must be obtained from the Comptroller's Office prior to directing the Contractor to perform the work when the change results in an increase in the cost of the project. Once the Comptroller's Office certifies the funds availability, the Resident Engineer's Project team should then direct the contractor to proceed with the work while continuing to negotiate a **Supplemental Agreement** to cover it until the work is completed or negotiations are terminated.

(5) If the work has been completed and Contractor and the Department still cannot agree on the compensation owed to the Contractor, then:

a. Where the Resident Engineer's Project team (or higher District management personnel, as determined by the District) determines that no further upward revision of the **Engineer's Estimate** is justified, then the Resident Engineer's Project team will attempt to negotiate a settlement at or below an amount considered reasonable to avoid delay to the project due to continued escalation. If the Contractor accepts the Department's offer, the individual authorizing that decision for the District will attach a signed and dated cover sheet to a package containing the most recently amended **Engineer's Estimate**. This cover sheet will be labeled **Negotiated Settlement amount**. The sheet will show only the increase in the amount paid to settle that is justified solely to avoid delay to the project by continued escalation. A **Supplemental Agreement** to settle the issue will then be prepared; or,

b. If the Contractor refuses to accept the maximum amount developed in the previous scenario; the Resident Engineer's Project team will prepare a **Unilateral Payment** to pay the Contractor the amount of the justified costs. The method to calculate these costs is stated in **Standard Specification 4-3** and the **Engineer's Estimate** and **Entitlement Analysis** must be adjusted accordingly. The methods of calculating any claims settlement costs beyond those developed under **Standard Specification 4-3** are covered in **Standard Specification 5-12**; and, regarding such costs, it should be noted

that only delay costs will be considered. The Contractor will then be required to handle any further request for compensation as a claim in accordance with **Specification 5-12.3**. Refer to **CPAM Section 7.5**.

(6) Idle asphalt plants should only be compensable for delays if the plant is dedicated to the project. If the asphalt plant provides asphalt to multiple projects or sells commercially and not dedicated to the project, it would not be compensable for delays.

If a claim includes costs for a non-dedicated idle asphalt plant, the costs should be removed from the subject claim.

### **7.3.7 Determining and Documenting the Basis for Contract Time Adjustments**

#### **Resident Level Responsibilities**

When the value of a contract is increased or decreased due to work added, work deleted, or a significant change, a statement of adjustment of contract time shall be included in the negotiations between the Department and the Contractor, and included in the **Supplemental Agreement or Unilateral Payment** documenting work added, work deleted, or a significant change (Refer to the **Guidance Document 7-3-A and 7-3-D** regarding additional contract time). Additional time should be commensurate with the estimated effects the changes will have on the critical path of work shown on the approved work schedule except when the approved work schedule is clearly not representative of actual project performance. When additional time is granted because critical path of work is delayed, the supporting documentation for the contract change shall list the critical path work delayed and number of non-overlapping delay days attributable to each.

When a **Unilateral Payment** is executed in lieu of a **Supplemental Agreement**, additional contract time will be determined by the Engineer based on the impact to controlling items of work shown on the approved work schedule except when the approved work schedule is clearly not representative of actual project performance. Any additional contract time due the Contractor for work paid by **Unilateral Payment** will be granted on the **Unilateral Payment** document. The **Unilateral Payment** document will include the reasons for all time extensions.

### **7.3.8 Obtaining Department Legal Approval**

#### **Resident Level Responsibilities**

**Section 334.185, F. S.**, requires the Department's legal staff to review and comment on all contracts prior to award, and on all proposed contractual changes, to determine the legal responsibility for construction, material, or design failures, and to advise on ways to minimize responsibility for such failures.

It is also important that close coordination between the construction staff and legal staff be maintained during the **Supplemental Agreement** negotiations process to ensure all applicable legal requirements are fulfilled and to obtain legal advice on matters related to contract disputes.

Each District will obtain legal review for **Supplemental Agreements** to construction contracts and **Unilateral Payments** from its respective District General Counsel prior to forwarding these documents to the Contractor for execution or notice respectively.

Space has been provided on the **Supplemental Agreement, Form No. 700-010-45** and the **Unilateral Payment, Form No. 700-010-05**, to document Department legal review. The **Supplemental Agreement** document shall be reviewed by a Department attorney to document legal review prior to forwarding the **Supplemental Agreement** to the Contractor for execution. Evidence of the legal review shall be retained in the **Supplemental Agreement** file as part of the backup documentation. Each **Unilateral Payment** shall be reviewed and signed by a Department attorney. A copy of any contract change document sent to the Contractor for execution shall be maintained in the project files until and unless it is superseded by a copy of the same contract change executed by the Contractor without alteration. Note that in case of a **Supplemental Agreement**, the Contractor will receive a fully executed copy only at the conclusion of the process. If a Contractor modifies a **Supplemental Agreement**, the **Supplemental Agreement** is to be revised with the new language that both parties agree to and the revised document is to be resubmitted to the Contractor for execution. **NOTE:** No **Supplemental Agreement** altered unilaterally by the contractor shall be accepted by the Department without the review and approval of the District Chief Counsel. Where paragraph 4 of the **Supplemental Agreement** has been altered, the review and approval of the Director, Office of Construction and the Office of General Counsel is also required before accepting the altered **Supplemental Agreement**.

### **7.3.9 Requesting Certification of Funds from the Department's Comptroller's Office**

#### **District Level Responsibilities**

(1) The District budget/work program staff will review all funds requested, to determine that the work program can support the expenditures prior to transmitting the funds request back to the District Construction Engineer or designee. The Contract Funds Management (CFM) will check the Financial Management system to verify that sufficient remaining authorization has been pulled before certifying availability of funds. The District Work Program Office must ensure the authorization has been approved. The authorization must be approved before work begins.

(2) For a **Supplemental Agreement**, the District Construction Engineer or designee must obtain funds approval through the CFM system prior to obtaining approval of the Secretary or designee on a draft copy of the **Supplemental Agreement** and prior to

transmitting the **Supplemental Agreement** to the Contractor or giving the Contractor written notice to proceed with the work. For a **Unilateral Payment**, the District Construction Engineer or designee must obtain funds approval through the CFM system prior to obtaining the approval of the Secretary or designee on a draft copy of the **Unilateral Payment** and prior to giving the Contractor notice to proceed with work which will be documented and paid with a **Unilateral Payment**.

(3) The CFM system is located on the Comptroller's website. To obtain access to the CFM system, the requestor must have completed the training course for the CFM system provided by District/Central Train the Trainer personnel.

(4) When funds are encumbered for construction contract changes on separate projects within the same contract with different fund categories, these changes must be documented separately for each fund category. The District Construction Engineer or designee will request funds approval for the project whose number is indicated in the request for certification of availability of funds as designated by the District Operations staff.

(5) Funds certified for **Contingency Supplemental Agreements** and funds made available for **Work Orders** by Contingency Pay Items may only be used temporarily for **Unilateral Payments** if the conditions for that use set forth in the **CPAM Section on Contingency Supplemental Agreements** are met. (See **CPAM Section 7.4**).

(6) For **Supplemental Agreements** issued for unforeseen utility work during construction, the District Construction Engineer or designee must notify the District Office of Work Program (immediately, but no later than the business day following the identified need for such a **Supplemental Agreement**) requesting Local Funds for Unforeseen Work (LFU) funds be programmed to the project commensurate to the value of the **Supplemental Agreement**. This notification shall be made via e-mail, with copies to the Comptroller, Financial Development Office and Central Office Work Program. The e-mail notification shall include: Contract Number, Financial Project Number, **Supplemental Agreement** Number, Utility Agency/Owner and the amount of the **Supplemental Agreement**.

### **7.3.10 Obtaining Federal Highway Administration Approval and Participation for Construction Contract Changes on Federal Aid Projects**

#### **7.3.10.1 General**

Federal Aid participation in all changes to Department Construction Contracts shall be determined as required by **Federal Aid Policy Guide 23, CFR Section 635.120**.

The following project changes are a representative sample of Federal Aid Non-

Participating work:

- (A) Spare parts turned over to the maintaining agency and not incorporated into the construction.
- (B) Material or equipment called for in the plans but not used in the construction.
- (C) Closed drainage systems on structures not justified in the environmental process.
- (D) Fishing Piers.
- (E) Drainage items, including water retention ponds, not supported through the environmental process.
- (F) Premium costs due to design or CEI errors or omissions.
- (G) Sole source items unless specifically approved by the Federal Highway Administration.
- (H) Construction changes for items that were set up as alternate bid items.
- (I) Repairing items that had not been properly maintained through regular maintenance (cleaning/desilting pipe, etc.)
- (J) Additional contract time and/or costs for utility or right of way delays beyond what was identified in the contract documents.
- (K) Additional contract time and/or costs to attain greater vertical or horizontal bridge clearance than deemed necessary to fulfill the intent of the original project documents.
- (L) Additional contract time and/or costs due to arbitrary one foot or less backwater criteria in construction or reconstruction of Interstate Highway Bridges.
- (M) MOT items for Federal Aid Non-participating time extensions.
- (N) Work resulting from insufficient subsoil investigation.
- (O) Claim Settlement Costs paid solely to avoid the risk associated with failing to settle the claim as defined in **CPAM Section 7.3.4**.
- (P) Repair or replacing existing and installed items due to 3<sup>rd</sup> party damages or theft.

- (Q) Regular maintenance items such as mowing and litter removal
- (R) Adjustment of private facilities (ie: signs, fences, irrigation) unless covered as a part of a right-of-way agreement or permit

### 7.3.10.2 FHWA Projects of Division Interest

#### Resident Level Responsibilities

The Resident Engineer on In-house CEI projects and the Department's Construction Project Manager on Consultant CEI projects shall solicit FHWA approval of and participation in all construction contract changes on all FHWA Projects of Division Interest (PODI). Federal-Aid participation shall be documented on the ***FHWA Approval - Major and Minor Construction Changes, Form No. 700-010-47***, FHWA refusal to participate in any construction contract change should be followed-up with an additional attempt to obtain Federal Aid participation by supplying all necessary additional information or explanations. The Resident Engineer on In-house CEI projects and the Department's Construction Project Manager on Consultant CEI projects should solicit the reason for any FHWA refusal to participate in any construction contract change. Such reason for non-participation shall be noted in the ***FHWA Approval - Major and Minor Construction Changes*** form or attachment thereto. Should FHWA refuse to supply a reason, such refusal should also be noted in the document or on the attachment as part of the pertinent information included in the complete contract change package.

- (1) **Major Changes** - All major changes in the plans and specifications must be approved in writing by FHWA on the ***FHWA Approval - Major and Minor Construction Changes*** form prior to approval of the changes by the Secretary or designee prior to giving the Contractor written notice to proceed with work. When emergency or unusual conditions exist, FHWA may give tentative prior approval verbally and ratify such approval in writing as soon thereafter as practical.

Major changes include the following:

- Revisions of geometric design (main roadway, ramps, frontage roads, or crossroads) including any project and construction limit extensions.

**(NOTE: Project and Construction Limit Extension approval requests must be forwarded through the State Construction Office in accord with *CPAM Section 7.3.5.2*).**

- Revisions of pavement structural sections.
- Revisions in conflict with standards.

- Revisions, additions, deletions, or relocation of structures.
- Any changes in the plan access control.
- Any changes that alter specifications, special provisions or other contract requirements, including previously approved provisions.
- Any changes in material type or quality.
- The grant of any additional contract time in a **Supplemental Agreement**.
- Any time extensions.
- Any adjustments to the contract made by the engineer because of a significant change when acceptable prices cannot be obtained through negotiations.
- Contract claim settlements.
- **Supplemental Agreements and Unilateral Payments** that total \$50,000.00 or more, or five (5) percent or more of the original total contract amount, whichever is less.
- Substantial overruns or underruns.

FHWA prior written approval for all major changes in the plans and contract provisions shall be documented on the **FHWA Approval - Major and Minor Construction Changes** form. FHWA may give tentative prior verbal approval for major changes, when justified by emergency or unusual conditions. When this occurs, it shall be documented on the **FHWA Approval - Major and Minor Construction Changes** form. The document should note who granted the verbal approval, the date granted, and who received the verbal approval before submitting that document for FHWA written approval. That document shall be submitted for FHWA written approval as soon as practical following receipt of verbal approval.

A copy of all pertinent information justifying the request for FHWA approval and participation must be included with the document prepared for FHWA approval. Such information shall include, but not be limited to:

- The reasons for quantity overruns and underruns.
- The **Entitlement Analysis**, the **Engineer's Estimate** and, where claim settlement costs have been incurred, a **Statement of Claim Settlement Cost** (see **CPAM Section 7.5.3** for a description of that statement).

- Documentation of concurrence from the Director, Office of Construction for all changes to contract specifications and extensions of the project and construction limits.
  - All related correspondence that may be pertinent to FHWA concerns.
- (2) **Minor Changes** - All minor changes in the plans and specifications shall be approved in writing by FHWA retroactively. All project changes other than major changes shall be classified as minor changes.

FHWA retroactive written approval for all minor changes shall be documented on ***FHWA Approval - Major and Minor Construction Changes, Form No. 700-010-47***. FHWA may elect to approve minor changes by having the document sent to them for signature or by signing the document at the time of a routine field visit.

A copy of all pertinent information justifying the request for FHWA approval and participation must be included with the document prepared for FHWA approval. Such information shall include, but not be limited to, the basis for determining the need for the changes, the ***Engineer's Estimate***, and the ***Entitlement Analysis***, the basis for determining changes to contract time, and all related correspondence which may be pertinent to FHWA concerns.

- (3) **Minor Overruns or Underruns** - Minor overruns or underruns will not require prior FHWA approval. Such overruns or underruns will be reviewed for approval by FHWA in its review of the project final estimate.

### **7.3.10.3 District Oversight (Delegated) Projects**

Neither FHWA approval nor Director, Office of Construction concurrence in Federal Aid participation is required on Delegated Projects.

#### **(A) Resident Level Responsibilities**

The Resident Engineer's staff shall develop the contract change document, submit the document to the District Construction Engineer for review and solicit a determination of FHWA participation before any payment is made on the contract change or any item included in the contract change.

#### **(B) District Level Responsibilities**

The District Construction Engineer shall determine the Federal Aid participation in accordance with the guidelines shown in ***CPAM Section 7.3.10.1***. The District Construction Engineer can delegate such approval authority, in writing, to a person within the District Construction Office staff, but not to a Resident Engineer. Such



delegation shall be maintained on file in the District Construction Office. Approval shall be documented in writing showing the amount of federal aid participation for all pay items included in the contract change and must be signed and dated by the District Construction Engineer or delegate and included in the project file for that contract change. An email from the District Construction Engineer or delegate will suffice as documentation of approval.

### **7.3.11 Documenting and Approving the Work; Issuing the Notice to Proceed with the Work**

#### **Resident Level Responsibilities**

The District Construction Engineer or designee must obtain funds approval through the Contract Funds Management System (CFM) prior to the Secretary or designee approving the work on **Supplemental Agreement, Form No. 700-010-45**, and before giving the Contractor written notice to proceed with the work.

If the Department and the Contractor agree on the need for and cost of the work, the Engineer shall accomplish the following before authorizing the Contractor to proceed with the work:

- (1) Prepare an **Engineer's Estimate, Entitlement Analysis** and a draft copy of the **Supplemental Agreement** form used for approval of form and language.
- (2) Ensure that the District Construction Engineer or designee has obtained a certification of the availability of the required funds from the CFM System (see **CPAM Section 7.3.10**).

If the Department and the Contractor cannot agree on the cost and or time allowed for some of the work, then the terms of the **Supplemental Agreement** may be changed by adding an exception to paragraph (4) of the document that reserves the right of the Contractor to dispute only that portion of the costs and or time on which the Department and the Contractor cannot agree. Such modifications shall only be made with the assistance and approval of the District Legal Counsel, the Director, Office of Construction and the Office of General Counsel. The District Construction Staff shall obtain the approval of the District Legal Counsel for such modifications before forwarding for the Director, Office of Construction's and the Office of General Counsel approval. When such modifications are initiated by the Department, the approval of the District Legal Counsel, the Director, Office of Construction and the Office of General Counsel shall be obtained before forwarding the **Supplemental Agreement** to the Contractor for signature. When such modifications are made unilaterally by the Contractor to the signed copy the Contractor returns to the Department, the approval of the District Legal Counsel and the Director, Office of Construction shall be obtained before returning a fully executed copy of the **Supplemental Agreement** to the Contractor.

If the Department and the Contractor cannot agree on the terms of a **Supplemental Agreement**, or the Contractor fails to timely execute **Supplemental Agreement, Form No. 700-010-45**, the Department has unilateral authority to pay the Contractor the sums the Department determines to be due the Contractor for work performed on a project. The Department shall make a **Unilateral Payment** considered fair and equitable by the Department for work ordered and documented by the Department on the **Entitlement Analysis** and **Engineer's Estimate**. Such payment shall be made by executing **Unilateral Payment, Form 700-010-05**, in lieu of the **Supplemental Agreement** document. All other requirements of this section will apply.

If the Department and the Contractor cannot agree on the cost of the work, and the Contractor has stated his refusal to execute any **Supplemental Agreement** for the issue, then a **Supplemental Agreement** need not be prepared. The Engineer will document the Contractor's refusal to execute a **Supplemental Agreement**. A **Unilateral Payment** may be used to pay the Contractor the sums the Department determines to be due the Contractor for work performed. For a **Unilateral Payment**, the District Construction Engineer or designee must obtain funds approval from the CFM System and the Secretary or designee must approve the work prior to giving the Contractor notice to proceed with work that will be documented and paid with a **Unilateral Payment**.

Such unilateral authority for the Department to pay the Contractor does not preclude or limit the rights of the Department or the Contractor to negotiate and agree on the cost of the work. By acceptance of any such **Unilateral Payment**, the Contractor does not waive any rights for payment by the Department for additional sums that the Contractor claims are due for the work.

Notice to proceed with work to be documented with a **Supplemental Agreement** or **Unilateral Payment** may be issued by the Resident Engineer after sufficient funds have been encumbered and the work has been tentatively approved by the Secretary or designee.

After issuing the notice to proceed, the Engineer shall ensure timely preparation of the **Supplemental Agreement**, since the Contractor cannot be paid for the work until the **Supplemental Agreement** document has been completely executed.

A **Unilateral Payment** document shall be timely prepared and executed by the Department and presented to the Contractor when required. Payment will be made based on a **Unilateral Payment** document only after completion of the work described therein to the satisfaction of the Engineer.

### 7.3.12 Forms and Guidance Documents

The following forms are available on the Office of Forms and Procedures Web sites:

<b>Contract</b>	<b>Funds</b>	<b>Management</b>	<b>Access</b>	<b>Request:</b>
<a href="http://fdotsp.dot.state.fl.us/sites/OOC/CFM/Shared Documents/CFM Access.docx">http://fdotsp.dot.state.fl.us/sites/OOC/CFM/Shared Documents/CFM Access.docx</a>				

**Supplemental Agreement, Form No. 700-010-45.** Execution of contract changes by both the Contractor and the Secretary or designee.

**Unilateral Payment, Form No. 700-010-05.** Unilateral execution of contract changes by the Secretary or designee.

**FHWA Approval - Major and Minor Construction Changes, Form No. 700-010-47.** FHWA approval of construction changes and approval for Federal Aid participation on FHWA Projects of Division Interest.

The following guidance documents are available at the end of this section:

**Guidance Document 7-3-A Documenting the “Engineer’s Estimate”, the “Basis for Estimate”, and the “Entitlement Analysis” for a Contract Change Impacts.**

**Guidance Document 7-3-B Sample - Transmittal Letter for Unilateral Payment.**  
**Guidance Document 7-3-C, Examples of Premium Cost Determinations.**

### 7.3.13 Executing and Processing Supplemental Agreement and Unilateral Payment Documents

#### District Level Responsibilities

(1) A **Supplemental Agreement** or **Unilateral Payment** must not be dated prior to the date of certification of availability of funds by the Comptroller’s office.

**Supplemental Agreements** and **Unilateral Payments** shall be dated and effective on the same date as the date of Execution by the Department.

**Supplemental Agreements** and **Unilateral Payments** will incorporate the same numbering system used for the SiteManager program contract modification number. No **Unilateral Payment** shall have the same number as a **Supplemental Agreement** or a **Contingency Supplemental Agreement** to that contract.

(2) Only the Secretary of Transportation can delegate authority for approval and execution of **Supplemental Agreements** and **Unilateral Payments**. That authority is delegated as follows:

a. For contract changes up to \$150,000, all **Supplemental Agreement** and **Unilateral Payment documents** shall be approved by the Resident Engineer and shall be executed by the District Construction Engineer;

b. For contract changes more than \$150,000 and up to \$500,000, all **Supplemental Agreement and Unilateral Payment** documents shall be

approved and executed by the District Construction Engineer; and

c. For contract changes more than \$500,000.00 and up to \$1,000,000, all **Supplemental Agreement** and **Unilateral Payment** documents shall be approved and executed by the District Director of Transportation Operations, except as follows, the District Construction Engineer may execute the **Supplemental Agreement** and **Unilateral Payment** documents after the District Director of Transportation Operations has approved a draft copy of that **Supplemental Agreement** or **Unilateral Payment** showing the language and terms being used. A copy of that **Supplemental Agreement** or **Unilateral Payment** shall be sent to the Director, Office of Construction; and

d. For contract changes more than \$1,000,000, all **Supplemental Agreement** and **Unilateral Payment** documents shall be approved and executed by the District Director of Transportation Operations, except as follows, the District Construction Engineer may execute these **Supplemental Agreement** and **Unilateral Payment** documents after the District Director of Transportation Operations has approved a draft copy of that **Supplemental Agreement** or **Unilateral Payment** showing the language and terms to be used. For contract changes more than \$1,000,000.00, the District Construction Engineer or District Director of Transportation Operations, as appropriate, may execute these documents after the Director, Office of Construction has approved a draft copy of the document showing the language and terms to be used. Director, Office of Construction approval may be obtained via email provided all electronic correspondence documenting said approval is maintained in the contract change file.

In all cases of Supplemental Agreement and Unilateral Payment documents greater than \$500,000, review and execution by a Special Counsel for Construction in Central Office is required.

The above limits apply regardless of whether the amount is an increase or decrease to the contract.

Payment will be made on **Unilateral Payment** documents only after the work has been completed to the satisfaction of the Engineer.

In the event that an agreement with the Contractor is concluded after a **Unilateral Payment** has been executed and processed for that work, a standard **Supplemental Agreement** will be executed to document any additional reconciliation required. A **Work Order** shall not be used for this purpose.

**NOTE:** The **Unilateral Payment** document will not be rescinded.

(3) All original **Supplemental Agreement** documents must be executed based on the appropriate organizational structure below.

a. Execution by the Contractor

- Corporation

Must be executed by the President or Vice President or, if executed by another person, must include a certified copy of that person's authority to bind the Corporation. When the **Supplemental Agreement** is not executed by either the President or Vice President, then a Corporate Resolution which designates those individuals who have authority to legally bind the Corporation should be obtained.

The Seal of the Corporation must be affixed for a wet ink signature.

The above signature must be attested by the Secretary of the Corporation (or an Assistant Secretary) for a wet ink signature.

- Partnership

Must be executed by a person with authority to bind the company and must include a certified copy of that person's authority to bind the company. The signature must be witnessed by two persons for a wet ink signature.

- Joint Venture

Must be executed by the attorney-in-fact currently on file with the Department.

- Manager-Managed Limited Liability Company (LLC)

Must be executed by a managing member of the LLC or, if executed by another person, must include a certified copy of that person's authority to bind the Company.

The above signature must be attested by managing member of the LLC for a wet ink signature.

- Member-Managed Limited Liability Company

Must be executed by a majority-in-interest of the members of the LLC or, if executed by another person, must include a certified copy of that person's authority to bind the Company.

The above signature must be attested by managing member of the LLC for a wet ink signature.

b. Execution by the Surety (only required when the cumulative value of all contract changes on this contract will exceed 25% of the original contract amount as a result of this contract change.)

- The Seal of the Surety must be affixed.
- If the attorney-in-fact for the Surety is not a Florida Resident Agent, the document must be counter signed by a Florida Resident Agent.
- The Surety's attorney-in-fact and Florida Resident Agent must attach their **Power of Attorney**, which must be original, or be certified by manual signature, unless an original signature is on file with the Department, or unless evidence is furnished that the Surety has authorized the use of facsimile signatures.
- The **Power of Attorney** must not contain a limit less than the total contract amount including the amount increased by all contract changes. The **Power of Attorney** must be certified as valid as of the date the Agent executes the **Supplemental Agreement**.

(4) All **Supplemental Agreement** documents are to be processed within the following timeframes:

- Thirty (30) days are allowed from the day the negotiations with the Contractor are finalized until the **Supplemental Agreement** is mailed to the Contractor for execution.
- Ten (10) days are allowed for the Contractor to receive, execute, and return the **Supplemental Agreement** to the Department.
- Five (5) days are allowed after receipt for the Department to execute the **Supplemental Agreement** and enter document information into the Contract Change Tracking System and CES/TRNS\*PORT program.
- After entry of document information into the CES/TRNS\*PORT program and receipt by the Comptroller's Office of a progress estimate showing completed work, the Comptroller's Office will make payment for that work on the progress estimate.

### 7.3.14 Obtaining a Revised Project Schedule

#### Resident Level Responsibilities

A revised project schedule should be requested at the time the Contractor executes a **Supplemental Agreement** or the Engineer grants additional contract time by **Unilateral**

**Payment** if the contract has an original contract time of ninety (90) days or more, and the time granted is fifteen (15) days or more. The contract duration, the amount of time granted, the status of work progress, and any special circumstances that may exist will also indicate the appropriateness of requesting a revised schedule. When additional time is granted and a revised schedule is not requested, the basis for that decision must be documented in the project files by the Resident Engineer.

When additional time is granted, back-up documentation for the contract change shall list the controlling items of work delayed and number of non-overlapping delay days attributable to each item.

### **7.3.15 Distributing Executed Supplemental Agreement and Unilateral Payment Documents**

#### **District Level Responsibilities**

After final execution, the District Construction staff will distribute copies of the **Supplemental Agreement, Form No. 700-010-45** or **Unilateral Payment, Form No. 700-010-05** to:

- **Comptroller's Office \*** - One copy.
- **District Construction Engineer \*** - One original of each with all attachments including a copy of all plan sheets revised by the **Supplemental Agreement** or **Unilateral Payment** and, where applicable copies of the **FHWA Approval - Major and Minor Construction Changes, Form No. 700-010-47** and the **State Construction Concurrence, Form No. 700-010-43**.
- **Contractor** - One original of the **Supplemental Agreement or Unilateral Payment** and a copy of all plan sheets revised by the **Supplemental Agreement or Unilateral Payment**.
- **Director, Office of Construction \*** - (ONLY on projects with an original contract amount exceeding \$10 million.) One copy of each with all attachments including, where applicable copies of the **FHWA Approval - Major and Minor Construction Changes, Form No. 700-010-47** and the Director, Office of Construction, **State Construction Concurrence, Form No. 700-010-43**. Distribution will be made to the Director, Office of Construction prior to submitting an estimate for payment of the work.
- **Resident Engineer \*** - One copy of each with all attachments including a copy of all plan sheets revised by the **Supplemental Agreement** or **Unilateral Payment** and, where applicable, copies of the **FHWA Approval - Major and Minor Construction Changes Form** and the Director, Office

of Construction, **State Construction Concurrence, Form No. 700-010-43.**

- **State Materials Office \*** - One copy of the **Supplemental Agreement or Unilateral Payment** (Only on contracts where the State Materials Office is providing the materials certification).
- **District Materials Office \*** - One copy of the **Supplemental Agreement or Unilateral Payment** (Only on contracts where the District Materials Office is providing the materials certification).
- **District Director for Production \*** (at the discretion of the District) - One copy of the **Supplemental Agreement or Unilateral Payment**.
- **Design Project Manager \*** - Responsible for managing the Design Consultant on contracts with consultant-prepared contract documents - One copy of the **Supplemental Agreement or Unilateral Payment** document.
- **Surety** - One copy of the Unilateral Payment document. (Only required when the cumulative value of all contract changes on this contract will exceed twenty five (25) percent of the original contract amount as a result of this contract change.)

\* **NOTE:** Distribution to this party should be made by either sending an electronic copy of the documentation or by sending the Electronic Document Management System Document Number via email.

A copy of all pertinent information must be attached to the **Supplemental Agreement or Unilateral Payment** documents distributed to the Director, Office of Construction, the District Construction Engineer and the Resident Engineer. The attachments mentioned in this section include but are not limited to:

- The **Entitlement Analysis**, the **Engineer's Estimate** and, if there are claim settlement costs paid solely to avoid the risk of failing to resolve the disputed issues, the **Statement of Claim Settlement Costs**.
- The reasons for any quantity overruns or underruns and extra work.
- Documentation of the Contractor's refusal to execute a **Supplemental Agreement** where this occurs.
- Documentation of concurrence from the Director, Office of Construction for all changes to contract specifications and extensions of the project and construction limits.

### 7.3.16 Contract Change Tracking



## District Level Responsibilities

Within fifteen (15) calendar days after payment on an approved estimate of all or a portion of the work identified within the **Supplemental Agreement** or **Unilateral Payment**, the District Construction Engineer or designee shall decide upon the final contract change coding and enter the **Supplemental Agreement** or **Unilateral Payment** information into the **Contract Change Tracking System** and **SiteManager**. If the DCE's designee is not a member of the District Construction office staff, the DCE's delegation shall be maintained on file in the District Construction office. Further, if the DCE's designee is not a member of the District Construction office staff the DCE shall develop a quality assurance process to ensure accurate contract change coding and compliance with this section. Such process shall be documented and maintained on file in the District Construction office.

For an explanation of the codes involved, see the information published under "Coding Contract Changes" heading as an attachment to this section on the State Construction Office website at :  
<http://www.fdot.gov/construction/Manuals/cpam/New%20Clean%20Chapters/CodingContractChanges.pdf>

### 7.3.17 Quality Control Process for Contract Changes

#### District Level Responsibilities

The District Construction Engineer shall develop a process to annually review a representative sample of all contract changes to ensure such changes were necessary and comply with the construction contract documents. Such process and reviews will be documented and kept on file in each District for State Construction Office and FHWA review.

## Guidance Document 7-3-A

### Documenting the "Engineer's Estimate," the "Basis for Estimate," and the "Entitlement Analysis" for a Contract Change

#### Documenting the Engineer's Estimate:

The **Engineer's Estimate** serves two purposes. First it is an independent estimate of the additional cost and time prepared by the CEI staff for each contract change. Second, it documents the final disposition of each contract change after completion of any negotiations. The following documents should be included in the documentation:

- Basis for Estimate
- Engineer's Estimate
- Contractor's Quote
- Final Disposition

#### Basis for Estimate:

The Basis for Estimate is a statement explaining the methods used to compute estimated costs and time associated with a contract change.

A Basis for Estimate could be but is not limited to:

- Review of historical bid prices.
- Review of area and/or regional averages.
- Review of recent winning bids on a Department contract.
- Overrun at a unit price included in the original contract.
- The documented actual costs of the Contractor.
- Using the resource approach, a detailed estimate of the quantities and unit costs of the manpower, material and equipment resources required.

#### Estimate:

The estimate is the cost and time estimate as determined from the above method.

If the resource approach is used, the estimated cost impacts should be based on the costs of equipment, labor, material and supplies anticipated, as well as, General Liability Insurance and Bond, subcontracted work and mark-ups for each shown in **Standard**

**Specifications, Section 4-3.** Note that the work associated with contract changes is occasionally complete before settlement is reached. When this happens then no estimate is prepared.

If the estimate includes contract time impacts, the time estimate should be commensurate with the estimated effects the changes have on the controlling items of work shown on the approved work schedule except when the approved work schedule is clearly not representative of actual project performance.

The **Engineer's Estimate**, including the attached basis, should be labeled **Engineer's Estimate** and must be signed and dated by the Engineer producing the estimate. The **Engineer's Estimate** may subsequently be amended by adding a cover sheet to the original estimate. The cover sheet must state the new justifiable amount of contract days and/or dollars for one or more of the issues covered in the estimate and the reason for each such change. This amendment should be labeled Amendment to **Engineer's Estimate** and it should be signed and dated by the Department's Engineer producing the amended estimate. An **Engineer's Estimate** should be prepared prior to the Engineer receiving the contractor's price proposal for work.

#### **Contractor's Quote:**

This is the contractor's proposal of additional costs and time for the contract change.

#### **Final Disposition:**

Once the Estimate and Contractor's quote are compared by the CEI, and negotiations are completed, the CEI will prepare a listing of agreed costs/time and a statement to explain how the final costs and time due were determined.

##### Examples:

- Contractor agreed to costs/time proposed by the Department.
- After negotiations the Department agreed to accept the contractor's price/time OR agreed to accept a price/time above the Engineer Estimate in order avoid delay or further cost/time impact to the project.
- Department agreed to pay for change based on actual costs.

#### **Documenting the Entitlement Analysis:**

In the **Entitlement Analysis**, the preparer should mention each of the contract change issues as follows. For each issue, state description and reason for each change. A copy of project correspondence must be attached to and made a part of the **Entitlement Analysis**. This can be an email from the Engineer of Record as an example. The **Entitlement Analysis** should be signed and dated by the Engineer producing it.

### **Dispute Review Board Recommendations:**

Where a Dispute Review Board (DRB) has considered a dispute and has made recommendations, the recommendations should ALWAYS be included in the required documentation for that contract change.

The impact of the DRB's recommendation on Entitlement should be discussed in and made a part of the **Entitlement Analysis** only when the Department's engineer feels the DRB recommendation contains sufficient new information to change his or her previous decision on the degree (percentage amount) of the Contractor's entitlement to recover the total reasonable quantity of additional compensation and contract time associated with the dispute.

The impact of the DRB's recommendation on Entitlement or Quantum should be discussed in and made a part of the Engineer's Estimate only when the Department's Engineer feels the DRB recommendation contain sufficient new information to change his or her previous decision on the total reasonable quantity of additional compensation and contract time associated with the dispute.

Where the Department accepts the DRB's ruling and the quantity of additional compensation and contract time associated with the dispute exceeds the amounts of the most recently updated **Engineer's Estimate** and **Entitlement Analysis**, then the DRB's recommendation should be used as justification for and made a part of the **Statement of Claim Settlement Costs** (see **CPAM Section 7.5.3**).

## Guidance Document 7-3-B Sample - Transmittal Letter for Unilateral Payment

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Contractor's Name)

\_\_\_\_\_  
(Contractor's Address)

**Re:** Fin. Proj. ID. \_\_\_\_\_  
Contract No. \_\_\_\_\_  
FAP No.: \_\_\_\_\_  
County \_\_\_\_\_

**UNILATERAL PAYMENT AMOUNT \$** \_\_\_\_\_

Enclosed please find a copy of a ***Unilateral Payment*** document which has been duly executed by the Department in accordance with ***Section 337.11(11), Florida Statutes***.

The Department has determined that you, as Contractor, are entitled to payment for the work described in that ***Unilateral Payment*** document in the amount set forth in that document.

The funds have been approved for payment and you, as Contractor, should expect to receive payment for the items described in that ***Unilateral Payment*** document in the near future.

By acceptance of the payment you, as Contractor, do not waive any rights you may have against the Department for payment of any additional sums you claim may be due for the work described in that ***Unilateral Payment*** document.

Sincerely,

\_\_\_\_\_  
(Engineer)

## **Guidance Document 7-3-C Premium Costs Determinations**

Premium Costs are defined as dollar amounts paid to a Contractor for non-value added work. Delays, inefficiencies, rework, or extra work as shown below other than those caused by the Contractor and/or his subcontractors or suppliers will be considered as non-value added work. Non-value added work can occur in three distinct situations:

1. Work delays or inefficiencies. In this situation, premium costs are the total delay/inefficiency damages paid to the Contractor.
2. Rework. Premium costs are the dollar amount of the original items of work that have to be removed and the costs to remove these items.
3. Extra work. In this situation, premium costs are computed as the net difference between the final agreed prices paid to the Contractor and the ***Engineer's Estimate***.

### **NOTE:**

- All extra work does not necessarily result in premium costs.
- All extra work that is determined to be the result of design errors or omissions does not necessarily result in premium costs.
- Contract increases due strictly to overruns of contract pay items are not premium costs, unless those contract pay item overruns are associated with re-work.
- Premium vs. Non-premium is not determined by whether the plans were designed by a production Consultant.
- Premium costs are strictly a numerical calculation: the difference between the amount paid vs. what we should have paid.

Premium Cost associated with issues determined to have the following Avoidability Codes shall also be coded with Cost Recovery Code R – Action Recommended:

Avoidable: Production Consultant

Avoidable: Consultant CEI

Avoidable: 3<sup>rd</sup> Party

The following are examples of premium cost determinations.

### **Work Delay or inefficiency**

#### **Example 1:**

During construction of a roadway widening project, it was discovered that the planned surcharge would affect an existing buried fiber optic line that was not scheduled to be relocated. The impact to the fiber optic line was that it would not be able to withstand the planned settlements due to the surcharge. The Department delayed the Contractor's work in this area to allow the utility owner to relocate its fiber optic cable. The Contractor was able to mitigate the majority of the delay by working in other areas and on other

phases of work. Submitted extra costs for delays and inefficiencies agreed to by the Department for this issue was 100% premium cost.

Example 2:

A Contractor submits a claim for delays and inefficiencies on a project. The Department disputes the claims entitlement but settles the issue to avoid future litigation. Settlement costs paid for this issued would be 100% premium cost.

Example 3:

A Contractor submits a claim for delays and inefficiencies on a project. The Department disputes the claims entitlement so the Contractor takes the matter to a DRB. The DRB rules entitlement and quantum for the issue. The Department accepts the ruling and pays the quantum. Quantum for this issue would be 100% premium cost.

Example 4:

A Contractor mobilized to a project to begin test pile driving. It was then discovered that an existing utility cable, that according to the Utility relocation schedule should have been relocated, was still active. The Contractor had to stop all work on this critical path activity in this area until the new line was installed and the old line abandoned. All costs associated with this delay (overhead, idled equipment and labor, any demobilization or remobilization) are premium costs. Cost recovery from the utility company should be recommended.

## Rework

Example 1:

The Contractor built driveway as identified in plans. The Department directed the Contractor to remove that driveway and place it at a different location due to agreement with local owner. Payment was handled as an overrun to existing pay items. The cost of the original driveway and it's removal is 100% premium cost.

**NOTE:** Any time any existing pay item is paid as an overrun to compensate a Contractor for rework, the cost of the original work is now non-value added and must be accounted for as premium cost.

Example 2:

The Department directs the Contractor to remove some installed 30" RCP and replace it with 36" RCP. Since contract did not include pay item for 36" RCP, a **Supplemental Agreement** was required. The cost of removal of 30" RCP, the cost of the installed 30" RCP that was removed, and the cost difference of 36" RCP over what would have been considered a reasonable bid price are 100% premium costs.

## Extra Work

### EXAMPLE 1:

On a Lump Sum milling & resurfacing construction project let in January 2008, the Department discovers in January 2009 that an error has been made by the Engineer of Record. The EOR has omitted a turn lane from the construction plans which was identified as required when the project was in the early design stages. The Contractor has completed all paving operations except for the Friction Course. The District decides to proceed with adding that turn lane to the project. The Engineer has determined that this issue qualifies as a “significant change” as defined in Standard Specification 4-3.1 due to a change in the character of the work. The Contractor submits a price to the Department for mobilizing of grading equipment, excavation, stabilization, base, additional asphalt costs due to pricing increases above the 2008 bid prices, overhead and additional time to perform the work. The Contractor’s price is reviewed and accepted by the Department. The premium costs associated with this issue would be:

- Price difference between asphalt quoted in the 2008 bid vs. the pricing quoted when the work is added in 2009
- Mobilization of grading equipment
- Overhead costs associated with added time to complete turn lane

### Example 2:

On a Pay Item reconstruction construction project let in January 2008, the Department elects to add a turn lane to the project in January 2009. The Contractor has completed all grading and paving operations except for Friction Course. The Engineer has determined that this issue does not qualify as a “significant change” as defined in Standard Specification 4-3.1 due to the fact that there is no change in the character of the work nor do any of the work items associated with this change meet the definition of a “Major Item of Work” which will be increased by 125% or decreased below 75% of the original Contract quantity. The Contractor submits a price to the Department for remobilizing of grading equipment, overrun of existing items for: excavation- stabilization-base, additional asphalt costs due to pricing increases above the 2007 bid prices, overhead and additional time to perform the work. The Contractor’s price is reviewed and accepted by the Department with the exception of the asphalt price increases. The premium costs associated with this issue would be:

- Remobilization of grading equipment
- Overhead costs associated with added time to complete turn lane

### Example 3:

A utility conflict was discovered with a proposed drainage installation. The Contractor has



to stop, move to another location until further direction given. The direction given is to construct a conflict manhole. Premium will be the contractor's labor/equipment costs to stop and move, costs to move back to the original site, and the cost differential between conflict manhole as agreed to and the price if in the original contract.

Example 4:

After drainage work was completed, a low spot is discovered that requires another inlet and pipe to correct the situation. In discussing this with the Engineer of Record it's discovered that the Department furnished the survey for the project. The project included the inlet and pipe items needed to do the work, but the contractor would not accept these costs because the extra work was an isolated condition, the drainage was sub-contracted work and the subcontractor was off the project. Premium costs would be the costs for subcontractor to re-mobilize, demobilize, and the cost differential between the inlet and pipe prices agreed to and the bid unit prices. Note: In order for the Department to accept the contractor position, the Engineer must determine that this represents a significant change per Standard Specification 4-3.1 and there is justification for not overrunning the inlet and pipe pay items.

## **Guidance Document 7-3-D Contract Time Adjustments**

The contractor is required to submit and maintain a project schedule that details the timing for controlling items of work or critical path activities from start to finish of the project. The schedule should depict the planned operation by day or week and the operation may take the form of a critical path. A review of the critical path activity can identify the impacts to controlling items of work or critical path activities.

If work covered by a contract change affects controlling items of work or critical path activities, a change in the contract time may be warranted. If the controlling items of work or critical path activities are unaffected, a change in contract time is not warranted.

Occasionally, there are events that are beyond the control of the contractor which affect either controlling items of work or critical path activities and are acceptable to support an extension of contract time (i.e. hurricanes). But there are events that are normally considered to be under control of the contractor which do not warrant a time extension (i.e. plant breakdown, suspensions for violation of safety or environmental regulations)

### **Contract time granted**

The contractor encountered existing drainage structures during the removal of a 48" pipe across a road. Due to the nature of the work specified, this additional structure removal required the use of additional equipment not anticipated and additional man hours not originally accounted for. As a result, two additional days were granted due to the impact on production to this controlling work item or critical path activity. An Engineer's Estimate was prepared detailing the additional equipment and man hours required to complete this work and an analysis for additional granted time was attached to the Supplemental Agreement as back up showing the impacts to this controlling item of work or critical path activity.

### **Contract time not granted**

The contractor submitted a request for time delays associated with a changed condition based on the soil that was available from the ponds. The type of soil material resulted in additional effort to dry the soil before use. The contractor contends this resulted in 17 delay days in drying the material thereby delaying completion of the project. The Department performed its own independent analysis and reviewed the delays requested during the time frame and the weather days granted to insure there was no overlap. The Department determined no controlling items of work or critical path activities were affected by this alleged delay and the end date of the project was not impacted. As a result, no time was granted to the contractor.

### **Concurrent delays resulting in contract time granted**

The contractor submitted a request for time delays associated with paving the roadway due to the revisions needed to the maintenance of traffic contract plans. The contractor is requesting a 3 day time extension. The Department performed an independent evaluation of the impact and determined the controlling items of work or critical path activities were affected in waiting to obtain the revised maintenance of traffic plans. However, it was learned that contractor's asphalt plant was broke down for 5 days during this 3 day time extension request and the contractor was unable to produce asphalt during these 5 days. Per **Specification 4-3.2.1**, the contractor shall be entitled to a time extension for each day that a controlling work item is delayed by the Department, but shall have no right to nor receive any monetary compensation for any indirect costs for any days of concurrent delay. As a result, the contractor is entitled to three non-compensable days.