

Section 7.6

CONTRACTING FOR GOVERNOR DECLARED EMERGENCIES

7.6.1 Purpose

To establish a uniform procedure for the initiation, execution and administration of emergency contracts and to standardize the Department's responses to contractors related to impacts to construction projects in advance of and following natural disasters covered by Governor declared emergencies.

7.6.2 Authority

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

7.6.3 Reference

Title XVII, Chapter 252, F.S., Emergency Management
Sections 4-3, 7-14, 8-7 and 104-7, Standard Specifications for Road and Bridge Construction
Article IV, Section 1(a), Florida Constitution

7.6.4 Emergency Contracts

Form **375-040-61, Emergency Contract** (herein referenced as **H-Contract**), **Supplemental Agreement, Unilateral Payment, Work Order**, or one of the Departments Standard Form Contracts with an "H" contract number, may be used to facilitate the contracting process for Governor declared emergencies as outlined in **Emergency Procurement During Governor Declared Emergencies, Procedure No. 375-040-130**. These contract forms are available from the Department's Infonet forms site and include detailed instructions for preparation and execution.

An **H-Contract** can be used to provide for emergency and/or permanent restoration on existing construction contracts. The emergency and/or permanent restoration work is to be negotiated with the contractor who has the existing construction contract without the need for competitive bids. Some advantages of using **H-Contracts** are: facilitated tracking, reporting, records retention, and federal reimbursement from either the Federal Highway Administration (FHWA) or the Federal Emergency Management Agency (FEMA). It is important to note that on state funded contracts, the Department will have

to enter into a separate H contract with the Contractor to be eligible for federal reimbursement without federalizing the existing construction project. To avoid federalizing a state funded project, any emergency damage repair eligible for federal reimbursement should be performed under a separate H contract.

Emergency related contracts will need an **H-Contract** number, the appropriate emergency financial numbers for each activity, and are to include all the emergency and/or permanent restoration work. Obtain the **H-Contract** number from the District Procurement Office and the emergency financial number from the District Work Program Office. The **H-Contract** should be fully executed by both parties prior to the emergency work starting, but shall be executed prior to the expiration of the Governor's declaration. Funding for the emergency work should be encumbered by the next business day following the work beginning or execution of the contract whichever is first.

When seeking FHWA reimbursement, attach the following to the **H-contract Supplemental Agreements, Unilateral Payments, and/or Work Orders**:

- **Form 1273 – Required Contract Provisions Federal-Aid Construction Contracts** – This form shall be attached to the **H-Contract** for construction related services where there is, or there is potential for, federal reimbursement. See link below:

<http://www.fhwa.dot.gov/programadmin/contracts/index.cfm>

- **Wage Rate Tables** – The appropriate wage rate table shall be attached if the services being provided are subject to the U.S. Department of Labor, Davis Bacon Act. See link below:

<http://www.dot.state.fl.us/construction/Wage.shtm>

A separate **H-Contract** may be issued with the Consultant Construction Engineering and Inspection (CCEI) managing the existing construction contract to oversee the emergency and/or permanent restoration work on existing construction contracts. Work is to be negotiated with the firm who has the existing CCEI contract. If these contract amendments are used, they must have the appropriate emergency financial number for each work activity to facilitate tracking, reporting, records retention and federal reimbursement (FHWA and FEMA). The appropriate emergency financial number should be obtained from the District Work Program Office. As with construction contracts, a separate H-Contract must be used on state funded projects seeking reimbursement to prevent federalizing the existing CCEI contract.

H-Contracts related to reimbursement requests under the FHWA Emergency Relief (ER)

program must be documented on a FHWA Detailed Damage Inspection Report (DDIR) to be completed by the Department and approved by FHWA. If practical, all DDIR's associated with the **H-Contract** should be referenced therein.

Supplemental Agreements, Unilateral Payments, and/or Work Orders can also be used for emergency and/or permanent restoration on existing construction contracts. Work is to be negotiated with the contractor who has the existing construction contract without the need for competitive bids. If these contract changes are used, they must have the appropriate emergency financial number for each work activity, and a contract change root cause reason code to facilitate tracking, reporting, records retention and federal reimbursement (FHWA and FEMA). The appropriate emergency financial number should be obtained from the District Work Program Office.

Do not use **H-Contracts, Supplemental Agreements, Unilateral Payments, or Work Orders** to contract with a local government for reimbursable FHWA funding. Form **350-000-15, Emergency Local Government Emergency Relief Reimbursement Agreement**, is to be used for this purpose. Emergency and permanent work to be performed by a Local Government shall be in accordance with **Emergency Procurement During Governor Declared Emergencies, Procedure No. 375-040-130**.

7.6.5 Governor Declared Emergencies

To account for the potential impacts natural disasters covered by Governor declared emergencies have on active construction projects, the following process will be utilized, pursuant to **Specifications 7-14 and 8-7.3.2**. Suspension and resumption of operations on projects shall be implemented by the Districts on a case by case basis. No statewide closures will be implemented in advance of a natural disaster covered by a Governor declared emergency unless directed by the Chief Engineer.

1. A State of Emergency must be declared by the Governor of the State of Florida.
2. During the period of the State of Emergency, the Department elects to compensate the Contractor for the following and/or grant time extensions for the following, where the Contractor has taken every reasonable precaution to prepare for the natural disaster covered by a Governor declared emergency:
 - Damage to material that was incorporated into the projects and accepted by the Department prior to the natural disaster (Federal-aid participating*; FHWA Emergency Relief (ER) eligible);
 - Damage to stored materials at the project site that would otherwise be permanently incorporated into the project (Federal-aid non-participating*; FHWA ER ineligible);

- Reconstruction of permanent or temporary erosion control features in accordance with **sub-article 104-7.1** (Federal-aid participating*; FHWA ER eligible);
- Taking down and replacing Maintenance of Traffic (MOT) devices as directed by the District Construction Office (Federal-aid participating*; FHWA ER ineligible);
- Repair of damaged post-mounted MOT signs, deemed to be essential by the Engineer and damaged where left in place; and repair of damaged Changeable (Variable) Message Signs that were specifically directed by the Department to be placed on projects during the storm (Federal-aid participating*; FHWA ER eligible);
- In the days immediately preceding a natural disaster covered by a Governor declared emergency, the Department may prohibit lane closures to allow departing travelers unrestricted egress from evacuation areas. These days, up to two (2) calendar days with prohibited lane closures, would not be eligible for compensation. For any days exceeding the two (2) calendar days, the Department will compensate idle equipment and labor per **sub-article 4-3.2** for the days on which the contractor could have prosecuted the work but for the District directed suspension of operations (Federal-aid participating*; FHWA ER ineligible);
- In the days immediately following a natural disaster covered by a Governor declared emergency, the Department may prohibit lane closures to allow returning travelers and assistance service vehicles unrestricted ingress to evacuation areas. These days, up to two (2) calendar days with prohibited lane closures, would not be eligible for compensation. For any days exceeding the two (2) calendar days, the Department will compensate idle equipment and labor per **sub-article 4-3.2** for the days on which the contractor could have prosecuted the work but for the District directed suspension of operations. Each contract will be evaluated on a case by case basis and factors such as adverse conditions at the job site, loss of power, etc. shall be considered in the determination of whether the contractor could have prosecuted work (Federal-aid participating*; FHWA ER ineligible).

* Reference to "*Federal-aid participating*" in this section refers to use of regular Federal-aid funds.

The Project Administrator and the Contractor must establish the extent of damage. The Department will pay these costs no later than the second (2nd) estimate following submittal by the contractor provided that all information and documentation requirements have been met.

No compensation will be paid to the contractor for the following items:

- Per day MOT devices not in place on a project;
- Damage to MOT devices, whether in place or elsewhere, except under the exception provided above;
- Temporary works or material damage, except under the exception provided above;
- Idle labor except as stated above;
- Idle equipment except as stated above;
- Reduced production rates due to effects of inclement weather;
- Loss of Profits; and
- Home Office Overhead, Jobsite Overhead, and any other Overhead except as stated above.

3. Pursuant to **Specification 8-7.3.2**, the Department may grant a non-compensable time extension for the effects of the inclement weather related to the natural disaster covered by a Governor declared emergency.

If project resources (equipment and/or personnel) documented to be allocated to critical path or controlling items of work are diverted for emergency work for other governmental agencies or for restoring water, electricity service, and signalization, the Department will grant non-compensable weather days equal to the duration those resources were reasonably diverted. For project resources that are documented to initially not be allocated to critical path but due to their diversion from the project become critical, the Department may consider granting non-compensable weather days only to the duration equal to the time documented to be on the critical path.

For contracts with No-Excuse Completion/Milestone/Incentive dates the Chief Engineer delegates authority to the District Construction Engineers (DCE) to approve requests to modify No-Excuse Completion/Milestone/Incentive dates which are the result of natural disaster covered by a Governor declared emergency. The Director, Office of Construction shall be sent copies of all No-Excuse Completion/Milestone/Incentive dates approved by the DCE.

All requests for modification of a No-Excuse Completion/Milestone/Incentive date which are the result of a natural disaster covered by a Governor declared emergency in excess of four (4) days must be submitted to the Director, Office of Construction for review and recommendation to the Chief Engineer for review and approval/disapproval.

Such No-Excuse Completion/Milestone/Incentive dates will only be adjusted by the

Department in its sole and absolute discretion, by action of the DCE or Chief Engineer as appropriate, based on the following criterion, and then only to the extent of whichever time calculation is greater:

- a. The amount of time that serious adverse conditions existed on the project (i.e., flooding, substantial erosion, etc.); and
- b. The amount of time that the Department suspended the Contractor's operations during normal (scheduled) work days (i.e., If contractor had five-day work week scheduled or the contract prohibited work on Saturday and Sunday, then time will not be granted for such days).

There shall be no right of any kind on behalf of the contractor to challenge or otherwise seek review or appeal in any forum of any determination made by the Chief Engineer under this section.

4. The Contractor will be required to submit, at a minimum, the following below listed items, along with a certification under oath and in writing, in accordance with the formalities required by Florida law, that the request for compensation, time extension, or modification of a No-Excuse Completion/Milestone/Incentive date is made in good faith, that any supportive data provided are accurate and complete to the Contractor's best knowledge and belief, and that the amount of compensation or days requested accurately reflects what the Contractor in good faith believes to be well founded under the criteria provided above for consideration by the Department. Such certification must be made by an officer or director of the Contractor with the authority to bind the Contractor. Items required to be provided, and certified as to under oath and in writing, to the Department are:
 - a. A detailed description of the activities and justification, with associated dates.
 - b. A detailed cost estimate for work to be performed or actual costs for work already performed. Work should be priced based on bid items to the maximum extent possible or in accordance with **Specification 4-3.2**.
 - c. If applicable, listing of labor and idle equipment present at the job site the day prior to the suspension, (including its identification number with serial number, manufacturer, year manufactured, model and description), the standby rate determined in accordance with **Specification 4-3.2** and the number of hours.

The above information shall be submitted no later than six weeks following the cessation of all natural disasters covered by a Governor declared emergency related impacts to the project or two weeks after Final Acceptance of the contract, whichever is sooner. A timely request is a condition precedent to any right for the

Contractor to recover any time and/or compensation. Any request that fails to fully comply with the certification requirements will not be reviewed by the Department.

5. Incorporate the following into the terms of any **Supplemental Agreement** issued for the purpose of compensating the contractor for impacts caused by natural disasters covered by a Governor declared emergency:

*“Notwithstanding the provisions of paragraph 4, this **Supplemental Agreement** is entered into pursuant to applicable provisions of the contract including **Article 7-14** of the applicable **Standard Specifications**, and to the extent this Supplemental Agreement covers rebuild, repair, restore and make good costs under **Article 7-14** it is expressly accepted by the Contractor as being the result of the exercise of the Department’s discretion under **Article 7-14**. Further, it is expressly understood and agreed to by the Parties that any time adjustment or sum to be paid pursuant to this **Supplemental Agreement** shall have no precedential value for purposes of constituting a basis for determining any potential future grant of time or money on this or any other project, and the facts, basis for, and particulars underlying the granting of any time or money hereunder shall also be inadmissible in any administrative, arbitration or legal proceeding arising out of this project, or any other project, for purposes of or relating to a claim of entitlement to time or money, whether as a settlement document or otherwise. The Department and the Contractor agree that the contract time adjustment, if any, and the sum agreed to in this **Supplemental Agreement** constitute a full and complete settlement of any and all issues of entitlement to either time or money and the Contractor hereby accepts the terms of this **Supplemental Agreement** as full compensation for all costs of equipment, manpower, materials, overhead, profit and delay damages and for all their costs, whether direct or indirect, whether incurred now or in the future, related to any of the issues set forth in this **Supplemental Agreement**.”*

6. All time extensions and costs paid in relation to a natural disaster covered by a Governor declared emergency shall be coded as “weather related new work, repairs, overruns or contract changes due to declared emergency”. Refer to **Section 7.3** of this **Manual** for the specific reason code for each natural disaster covered by a Governor declared emergency. See link below:

<http://www.dot.state.fl.us/construction/Manuals/ManualsMain.shtm>

Pursuant to **Specification 8-7.3.2**, the Department’s determination as to entitlement to time extensions related to natural disasters covered by a Governor declared emergency will be final, unless the Contractor can prove by clear and convincing evidence to a Disputes Review Board that the Department’s determination was without any reasonable factual basis.

Pursuant to **Specification 7-14**, the Department's determination as to entitlement to compensation related to natural disasters covered by a Governor declared emergency will be final and there shall be no right of any kind on behalf of the contractor to challenge or otherwise seek review or appeal in any forum of any determination made by the Department under this provision.

Applicability of this section and/or specific inclusions and/or exclusions of items that are to be compensated which are related to natural disasters covered by a Governor declared emergency can only be appealed to the Director, Office of Construction.

7. FHWA ER on Active Construction Projects:

The primary intent of this section is to address the Department's and FHWA's position on reimbursing the contractor for damages on active construction projects as a result of natural disasters covered by a Governor declared emergency. It is FHWA's position that a roadway under construction should be treated the same as a roadway with an inherent deficient condition unless a roadway segment cross section has been completed in conformance with the project's contract requirements. Therefore, FHWA generally will NOT reimburse for fixing damages on active construction projects with ER funding unless damage occurs on a segment of the roadway in which the cross section has been completed. Regular federal aid funds may still be used for the repairs provided the repair work is determined to be outside the requirements of the construction contract, thus it is not the contractor's responsibility to make the repairs at no additional cost under the contract terms.

Below is the FHWA program position for reimbursement eligibility under the ER program:

a. Only those project sites sustaining a minimum of \$5,000 in repair costs and located in counties covered by a declared State of Emergency are eligible for reimbursement.

b. In addition to FHWA making an ER eligibility determination, the FHWA District Transportation Engineer must also determine if the repair is an Emergency Repair or Permanent Repair. Emergency Repairs are reimbursed at 100% if completed within 180 days after the event. Permanent Repairs are reimbursed at the normal pro-rata share for that particular facility (Interstate 90%, other 80%). FHWA approval must be obtained prior to performing repairs classified as Permanent Repairs. Permanent restoration requires contract acquisition under routine process design, bid, build. Upon design completion, project is advertised, let and

awarded as required by FHWA. Any reimbursement request under the FHWA ER program must be documented on a ***FHWA Detailed Damage Inspection Report*** to be completed by FHWA.

c. The following bulleted items may be eligible subject to review and approval by the FHWA District Transportation Engineer on a case by case basis:

- Damage to material that was incorporated into the projects.
- Reconstruction of permanent or temporary erosion control features in accordance with ***Specification 104-7.1***.
- Repair of damaged post-mounted MOT signs, deemed to be essential by the Engineer and damaged where left in place; and repair of damaged Changeable (Variable) Message Signs that were specifically directed by the Department to be placed on projects during the storms.