

Contract Modification Discussion

Construction Academy

Larry Ritchie

State Construction Office

October 12, 2023

AGENDA

- Purpose
- Types of Contract Modifications
- Documentation
- Approvals
- Common Errors

WHAT IS THE PURPOSE? WHY ARE WE HERE?

- Standardize procedures
- Provide guidance
- Minimize mistakes
- Expedite the processing of Contract Modifications
- Promote discussion and feedback on existing policies

Supplemental Agreements and Unilateral Payments

DEFINITIONS

- **Supplemental Agreement:**

A written agreement between the Contractor and the Department, modifying the Contract within the limitations set forth in the prevailing specifications.

- **Surety:**

The corporate body that is bound by the Contract Bond with and for the Contractor and responsible for the performance of the Contract and for payment of all legal debts incurred by the Contractor.**

Surety- Responsible for the contract if contractor defaults

CPAM Section 7.3, Section 4-3 Standard Specifications

***** Surety does not need to sign SAs up to and including 25% of the original contract amount cumulative. However, the Surety must sign any SA or SAs (cumulative) greater than 25% of the Original Contract amount.***

DEFINITIONS

- **Unilateral Payment:**

A payment of money made to the Contractor by the Department pursuant to Section 337.11(12), Florida Statutes (2021), for sums the Department determines to be due to the Contractor for work performed on the project, and whereby the Contractor by acceptance of such payment does not waive any rights the Contractor may otherwise have against the Department for payment of any additional sums the Contractor claims are due for the work.

WHAT IS THE BASIC DEFINITION?

- **Unilateral Payment:**

In other words, if the contractor doesn't agree and we want him to go to work, use a Unilateral. Keep up with time and materials and settle up later!

GET ON WITH THE WORK!

SUPPLEMENTAL AGREEMENTS OR UNILATERALS PAYMENTS SHOULD BE USED FOR THE FOLLOWING ITEMS OTHERWISE A WORK ORDER CAN BE USED?

- (A) Clarify the plans and specifications of a contract
- (B) Provide for unforeseen work, grade changes, or alterations in the plans that could not reasonably have been contemplated or foreseen in the original plans and specification.
- (C) Change in the limits of construction to meet field conditions. **Change to limits of construction on a Federal Aid project require a FMIS modification.**

SUPPLEMENTAL AGREEMENTS OR UNILATERALS PAYMENTS SHOULD BE USED FOR THE FOLLOWING ITEMS OTHERWISE A WORK ORDER CAN BE USED? (continued)

- (D) Provide a safe and functional connection to an existing pavement.
- (E) Settle contract claims (*Supplemental Agreements only*).
- (F) Make the project functionally operational in accordance with the intent of the original contract (Errors & Omissions/Premium Costs).

SUPPLEMENTAL AGREEMENTS OR UNILATERALS PAYMENTS SHOULD BE USED FOR THE FOLLOWING ITEMS OTHERWISE A WORK ORDER CAN BE USED? (continued)

- (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 (*FS 337.11(9)(b)*). **If the Director, Office of Construction determines a fair bidding practice concern exists, a public interest finding will be included in the project file.**
- (H) Give effect to the negotiated settlement of a dispute.

WHAT ARE GENERAL REQUIREMENTS FOR PROCESSING SUPPLEMENTAL AGREEMENTS?

- An Engineers Estimate
- An Entitlement Analysis
- A Basis for Estimate
- A Premium Costs Analysis
- A detailed itemization of all items of work including quantities and unit prices
- The Comptroller's office must certify the availability of funds
- Proper level of Approval and Execution must be obtained (OCE, DCE, Dir of Ops, FHWA)

WHAT ARE GENERAL REQUIREMENTS FOR PROCESSING SUPPLEMENTAL AGREEMENTS? *(continued)*

- All Supplemental Agreements are to be processed within the following timeframe from the day the negotiations with the Contractor are finalized.
- 30 days are allowed from the date negotiations are finalized until the SA is mailed to the Contractor for execution
- 10 days are allowed for the Contractor to receive, execute, and return the SA to the Department

WHAT ARE GENERAL REQUIREMENTS FOR PROCESSING SUPPLEMENTAL AGREEMENTS? *(continued)*

- 5 days are allowed after receipt for the Department to execute the SA and enter, or be ready to enter, document information into the Contract Change Tracking System and *CES/TRNS*PORT* program
- After entry of document into the *CES/TRNS*PORT* program and receipt by the Comptroller's office of a progress estimate showing completed work, the Comptroller's office to make payment for the work on the progress estimate

Contingency Supplemental Agreements and Work Orders

DEFINITIONS

- **Initial Contingency Amount – (alternate method of funding additional work):**

Due to the complexity or size of construction projects, it is expected that unforeseen additional work may be necessary on some projects to complete the work and make their project functionally operational in accordance with the intent of the original contract. The pay item for this is included in the Contract for use by the Project Administrator for any extra work without having to do an SA.

- **Contingency Supplemental Agreement:**

After the Initial Contingency Amount is at least 50% billed to *SiteManager*, the Project Administrator may process a pre-approved amount in the form of a Contingency Supplemental Agreement to continue the progress of the project expeditiously.

DEFINITIONS

- **Work Order for Unforeseen Additional Work:**

The intent/use of this procedure is to allow delegation of authority for execution of the Work Order to a responsible Department designee who can make timely decisions for incorporating the unforeseen additional work. Authority for execution of the Work Order is delegated to the PA.

Prior to issuing the NTP to the Contractor for additional work covered by a Work Order, the PA shall confirm that sufficient funding is available to cover the cost of the work.

DEFINITIONS

- **Work Orders:**

are funded by the Initial Contingency amount in the Contract or by Contingency Supplemental Agreement(s) prepared after the Initial Contingency Amount is expended.**

Also, contingency percentages/amounts (i.e. \$50,000 or \$150,000) per CPAM can be exceeded if an exception request is made by the District Secretary. This is something to consider for very large projects.

*** Before any Contingency SA can be issued, 50% of the Initial Contingency Amount has to be billed in Site Manager. This also applies to subsequent Contingency Supplemental Agreements.*

WORK ORDER NUMBERING

Work Orders are funded through an Initial Contingency Amount Pay item (999-25).

For funding by the Initial Contingency Pay Item, number the Work Orders sequentially beginning with 01,02,03, etc...

For each subsequent Contingency Supplemental Agreement (CSA) restart the numbering of the Work Orders on that CSA beginning with 01,02,03, etc...

WORK ORDERS

- **Work Orders** shall not be written to include normal overruns of existing contract items for work at established contract unit prices shown in the contract documents.
- **Work Orders** shall not be used to settle claims or previously executed Unilateral Payment documents.
- **Work Orders** shall not be used to settle costs associated with unforeseen utility work during construction.

WORK ORDERS

- **Work Orders** should not include lump sum items without a detailed itemization stating the quantities and unit prices the lump sum item was based on.
- **Work Orders** may be used to document the Florida Department of Transportation reimbursement to the Contractor for the Contractor's fee payments made to the individual board members of a Regional Disputes Review Board (RDRB) for those board members participation in RDRB meetings held to resolve disputes related to the contract.

WORK ORDERS

- ***Work Orders*** may be used, along with the appropriate approvals from the Director, Office of Construction, and the FHWA as documentation to effect a specification change or extend the physical limits of a project (*see CPAM Section 7.4.9.6*).

WHAT ARE GENERAL REQUIREMENTS FOR PROCESSING WORK ORDERS?

- An Engineers Estimate
- An Entitlement Analysis
- A Basis for Estimate
- A Premium Costs Analysis
- A detailed itemization of all items of work including quantities and unit prices
- The Comptroller's office must certify the availability of funds
- Proper level of Approval and Execution must be obtained (OCE, DCE, Dir of Ops, FHWA)

Documentation

DEFINITIONS

- **Engineer's Estimate:**

The estimate of the actual cost and time impacts to the Contractor caused by a contract change without regard to whose fault the contract change is or the percentage of those cost and time impacts the Contractor may be entitled to recover. For each contract change issue, the Engineer's Estimate will show the pay items involved along with quantities, unit prices, any time impacts, and the basis for the estimate.

ENGINEER'S ESTIMATE

The Engineer is to prepare their own independent estimate and can do this either way.

1. Can use pay item approach – Qty, Unit Prices, and Summary
2. Can use resource approach – Labor/Equipment/Material/Mark-ups

Note: Can accept the contractor's quote as the EE if it's a matter of using contract unit prices/quantities. In the event that both the contractor and the Department agree to do the work on a time and materials basis then there is no EE.

DEFINITIONS

- **Entitlement Analysis:**

A document, signed and dated by the Engineer, containing statements regarding each issue of a contract change, stating the reasons why the Contractor is, or is not, entitled to recover some or all of the time and cost impacts calculated for that contract change issue in the Engineer's Estimate. The Entitlement Analysis for each issue should also include a numeric percentage (i.e. 100%, 0%, no ranges) of those cost and time impacts for which the reasons previously stated justify the Contractor's entitlement. Each contract change issue should include all the pay items associated with that issue.

DEFINITIONS

- **Basis for Estimate (for a Contract Modification):**

This is a statement which is a required part of the supporting documentation. This statement shows the methods used to determine the costs and time impacts for those issues shown in the Engineer's Estimate.

Note: This is a statement, NOT a number. This is generally understood. Documenting the cost & time analysis for each change negotiated.

DEFINITIONS

- **Premium Costs:**

The additional cost of a contract change that would not have been incurred if the work had been included in the original contract. More specifically, Premium Costs are dollar amounts paid for non-value added work. Delays, inefficiencies, rework, or extra work, other than that 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.

WHAT ARE THREE DISTINCT SITUATIONS FOR PREMIUM COSTS?

- **Work Delays or inefficiencies.** In this situation, the Premium Costs are the total delay/inefficiency damages paid to the contractor.
- **Rework.** The Premium Costs are the dollar amount of the original items of work that have to be removed and the costs to remove these items.
- **Extra work.** In this situation, the Premium Costs are computed as the net difference between the final agreed prices paid to the contractor and what the cost would have been had the extra work been included in the original bid at Letting.

Premium Costs incurred on Federally funded projects which are associated with EOR and CCEI Errors and Omissions shall be Federal Aid Non-Participating.

PREMIUM COSTS?

Please Note:

- All extra work does not necessarily result in Premium Costs.
- All extra work that is deemed 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.

WHAT ARE COMMON PROBLEMS WITH PREMIUM COST CALCULATIONS?

1. Incorrectly calculated - Whole cost vs. Extra (non-value added) costs.
2. Delay and Inefficiency costs ignored.
3. Not Calculated – Totally ignored
4. Calculation not documented – You must document the process which brought you to the conclusion.

DETERMINING COSTS

- **Direct Costs** The actual costs associated with labor, equipment and materials.
- **Indirect Costs** The “soft costs” or overhead costs of doing business such as utilities, building rent/payments, insurance, fringe benefits, etc. These are not directly recoverable but are compensated by the greater of either (1) or (2) below:
 - (1) Mark-up of 17.5% on the payments of labor, equipment and materials plus bond and subcontractor mark-up.Or
$$D = \frac{A \times C}{B}$$
 - (2) ** Where A = Original Contract Amount B = Original Contract Time C = 8%
D = Average Overhead Per Day

*** Not eligible to recover the first 10 days of a delay Section 5-12, Standard Specifications*

INDIRECT COSTS 4-3.2.2 SUBCONTRACTED WORK

The “soft costs” or overhead costs of doing business such as utilities, building rent/payments, insurance, fringe benefits, etc. These are not directly recoverable but are compensated by the greater of either (1) or (2) below:

(1) Mark-up of 17.5% on the payments of labor, equipment and materials plus bond.

Or
$$D = \frac{A \times C}{B}$$

(2) ** Where A = Original Contract Amount minus Original Subcontract Amounts

B = Original Contract Time

C = 8%

D = Average Overhead Per Day

WHAT ABOUT BOND COSTS?

Specification 4-3.2 states:

SUBARTICLE 4-3.2.1, (4) (1), :

- (1) Bond: The Contractor will receive compensation for any premium for acquiring a bond for such additional or unforeseen work at the original Contract bond rate paid by the Contractor. No compensation for bond premium will be allowed for additional or unforeseen work paid by the Department via initial contingency pay item.

WHAT DOES THIS SPECIFICATION DO?

- Establishes how payment of bond for extra work (additional and/or unforeseen work) shall be paid and to ensure that it is paid in a consistent manner.
- Establishes that the contractor will receive compensation for premiums paid for acquiring a bond for such additional or unforeseen work at the original Contract bond rate.

WHAT DOES THIS SPECIFICATION MEAN? (continued)

- Bond premium will NOT be paid for additional work paid for by the Initial Contingency Item.
 - Bond will be paid for work added by SA or by a Work Order on a Contingency SA.
 - Payment of the bond will be at the contract bond rate.
-
-

EXTRA WORK DUE TO DESIGN ERROR/OMISSION:

If the Contract Modification is a result of an Error or Omission, the PA shall obtain Design Project Manager (DPM) concurrence. The PA shall enter the document into the FDOT Resolution Tracking System (RTS), notifying the DPM when it is entered.

All documents resulting from avoidable Errors or Omissions (Consultant Designers or CCEI's) shall be entered into the RTS regardless of whether or not Premium Costs are incurred.

The reporting to the DPM and any subsequent reporting or actions is NOT to hold up the processing of the SA to the Contractor. The assignment of responsibility for an error/omission and the processing of the SA are on separate paths.

REMINDER

Documentation Requirements

When submitting Contract Modifications to the District Construction Office, the PA should include, as part of the Entitlement Analysis and Engineering Estimate, adequate documentation to support the EE, EA and Premium Costs.

WHAT DOCUMENTATION (SA PACKAGE) IS REQUIRED?

- Additional Work Program or Tracking forms if required by District policy
- Correct SA form (Unilateral, etc.)
- Entitlement Analysis
- Engineer's Estimate (including Basis for Estimate/Premium Costs Analysis)
- Claim Settlement Statement (if applicable)
- Correct reason code
- FHWA approval (if applicable)
- Correspondence from Contractor
- SA Back-up Guidance Documentation
- Any Additional Items required by District

WHAT DOCUMENTATION SHOULD BE PROVIDED WHEN GRANTING TIME ON A SUPPLEMENTAL AGREEMENT?

- A statement of adjustment of contract time shall be included
- Additional time should be commensurate with the estimated effects the changes have on the controlling items of work
- When additional time is granted, the back up documentation for the change shall list the controlling items of work delayed and the number of non-overlapping delay days attributable to each.
- When contract time is granted a revised schedule is required if 15 days or more is granted and the original contract time is at least 90 days.

APPROVALS

WHAT ARE THE LEVELS OF ENPOWERMENT? (WHO CAN APPROVE WHAT)

Project Administrators

- Work Orders

** (CCEI-FDOT PM needs to initial, or if In-house CEI, the PA has the authority)

** Requirement of some Districts

WHAT ARE THE LEVELS OF ENPOWERMENT? (WHO CAN APPROVE WHAT)

Operation Center/Resident Engineer

- Contract change costs up to \$150,000
- Time Extensions - Cumulative maximum of thirty days or up to 5% of original contract time, whichever is greater

WHAT ARE THE LEVELS OF ENPOWERMENT? (WHO CAN APPROVE WHAT)

District Construction Engineer

- Contract change costs up to \$150,000 to \$500,000
- Time Extensions - In excess of thirty days or over 5% of original contract time

WHAT ARE THE LEVELS OF ENPOWERMENT? (WHO CAN APPROVE WHAT)

District Director of Operations

- Contract change costs over \$500,000
- * Required Director, Office of Construction Approval for contract changes greater than \$1,000,000.

ENPOWERMENT? (WHO CAN APPROVE WHAT)

FHWA Approval on Projects of Division Involvement (PoDI)

Major Changes - (Must have prior signed approval)

- Revisions to geometric design
- Revisions to pavement structural sections
- Revisions in conflict with standards
- Revisions, additions, deletion or relocation of structures
- Any changes in plan access control
- Any changes that alter specifications, special provisions, etc.

ENPOWERMENT? (WHO CAN APPROVE WHAT)

FHWA Approval on PoDI projects (continued)

Major Changes – (Must have prior signed approval)

- Any change in material type or quality
- Granting of additional Contract Time (Time Extensions)
- Any adjustments made by the Engineer when prices cannot be negotiated
- Contract Claim settlements
- Increases of 50,000 or 5% or original contract, whichever is less
- Substantial overruns and underruns

ENPOWERMENT? (WHO CAN APPROVE WHAT)

FHWA Approval

Major Changes/Work Orders

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 determines participation* on PoDI projects

DCE determines FHWA participation* on exempt (delegated) projects

** FHWA will not participate in Premium Costs if incurred as a result of errors & omissions.*

WHAT ARE SOME COMMON ERRORS?

- Engineer's Estimate considerably less than Contractor's Estimate
- Inadequate support for unit price changes
- Insufficient backup/background
- Time granted not related to schedule
- The Contract Modification is coded incorrectly
- Federal Aid Participation*

QUESTIONS?

larry.ritchie@dot.state.fl.us

850-414-4168
