

**From:** Powell, Jr., Rudy  
**Sent:** Thursday, May 13, 2010 10:24 AM  
**To:** Toole, Deborah  
**Subject:** FW: Contractor Tort Liability.  
**Attachments:** definition changes.doc

Please get these formatted for 1/11 implementation.

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**From:** Powell, Jr., Rudy  
**Sent:** Thursday, May 06, 2010 8:46 AM  
**To:** Sadler, David A; Steinman, Paul J.; Brautigam, Duane  
**Subject:** FW: Contractor Tort Liability.

Attached are the changes as I understand them. I searched and found two locations for “change order” – 5-12.6.2 and the index. No locations for “field order.” A definition for work order is needed. I am not sure what is needed to address the request below:

Second, I do not expect that it is disputed that plan alterations made pursuant to sections 4-3.1 and/or 5-1.3 would be a contract document but the definition should be rewritten somehow to make that clear if for no other reason than section 337.195 purposes.

Also, performance and payment bond are not mentioned in 3-5. The term Contract Bond is used. Are changes needed?

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**From:** Blanchard, Brian  
**Sent:** Tuesday, May 04, 2010 11:32 AM  
**To:** Burleson, Bob  
**Cc:** Powell, Jr., Rudy; Brautigam, Duane; Sadler, David A; Steinman, Paul J.  
**Subject:** RE: Contractor Tort Liability.

Bob,

I met yesterday with staff to discuss this request. We will make a change in the definition of “contract documents” to clarify that plan changes during construction are part of the “contract documents”, plus any other minor tweaks needed.

### **Change Order.**

~~—A written order issued by the Department and accepted by the Contractor, covering minor changes in the plans, specifications, or quantities of work, within the scope of the Contract, when prices for the items of work affected are previously established in the Contract.~~

### **Contract Documents.**

The term “Contract Documents” includes: Advertisement for Proposal, Proposal, Certification as to Publication and Notice of Advertisement for Proposal, Appointment of Agent by Nonresident Contractors, Noncollusion Affidavit, Warranty Concerning Solicitation of the Contract by Others, Resolution of Award of Contract, Executed Form of Contract, Performance Bond and Payment Bond, ~~Standard Specifications, Supplemental Specifications, Special Provisions,~~ plans, Addenda, or other information mailed or otherwise transmitted to the prospective bidders prior to the receipt of bids, ~~change orders, field orders~~ *work orders*, and supplemental agreements, all of which are to be treated as one instrument whether or not set forth at length in the form of contract.

Note: As used in Sections 2 and 3 only, Contract Documents do not include ~~change orders, field orders,~~ *work orders* and supplementary agreements. As used in Section 2 only, Contract Documents also do not include Resolution of Award of Contract, Executed Form of Contract, and Performance and Payment Bond.

### ***Work Order.***

*A written order issued by the Department and accepted by the Contractor ...*

**5-12.6.2 Compensation for Delay:** Notwithstanding anything to the contrary contained in the Contract Documents, the additional compensation set forth in 5-12.6.2.1 shall be the Contractor’s sole monetary remedy for any delay other than to perform extra work caused by the Department unless the delay shall have been caused by acts constituting willful or intentional interference by the Department with the Contractor’s performance of the work and then only where such acts continue after Contractor’s written notice to the Department of such interference. The parties anticipate that delays may be caused by or arise from any number of events during the term of the Contract, including, but not limited to, work performed, work deleted, ~~change orders,~~ supplemental agreements, *work orders*, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right-of-way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, suspensions of work by the Engineer pursuant to 8-6.1, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, special events, suspension of Contract time, or other events, forces or factors sometimes experienced in construction work. Such delays or events and their potential impacts on the performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not be deemed to constitute willful or intentional interference with the Contractor’s performance of the work without clear and convincing proof that they were the result of a deliberate act, without reasonable and good-faith basis, and specifically intended to disrupt the Contractor’s performance.

Also, we will remove the reference in the "contract documents" definition for "change orders" and "field orders" since those terms are not used anymore in the CPAM (we refer to work orders and supplemental agreements now). Since Section 1 has a definition for "change order", we will change that definition to "work order", but we need to review the specifications book to for any unintended consequences. This review is currently being performed by the specifications office and these changes will go into effect in January 2011 as part of the normal process. Thanks

Brian A. Blanchard, P.E.  
Chief Engineer  
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Email: [brian.blanchard@dot.state.fl.us](mailto:brian.blanchard@dot.state.fl.us)

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**From:** Bob Burleson [mailto:[bburleson@ftba.com](mailto:bburleson@ftba.com)]  
**Sent:** Friday, April 30, 2010 6:16 PM  
**To:** Blanchard, Brian  
**Subject:** Re: Contractor Tort Liability.

Thanks

Bob Burleson  
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Florida Transportation Builders' Association  
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On Apr 30, 2010, at 5:33 PM, "Blanchard, Brian" <[brian.blanchard@dot.state.fl.us](mailto:brian.blanchard@dot.state.fl.us)> wrote:

There is a meeting on our calendars on Monday at 11 am. I will let you know afterwards  
Chief Engineer

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**From:** Bob Burleson <[bburleson@FTBA.com](mailto:bburleson@FTBA.com)>  
**To:** Blanchard, Brian  
**Sent:** Fri Apr 30 17:30:54 2010  
**Subject:** RE: Contractor Tort Liability.

Any update on this?  
Thanks

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**From:** Blanchard, Brian [mailto:brian.blanchard@dot.state.fl.us]  
**Sent:** Tuesday, April 20, 2010 8:43 PM  
**To:** Bob Burleson  
**Subject:** RE: Contractor Tort Liability.

Instead of me giving you a quick answer, let me discuss with Duane Brautigam, David Sadler, and Calvin to discuss the proper definition. thanks

Brian A. Blanchard, P.E.  
Chief Engineer  
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**From:** Bob Burleson [mailto:bburleson@ftba.com]  
**Sent:** Tuesday, April 20, 2010 5:21 PM  
**To:** Blanchard, Brian  
**Subject:** Fwd: Contractor Tort Liability.

Brian,  
This is what I was talking about earlier today.  
Thanks,  
Bob

Bob Burleson  
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Begin forwarded message:

**From:** "Brad Copenhaver" <[bcopenhaver@vlplaw.com](mailto:bcopenhaver@vlplaw.com)>  
**Date:** April 19, 2010 12:42:45 PM EDT  
**To:** "Bob Burleson" <[bburleson@FTBA.com](mailto:bburleson@FTBA.com)>  
**Subject:** Contractor Tort Liability.

Bob,

Per our discussion this morning it appears that FDOT needs to make a change to its definition of "contract documents" to comply with the tort liability protection afforded by section 337.195. The problem that has come up involves plan changes made by FDOT during construction either by the EOR or CEI. It appears that FDOT's practice is to just issue revised plans (or in some cases just an email with directions when the change is an MOT change) without issuing an actual work order or supplemental agreement. The technical problem is that to get the statutory tort protection the contractor has to be in compliance with the "contract documents" and the current FDOT definition of "Contract Documents" includes only these 3 post bid documents: change orders, field orders and supplemental agreements.

First, I am not aware of FDOT using the terminology of "change orders" or "field orders" anymore. They are not defined terms and I am not sure that I have ever seen either in actual practice. I would think that they mean work orders and supplemental agreements and maybe they should clarify that here or explain what those two items are.

Second, I do not expect that it is disputed that plan alterations made pursuant to sections 4-3.1 and/or 5-1.3 would be a contract document but the definition should be rewritten somehow to make that clear if for no other reason than section 337.195 purposes.

Thanks and let me know how we can help.

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Vezina Lawrence & Piscitelli, PA  
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## *Florida Department of Transportation*

CHARLIE CRIST  
GOVERNOR

605 Suwannee Street  
Tallahassee, FL 32399-0450

STEPHANIE KOPELOUSOS  
SECRETARY

### MEMORANDUM

**DATE:** June 24, 2010

**TO:** Specification Review Distribution List

**FROM:** Rudy Powell, Jr., P.E., State Specifications Engineer

**SUBJECT:** Proposed Specification: **0051206 Control of the Work – Compensation for Delay.**

In accordance with Specification Development Procedures, we are sending you a copy of a proposed specification change.

This change was proposed by Brian Blanchard, Chief Engineer, to remove the term change order as it is no longer used and add the currently used term work order.

Please share this proposal with others within your responsibility. Review comments are due within four weeks and should be sent to Mail Station 75 or to my attention via e-mail at ST986RP or rudy.powell@dot.state.fl.us. Comments received after **July 22, 2010** may not be considered. Your input is encouraged.

RP/dt  
Attachment

**CONTROL OF THE WORK – COMPENSATION FOR DELAY.  
(REV 5-13-10)**

SUBARTICLE 5-12.6.2 (Pages 48-49) is deleted and the following substituted:

**5-12.6.2 Compensation for Delay:** Notwithstanding anything to the contrary contained in the Contract Documents, the additional compensation set forth in 5-12.6.2.1 shall be the Contractor's sole monetary remedy for any delay other than to perform extra work caused by the Department unless the delay shall have been caused by acts constituting willful or intentional interference by the Department with the Contractor's performance of the work and then only where such acts continue after Contractor's written notice to the Department of such interference. The parties anticipate that delays may be caused by or arise from any number of events during the term of the Contract, including, but not limited to, work performed, work deleted, ~~change orders~~, supplemental agreements, *work orders*, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right-of-way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, suspensions of work by the Engineer pursuant to 8-6.1, shop drawing approval process delays, expansion of the physical limits of the project to make it functional, weather, weekends, holidays, special events, suspension of Contract time, or other events, forces or factors sometimes experienced in construction work. Such delays or events and their potential impacts on the performance by the Contractor are specifically contemplated and acknowledged by the parties in entering into this Contract, and shall not be deemed to constitute willful or intentional interference with the Contractor's performance of the work without clear and convincing proof that they were the result of a deliberate act, without reasonable and good-faith basis, and specifically intended to disrupt the Contractor's performance.

**5-12.6.2.1 Compensation for Direct Costs, Indirect Costs, Expenses, and Profit thereon, of or from Delay:** For any delay claim, the Contractor shall be entitled to monetary compensation for the actual idle labor and equipment, and indirect costs, expenses, and profit thereon, as provided for in 4-3.2.1(d) and solely for costs incurred beyond what reasonable mitigation thereof the Contractor could have undertaken.