



## Permissible Changes in Scope of Work for Construction Contracts

### DETAILS

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# Legal Research Digest 67

## PERMISSIBLE CHANGES IN SCOPE OF WORK FOR CONSTRUCTION PROJECTS

This report was prepared under NCHRP Project 20-06, Topic 20-03, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Eric M. Kerness, Kerness Consulting, and Kurt Dettman, Constructive Dispute Resolutions. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

### The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

### Applications

Following the award of a construction contract on a transportation project, the procuring agency may need to modify the scope of the work. Given the often unpredictable nature of construction projects, after award of the contract it often becomes necessary to change the contract to account for unforeseen circumstances or different conditions than anticipated at the time of bid and award. There are two basic types of changes: 1) changes ordered or directed by the awarding agency and 2) changes requested by the contractor for reasons permitted by the contract or by law.

Whenever a modification is desired, the agency should consider whether it constitutes a significant change in the character of the work subject to restrictions under 23 C.F.R. 635.109. The agency should also consider whether the change violates competitive procurement requirements as a matter of state or local law, or whether the agency is required to include the work in question in a new procurement.

The line between permissible and impermissible changes is not clearly drawn. Procuring agencies would benefit from legal guidance regarding the laws applicable to contract modifications in different states.

Accordingly, this research:

- Identifies the policy reasons underlying restrictions on contract modifications.
- Identifies state and federal statutes and regulations affecting modifications.
- Highlights the importance of including a provision for modifications in the contract.
- Provides examples of practices followed by departments of transportation in determining whether modifications are allowed.

The focus of this digest is to explore whether there are statutory, procedural, or legal tests to determine when the issuance of a contract modification is permissible. The old test of the dichotomy between a change outside the scope of the contract (cardinal change), which is not permissible, and a change that is within the scope of the contract, which is permissible, has been replaced with statutes and guidelines that clearly indicate when a change order can be used for changed work or when that changed work must be competitively advertised.

This digest should be useful to transportation attorneys, financial officials, contracting officers and personnel, engineers, and other transportation officials.

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## PERMISSIBLE CHANGES IN SCOPE OF WORK FOR CONSTRUCTION PROJECTS

By Eric M. Kerness, Kerness Consulting, and Kurt Dettman, Constructive Dispute Resolutions

### I. INTRODUCTION

Due to the unpredictable nature of construction projects, it often becomes necessary to change a contract after it is awarded to account for unforeseen circumstances or different conditions than anticipated at the time of bid and award. There are two basic types of changes: 1) changes ordered or directed by the awarding agency and, 2) changes requested by the contractor for reasons permitted by the contract or by law.

Underscoring this relative flexibility to make changes to existing contracts in order to accomplish the project is another fundamental requirement: public works contracts must be competitively bid. There are sound public policy reasons underlying both of these seemingly contradictory requirements. The focus of this digest is to explore whether there are statutory, procedural, and/or legal tests to determine when the issuance of a contract modification (sometimes referred to in this digest and supporting materials as a “change order”) triggers the obligation to competitively bid the added or modified work rather than process it as a contract modification to an existing contract.

This digest will cover the following topics: the policy issues underlying restrictions on contract modifications; state and federal statutes and regulations affecting contract modifications; case law defining tests and examples of where contract modifications triggered competitive bidding requirements; the importance of including contract modification provisions in construction contracts; and case studies of how representative state departments of transportation determine the permissibility and scope of contract modifications versus competitive bidding.

Preparation of this digest commenced with a review of relevant federal and state statutes and regulations, as well as general “best practices” sourcebooks regarding bidding requirements and contract modifications, all as referenced in the footnotes to this digest. Initial interviews were conducted with representatives from the Massachusetts Department of Transportation (MassDOT) Highway Division, New York State Department of Transportation (NYSDOT), Vermont Agency of Transportation (VTrans), Rhode Island Department of Transportation (RIDOT), and Ohio Department of

Transportation (ODOT). Surveys were then sent to 47 transportation agencies. The surveys covered each agency’s statutory, regulatory, and procedural requirements and practices for public bidding and for the issuance of contract modifications. The authors analyzed the 23 survey responses, and further communications were conducted with certain survey responders to elicit more detailed information that resulted in the case study in Section VIII.<sup>1</sup>

Appendix A is a summary of the survey results and a sample of the survey. Appendix B gives a useful summary of the varying approaches taken by state departments of transportation on the use of contract modifications to existing contracts. It provides statutory references, rules and regulations, and factors that sample state transportation agencies consider in the contract modification approval process.

### II. COMPETITIVE BIDDING BASICS

State and federal laws nearly always require that public works projects are procured through a competitive bidding process.<sup>2</sup> The nation’s Interstate Highway System was procured using this competitive bid system. Most transportation construction has traditionally utilized the “design-bid-build” method through competitive sealed bidding. Under this system the transportation agency designs the project with its own staff or through a consultant, prepares the project specifications and plans, and advertises the project for bids to an eligible pool of bidders. The agency then selects the lowest eligible and responsible bidder to build the project in accordance with the project specifications and plans.

Some agencies are also using alternative project delivery methods, including design-build, construction manager (CM)/general contractor, and public-private partnerships. For example, the 2000 American Bar Association (ABA) Model Procurement Code for State and Local Governments (ABA Model

<sup>1</sup> Surveys were returned by transportation agencies from New York, Massachusetts, Connecticut, Rhode Island, Oregon, Maine, Minnesota, Kentucky, New Jersey, Tennessee, Montana, Vermont, Virginia, Ohio, Nevada, Michigan, Wyoming, Texas, Florida, Delaware, Colorado, West Virginia, and California.

<sup>2</sup> See, e.g., *Graydon v. Pasadena Redevelopment Agency*, 104 Cal. App. 3d 631, 164 Cal. Rptr. 56 (1980).

Code) includes processes for competitive sealed bidding that are used for design-build and other alternative delivery methods.<sup>3</sup> The ABA Model Code provides that competitive sealed bidding is still the default selection method although it is no longer a statutory preference.<sup>4</sup>

Procedures for selection of contractors on transportation infrastructure projects are based on state statutes and administrative rules. The underlying objectives of today's bidding laws and regulations that require competitive bidding are the prevention of favoritism in expending public funds, the stimulation of competition in the construction industry, and the achievement of the best economic result for the public.<sup>5</sup> Many state courts have stressed the objectives of competitive bidding. In New York, for example, the importance of complying with competitive bidding is illustrated in *District Council No. 9 International Brotherhood of Painters & Allied Trades v. Metropolitan Transit Authority*,<sup>6</sup> where the court stated:

The intent of the bidding statutes is to prevent favoritism, improvidence, extravagance, fraud and corruption and to promote economy in public administration and honesty, fidelity and good morality of administrative officers. ...This policy is so strong that a violation of the competitive bidding statute renders a public works contract void.<sup>7</sup>

The avoidance of favoritism and fraud is an important factor. However, the primary objective has always been to obtain a full and fair return on the expenditure of public funds. This is accomplished by extending invitations for public contract work on an open and equal basis to all that are able and willing to perform the work. Through supervised competition among the parties, the public is assured that there will be a real and honest basis for the work performed.<sup>8</sup>

In Florida, as another example, the major objectives of competitive bidding are found in *Wester v. Belote*,<sup>9</sup> where the court states:

[To] protect the public against collusive contracts to secure fair competition upon equal terms to all bidders, to remove, not only collusion, but temptation for collusion and opportunity for gain at public expense, to close all avenues to favoritism and fraud in its various forms, to secure the best

<sup>3</sup> Model Procurement Code for State and Local Governments, American Bar Association, § 3-202 (2000).

<sup>4</sup> *Id.* at xiii. For a discussion of project delivery systems, see SELECTED STUDIES IN TRANSPORTATION LAW, VOLUME 1, 2014 SUPPLEMENT, CONSTRUCTION CONTRACT LAW 1-12 through I-15, I-44 through I-84 (2014) (hereinafter 2014 Supplement).

<sup>5</sup> 2014 Supplement, *supra* note 4, at 1-12.

<sup>6</sup> 115 Misc. 2d 810, 454 N.Y.S.2d 663 (1982).

<sup>7</sup> *Id.* at 816 (citations omitted).

<sup>8</sup> 2014 Supplement, *supra* note 4, at 1-13.

<sup>9</sup> 103 Fla. 976, 138 So. 721 (1931).

values, and to afford an equal advantage to desiring to do business with public authorities, by affording an opportunity for an exact comparison of bids.<sup>10</sup>

In summary, competitive bidding requirements permit contractors to compete on a level playing field, enabling the public transportation agency to award contracts to the lowest eligible and responsible bidder.

State competitive bidding statutes are quite similar and detail the process for state construction procurements. Common requirements include the following standard procedures: 1) public advertisement to bidders inviting submission of proposals; 2) preparation of specifications, plans, and related information that are furnished to all prospective bidders; 3) formal submission to the awarding agency of written proposals responsive to the stated bidding requirements and with the required financial security guaranteeing execution of the contract; 4) agency consideration of the proposal using uniform evaluation criteria; and 5) award of the contract to the lowest eligible and responsible bidder.<sup>11</sup>

### III. EXCEPTIONS TO COMPETITIVE BIDDING

Some state statutes and regulations specify certain circumstances where competitive bidding procedures do not apply. The most common exceptions include: the amount of money involved in the contract; the necessity to respond to emergency situations; and the use of “on-call” contracts.<sup>12</sup> Certain state statutes do not require a competitive procurement if the contract value is less than \$10,000.<sup>13</sup> Bidding statutes often provide exceptions for emergency situations in which the temporary necessity for quick action to protect public safety and welfare overrides the interests of promoting competition.<sup>14</sup> For example, Rhode Island permits the purchasing agent (who authorizes action by RIDOT) to make emergency procurements when there exists a threat to public health, welfare, or safety—all that is required is that “emergency procurements be made

<sup>10</sup> *Id.* at 981. See also *Morse v. City of Boston*, 253 Mass. 247, 148 N.E. 813 (1925).

<sup>11</sup> 2014 Supplement, *supra* note 4, at 1-13.

<sup>12</sup> Another related exception in relation to construction projects is the impracticality of procuring certain professional services through price competition. Under federal law, the Brooks Act allows the solicitation of architectural and engineering services based on factors other than price. Many states have adopted “Mini Brooks Acts” providing that price competitive bidding is not required for the procurement of personal or professional services. See 2014 Supplement, *supra* note 4, at 1-32.

<sup>13</sup> 2014 Supplement, *supra* note 4, App. C.

<sup>14</sup> 2014 Supplement, *supra* note 4, at 1-33.

with such competition as is practicable under the circumstances.”<sup>15</sup> In emergency situations, agencies could exercise such broad authority by adding work to existing contracts to address emergencies.

Another area that provides agencies flexibility is the “on-call” contracts. Some agencies, primarily in relatively uncomplicated highway work such as guard rail repair or striping work, will competitively procure one or more contractors to provide general scopes and pricing for such work, and then add that work on a task order basis to those contracts.<sup>16</sup> For example, MassDOT, after a general competitive procurement, lets contracts in districts for various scopes of work for both scheduled activities and emergency activities and then issues work orders for specific assignments.<sup>17</sup> Thus, the threshold competitive procurement allows the agency the flexibility of “adding” specific work to be performed, via task order, without having to competitively procure each item of specific work needed.

A unique case from California illustrates an unusual exception to competitive bidding where competitive proposals would not produce an advantage, or where it is impractical to obtain what is required. In *Graydon v. Pasadena Redevelopment Agency*,<sup>18</sup> the court approved a negotiated contract for construction of a subterranean garage without competitive bidding. The court reasoned that requiring competitive bidding would result in a delay of 14 months and affect the agency’s ability to pay its bonds, which was dependent on the flow of tax increments resulting from the completion of the retail center. The court noted this exception to competitive bidding and concluded that the delay in the completion of the retail center if the changed work had been competitively bid would have a direct bearing on the financial ability of the agency to meet its financial obligations and statutory purposes.

#### IV. CONTRACT MODIFICATION BASICS

Virtually all construction contracts contain a “changes” clause that allows the awarding agency to modify the scope of the work and time of performance, with or without the consent of the contractor. Under common law, an attempt to modify the contract by one party without the consent of the other party was considered a breach of contract. Thus, under common

law, without a changes clause an owner could not modify the contract unless the contractor agreed.<sup>19</sup>

The changes clause is an essential element in today’s transportation contracts. The changes clause provides for flexibility by giving the agency the unilateral right to order changes in the work to accommodate changes in needs, requirements, and circumstances on the project. It also typically provides the contractor a means of proposing changes to the work to facilitate more efficient performance and improving quality and products.<sup>20</sup> Changes may also be needed for other reasons, including correcting a design error, providing more detail on ambiguous or inadequate specifications or plans, or dealing with unanticipated site conditions that affect the cost and time of performance. The changes clause typically gives broad authority to the contracting officer or engineer to order or approve changes without going through a new competitive procurement.<sup>21</sup> Despite this flexibility, the changes clause often produces controversy and is the most frequently litigated provision in construction contracts.

The changes clause has been used by the federal government for over 100 years. The wording of the clause has been revised and modified by each state transportation agency, but the basic provisions used by states closely mirror the federal requirements. The changes clause also has been modified over the years to reflect new federal requirements that will be discussed later in this digest. Typical changes clauses have several common elements that include:

- Giving authority to the owner to make unilateral changes;
- Identifying the bases for changes to be made;
- Identifying the person authorized to make changes;
- Requiring that the change be in writing;
- Requiring supporting information and justification for the change;
- Outlining permissible compensation; and
- Outlining permissible extensions of time.

The American Association of State Highway and Transportation Officials (AASHTO) Guide Specifications for Highway Construction contain sample

<sup>15</sup> RI. GEN. LAWS § 37-2 -21 (b) (2014).

<sup>16</sup> For a complete discussion on exceptions from competitive bidding, see 2014 Supplement, *supra* note 4, at 1-30 through I-44.

<sup>17</sup> Copy of document on file with authors (Project No. 605005, Document A00801).

<sup>18</sup> 104 Cal. App. 3d 631, 164 Cal. Rptr. 56 (1980).

<sup>19</sup> 2014 Supplement, *supra* note 4, at 53.

<sup>19</sup> 2014 Supplement, *supra* note 4, at 53.

<sup>20</sup> JOHN CIBINIC, RALPH C. NASH & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 380 (4th ed. 2006) (hereinafter “Cibinic”).

<sup>21</sup> *Id.* at 381.

changes clause provisions that state transportation agencies have adopted or modified in their contracts.<sup>22</sup>

### A. Cardinal Change

The authority to order or permit changes is not unlimited. In general, the contractor is not obligated to perform work under a unilateral change order when the changed work results in a project scope that is substantially different from the one that the contractor agreed to perform when the contract was signed. The courts, based upon federal procurement, have coined the term “cardinal change” to describe changes materially beyond the scope of the original contract. The litigated cases fall within two sources: 1) where the contractor is displeased with the request for changed work and seeks a determination that the work is beyond the contract scope, and 2) where a competitor of the contractor protests the issuance of the change order as violating competitive bidding requirements and depriving it of the opportunity to compete for the work.<sup>23</sup>

Most of the cases interpreting the changes clause analyze whether the change is within the scope of the contract. The cases that fall within this category deal with disputes between the contractor and the awarding agency or cases involving protest by competitors to the awarding agency. Courts have adopted the cardinal change doctrine in “beyond the scope of contract” cases. Understanding the cardinal change doctrine is important to assessing what changes may require competitive bidding.

#### 1. Unwilling Contractor and “Cardinal Change”

Contractors unwilling to perform directed changed work often dispute the change, asserting that the change is not within the general scope of the original contract and therefore is a “cardinal change.” The contractor argues that it is not obligated to perform the work where the changed work is substantially different from the work the contractor agreed to perform when it signed the original contract. Asserting the cardinal change doctrine, the contractor argues that the changed work is not within the general scope of the work as bid. The cardinal change doctrine has two purposes: 1) to protect a contractor from being compelled to perform work substantially different from the work it agreed to perform when the contract was signed, and 2) to prevent the agency from circumventing the competitive bidding process by ordering substantial modifications to the work beyond the original scope of the contract as bid.<sup>24</sup>

<sup>22</sup> Further discussion of AASHTO guide specifications is included later in this digest.

<sup>23</sup> Cibinic, *supra* note 20, at 381.

<sup>24</sup> 2014 Supplement, *supra* note 4, at 5-8.

The cardinal change doctrine is fact dependent, requiring an analysis of the facts regarding the magnitude or quantity of the change and its effect on the entire project. At the conclusion of the analysis the basic question is whether the contractor has been ordered to perform changes that are substantially different from what the contractor agreed to perform when it accepted the contract.<sup>25</sup>

Although the cardinal change doctrine has not been universally accepted in all states, its underlying concepts have been applied in various court decisions. In *Alfred Elia Bldg. Co. v. New York State Urban Dev. Corp.*,<sup>26</sup> the court made no reference to cardinal change, but held that a change order may be issued without competitive bidding so long as the modification does not alter the essential identity or main purpose of the contract. The court reviewed a contract modification that added tunnel construction to the building of a convention center in Niagara Falls, New York. The petitioner challenged the modification, asserting that it was outside the scope of the original contract and required competitive bidding. The court determined that the test is whether the supplemental work ordered *was so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract that it constitutes a new undertaking.*<sup>27</sup> The court concluded that the added tunnel construction was of such importance that it constituted a new undertaking requiring competitive bidding.<sup>28</sup>

From a historical perspective, similar case holdings highlight if the work is of minor importance, if it is new and different in main aspects, or if it amounts to a new undertaking or alters the essential character of the project.<sup>29</sup>

This same test has been uniformly applied in several opinions by the New York State (NYS) Comptroller. For example, as to a modification for \$40,000 of additional sewer repairs under a \$349,000 sewer contract, the NYS Comptroller opined that the additional work was incidental to the original work and did not so substantially vary from the original plan or materially alter the main purpose of the contract as to constitute a new undertaking.<sup>30</sup>

<sup>25</sup> *Id.*

<sup>26</sup> 54 A.D.2d 337, 388 N.Y.S.2d 462 (1976).

<sup>27</sup> *Id.* at 343.

<sup>28</sup> *Id.* at 344.

<sup>29</sup> *Id.* at 342 (citations omitted).

<sup>30</sup> Office of The State Comptroller of New York, Op. 83-52, 1983 N.Y. Comp. Lexis 430 (Mar. 17, 1983); *see also* Office of the Attorney General of the State of New York, 1957, N.Y. Op. (Inf.) Att’y. Gen. 108, 1957 N.Y., AG Lexis 212 (Oct. 9, 1957); Office of the State Comptroller of New York, Op. 81-224, 1981 N.Y. Comp. Lexis 661, N. St. Compt. 241 (July 1, 1981).

Similar decisions can be found from the courts in Massachusetts. In *Morse v. City of Boston*,<sup>31</sup> for example, the court reviewed a contract modification that more than doubled the estimated quantity of earth and gravel fill and changed the payment provisions substituting truck measurements of less than 10 percent, rather than the “in place” measurement required in the original contract. The court held that the city could change the contract *within reasonable limits*, but that an alteration that results in an essential change of such magnitude as to be incompatible with the original contract is not permissible under the competitive bidding statute. The court reviewed the change to determine whether the alteration was *new and different in main aspects and not incidental to the main contract* (emphasis added). The court determined that the aggregate amount of the change was a large sum of money and not incidental to the main contract. The change altered the contract and resulted in a new and different contract in violation of the competitive bidding statute.<sup>32</sup> Other courts in Massachusetts have noted the danger of attempting to significantly change the terms of competitively bid public contracts and thereby restrict the power of public officials to amend or alter public contracts.<sup>33</sup>

Similar concepts can be found in Arkansas, where in *Shackelford v. Campbell*,<sup>34</sup> the court reviewed a contract modification, indicating that the analysis should be determined, not by the cost of the change, but by the relation the change bears to the main work. The court concluded that the change from steel construction to reinforced construction would not alter the substantial character and general plan of the building or increase its cost to an unreasonable amount that would require competitive bidding.

It needs to be noted, however, that the cardinal change doctrine has not gained wide acceptance in public transportation contracting and has been eroded by federally mandated changed condition clauses. The Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987 required the Federal Highway Administration (FHWA) to develop standardized changed condition clauses that were to be included in all federal aid construction projects. The intent behind the legislation was the concept that new change order (adjustment) clauses would reduce contractor contingencies

included in bids, resulting in reduced costs.<sup>35</sup> The standardized changed condition clauses required by 23 U.S.C. § 112(e) and implemented by federal regulations, 23 C.F.R. 635.109, must be included verbatim in all federally aided state contracts, unless it is prohibited by state statutes. Alternate clauses must be approved by the FHWA Administrator.

The three federal change clauses provide for adjustments for 1) significant changes in the character of the work; 2) suspension of work; and 3) differing site conditions. The significant changes clause provides two definitions of significant change: 1) instances where the character of the work is changed or modified and differs materially from the work in the original contract, and 2) where a major item of work as defined in the contract provisions is increased or decreased by more than 25 percent from the original bid quantity. The clause provides that either party may seek an adjustment in time and/or additional costs. This changes clause is widely used by transportation agencies. The suspension of work provision provides a compensation mechanism for written stop work orders, while the differing site conditions provision provides for compensation of both time and money for changes characterized as Type 1 (differing conditions based upon what is depicted in the contract documents) or Type 2 (differing conditions based on changes not generally recognized as inherent in the work).

As noted above, under the cardinal change doctrine the test is whether the modification exceeds the scope of the contract.<sup>36</sup> The three federally mandated changes clauses greatly expand the scope of the traditional changes clause. These provisions are broad; anticipate, authorize, and permit changes both in character and time of performance to the contract work; and erode the continued application of the cardinal change doctrine.

## 2. Third Party Protest—“Scope of Competition” Test

When a competitor protests the issuance of the change order in lieu of conducting a competitive procurement, the test is whether the proposed change is within the scope of the original bidding competition. Courts have analyzed the “scope of competition test” as essentially the same as “scope of the contract” with a slightly different focus. For example, in *AT&T Communication Inc. v. Wiltel, Inc.*,<sup>37</sup> the court reviewed the solicitation to determine what contract modifications might be called for. The court indicated “we also consider whether

<sup>31</sup> 253 Mass. 247, 148 N.E. 813 (1925).

<sup>32</sup> Francis A. Morse v. City of Boston, 253 Mass. 247, 254 (1925).

<sup>33</sup> Construction Industries of Mass., Inc., et al. v. City of Peabody et al., 6 MASS. L. REP. 615 (1997).

<sup>34</sup> 110 Ark. 355, 161 S.W. 1019 (1913).

<sup>35</sup> 2014 Supplement, *supra* note 4, at 5-9.

<sup>36</sup> 2014 Supplement, *supra* note 4, at 5-8.

<sup>37</sup> 1 F.3d 1201 (FED. CIR. 1993).



the solicitation for the original contract adequately advised the offerors of the potential changes during the course of the contract that in fact occurred, or whether the modification is of a nature which potential offerors would reasonably have anticipated under the change clause.”<sup>38</sup>

Again, under today’s modern transportation contract forms, the aforementioned test has limited applicability since standard transportation contracts contain the three federal changes clauses permitting contract adjustments for significant changes in the character of the work, the suspension of work orders, and differing site conditions. However, the “scope of competition” test may have some applicability for other project delivery methods involving lump sum contracts that may not include the three federally mandated changes clauses. The authors have not discovered any applicable case law for transportation contracts discussing the application of the three changes clauses and the “scope of competition” test.

## V. FEDERAL REQUIREMENTS

The selection of contractors for federal agency construction is governed by 41 U.S.C. § 5, which requires, with certain exceptions, that construction contracts be awarded through competitive bidding. Similar statutes apply to federal aid highway program contracts awarded by state agencies. However, alternates to competitive bidding may be allowed where the state agency can demonstrate that another method is more cost effective or that an emergency exists.<sup>39</sup> Federal regulations also require award to the lowest responsible bidder.<sup>40</sup> Each bidder is required to file an affidavit that it did not engage in any action in restraint of free competition in connection with an awarded contract.<sup>41</sup>

Title 23 U.S.C. provides very broad authority for the Secretary of Transportation to prescribe regulations to carry out the federal aid highway program. However, there are no specific statutes dealing with contract modifications other than those required under 23 U.S.C. § 112(e), requiring the use of the standard changes clauses previously discussed.

23 C.F.R. § 635.109(c) addresses the use of changed condition clauses for design-build contracts. FHWA encourages, but does not require, the use of such clauses in design-build projects. The FHWA procedures for review for federal participation in

<sup>38</sup> *Id.* at 1207 (citation omitted).

<sup>39</sup> 23 U.S.C. § 112(a)(b) (2012); see 2014 Supplement I-30; 23 C.F.R. § 635.204(a) (2015).

<sup>40</sup> 23 U.S.C. § 112(b)(1) (2012).

<sup>41</sup> 23 C.F.R. § 112(c) (2015).

change orders and extra work are detailed in 23 C.F.R. § 635.120. 23 C.F.R. § 635.121 describes the procedures for FHWA review and approval of time extensions. Neither of these provisions has been updated since 1991.

FHWA does offer some guidance by way of policy memos.<sup>42</sup> An FHWA memorandum dated November 15, 1996, indicates that the cardinal change doctrine still has some viability, even after the adoption of the aforementioned changed conditions clauses. Illustrative of this is the FHWA guidance memorandum involving a New Jersey transportation project, wherein NJDOT was seeking to add a \$10 million bridge rehabilitation change order to the \$40 million Parsippany Road Interchange Reconstruction. The Utility Transportation Contractors Association sought review of the FHWA Administrator’s rejection of the change order.

FHWA stated:

Contracting under the Federal-aid highway program is based in the premise that competitive bidding is the best way to keep costs low while achieving a quality product. Indeed Federal Law requires competitive bidding unless some other method is more cost effective or an emergency exists....

We recognize that after a contract gets under way conditions may change or conditions or circumstances may exist that were not anticipated during preparation of the plans...Our governing legislation and our implementing regulations allow for change orders within the scope of the work covered by the contract. In awarding federal-aided highway projects, the State transportation departments must include a standardized clause on changed conditions to provide for an adjustment of contract terms if the altered character of the work differs materially from that of the original contract or if a major item of work increased or decreased by more than 25 percent of the original contract value. The key to the change order process, however, is that the change must involve the scope of the work covered by the contract.<sup>43</sup>

FHWA in its guidance memorandum determined that *the change order added reconstruction of a new bridge and did not involve the scope of work covered by the contract.*<sup>44</sup> FHWA concluded that approving the change order would award a federal aid contract under the guise of a change order and would not only violate federal law, but also be unfair to other contractors who wished to bid on the bridge project.

Although there are no more specific FHWA regulations, some change order modification

<sup>42</sup> See *FHWA Construction Program Guide (Policy)* <http://www.fhwa.dot.gov/construction/cqit/changes.cfm> (reference paragraph no. 4) (last visited Feb. 26, 2015).

<sup>43</sup> See FHWA Memorandum Letter, Nov. 15, 1996, <http://www.fhwa.dot.gov/programadmin/contracts/111596.cfm> (last visited Feb. 26, 2015).

<sup>44</sup> *Id.*

guidance can be obtained from the FHWA *Contract Administration Core Curriculum Manual*,<sup>45</sup> which recognizes that it is unrealistic to expect construction projects to be built without deviating from the project plans. The manual provides that establishing a strict set of rules to govern federal aid policy in contract changes is not practical since the rules would need to recognize that contract changes involve unique circumstances.

Generally the FHWA manual classifies change orders by plan changes, specification changes, and changes in cost and time. Federal policy requires that proposed major extra work or major changes in the contract plans be approved in advance, unless it is an emergency. Major change or major extra work means a change that would significantly affect the cost of the project to the federal government, or alter the limits, character, or scope of work.

Early coordination between the state transportation agency and FHWA is essential to reviewing and handling change orders. FHWA's review of proposed change orders includes federal aid eligibility, impacts on the "original scope of work,"<sup>46</sup> basis of payment, and time adjustments.

The manual provides that in cases where the proposed work is beyond the "original scope of work," the FHWA Division Office must determine whether the additional work is a modification of the original scope or a significant change that would benefit from competitive bidding. "The individual circumstances associated with the magnitude of the work and quality of the change, as well as the cumulative impact upon the whole project, should be reviewed."<sup>47</sup>

Among the considerations are:

- Have the contract work elements changed?
- How does the additional work impact quantities and cost?
- Do the proposed changes impact the complexity of the work?
- What is the cumulative impact on the project?
- Would there be a substantial benefit to the public for the proposed change of work to be bid out?<sup>48</sup>

<sup>45</sup> FHWA *Contract Administration Core Curriculum Manual*, Oct. 2014 (entire manual may be downloaded at <http://www.fhwa.dot.gov/programadmin/contracts/coretoc.cfm> (last visited Feb. 26, 2015)).

<sup>46</sup> *Id.* at 153.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

## VI. REPRESENTATIVE STATE REQUIREMENTS ON CONTRACT MODIFICATIONS

### A. Competitive Bidding Statutes

A review of state case law on contract modifications reflects that in certain defined situations, contract modifications do not require competitive bidding. The following statutory rules and principles can be ascertained from a review of state case law and statutes.

Some states have strict monetary threshold limits for change orders that trigger competitive bidding. In Oklahoma, for example, the Oklahoma statutes provide that advertising for competitive bidding is required for change orders on contracts of \$1 million or less where the change order exceeds 15 percent of the original contract amount, and advertising for competitive bidding is required for change orders on contracts exceeding \$1 million where the change order exceeds \$150,000 or 10 percent cumulative increase in the original contract amount.<sup>49</sup>

South Dakota statutes provide an excellent example of state statutory requirements that govern contract modifications. S.D. Codified Law 5-18B-19 (2015) provides as follows:

Any amendment or change order to an existing contract for construction, reconstruction, or remodeling of a public improvement, does not need to be bid if:

- (1) the contract contains unit prices for the same type or class of work;
- (2) the change or extra work is necessitated by circumstances related to soils, utilities, or unknown conditions directly affecting the performance of the work that were not reasonably foreseeable at the time the underlying contract was let and the change or extra work is necessary to the completion of the public improvement.

In South Dakota, since most transportation project contracts are unit price contracts, the changed or modified work must be the same type or class or work spelled out in the contract. If the contract is not a unit price contract, then the statute requires that the change is necessary for completion of the project and could not have been reasonably foreseeable at time of contract letting. For example, in *Thomas Bozied v. City of Brookings, South Dakota*,<sup>50</sup> the case was remanded for retrial to determine whether the change order for additional parking lot work required for tenant improvements was necessary to complete the project and was unforeseen at the time of contract letting.

Another example of statutory restrictions on change orders is the Virginia Code in Title 43, which provides as follows:

§ 2.2-4309. Modification of the contract.

<sup>49</sup> OKLA. STAT. tit. 61, § 121 (2014).

<sup>50</sup> 2001 SD 150, 638 N.W.2d 264 (2000).

A. A public contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or \$50,000, whichever is greater, without the advance written approval of the Governor or his designee, in the case of state agencies, or the governing body, in the case of political subdivisions. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

...

C. Nothing in this section shall prevent any public body from placing greater restrictions on contract modifications.

Thus, VDOT has some statutory restrictions on the scope of contract modifications that can be approved by the Governor, but in this instance there is at least an implicit threshold where a decision could be made to competitively procure additional work.

## B. AASHTO Guide Specifications and Typical State Guidelines and Specifications

The *AASHTO Guide Specifications for Highway Construction* contains sample changes clause provisions that many state transportation agencies have adopted or modified in their contracts. The guide specifications recognize the need to make changes in the contract for time and cost of performance. The permissible changes include differing site conditions, significant changes in the character of the work, suspensions of work ordered by the engineer, and extra work. The specifications provide:

### 104.02 Contract Revisions

A. *General.* The Agency reserves the right to revise the contract at any time. These revisions do not invalidate the contract or release the surety, and the Contractor agrees to complete the contract as revised. Do not proceed with the work without the Engineer's written authorization. Upon receiving written approval, proceed immediately with the revised work.

The Agency will only consider requests from the Contractor for a revision to the contract amount or time if the Contractor first notifies the Engineer as specified in Subsection 104.03.

If the Engineer determines that a revision is necessary, the Agency will revise the contract time as specified in Subsection 108.06 and will pay for the revised work at the contract unit bid prices unless the Contractor's cost of production or the character of the work is materially changed, in which case the Agency may revise the contract as specified in Subsection 109.04. The Agency will not pay for lost or anticipated profits resulting from a revision to the contract.

If the Engineer decides that a potential contract revision identified by the contractor is not necessary, and the Contractor does not agree with the Engineer's decision, the Contractor may pursue a claim as specified in Subsection 105.18.

B. *Differing Site Conditions.* If either of the following conditions is encountered during the progress of the work,

immediately notify the Engineer of the conditions as specified in Subsection 104.03 before they are disturbed and before performing or continuing with the affected work.

1. A subsurface or latent physical condition differing materially from those indicated in the contract; or
2. An unknown physical condition of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract.

C. *Significant Changes in the Character of Work.* The Engineer may alter the contract quantities, the work, or both as necessary to satisfactorily complete the project. If such alterations significantly change the character of the work, the Agency will make appropriate adjustments in the contract as specified in Subsections 108.06 and 109.04.

Consider either of the following to be a "significant change":

1. When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or
2. When the quantity of a major item of work is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity applies only to that portion in excess of 125 percent of original contract item quantity, or in the case of a decrease below 75 percent, to the actual amount of work performed.

Before performing significantly changed work, reach agreement with the Agency concerning the basis for the adjustment as specified in Subsections 109.04 and 108.06.

If the alterations do not significantly change the character of the work specified in the contract, the Agency will pay for the altered work at the contract unit price.

If the Contractor disagrees as to whether an alteration constitutes a significant change, use the notification procedures specified in Subsection 104.03.

D. *Suspension of Work Ordered by the Engineer.* If the Engineer suspends or delays all or any portion of the work for an unreasonable period of time (not originally anticipated, customary or inherent to the construction industry), and the Contractor believes that additional compensation, contract time, or both is due because of the suspension or delay, the Contractor shall notify the Engineer as specified in Subsection 104.03.

The Engineer will evaluate the Contractor's request. If the Engineer agrees that the cost, time or both required for the performance of the contract has increased due to the suspension or delay and the suspension or delay was caused by conditions beyond the control of and not the fault of the Contractor, its suppliers, or subcontractors at any approved tier and not caused by weather, the Engineer will revise the contract as specified in Subsections 108.06 and 109.04.

The Agency will not grant or consider revisions based on an Engineer-ordered suspension

1. without timely written notice as specified in Subsection 104.03;
2. to the extent that performance would have been suspended or delayed by any other cause;

3. for which an adjustment is provided or excluded under any other term or condition of the contract; or

4. that includes profit.

*E. Extra Work.* When necessary or desirable to complete the project, the Engineer may direct the Contractor to perform unforeseen work for which there is no pay item or unit price in the contract. The Agency will pay for such work as specified in Subsection 109.04.

*F. Eliminated items.* The Agency may partially or completely eliminate contract items. The Agency will reimburse the Contractor for costs incurred before notice of the elimination as specified in Subsection 109.05.

The AASHTO specifications contain provisions for compensation for altered quantities using contract unit prices, negotiated prices or lump sum prices, or force account. The force account provision provides for labor, to which a 35 percent overhead and profit factor is applied, bond insurance and tax, material costs, equipment and plant rental, and subcontracting.

The AASHTO specifications do not provide guidance on the specifics for change order preparation or required parameters or requirements, but leave those to the state transportation agency. The AASHTO specifications also do not mention the concept of competitive bidding of change orders.

State administrative change order procedures are generally set forth in state administrative manuals and procedures, and specifications. Appendix B provides a detailed listing of the administrative process and procedure followed by 23 survey responders. It also provides a summary of the typical questions and analysis that are conducted for each contract modification. General requirements include justification, price analysis, and documentation requirements.

### C. Alternative Project Delivery

Many state agencies are now delivering projects using project delivery models that vary from traditional “design-bid-build” project delivery. For example, they are using design-build, construction manager (CM)/general contractor, and public-private partnerships. The specific bidding and procurement requirements and practices vary from state to state and are beyond the scope of this digest. In response to the surveys for this digest, the majority of agencies advised that they apply most of the same regulations, guidelines, and procedures on contract modification on alternative project delivery projects.<sup>51</sup> At the federal level, 23 C.F.R. 635.109(c) addresses the use of changed condition clauses for design-build

contracts. FHWA encourages, but does not require, the use of such clauses in design-build projects.

The authors note, however, that alternative project delivery contracts often contain materially different allocations of risk, which will affect the scope and pricing of allowable contract modifications. In general, alternative project delivery projects will still permit changes and will include allowable bases for contract modifications that echo those from traditional design-bid-build contracts summarized in this digest. Although the entitlement bases and justification requirements for them will change based on the allocation of risk among the parties to the applicable contracts, none of the state transportation agencies surveyed reported that this made any difference in terms of decisions about contract modifications versus re-bidding the subject work.

## VII. GENERAL CONCLUSIONS

There is a common requirement to procure highway work by public competitive procurement awarded generally to the lowest eligible and responsive bidder. The basic premises of competitive bidding are to prevent favoritism in expending public funds, to stimulate competition, and to obtain the best economic result for the public. The example statutes cited in this digest sometimes establish monetary thresholds that trigger, or exempt, public bidding, or recognize situations such as emergencies where bidding requirements are waived or modified.

Once a contract is awarded, however, the required (by statute, regulation, and industry) accepted practice is to give wide latitude to agencies to make changes to contracts through the so-called changes clauses. Almost all construction contracts contain a changes clause that permits an awarding agency to modify the scope of the work and time of performance with or without the consent of the contractor. One set of changes are those ordered by the agency; the other set of changes are those permitted to be requested by the contractor.

As discussed earlier in the digest, there are good policy reasons to permit these types of changes, most notably the recognition that changes on construction projects are inevitable, and the best way to deal with them is to allow flexibility to address them to support project completion. The changes clauses provide the owner flexibility and give the agency the unilateral right to make changes based on needs and requirements of the project, without the necessity of conducting an additional competitive procurement. Changes may be required to facilitate completion, improve quality, correct design errors, provide more details in the plans, or deal with

<sup>51</sup> One exception was MassDOT Highway Division, which has a standard provision in its design-build contracts, Section 3 (Changes in the DB Work), that set forth change order provisions that are different from its standard specifications (on file with the authors).

unanticipated site conditions. The adoption of broad changes clauses enables contractors to reduce, if not eliminate, bid contingencies, recognizing that the contract provides effective adjustment mechanisms to address unanticipated site conditions or other changes in the work.

That said, the right to make changes is not limitless. As noted in this digest, usually standard contract specifications (and sometimes statutes and regulations) define the limits of authority of the agency to *direct* changes and the limits of entitlement for contractors to request changes. In general, the contractor is not obligated to perform work under the changes clause when the changed work is substantially different from the one the contractor agreed to perform when the contract was signed. In addition, some courts have addressed the scope of permissible changes by applying the “cardinal change” test and the “scope of the competition” test to limit the authority of agencies to change contracts after they have been bid and awarded. The aforementioned cardinal change doctrine is fact dependent, requiring an analysis of the magnitude or quantity of the changes and its effect on the entire project. In addition, similar concepts are found in numerous state court decisions where the courts have determined that competitive bidding is not required if the essential identity or main purpose of the contract is not altered by the change.

Today’s modern changes clauses required for all federally aided construction projects are quite broad and permit contract modifications for significant change in the character of the work, suspension of work, and differing site conditions without a competitive procurement. Many states have adopted these broad adjustment provisions in their standard contract specifications even if they are not federally funded. As noted in the digest, the three federally mandated change clauses greatly expand the scope of the traditional changes clauses, erode the cardinal change doctrine, and authorize changes both in character and time of performance, all without conducting a competitive procurement.

Most state agencies in their change order statutes, regulations, policies, and procedures do not explicitly address the interplay, let alone the trigger point, between change orders and competitive bidding. In general, state administrative manuals and procedures focus on justification, documentation, and procedure and do not address the necessity of conducting a competitive procurement. However, in their research and from the surveys, the authors found a few states where there was an explicit test for when a contract modification triggered an inquiry of whether a competitive procurement was

required. In Oklahoma, for example, competitive bidding is required for change orders exceeding certain monetary amounts specified in the Oklahoma statutes. The Ohio Revised Code and ODOT’s policy memos and guidance provide a detailed process for the approval of contract modifications without competitive bidding if the modification falls within numerous defined exceptions and requirements.

Federal guidelines are limited to the Curriculum Manual, which indicates that the FHWA division office must determine if a contract modification of the original scope or a significant change would benefit from competitive bidding. In addition, the manual mandates review of the circumstances, magnitude, quality, and the cumulative impact upon the whole project.

Therefore, the authors have concluded that the common practice for state highway agencies is to permit wide latitude to issue contract modifications as long as 1) the modifications are permitted (or not prohibited) by statute, regulation, or specification and 2) the modifications are generally within the scope of the original contract, including the contract adjustment provisions and the aforementioned three federally mandated change condition provisions. If these tests are met, then no competitive procurement of the revised scope of work is required in most cases.

## VIII. SELECTED CASE STUDIES

Based on the preliminary research for this digest and the results of the surveys, the authors selected representative state transportation agencies for case studies. These representative state agencies’ programs vary from over \$1 billion to under \$500 million. Otherwise, all programs are similar in that they engage in competitive bidding practices with exceptions for emergencies. Differing site conditions and unanticipated suspensions are statutory bases for change orders. Each of these programs requires a multi-tiered approval process for contract modifications necessitating an increase in the original contract amount.

### A. Ohio Department of Transportation

#### 1. Statutory and Administrative Constraints

The Ohio Department of Transportation (ODOT) has an approximately \$2 billion yearly construction program and has devoted serious attention to competitive bidding and change orders. ODOT’s construction program is governed by detailed Ohio Revised Code (ORC) provisions and written policies concerning the approval of change orders and competitive bidding.

The ORC Section 127.16 mandates competitive selection and provides that except as otherwise provided in the section, no state agency using money that has been appropriated to it directly shall spend

greater than \$50,000 with one supplier within the fiscal year unless the purchase *is made by competitive selection or with the approval of the Controlling Board*. The ORC also provides that the Controlling Board may approve the purchase without competitive bidding if it determines an emergency exists or there is a significant economic reason.

Change orders in Ohio are considered purchases and the department reviews the change order to determine if it should be competitively bid, is exempted from competitive bidding, or requires Controlling Board approval.

## 2. Ohio Contract Modification Provisions

ODOT contract provisions contain several important change provisions. Section 104.02 Revisions to Contract Documents of the Ohio Construction and Material Specification (CMS) includes:

A. “General. The Department reserves the rights to revise the Contract Documents at any time. Such revisions do not invalidate the Contract or release the Surety, and the Contractor agrees to perform the Work as revised. The provisions of this section are subject to the limitations of ORC 5525.14.”

B. Differing Site Conditions provision that conforms to the federally mandated provisions.

C. Suspension of work provision that conforms to the federally mandated provisions.

D. Significant Change in Character of Work that conforms to the federally mandated provisions and provides a table for increase and decrease factors that adjust the compensation provisions.

E. Eliminated Items providing that the Department may partially or completely eliminate contract items.

F. Extra Work providing that the contractor must perform extra work as directed by the Engineer.

G. Unilateral Authority to Pay providing that ODOT has unilateral authority to pay the Contractor sums it determines to be due the Contractor for work performed on the project.

## 3. Modification Review Criteria

Ohio Revised Code provisions also provide monetary limits (“contract limit”) for change orders that can be approved without competitive bidding or Controlling Board approval. The monetary limit is the amount of contract pay item that may be increased. The Ohio Code limits are: \$25,000 for contracts having an original contract price of \$500,000 or lower; 5 percent of total contract price for contracts with original contract price of \$500,000 to \$2 million; and \$100,000 for contract with original contract price over \$2 million.<sup>52</sup>

<sup>52</sup> See *Ohio Standard Procedure for Processing Change Orders*, Standard Procedure No. 510-010 (SP) (June 18, 2010), available at [http://www.dot.state.oh.us/Divisions/ConstructionMgt/OnlineDocs/Construction%20Policies/510-010\(SP\)\\_03092012.pdf](http://www.dot.state.oh.us/Divisions/ConstructionMgt/OnlineDocs/Construction%20Policies/510-010(SP)_03092012.pdf) (last visited Feb. 26, 2015).

Ohio Revised Code § 5525.14 (A) provides that the Director of Transportation may increase and decrease the quantities of any items specified except as proved in Division B of this section; the additional cost shall not exceed the lesser of \$100,000 or 5 percent of the total contract price.

The monetary limits do not apply and competitive bidding is not required if the change order falls with the requirements of Division B:

1) To change orders when the total dollar value of the change is \$25,000 or less.

2) To change orders that reflect increase in the plan quantity that is determined during the final measurement of an item of work.

3) To change orders that result from federally mandated requirements that did not exist at the time of the original award.

4) Circumstances that would create a life, safety, or health threatening situation or would unduly delay the completion of a project or increase its costs only if the Director makes a finding of such fact and declared an emergency and issues the findings. Extra work under these circumstances may include not only construction needed to complete project but also adjustments to meet changed conditions alteration in original plans, unforeseen contingencies or payments necessitated by contract termination or suspension.

The definition of emergency is defined as a life, safety, or health hazard if work is not started within the next 6 weeks or if postponing the work up to 6 weeks will cause a delay or additional cost to the project.

## 4. Standard Ohio Contract Provisions and Policy Memoranda

The ODOT standard contract provisions contained in CMS Section 104.02 provide that the Department reserves the right to revise the contract documents at any time.<sup>53</sup>

ODOT has adopted a change order memorandum<sup>54</sup> that provides that it is the policy of ODOT to execute change orders to modify construction contracts to accomplish the following: add work that is necessary to complete the project as intended by the original plan and for any reason that is necessary to complete the project as intended and as necessitated by policy, contract, and applicable law.

The policy further provides *that work that is not necessary to complete the project as originally intended shall not be added to a project and shall be contracted through the department’s competitive*

<sup>53</sup> Phone conversation with ODOT engineer Pam Clawson on Oct. 7, 2013, and 2013 Change Orders, Office of Construction Management training curriculum.

<sup>54</sup> *Change Order Policy 27-010 (P)*, available at [https://www.dot.state.oh.us/Divisions/ConstructionMgt/OnlineDocs/Construction%20Policies/27-010\(P\)\\_06202003.pdf](https://www.dot.state.oh.us/Divisions/ConstructionMgt/OnlineDocs/Construction%20Policies/27-010(P)_06202003.pdf).

*bidding process* or the director's emergency contracting authority. Construction or lower costs are not valid reasons to avoid competitive bidding requirements of state law.

The policy further states that the work must be within the existing right of way, covered by environmental document and waterway and miscellaneous permits, and within the project limits stated in the plans. If necessary, the deputy director shall acquire additional right of way, reevaluate and update the approved environmental document and permits, and extend project limits utilizing forms contained in 510-010 (SP).

Ohio contract provisions also provide for the previously discussed changed condition clauses required under 23 U.S.C. 106 and C.F.R. 635.109 and required approval of the Federal Highway Division Administrator under C.F.R. 635.120.

### 5. Administrative Approval Process

Standard Procedure for Processing Change Orders No. 510-010 (SP) governs the ODOT approval process and provides that the procedure and policy will ensure fair and reasonable prices for change orders, *prevent compromising of the competitive bidding process*, prevent the appearance of favoritism to any contractor, and minimize the risk of fraud (emphasis added).

The procedure mirrors the aforementioned policy statement and describes regular work change orders, extra work change orders, force account, Federal Highway Administrative Consultation and Concurrence, Program Managers Consultation and Concurrence, Approval Authority, Controlling Board Approval, Execution and Distribution, Authority to Proceed with work prior to processing change order, change orders on projects in litigation, extension of project limits, and monitoring compliance.

It outlines the document requirements for change orders (which include the terms, conditions, and justification), and provides for consultation with the district and the director. It details the requirement that all major changes in the plans and contract provisions and all major extra work shall have FHWA approval in advance of their effective dates and for non-major changes and for non-major work formal FHWA approval may be given retroactively.

It further provides that all extra work change orders in excess of the contract monetary limits must be submitted to the Controlling Board for approval prior to performance and payment, as well as detailing the aforementioned Ohio Revised Code exceptions.

The procedure provides that change orders be approved by the District Program Manager and the Central Office Program Manager (and discussed with the local participating agency prior to approval for an item containing local funding).

It further details the approval authority in the district and main office levels and provides the requirements for change orders based on emergency declarations. The procedure grants the director emergency permission under Ohio Revised Code Section 5525.14 to proceed with added work that exceeds the contract limits prior to processing the change order. It provides that permission shall be in writing and granted to add work that is necessary to eliminate emergency circumstances that would create life, safety, or health situations, or unduly delay the completion of the project. The procedure requires a director's declaration entitled "Declaration of Emergency and Permission to Proceed with the Work."

### 6. Significant Case Law Developments

None reported

## B. New York State Department of Transportation

The New York State Department of Transportation (NYSDOT) has a \$1.5 billion annual construction program.

### 1. Statutory and Administrative Constraints

NYSDOT's construction program is governed by several statutes, which include:

New York Highway Law Section 38(3) (2014) provides: "The contract of the construction or improvement of such highway or section thereof shall be awarded to the lowest responsible bidder as will best promote the public interest."

The provisions require that NYSDOT and the Office of the State Comptroller approve change orders.

Section 38 (8) also provides:

Contingencies and extra work. Whenever the commissioner of transportation determines that from any unforeseen cause the terms of any contract should be altered to provide for contingencies or extra work, he may, if funds are available for payment for the costs thereof, issue an order on contract therefor to the contractor, a copy of which shall be filed with the director of the budget and the state comptroller. The estimated expenditure pursuant to that order on contract shall not increase the total amount of the primary contract until the estimated expenditure shall have been approved by the commissioner of transportation and a duplicate of such approval shall have been filed with the comptroller.

Section 112: 2.(a) of the State Finance Law provides: "Before any contract made for or by any state agency department, board, officer or institution shall be executed or become effective, whenever

such contract exceeds fifty thousand dollars...in amount it shall be approved by the comptroller and filed in his or her office.”

In addition, if federal funds are involved, approval of FHWA is also required.

NYSDOT contract provisions contain numerous contract modification provisions, which include:

## 2. Contract Modification Provisions

104-02 CHANGES, CONTINGENCIES, EXTRA WORK AND DEDUCTIONS, provides:

The provisions of Article 5, *Alterations and Omissions* of the contract agreement shall apply. Whenever the Department determines that from any unforeseen cause the terms of any contract should be altered to provide for changes, contingencies, extra work, or the deletion of work an order-on-contract may be issued to the Contractor, which shall promptly proceed with the performance of the work and the furnishing of the materials and equipment necessary for its accomplishment in accordance with the pertinent specifications. Such changes in quantities and alterations shall not invalidate the contract nor release the Surety, and the Contractor shall perform the work as altered.

No instructions, either written or verbal from any Department employee or agent shall be construed as an order for changes until receipt by the Contractor of written notification that an order-on-contract has been approved by the Department, or written notification from the Engineer that changes in the work are eligible and authorized for payment in accord with Section 697 *Field Change Payment*. The Contractor may proceed with the work in advance of the approved order-on-contract if the Contractor has received an approved *Authorization of Extra Work*.

### 104-03 DIFFERING SITE CONDITIONS.

NYSDOT specifications provide a unique approach of how to incorporate the federal changed condition provisions into the contract. They cite the required federal change condition provision and detail how they will be applied to the project. After the changes provisions, the NYSDOT specifications provide the required notice and record keeping requirements, response times, and refers to the applicable compensation provisions of the contract.

The applicable NYSDOT specifications provide:

In accordance with 23 CFR 635.109(a) (1):

(i) During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party of the specific differing site conditions before the site is further disturbed and before the affected work is performed.

(ii) Upon written notification, the Engineer will investigate the site conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding anticipated profits, will be made and the contract modified in writing accordingly. The engineer will notify the contractor of the determination whether or not an adjustment to the contract is warranted.

(iii) No contract adjustment which results in a benefit to the contractor will be allowed unless the Contractor has provided the required written notice.

The department will administer the above federal regulations as follows:

During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, the party discovering such conditions shall promptly notify the other party of the specific differing site conditions before the site is further disturbed and before the affected work is performed, with subsequent written notice to be provided later. The contractor shall comply with the notice and recordkeeping provisions of § 104-06 *Notice and Recordkeeping*.

The contractor or the state, as the case may be, must make written notice to the other party of the existence of apparent subsurface or latent physical conditions if that party wishes to adjust the contract price or time of performance, including direct costs and/or time related compensation, if applicable. Such notice shall be given within ten (10) workdays of the time at which the party had knowledge, or should have had knowledge of the differing site condition. The department will have no liability and no adjustment will be made for any damages, which accrued more than ten (10) workdays prior to the filing of such a notice with the Engineer.

Upon written notice, the engineer will investigate the site conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of the work, an adjustment, excluding anticipated profits, will be made to the contract. The engineer will make an initial response in writing to the contractor, within 15 workdays, with a determination whether or not an adjustment to the contract is warranted. Situations requiring examination of the site or input from other department personnel may require additional time to resolve. No contract adjustment will be allowed unless the contractor has provided the required written notice, or written notice was provided to the contractor by the state.

The contractor shall keep daily records and make reports of all labor, material and equipment used in connection with such work and the cost thereof as specified in § 109-05C *Force Account Reports*. Compensation for increased costs of the work resulting from the differing site conditions will be made in accordance with § 109-05 *Extra Work and Time Related Compensation*. Compensation for time related costs, if any, will be made in accordance with § 109-05D *Time Related Dispute Compensation*.



#### 104-04 SIGNIFICANT CHANGES IN THE CHARACTER OF WORK.

NYSDOT has incorporated the federal significant change provisions and supplements with adjustment provisions for lump sum items, certain composite items, and fixed quantity items. The NYSDOT provisions provide:

In accordance with 23 CFR 635.109(a) (3):

(i) The engineer reserves the right to make, in writing, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the contract nor release the surety, and the contractor agrees to perform the work as altered.

(ii) If the alterations or changes in quantities significantly change the character of work under the contract, whether such alterations or changes are in themselves significant changes in the character of work, or by affecting other work cause such other work to become significantly different in character, an adjustment, excluding anticipated profits, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made by the department, either for or against the contractor, in such amount as determined to be fair and equitable.

(iii) If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.

(iv) The term significant change shall be construed to apply only to the following circumstances: (a) when the character of the work altered differs materially in kind or nature from that involved or included in the original proposed construction; or (B) when a Major Item of work, as defined elsewhere in the contract, is increased in excess of 125 percent, or decreased below 75 percent of the original contract quantity. Any allowance for a change in unit price shall apply only to that portion of work in excess of 125 percent of the original contract item quantity, or in the case of a decrease below 75 percent, to the actual amount of work performed.

The department will administer the above Federal regulations as follows:

The department may make, in writing, at any time during the work, any necessary changes in quantities and alterations to the work in order to satisfactorily complete the project. If the contractor or the department discovers a change that constitutes a significant change in the character of work as defined below, the party discovering the change shall promptly provide the other party written notice of the significant change in the character of work before additional work is performed. The contractor shall comply with notice and recordkeeping provisions of § 104-06 *Notice and Recordkeeping*.

The contractor or the state, as the case may be, must make written notice to the other party of the existence of an apparent significant change in the character of work if that party wishes to adjust the contract price or time of performance, including direct costs and/or time related compensation, inapplicable. Such notice shall be given within ten (10) work days of the time at which the party had knowledge, or

should have had knowledge of an event, matter or occasion which results in a significant change in the character of work. The department will have no liability and no adjustment will be made for any damages, which accrued more than ten (10) workdays prior to the filing of such a notice with the Engineer.

Upon written notice, the engineer will investigate the changes and if it is determined that the alterations or changes in quantities significantly change the character of work, whether such alterations or changes are in themselves significant changes in the character of work, or by affecting other work, cause such other work to become significantly different in character, an adjustment, excluding anticipated profits, will be made to the contract. The engineer will make an initial response in writing to the contractor, within 15 workdays, with a determination whether or not an adjustment to the contract is warranted. Situations requiring examination of the site or input from other department personnel may require additional time to resolve. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made by the department, either for or against the contractor, in such amount as determined to be fair and equitable. No contract adjustment will be allowed unless the contractor has provided the required written notice, or written notice was provided to the contractor by the State.

The contractor shall keep daily records and make reports of all labor, material and equipment used in connection with such work and the cost thereof as specified in § 109-05C Force Account Reports. Compensation for increased costs of the work resulting from significant changes in the character of work will be made in accordance with § 109-05 *Extra Work and Time Related Compensation*. Compensation for time related costs, if any, will be made in accordance with § 109-05D *Time Related Dispute Compensation*.

*A. Character of Work.* The term "significant change" shall be construed to apply only when the character of the work differs materially in kind or nature from that involved or included in the original proposed construction.

*B. Major Items.* The term significant change shall be construed to apply to Major Items (as defined in § 101-02 *Definitions of Terms*) only when the quantity of a Major Item is more than 125%, or is less than 75% of the original contract quantity. Any allowance for a change in the unit price shall apply only to that portion of work in excess of 125% of the original contract item quantity, or the actual amount of work performed if the quantity decreases below 75% of the original contract item quantity. The contractor or the state, as the case may be, must make written notice to the other party of the significant change in the quantity of a major item if that party wishes to adjust the contract price or time of performance. Knowledge of a significant change in quantity could result from receipt of an order on contract (approved or unapproved), a letter directing a change in the contract work, review of plan details and estimates, review of work completed or progress payment quantities, or a combination of the above. Payment for major items will be limited in accordance with § 109-02 *Payment for Altered Quantities*.

*C. Minor Items.* The term "significant change" shall be construed to apply to Minor Items (as defined in § 101-02 *Definitions of Terms*) only when extra work both (1) increases

the quantity of a Minor Item to more than 200% of the original contract quantity and (2) results in an increase of more than \$1,000 from the original contract amount. Any allowance for a change in the unit price shall apply only to that portion of work both in excess of 200% of the original contract item quantity, and in excess of \$1,000 from the original contract amount.

*D. Composite Items.* Composite items, for the purposes of this subsection, consist of rock and non-rock components, and are limited to unclassified excavation and trench and culvert excavation. The term “significant change” shall be construed to apply only if the composite item is a Major Item, any individual component of the composite is less than 75% or more than 125% of the quantity stated in the Earthwork Summary Sheet used by the department in preparing the contract, and the reasonable costs of the composite item either increases or decreases as a result of the change. The adjustment in payment shall be based on variance in quantity of the individual components from the quantity stated in the Earthwork Summary Sheet. For contracts containing Major Items of unclassified excavation and/or trench and culvert excavation, the contractor shall submit, at the request of the Engineer, its price breakdown of the bid price of the composite item for the rock and non-rock components.

*E. Fixed Quantity Items.* Certain items of work may be fixed quantity items, and payment will be restricted to the quantity stated in the Estimate of Quantities. The term significant change shall be construed to apply to fixed quantity items only if, during the progress of the work, the quantity of work is found to be less than 75% or more than 125% of the quantity stated in the Estimate of Quantities.

*F. Lump Sum Items.* Certain items of work may be Lump Sum items, wherein a single bid amount is intended to provide payment for all necessary work during the execution of the contract. The term “significant change” shall be construed to apply to lump sum items only to the extent that changes in other contract work items result in a significant change in the character of work required to complete “Lump Sum” items of work.

Section 105.14 (Disputed Work and Dispute Resolution) from NYSDOT standard specification details the provisions on dispute resolution. This section sets forth that it is the goal to resolve disputes that may arise under the contract in a timely, just, and fair manner consistent with the terms of the contract. These provisions outline the details of disputed work; time related disputes; acceleration disputes; review time periods; disputes over \$250,000; required contents of dispute submission; certifications; auditing of records; closeout process, which included contract closeout meetings; gatekeeper concept; and referral of dispute to a dispute resolution board (DRB) or facilitated closeout meeting.

Section 109.05 (Extra Work and Time Related Compensation) details the compensation provisions for monetary compensation for extra work and time related costs, which include agreed prices, force account, and recoverable and nonrecoverable costs for time related damages and costs.

### 3. Modification Review Criteria

The NYSDOT Contract Administration Manual provides that where changes involve major redesign or major increase in cost, pre-approval by the Office of Construction is required to ensure approval by the Office of the State Comptroller (OSC). The Office of Construction, if appropriate, may contact OSC in advance.

The region should provide the following information, which includes:

1. Need for the change, costs and benefits, and consequences of the revision or inaction.
2. Essential cost of the change.
3. Comments by the Regional Design Group and Project Manager and the evaluation of the potential effects on other agencies and the public.
4. List of additional resolutions, right-of-way, and/or permits (environmental or other that may be required).
5. Evaluation of the impact on the contractor’s progress schedule and other contract work.
6. Need of any extensions of time and impact to time related provisions.<sup>55</sup>

In addition, although not codified in the construction administration manual, NYSDOT also inquires if the work results from an emergency situation, involves existing contract bid items, cost of cost savings and cost avoidance, or if the work violates any stakeholder commitments. Inquiry is also made as to whether the change order could result in a potential bid reversal situation.<sup>56</sup>

### 4. Administrative Approval Process

NYSDOT Contract Administration Manual details the change order approval process. Once the need for the change order is identified, the engineer in charge (EIC) or project manager (PM) oversees the preparation of the change order with explanation and supporting data. Reviews are conducted by the regional change order specialist, and then the Office of Construction in the main office. The change order is then reviewed by FHWA, if necessary, and if approved sent to the accounting bureau expenditure unit for verification of funding and then entered into the statewide financial system and forwarded to the OSC for approval through the site manager program. The OSC reviews the change order for completeness and accuracy and verifies that the actions being taken are within the department’s authority

<sup>55</sup> 104.02 Changes, Contingencies, Extra Work and Deductions, NYSDOT CONTRACT ADMINISTRATION MANUAL, pt. IV, June 2014.

<sup>56</sup> Interview with Brian DeWald, NYSDOT Construction Division (Sept. 10, 2013).

and the work is within the scope of the contract and that decisions have been made in accordance with approved department process and procedures. The multilayered approach ensures that proper documentation is presented and appropriate procedures and processes have been followed.

### 5. Significant Case Law Developments

These are covered in Section I of this digest.

## C. Rhode Island Department of Transportation

Rhode Island Department of Transportation (RIDOT) has an annual highway program of \$500 million.

### 1. Statutory and Administrative Constraints

Rhode Island has statutes that require competitive bidding of government sponsored contracts. The statutes that affect highway construction projects are set below verbatim, in pertinent part, as there are certain thresholds that trigger the bidding requirements.

#### Competitive Bidding Requirements:

R.I. Gen. Laws § 37-2-18 Competitive sealed bidding provides, in relevant part:

(a) Contracts exceeding the amount provided by § 37-2-22<sup>57</sup> shall be awarded by competitive sealed bidding unless it is determined in writing that this method is not practicable or that the best value for the state may be obtained by using an electronic reverse auction as set forth in § 37-2-18.1. Factors to be considered in determining whether competitive sealed bidding is practicable shall include whether:

(1) Specifications can be prepared that permit award on the basis of either the lowest bid price or the lowest evaluated bid price; and

(2) The available sources, the time and place of performance, and other relevant circumstances as are appropriate for the use of competitive sealed bidding.

(b) The invitation for bids shall state whether the award shall be made on the basis of the lowest bid price or the lowest evaluated or responsive bid price. If the latter basis is used, the objective measurable criteria to be utilized shall be set forth in the invitation for bids, if available....

....

(j) As of January 1, 2011, this section shall apply to contracts greater than one million dollars (\$1,000,000); on January 1, 2012 for all contracts greater than seven hundred fifty thousand dollars (\$750,000); on January 1, 2013

<sup>57</sup> R.I. GEN. LAWS § 37-2-22 provides:

Procurements, not to exceed an aggregate amount of ten thousand dollars (\$10,000) for construction and five thousand dollars (\$5,000) for all other purchases may be made in accordance with small purchase regulations promulgated by the chief purchasing officer. Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.

for all contracts greater than five hundred thousand dollars (\$500,000); and on January 1, 2014 for all contracts awarded pursuant to this section.

Rhode Island has laws that require all state contracts (and modifications thereof) to be made through the state purchasing agent who is part of the Department of Administration. R.I. Gen. Laws Section 37-2-9 gives authority to the state purchasing agent over all “purchasing, management, and control of any and all supplies, services, construction, and other items required to be purchased by the state.” R.I. Gen. Laws Section 37-2-12 transfers all authority of state agencies over, among other things, construction, to the chief purchasing officer. R.I. Gen. Laws Section 37-2-7 includes certain definitions, including the following sections pertinent to construction contract modifications:

(2) “Change order” means a written authorization signed by the purchasing agent directing or allowing the contractor to proceed with changes, alterations, or modifications to the terms, conditions, or scope of work on a previously awarded contract.

....

(4) “Construction” means the process of building, altering, repairing, improving, or demolishing any public structures or building, or other public improvements of any kind to any public real property. It does not include the routine maintenance or repair of existing structures, buildings, or real property performed by salaried employees of the state of Rhode Island in the usual course of their jobs.

(5) “Contract” means all types of agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and construction management contracts. It also includes supplemental agreements with respect to any of the foregoing. “Contract” does not include labor contracts with employees of state agencies.

(6) “Contract amendment” means any written alteration in the specifications, delivery point, rate of delivery, contract period, price, quantity, or other contract provisions of any existing contract, whether accomplished by unilateral action in accordance with a contract provision, or by mutual action of the parties to the contract. It includes bilateral actions, such as supplemental agreements, and unilateral actions, such as change orders, administrative changes, notices of termination, and notices of the exercise of a contract option.

(7) “Contractor” means any person having a contract with a governmental body.

The Rhode Island Department of Administration (RI DOA) has adopted regulations that govern RIDOT. Section 12, Rhode Island Department of Transportation Projects, adopted June 20, 2011, provides in Section 12.102 (Bidding Requirements and Conditions) and Section 12.103 (Award and Execution of the Contract) detailed requirements

for RIDOT bidding procedures and documentation. (Hereinafter the RI DOA regulations governing RIDOT will be referred to as “DOA Section 12.”) DOA Section 12.3.3 provides that RIDOT’s Standard Specifications for Road and Bridge Construction shall be incorporated into and made part of all DOA solicitations for bids for RIDOT projects.<sup>58</sup>

#### *Change Order Requirements:*

R.I. Gen. Laws Section 37-2-7(6) permits the chief purchasing officer/purchasing agent to delegate to the director of RIDOT the delegated purchasing authority to enter into binding contract amendments on behalf of the state, as authorized by the chief purchasing officer by written determination, for all RIDOT projects that were originally solicited by the chief purchasing officer or his/her designee.<sup>59</sup> However, the delegation of authority is limited to the amount of state and/or FHWA funds that have been allocated to the particular project.<sup>60</sup>

DOA Section 12.101 provides a series of definitions.<sup>61</sup> Pertinent ones include the following as it relates to contract modifications:

12.101.12 **CONTRACT ADDENDUM.** Any change to the Contract made after its initial execution, which change shall become part of the Contract Agreement. Contract Addenda must be set forth in writing and executed by the original signatories, or their successors in interest, or their designees. Each Contract Addendum must be preceded and documented by a corresponding Report of Change.

12.101.25 **EQUITABLE ADJUSTMENT.** An adjustment in the Contract price and time occasioned by the performance of work beyond that required by the original Contract, including extra work, changes, differing site conditions and changes in quantities. The equitable adjustment of Contract price will be based on an agreed upon lump sum, agreed upon unit prices, force account, or the actual cost of the work. The equitable adjustment of the Contract time will be based on a comparison of the time demonstrated by the Contractor’s schedule and the time required for the execution of the work.

12.101.27 **EXTRA WORK.** Work not provided for in the Contract as awarded but considered essential to the satisfactory completion of the Contract.

12.101.36 **MAJOR AND MINOR CONTRACT ITEMS.** Any item having an original value in excess of 5 percent of the original Contract amount shall be considered to be a major item. All other original Contract items shall be considered

<sup>58</sup> See R.I. GEN. LAWS § 37-8-38 (Issuance of Specifications).

<sup>59</sup> DOA § 12.2.2.

<sup>60</sup> *Id.*

<sup>61</sup> OA Section 8 (Contracts) also includes definitions of “change order” (Section 8.1.1), “contract modification” (Section 8.1.3), and “contract addendum” (Section 8.1.4)—these incorporate the definitions of such terms from R.I. GEN. LAWS § 37-7-2.

minor items. In addition, any minor item which increases by 100 percent will be considered a major item. The revised quantity will then be considered the original Contract quantity for purposes of determining a major item of work under Subsection 12.104.07; Significant Changes in the Character of Work.

12.101.55 **REPORT OF CHANGE.** A written order to the Contractor covering contingencies, extra work, increases or decreases in Contract quantities, and additions or alterations to the Plans or Specifications, within the scope of the Contract, and establishing the basis of payment and time adjustments for the work affected by said changes. A Report of Change provides the required documentation for the execution of a Contract Addendum.

12.101.75 **SUPPLEMENTAL AGREEMENT.** A Contract Addendum signed by the Department and the Contractor for the performance of work which is beyond the scope of the original Contract but which the Department elects to perform in conjunction with the existing Contract.

DOA Section 12 also has detailed provisions dealing with the process and basis for contract modifications. The relevant sections include the following:

#### 12.104.02 CHANGES IN THE CONTRACT.

a. **Right to Change.** The Engineer reserves the right to make changes in the Contract at any time during the progress of the work as are necessary to satisfactorily complete the Project. Such changes shall not invalidate the Contract nor release the Surety. The Contractor agrees to perform the work as directed by the Engineer. Any costs applicable to such changes will be paid for by the execution of an appropriate Contract Addendum.

b. **Causes for Changes.** Changes in the Contract may result from any of the following causes: 1. Differing site conditions. 2. Alterations in the Plans or Details; additions to, reductions in, or elimination of an existing item of work contained in the Proposal. 3. Extra or unforeseen work for which there is no item of work in the Proposal. 4. Suspension of the work for any reason. 5. Significant changes in the character of the work.

12.104.03 **DIFFERING SITE CONDITIONS.** During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed. Upon written notification, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment, excluding anticipated profits, will be made and the Contract modified in writing accordingly. The Engineer will notify the Contractor of the determination whether or not an adjustment of the Contract is warranted.

No Contract adjustment, which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice. No Contract adjustment

will be allowed under this clause for any effects caused on unchanged work.

**12.104.04 ALTERATIONS IN THE PLANS OR DETAILS.** The Engineer may order changes in the Plans or Details, increase, reduce, or eliminate any Contract work item deemed necessary to satisfactorily complete the Project. Should such alterations in the Contract result in changes in the quantities of work to be performed, the Contractor shall complete such altered quantities in the same manner prescribed for the corresponding unaltered quantities. Unless otherwise provided for under Subsection 12.104.07; Significant Changes in the Character of the Work, such altered work shall be paid for at the same unit prices as for the corresponding unaltered items of work.

....

**12.104.05 EXTRA WORK.** The Contractor shall perform extra work, for which there is no price included in the Contract, whenever it is deemed necessary or desirable to complete the work as contemplated. Such work shall be performed in accordance with the Specifications and as directed, and will be paid for as provided under Subsection 12.109.04; Differing Site Conditions, Changes, Extra Work, and Force Account Work.

**12.104.07 SIGNIFICANT CHANGES IN THE CHARACTER OF THE WORK.** The Engineer reserves the right to make in writing at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the Contract nor release the surety, and the Contractor agrees to perform the work as altered.

If the alterations or changes in quantities significantly change the character of the work under the Contract, whether such alterations or changes are in themselves significant changes to the character of the work or by affecting other work cause such other work to become significantly different in character, an adjustment, excluding anticipated profits, will be made to the Contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable.

If the alterations or changes in quantities do not significantly change the character of the work to be performed under the Contract, the altered work will be paid for as provided elsewhere in the Contract.

a. Circumstances for Significant Change. The term “significant change” shall be construed to apply only to the following circumstances:

1. When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction or;

2. When a major item of work, as defined elsewhere in the Contract, is increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original Contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

DOA Section 12.105.18 (CLAIMS FOR ADJUSTMENTS AND DISPUTES) sets forth the process for contractors to follow to request contract modifications.

a. Notification. If the Contractor deems that additional compensation is due for work or material not clearly covered in the Contract, the Contractor shall notify both the Engineer and the Chief of Construction Operations in writing of its intention to make claim for such additional compensation before beginning or continuing the affected work; also, the Contractor shall proceed diligently with performance of the contract pending final resolution of any request for relief, payment, claim, appeal or action arising under the contract, and comply with any decisions of the Engineer. If such notification is not given, or the Contractor does not afford the Engineer proper facilities for keeping strict account of the actual costs, the Contractor thereby waives any claim for additional compensation. Notice by the Contractor, and the fact that the Engineer has kept account of the costs, shall not be construed as substantiating the validity of the claim.

b. Submission. Claims must be submitted within 120 days of substantial completion of the project. Claims submitted after 120 days will not be accepted. An equitable adjustment will be made to the Contract if the claim is found to be just. Nothing in this Subsection shall be construed as establishing any claim contrary to the terms of Subsections 12.104.02; 12.104.03; 12.104.04; 12.104.05; 12.104.06 and 12.104.07 of these Standard Specifications.

c. Documentation of Claims. Any claim shall be in sufficient detail to enable the Engineer to determine the basis for entitlement and the resulting costs. [Minimum requirements for claim supporting materials are listed, but not replicated here.]<sup>62</sup>

## 2. Contract Modification Provisions

RIDOT’s *Standard Specifications for Highways and Bridges*, also known as the “Bluebook,” contains the same provisions as are provided in DOA Section 12, as discussed in Section I of this digest, so they are not repeated here.

## 3. Modification Review Criteria

See Section I of the digest, where DOA Section 12 spells out the type of contract modifications that are permitted on RIDOT projects. Section 12.104.2.a (CHANGES IN THE WORK) defines the right of the engineer to make changes “as are necessary to satisfactorily complete the Project” and Section 12.104.2.b, which lists “causes” for changes. Section 12.104.05 (EXTRA WORK) provides: “The Contractor shall perform extra work, for which there is no price included in the Contract, whenever it is deemed necessary or desirable to complete the work as contemplated.” Section 12.104.04 (ALTERATIONS IN THE PLANS OR DETAILS) provides: “The Engineer may order changes in the Plans or Details, increase, reduce, or eliminate any Contract work

<sup>62</sup> Claims must also be certified (DOA § 12.105.18.d) and are subject to audit (DOA § 12.105.18.e).

item deemed necessary to satisfactorily complete the Project.”

#### 4. Administrative Approval Process

RIDOT has a *Policy and Procedure for Change Orders*. In the preamble it notes that change orders can be made for reasons “including but not limited to, increases to existing contract quantities, modifications to a design or plan of specification, modifications to scope of work, differing site conditions, time extension, adding or deleting an item, emergency work, or any other extra work.” The Policy and Procedure<sup>63</sup> specifies how to justify the change order (“why was the modification required?”); how to price the change order; the backup required for price and time recommendations; the administrative process to obtain necessary approvals (including the approval of FHWA for “extra work” over \$50,000); and delegated authority based on the amount of the change order. The change order form for FHWA approval requires classification of the change order by the following categories: Potential Design Errors/Omissions or Unbuildable Design; Discretionary—Quality Adjustment; Differing Site Conditions; or Quantity Adjustments.

#### 5. Significant State Case Law Developments

None reported.

### D. MassDOT Highway Division

MassDOT Highway Division has an annual statewide highway program of under \$500 million.

#### 1. Statutory and Administrative Constraints

Massachusetts has statutes that require competitive bidding of most public works projects. The statutes that affect highway construction projects are set forth below verbatim, in pertinent part, as there are certain thresholds that trigger the bidding requirements.

##### *Competitive Bidding Requirements:*

Massachusetts General Laws (M. G. L.) Chapter 30, Section 39M provides, in relevant part:

Every contract for the construction, reconstruction, alteration, remodeling or repair of any public work, or for the purchase of any material, as hereinafter defined, by the commonwealth, or political subdivision thereof, or by any county, city, town, district, or housing authority, and estimated by the awarding authority to cost more than ten thousand dollars, and every contract for the construction, reconstruction, installation, demolition, maintenance or

<sup>63</sup> The RIDOT Policy and Procedure also requires that change orders be prepared in accordance with Sections 8 and 9 of the *Procedures for Uniform Record Keeping Manual* (PURK).

repair of any building by a public agency, as defined by subsection one of section forty-four A of chapter one hundred and forty-nine, estimated to cost more than \$25,000 but not more than \$100,000, shall be awarded to the lowest responsible and eligible bidder on the basis of competitive bids publicly opened and read by such awarding authority forthwith upon expiration of the time for the filing thereof....<sup>64</sup>

##### *Change Order Requirements:*

Massachusetts has statutes that require certain types of contract modifications to be permitted as a matter of law—these include differing site conditions and suspensions. The statutes require that these provisions appear in highway construction projects.<sup>65</sup> The statutes are set forth below verbatim, in pertinent part.

M.G.L. Chapter 30, Section 39I provides, in relevant part:

Every contractor having a contract for the construction, alteration, maintenance, repair or demolition of, or addition to, any public building or public works for the commonwealth, or of any political subdivision thereof, shall perform all the work required by such contract in conformity with the plans and specifications contained therein. No willful and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority or by the engineer or architect in charge of the work who is duly authorized by the awarding authority to approve such deviations. In order to avoid delays in the prosecution of the work required by such contract, such deviation from the plans or specifications may be authorized by a written order of the awarding authority or such engineer or architect so authorized to approve such deviation....

M.G.L. Chapter 30, Section 39N provides:

Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:

If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be

<sup>64</sup> See also MASS. GEN LAWS ch. 149, § 44J, which sets forth certain procedures to be followed for those contracts that are required to be competitively bid pursuant to MASS. GEN LAWS ch. 30, § 39M.

<sup>65</sup> See *Reynolds Bros., Inc. v. Commonwealth of Massachusetts*, 412 Mass. 1 (1992) (even if contract fails to include ch. 30, § 39O, the contract must be read as containing it).

delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly.

M.G.L. Chapter 30, Section 39-O provides:

Every contract subject to the provisions of section thirty-nine M of this chapter or subject to section forty-four A of chapter one hundred forty-nine shall contain the following provisions (a) and (b) in their entirety and, in the event a suspension, delay, interruption or failure to act of the awarding authority increases the cost of performance to any subcontractor, that subcontractor shall have the same rights against the general contractor for payment for an increase in the cost of his performance as provisions (a) and (b) give the general contractor against the awarding authority, but nothing in provisions (a) and (b) shall in any way change, modify or alter any other rights which the general contractor or the subcontractor may have against each other.

(a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions.

(b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

## 2. Contract Modification Provisions

MassDOT Highway Division's *Standard Specifications for Highways and Bridges* has the following standard provisions, summarized below:<sup>66</sup>

*Section 1.20 Extra Work [Definition]:* Work which 1. was not originally anticipated and/or contained in the contract; and therefore 2. is determined by the Engineer to be necessary for the proper completion of the project; and 3. bears a reasonable subsidiary relation to the full execution of the work originally described in the Contract.

*Section 4.02 Alterations:* The Engineer is permitted, in writing, to make alterations in the form, character, or detail of any of the work done or to be done. The contractor shall accept as full compensation the contract unit prices for the actual quantity of work performed in an acceptable manner.

*Section 4.03 Extra Work:* The Contractor shall do any work "not herein otherwise provided for when and as ordered in writing by the Engineer." This section also addresses time for completion of the contract and the amount and value of the extra work (with reference to other sections of the specifications).

*Section 4.04 Changed Conditions:* This section sets forth verbatim the language of M.G.L. Chapter 30, Section 39N, as quoted above.

*Section 4.05 Validity of Extra Work:* The Engineer may issue Extra Work Orders for such additional work outside the scope of the original Contract as in his judgment is reasonably necessary for the satisfactory completion of the project...providing that the work to be done under such an Extra Work Order shall not result in a change of such magnitude as to be compatible with the provisions of...<sup>67</sup> Chapter 149, Section J of the General Laws.

*Section 4.06 Increased or Decreased Contract Quantities:* The contractor shall accept as full payment the original contract unit prices when accepted quantities of work vary from the bid schedule quantities. The Engineer may order omitted from the work any items or portions of the work found unnecessary to the improvement. Certain limitations on recovery for omitted work also are provided.

## 3. Modification Review Criteria

See Section 2 above, where standard specifications define what is and is not allowable under the contract as it relates to contract modifications. As to extra work, see Section 4.05 that permits the engineer to issue Extra Work Orders "for such additional work outside the scope of the original Contract as in his judgment is reasonably necessary to completion of the project...."

<sup>66</sup> The provisions cited or quoted are from the 1988 *Standard Specifications for Highways and Bridges*, which is generally used by MassDOT Highway Division in its highway construction projects.

<sup>67</sup> Chapter 38 of the Acts of 2013 at 44 repealed MASS. GEN LAWS ch. 29, § 20A, which is cited in this section.

#### 4. Administrative Approval Process

MassDOT Highway Division uses Standard Operating Procedure (SOP) CSD 25-12-000, entitled Extra Work Orders over \$100,000 (effective August 1, 2011). In summary, it provides that Extra Work Orders are prepared in the district office and processed in the Boston office. “Extra Work” is defined as follows:

1. was not originally anticipated and/or contained in the contract, and 2. is determined by the Engineer to be necessary for the proper completion of the project, and 3. bears a reasonable subsidiary relation to the full execution of the work originally described in the contract; i.e. is work that is reasonably similar in type and character to the work originally described in the Contract.

The SOP describes various steps in preparing an Extra Work Order, which includes a description of the character, necessity, and location of the work, together with estimated cost and schedule impacts. More detailed requirements include, among other things: scope and significance of the proposed work; the economic and engineering necessity for the proposed work; a statement that there is not a more equitable or practicable alternative than that proposed, and a description of any efforts made to minimize the cost of the extra work. Approval of the Extra Work Order is subject to certain signatory authorization levels. There is an exception for emergency extra work, where there is authority for the chief engineer to approve the work before proceeding, with a follow up Extra Work Order in due course, meeting the other requirements of the SOP. The SOP also permits Multipart Extra Work Orders to avoid delays, when the task can be defined but the full scope and cost cannot be determined until completion of the work, or when it is “necessary to proceed” before the full scope, pricing, or timeframe can be determined and negotiated.

There also is a section dealing with “Disputed Extra Work” where there is a question during the performance of any contract work as to whether or not “Extra Work” may be involved. In this case, the resident engineer keeps time and material records.

#### 5. Significant State Case Law Developments

None reported.

### E. Vermont Agency of Transportation

#### 1. Statutory and Administrative Constraints

Vermont Agency of Transportation (VTrans) has a \$200 million yearly construction program.

The State of Vermont, Agency of Administration, Bulletin 3.5 provides that

It is the policy of the State of Vermont to obtain high quality services and materials in a cost effective manner through

the use of an open and competitive contract solicitation process to ensure proper development and review of contracts prior to their being signed and to oversee established contracts effectively through their completion.<sup>68</sup>

Construction contracts are awarded after public bidding pursuant to Section 1502 of the Vermont Statutes Annotated (V.S.A.), which provides that the agency may comply with federal rules and regulations and may use such funds available for highway purposes as shall be necessary to secure federal funds.

Vermont essentially relies on federal rules and regulations and state policy as the authority to conduct competitive bidding.

In order to obtain federal funds, VTrans must comply with all federal requirements, including 23 C.F.R. 635.104 that provides:

Section 635.104 Method of Construction

(a) Actual construction work shall be performed by contract awarded by competitive bidding unless as provided in Section 635.104 (b), the STD demonstrates to the satisfaction of the Division Administrator that some other method is more cost effective or that an emergency exists. The STD shall assure opportunity for free, open and competitive bidding, including adequate publicity of the advertisements or calls for bids. The advertising or calling for bids and the award of contracts shall comply with the procedure set forth in Section 635.12 and 635.114.

#### 2. Contract Modification Provisions

VTrans specifications contain various provisions that relate to changes, including:

104.01 INTENT OF CONTRACT. The intent of the Contract is to provide for the construction and completion in every detail of the work described. The Contractor shall furnish all labor, materials, equipment, tools, transportation, and supplies required to complete the work in accordance with the Plans, Specifications, and other provisions of the Contract.

104.02 ALTERATION OF PLANS OR CHARACTER OF WORK. To suit conditions disclosed as the work progresses, the Engineer may, without notice to the Sureties on the Contractor's bonds, make alterations in the design, in type of materials, in the quantities or character of the work or materials required, in the cross-sections, in dimensions of structures, in length of project, in locations, and any other ways deemed appropriate. Alterations will not constitute a change in other parts of the Contract or a waiver of any condition of the Contract, and shall not invalidate any of the provisions of the Contract Documents. Payment for work occasioned by changes or alterations will be made according to Subsections 109.04 and 109.05. If the altered or added works are of sufficient magnitude to require additional time in which to complete the project a time adjustment will be made pursuant to Subsection 108.11.

104.03 EXTRA WORK. The Contractor shall perform extra or unforeseen work for which there is no quantity and price

<sup>68</sup> State of Vermont, Agency of Transportation, Bulletin 3.5, July 15, 2008, at 6.



included in the Contract according to the Contract or as directed by the Engineer whenever it is deemed necessary or desirable by the Engineer in order to complete the work as contemplated; payment will be made pursuant to Subsection 109.06.

#### 104.08 DIFFERING SITE CONDITIONS.

(a) During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those specified in the Contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before they are disturbed and before the affected work is performed.

(b) Upon written notification, the Engineer will investigate to determine if the conditions materially differ and will cause an increase or decrease in the cost or time required for the performance of any work under the Contract. The Contractor will be notified of the Engineer's determination, whether or not an adjustment of the Contract is warranted. If an adjustment is warranted, the Contract will be modified in writing accordingly. Any adjustment made will exclude loss of anticipated profits.

(c) No Contract adjustment that results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.

(d) No Contract adjustment will be allowed under this clause for any effects caused on unchanged work.

#### 109.04 SIGNIFICANT CHANGES IN THE CHARACTER OF WORK

(a) General. At any time during work the Engineer reserves the right to make, in writing, changes in quantities and alterations in the work as are deemed necessary or desirable to satisfactorily complete the project. Changes in quantities and alterations in the work will not invalidate the Contract or release the Contractor's surety, and the Contractor shall perform the work as altered.

(b) Significant Alteration/Change to Character of Work; Adjustment to Contract. If the alterations or changes in quantities significantly change the character of the work under the Contract, whether or not changed by different quantities or alterations, a monetary adjustment will be made to the Contract; loss of anticipated profits shall not be included. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, an adjustment will be made as the Engineer determines to be fair and equitable.

(c) Alterations/Changes Not Significant. If the alterations or changes in quantities do not significantly change the character of the work to be performed under the Contract, the altered work will be paid for as provided elsewhere in the Contract.

(d) Significant Change Defined. The term "significant change" shall be construed to apply only to the following circumstances: (1) When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or (2) When a major item of work, as defined, is increased in excess of 25 percent above or decreased below 75 percent of

the original Contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of the original Contract item quantity; any allowance for a decrease in quantity below 75 percent shall apply to the actual amount of work performed.

(e) Major Item Defined. A major item of work is any bid item that has a total bid value greater than 20 percent of the total bid amount of the Contract.

#### 109.05 COMPENSATION FOR ALTERED PLANS OR QUANTITIES.

(a) General. When alterations in the Plans or quantities of work are ordered and performed as provided in Subsection 104.02 and when such changes or alterations result in an increase or decrease of not more than 25 percent of the total original Contract amount, or the length of the project is not increased or decreased more than 25 percent of the original length shown in the Contract, the Contractor shall accept payment in full at the Contract unit price for the actual quantities of work done.

(b) Adjustment When Exceeded. When changes or alterations result in a sum total change of more than 25 percent of the total cost of the Contract calculated from the original bid quantities and the original Contract unit prices, or a length increased or decreased more than 25 percent, and a demand is made by the Contractor or the Agency, a negotiated Supplemental Agreement shall be signed by both parties setting forth the necessity for the change and an adjustment of unit prices agreed upon as satisfactory to both parties. In order to bring a claim for additional compensation, the Contractor shall meet all applicable requirements of Subsection 105.20.

(c) No Further Allowance. No further payments will be made for changes/alterations, including no further allowances for any increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the Contractor resulting directly from the changes/alterations or indirectly from unbalanced allocation of overhead expense among the Contract items by the Contractor and subsequent loss of expected reimbursements therefore or from any other cause.

109.06 EXTRA AND FORCE ACCOUNT WORK. Extra work ordered and accepted as specified in Subsection 104.03 will be paid for on a unit price or lump sum basis under a Supplemental Agreement. The agreement will be made before the work is started. When the Engineer deems it impractical to handle any Extra Work ordered on a unit price or lump sum basis, a Supplemental Agreement will be made and the work will be ordered done and paid for on a force account basis.

### 3. Modification Review Criteria

The VTrans construction administration manual provides some guidance and cautions resident engineers to recognize whether the proposed change is a "nicety" or a "necessity." A change that is a "nicety" is one that may be an improvement to the project, but is not actually needed for the successful completion of the project. A change classified as a "necessity" is one that is required in order to complete the project according to sound engineering principles

or would be of considerable importance to future maintenance and public safety. Further changes considered a “nicety” must be carefully weighed in terms of added costs to the project and delays to the contractor.<sup>69</sup>

The questions that need to be answered and discussed include:

- Is the work eligible for federal aid?
- What is the impact on the original scope of work?
- What is the basis of payment and what cost analysis must be accomplished to support the negotiated prices that are part of the Change Order?

Changes that are determined to be a “necessity” require the completion of the change order form. The manual provides that the proposed change be discussed with the regional construction engineer and project manager before making all but minor changes. If the project involves full federal oversight, it is necessary to discuss it with the FHWA area engineer to prepare for FHWA approval. In all cases where there is a question of whether the work is of a “minor” or “major” nature, the regional construction engineer should be consulted. Changes that require work outside the project construction limits, as well as changes in drainage features, impervious surface, or illicit discharges, may require review by the Environmental Unit.

#### 4. Administrative Approval Process

Additional change order guidance is provided in the VTrans procedure for approval of change orders in Appendix B-21 of the *Construction Administration Manual*. The appendix provides detailed guidance for verbal approvals, drafting change orders, price analysis, reason codes, review of draft change orders, entering information in site manager, change order review team, approval level, and distribution.<sup>70</sup> The appendix notes that the resident engineer should discuss the change order with the regional construction engineer, project manager, and FHWA. The change order shall contain a description of the change, quantities to be added, time added, necessity of revision, location of the change, when the change was recognized, parties involved, price analysis, and applicable reason code. The multilevel

<sup>69</sup> *Vermont Construction Administration Manual*, § II, 2-110.20 (on file with authors).

<sup>70</sup> *Vermont Construction Administration Manual*, App. B-21: Drafting and Executing Change Orders—Guidance and Procedures, 2013.

review process includes review by the regional construction engineer, regional technician, regional program services clerk, finals engineer, construction service engineer, construction executive assistant, resident engineer, Certification and Independent Assurance (C & IA) supervisor, project manager and quality assurance engineer, director of program development, and FHWA engineer.

Of significance was the amendment made to the Construction Manual on March 3, 2010, by construction engineer David Hoyne, setting forth an FHWA report on *Independent Cost Analysis of New Items by Change Orders*. The field memo contained excerpts from the FHWA *Core Curriculum Manual* referring to FHWA guidelines for approval of change orders previously discussed in this digest. The field memo noted FHWA review of major contract modifications beyond the scope of work and the FHWA role to determine whether the additional work would benefit from competitive bidding.

#### 5. Significant State Case Law Developments

None reported.



## APPENDIX A—SUMMARY OF SURVEY RESPONSES

### Survey Responses—Contract Modification Factors

The authors sent surveys to 47 state transportation agencies. One of the questions asked the respondents to check off the factors that they take into account on whether to approve a contract modification or, alternatively, to undertake a competitive bid. Most of the respondents checked off the following factors that are taken into account in relation to contract modifications (but note that these are not explicitly tied to competitive bidding triggers):

- Is the contract modification within the general scope of the original contract?
- Is the contract modification within the project limits or right of way of the original contract?
- Does the contract modification result from an emergency situation affecting life, safety, or health?
- Does the contract modification result from an unforeseen site condition?
- Would delaying the contract modification and implementing a competitive bid process lead to significant increased costs?
- Would delaying the contract modification and implementing a competitive bid process significantly delay completion of the project?
- Would approval of the contract modification go beyond statutory or regulatory authorizations?
- Is the work of the contract modification required by new federal mandate or requirements?
- Does the contract modification violate existing permits or commitments to stakeholders or governmental agencies?
- Is the cost of the contract modification fair and reasonable?
- Does adding the work of the contract modification delay the project completion?

It should be noted, however, that even though most of these factors were noted as germane to the contract modification/competitive bidding decision, individual DOTs might be limited to specific factors for contract modifications as provided by statutes, standard contract specifications, or Standard Operating Procedures (SOPs) or manuals. Stated another way, the survey responses did not necessarily reflect what was in statutes, specifications, or SOPs applicable to the respondent agency. The authors concluded that, in practice, most of these factors are taken into account in making decisions on making contract modifications. The authors did not get any survey responses that specifically identified these factors as triggering a competitive bidding requirement; rather, they were used to decide whether to issue—or not issue—a contract modification.

### Survey Responses—Outside Agency Approvals of Contract Modifications

One of the survey questions asked respondents to advise on the necessity of outside agency approval of contract modifications. Almost universally, DOTs identified the necessity of Federal Highway Administration approval of contract modifications on federal aid projects. Some DOTs, for example RIDOT and MnDOT, also identified the need to get administrative approval from a state agency responsible for government expenditures, contracts, and/or services.<sup>71</sup>

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<sup>71</sup> An example includes the New York State Finance Law 112.

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**Survey Questions Distributed to State Agencies**  
**NCHRP 20-06, STUDY TOPIC 20-03**  
**PERMISSIBLE CHANGES OF WORK FOR CONSTRUCTION PROJECTS**  
**SURVEY QUESTIONS**

Agency Name: \_\_\_\_\_

Name of Employee: \_\_\_\_\_

Job Title: \_\_\_\_\_

Contact telephone/cell phone number: \_\_\_\_\_ / \_\_\_\_\_

Email address: \_\_\_\_\_

**Notes**

(a) Please provide copies via e-mail or provide an Internet-link for any contracts or other documents identified in your responses.

(b) If certain of the questions below are covered by an existing administrative procedure manual/guidelines or standard operating procedure, and you would prefer not to give a narrative response, please provide a reference to the applicable section(s) of those manuals or SOPs and a copy via email or Internet-link.

(c) In responding to the following questions, please feel free to attach extra pages or documents as needed.

1. Please provide a reference and email copy or Internet-link to your state competitive bid statute and/or state rules and regulations that govern competitive bidding of construction contracts.

2. Please provide a reference and email copy or Internet-link to the state law and/or rules and regulations that govern the issuance and/or approval of contract modifications on construction contracts.

3. Please describe the administrative process used to approve contract modifications to existing construction contracts, or email a copy or provide an Internet-link to any relevant administrative procedure manual/guidelines or standard operating procedures.

4. Who in your organization is primarily responsible for administering the contract modification approval process?

5. What factors are considered in determining whether to approve a contract modification or, alternatively, to undertake a competitive bid process?

Check all that apply

- a. Is the contract modification within the general scope of the original contract?
  - b. Is the contract modification within the project limits or right of way of the original contract?
  - c. Does the contract modification result from an emergency situation affecting life, safety or health?
  - d. Would delaying the contract modification and implementing a competitive bid process lead to significant increased costs?
  - e. Would delaying the contract modification and implementing a competitive bid process significantly delay completion of the project?
  - f. Would approval of the contract modification go beyond statutory or regulatory authorizations?
  - g. Is the work of the contract modification required by new federal mandate or requirements?
  - h. Does the contract modification violate existing permits or commitments to stakeholders or other governmental agencies?
  - i. Is the cost of the contract modification fair and reasonable?
  - j. Does adding the work of the contract modification delay the project completion?
6. Please list any other factors not included in the above list that are considered in a decision to issue a contract modification vs. bidding the additional or changed work.
7. Please identify and describe the name and role of all oversight agencies or entities that are required to approve contract modifications.
8. Please list other approval issues that affect your agency's approval of contract modifications if not otherwise mentioned in response to other questions.
9. Please reference any court case or significant legal decision relating to the issue of whether a contract modification is allowable and/or when and whether competitive bidding is required, as it relates to a contract modification to an existing construction contract.
10. Please identify any differences in contract modification rules, policies, procedures, etc., for alternative project delivery contracting methods, including CM/GC, design build, or public private partnerships and provide references to, copies of, or Internet-links to documents that contain or describe such differences.
11. Does your agency have a policy or procedure to add work to existing contracts for emergency situations?  
If so, please provide a reference, email copy or Internet-link to such policy or procedure.
12. Does your agency have a policy or procedure that requires competitive bidding in emergency situations? If so, please provide a reference, email copy or Internet-link to such policy or procedure.
13. Please provide a reference, email copy, or Internet-link to your current standard specifications dealing with contract modifications.

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14. Does your agency use “on-call” contracts for construction or capital maintenance work? If so, please provide a reference, email copy, or Internet-link to any policy, procedure, and typical contract form for such contracts.

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Please send your responses and any other documents, **preferably by e-mail**, to:

**Eric Kerness, Esquire**  
**Kerness Consulting**  
**1357 Stanley Lane**  
**Schenectady, NY 12309**  
**Tel. (518) 347-2778**  
**Cell: (518) 928-9433**  
**Eric@Kerness.com**

## APPENDIX B—SUMMARY OF STATE TRANSPORTATION APPROACHES TO CONTRACT MODIFICATIONS

QUESTIONS	ODOT	California	Connecticut
1. State Competitive Bidding Laws for construction contracts?	Ohio Rev. Code § 5525, Construction Contracts	See the Cal. Pub. Cont. Code §10115.2, Minority and Women Business Participation Goals for State Contracts.	Conn. Gen. Stat. § 13a-95. Submission of bids on state highway construction. Standard Specifications Form 816. Section 1.02 Proposal Requirements and Conditions.
2. State laws or regulations that govern issuance and/or approval of construction contract modifications	Construction policies 27-010P, Change Orders	See the Cal. Pub. Cont. Code §10227, Contract Requirements.	Contracts for highway construction. Standard Specifications Form 816. Section 1.03 Award and Execution of Contract, Section 1.04 Scope of Work, and Section 1.09 Measurement and Payment. Construction Contract Bidding and Award Manual.
3. Administrative process for approval of construction contract modifications?	Ohio DOT Policy: Construction Policies 27-010(P), Change Orders. Ohio DOT Procedure, 510-010(SP), 03092012, Change Order Standard Procedure.	Caltrans Construction Manual Section 5-3, Changes.	Chapters 5–8 of the Construction Manual outline this process.
4. Factors considered in determining whether to approve a contract modification or undertake a competitive bidding process.	Factors considered: Change order over \$25,000. Change order resulting from increase of final measurement quantity. Results from federal requirement. Circumstance creating life safety situation; (emergency situation).	Chapter 5, Section 3 of Caltran’s Contract Administration Manual provides consideration of the following: Is the type of work significantly different from other types of work in contract? Is it necessary to mobilize specialized equipment? Will the estimated cost of proposed work plus other changes go beyond contract allotment? Does the proposed work represent significant deletion? Does it delay completion? Is it outside contract limits? Is the proposed change order necessary to complete the work? Will it cause a work character change? Will the contract time be affected?	Contraction Manual Chapter 8 1-801, Review of change orders requires review of change: is the change in the public interest; does it provide an equal or better material or product; better method of construction? Does the contractor benefit from the change, and if so, is there a corresponding benefit to the project; assessment required on effect of change on contract lump sum items impact to construction activities; effect on project schedule



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QUESTIONS	ODOT	California	Connecticut
		<p>Does the proposed change adhere to existing permits conditions, environmental mitigation requirements, local agency and utility obligations, and right of way agreements?</p> <p>Does the proposed change require new coordination, permit, or agreements?</p> <p>What is effect on contractor's planned method of performing work?</p> <p>Is the proposed work already covered in the contract?</p> <p>Will the contractor cooperate with timely cost estimates?</p> <p>What methods of payment will be used?</p>	<p>and budget.</p> <p>Survey response provided this additional information.</p> <p>Is the contractor well suited to execute the proposed work and provide a quality product?</p> <p>Is the work able to be completed by DOT Highway Operations (Maintenance) Staff?</p>
5. Case law or legal decision that affects decision to issue a contract modification or competitively bid additional work.	None	None reported.	None reported.
6. Any different policy or procedure for alternative project delivery projects?	None	None reported.	<p>Facilities Construction: Form 816</p> <p>Section 1.20, Design Build</p>
7. Policy or procedure for governing additional work to existing contracts or competitive bidding for emergency contracting?	<p>Ohio DOT Policy: Construction Policies 27-010(P), Change Order,</p> <p>Ohio DOT Procedure: Construction Policies 510-010(SP) 03092012, Change Order Standard Procedure</p>	<p>Caltrans Construction Manual Chapter 5,</p> <p>Sec. 5-5, Emergency Contract Administration</p>	Same procedure adding non-emergency work.
8. Does your agency use "on-call contracting" for capital or maintenance?	No, but on the operation side there are material supplier contracts to perform minor work "on-call."	None reported.	No

QUESTIONS	NYS DOT	New Jersey DOT	Florida
1. State Competitive Bidding Laws for construction contracts?	NYS Highway Law, § 38, Contracts for construction or improvement of highways		Florida Statutes 2013, Chapter 337 Statute  Chapter 14-22, Administrative Rule
2. State laws or regulations that govern issuance and/or approval of construction contract modifications			
3. Administrative process for approval of construction contract modifications?	NYS DOT uses AASHTO Site Manager to process Change Orders. The CO is developed by field staff in accordance with the contract documents. Required documentation may need to be submitted by the Contractor (e.g., Force Account records, etc.). The Contractor's concurrence is sought, particularly when the contract provides more than one option (e.g., multiple options for Agreed Price). The Approval chain includes the EIC > Regional CO person > Area Supervisor > RCE > MO Reviewer > DCEC > FHWA (as appropriate) Funding > Fund Supervisor. NYS OSC reviews the CO, updates the Statewide Financial System (SFS), and files the CO.	Change order guide provides details on processing of change orders, which include increases in quantities, changes in the character of the work, including different site conditions, constructive acceleration, delays, and inefficiencies. Process involved Change Control Board.	This is covered in FDOT's Construction Project Administration Manual (CPAM). Chapters 7 s 3.
4. Factors considered in determining whether to approve a contract modification or undertake a competitive bidding process.	Construction Admin. Manual provides for evaluation need for change, cost and benefits, and consequences as of revision; evaluation of potential on other agencies and the public; additional resolutions, right of way permits required; impact on contractor's progress schedule and other contract work; need for extension of time and impact on time-related provisos.	NJ Construction Procedure Handbook Section IV, Construction Changes provides modification to existing environmental permits; reason for change; advantages and disadvantages; effects and implementation; impact on time of completion; estimated cost, third party participation, and approval.	Chapter 337 of Florida Statutes provide with respect to supplemental agreements and written work orders, statutory guidance, which include, does the change clarify the plans and specifications? Does the change meet the field conditions to provide a safe and functional connection to the pavement? Does the change expand the physical limits of a project only to the extent necessary to make the project functionally operational (such change to physical limits cannot exceed the greater of \$100,000 or 10% of the original contract; does the change provide for unforeseen work, grade changes, or alterations in the plans that could not be reasonably contemplated or foreseen in

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QUESTIONS	NYS DOT	New Jersey DOT	Florida
			<p>the original plans and specifications. In addition, Section 7 of the Florida Construction Project Administration Manual provides for the Engineer to provide estimate and entitlement analysis of the change outlining the reasons for extra work.</p> <p>In addition, delay to the project completion is one that is looked at closely when deciding whether or not to add work to a contract, particularly if the contract is short on or out of allowable contract time. The necessary work done without affecting the existing contract (such as adding to a different contract or letting a fast response contract), FDOT will take this into consideration.</p>
5. Case law or legal decision that affects decision to issue a contract modification or competitively bid additional work.	None reported.	None reported.	None reported.
6. Any different policy or procedure for alternative project delivery projects?	<p>Facilities Construction: Form 816 Section 1.20</p> <p>Design Build:</p> <p>The only changes are in the wording of the specific project. Given that D-B is in general thought about as a lump sum with responsibility taken on by the D-B firm, then the pendulum of responsibility for producing a completed set of plans falls to the D-B firm. So unless there is an issue with the base technical concept, which essentially falls under a differing site condition, or there is a directed change, then there would only be contractor requested changes. The nuts and bolts of the processing of changes are unchanged.</p>	None reported.	None reported.
7. Policy or procedure for governing additional work to existing contracts or competitive	None reported.	None reported.	Emergency contracts can be entered into without competitive bid, however, FDOT will most often put the emergency work out to competitive bid. Florida Statute chapter 337 has language addressing FDOT's authority for emergency

QUESTIONS	NYS DOT	New Jersey DOT	Florida
bidding for emergency contracting?			contracts. CPAM chapter 7.6 addresses Emergency Contracts.
8. Does your agency use “on-call contracting” for capital or maintenance?	Yes	Yes	<p>Florida causing damage.</p> <p>FDOT also uses Push-Button Contracts (indefinite quantity/indefinite delivery). FDOT’s Maintenance Office uses Asset Maintenance Contracts to provide for its needs.</p>

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QUESTIONS	MassDOT Highway	RIDOT	CDOT
1. State Competitive Bidding Laws for construction contracts?	<p>Massachusetts General Laws: Chapter 30 / Section 39M – Contracts for Construction and Materials, Manner of Awarding (horizontal)</p> <p>Chapter 149 / Section 44A-H – Public Building Construction (vertical)</p>	R.I. Gen. Laws § 37-2-1 thru 37-2-18. State Purchases	
2. State laws or regulations that govern issuance and/or approval of construction contract modifications	<p>Chapter 30 / Section 39I – Deviations from Plans and Specifications</p> <p>Chapter 30 / Section 39N – Construction Contracts, Equitable Adjustment in Contract Price for Differing Subsurface or Latent Physical Conditions</p> <p>Chapter 30 / Section 39O – Contracts for Construction and Materials; Suspension, Delay or Interruption due to Order of Awarding Authority; Adjustment in Contract Price; Written Claim</p> <p>Chapter 29 / Section 20A – Orders or Claims for Extra Work or Materials; Notice</p> <p>Chapter 149 / Section 44J – Invitations to Bid; Notice; Contents; Violations; Penalty</p> <p>Chapter 38 of the Acts of 2013 / 44 – Repeal of Chapter 29 / Section 20A Internet-link: malegislature.gov</p>		N/A
3. Administrative process for approval of construction contract modifications?	See MassDOT S.O.P. CSD 25- 12-1-000: Extra Work Orders over \$100,000.	See RIDOT Policy and Procedure for Change Orders dated July 2013.	See 2014 CDOT Construction Manual Section 120.7, Change Orders.
4. Factors considered in determining whether to approve a contract modification or undertake a competitive bidding process.	Statutes listed in Section 1 above define certain types of contract modifications and the circumstances to which they apply.	Statutes listed in Section 1 above define certain types of contract modifications and the circumstances to which they apply.	See 2011 Standard Specifications for Road and Bridge Construction, Sections 104.01 to 104.07.

QUESTIONS	MassDOT Highway	RIDOT	CDOT
	Standard Specifications Sections 1.02, 4.03, 4.04, 4.05, and 4.06 define and prescribe the elements of contract permissible contract modifications.	See also RIDOT Policy and Procedure for Change Orders dated July 2013.	See also 2014 CDOT Construction Manual Section 120.7.
5. Case law or legal decision that affects decision to issue a contract modification or competitively bid additional work.	None	None	None
6. Any different policy or procedure for alternative project delivery projects?	MassDOT has different change order provisions in its standard design build contracts (on file with authors).	(RIDOT permitted to do alternative contracting in accordance with federal regulations)	N/A
7. Policy or procedure for governing additional work to existing contracts or competitive bidding for emergency contracting?	S.O.P. CSD 25-12-1-000 permits the Chief Engineer to approve the start of extra work (subject to later process approvals) due to extreme emergency as a matter of public safety.	See RIDOT Policy and Procedure for Change Orders dated July 2013	See 2014 CDOT Construction Manual, Section 120.8.1 to 120.08.8, Emergency Construction Projects.
8. Does your agency use “on-call contracting” for capital or maintenance?	N/A	RIDOT uses Master Price Agreements (MPA) for the following construction related activities: MPA 451 Statewide Pavement Striping and MPA 484 Statewide Sign & Delineator Installation & Removal.	N/A

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<b>QUESTIONS</b>	<b>MnDOT</b>	<b>TennDOT</b>	<b>MichDOT</b>	<b>MaineDOT</b>
1. State Competitive Bidding Laws for construction contracts?	Minn. Stat. §161.32, Contracting for work on trunk highway.	See Tenn. Code Ann. §§ 54-5-114 thru 54-5-118, State Highways, General Provisions Tenn. Rules 1680, Transportation, 1680-05, Construction Division, 1680-05-03, Prequalification rules.	See Mich. Comp. Laws Chapter § 247.661c, Sec. 11c, Construction and maintenance projects to be performed by contract awarded by competitive bidding; other method; finding; report.	See Me. Rev. Stat. Ann. 23 § 4242, Contracts for transportation-related services and § 4243, Contracts for construction and maintenance.
2. State laws or regulations that govern issuance and/or approval of construction contract modifications	See Minn. Stat 161.32, Subd. 7, Approval and payment of supplemental agreements.	N/A	N/A	N/A
3. Administrative process for approval of construction contract modifications?	See MnDOT Construction Tools – Contract Changes  See Construction Tools – Construction Administration Manual (updated May 16, 2011).	See Construction Circular Letters—104.02-01, 104.03-01, and 104.03-02.	See Bureau of Highways Instructional Memorandum 2012-03, “Processing Contract Modifications.”  Bureau of Highways Instructional Memorandum 2013-126, “Contract Modification Procedures for FHWA Oversight Projects.”	See Department of Transportation Construction Manual (revision of June 2003).
4. Factors considered in determining whether to approve a contract modification or undertake a competitive bidding process.	See Standard Specifications for Construction Section 1402.  See MnDOT Construction Tools – Contract Changes.  See Construction Tools – Construction Administration Manual (updated May 16, 2011).	See Standard Specifications for Road and Bridge Construction Sections 104.01 to 104.03, which define and prescribe the elements of permissible contract modifications.  See also Tenn. DOT Policy No. 355-01, Approval of Construction Change Orders and Force Account Work, Dec. 15, 2013 (on file with authors).	See 2012 Standard Specifications for Construction Sections 103.01 to 103.02, Scope of work.	See Department of Transportation Standard Specifications (Nov. 2014 edition) Section 109 (Changes).
5. Case law or legal decision that affects decision to issue a contract modification or competitively bid additional work.	See Fuller Co. v. Brown, 678 F. Supp. 506 (E.D. Penn. 1987) (cardinal change case).	None	N/A	N/A

<b>QUESTIONS</b>	<b>MnDOT</b>	<b>TennDOT</b>	<b>MichDOT</b>	<b>MaineDOT</b>
6. Any different policy or procedure for alternative project delivery projects?		N/A	N/A	N/A
7. Policy or procedure for governing additional work to existing contracts or competitive bidding for emergency contracting?	See Standard Specification for Construction Section 1402.	See Tenn. Code Ann. Title 54-1-135, Transportation System Failure.	MichDOT has an emergency contract process (documents on file with the authors).	N/A
8. Does your agency use “on-call contracting” for capital or maintenance?	See MnDOT Indefinite Delivery/Indefinite Quantity (IDIQ) in the Construction Manual, Chapter 7.	Yes	N/A	Maine DOT uses on-call contracts for maintenance (survey response on file with authors).



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QUESTIONS	DelDOT	MonDOT	WVDOT	TXDOT
1. State Competitive Bidding Laws for construction contracts?	Del. Code Ann. 29, § 6962, Large public works contract procedures.	See Mont. Code Ann. §18-1-102, State contracts to lowest bidder - reciprocity.	See W. Va. Code § 5A-3-1 (Purchasing Division) and W. Va. Code § 17-2A et seq., Roads and highways.	See Texas Admin. Code Title 43, Part 1, Chapter 9, Subchapters B, Highway Improvement Contracts, and E, Maintenance project contracts.
2. State laws or regulations that govern issuance and/or approval of construction contract modifications	Del. Code Ann. 29, § 6963(b), Emergency procedures and contract change orders.	N/A	N/A	N/A
3. Administrative process for approval of construction contract modifications?	N/A (no formal process)	See Montana Department of Transportation Construction Administration Manual Section 104 (on file with authors) and Montana Department of Transportation Site Manager Construction Management System Section 10 Change Orders (on file with authors).	See WVDOH Construction Manual (2002).	See Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, Section 4.2 (2004).
4. Factors considered in determining whether to approve a contract modification or undertake a competitive bidding process.	See Del. Code Ann. 29, § 6963(b).  See also Standard Specifications for Road and Bridge Construction Sections 104.05 to 105.08 (Aug. 2001), Scope of work regarding changes in the character of work—differing site conditions.	See Standard Specifications for Road and Bridge Construction Sections 104.01 to 104.03 (2014 Edition), Scope of work.  See also Montana Department of Transportation Construction Administration Manual Section 104 (on file with authors) and Montana Department of Transportation Site Manager Construction Management System Section 10 Change Orders (on file with authors).	See Road and Bridge Specifications Sections 104.01 to 104.03 (2010), Scope of work.	See Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, Section 4.2 (2004).

<b>QUESTIONS</b>	<b>DelDOT</b>	<b>MonDOT</b>	<b>WVDOT</b>	<b>TXDOT</b>
5. Case law or legal decision that affects decision to issue a contract modification or competitively bid additional work.	None.	None.	None.	None.
6. Any different policy or procedure for alternative project delivery projects?	N/A	N/A	N/A	TxDOT has different provisions for its P3 projects
7. Policy or procedure for governing additional work to existing contracts or competitive bidding for emergency contracting?	See Del. Code Ann. 29 § 6963(b).	N/A	Would be considered force account work under Road and Bridges Specifications, Section 104.09 (2010).	See Texas Admin. Code Title 43, Part 1, Chapter 9, Subchapters B, Section 9.19, Emergency contract procedures.
8. Does your agency use “on-call contracting” for capital or maintenance?	N/A	N/A	N/A	See Texas Admin. Code Title 43, Part 1, Chapter 9, Subchapter E, Maintenance project contracts.

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QUESTIONS	VDOT	Nevada	Kentucky
1. State Competitive Bidding Laws for construction contracts?	See Code of Virginia Title 2.2, Chapter 43, Section 2.2-4303.D.2 (Methods of Procurement)	NVDOT is governed by Nev. Rev. Stat. (NRS) 408. Bidding is addressed in NRS § 408.323–§ 408.343 and § 408.367. Certain provisions of NRS 338–Public Works may also apply.	Kentucky Model Procurement Code, KRS Chapter 45A.  Specific language relating to the Department of Highways and contracts in KRS 176.
2. State laws or regulations that govern issuance and/or approval of construction contract modifications	See Code of Virginia Title 2.2, Chapter 43, Section 2.2-4309.A (Modification of the contract).	Duties and powers of the Director are addressed in NRS § 408.190 to § 408.228. NRS § 408.205 addresses execution of instruments and documents.	KRS 45A.210. Issuance of Regulations concerning modification and termination of contracts by Commonwealth.  KRS 176.100. Deviation from Contract.
3. Administrative process for approval of construction contract modifications?	See VDOT Construction Division Instructional and Informational Memorandum dated Aug. 1, 2013.	NVDOT Construction Manual	Section 303 of the Reference guide document.  Part 4 and Part 8 of the reference guide.
4. Factors considered in determining whether to approve a contract modification or undertake a competitive bidding process.	See VDOT Road and Bridge Specifications (2007), Sections 104.02 (Alteration of Quantities or Character of Work); 104.03 (Differing Site Conditions); 109.04 (Compensation for Altered Quantities); and 109.05 (Extra and Force Account Work).	Section 3-403.5.2 of the Nevada Construction Manual provides analysis of right of way, estimate of cost, analysis of whether work is outside the scope of the contract and essential to the satisfactory completion of the project, requires a time extension and justification for additional work days, or is the case of extreme emergency.  Modifications outside the project limits are labeled supplemental negotiated agreements.	The Kentucky Division of Construction Change Order procedure of June 7, 2013, requires that change orders address contract time, provide detailed explanation, provide statements justifying costs, and provide supporting documentation. Change order procedure CSGT-3-3-2 requires that the explanation describe the purpose and need for the change order and provide the basis of costs for the change.
5. Case law or legal decision that affects decision to issue a contract modification or competitively bid additional work.	None	None	None
6. Any different policy or procedure for alternative project delivery projects?	N/A	Alternative delivery projects are relatively new to NVDOT (since 2007). To date we have completed 5 Design-Build projects and 2 CMGC projects. We have 2 more CMGC projects	None

QUESTIONS	VDOT	Nevada	Kentucky
		underway. And NVDOT is in the process of preparing an RFP for its first P3 project. Alternative delivery projects are administered by the Project Management Division. Project managers are required to complete a Project Management Plan that includes change management (Page 17 of Plan template). There does not appear to be a written formalized set of rules or procedures for changes on alternative delivery projects comparable to the guidance found in the Construction Manual used on conventional design-bid-build projects.	
7. Policy or procedure for governing additional work to existing contracts or competitive bidding for emergency contracting?	See Code of Virginia Title 2.2, Chapter 43, Section 2.2-4303.F.	See answer to question 2 above.	No
8. Does your agency use “on-call contracting” for capital or maintenance?	Sample contract on file with authors.	No	No, but on the operation side there are material supplier contracts to perform minor work “On-call.”

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QUESTIONS	Oregon	Wyoming DOT	Vermont
1. State Competitive Bidding Laws for construction contracts?	ORS 279C.300 Policy on competition	Wyo. Stat. 24-2-108. Road and bridge construction.	Section 1502 of V.S.A requires compliance with federal rules and regulations for federal funding. State of Vermont Agency of Administration Bulletin 3.5 provides for competitive bidding.
2. State laws or regulations that govern issuance and/or approval of construction contract modifications	Or. Admin. R (OAR) 137-049-0910 Contract Suspension; Termination Procedures		None reported.
3. Administrative process for approval of construction contract modifications?	Chapters 12-G and 15 of the Construction Manual	Section 104 of WYDOT Construction Manual provides detailed guidance on change orders and contract amendments.	See Section B-21 of construction administration manual for details of multi-level approval process.
4. Factors considered in determining whether to approve a contract modification or undertake a competitive bidding process.	<p>ORS 137-0490-910 provides exemptions from competitive bidding if within the general scope of the work if the work is reasonably implied from the solicitation documents only when they are the original scope of the procurements, and the field of competition would not likely have been affected by the contract modification. Factors to be considered are similarities in work, project site, dollar value, difference in risk allocation, and whether the original procurement was competitive bid, competitive proposals or sole source, or emergency contract.</p> <p>Chapter 15 of the Construction manual procedures provides for cost justification reason coding, which includes new requirements after contract award, changed conditions, scope changes, and added work in an anticipated work item.</p>	Section 104 of the Wyoming DOT Construction Manual provides for changes that are advantageous to the Dept. It requires the reasons be listed and the effect on inter-department programs if it involves complex design, estimate cost to the project, evaluation of contract time extension.	Appendix B-21 of the construction administration manual provides for analysis of the change as a “nicety” or “necessity”; is the work eligible for federal aid; impact on original scope of work; basis of payment with cost analysis.
5. Case law or legal decision that affects decision to issue a contract modification or competitively bid additional work.	None reported.	None reported.	None reported.

QUESTIONS	Oregon	Wyoming DOT	Vermont
6. Any different policy or procedure for alternative project delivery projects?	OAR 731-007-0340 through 0400 (Alternative contracting methods)	Alternative delivery is not allowed in Wyoming for highway projects.	None reported.
7. Policy or procedure for governing additional work to existing contracts or competitive bidding for emergency contracting?	OAR 731-147-0030 (Emergency procurements process)	None reported.	None reported.
8. Does your agency use “on-call contracting” for capital or maintenance?	Only if emergency is declared.	No.	Yes, use maintenance rental agreements.

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