

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

AGENCY: Federal Highway Administration (FHWA), DOT.

23 CFR Part 635

Construction and Maintenance; Contract Procedures;
Standardized Contract Clauses

[FHWA Docket No. 87-15]

RIN 2125-AB87

54 FR 4269

January 30, 1989

ACTION: Final rule.

SUMMARY: The FHWA is revising its regulations on contract procedures to implement the provision mandated by section 111(c) of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987 which became law on April 2, 1987. Section 111(c) amends section 112 of Title 23, United States Code (23 U.S.C.), to direct the Secretary of Transportation to issue regulations establishing and requiring certain standardized contract clauses in all Federal-aid highway contracts unless otherwise provided for by State law. The standardized contract clauses will provide for the equitable adjustment of contract terms: (1) Where site conditions differ from those indicated in the contract, (2) where work has been suspended by order of the contracting agency (other than a suspension of work caused by the fault of the contractor or by weather), and (3) where there are significant changes in the character of the work specified in the contract.

EFFECTIVE DATE: May 1, 1989. The provisions contained in this final rule apply to all Federal-aid contracts authorized to proceed with the construction stage on or after May 1, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. William A. Weseman, Chief, Construction and Maintenance Division, (202) 366-0392 or Mrs. Kathleen Markman, Office of the Chief Counsel, (202) 366-0780. Office hours are from 7:45 a.m. to 4:15 p.m., ET, Monday through Friday, except for legal holidays.

TEXT: SUPPLEMENTARY INFORMATION: Under the Federal-aid highway program, federally assisted projects are generally constructed by private contractors under contract to the State highway agencies (SHAs) or local governmental agencies. Payment to the contractors is based on the amount of work performed in accordance with the terms of the contract. The FHWA reimburses the statutory Federal share of the costs to the SHAs as the projects are constructed and the costs are incurred. The plans, specifications, and estimates (PS&E) are prepared by the SHAs or their representatives. Due to the nature of subsurface

conditions, highway construction, and conditions under which the work is performed, the geotechnical engineer and the designer cannot always accurately determine and describe in the contract documents all the subsurface or latent conditions existing at project sites. Consequently, in some instances the subsurface conditions encountered during construction may be different from those described in the geotechnical reports or indicated in the plans. These unanticipated conditions may cause a change in construction costs.

There also may be situations which develop during construction requiring the contracting agency (SHA or local governmental agency) to order the contractor to slow down or stop the progress of construction through no fault of the contractor and not due to weather conditions. These situations may occur, for example, when a defect in the design is found and the contracting agency needs time to study the problem and correct the design or when a third party, not part of the Federal-aid contract, does not perform as originally anticipated. These slowdowns or stoppages in the work may cause a change in construction costs.

There also may be situations encountered during construction which require the contracting agency to make alterations in the design. When these occur, the contract quantities are normally changed to reflect the alteration, and the contract is modified accordingly. Some of these alterations could significantly increase or decrease the contractor's production costs, in addition to providing a change in the amount of work required by the contract.

The unanticipated variations in contract costs caused by any of the above mentioned situations may in some instances add up to sizable amounts of money and constitute an additional risk to either the contractor or contracting agency. In those States where the contracting agency shifts the responsibility of such costs to the contractor, the contract documents normally do not provide for a mechanism to allow the contracting agency to legally adjust the contract to recover a savings due to a decrease in costs or to compensate the contractor for an increase. Thus, the contracting agency does not normally recover for the decreases, and the contractor can only recover for the increases by either anticipating such costs and increasing the amount bid by including a contingency amount in the bid or by submitting a claim. Claims and the possible resulting litigation process can be quite lengthy and costly and often yield unsatisfactory results for both parties. On the other hand, the contractor's contingency amount when included in the bid may exceed any actual additional costs, and may result in an unreasonable windfall for the contractor, and may unnecessarily increase the construction costs to the public.

Previous FHWA policy did not mandate any specific contract provisions to address resolution of these situations, but encouraged the adoption of contract language, such as clauses 104.02 and 108.07 of the 1984 American Association of State Highway and Transportation Officials (AASHTO) "Guide Specifications for Highway Construction" (available from AASHTO, 444 North Capitol Street NW., Suite 225, Washington, DC 20001). These clauses provided for an equitable adjustment of the contract terms in the event of unanticipated variations in contract costs. Section 111(c) of the STURAA of 1987, Pub. L. 100-17, 101 Stat. 132 and 147, however, made it a requirement for the Secretary of Transportation to develop and require to be included in Federal-aid contracts, unless otherwise provided for by State law, a standardized contract clause addressing the equitable adjustment of the contract terms for differing site conditions, material changes in the scope of work, and suspensions of work ordered by the

contracting agency other than those caused by the fault of the contractor or by weather.

The requirements contained in section 111(c) of the STURAA of 1987 were originally considered for adoption by the 99th Congress (H.R. 3129), but a bill was never enacted because the House and Senate Committees conferees were unable to reach agreement. A similar bill, subsequently considered and adopted by the 100th Congress, was accompanied by only an abbreviated House Committee Report. Therefore, the 1986 House Committee Report (H.R. Rep. No. 665, 99th Congress, 2d Sess. 8-11(1986)) is the primary legislative history of section 111(c). The final rule takes into consideration the congressional intent as shown in this House Committee Report, the comments received by the FHWA on the Notice of Proposed Rulemaking (NPRM), and other available published information.

Section 111(c) of the STURAA of 1987 applies to all projects approved by the FHWA under Section 106 of Title 23, United States Code (23 U.S.C. 106, Plans, Specifications, and Estimates). However, section 106 provides that PS&E's administered under section 117 of Title 23, United States Code (23 U.S.C. 117, Certification Acceptance) are exempted from the FHWA approval requirements. Therefore, the provisions of section 111(c) of STURAA of 1987, do not apply to projects administered under an approved certification acceptance plan.

Highway contractor organizations have long voiced their support for standardized changed conditions clauses. They have felt that contractors should not have to assume the risk for the possibility of differing site conditions, significant changes in the character of the work, or suspensions of work for the convenience of the contracting agency. The 1986 House Committee Report articulated this same view in stating that contractors should be able to bid a project with the expectation of being compensated for all the acceptable work which is performed in accordance with the terms of the contract. In addition, the report indicates that a standardized arrangement would provide more uniformity among the States and eliminate much of the frustration being experienced by contractors who deal with several States at the same time.

An NPRM was published in the Federal Register on December 1, 1987, at 52 *FR* 45645, in which the FHWA requested comments on the proposed regulation. Originally, comments were to be received by February 1, 1988; however, pursuant to a request received, the comment period was extended to March 1, 1988, by notice published in the Federal Register on February 10, 1988, at 53 *FR* 3897.

Discussion of Comments

General

Thirty-one written comments were received in the docket. Of the 31 comments, 5 were from private contractors and contractor organizations. The remaining 26 comments were from SHAs. All the contractors and contractor organizations favored the proposed rule and recommended minor revisions. Ten of the SHAs indicated a strong objection to the rule.

Several commenters revealed apprehension and concern that the proposed regulation will result in a constant flow of notifications from the contractors

in an attempt to convert unit price, competitively bid contracts into cost-plus contracts. A comment was also made to the effect that the competitive bidding process will be deteriorated, reducing quality and increasing costs. The FHWA knows of no factual information to support the statements made by these commenters. On the contrary, there are a number of States which are presently using similar specifications. These States have not reported major problems in the administration of such provisions in their contracts.

Several questions were raised in regard to the future administration of the projects containing the standardized contract clauses such as the type of written notices to be used, allowable costs, etc. As with any other specification, SHA's are expected to handle the administration of the standardized contract clauses according to their standard administrative procedures, such as those contained in SHAs construction manuals and by other sections of the SHAs' standard specifications dealing with methods of payments, variations in the work, etc.

Several commenters disagreed with the statement made in the preamble of the NPRM in regard to the possible economic impacts of the regulation. The preamble indicated that the regulation should have a positive economic impact because it "should: (1) Reduce the construction costs in general by reducing the uncertainties which the contractor must price during the bidding process, (2) reduce the number of claims reaching litigation thus reducing the legal expenses of both the contractors and contracting agencies, and (3) promote a better working relationship between the contractors and contracting agencies." The commenters indicated that, contrary to be preamble, the regulation will have an adverse economic impact and will most likely increase the construction costs of Federal-aid projects. Some commenters suggested delaying the implementation of the final rule until the adverse effects of the action are studied in greater detail. Another commenter indicated that the regulation will increase the number of claims that reach litigation.

The statement regarding the positive effects of the rule originated with the House Public Works Committee Bill (H.R. 3129) Report. The FHWA does not have information which would support for rebut this statement. Nevertheless, the possible economic impacts of the regulation were considered and it was concluded that, even if the number of claims increased, the resultant increase in project costs would most likely not be sufficient to trigger a full regulatory evaluation. A full regulatory evaluation recommended by some commenters was, therefore, not considered warranted.

Some commenters suggested amending the regulation to indicate that if the contractor disagrees with the amount of the adjustment as determined by the engineer, the contractor would be allowed to perform the work on a force account basis. It is not intended that the regulation preempt force account procedures provided by State specifications. Force account is a viable procedure to reimburse the contractor for contract adjustments, as appropriate. It is the FHWA policy, however, that the use of force account be keep to a minimum. Normally, force account is considered satisfactory when the extent of the work cannot be quantified with any degree of accuracy or an agreement cannot be reached with the contractor on appropriate unit proces for work to be performed.

Several commenters suggested revising the term "equitable adjustment" mainly because the term could be subject to several different interpretations and could

lead to litigation. It is agreed that the adjective "equitable" does not add any substance to the regulation since any adjustments to the contract proposed by the engineer should, in effect, be fair and representative of the cost of the increased or decreased work. Therefore, the word "equitable" has been deleted and only the term adjustment is used in the final rule.

Several commenters requested assurances from the FHWA that Federal funds will participate on all amounts paid to contractors under the proposed regulation. Standard Federal-aid policy does not provide for such blanket participation. Federal participation on adjustments made under the standardized contract clauses will be considered on its own merits as is normally done with other proposed adjustments in Federal-aid highway projects.

A comment was made to explicitly exclude any reimbursement for loss of anticipated profits. The final rule includes language which clarifies that no reimbursement will be made for loss of anticipated profits. This position is consistent with longstanding FHWA policy to not participate in loss of anticipated profits.

Some commenters expressed their opinions as to what should constitute the basis for extra compensation and/or contract time. It is not the intention of the regulation to specify the type of contract adjustment to be allowed in any one specific situation. Any contract adjustment should be justifiable and fair compensation for increases or decreases caused by the changed contract conditions.

One commenter expressed a concern regarding use of the standardized clauses in a contract with end-result specifications. The concern was that a contractor who underestimates a project where differing site conditions are later found would be able to offset his/her misjudgment. There may be situations in which a differing site condition found during construction could present a contractor the opportunity to attempt recovery from bidding errors and/or wrong assumptions made during the bidding of the project. For this reason, it is incumbent upon the SHAs to assure a careful and detailed review of all apparent low bids to detect any unbalancing and/or bidding errors. The use of good contract administration methods and engineering judgment is essential for the successful administration of any project to assure that contract adjustments, whether an increase or decrease, reflect only the changed condition and do not constitute an unwarranted monetary gain or loss to the contractor.

One commenter suggested amending the regulation to make reference to the Contract Disputes Act of 1978 (Pub. L. 95-563, 92 Stat. 2383) to allow the contractors to carry any dispute beyond the engineer's decision. The Contract Disputes Act of 1978 is only applicable to Direct Federal procurement contracts; thus, it does not apply to Federal-aid contracts which are administered by the SHAs or the local governmental agencies. Further, the engineer is expected to render a fair decision closely representing the differential in costs caused by the changed contract condition. In the event of a subsequent dispute, since the engineer's decision is an administrative action, the contractor may still resort to the judicial system.

One commenter suggested making provision in the regulation to cover instances where the SHA would consider it appropriate to provide for an allocation of risks in the contract. Upon consideration of the suggestion, and a reexamination

of the statutory authority of the Secretary, it was determined that the Secretary lacks the authority to waive the requirements of section 111(c) for any one project. The final rule must, therefore, be applicable to every Federal-aid highway project approved under 23 U.S.C. 106.

Several commenters suggested including permissive language in the final rule which would permit the SHAs to make changes in the standardized contract clauses to accommodate the language in their respective standard specifications. Other commenters indicated that section 111(c) requires the Secretary to only establish guidelines to be used by the States in the preparation of the clauses to be used in Federal-aid highway contracts. It is the clear intent of Congress, based on an objective reading of the statutes and the conference report, that standardized contract clauses be utilized by all States, unless otherwise provided for by State statute. The States' option to adopt a clause or clauses different from the one established by the Secretary or to not adopt a clause at all was clearly established by Congress in the Limitation of Applicability of section 111(c).

Section 111(c) does not place any limitation on the timing of the enactment of State statutes requiring or excluding the inclusion of the standardized contract clauses. Likewise, the final rule permits the States to enact and make effective such State statutes at any time. Thus, the standardized contract clauses, established under this rule, shall be inserted by the SHAs in Federal-aid contracts approved under 23 U.S.C. 106 until otherwise provided for by State statute.

Nearly half of the SHAs have already adopted changed conditions clauses. Many of them use language similar to the 1984 AASHTO "Guide Specifications for Highway Construction" or to the Federal Acquisition Regulations (FAR). In order to provide as much continuity as possible, and in keeping with the principles of federalism, the standardized contract clauses of the final rule have been developed following closely, where possible, the language of both the AASHTO Guide Specifications and the FAR. (The FAR is contained in 48 CFR Parts 1 to 99, and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. The FAR is mandatory only for contracts for which the Federal Government is the contracting agency. This is not the situation in the Federal-aid highway program; therefore, compliance with the FAR is not a requirement.)

In 1988, AASHTO adopted and published new Guide Specifications which contain language that is very similar to that contained in the clauses of the final rule. The differences between the final rule and the new AASHTO Guide Specifications are in the area of impact costs (generally not recognized by AASHTO) and editorial changes by AASHTO needed for conformance to the language in other sections of the Guide Specifications. (Impact costs, also known as "ripple damages," are increased costs attributable to the changed contract conditions but are not part of the changed work.)

Section 635.131(a)(1)

One commenter suggested deleting the words "latent" and "unknown" from the regulation. These words are used to mean hidden to the naked eye, not known at the time of bidding, and as such have not been deleted.

Several commenters suggested not recognizing impact costs. Section 635.131(a)(1), as published in the NPRM, provided for impact costs. Upon a re-examination of the committee report, it is agreed that the congressional purpose "to take at least some of the gamble on subsurface conditions out of the bidding" can be accomplished with the least amount of federalism impact if impact costs are not recognized as a mandatory contract adjustment item. In addition, the congressional mandate is to produce and require a clause addressing the differing site conditions in an equitable manner. It is felt this mandate can be accomplished without mandating the inclusion of impact costs. For these reasons, the final rule contains a new optional paragraph, § 635.131(a)(1)(iv) which excludes impact costs from consideration. Since several of the SHAs presently recognize impact costs in their assessment of differing site conditions and in keeping with the principle of Executive Order 12612 on "Federalism," it is the intention that this final rule not preclude the continuation of such practice. These SHAs, therefore, have the option to continue to recognize impact costs as provided for in their standard specifications and contract procedures by deleting paragraph 635.131(a)(1)(iv).

The language of § 635.131(a)(1), as contained in the final rule, clarifies that either party to the contract is entitled to request an adjustment due to a differing site condition. The adjustment may be to fairly compensate the contractor or benefit the State; however, no adjustment in favor of the contractor will be allowed unless the contractor notifies the contracting agency in writing prior to performance of the affected work or disturbing the alleged differing site conditions. The language of § 635.131(a)(1) as contained in the NPRM was also revised to clarify that the contractor will be notified of the engineer's determination. Several editorial changes were made as well.

Section 635.131(a)(2)

Several commenters suggested that impact costs not be recognized. Unlike the differing site conditions clause in this instance, the FHWA believes that it must provide for the impact costs and effects of State-mandated suspensions or delays of work in order to accomplish the congressional intent. Therefore, the clause was not changed as suggested by the commenters.

Several commenters suggested that § 635.131(a)(2) be clarified to indicate that it only applies to written suspensions of work and/or delays. The clause has been amended to clarify that the suspensions and delays affected by the clause are those in writing.

Conversely, other commenters recommended adding a provision for constructive suspensions and delays (where the contracting agency causes a suspension or delay due to action or inaction, without issuing a written suspension order). As discussed in the NPRM, it is not the intention of the regulation to expand this clause to include such suspensions and delays. However, some of the SHAs presently recognize constructive suspensions and delays as well as those in writing. For this reason, the final rule does not preclude the continuation of such practice and SHAs, thus, have the option to recognize constructive suspensions and delays as they may choose in their standard specifications and contract administration procedures. Such coverage would, of course, be in addition to that provided by the written suspensions and delays provisions of this section.

One commenter suggested amending the regulation to clarify that the suspensions of work clause applies only if the suspension affects the controlling operation and is not caused by the contractor or a third party. It was also suggested that no additional compensation be provided for any suspensions or delays during a reasonable period of time necessary to evaluate and respond to any "differing site conditions" found. The regulation has been written on the basis that the effects of any suspension or delay ordered in writing by the contracting agency will be evaluated in accordance with recognized and accepted methods. Such methods normally make use of the contractor's planned construction schedule and take into consideration any effects on the controlling operation(s). It is not intended that the regulation exclude suspensions or delays caused by third parties if these are the result of a written instruction by the contracting agency. The delays caused by third parties or a differing site condition are to be considered and evaluated on their own merits on a case-by-case basis.

With a few exceptions, the suspensions of work clause in the 1988 AASHTO Guide Specifications is similar to the FAR. The main difference is that AASHTO does not recognize "constructive suspensions." The FAR does. The suspensions of work clause of the final rule, as previously discussed, follows the AASHTO approach and does not recognize constructive suspensions.

The clause is consistent with both AASHTO and the FAR in not allowing the recovery of profit on any additional costs caused by the suspension or delay, and requiring that suspensions must be for unreasonable periods. Thus, recognized suspension periods would not include brief customary suspensions inherent to highway construction for reasons such as the collection of material samples, testing of materials, approvals of shop drawings and material sources, etc., and other reasonable and customary suspensions necessary for the orderly supervision of construction by the contracting agency.

As previously noted, the language of § 635.131(a)(2) as contained in the NPRM has been revised in the final rule to clarify that suspensions will be in writing. Also to clarify that the contractor will be notified of the engineer's determination, to delete the engineer's reasons to suspend work because this is normally addressed by SHAs in other portions of their standard specifications, and to make general editorial changes.

Section 635.131(a)(3)

Many commenters indicated that the regulation contained several undefined terms which may result in controversy and litigation. Others recommended that § 635.131(a)(3) be modified to specify the threshold increase or decrease that would justify a request for an adjustment to the contract based on changed production costs. The majority of these commenters suggested a threshold of 20 to 25 percent change in the quantity of a major item of work. The AASHTO Guide Specifications defines a major item of work as an item whose total original contract cost exceeds 10 percent of the total original contract amount.)

The NPRM explained that a threshold amount had not been included in the regulation because this is normally defined in the contracting agencies' standard specifications. However, upon further consideration and in view of the comments received, the final rule now includes a definition for the term

"significant change" which incorporates threshold amounts.

Although the 1988 AASHTO Guide Specifications do not contain a written definition for "significant change" they do contain a recommendation that a threshold amount of 25 percent change in the quantity of a major item of work be used to denote such changes. It also sets a cap of 25 percent maximum change in the contract unit prices. The FAR, on the other hand does not establish a cap amount on unit prices and specifies the threshold amounts at 15 percent of the quantity of any item of work.

The approach used in the final rule is similar to AASHTO in that a threshold amount of 25 percent change in the quantity of a major item of work is specified. However as in the FAR, a cap on the amount of change in the unit price has not been established. In addition, the final rule clarifies that the term "significant change" also applies to situations when the character of the changed work differs materially in kind or nature from the work as originally proposed.

Section 635.131(a)(3) as published in the NPRM provided for impact costs to the extent that the impacted work is part of the contract. This is in accordance with the congressional intent in the Conference Report and is not changed in the final rule.

The NPRM noted that the standardized clause in § 635.131(a)(3) was not intended to cover constructive change orders. (A constructive change order occurs when the contracting agency causes a change but does not issue a written order.) Several commenters agreed that the clause should not provide for constructive changes, but at least one commenter suggested adding such a provision. The clause has been amended in the final rule to clarify that the changes affected by the standardized clause are only those in writing. However, several SHAs presently recognize constructive changes as well as those in writing. The final rule does not preclude the continuation of such a practice. Those SHAs may continue to recognize constructive changes as provided for in their standard specifications and contract administration procedures in addition to the written changes of work as provided for in § 635.131(a)(3).

Additional changes to § 635.131(a)(3) as it appeared in the NPRM include deletion of the terms "material" and "scope" and the substitution in their place of the terms "significant" and "character." The term "material" was changed to clarify the title of the clause. The work "scope" was changed to read "character" to avoid conflict with the States' standard specifications.

In addition, § 635.131(a)(3) was amended to clarify the exclusion of reimbursement for loss of anticipated profits. Several other changes, editorial in nature, were also made for clarification.

Section 635.131(b)

Some commenters interpreted section 111(c) of the STURRA of 1987 to allow the SHAs to adopt, by State statute, language of their choice for any of the three clauses without a determination by the Division Administrator that the State clauses are comparable to the clauses contained in the final rule and took exception to the requirement as it was presented in the NPRM. Upon further

consideration and reexamination of the committee report and the provisions of section 111(c) of the STURRA of 1987, the commenters' interpretation that the Division Administrator's determination of comparability is not necessary was found to have merit. The final rule reflects this determination. States may adopt any language for the standardized contract clauses or prohibit any one or more of the clauses as long as it is done under the mandate of a specific State statute concerning changed contract conditions. Such clause or clauses, however, must be in conformance with 23 U.S.C., 23 CFR, and other Federal statutes and regulations as appropriate and will be subject to the Division Administrator's approval as part of the PS&E.

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 or a significant regulation under the regulatory policies and procedures of the Department of Transportation. This rulemaking action has been prepared in order to implement a statutory mandate. That mandate requires the imposition of new requirements on State and local governments with the inclusion of standardized contract clauses in all Federal-aid highway contracts unless the State has developed and implemented, by statute, language of its choice for any of the clauses or adopts or has adopted a statute which does not permit inclusion of such clause or clauses. A full regulatory evaluation is not required because of the ministerial nature of this action. However, potential regulatory impacts have been addressed, as appropriate, in the development of this final rule.

Under the criteria of the Regulatory Flexibility Act (Pub. L. 96-354), the FHWA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

In consideration of the foregoing, the FHWA hereby amends Part 635, Subpart A of Chapter I of Title 23, Code of Federal Regulations, as set forth below.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

List of Subjects in 23 CFR Part 635

Government contracts, Grant programs-transportation, Highway and roads.

Issued on January 23, 1989.

Robert E. Farris,

Federal Highway Administrator.

The FHWA hereby amends 23 CFR Part 635, Subpart A, as follows:

PART 635 -- CONSTRUCTION AND MAINTENANCE

Subpart A -- Contract Procedures

1. The authority citation for Part 635 continues to read as follows:

Authority: 23 U.S.C. 112, 113, 114, 117, 128, and 315; 31 U.S.C. 6506; 42 U.S.C. 3334, 4601 et seq.; 49 CFR 1.48(b).

2. Part 635, Subpart A is amended by adding a new § 635.131 to read as follows:

§ 635.131 Differing site conditions, suspensions of work and significant changes in the character of work.

(a) Except as provided in paragraph (b) of this section, the following contract clauses shall be made part of, and incorporated in, each highway construction project approved under 23 U.S.C. 106:

(1) *Differing site conditions.* (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 in writing of the specific differing conditions before they are disturbed and before the affected work is performed.

(ii) Upon written notification, the engineer will investigate the conditions, and if he/she determines 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 loss of anticipated profits, will be made and the contract modified in writing accordingly. The engineer will notify the contractor of his/her determination whether or not an adjustment of 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.

(iv) No contract adjustment will be allowed under this clause for any effects caused on unchanged work. (This provision may be omitted by the SHAs at their option.)

(2) *Suspensions of work ordered by the engineer.* (i) If the performance of all or any portion of the work is suspended or delayed by the engineer in writing for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry) and the contractor believes

that additional compensation and/or contract time is due as a result of such suspension or delay, the contractor shall submit to the engineer in writing a request for adjustment within 7 calendar days of receipt of the notice to resume work. The request shall set forth the reasons and support for such adjustment.

(ii) Upon receipt, the engineer will evaluate the contractor's request. If the engineer agrees that the cost and/or time required for the performance of the contract has increased as a result of such suspension and the suspension 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 make an adjustment (excluding profit) and modify the contract in writing accordingly. The engineer will notify the contractor of his/her determination whether or not an adjustment of the contract is warranted.

(iii) No contract adjustment will be allowed unless the contractor has submitted the request for adjustment within the time prescribed.

(iv) No contract adjustment will be allowed under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided for or excluded under any other term or condition of this contract.

(3) *Significant changes in the character of work.* (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 the work under the contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of 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.

(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 as 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 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.

(b) The provisions of this section shall be governed by the following:

(1) Where State statute does not permit one or more of the contract clauses included in paragraph (a) of this section, the State statute shall prevail and such clause or clauses need not be made applicable to Federal-aid highway contracts.

(2) Where the State highway agency has developed and implemented one or more of the contract clauses included in paragraph (a) of this section, such clause or clauses, as developed by the State highway agency may be included in Federal-aid highway contracts in lieu of the corresponding clause or clauses in paragraph (a) of this section. The State's action must be pursuant to a specific State statute requiring differing contract conditions clauses.

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