



Construction Procedure Bulletin

CPB 03-3 Communications between the Resident Engineer and the Federal Highway Administration Transportation Engineer on State Administered Projects

References: *Construction Manual*, Chapter 5, Section 308
Construction Manual, Chapter 5, Section 311
Construction Manual, Chapter 3, Section 605
Construction Manual, Chapter 7

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Approved: 
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Background

The intent of this bulletin is to clarify the resident engineer's responsibilities in obtaining Federal Highway Administration (FHWA) involvement with major contract issues and milestones as early as possible during the construction phase for all federal-aid projects. This early involvement will provide timely notification to the FHWA transportation engineer of major contract issues and milestones, assist in the resolution of disputes, and ensure federal participation on the federal-aid projects.

Existing Procedure

The *Construction Manual* (manual) addresses FHWA involvement in Section 5-308 "Federal Requirements." Section 5-308A "Federal Highway Administration Contract Change Order Prior Approval" covers prior approvals for contract change orders. Section 5-308B "Federal Funding" covers the determination of the federal participation on contract change orders. Section 5-311A defines major change orders requiring FHWA approval. Part of Section 3-605 "Certificates of Compliance" covers federal Buy America requirements. Chapter 7 "Environmental Rules and Requirements" provides information and guidelines for administering the various environmental requirements for Caltrans contracts.

New Procedure

Construction Manual sections:

- Section 5-308 "Federal Requirements."
- Section 5-308A "Federal Highway Administration Contract Change Order Prior Approval"

- Section 5-308B “Federal Funding”
 - Section 5-311A Division of Construction Approval
- Are to be replaced with the new section below.

5-308 Federal Requirements

All federally funded projects are classified as either nonexempt or exempt for purposes of oversight by the Federal Highway Administration (FHWA) per the Department of Transportation’s (Department) stewardship agreement with them. The letter “N” at the end of the federal project number indicates that the project is subject to full oversight and review by the FHWA. The letter “E” at the end of the federal project number indicates that the project is exempt from full FHWA oversight requirements for engineering activities. FHWA has delegated to the Department approval authority to act in their behalf for most issues. However, FHWA delegation of authority does not apply to non-Title 23 United States Code activities (environmental (NEPA), right of way, civil rights, etc.).

5-308A Federal Highway Administration Contract Change Order Prior Approval

For “N” projects, early and frequent communication with the FHWA transportation engineer is essential to ensure full compliance with all federal requirements. This communication should begin with the award of the project and continue through contract acceptance, the claims process until final payment by FHWA. There are several specific instances or events that occur during the life of the project that require the resident engineer to contact the FHWA transportation engineer. For “E” projects, resident engineers are not formally required to communicate with the FHWA transportation engineer, except for a few instances. However, informal discussions for technical or general guidance are still encouraged. Outlined below are those instances when the resident engineer shall seek FHWA involvement and contact the FHWA transportation engineer.

“N” PROJECTS

The resident engineer must obtain written and signed prior approval from FHWA for all major contract change orders (CCO) before proceeding with a proposed change. Otherwise, federal participation at the applicable pro-rata share may be jeopardized. For major contract change orders, the resident engineers may obtain same-day verbal approvals by telephone from the FHWA transportation engineer once adequate support information is furnished (i.e. draft prior approval). Following the verbal prior approval, the FHWA transportation engineer will send a signed prior approval to the resident engineer. The resident engineer may arrange with the FHWA transportation engineer to send the prior approval electronically (e-mail and/or fax). Once the CCO is approved by the district, a copy of the CCO and CCO memorandum will be sent to the FHWA transportation engineer.

Other types of CCO are considered “minor” and while approval may be granted retroactively, must still be approved in writing by the FHWA transportation engineer. These approvals will occur at the project site during FHWA transportation engineer construction reviews, or will be satisfied by the FHWA transportation engineer final acceptance of the project.

5-308B Major Contract Change Orders Requiring FHWA Prior Approval

1. Change in Scope (example – additional lanes (including auxiliary) design exceptions, etc.) especially those which effect previous environmental clearance.
2. CCO that would increase the cost > \$200,000
3. CCO that would increase the cost of anticipated “Supplemental Work Item” listed in the detail estimate >\$200,000
4. Once the \$200,000 threshold is reached, each supplemental CCO.
5. Changes in Specifications (with the exception of “Lane Requirements and Hours of Work” charts”)
6. Changes in method of payment
7. Changes in material processing
8. Changes in type or quantity of materials to be furnished (with the exception of minor building materials), such as changing the individual aggregate base to an asphalt concrete material.
9. Proprietary or sole source materials for which specific or blanket approval has not been previously given.
10. Waivers to the “Buy America” requirements, above the minimal amount that is allowed in the *Construction Manual* and the project special provisions.
(Note – FHWA transportation engineer is required to obtain concurrence from FHWA HQs office in Washington D.C. Resident engineers need to allow FHWA transportation engineer time for review and approval/denial.)
11. Cost Reduction Incentive Proposal (CRIP)
12. Experimental Work Plan
13. Changes to Federal Environmental Requirements
 - environmental mitigation (If available, see Mitigation Monitoring Reporting Record)
 - permit conditions
 - agreements with Federal Resource Agencies(Examples: revising soundwalls – height, length & location, adding auxiliary lanes, disturbing a 106 historical site, etc.)
14. Introduction of new social, environmental or economic issues that need to be addressed under applicable federal laws
15. Changes to, or requiring of, mandatory disposal or borrow sites - Public Interest Finding (PIF) and/or NEPA clearance may be needed.
16. Project limits expanding beyond the limits set in the environmental document
17. Any form of payment (not just a CCO) to a contractor resulting from a claim, Board of Review, exception to Proposed Final Estimate, District Director determination or arbitration.
18. Supplemental CCOs to all of the above
19. Any change that results in a contract time extension of 20 or more working days. Additionally, if time is extended by more than 20% of the original contract working days, then that change and each subsequent contract change order to extend time.

In addition to the major contract change orders listed above, there are several other issues or events that may trigger the involvement of the FHWA. The resident engineer and the FHWA transportation engineer should discuss the issue or event and determine what FHWA involvement, if any, is necessary. Preferably the resident engineer and the FHWA transportation engineer will meet soon after the award of the contract to develop an understanding regarding these types of activities.

Issues or events that may trigger FHWA involvement:

- Preconstruction conferences
- Partnering workshops
- Value Analysis studies
- Notices of Potential Claim (NOPC)
 - Filings (Submit copies of NOPCs and updates to the NOPC log to FHWA transportation engineer.)
 - Resident engineer's determination of NOPC merit
 - NOPC resolution
- Dispute Review Boards
 - formation
 - meeting
 - recommendation of DRB
 - responses (accept or reject)
- Proposed Final Estimate (Submit attached Final Acceptance Checklist to FHWA transportation engineer with a copy of the proposed final estimate)
- Claims
 - exceptions to the Proposed Final Estimate (PFE)
 - payments
 - settlements
- Director Days
- Boards of Review
 - meetings
 - recommendations
- District Director Determinations
- Arbitration (Headquarters Construction Coordinator will be responsible for keeping the FHWA area engineer informed of):
 - filings
 - hearings
 - settlements
 - decisions
- Other major milestones, events, or occurrences as deemed necessary by the resident engineer and the FHWA transportation engineer.

“E” PROJECTS

The resident engineer shall contact the FHWA transportation engineer for the following:

1. Changes to federal environmental requirements
 - environmental mitigation (If available, see Mitigation Monitoring Reporting Record)
 - permit conditions
 - agreements with Federal Resource AgenciesExamples: revising soundwalls – height, length & location, adding auxiliary lanes, disturbing a 106 historical site, etc.)
2. Introduction of new social, environmental or economic issues that need to be addressed under applicable federal laws
3. Changes to, or requiring of, mandatory disposal or borrow sites – PIF and/or NEPA clearance may be needed
4. Waivers to the “Buy America” requirements, above the minimal amount that is allowed in the *Construction Manual* and the project special provisions.
(Note – FHWA transportation engineer is required to obtain concurrence from FHWA HQs office in Washington D.C. Resident engineers need to allow FHWA transportation engineer time for review and approval/denial.)
5. Project limits expanding beyond the limits set in the environmental document
6. Expanding scope of work or changing design features in the approved environmental document

The resident engineer shall contact the FHWA transportation engineer in each case listed above for “N” and “E” projects, and provide documents as necessary. The FHWA transportation engineer may address many issues during the regular nonexempt project review. In the case of project, workshops, meetings, etc., the FHWA transportation engineer shall be contacted sufficiently in advance of the event to allow their participation if desired. In all other cases, the FHWA transportation engineer shall be contacted as soon as practical upon the event or occurrence to ensure federal concurrence and participation.

5-311A Division of Construction Approval

3rd paragraph is replaced with the new paragraph below:

On nonexempt “N” interstate projects, major contract orders require FHWA approval before commencing the work authorized by the CCO (see *Construction Manual section 5-308B* “Major Contract Change Orders Requiring FHWA Prior Approval”.) Note: FHWA approval is required before requesting Division of Construction approval.

FHWA
**FINAL ACCEPTANCE CHECKLIST
 FOR FEDERAL-AID “N” PROJECTS**

Project Information:

EA No. _____ Federal-aid No. _____
 Project Description: _____
 District/County/Route/KP: _____
 Date Awarded: _____ Approval Date: _____
 Time Started: _____ Work Started: _____
 Contract Days: _____ Final No. Working Days: _____
 Original Completion Date: _____ State Acceptance Date: _____
 Liquidated Damages (No. of days and total \$ amount): _____

Submittals:

	<u>Submitted?</u>	<u>Date:</u>
Material Certification (CM 6-1.1)	Yes/No – N/A	_____
Form FHWA-47M	Yes/No – N/A	_____
Proposed Final Estimate	Yes/No – N/A	_____
Last Statement of Working Days	Yes/No – N/A	_____
Contractor’s Written Statement Of Claims (Submitted Separately)	Yes/No – N/A	_____
List of CCO’s (Approved and Pending)	Yes/No – N/A	_____
(Participating/Non-Participating)	Yes/No – N/A	_____
List of Time Extensions (FHWA Approved/Not Approved)	Yes/No – N/A Yes/No – N/A	_____ _____
Form CEM-2402 (F) Final Report Utilization of DBE	Yes/No – N/A	_____
Mitigation Monitoring Reporting Record (If available, status of environmental commitments if not completed)	Yes/No – N/A	_____

Additional Information:

Labor Compliance Problems: _____

 Any other changes: _____
