Project Delivery Directive

To: *Project Delivery Employees*

Number: PD-04

References: *Ready To List and Construction Contract Award Guide (RTL Guide), Section 7, Richard D. Land memo dated 11/22/06, "Construction Contract Contingencies and Supplemental Work"*

Effective Date: 10/14/09

Supersedes: *Richard D. Land memo dated 11/22/06, "Construction Contract Contingencies and Supplemental Work"*

Review by: 10/14/12

TITLE: *Project Contingencies and Supplemental Work*

DIRECTIVE

Project contingencies are limited to 5 percent of a project's estimated total costs for contract items, supplemental work items and State-furnished materials and expenses.

Project supplemental work is limited to 5 percent of a project's estimated total cost for contract items.

The need and cost for project contingencies and supplemental work items must be documented.

Supplemental work items are limited to items shown on the Federal Highway Administration (FHWA) pre-approved list, acceptable supplemental work-item list prepared by the Department or a project specific supplemental work item approved by the Department and FHWA when required.

This Project Delivery Directive includes responsibilities for:

- Approving increases or decreases to the standard 5 percent project contingencies up to 10 percent maximum.
- Approving increases above the 5 percent supplemental work limit.
- Approving supplemental work items not on the pre-approved or acceptable supplemental work-item list.

The approvals must be secured prior to project advertisement.

BACKGROUND

The Department limits funding for contingencies and supplemental work and has set limits of supplemental work items to ensure full and open competition and to avoid cardinal changes in contracts.

Under Section 4-1.03, "Changes," of the Standard Specifications, the Department has the right to make changes within the general scope of the contract, and the contractor has the obligation to perform this additional work. A contractor has no duty to perform work outside the general scope of the contract. Work outside the general scope of the contract is commonly called a cardinal change. If a change is considered to be a cardinal change, its work constitutes a new procurement and cannot be added by change order unless authorized as an exemption to the requirement for full and open competition.

Public Contract Code Section 10120 states, "Before entering into any contract for a project, the department shall prepare full, complete, and accurate plans and specifications and estimates of cost, giving such direction as will enable any competent mechanic or other builder to carry them out." Providing supplemental funds for work that can reasonably be designated as biddable by contract item is a potential violation of the Public Contract Code. Supplemental funds are not to be used as an additional unsubstantiated "cushion" in establishing the engineer's estimate.

The FHWA requires justification for the need and cost of all supplemental work items. FHWA requested that the Department develop a procedure for documenting justification for supplemental work items need and cost. Department and FHWA representatives have worked together to develop the supplemental work-item need and cost justification procedure shown in Appendix A of this project delivery directive.

This project delivery directive replaces the Construction Contract Contingencies and Supplemental Work memorandum, dated November 22, 2006. To reduce the number of project exceptions to the supplemental work cost limitations established in the memorandum, it has been determined that some supplemental work items with well defined need and cost justification can be excluded when calculating the 5 percent cost limitation.

To implement this project delivery directive Appendix A provides the approval procedures for both contingencies and supplementary work. This directive will be incorporated into the next revision of the Project Development Procedures Manual.

DEFINITIONS

Contingency is the amount included in the engineer's estimate to cover the cost of unforeseen factors related to construction within the defined project scope.

Supplemental work is the anticipated work within the scope of the project which is included in the engineer's estimate for a project to cover work of such an uncertain nature that it cannot be quantified as a contract bid item.

RESPONSIBILITIES

Chief Engineer: Approves or disapproves district director requests to change project contingencies from 5 percent.

District Directors:

- Request Chief Engineer approval to change project contingencies from 5 percent. This authority may not be delegated.
- Approves or disapproves requests to exceed supplemental work limits up to 10 percent of the project's estimated total cost for contract items. This authority may not be delegated below the deputy district director or region division chief.
- Request Chief, Division of Construction approval to exceed supplemental work limit of 10 percent of the project's estimated total cost for contract items. This authority may not be delegated.
- Request Chief, Division of Construction approval for supplemental work items not on pre-approved or acceptable supplemental work items list. This authority may not be delegated below the deputy district director or region division chief.

Chief, Division of Design:

- Provides policy, procedures, and guidance to ensure compliance with this directive.
- Concurs or declines to concur with project contingency exceptions request.

Chief, Division of Construction:

- Provides policy, procedures, and guidance to ensure compliance with this directive.

- Approves or disapproves district director requests for supplemental work to exceed 10 percent of project's estimated total costs for contract items.
- Approves or disapproves district director request for supplemental work items not on the pre-approved or acceptable supplemental work items list.
- Works biennially with the FHWA to maintain the list of FHWA Pre-Approved Supplemental Work Items.
- Maintains the list of Acceptable Supplemental Work Items.

Deputy District Directors or Region Division Chiefs:

- Concurs with requests to change project contingencies from 5 percent.
- For projects where the total supplemental work-item costs exceed the 5 percent limit, recommends approval of justification for supplemental work items requests to the district director.
- For projects that include supplemental work items not on the pre-approved or acceptable supplemental work items list, recommends approval of justification for supplemental work items requests to district director.
- For high-profile (formerly full-oversight) projects, recommends approval of justification for supplemental work items requests when the memorandum includes supplemental work items not on the pre-approved list. Recommendation can be made only after approval from the appropriate FHWA transportation engineer.
- Recommends approval of justification for supplemental work items memorandum when FHWA has rejected supplemental items if the memorandum explains why supplemental work item(s) should be included and identifies the source of non-federal funds.

If delegated by the district director, the deputy district director or region division chief recommends justification for supplemental work items approval requests. This delegated authority may not be sub-delegated.

Project Engineers:

- Prepare a request and obtain concurrence from the deputy district director or region division chief to change project contingencies percentage from 5 percent when it is determined that the standard contingency amount is inadequate or excessive.
- Prepare a justification for supplemental work items memorandum for all projects and obtain necessary approval for supplemental work-item needs and costs.

- Obtain recommendation from deputy district director or region division chief and district director approval on the justification for supplemental work items memorandum when the supplemental work-items total cost exceeds the 5 percent limit but is equal to or less than 10 percent.
- Obtain recommendation from deputy district director or region division chief and recommendation from the district director on the justification for supplemental work items memorandum when the supplemental work-items total cost exceeds 10 percent or for supplemental work items that are not on the FHWA pre-approved or acceptable supplemental work items list.
- For high-profile projects, before obtaining departmental approval of the justification for supplemental work items memorandum, prepare a Supplemental Work Letter to FHWA, and obtain FHWA approval for supplemental work items not on the FHWA pre-approved list and for all supplemental work-item costs.

Resident Engineers: Manage projects fund balances and administer contract change orders for both contingency and supplemental work.

RICHARD D. LAND
Chief Engineer
Deputy Director, Project Delivery

10/14/09
Date Signed