

## Chapter 5 - Adjustment of Contract Items & Differing Site Conditions

### *1-501 Minor Items – Article 1.04.02*

Payment for minor items may only be adjusted under the procedures detailed in §1.04.02. Under this section, when the quantity of a minor item increases or decreases by 25% from the original estimated quantity, the Department should make an adjustment in one of following three ways. First, the Department and the Contractor may come to an agreement on price. That price will have to be substantiated in a method similar to substantiating a new item of work. Second, unlike the major item adjustment, the Department can direct the Contractor to perform the work in a cost-plus manner in accordance with §1.09.04. Third, if neither of these first two procedures is used, the “adjustment of the original Contract unit price shall be the difference between the Contract unit price and the actual unit price ... to be calculated when all work under the item has been completed...” Calculations of actual costs for either increases or decreases in minor item quantity should be made by the Engineer “in the same way that they would if payment were to be made on a cost-plus basis under Article 1.09.04.” This method of adjusting the Contract price of a minor item is not to be used when the adjustment is due to a significant change in the character of work or differing site conditions. That type of adjustment must be calculated under Article 1.04.03 or 1.04.04

**Approval authority for Adjustments to Minor Items is the same as agreed prices and must be approved by a Transportation Principal Engineer, Assistant District Engineer, or District Engineer. This approval will be documented by memorandum unless the approval letter sent to the Contractor is signed by the approval authority.**

### *1-501A Increases of more than 25%*

According to §1.04.02(a), if the minor item is being increased by more than 25%, any fixed costs which are part of the actual costs of the work, “shall be deemed to have been recovered by the Contractor as part of the payments made by the Department for the 125 percent of the Engineer’s Estimate of that item; such fixed costs shall be excluded from any computation of the actual unit costs.” Also, it must be remembered that the adjustment of price is only for the excess quantity over 125% of the original quantity. The quantity less than 125% of the minor item being increased should be paid at the original unit price.

Absent prior written approval by the OOC, no adjustment should be made for items increased by more than 25%, “When the total compensation payable for the excess item units ... would be less than \$25,000 if they were paid for at the original Contract unit price.”

### *1-501B Decreases of more than 25%*

Price adjustments for minor items decreased more than 25% must be requested in writing by the Contractor before any adjustment is made. According to §1.04.02(b), if the minor item is being decreased by more than 25%, any fixed costs, which are part of the actual costs of the work, should be considered in any computation of actual unit costs. Also, any adjustment of a unit price for minor items decreased more than 25% “shall not ... be less than the unit price in the original Contract.” Finally, total payment for an item that has been decreased “may not ... exceed the payment which would be made for the performance of 75 percent of the Engineer’s Estimate of the item at the original Contract unit price for that time.”

### *1-501C Examples of Minor Item Adjustment Situations:*

The Contractor’s bid for Rock Excavation is \$30.00/CY. Rock Excavation is a minor item. The item quantity is decreased to less than 75% of the original Contract quantity. The cost of the work, as computed

by the cost-plus method under §1.09.04, is calculated to be \$35.00/CY. If the Contractor requests an adjustment under §1.04.02, the Contractor is entitled to an adjustment of \$5.00/CY for the total quantity completed, so long as the total compensation for this item does not exceed the value of 75% of the original Contract quantity paid at \$30.00/CY.

The Contractor's bid for Variable Depth Patch is \$300.00/CF. Variable Depth Patch is a minor item. The quantity increases by more than 25% of the original Contract quantity and no agreement can be reached for payment. The Contractor should be ordered to proceed on a cost-plus basis. If the Contractor is not so directed, and the cost of the work, according to the cost-plus method, is \$350.00/CF, then the Contractor is entitled to an adjustment of \$50.00/CF for the quantity above 125% of the original Contract quantity. The quantity less than 125% of the original Contract quantity should be paid at the original unit price.

### ***1-502 Change in Quantities of Major Items and Significant Changes in the Character of Work – Article 1.04.03***

Under §1.04.03(4)(b) of the Forms 814A, 815, and 816 “When a major item of work ... is increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity” it is **“by definition” considered a “significant change”** in the character of the work. Also, any item under the Contract regardless of whether it is a minor or major item that undergoes a significant change in the character of the work is required to be adjusted under Article 1.04.03. Section 1.04.03(2) requires the Engineer to make “an adjustment, excluding loss of anticipated profits” if such a change occurs. A “significant change” in the character of the work is any department directed change that significantly impacts the construction methods to perform the original Contract work. If additional direction is necessary on whether the change constitutes a “significant change” under the Contract the **Assistant District Engineer or District Engineer** should consult with the Office of Construction claims staff for further clarification and advice on how to proceed.

Once the District establishes that a “significant change” has occurred an attempt should be made to arrive at a mutually agreeable adjustment to the Contract with the Contractor. If an agreement cannot be made prior to the work being performed, the Engineer shall make such an adjustment that is “fair and equitable.” When an adjustment is made because a major item of work is increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity only the quantity in excess of 125% or below 75% of the original Contract quantity should be adjusted. It is important to note however that just because an item qualifies for an adjustment (i.e., major item that increases more than 25%) it doesn't mean that an adjustment is warranted in all cases. **For an adjustment to be warranted the increase or decrease in costs must be due solely to the increase or decrease in quantity or to the significant change in the character of the work.** The cost-plus method should **NEVER** be used when adjusting a major item. An additional 10% should be added to compensate the Contractor for overhead and profit. If the adjustment is less than \$100,000 and Blue Book rates for equipment is used the 10% should be applied to the labor and materials only. If the adjustment is over \$100,000 and actual equipment costs supported by an audit are used then the 10% should be applied to the labor, equipment, and materials. If the Contractor argues that 10% does not adequately compensate him for the overhead expended the Contractor may decide to submit additional information to support their additional overhead costs. Any additional overhead requested must be discussed with the Office of Construction claims unit. On adjustments over \$100,000, Blue Book rates for equipment should not be used.

The adjustment should be based on the difference in costs between what the Contractor would have spent prior to the increase in quantity or significant change in the character of the work and what the Contractor's actual costs were after the change. The Contractor's bid may or may not be a good indicator of the Contractor's expected costs prior to any change. An independent estimate should be performed.

**Approval authority for Adjustments to Major Items or Significant Changes in the Character of Work for sums which the District can justify, not to exceed \$ 100,000.00 is the District Engineer.**

**All adjustments to major items, which, in the aggregate, exceed \$100,000, must be discussed with and approved by the Office of Construction. The Office of Construction may require that Contract adjustments under §1.04.03 greater than \$100,000 be reviewed by an independent Certified Public Accountant and/or claims personnel.**

**This approval will be documented by memorandum or E-Mail unless the approval letter sent to the Contractor is signed by the approval authority.**

### ***1-502A Examples of Major Item Adjustment Situations:***

The Contractor's bid for Rock Excavation is \$30.00/CY. The Contractor has estimated its cost to do the work at \$25.00/CY. Rock Excavation is a major item. Because of design issues, a significant portion of the project is not constructed and the rock excavation quantity decreases significantly (less than 75% of original quantity). If the actual cost of doing the work is calculated at \$40.00/CY and the Contractor's estimate is found to be reasonable, then under §1.04.03, the Contractor is entitled to an adjustment of \$15.00/CY on the total quantity completed plus \$1.50 for overhead and profit of 10%.

The Contractor's bid for Earth Excavation is \$12.00/CY. The Contractor has estimated its cost to do the work at \$9.00/CY. Earth Excavation is a major item. The quantity goes over 125% of the original Contract quantity, causing the Contractor to work on the item in a second year. Because of an increase in the cost of materials and labor, the actual cost to do the work is calculated at \$12.00/CY. If the Contractor's estimate is found to be reasonable, under §1.04.03 the Contractor is entitled to an adjustment of \$3.00/CY for the quantity more than 125% of the original Contract quantity plus \$ 0.30 for overhead and profit of 10%.

The Contractor's bid for Earth Excavation is \$12.00/CY. The Contractor has estimated its cost to do the work at \$9.00/CY. Earth Excavation is a major item. The quantity goes over 125% of the original Contract quantity, but does not extend the project duration or cause an increase in the price of materials or labor. The actual cost to do the work is calculated at \$12.00/CY. If the increase in cost was caused by the Contractor's inability to do the work or the Contractor's estimate was unreasonable, the Contractor is not entitled to any adjustment under §1.04.03.

The Contractor's bid for Class A Concrete is \$300.00/CY. The Contractor has estimated its cost to do the work at \$260.00/CY. Class A Concrete is a major item. The quantity is increased more than 125% of the original Contract quantity due to extra work. The Contractor's actual cost is calculated to be \$230.00/CY. Under §1.04.03, the Department is entitled to adjust the Contractor's cost downward \$30.00/CY for the quantity above 125% of the original Contract quantity.

The Contractor's bid for both Class 1 and Class 4 Bituminous Concrete is \$45.00/Ton. The Contractor has estimated its cost to do the work at \$42.00/Ton. Both items are major items. Class 4 replaces a large portion of the Class 1 quantity. This causes the Class 1 quantity to go below 75% of the original Contract quantity while increasing the Class 4 quantity to over 125% of the original Contract quantity. If these are the only significant changes to these items, the Contractor is not entitled to any adjustment under §1.04.03.

### ***1-503 Differing Site Conditions – Article 1.04.04***

Under Article 1.04.04 of the Forms 814A, 815 and 816, ... “ if a 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 and inherent in the work provided for in the Contract...” then an adjustment to the Contract may be due. This language is federally mandated for all federally funded projects. Because of the difficulty in analyzing differing site condition requests it is important to seek guidance from the Office of Construction's claims section in evaluating these requests.

**Approval authority for Differing Site Conditions which the District can justify, not to exceed \$ 100,000.00 is the District Engineer.**

**All differing site condition requests which, in the aggregate, exceed \$100,000, must be discussed and approved by the Office of Construction. The Office of Construction may require that Contract adjustments under §1.04.03 greater than \$100,000 be reviewed by an independent Certified Public Accountant and/or claims personnel.**

**This approval will be documented by memorandum or E-Mail unless the approval letter sent to the Contractor is signed by the approval authority.**

The causes for a differing site condition generally consist of the following:

Subsurface Conditions

- Unanticipated Rock
- Unanticipated Groundwater
- Buried structures
- Hazardous or contaminated material

Other physical conditions

- In rehabilitation projects:
  - Concealed decay
- In demolition projects:
  - Concealed reinforcement

Differing Site conditions are generally categorized as either Type I or Type II requests. Article 1.04.04 addresses both of these types of requests.

***1-503A "TYPE I" Differing Site conditions***

Article 1.04.04 states “if a subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract...” This describes the circumstance of when a Contractor is entitled to a differing site condition adjustment as a Type I differing site condition.

A Type I differing site condition exists when subsurface or latent (not obvious) physical conditions at the site differ materially from those indicated in the Contract.

**The courts have articulated various tests for Type I requests. Generally, a contractor must show that all of the following conditions are met:**

1. Contract documents indicate the subsurface or latent conditions forming the basis of the request.
2. The Contractor's interpretation of the Contract documents is reasonable.
3. The Contractor must have relied on the indications of the subsurface or latent conditions in the Contract.

4. The subsurface or latent conditions actually encountered at the site must materially differ from those represented in the Contract.
5. The actual condition encountered must have been reasonably unforeseeable.
6. The costs requested must be solely attributable to materially different subsurface conditions.

The following types of contract documents constitute “representations”

"Existing conditions" drawings

Structures to be demolished

Buried utilities

Contours, waterways

Reports of Subsurface investigations

Boring logs

Geotechnical report

Environmental Investigation

### ***1-503B “TYPE II” Differing Site conditions***

Article 1.04.04 also states “if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized and inherent in the work provided for in the Contract...”. This describes the circumstance of when a contractor is entitled to a differing site condition adjustment as a Type II differing site condition. These are conditions, which differ from those usually, found on similar projects.

Even in the absence of specific contract representations or indications regarding any subsurface or latent physical conditions, a contractor may still be entitled to an equitable adjustment for encountering a differing site condition. Under a Type II request, the Contractor is entitled to an adjustment if it encounters an unknown and unusual condition that is materially different from that ordinarily encountered.

A Type II analysis is not concerned with representations in the Contract; the Contract is silent as to the conditions to be encountered. The silence need not be as to all conditions at the site, but must exist at least in regard to the condition forming the basis of the Type II request. The focus is on what was actually encountered compared to what is normally or usually encountered at a like jobsite. The Contractor must prove that what is encountered was not normal but, in fact, unknown and unusual. It must be a condition that reasonably could not have been anticipated by the Contractor from a study of the Contract documents, by site investigations, or by the general experience of the Contractor. The lack of contractual representations regarding the jobsite in a Type II case makes the Contractor's burden of proof more difficult to meet.

#### **To prevail in a Type II case a contractor must prove:**

What were the usual conditions a contractor would predict at the site.

What physical conditions were actually encountered.

The physical conditions actually encountered differed materially from the known and the usual.

These conditions caused an increase in the cost of performance.

The language of the differing site conditions clause states the existence of a Type II condition must have been unknown to the Contractor. The request will be denied if the Contractor knew or should have known of the existence of the condition.

### ***1-503C Definitions***

#### **Extra Work:**

Unforeseen work made necessary by the Engineer's **changes of the Contract plans or specifications**. It is not extra work when original Contract work is involved.

#### **Significant Change in the character of the work**

Any department directed change that significantly impacts the construction methods to perform the original Contract work.

#### **Materiality:**

Arbitrators and courts have a difficult time determining if the condition encountered is "materially different" from that indicated in the Contract. The materiality analysis in Type I requests is somewhat less complex than that in Type II requests. In a Type I request, there is some contract indication to compare to the encountered condition. This indication, although maybe not as specific as a quantity or percentage, is usually more concrete than what is "usual" the standard of comparison of a Type II request.

The easiest way to determine materiality in a Type II request is to compare what the Contractor could have reasonably expected to encounter against what was actually encountered and determine whether this difference caused a change in the Contractor's method.

The "materiality" standard reflects the expectation that the Contractor never is assured that everything on the job will go just as planned. Only variations outside of the norm will be grounds for extra compensation.

#### **Foreseeability:**

To be compensable, subsurface or latent physical conditions encountered must not only differ materially from the Contract indications, but also must be reasonably unforeseeable on the basis of all information available to the Contractor at the time of bidding. The condition must not have been anticipated by the Contractor from a study of the Contract, inspection at the site, and general experience.

For example, in requests of unusual weather, one norm is that weather pattern from the last 10 years are considered foreseeable.

#### **Reliance:**

Reasonable reliance is an essential element of a differing site condition. A contractor requesting a differing site condition will not be successful, even if the site conditions vary from the Contract, unless the Contractor reasonably relies on the Contract's assertions as to the condition. This requirement is typical of most misrepresentation claims. If the Contractor did not reasonably rely on the contract indications, it did not suffer damages as a result of them and therefore cannot recover.

A common area of dispute is over the Contractor's duty to investigate public records of past work at the site. Sometimes there are records available at, for example, a town engineer's office. Even if the owner has not reviewed those and disclosed them to contractors, the owner may argue that the Contractor has a duty to look at such documents before arriving at conclusions about the site.

**Unusual condition (Type II Request):**

A condition that might not reasonably be anticipated based on the contract work and the location at which it was to be performed. A contractor is not entitled to expect the most favorable conditions, but it need not anticipate the worst. Generally, the more extreme the condition, the easier it will be for the Contractor to prevail on its request.

***1-503D Examination of Site Clauses***

CONNDOT contracts require the Contractor to visit the site and familiarize himself with conditions there. Any condition, which would have been seen in a pre-bid inspection, will be deemed to have been "disclosed" to the bidder. Disputes arise over what level of site inspection the bidder should make, and whether it includes uncovering of work to see "hidden" conditions.

Contractors are expected to look closely at important parts of the project during the site inspection, but are not expected to perform invasive work to uncover hidden work.

Once the District establishes that a "differing site condition" has occurred an attempt should be made to arrive at a mutually agreeable adjustment to the Contract with the Contractor. If an agreement cannot be made prior to the work being performed, the Engineer shall make such an adjustment that is "fair and equitable." **For an adjustment to be warranted the increase or decrease in costs must be due solely to the significant change in the character of the work caused by the differing site condition.** The cost-plus method should **NEVER** be used. An additional 10% should be added to compensate the Contractor for overhead and profit. If the adjustment is less than \$100,000 and Blue Book rates for equipment is used the 10% should be applied to the labor and materials only. If the adjustment is over \$100,000 and actual equipment costs supported by an audit are used then the 10% should be applied to the labor, equipment, and materials. If the Contractor argues that 10% does not adequately compensate him for the overhead expended the Contractor may decide to submit additional information to support their additional overhead costs. Any additional overhead requested must be discussed with the Office of Construction claims unit.

The adjustment should be based on the difference in costs between what the Contractor would have spent prior to the significant change in the character of the work and what the Contractor's actual costs were after the change. The Contractor's bid may or may not be a good indicator of the Contractor's expected costs prior to any change. An independent estimate should be performed.

***1-504 Adjusted Price Forms for Major Items,  
Change in Character of Work & Different Site Conditions***

Figures 1-5.1 and Figures 1-5.3 show forms that are used to calculate adjusted prices for major items change in character of work and different site conditions.

