

- E. **Refusal or Failure to Provide Bid Documentation.** Failure to provide the bid documentation shall render the bid non-responsive.
- F. **Confidentiality of Bid Documentation.** The bid documentation and affidavit in escrow are, and shall remain, the property of the Contractor. The Department has no interest in, or right to, the bid documentation unless notification of the intention to file claim is received or litigation ensues between the Department and Contractor. In the event of such notification or litigation, the bid documentation and affidavit will become the property of the Department; provided that these materials, and all copies made by the Department, are returned to the Contractor at the conclusion of litigation, or final resolution of all outstanding claims, upon execution of a final release.
- G. **Payment.** The cost of placing the bid documentation into escrow is included as a separate bid item in the Contract. After the bid documentation has been deposited in a storage facility and the Contract has been signed, payment for the entire lump sum item, "Escrow of Bid Documentation" will be made to the Contractor on the first estimate prepared after the documents have been placed in escrow. The Contractor shall be responsible for the payment of the depository rent.

These payments will be full compensation for all data compilation, container, storage rental, and any other associated costs; and no other payments will be made to the Contractor for this bid item.

## **SECTION 104 CONTRACT ADJUSTMENTS**

### **104.01 INTENT OF CONTRACT.**

The Contractor shall furnish all resources required to complete the work and shall execute the work according to the terms of the Contract.

### **104.02 SUBLETTING OF CONTRACT.**

The Contractor shall not sublet, sell, transfer, assign, or dispose of any portion of the Contract or Contracts without written consent of the Engineer. The maximum percentage that can be sublet shall be 70%, of the Total Contract Amount, excluding any designated specialty items of work. The amount of any specialty items performed shall be deducted from the total original Contract Amount before computing the percentage of work sublet. Requests for permission to sublet shall be submitted to the District Engineer in whose District the Project is located. The request shall be in writing on Department forms accompanied by evidence showing that the organization performing the work is experienced and equipped for such work. Subcontract work shall not begin until the "Request to Sublet" is approved. The Department's approval of the "Request to Sublet" does not create a contractual relationship between the Department and the

subcontractor. The following items shall be submitted with the "Request to Sublet" prior to the start of work.

- A. The "Request to Sublet" must show the total price subcontracted. The items of work, and quantities of each item subcontracted shall be shown.
- B. Partial items shall be explained in detail and show the amount of each contract item being subcontracted.

Upon request of Project Engineer/Manager the Contractor shall provide a copy of the subcontract agreement or lower tier subcontracts if not attached to the "Request to Sublet." The Engineer's consent shall in no way be construed to be an endorsement of the subcontractor or its ability to complete the work in a satisfactory manner.

The Contractor shall assure that the Subcontractor has received the following provisions:

- A. EEO Affirmative Action Requirements.
- B. Labor Rates form U.S. Department of Labor.
- C. Required Contractor Provisions all Federal Aid Construction Contracts (FHWA-1273) and any addendums attached thereto.
- D. Other federal aid provisions such as Buy America clauses.

No Subcontracts, or transfer of Contract, shall relieve the Contractor of liability under the Contract Bonds.

#### **104.03 ALTERATION AND CHANGE OF PLANS OR CHARACTER OF 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 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. A Change Order will be executed to cover changes within the scope of the Contract. If the directed changes require additional time to complete the Contract, adjustments in Contract time will be made under Section 108.04.

- A. **Significant Changes in the Character of Work.** 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 the Engineer may determine to be fair and equitable. If the adjustment is not acceptable to the Contractor, the Engineer will make a determination based on Section 104.03 D.

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.

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 in Section 104.03 B, is increased in excess of 125% or decreased below 75% of the original Contract quantity.

**B. Increased or Decreased Quantities.** Adjustments in unit prices for increased or decreased quantities will be governed by the following:

A major item of work is defined as any Contract item having a value in excess of 5% of the total original Contract amount. All other items are minor items. Any adjustment to Contract Unit Prices for an increase in quantity shall apply only to that portion in excess of 125% of original contract item quantity, or in case of a decrease below 75%, to the actual amount of work performed.

1. If the quantity of any major item of work required to complete the Project increases or decreases from the original Contract quantity by 25% or less, payment will be made at the Contract Unit Price.
2. Should the original Contract quantity of one or more major items of work be increased or decreased by more than 25%, either party to the Contract may demand that a supplemental agreement be negotiated with an adjustment of unit prices satisfactory to both parties. Adequate evidence shall be submitted to support the request for Contract Unit Price adjustments. Failure to submit the bid documents will be considered as a waiver by the Contractor of the right to recover any additional costs.

An adjusted unit price for the quantity of the item which is in excess of 125% of the original Contract quantity will be negotiated on the basis of the actual cost of that portion of the item in excess of 125%, plus a reasonable allowance for profit and applicable overhead.

An adjustment to the unit price for the quantity of the item which is less than 75% of the original Contract quantity will be considered if the Contractor can prove, to the satisfaction of the Engineer, that the fixed expenses have not been recovered because of the decreased quantity of the item. However, total payment for the item shall not exceed that amount which would be made for 75% of the original Contract item at the Contract Unit Price, plus any additional fixed costs which can be substantiated by the original bid documents, not recovered because of this 75% cap. In no case shall the re-negotiated price exceed the total Contract amount for this item.

The Contractor shall provide written notice of intent to request an adjustment to the bid price for underrun or overrun quantities. This notice shall be submitted as per Section 104.06 A as soon as the Contractor is aware that an overrun or underrun will occur that will require a price adjustment. This request for adjustment of the bid price of underrun and overrun quantities shall also be governed by the requirements of Section 104.06 B.

3. If aggregate production equipment has been moved off the Project and there is an increase in the quantity of aggregate, the Department will pay for

remobilization. If the equipment is still on the Project and the Department has notified the Contractor of the increase in writing, no additional mobilization payment will be made.

4. A minor item will be paid for at the Contract Unit Price for the quantity required to complete the work except when the quantity is increased to the extent that the minor item becomes a major item. Unit price adjustment will then be according to the Specifications for adjustment of major items as described herein.
- C. **Eliminated Items.** If any items in the Contract are found unnecessary for proper completion of the work, the Engineer may, upon written order to the Contractor, eliminate such items from the Contract. When items are eliminated, reimbursement will be based on actual work done and all costs incurred, including mobilization before notification. If the Contractor requests an adjustment above and beyond payment at bid price for work done on the item eliminated, written notice shall be provided as per Section 104.06 A. The Contractor's request for extra compensation shall include the items required in Section 104.06 B.
- D. **Extra Work.** The Contractor shall perform unforeseen work for which there is no price included in the Contract whenever the extra work is necessary or desirable for Project completion. This work shall be performed according to the Specifications and as directed by the Engineer in writing.
1. Extra work that is estimated to cost less than \$25,000 in labor and equipment will be paid for at Contract Unit Prices or at a negotiated unit price. If an agreement cannot be reached, work will be paid for under Section 109.04.
  2. Extra work that is estimated to cost \$25,000 or more in labor and equipment will be paid for at negotiated unit prices. If negotiations are unsuccessful, Section 104.06 B will be applied.
  3. Extra work that is not quantifiable and is estimated to cost more than \$25,000 in labor and equipment may be paid for under Section 109.04 only if directed by the Department in writing.

#### **104.04 DIFFERING SITE CONDITIONS.**

During the progress of the work, if subsurface or latent physical conditions at the site which differ materially from those indicated in the Contract; or if unknown physical conditions of an unusual nature which differ 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.

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.

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

There will be no Contract adjustment allowed on work not affected by the changed conditions.

Written notice of intent to file a claim, followed by the claim for extra compensation for differing site conditions shall be as outlined in Section 104.06.

#### **104.05 ADDITIONAL COMPENSATION FOR SUSPENSION OR DELAY OF WORK.**

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.

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.

No Contract adjustment will be allowed unless the Contractor has submitted the request for adjustment within the time prescribed.

No Contract adjustment will be allowed under this section 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.

The Contractor's written notice of intent to file a claim, followed by the claim for extra compensation for suspension or delay of work shall be as per the requirements outlined in Section 104.06, except that the required notice time frame will be as specified in this Section.

#### **104.06 CLAIM FOR EXTRA COMPENSATION.**

A. **Notice of Intent to File a Claim.** If the Contractor contends that additional compensation is due for work or material not clearly covered in the Contract, the Contractor shall promptly notify the Engineer in writing of the intention to file a claim and the basis for additional compensation before beginning or continuing construction on the affected work. If the basis for the claim does not become apparent until after proceeding with the work and it is not feasible to stop the work, the Contractor shall immediately notify the Engineer that work is continuing and that written notification of the intent to file a claim will be submitted within 10 calendar days. The failure to give the required notification or to provide the Engineer

proper facilities and assistance in keeping strict account of actual costs will constitute a waiver of the claim for additional compensation in connection with the work already performed. Notification of a claim, and the fact that the Engineer has kept account of the costs involved, shall not be construed as proving or substantiating the claim's validity.

Notice must be provided on the Department form entitled "Notice of Intent to File a Claim."

The Contractor shall mail the original notice to the Project Engineer and a copy to the Construction Engineer.

The Contractor shall define each basis for which additional compensation will be sought. Failure to properly supply all of the information required on the form entitled "Notice of Intent to File a Claim" shall constitute a waiver of the right to recover additional compensation for claim items not identified.

- B. Submission of the Claim.** All claims shall be submitted in writing not later than 90 days after the final estimate has been submitted to the Contractor, as outlined in Title 24 of the North Dakota Century Code.

If the Contractor signs the final payment voucher and certifies that the quantities are a true and correct statement of the work performed, the Contractor, by this action, accepts the amount stated as full and final payment on the Contract for the stated Project and waives all rights to any additional payments to complete the Project.

The claim submittal must describe and detail all claim items being submitted for review as described in the notice of intent to file a claim in 104.06 A. Section 109.04 shall not be used for costing of claims submitted. The description and detail in the claim submittal shall, at a minimum include:

1. A detailed narrative justification citing the basis for the claim with reference to relative portions of the Plans, Specifications, or other Contract documents.
2. A detailed explanation of the amount of extra compensation claimed is required for each item. Total Project cost claims will not be allowed as part of the claim submitted. Allowable costs submitted for each of the individual claim items will be verified using generally accepted contract cost principles and procedures. The only costs which will be allowed will be as follows:
  - a. Materials purchased as verified by copies of paid invoices.
  - b. Direct payroll as verified by copies of certified payrolls.
  - c. Owners share of payroll additives with each employee's applicable "ceilings" accounted for on the claim item and verified by applicable accounting records.
  - d. **Equipment.** No allowance will be made for equipment replacement or replacement escalators, cost of facilities capital, interest, or any other additives not listed. All equipment hours will be paid for as straight time. The only equipment payments that will be made are as follows:

- (1) **Owned Equipment.** Payment for the actual hours of Contractor-owned equipment will be 70% of the bare rate as determined using the procedures outlined in the then current edition of the Department manual entitled *Rental Rates for Equipment and Traffic Control Devices*.

The computed hourly equipment cost times the number of hours claimed shall not exceed the Contractor's actual purchase price for the piece of equipment being claimed.

Subcontractor-owned equipment will be paid for in the same manner as Contractor-owned equipment unless such equipment has been rented, leased, or hired by the Contractor, as provided for in (2) below.

- (2) **Leased, Rented, or Hired Equipment.** Payment for leased, rented, or hired equipment shall be the actual invoice payment plus sales tax as verified by paid invoices signed by the lessor, or by checks issued by the Contractor. If the lease or rental is weekly, the weekly rate shall be divided by 40 to get an hourly equipment cost for the claim. If the lease or rental is monthly, the monthly rate shall be divided by 176 to get an hourly equipment cost for the claim.

The computed hourly equipment cost, for each individual piece of equipment, times the number of hours claimed shall not exceed the Contractor's actual lease or rental cost for the time frame claimed.

- (3) **Operating Costs.** Equipment operating costs will be the equipment service charges as determined using the procedures outlined in the then current edition of the Department manual entitled *Rental Rates for Equipment and Traffic Control Devices*.

- (4) **Idle Time.** The number of hours of equipment use to be paid for will only be the hours that the equipment is operating on the claim item. No payment will be made for equipment on standby unless the standby is directed in writing by the Engineer, or the standby is proven to be as the direct result of the Department's actions or inactions. Standby will be paid at 50% of the hourly bare rate calculated by dividing the monthly rate by 176. The listed weekly, daily, or hourly rates will not be used. Operating costs will not be paid for hours of idle time.

Payment for standby time will not be made on any day the equipment operates for 8 or more hours. For equipment accumulating less than 8 hours operating time on any normal work day, standby payment will be limited to only that number of hours which, when added to the operating time for that day equals 8 hours. Standby payment will not be made in any case on days not normally a work day.

- e. Complete payment for overhead shall be 10% and profit shall be 10% applied to the total of (a) through (c) in Section 104.06 B.2. Superintendents and their associated costs will be covered by the 10% overhead item.

- 3. A statement containing the following language shall also be submitted with the claim:

Under the penalty of law for perjury or falsification, the undersigned,

\_\_\_\_\_ , \_\_\_\_\_  
NAME TITLE  
 of \_\_\_\_\_ , hereby certifies  
COMPANY

that the claim for extra compensation made herein for work on this Project is a true statement of the actual costs incurred, and is fully documented and supported under the contract between the parties.

I hereby agree that the Department or its authorized representative shall have the right to examine and copy all Contractor records, documents, work sheets, payrolls, invoices, depreciation schedules, and other data which are pertinent to the justification of the claim and to the substantiation of all costs related to the claim.

Date \_\_\_\_\_ /s/ \_\_\_\_\_

Subscribed and sworn between me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC  
 My Commission Expires \_\_\_\_\_

- 4. The Contractor hereby agrees that the Department or its authorized representative shall have the right to examine and copy all Contractor records, documents, work sheets, payrolls, invoices, depreciation schedules, and other data which are pertinent to the justification of the claim and to the substantiation of all costs related to the claim. If the bid documents used in preparation of the bid are not being held in escrow, the Contractor shall submit the bid documentation with the claim.

Failure of the Contractor to adhere to all of the requirements outlined in Section 104.06 shall serve as a waiver of claim for additional compensation for each of the claim items submitted.

- C. **Department's Response to Claim.** Within 60 days after receipt of a properly submitted claim, written notification will be given to the Contractor indicating approval, partial approval, or disapproval of the claim for additional compensation as per Title 24 of the North Dakota Century Code.
- D. **Conditions Precedent to Contractor's Demand for Arbitration.** Full compliance by the Contractor with Section 104.06 is a contractual condition precedent to the Contractor's right to demand arbitration.

No right shall exist to demand arbitration against the Department until the conditions specified in Section 104 and in Title 24 of the North Dakota Century Code have been complied with.

### **104.07 CLAIMS AGAINST CONTRACTOR**

The Contractor will be notified in writing when construction-related claims are being assessed against the Contractor. Claims in this category include, but are not limited to: (1) unpaid royalty for material removed from Department-optioned pits and borrow areas; (2) materials, supplies, and services obtained from the Department; (3) products and materials not meeting Specifications; and (4) judgments entered against the Contractor.

If the claim is not paid within 30 days after written notification, the amount of the claim shall be withheld from any Contract payments due, except that judgments against the Contractor by a court will be immediately assessed.

It is not necessary that the claim and the withheld payment be related to the same Project or to each other.

### **104.08 VALUE ENGINEERING INCENTIVE.**

- A. Value engineering incentive applies to cost reduction proposals initiated and developed by the Contractor for changing the drawings, designs, Specifications, or other requirements of the Contract. It does not apply to any proposal unless it is identified by the Contractor at the time of submission to the Department as a value engineering incentive proposal.
- B. The cost reduction proposals contemplated are those that:
  - 1. Would require a Change Order to the Contract on Department forms; and
  - 2. Would result in savings to the Department by providing less costly items or methods than those specified in the Contract without impairing essential functions and characteristics of the Project, such as service life, reliability, economy of operation, ease of maintenance, and necessary standardized features.
  - 3. Any savings realized, due to the use of an aggregate source other than that provided by the Department, will not be considered a value engineering incentive. This will not prevent the Contractor from using their own aggregate source. Any savings realized in reduction of bitumen content due to switching of aggregate source shall not be allowable under value engineering incentive.
  - 4. The substitution of one bid item for another bid item, resulting in a decrease in the Contract amount, will not be considered as a saving under value engineering incentive. When any change involves the increase of one bid item and the decrease of another bid item, a Change Order will be executed.
  - 5. A cost reduction proposal will not be approved that would revise or modify work requirements or materials that are incorporated in the Contract for compliance with established Department Policies and Standards. This exception would not apply to other design or material features of the work which have been selected for the needs of the work.
- C. Cost reduction proposals shall be processed in the same manner as any proposal which would require a Change Order. As a minimum the following information shall be submitted with each proposal:

1. A statement that the proposal is submitted as a value engineering proposal.
  2. A description of the proposal.
  3. An itemization of the Contract requirements that requires a change and a recommendation of how to make each change.
  4. An estimate of the savings that will result from adoption of the proposal.
  5. A prediction of any effects the proposed change will have on other costs.
  6. A statement of the time the Change Order must be issued to obtain maximum cost reduction during the remainder of the Contract, and the reason for the time schedule.
  7. The dates of any previous submissions of the proposals, including Contract numbers and the Department's actions.
  8. A statement of the proposal's effect on the time for Project completion.
- D. The Department will not be liable for any delay in acting upon any proposal submitted. The Engineer's decision to accept any such proposal will be final and will not be subject to Section 104.06. The Engineer may accept, in whole or in part, any cost reduction proposal submitted by issuing a Change Order.
- E. If a cost reduction proposal is accepted, the Contractor and the Department shall share equally in any savings realized. This acceptance will be made according to this Specification or other applicable Contract provisions.
- The Change Order will indicate the changes and accompanying revised costs as proposed by the Contractor and accepted by the Department. The Change Order will also reflect the estimated net savings to the Department after the estimated implementation costs and additional administrative costs incurred as a result of this proposal have been deducted.
- Payment to the Contractor, in addition to the agreed upon revised costs, will be 50% of the net savings as determined above.
- If the proposal results in an increase in cost, this Specification shall not apply. Any increase in costs above the original design shall be at the Contractor's expense.
- F. The Contractor may restrict the Department's right to use or disclose information submitted with a value engineering proposal if the proposal is rejected. Such restriction must be in writing and be submitted with the proposal. If the proposal is accepted, this restriction shall be void and the Department may use, duplicate, or disclose in whole or in part any data necessary to utilize the proposal.

## **SECTION 105 CONTROL OF WORK**

### **105.01 GENERAL.**

The Contractor shall be responsible for the direct supervision of the workers and their methods of workmanship.