

## §104-04 SIGNIFICANT CHANGES IN THE CHARACTER OF WORK

### I. GENERAL

Significant Changes in the Character of Work is one of the three Changed Condition Clauses mandated for inclusion in Federal-Aid contracts. If any of the definitions are met, then the Contractor or the Department may request a new price for the work involved.

### II. NOTICE AND RECORDKEEPING

Written Notice of a significant change in the character of work must be made by the party who wishes to adjust the contract prices or time of contract performance, within 10 days of the time the party had, or should have had, knowledge of an event which results in a significant change and should be made before the work has progressed significantly.

Notice of a significant change in the character of work is essential for the Department to assess the situation and assess the need or possibility of mitigating the impacts of the differing site conditions.

Written notice from the Contractor of a significant change in the character of work and a request to renegotiate contract prices must be in a letter to the EIC and be followed by the start of submission of daily force account records. If the Department wishes to renegotiate contract prices due to a differing site condition, the Department must also provide written notice to the Contractor. Verbal notices, Diary entries or meeting minutes do not constitute adequate written notice. See §104-06 *Notice and Recordkeeping*.

### III. SIGNIFICANT CHANGES

Knowledge of a significant change in the character of the work may not be readily apparent. For example, the Contractor may work for some time without realizing that work operations have changed significantly.

#### A. Character of Work

The Contractor must prove that the attributes of the work have changed significantly. If agreement cannot be reached on the existence of a significant change, then force account records must be kept and submitted to the EIC by the Contractor. In this case, final determination on a "significant change" and resulting payment will be made through the disputed work process.

If both parties agree that significant change has occurred, and only a new unit price is sought, then an agreed price should be negotiated. Failure to reach an agreed price results in the work being documented using Force Account records. If an agreement was reached on a determination of a significant change, and both delay damages and extra work costs are sought, then the delay damages must be documented by force account methods.

#### B. Major Item Quantity Changes

It is important to inform the Contractor of any known changes in quantities in a timely manner. By sharing this information, the Department provides the Contractor an opportunity to assess the impact of the changed quantity on costs, and to make a timely decision regarding any requests for changes in price. Such communications with the Contractor should occur through normal contract level communications (progress meetings and review of payment estimates) and should be documented.

- 1. Overruns.** When the quantity of a Major Item will (or did) increase or decrease by more than 25%, the contract unit bid price may not be reasonable compensation for the altered quantity of work, and consideration will be made for an adjustment of the unit price. An item is considered an overrun only when the threshold is exceeded on the entire contract quantity for that specific item. Field staff are encouraged to use the Business Intelligence Report labeled "Item Analysis" report to assist them with contract thresholds. When category quantities need to be adjusted, use [QRG# 18 Change Order Existing Items](#). Neither the State nor the Contractor may realize until an estimate is run that the final quantity will exceed 125%. The Contractor should be notified in writing as soon as possible of any impending significant change in quantity.

Either the Department or the Contractor may request a change in price if a significant change occurs in the quantity of a major item. Any change in the unit price should be a reflection of change in the cost of performing the altered quantity of work. The Department's determination regarding

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acceptability of the unit bid price should be based on review of weighted average item prices, lowest bidders, etc. A new price only applies to the quantity of work above 125% of the original contract quantity.

**2. Underruns.** A new price for a decrease of a major item to a quantity under 75% of the original contract quantity would apply to the entire quantity of work, with total compensation limited to the product of the original contract quantity multiplied by the original unit bid price. A quantity underrun is the only exception for notice and recordkeeping requirements, if the work is completed before either the Contractor or the EIC is aware an underrun is going to occur. An item is considered an underrun only when the threshold is below the entire contract quantity for that specific item. Field staff are encouraged to use the Business Intelligence Report labeled "Item Analysis" report to assist them with contract thresholds. When category quantities need to be adjusted, use [QRG# 18 Change Order Existing Items](#).

If an underrun in quantity has occurred, or a probable underrun in quantity is detected, promptly issue written notice to the Contractor that there is no more work under the identified contract pay item(s). The EIC should determine whether the original bid price is acceptable for the work or a new price is desired and should be renegotiated. The Department's determination regarding acceptability of the unit bid price should be based on review of weighted average item prices, 3 lowest bidders, etc. It is acceptable to negotiate a new agreed price. Because force account records may not be available, some other method of reimbursement may be used to develop an agreed price. An agreed price could be based upon limited force account records kept at the end of the underrun, weighted average bid prices, daily work reports, Contractor records, or a combination of the above. The agreed price should reflect the actual work effort as recorded in daily work reports or other available documentation.

### C. Minor Item Quantity Overruns

When the quantity of a Minor Item increases to more than 200% of the original contract quantity, and results in more than \$5,000 increase, the contract unit bid price may not be reasonable compensation for the altered quantity of work, and consideration will be made for an adjustment of the unit price.

Example 1: 4 each of Item A with unit price of \$200 is increased to 10.

The first 4 additional units of item A (qty is now 8, which 200% of the original quantity) are at the original bid price. The 9<sup>th</sup> additional unit, which is more than 200%, but not more than a \$5,000 change (5 additional units at \$200 each), is paid at the original bid price also. The 10<sup>th</sup> unit exceeds 200% of the original quantity and results in more than a \$5,000 change. Either party may request a change to the bid price for the 10<sup>th</sup> item and any additional quantities. An item is considered an overrun only when the threshold is exceeded on the entire contract quantity for that specific item. Field staff are encouraged to use the Business Intelligence Report labeled "Item Analysis" report to assist them with contract thresholds. When category quantities need to be adjusted, use [QRG# 18 Change Order Existing Items](#).

### D. Composite Item Changes

For the purposes of this section, composite items are contract pay items *Unclassified Excavation* and *Trench and Culvert Excavation* that are major items. These items are considered to have two components, rock and non-rock. In terms of the earthwork summary sheet notation,  $C_R$  is the rock component, and all other excavation elements  $T_E$  and  $T_U$ , combined are the non-rock component. A composite item can only be adjusted if all of the following conditions are met; (1) the item is a major item of work; (2) the rock or non-rock component varies by more than 25% from that stated in the earthwork summary sheet; and (3) the unit cost of the work changes as a result.

Daily Work Reports which cover the excavation work must contain field measurements and calculations of the quantity of rock. If the sum of the field measurements exceeds by 25% the excavation sheet total quantity shown under  $C_R$ , the Contractor can request a new price for the composite item. The new price should be based upon the final ratio of rock to non-rock and the corresponding prices for performing each component of the composite item. The new price would then be applied to the entire quantity of the composite item. The EIC should have received the Contractor's excavation bid price

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breakdown for rock and non-rock components at the Preconstruction Meeting. The bid prices should make mathematical sense with the split shown in earthwork sheets and the Contractor's bid price for the composite item. The bid split can then be used to compare against any submitted new price.

If the sum of rock quantity is going to fall below the excavation sheet total quantity under  $C_R$  by more than 25% then the EIC can ask for a new, lower price for the composite item. The method for calculating the new price is the same as stated above.

### E. Fixed Quantity Item Changes

Fixed quantity items are those that list in the measurement portion of the contract pay item specification that the work will not be measured in the field, but rather the quantity stated in the Estimate of Quantities will be used for payment. Most of the specifications with these types of measurements have been revised, but some may remain in use. If the quantity in the field varies by more than 25%, it would be considered a Significant Change, and either party may request a change in the price. An item is considered an overrun only when the threshold is exceeded on the entire contract quantity for that specific item. When category quantities need to be adjusted, use [QRG# 18 Change Order Existing Items](#).

### F. Lump Sum Adjustments

A necessary pre-condition to significant changes in Lump Sum contract pay items is the existence of a significant change(s) in other contract work items. Prices for items like Work Zone Traffic Control (WZTC) and Survey and Stakeout may be considered for adjustment when the work effort required for those items is significantly impacted by significant changes in other work items. Any adjustments, either to increase or decrease Lump Sum prices, are based on the increased or decreased work effort resulting from the significantly changed portions of the other work. Separate records may need to be kept to account for the changes in effort under Lump Sum items such as WZTC.

## IV. COSTS

Determine whether an adjustment in price is warranted. An adjustment may be appropriate if a significant change in the character of the work causes a change in the Contractor's work operations and resulting costs. The determination should be based upon a comparison of the Contractor's planned and actual work operations and resulting costs. The comparison of Contractor operations should consider whether the planned method of operation was reasonable. If the Contractor's assumed methods are unreasonable, use a reasonable method of operation as a basis for comparison against actual work operations. If it is determined that a significant change in the character of the work does not exist, the Contractor may choose to pursue the issue as a dispute.

A significant change in the character of the work can be compensated by an increase or decrease in the unit prices for the extra work. If a cost adjustment is requested by the Contractor, and the EIC agrees, or if the EIC has requested a downward cost adjustment and the Contractor agrees, an agreed price should be negotiated before work resumes. If an agreed price cannot be reached, then the work affected by the significant change in the character of the work should be reimbursed by force account. Work affected by the significant change in the character of the work but performed more than 15 days prior to notice, will be reimbursed at the original unit price.

When considering a new price, if the EIC believes the additional work should be cheaper than the original unit bid price and the Department requests a lower unit price, the Contractor may not agree. The result may be paying for work via force account, which may result in a higher unit price, and also expend State resources for review and approval.

If necessary, a time extension should be agreed to and processed promptly after a significant change in the character of the work is identified. The Contractor should be granted a time extension without engineering charges or liquidated damages for additional time needed to perform extra work that created the significant change in the character of the work. The length of the time extension should be based on production rates shown in the latest approved schedule and previous contract performance. The Contractor may also seek delay costs as allowed by §109-05D *Time Related Dispute Compensation*.

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### REFERENCES

QRG# 18 Change Order Existing Items

[https://www.dot.ny.gov/main/business-center/contractors/construction-division/construction-repository/18\\_QRG-CO\\_Existing\\_Items.pdf](https://www.dot.ny.gov/main/business-center/contractors/construction-division/construction-repository/18_QRG-CO_Existing_Items.pdf)

### EXHIBITS

A. Sample Contractor Notice Significant Changes in the Character of Work

[Insert Letterhead]

Date:

[Contractor Name, Title]

[Contractor Address]

[City, State Zip Code]

**RE: D123456 SIGNIFICANT CHANGES IN THE CHARACTER OF WORK**

Dear [Contractor Name]:

The work to be performed under contract pay Item 123.45 is significantly different than that contemplated in the contract documents. Specifically, the excavation was identified to be done in 4 separate stages using hand tools due to the potential presence of unexploded ordinance. Those areas have been cleared by the US Army EOD and can now be excavated in one stage using hydraulic powered excavation equipment.

The Department is hereby requesting a renegotiated price for the quantity of XX [Pay Unit] in accordance with the changed condition provisions of §104-04 *Significant Changes in The Character of Work*. Please also note the associated notice and recordkeeping requirements established by §104-06 *Notice and Recordkeeping*.

[EIC Signature]

[EIC Name]

Engineer-In-Charge