

SDDOT CONSTRUCTION MANUAL  
PROJECT MANAGEMENT SECTION  
**CHAPTER 11 – CCO’S AND PRICE NEGOTIATIONS**

**CONSTRUCTION CHANGE ORDERS**

Once a construction project has gone through the bid letting process and has been awarded, a contract is then signed that binds the Prime Contractor into agreement with the Department. The contract itself is comprised of many separate documents linked together by the main contract document. These include items such as the plans themselves, the Special Provisions and the Standard Specifications for Roads and Bridges. The Contract that has been created exists only between the Department and the Prime Contractor.

It is the responsibility of the Area Engineer and his designees to ensure that projects are constructed in accordance with the details contained within the contract and all associated documents tied to the contract. From time to time, conditions are encountered upon construction that requires the contract to be modified to better fit field conditions.

It is very unrealistic to expect that any construction project can be built without some form of deviation from the original contract. The Federal Highway Administration defines a construction contract as a formal agreement between two parties that requires an equally formal agreement when it is to be modified. Hence, when those deviations occur a Construction Change Order (CCO) is required.

A CCO is a formal agreement between the Prime Contractor and the Department. Upon execution and approval, it becomes a legal document that is as equally binding as the original contract. For this reason, it is extremely important that a CCO be clearly worded and complete in all aspects. It is vital that all information pertaining to a CCO be channeled between the Department and the Prime Contractor. Subcontractors involved in any change to the contract must submit any documents they wish to submit through the Prime Contractor. If an Area Office receives such documents from a sub-contractor directly they should immediately forward those documents to the Prime Contractor and make the sub-contractor aware that the Area office will not accept documentation directly from a subcontractor.

CCO's are to be prepared and submitted whenever there is a change in design, extension of contract time, modification of quantities, change in plan notes, change in specifications, or whenever there is a new item needed or extra work becomes necessary for the satisfactory completion of the work.

CCO's are comprised of a DOT 220A and a DOT 220B Form. Both forms have very different requirements as to the details needed on each form. These details are defined in the *Construction Change Order Policy* and should be reviewed prior to creation of the CCO.

If additional work is added to the contract, the Contractor may be entitled to an increase in contract time. The procedures for increasing the contract time based on a monetary value are included in the *Construction Change Orders Policy*. Disputes regarding contract time should be referred to the Time Extension Request Policy for further guidance.

The *Construction Change Order Policy* states that all problems involving the design of a project, excluding traffic control, are to be directed to the appropriate personnel in the Division of Planning/Engineering for resolution. Significant changes from the plan shown design will require a CCO. CCO's regarding changes in the traffic control plan shall contain the note "Approved as a design change" along with Region Traffic Engineer concurrence.

The Delegation of Authority Policy sets the various monetary levels which note authority to approve a CCO. Any change beyond the scope of the contract or beyond the termini of the contract will require approval of all of the Division Directors prior to the execution of the CCO.

Some CCO's require additional approval from entities outside the initial contract established between the Department and the Prime Contractor for the CCO to be fully executed. Projects involving local governments such as Counties should be signed by an approved representative of the County before DOT gives final approval. Some CCO's require signature from the Federal Highway Administration (FHWA) before they are fully executed. Those projects are identified ahead of bid letting and are known as Projects of Division Interest (PODI). The Area Engineer and his designees are expected to be aware of what projects are listed as PODI's prior to work beginning. It is also vital at this point that the Area Engineer makes sure that all people signing a CCO have the authority level to do so.

Regardless of whether a project is a designated PODI or not, new items added to the contract via CCO need to be reviewed to determine if they qualify for Federal Participation or not. Generally speaking, if a new item is associated with some sort of maintenance activity Federal Funds cannot be used and the item needs to then be designated as non-participating in the CCO. The designation of whether an item is participating or non-participating is done by placing either a "P" or an "N" adjacent to the line item selected for use in the CCO. If an item is unclear, the Operations Engineer should be consulted to make a determination.

Federal regulations mandate that the DOT must keep record of all documents used to analyze contractor cost proposals when submitted and used to form the basis for Unit Price on a CCO. Those documents need to be stored in the project file and retained as part of the permanent record. There is a wide range in needs when it comes to the degree of analysis of price quotes needed from Contractors for various items. Any questions as to what is acceptable should be channeled through the Operations Engineer.

If agreement of prices cannot be attained, Force Account shall be utilized. All new items or force account work require a written agreement with the Contractor prior to performance of the work. If a CCO cannot be executed before the work needs to commence, an Extra Work Authorization must be completed. This agreement between the Area Engineer and the Contractor may be prepared on the DOT 228 form, or by other means, such as email, letter, etc.

Final CCO's are to be prepared and submitted upon completion of all projects. The intent of the final CCO is to correct minor quantity changes. The Department is required to pay interest to the Contractor for payments in excess of \$2000 on any money due the Contractor that remain unpaid 120 days after completion of the work. For this reason, the Project Engineer should make every attempt to use progress CCO's and intermediate pay estimates to ensure payments are up to date and quantities are at the correct amount so that we ensure that the amount of money owed to the Contractor is correct and if possible under \$2000 prior to the final CCO being initiated.

It can become difficult at times to get the Contractor to sign final CCO's. For this reason, the following direction is provided:

All final CCO's that modify specifications or that add or delete bid items (with the following exceptions) shall have the Contractor's signature.

1. Claim payments or withholdings, as determined by the Claim Review Panel or new claims process.
2. Time Extension determinations, as determined by the Claim Review Panel or new time extension process.
3. Fuel Cost Adjustments.
4. Items on the Price Schedule for Misc. Items.
5. Price adjustments for specification deviations.
6. Excise Tax adjustments.
7. Price adjustments for incentive/disincentive items (such as smoothness, QC/QA, contract time, etc.).

For more information regarding CCO's review the *Construction Change Orders Policy*.

## **PRICE NEGOTIATIONS**

Simply put, negotiation occurs when parties resolve an issue themselves. In our industry it is best when this happens at the Area level whenever possible. It is vital to remember that any documentation used during the negotiation process is to be kept and stored in the project files. FHWA mandates SDDOT to analyze and document all costs associated for a price negotiation independently of the contractor's proposal.

It is important that SDDOT do this no matter how small or large the negotiation is. As such, instant yes and no answers to proposals submitted by contractors should be avoided. Make sure to give proper time to analyze all proposals. It is also important that we treat contractors in the same manner. We should not expect an instant yes or no response as we need to also ensure Contractors are given ample time to analyze counter proposals. This is common courtesy and should be expected by all parties whenever negotiations are taking place.

SDDOT is fully committed to ensuring fair prices are paid to contractors for all work performed and that as such the contractor should expect a fair profit in performing work. All SDDOT personnel and Contractor personnel who are involved in a price negotiation are expected to have read and be familiar with Section 9.5 of the Standard Specifications for Roads and Bridges 2015 Edition. This is vital to ensuring a successful price negotiation.

SDDOT Personnel involved in price negotiations should always ask for cost breakdowns of how prices are derived. The breakdowns should include copies of invoices for materials, rates for equipment usage, contractor calculations of costs, etc. Without this breakdown, it would be nearly impossible to study price proposals in the manner of which FHWA mandates to analyze those proposals.

Some items to be on the lookout for are charging excess profit outside what is allowed in Section 9.5 of the Spec. Book, over-estimating labor and material costs, charging profit on items where profit is not allowed, adding overhead costs that are vague and unsubstantiated, etc. To aid in the analyzing process, SDDOT personnel should also check all prices received to see if they compare to average unit bid prices as shown in the CDBS system.

Please see the worksheet at the end of this section. This is an optional worksheet developed in the Yankton Area that will aid in the price negotiation process and ensure the requirements of Section 9.5 are adhered to.

When conducting the analysis of price submittals, all documents used in the process are to be kept and stored in the permanent files at the Area Office and should not be thrown away until 3 years after FHWA has made final acceptance of the project. Note that this date may vary from the date SDDOT makes final acceptance.

Often times when an extra work price proposal is submitted from a contractor, SDDOT will be told by the contractor that an answer is needed right away. Be very cautious of those types of demands. Placing tight deadlines is a tool used by many in negotiations that often causes someone to make a concession that they may later on regret. Quick concessions of this nature are rarely good for the party making them as people by nature often make very bad decisions when under high pressure or stress.

Another item to be on the watch for when negotiating prices is to be careful what you say during negotiations. Sometimes when we are in a hurry to resolve something and know a deadline may exist we get too eager to solve something and may say things that we should not that may give the other party an advantage in negotiating against SDDOT.

The bottom line is, take the time you need to analyze a proposal. Stay professional and calm at all times. Remember to be fair in your analysis as we are not intent on taking advantage of contractors. Make sure that you are clear on anything you agree to or disagree to and that nothing is left open or vague. Always make sure it is about good business. Never make it personal against any contractor. Treat all contractors the same whether it is your favorite or least favorite contractor. Document and file your analysis. Treat others as you expect to be treated. Don't be afraid to use the Conflict Resolution process along the way to help in the negotiating process. See the section in the manual on Conflict Resolution for more details as to how that process works.

Sometimes it may not be possible to resolve an issue at the project level or Area level through the normal negotiation process. When this happens there are tools that still can be utilized to keep work proceeding along without undue delay. Those tools are the use of a Force Account Agreement and/or the use of an Extra Work Authorization Agreement.

A Force Account Agreement is an agreement by which all costs for materials, labor, and equipment are measured and paid for on a cost plus basis to ensure the Contractor receives a fair profit. Force Accounts are established as per Section 9.5 of the Standard Specifications. Before initiating a Force Account it is vital that the Office of Operations Support be consulted to obtain proper instruction in establishing rental rates and computing rates and quantities on the proper forms.

An Extra Work Authorization Agreement is just as binding as a signed contract document or Construction Change Order Document. It can be used to lock in known items that both parties agree upon even though unknown items may still exist. An example is an item where both parties agree on an hourly rate to perform the work; however disagreement exists as to how many hours the work will take. This type of agreement allows work to keep proceeding on

without undue delay and gives both parties the advantage of monitoring the work and measuring the unknowns as work is taking place to turn unknown factors in to known factors.

If issues still exist after project work has been completed, a powerful tool to use and potentially resolve those issues is a Project Close-Out Meeting. It is recommended that all pertinent personnel from the project attend this meeting. This may include staff such as Technicians, Project Engineers, Engineering Supervisors, Area Engineers and Region Engineers from the SDDOT side depending on the issues. The Contractor needs to also feel welcome at bringing anyone he feels is pertinent and needed to aid in resolving the issues as well. This may include subcontractors, suppliers, and any pertinent workers on the project as deemed necessary by the Contractor. For a Project Close-Out Meeting to be effective it is also vital that everyone entering this meeting know that there is no pressure to settle on demands from either side. This meeting cannot be about putting pressure on someone to resolve something or it won't work. Both parties need to know that there is no shame in saying we cannot resolve this and as such must forward the issue to the Claim Review Panel. We all need to recognize that there is nothing wrong with this if it happens as long as we know we've truly exhausted every possible effort to resolve an issue first.

A suggested format that works well in Project Close-Out meetings is to have both parties follow the Conflict Resolution Process. (See Chapter 10 for more details on that process.)

Negotiation itself often comes down to an art form where the best in the business learn the art of how to compromise in the right manner where both the SDDOT and contractor leave the negotiation happy of the outcome. Neither party should ever expect the other party to make concessions without getting something in return. That is what compromise is. That is what makes a strong negotiator.

Negotiation is not a game or a contest. The object of negotiating prices is not about winning and losing for either party as an individual entity. Winning happens when an agreement is reached and both parties are satisfied of the outcome.

