Change Order Approval Process on Federal-Aid Projects

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This is the general outline on the presentation.
Full Oversight and State Oversight projects are determined based on the criteria listed in the “Stewardship and Oversight Agreement” between FHWA and INDOT.

On Full Oversight projects, federal-aid eligibility determinations of change orders are made by FHWA, and by INDOT on State Oversight Projects. INDOT acts on FHWA behalf on State Oversight projects.
FHWA Change Order Policy

“Following authorization to proceed with a project, all major changes in the plans and contract provisions and all extra work shall have formal approval by the Division Administrator in advance of their effective dates.” – 23 CFR 635.120 (a)

FHWA concurrence in the award of the construction contract constitutes authorization to proceed with project construction – 23 CFR 635.114(b).

This regulation states in part: “Concurrence in award ... is a prerequisite to Federal participation in construction costs and is considered as authority to proceed with construction, unless specifically stated otherwise.”
What does this really mean? FHWA must give INDOT the needed “verbal approval” to avoid delaying the contractor from continuing work.
The following are some key definitions to keep in mind: What “Formal Approval” means; Who represents the FHWA “Division Administrator” in this context?
TE Assignments

- Lou Haasis – Fort Wayne and La Port Districts
- Eryn Fletcher – Greenfield and Crawfordsville Districts
- Leslie Lahndt – LPA Program (Statewide)
- Bren George-Nwabugwu – Vincennes & Seymour Districts

They are your contacts at the FHWA Division office.
What **Effective Date** means, and Why it is important in the context of the policy.

The FHWA Transportation Engineer determines the effective date based on available information received at the time of the “Major Change Order” is initiated.

“Verbal approval” – Essentially, this is the **tentative advance approval that is given orally** in the case of emergency or unusual conditions. It **does not guarantee** federal-aid participation. Its **effective date** is the date of the verbal approval. Normally, we encounter **unusual conditions** on construction projects (not emergency). **Emergency** in federal-aid is addressed via the FHWA Emergency Program.

A **good example of an unusual condition** that justifies FHWA verbal approval is when during excavation, a contractor encounters an underground utility that should have been relocated in advance of the scheduled work in this location. Under this circumstance, to avoid delaying the contractor from continuing work, the PE/PS should (immediately) notify Indiana Division Office Transportation Engineer (TE) by phone, discuss the situation and receive verbal prior approval.
A change is “major” if it is proposed to:

1. Add significant cost to the project; or
2. Change the work described in the Environmental Document; or
3. Change the Project Termini or scope of work.

These changes must be approved in advance. It is the responsibility of INDOT to coordinate in a timely manner and receive the required FHWA advance concurrence/approval.

“Non-major change or non-major extra work” – aka “minor”; Like majors, minors require formal approval, but may be given retroactively at the DA’s discretion.
**Change Orders**

**General Rules:**
- Used to make the design a better fit for field conditions. (unforeseen)
- May result in a better product at no substantial increase in cost or time, or an equal product with savings in cost, time, or both.

Essentially, COs make the design a better fit for the actual field conditions.
Change Orders Contd.

- FHWA makes participation decisions on all Full Oversight contract change orders regardless of cost.
- Prior FHWA approval required for major CO’s on Full Oversight projects. (23 CFR 35.120)

When in doubt, please, contact FHWA
Change Orders Contd.

FHWA considers 4 main components during review of CO’s:

- Eligibility for Federal-aid
- Impact on original “Scope of Work”
- Basis of Payment
- Time Adjustments

*(FHWA Contract Administration Manual)*

FHWA considers these when we review Full Oversight change orders. INDOT should be following the same review process on State Authorized projects. This is a fundamental concept of the Stewardship Agreement.

As a general rule of thumb, if the CO work is typically eligible for inclusion in a Federal-aid project, it is typically eligible for Federal participation.
CO must be “justified” for federal-aid participation. Essentially, addressing:
Reason for the change; what caused the change, and why it is necessary. Why it is necessary answers the question: “if not done, what will be the consequence”

Need to perform a suitable analysis and document costs for each negotiated contract change or negotiated extra work order. The cost analysis must be attached to the request. Do not just submit the contractor's breakdown.

Force accounts is a method of payment, and should only be used a “last resort”, when:

1. An agreement cannot be reached with the contractor or
2. The extent of new work is unknown or
3. Work is of such character that a price cannot be determined to a reasonable degree of accuracy.
Change Orders Contd.

**Time Extensions** (23 CFR 635.120 & 121)

- Time necessary to complete work ( Normally granted when events are beyond the control of the contractor and/or SDOT).
- Effect on Critical Path.
Time Extensions Contd.

Utility delays (23 CFR 635.307 & 309)

Time extension resulting from utility work, is usually Non-Participating, especially, if there was no proper coordination between the SDOT and the utility company; OR proper coordination was arranged, but utility work was not completed prior to contractor’s operation in the area.
**Time Extensions Contd.**

The following events are considered to be beyond the control of the contractor and/or SDOT):

- Labor strikes; Acts of God; Declarations of War; Public protest to the project; General riot; Traffic accidents (such as hazardous spills etc); Nationwide shortage of materials; OR when work is the controlling operation.
**Time Extensions Contd.**

Time extensions are not granted under these events that are considered to be under the control of the contractor:

- Shutdowns for maintenance activities,
- Equipment breakdowns,
- Suspensions, stop work orders for violation of safety or pollution regulations,
- Shutdowns for construction accidents, and
- Material delays
When things don’t go in accordance with the approved contract and we end up with a claim…..; please, **document claims** as shown on the slide.

**Early coordination** with your FHWA representative, and his/her involvement is essential

On Full Oversight projects, provide FHWA with **contractor’s submittal** (including **supporting documentations and INDOT’s independent analysis of claim**).

When requesting Federal participation, INDOT shall set forth in writing the legal and contractual basis for the claim, together with the cost data and other facts supporting the award or settlement – 23 CFR 635.124 (c)

Fed-aid participation determined on a case-by-case basis.
Claims Contd. (23 CFR 635.124)

Administrative Settlements:

- Must be supported, and have a basis in terms of the contract and applicable state law.

- Basis shall be in accord with prevailing principles of public contract law.

- Negotiated settlements without full justification will be non-participating.

Administrative settlements must be supported. Sometimes things don’t go in accordance with the approved contract and we end up with a claim…..

“…SDOT shall set forth in writing the legal and contractual basis for the claim, together with the cost data and other facts supporting the award or settlement…”

Fed-aid participation determined on a case-by-case basis. The fact that it would cost more to go to court than settle does not, by itself, provide sufficient justification. Other factors must be taken into consideration.
Eligibility Determination

**Full Participation**: Proposed change order is eligible as submitted

**Participating in-part**: Part(s) of the proposed change order is/are eligible

**Non-Participating**: Proposed change order is ineligible as submitted

In addition to noting the “approval effective date” of the major change, the TE must describe the **type of FHWA approval**, essentially, stating whether the major CO is:

1. fully Participating or
2. Participating-in-Part or
3. Non-Participating
Eligibility

Payment:

- Only pay for acceptable work and materials once. (FHWA Policy)

- Only pay for work and materials meeting specifications that are incorporated into the project. (23 CFR 637.205)

23 CFR 635.123 - States must have procedures to assure quantities of completed work are determined accurately/uniformly. Unacceptable work will be removed and replaced at the contractors expense.
Eligibility

Work & Materials:
- Must comply with PS&E including approved contract change orders. (23 CFR 637.205)
- “Good Faith Efforts” do not justify non-conformance with PS&E.

23CFR630.205 – Essentially, PS&E must be of sufficient detail to facilitate the construction.
Eligibility: Ineligible Costs

- Contract claim awards if SDOT is determined to be negligent. (23 CFR 635.124)

- Administrative settlements not adequately supported and justified. (23 CFR 635.124)

- Work not necessitated by the highway project (i.e. fence upgrades, utility upgrades, etc.) (23 CFR 645.117)

- Maintenance-related work. (23 CFR 1.27)

Betterment Example: Replacing an existing 12” waterline shown in the plans, with a larger pipe. Federal funds can only replace in kind (if not justified).

Betterments: 23 CFR 645.117 requires credit for the costs of betterments.

Maintenance is a State responsibility. Federal funds cannot participate in maintenance on projects, such as cleaning out pipes.
Eligibility: Project Limits

To increase the Project Limits:
- Revised project authorization approved by FHWA. (23 CFR 635.120)
- Approved environmental re-evaluation covering the additional work/limit. (23 CFR 771.129, et.al.)

Prior approval required BEFORE starting Work!

23 CFR 635.120 - Includes that all major changes shall be approved by the DA (FHWA).

23 CFR 771.129 - Requires a re-evaluation to evaluate social, economic, environmental impacts of the proposed improvement. If we change the project limits, we are changing the project termini & possible the scope. There may be environmental effects that were not previously considered.
At the time of the initiation of the major change by the PE/PS, we suggest that the PE/PS initiates the communication with FHWA TE assigned to his/her District.

**FHWA Expectation**

In initiating COs, especially those that do not warrant verbal approval, early communication between the PE/PS and the FHWA TE is essential to assure that the changes being proposed are in conformance with the standards and prior authorization requirements of FHWA.
FHW A Expectation

Each CO request (major or minor) must describe the proposed change in detail, discuss the exact reason(s) for the change, what caused the change, and why the change is necessary. All applicable supporting documentations must be attached to the request.

For consistency, familiarize yourself with FHWA Contract Administration Manual & 23 CFR

Inadequate supporting documentation is a good reason for determining a CO to be non-participating.

Why the change is necessary – if change is not made, what will be the consequence?
Websites to access Title 23, Code of Federal Regulations (CFR), Highways; and the FHWA Contract Administration Core Curriculum Manual, and INDOT's General Instructions to Field Employees

**Additional Info.**

Legislation, Regulations and Guidance
www.gpoaccess.gov/nara

FHWA Contract Admin Manual
http://www.fhwa.dot.gov/programadmin/contracts/coretoc.fcm

INDOT General Instructions to Field Employees (GIFE)
http://www.in.gov/dot/div/contracts/standards/GIFE_Initerim09/GIFEindex.html

Websites to access Title 23, Code of Federal Regulations (CFR), Highways; and the FHWA Contract Administration Core Curriculum Manual, and INDOT's General Instructions to Field Employees
Questions?