

APPENDIX E – CLAIMS AND DISPUTES

Claims

3.1 A Claim is a written demand by one of the parties to the Contract for an interpretation of Contract terms or an adjustment in Contract conditions including Price or Time and may involve questions of performance under the Contract including acceptability of work, progress of work, the extent to which work has been completed, whether work is included in the Contract, and other matters in question between the Owner and the Contractor.

3.2 Content of Claim. Claims shall be made in writing and shall include complete documentation including:

.1 The Contractor's certification, by its owner or an officer, under penalty of perjury, that (a) the claim is made in good faith, (b) supporting data are accurate and complete to the best of the Contractor's and subcontractor's knowledge and belief, and (c) the amount requested accurately reflects the Contract adjustment for which the Contractor believes the Owner is liable.

.2 Full disclosure of facts and detailed reasons supporting the Claim and citing relevant provisions in the Contract Documents.

.3 Complete documented cost of doing the work for which it is making a Claim and such cost and documentation shall be submitted in accordance with paragraphs 3.9 through 3.12.

Engineer's Decisions

3.3 The Engineer, as an arbiter of disputes, will make an initial decision on all Claims made prior to the date the final payment is due including Claims alleging an error or omission by the Engineer. The Engineer's decision will be in writing, will be consistent with the intent of the Contract Documents and will cite the basis on which it is made. The Engineer will endeavor to make decisions that are impartial and will not be liable for results of decisions made in good faith. The Engineer's decision is a condition precedent to a demand by either party that a Claim be settled by litigation, or if agreed to in advance by both parties or if required by law, be settled by mediation or arbitration.

Time Limits for Submitting and Deciding Claims

3.4 The Contractor shall give written notice 5 days prior to beginning any work for which it intends to make a Claim for an increase in Contract Time or Price and expressly waives any right to make a Claim if the required notice is not given. All other Claims must be made within 14 days of the time the condition giving rise to the Claim becomes known to the claimant. The Engineer, as an arbiter of disputes, will issue a written decision on the Claim within 30 days after receipt of the Claim unless additional information is requested from the claimant or the claimant amends the Claim and then a decision will be issued within 30 days after receipt of additional information, or an amended Claim. Should a Claim be presented that is in part timely and in part untimely, the Engineer shall reject the untimely Claim and decide the timely claim. All Claims must strictly follow the notice requirements of this agreement.

3.5 A demand to appeal the Engineer's decision and settle a Claim by litigation, mediation or arbitration can only be made after the Engineer has made a written determination, or in the absence of a determination, 7 days after the Engineer's determination became due. If no demand to settle a Claim by litigation, mediation or arbitration is made within 15 days after the Engineer's written decision was issued, the Engineer's decision shall become final and binding on the Owner and the Contractor and if a change in Contract Time or Price is involved, a Change Order shall be signed by both parties.

3.6 Provisions of law notwithstanding, the Owner and Contractor hereby agree that neither the Engineer, the Design Engineer, nor any other third party shall, without its specific written consent, be required to participate as a party in any litigation, arbitration or mediation proceedings between the Contractor and the Owner initiated to resolve disputes under the Contract Documents.

Mediation

3.7 If any dispute, controversy, or Claim (hereinafter referred to as a dispute) arises out of or relates to this Contract, or breach thereof, and if the dispute cannot be settled through direct discussions, then the parties first agree to try to settle the dispute by mediation before resorting to litigation or some other dispute resolution procedure. The mediator shall be an attorney experienced in mediating construction disputes and shall be chosen by agreement of the parties, but if no agreement then appointed by the Presiding Judge of the Superior Court in the jurisdiction of the site. Each party shall bear its own costs and expenses of the mediation, including attorney's fees. The fees and costs of the mediator shall be borne equally by the parties.

Work Continued During Disputes

3.8 The Contractor shall continue to work in conformance with the requirements of the Contract Documents and the progress schedule during any dispute and when waiting for decisions on Claims by the Engineer or for resolution of Claims by litigation, mediation or arbitration, unless otherwise directed in writing by the Engineer or Owner.

Documenting cost:

Determining Cost of Changes

3.9 The Contractor's quotations of cost on proposed changes and cost reported for work performed on a cost accounting basis shall be determined as the sum of the following:

.1 costs of labor including foremen engaged on the work but not of the Superintendent, field engineer, project manager, and other supervisory or support personnel except as provided in paragraph 3.9.5. Labor costs shall include the cost of social security, old age and unemployment insurance, fringe benefits required by labor agreements and workers' or workmen's compensation insurance;

.2 costs of materials, supplies and equipment, including cost of transportation, incorporated in the Work;

.3 rental costs of machinery and equipment, exclusive of portable power or hand tools, supplied by the Contractor or rented from others;

.4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the change;

.5 the increased or decreased cost of the Contractor's supervision and field office personnel but only if the change affects the "critical path" of construction activities and requires a change in Contract Time;

.6 the reasonable cost of any tier of subcontractors' work computed as required for the Contractor's work. The mark-up charged by a subcontractor for overhead and profit shall be the lesser of: i) subject to negotiation, ii) as included in the original bid for the Work, or iii) not to exceed the described amounts in the Standard Construction Specifications, and

.7 for the reasonable work performed by the Contractor, the mark-up for overhead, profit and all other costs shall be the lesser of: i) subject to negotiation, as included in the original bid for the Work and contained in escrowed bid documents, or iii) not to exceed the amounts specified in the Standard Construction Specifications.

.8 Limitations on Markup for Changes. Where multiple tiers of Subcontractors are involved in a change in the Work, the maximum total amount of adjustment to the Contract Price and for markup for all tiers of Subcontractors and for Contractor self-performed Work shall not exceed twenty percent (20%) of the direct costs incurred by Contractor and the Subcontractors and Material Suppliers actually performing the Work.

Work shall be done making the most effective use of labor; materials shall be purchased at the lowest available price and all discounts shall be passed on to the Owner; equipment shall be rented at the most favorable rate available for the term of use required.

3.10 When both additions and deletions are related and pertain to the same work item and are included in the same Change Order, the mark-up for overhead and profit shall be computed on the net increase, if any. No deductions for overhead and profit will be made on deductive changes except for deductive changes that materially change the scope of the work or deductive changes issued pursuant to the Owner's right to correct defective work, the Owner's right to remedy the Contractor's default or neglect or the Owner's right to terminate the Contract for cause.

3.11 The Contractor shall keep the Engineer informed as to when and where work is being performed on a cost accounting basis and shall submit complete auditable records of the cost of such work including daily time sheets signed daily by the Engineer.

3.11.1 Contractor Maintenance of Daily Records for Changes. In the event that Contractor is directed to perform any changes to the Work, or should Contractor encounter conditions which the Contractor believes would obligate the Owner to adjust the Contract Price and/or the Contract Time, Contractor shall maintain detailed records of the cost of such changes on a daily basis and a summary in a daily report supplemented by back-up records. Such records shall include without limitation hourly records for labor and construction equipment, itemized records of materials, including delivery tickets, and equipment used each day in connection with the performance of any change to the Work. In the event that more than one change to the Work is performed by Contractor in a calendar day, Contractor shall maintain separate records of labor, construction equipment, materials, and equipment for each such change. In the event that any Subcontractor of any tier shall provide or perform any portion of any change to the Work, Contractor shall require that each such Subcontractor maintain records in accordance with this Article. Each daily record maintained hereunder shall be signed by the Contractor; such signature shall be deemed Contractor's representation and warranty that all information contained therein is true, accurate, complete, and relates only to the change referenced therein. All records maintained by Subcontractors of any tier, relating to the costs of a change in the Work shall be signed by such Subcontractor's authorized Project Manager or Superintendent as a representation and warranty that all information contained therein is true, accurate, complete, and relates only to the change referenced therein. All such records shall be delivered to Engineer not later than on the day the Work is performed (same day) for independent verification. The Engineer shall attempt to review and reconcile costs of changes on a daily basis. The Engineer's signature on the report shall indicate agreement with the information reflected therein, not that the Contractor is entitled to payment of the costs in the report. If the Engineer disagrees with the response, the Engineer shall note the areas of disagreement on the report. In the event that the Contractor shall fail or refuse, for any reason, to maintain or make available for inspection, review and/or reproduction such records, adjustments to the Contract Price or Contract Time, if any, on account of any change to the Work may be deemed waived for that day. Contractor's obligation to maintain back-up records hereunder is a material inducement to and in addition to, and not in lieu of, any other Contractor obligation under the Contract Documents with respect to changes to the Work.

3.11.2 Labor. The daily report shall show the names, trade, labor, classifications, and hours worked, for the workers.

3.11.3 Material. The daily report shall describe and list quantities of materials used, attaching delivery tickets.

3.11.4 Equipment. The daily report shall show type of equipment, size, identification number, and hours of operation, including loading and transportation, if applicable.

3.11.5 Other Services and Expenditures. Other services and expenditures shall be described in such detail in the daily report as the Owner or Engineer may require.

3.11.6 Cost. The report shall provide dollar values for each category of cost.

3.12 Any work for which the Contractor may wish to make a claim shall be done in accordance with these requirements for work done on a cost accounting basis.