

# SECTION 9 - CHANGES AND CLAIMS

## TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
9-1 AUTHORITY FOR CHANGES.....	9.1
9-2 ORDERING OF CHANGES.....	9.1
9-3 CONSTRUCTION INCENTIVE CHANGE PROPOSAL (CICP) .....	9.1
9-3.01 General .....	9.1
9-3.02 Description .....	9.1
9-3.03 Submittal .....	9.2
9-3.03.A Pre-Submittal .....	9.2
9-3.03.B CICP Submittal.....	9.2
9-3.04 Acceptance .....	9.3
9-3.05 Sharing Provisions and Formula .....	9.3
9-4 CHANGES TO THE CONTRACT.....	9.3
9-5 PROSECUTION OF CHANGES TO THE CONTRACT .....	9.3
9-6 COST AND PRICING DATA.....	9.4
9-7 ACCESS TO RECORDS .....	9.4
9-8 PAYMENT FOR CHANGES .....	9.4
9-8.01 Lump Sum Price .....	9.4
9-8.02 Unit Prices.....	9.4
9-8.03 Force Account .....	9.5
9-8.03.A Labor.....	9.5
9-8.03.A.(1) Actual Wages.....	9.5
9-8.03.A.(2) Labor Surcharge .....	9.5
9-8.03.A.(3) Subsistence and Travel.....	9.6
9-8.03.B Materials .....	9.6
9-8.03.C Equipment.....	9.6
9-8.03.D Subcontracts.....	9.6
9-9 MARKUPS FOR CHANGED WORK .....	9.6
9-10 COMPENSABLE UNAVOIDABLE DELAYS.....	9.7
9-10.01 Construction Equipment .....	9.7
9-10.02 Jobsite Indirect Costs.....	9.7
9-10.03 Markup for Compensable Unavoidable Delays .....	9.7
9-10.04 Duplicated Overhead Costs.....	9.8
9-11 LIMITATIONS ON PAYMENTS FOR CHANGED WORK .....	9.8
9-12 TIME EXTENSIONS FOR CHANGES .....	9.8
9-13 EFFECT ON SURETIES OF CHANGES TO THE WORK .....	9.8
9-14 CONTRACT CHANGE ORDER (CCO) .....	9.8
9-15 ACCEPTANCE OF ORDERS FOR CHANGES .....	9.8
9-16 DISPUTE REGARDING CONTRACT REQUIREMENTS.....	9.9
9-17 NOTICE AND MITIGATION OF POTENTIAL CLAIM.....	9.9
9-17.01 Notice of Potential Claim (NOPC).....	9.9
9-17.02 Duty to Mitigate Damages.....	9.9
9-18 SUBMISSION OF CONSTRUCTION CLAIMS.....	9.10
9-18.01 In General .....	9.10
9-18.02 Purpose.....	9.10
9-18.03 Claim Documentation.....	9.10
9-18.04 Claim Resolution Process .....	9.11

9-18.05	Qualifications of A Mediator.....	9.12
9-18.06	Vacancies .....	9.12
9-18.07	Representation .....	9.12
9-18.08	Time and Place of Mediation.....	9.13
9-18.09	Identification of Matters in Dispute.....	9.13
9-18.10	Authority of Mediator .....	9.13
9-18.11	Privacy .....	9.13
9-18.12	Confidentiality.....	9.13
9-18.13	No Stenographic Record.....	9.13
9-18.14	Termination of Mediation.....	9.14
9-18.15	Exclusion of Liability .....	9.14
9-18.16	Interpretation and Application of These Mediation Provisions .....	9.14
9-18.17	Expenses .....	9.14
9-19	RESERVED .....	9.14
9-20	RESERVED .....	9.14
9-21	NO ALTERNATIVE CLAIMS PROCEDURE .....	9.14
9-22	ASSIGNMENT OF CLAIMS .....	9.14
9-23	NO WAIVER OF GOVERNMENT CLAIM PROCESS .....	9.14

## **SECTION 9 - CHANGES AND CLAIMS**

### **9-1 AUTHORITY FOR CHANGES**

The Agency reserves the right to order corrections, alterations, additions, modifications, deletions or other changes required for the proper completion of the Work. The order may be made prior to the final acceptance of the Contract without voiding the Contract, without notice to the Contractor's sureties, and in accordance with the provisions of 9-2, "Ordering of Changes", of these Specifications.

The Contractor must not perform corrections, alterations, additions, modifications, deletions, or other changes to the Work without a written order from the Agency, in accordance with Section 9-2, "Ordering of Changes", of these Specifications.

Payment for changed or extra work will not be made without the Agency's written authorization for the changed or extra work.

### **9-2 ORDERING OF CHANGES**

The Agency may order a change, in writing, during the course of the Work, and the Contractor must comply with the order. Changes to the Work do not affect, vitiate, or make void the Contract or any part thereof, except that which is necessarily affected by the changes and is clearly the intent of the parties to the Contract.

Changes to the Work may be initiated as described in Section 4-5, "Field Instructions or Other Written Directives", of these Specifications. Changes that require an adjustment to the Total Contract Price or the Contract Time will be formalized in a Contract Change Order, in accordance with Section 9-14, "Contract Change Order (CCO)", of these Specifications. Failure of the Agency and Contractor to agree to terms of an order for change does not relieve the Contractor of his obligation to complete all work specified in the order.

### **9-3 CONSTRUCTION INCENTIVE CHANGE PROPOSAL (CICP)**

#### **9-3.01 General**

The Construction Incentive Change Proposal (CICP) Program provides a means for the Contractor to use his expertise to improve Contract performance to create an overall reduction in the Total Contract Price. Proposing to delete work is not a CICP. Deleted work is addressed in Section 4-8, "Deleted Items", in these Specifications. The CICP Program does not apply to Agency contracts of less than \$100,000. The Contractor and Subcontractors at any tier may participate in the CICP Program. Participation of Subcontractors is through the Contractor and the Contractor and his Subcontractor (s) must agree on the cost savings arrangement. Written evidence of the arrangement must be submitted with the CICP.

While a CICP is being considered or processed, the Contractor must proceed with the Work as scheduled.

#### **9-3.02 Description**

A CICP is a formal written proposal for a Contract Change Order. A CICP must be initiated, developed, and identified as a CICP by the Contractor or his Subcontractor. A CICP must result in a net capital cost reduction while causing no increase in the total life cycle cost of the Project and must comply with the following conditions:

- Required function, reliability, and safety of the Project must be maintained without detracting from the life expectancy or increasing maintenance requirements.

- The proposed change must not cause undue interruption of the Work or extend the Contract Time.
- The proposed change must comply with all applicable permits, regulations, code requirements, and all requirements set forth in the Contract. The proposed change cannot involve payment of royalties by the Agency to the Contractor.

### **9-3.03 Submittal**

#### **9-3.03.A Pre-Submittal**

Before preparing a CICIP, the Contractor and any participating Subcontractor(s) must meet with the Agency to discuss:

1. Proposal concept
2. Permit issues
3. Impact on other projects
4. Project impacts, including traffic, schedule, and later stages
5. Peer reviews
6. Overall proposal merits
7. Review times required by the Agency and other entities

#### **9-3.03.B CICIP Submittal**

A CICIP submittal must contain adequate information and supporting documentation for Agency evaluation. At a minimum, the following information must be submitted:

1. Name of individuals associated with the development and preparation of the CICIP.
2. A detailed description and plans and specifications showing work as presently designed and the proposed changes. The plans and specifications must be stamped and signed by a California-registered civil engineer.
3. A clear explanation of all advantages and disadvantages for each proposed change.
4. A detailed procedure and schedule for implementing the proposed change. This detailed procedure and schedule must describe all necessary Contract amendments. Also indicated must be the latest date that the CICIP can be approved for timely implementation.
5. A summary of costs, including:
  - a. Project construction costs before and after the CICIP. This must be a detailed estimate identifying the following items for each trade involved in the CICIP:
    - Quantities of material and equipment
    - Unit prices of materials and equipment
    - Labor hours and rates for installation
    - Subcontractor and prime Contractor markups
    - Operation and maintenance costs before and after the CICIP
    - Cost for implementing the CICIP not included elsewhere
  - b. Contractor's share of the savings based on the sharing provision in Section 9-3.05, "Sharing Provisions and Formula", of these Specifications.
  - c. Other data as required by local permits and regulations and code requirements as set forth in the Contract.
6. Time required for execution of the proposed change.

To the extent indicated herein, the Contractor may restrict the Agency's use of a CICIP or the supporting data submitted by that Contractor pursuant to this program. To do so, the Contractor must include language in the CICIP substantially in the following form:

"This data furnished pursuant to the construction incentive clause of the Contract must not be disclosed or duplicated in whole or in part beyond what is necessary to accomplish the Agency's review. This restriction does not limit the Agency's right to use the information if it is available from any other source without limitations. The Agency has the right to duplicate, use and disclose such information if the CICIP is accepted."

The Agency may modify, accept, or reject the CICIP. If the CICIP is modified or not acted upon within the time allotted in the proposal, the Agency will not be liable for the Contractor's cost of developing the CICIP if it is withdrawn or rejected.

#### **9-3.04 Acceptance**

The Agency will use the processing procedure specified for Change Orders in Section 9-14, "Contract Change Order (CCO)", of these Specifications, if a CICIP is accepted. The Agency's written approval of the CICIP is required. If the CICIP is rejected, the Contractor cannot appeal the decision.

#### **9-3.05 Sharing Provisions and Formula**

Upon acceptance of the CICIP, the Contractor will receive 50% of the Net Capital Savings based on the following formula:

$$\text{Net Capital Savings} = \text{Contract Cost Prior to CICIP} - (\text{Revised Contract Cost After CICIP} + \text{Contractor's CICIP Development Cost} + \text{Agency's CICIP Implementation Cost})$$

The Contractor's CICIP development cost is limited to those costs directly associated with the preparation of the CICIP package. Development costs will be reimbursed after approval. The Agency will reject costs that cannot be satisfactorily substantiated.

The Agency's CICIP implementation costs include engineering costs for reviewing and redesigning the changes plus any additional inspection and testing costs. Agency costs for processing the CICIP are excluded.

### **9-4 CHANGES TO THE CONTRACT**

Within 14 Calendar Days of a Notice of Potential Claim from the Contractor or issuance of an order or a request for proposal from the Agency for a change to the Contract, the

Contractor must provide a cost and time proposal prepared in accordance with Sections 9-8, "Payment for Changes", and 9-12, "Time Extensions for Changes", of these Specifications. The Contractor's proposal must indicate the amount to be added or deducted from the Total Contract Price, supported by complete details of all Contractor, Subcontractor, vendor or supplier costs per Section 9-6, "Cost and Pricing Data", of these Specifications. If the Agency opts not to proceed with the change, the Agency will reimburse the Contractor for the actual costs associated with the preparation of the proposal. The Contractor must submit an invoice prepared in accordance with Section 9-8.03 of these Specifications.

If the Contractor does not submit a proposal within 14 Calendar Days, the Contractor agrees to perform the work described in the order for change with no additional compensation or contract time. If the order for change is issued on a force account basis, the Contractor must immediately begin keeping records in accordance with Section 9-8.03, "Force Account", of these Specifications.

## **9-5 PROSECUTION OF CHANGES TO THE CONTRACT**

The Contractor must comply with and prosecute all portions of the order for change with the same diligence and manner as if the changes were originally included in the Contract, except as otherwise provided in the order.

If agreement is reached regarding payment, but not a time adjustment, the Agency has the right to direct the Contractor to proceed with the change at the agreed price. The impact of the changed work on the project schedule will be considered by the Agency in accordance with Section 9-12, "Time Extensions for Changes", of these Specifications.

When the Agency and Contractor cannot agree on the credit for deleted work (see Section 4-8 of these Specifications), the Agency's estimate will be deducted from the Total Contract Price, unless the Contractor presents proof prior to the Final Payment that the Agency's estimate is in error.

## **9-6 COST AND PRICING DATA**

Cost and pricing data submitted by the Contractor must be true, complete, accurate, and current. The Agency may require a formal certification by a corporate officer to verify Contractor-submitted cost and pricing data. Additional requirements for cost and pricing data may be included in the Special Provisions. The Agency must have access to the records supporting the cost and pricing data in accordance with Section 9-7, "Access to Records", of these Specifications.

## **9-7 ACCESS TO RECORDS**

Upon reasonable notice and during normal business hours, the Agency must be given access to the Contractor's and Subcontractors' records for the purpose of verifying and evaluating the changed Work, including the accuracy of cost and pricing data submitted by the Contractor. "Records" as used in this Section include: original estimates, subcontract agreements, purchase orders, books, documents, accounting records, papers, project correspondence, project files, and scheduling information necessary to determine the direct and indirect costs, job site, area and home office overhead, delay and impact costs. Records must include the original Bid and all documents related to the Bid and its preparation, the as-planned construction schedule and all related documents. Access includes the right to examine and audit records and make excerpts, transcriptions, and photocopies at the Agency's expense.

## **9-8 PAYMENT FOR CHANGES**

The method of payment agreed upon by the Contractor and the Agency or selected by the Agency in the absence of agreement, will be set forth in the order for change.

Methods of payment are:

### **9-8.01 Lump Sum Price**

The Contractor submits a lump sum price proposal that includes all labor, material, equipment, Subcontractor, and material supplier costs, and all labor surcharges, sales tax, and markups as stipulated in Section 9-9, "Markups for Changed Work", these Specifications.

If the Agency and the Contractor agree to a Lump Sum payment, no additional payment or adjustment will be made.

### **9-8.02 Unit Prices**

If payment for Contract work is based on unit prices, payment for changed work will be made based on actual quantities of work done at the unit prices contained in the Contract or unit prices otherwise agreed to by the Agency and Contractor if none are contained in the Contract. Payment for changed work based on Contract or agreed upon unit prices includes the full cost of the item of work including profit and overhead; and no additional payment or adjustment will be made.

If an ordered change materially changes the character of the work of a Contract item from that on which the Contractor based the bid unit price, and if the change increases or decreases the actual unit cost of the changed item compared to the actual or estimated actual unit cost of performing the work of that item in accordance with the plans and specifications originally applicable thereto, in the absence of an executed Contract Change Order specifying the compensation payable, an adjustment in compensation may be made in accordance with the following:

Unit price adjustments for material changes will be the difference between the actual costs to perform the work as originally planned and the actual unit cost of performing the work of the item or portion thereof involved in the change, or as agreed to by the Contractor and the Agency. Actual unit costs will be determined by the Agency in accordance with Section 9-8.03, "Force Account", of these Specifications. The adjustment will apply only to the portion of the work actually materially changed in character. At the option of the Agency, the materially changed work will be paid for by force account per Section 9-8.03, "Force Account", of these Specifications.

### **9-8.03 Force Account**

In the absence of either an agreed lump sum price or unit prices for a change, the Agency may direct the Contractor to proceed with the changed work on a force account basis. The Contractor must keep and present, in a form acceptable to the Agency, a complete and correct accounting of all costs associated with the change, including all pay records, vouchers, invoices, etc. The Contractor will be paid for labor, materials, and equipment actually used during the performance of the changed work as specified in Sections 9-8.03.A, "Labor", 9-8.03.B, "Materials", and 9-8.03.C, "Equipment" of these Specifications; plus the percentages stipulated in Section 9-9, "Markups for Changed Work".

To facilitate agreement on direct craft labor hours, construction equipment hours, and material quantities, the Contractor must notify the Agency not less than 4 hours prior to starting force account work. The Contractor must submit Daily Extra Work Reports (DEWRs) for signature no later than 9:00 a.m. the day following performance of force account work. DEWR's must list names of all Contractor's staff, the staff person's craft or trade, all craft or trade labor hours, and all material and construction equipment used to perform the changed work. The Contractor must use the Agency's DEWRs in preparing billings for force account work.

All documentation supporting Force Account work must be priced out and submitted to the Agency no later than 30 Calendar Days after the work is completed. Failure by the Contractor to notify the Agency of the beginning of the extra work, submit the DEWRs as required, or submitting support documentation may result in the Agency denying the costs of the extra work.

#### **9-8.03.A Labor**

The Contractor will be paid the cost of direct labor (foreperson and below) used in the actual and direct performance of the changed work including working foreman when authorized by the Agency. The Contractor will receive no additional compensation for overtime work without prior written authorization from the Agency. The cost of labor will be the sum of the following:

##### **9-8.03.A.(1) Actual Wages**

Charges for labor will be the Contractor's actual payroll costs for labor, including employer payments to or on behalf of the workers for health and welfare, pension, vacation, and similar purposes.

##### **9-8.03.A.(2) Labor Surcharge**

A 26% surcharge for taxes, insurance, and all other payments made to or on behalf of the employee may be added to the actual wages.

**9-8.03.A.(3) Subsistence and Travel**

The Agency will pay the Contractor for actual subsistence and travel allowance costs associated with the changed work required by labor agreements or acceptable to the Agency. Documentation must be provided to the Agency.

**9-8.03.B Materials**

Payment will be for the purchaser's actual cost of supplier or vendor furnished materials. If the Contractor does not furnish satisfactory evidence of the cost of the materials, the cost will be the lowest current wholesale price at which required quantities of materials are available and delivered to the job site. The Agency reserves the right to purchase materials for the changed work; the Contractor has no claim for costs or profit on the materials.

**9-8.03.C Equipment**

The prices paid for equipment directly and solely required for performance of the changed work will be those listed in the current edition of the Caltrans publication, "Labor Surcharge and Equipment Rental Rates". If the equipment is not shown in this publication, the Contractor will be paid hourly rental rates agreed upon by the Contractor and the Agency prior to use of the equipment, plus 33-1/3% for the cost of fuel, oil, lubrication, field repairs, and maintenance

if not included in the rental rate. The hourly rental rates cannot exceed those of established distributors or equipment rental agencies serving the area, as determined by the Agency.

The rate paid for the use of equipment constitutes full compensation to the Contractor for all costs, including fuel, power, oil, lubrication, supplies, small tools, small equipment, necessary attachments, repairs and maintenance, depreciation, storage, insurance, labor (except for equipment operators), and costs to the Contractor incidental to the use of the equipment for the changed work.

Payment will not be made for the equipment while it is inoperative due to breakdowns or for time in which no changed work was performed. Payment for rentals will include time required to move equipment to the changed work from the nearest available rental source and to return it to the source. However, no moving, loading, or transportation costs will be paid if the equipment is used for any other portion of the Work.

Individual pieces of equipment having replacement value of \$500 or less are considered tools or small equipment and no payment will be made for those pieces of equipment.

**9-8.03.D Subcontracts**

Subcontract costs are the actual cost to the Contractor for work performed by a Subcontractor. The provisions of Section 9-8.03, "Force Account", of these Specifications apply to the computation of subcontract costs. Subcontractors must compute markups per Section 9-9, "Markups for Changed Work", of these Specifications.

**9-9 MARKUPS FOR CHANGED WORK**

Only direct costs directly attributable to the performance of the changed work are allowed. All other costs are included in the allowed markups, including, but not limited to, profit, home office overhead, jobsite indirect costs, jobsite office personnel, general field superintendence, general engineering, supervision of labor, bond and insurance premiums, and general field expense, and constitutes full compensation for all costs not included as actual labor, materials, equipment, or Subcontractor costs. Markups for changed work must not exceed the following:

Labor	25%
Materials	15%
Equipment Rental	15%



The Contractor or Subcontractor, whoever actually performs the changed work, may add the markups to the total of allowable costs. When a Subcontractor performs work, the Contractor and higher tiered Subcontractors may add as mark-up to the total of allowable costs an aggregate amount not to exceed 5%, subject to the limitations of this Section. When the Agency is entitled to credit for deleted work, a 10% credit for deleted overhead of the Contractor or Subcontractor, as applicable, will be added to the credit.

## **9-10 COMPENSABLE UNAVOIDABLE DELAYS**

Payments will be made as follows for compensable unavoidable delays, as defined in Section 7-12.02, “Unavoidable Delays”, in these Specifications.

### **9-10.01 Construction Equipment**

Compensation will be paid for construction equipment idle as a result of a compensable unavoidable delay to the extent costs are incurred. The prices paid for equipment will be those in the current edition of the Caltrans publication, “Labor Surcharge and Equipment Rental Rates”, with the following modifications:

- The right-of-way delay factor for each classification of equipment will be applied to the rental rate.
- Compensation will be provided for the actual time of the delay, but not more than 8 hours per day.
- Compensation will only be paid for equipment that was actually idle; Agency will not compensate for equipment that was removed from the jobsite during the idle period.
- Compensation will be provided for each day or portion of a day, excluding Saturdays, Sundays and holidays, for the duration of the delay.

### **9-10.02 Jobsite Indirect Costs**

Indirect costs are limited to the following:

1. Actual payroll costs for field office staff incurred as a result of the delay, including management, supervision, safety, estimating, engineering, drafting, clerical, secretarial and accounting. A 26% surcharge for taxes, insurance, and all other payments made to or on behalf of the employee may be added to the payroll costs.
2. Actual cost for third-party services provided for the field office, such as management, supervision, safety, estimating, engineering, drafting, clerical, secretarial, and accounting utilized in lieu of employees.
3. Applicable field office expenses for rent and utilities that are substantiated by invoices. Compensation for on-site plant, incidentals, and facilities for non-field office personnel including branch office and home office personnel will not be provided. Compensation for these items and other incidentals is included in the following Section 9-10.03, “Markup for Compensable Unavoidable Delays”, of these Specifications.

### **9-10.03 Markup for Compensable Unavoidable Delays**

Except for compensable unavoidable delays associated with archeological and cultural resources as described in Section 10-12, “Archeological and Cultural Resources”, of these Specifications and right-of-way delays, 15% can be added to job-site indirect costs for onsite plant, incidentals, overhead, home and branch office costs, bonds, insurance, and profit. The Contractor must determine the distribution of the markup among the Contractor, Subcontractors, and suppliers.

**9-10.04 Duplicated Overhead Costs**

If the Contractor is compensated for delays in accordance with this Section, and the delay is attributable to direct cost changes to which markups were added, in accordance with Section 9-9, “Markups For Changed Work”, of these Specifications, those markups will be adjusted to 5% for profit only as all overhead costs are compensated in accordance with Sections 9-10.02 and 9-10.03 of these Specifications.

**9-11 LIMITATIONS ON PAYMENTS FOR CHANGED WORK**

The Agency will not pay the Contractor for costs in excess of prevailing market values, unless the Contractor can establish, to the satisfaction of the Agency, that the Contractor has investigated all possible means of providing the work and that the excess costs could not be avoided. The Agency will be the sole judge of the necessity of incurring costs in excess of market value and whether the excess costs are directly required for performance of changed work. The Agency’s determination will be final.

**9-12 TIME EXTENSIONS FOR CHANGES**

The Contractor is entitled only to an adjustment in Contract Time if completion of the entire Work is extended due to the change impacting the controlling item of work. Each proposal submitted by the Contractor in accordance with Section 9-4, “Changes to the Contract”, of these Specifications must state the amount of extra time the Contractor believes the change added to the overall project schedule. Failure to request a time extension within the time allowed constitutes a waiver of the Contractor’s right to subsequently claim an adjustment in Contract Time.

**9-13 EFFECT ON SURETIES OF CHANGES TO THE WORK**

Alterations, time extensions, extra or additional work, or other changes authorized by these Specifications, the Special Provisions, or any part of the Contract do not affect or change the sureties’ obligations under the Contract.

**9-14 CONTRACT CHANGE ORDER (CCO)**

The Agency will issue a Contract Change Order (CCO) for approval if a change to the Total Contract Price or Contract Time is necessary. The Contractor is not entitled to adjustments in either Contract Time or Total Contract Price for changes performed without written direction from the Agency. Adjustments in Contract Time or Total Contract Price for changes performed will not be made until a Contract Change Order is approved. A Contract Change Order is comprised of one or more Field Instructions or other written directives and contains a summary of each change and changes to the Contract Time or Total Contract Price.

Certain Contract Change Orders will require the approval of the Board of Supervisors if authority is not otherwise delegated to Agency officers pursuant to Public Contract Code Sections 20135 through 20142 and County Code Section 2.61.057.

**9-15 ACCEPTANCE OF ORDERS FOR CHANGES**

The Contractor’s written agreement of a Contract Change Order, Field Instruction, or other written directive constitutes final and binding agreement to the provisions of the Contract Change Order, Field Instruction, or other written directive, and a waiver of all claims in connection therewith, whether direct or consequential in nature, including those of Subcontractors or suppliers. If the Contractor disagrees with a Contract Change Order, Field Instruction, or other written directive, the Contractor may submit a Notice of Potential Claim to the Agency in accordance with Section 9-17, “Notice and Mitigation of Potential Claim”, of these Specifications. Disagreement with the provisions of a Change Order, Field Instruction, or other written directive does not relieve the Contractor of the Contractor’s obligations under the Contract.

## **9-16 DISPUTE REGARDING CONTRACT REQUIREMENTS**

If the Contractor and Agency fail to agree on whether any work or other matter is within the scope of the Contract, the Contractor must nevertheless immediately perform the work upon receipt of a written Field Instruction or other written directive. Within 14 Calendar Days after receipt of the Field Instruction or other written directive, the Contractor may submit a written protest detailing the Contract requirements exceeded or deviated from and the approximate cost and/or time change. Failure to submit a protest within the specified period constitutes a waiver of the Contractor's rights to adjustments in the Total Contract Price or Contract Time for the disputed Contract requirement.

The Contractor must not stop performing the Work pending resolution of a dispute, unless ordered in writing by the Agency.

If the Agency agrees with the Contractor's written protest, the Total Contract Price and/or Contract Time will be adjusted through a Contract Change Order. The Agency will provide written notification of protests and claims denied by the Agency.

## **9-17 NOTICE AND MITIGATION OF POTENTIAL CLAIM**

### **9-17.01 Notice of Potential Claim (NOPC)**

The Contractor is not entitled to additional compensation for any cause, including a disagreement, protest, or change, an act or failure to act by the Agency, or the happening of an event, thing or occurrence, unless the Contractor has given the Agency advance written notice of potential claim (NOPC). The NOPC must clearly describe the nature, circumstances, and basis of the potential claim, and must explain the reasons that the Contractor believes additional compensation and/or time will or may be due, the nature of the costs and/or time involved, the amount of the potential claim, a request for equitable adjustment, and written and verifiable documentation and support. The nature, circumstances, basis, and reasons must remain consistent.

Except as required in Section 9-18, "Submission of Construction Claims", of these Specifications, the Contractor must promptly provide an NOPC to the Agency upon discovery of concealed or unknown conditions or a disagreement, protest, situation, event, or occurrence that may result in a claim. This notice must be submitted no more than 7 Calendar Days after the discovery or occurrence of an event that may be the basis for a claim for additional compensation or time; failure to do so waives the claim.

If costs or time cannot be reasonably determined at the time the NOPC is provided, the NOPC must be amended to include quantified cost and time impacts within 30 Calendar Days after work has ceased on the event that prompted the NOPC; failure to do so waives the claim. For NOPC events that extend more than 30 Calendar Days the Contractor must provide a monthly accounting of ongoing costs and time impacts by the 5th day of the succeeding month; failure to do so waives the claim.

### **9-17.02 Duty to Mitigate Damages**

The Contractor is required to take all reasonable and practical efforts to mitigate the damaging effects of a potential current or future claim it perceives as a result of an act or failure to act on the part of the Agency, or as a result of an event, thing or occurrence. Written notice by the Contractor of a potential claim does not excuse the Contractor from pursuing the mitigation of a claim in good faith and with due diligence. Where possible, or if directed by the Agency, the Contractor must be prepared to discuss various methods of mitigation with the Agency prior to actual mitigation.

The obligation to minimize foreseeable damages requires that the Contractor use reasonable care and diligence to prevent an unwarranted incurrence of damages from a delay caused by

the other party or an unforeseen event. If, in the opinion of the Agency, the delay could have been avoided by due care of the Contractor, the Contractor will be responsible for additional costs attributed to the failure to mitigate.

## **9-18 SUBMISSION OF CONSTRUCTION CLAIMS**

### **9-18.01 In General**

Claims procedures shall be in accordance with Public Contract Code Section 9204 as restated and supplemented herein. Claims must be submitted to the Engineer.

For the purposes of this Section 9-18, a “claim” is as defined in Public Contract Code Section 9204 and includes a collection of separate demands on the same project.

### **9-18.02 Purpose**

The purpose of this Section shall be to provide a process for the resolution of construction contract disputes at the department level prior to initiating any other claims process or legal action against the Agency. Where a claim seeks payment by the Agency of money or damages, compliance with this Section 9-18 shall be a prerequisite to, but not a substitute for, compliance with the claims process set forth in the Government Claims Act (California Government Code Section 810 et seq.).

### **9-18.03 Claim Documentation**

For any claim, the Contractor must furnish reasonable claim documentation as specified herein.

Contractor must submit one electronic and three hard copies of the claim. The evaluation of the Contractor's claim will be based on Agency's records and the claim documentation submitted by Contractor.

Claim documentation must conform to generally accepted auditing standards and must be in the following format:

1. Introduction and background
2. Issues
  - a. Index of issues
  - b. For each issue:
    - Background
    - Chronology
    - Contractor's position (reason for County's potential liability)
    - Supporting documentation of merit
    - Supporting documentation of damages
3. Critical path method schedules, as-planned versus as-built, and delay (time impact) analysis
4. Productivity and damages exhibits
5. Summary of issues and damages

Supporting documentation of merit for each issue must be cited by reference, photocopied, or explained. Supporting documentation may include, but is not limited to, general conditions, technical specifications, drawings, correspondence, conference notes, shop drawing logs, survey books, inspection reports, delivery schedules, test reports, daily reports, subcontracts, fragmentary critical path method schedules, photographs, technical reports, requests for information, field instructions, and other related records.

Supporting documentation of damages for each issue must be cited, photocopied, or explained. Supporting documentation may include, but is not limited to, certified detailed labor, materials, equipment, and construction equipment and services costs; purchase orders; invoices;

project as-planned and as-built costs; subcontractor payment releases; quantity reports; other related records; general ledger and all other accounting materials.

Each copy of claim documentation must include the following certification, signed in the same manner as the Contract was signed:

"I, \_\_\_\_\_, being the (must be an officer) of (general contractor), declare under penalty of perjury under the laws of the State of California, and do personally certify and attest that: I have thoroughly reviewed the attached claim for additional compensation and/or extension of time, and know its contents, and said claim is made in good faith; the supporting data is truthful and accurate; that the amount requested accurately reflects the Contract adjustment for which the Contractor believes the Agency is liable; and, further, that I am familiar with California Penal Code Section 72 and California Government Code Section 12650, et seq., pertaining to false claims, and further know and understand that submission or certification of a false claim may lead to fines, imprisonment and/or other severe legal consequences.

(Signature of officer)

(Date) "

If the Contractor is unable to support any part of a claim and it is determined that the inability is attributable to falsity of the certification or misrepresentation of fact or fraud by the Contractor, the Contractor is liable to the Agency for 3 times the amount of damages sustained by the Agency, plus the cost of civil action. The Contractor may also be liable to the Agency for a civil penalty of up to \$10,000 for each false claim.

#### **9-18.04 Claim Resolution Process**

A. One electronic copy and three hard copies of the claim must be mailed on or before the date of final payment. Claims must be sent by registered mail or certified mail with return receipt requested.

B. Upon receipt of a claim pursuant to this Section, the Agency shall conduct a reasonable review of the claim and, within a period not to exceed 45 days, shall provide the Contractor a written statement identifying what portion of the claim is disputed and what portion is undisputed. Upon receipt of a claim, the Agency and Contractor may, by mutual agreement, extend the time period provided in this Section.

C. If the Agency requires approval from the Board of Supervisors to provide the Contractor a written statement identifying the disputed portion and the undisputed portion of the claim, and the Board of Supervisors does not meet within the 45 days or within the mutually agreed to extension of time following receipt of a claim sent by registered mail or certified mail, return receipt requested, the Agency shall have up to three days following the next duly publicly noticed meeting of the Board after the 45-day period, or extension, expires to provide the Contractor a written statement identifying the disputed portion and the undisputed portion.

D. Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the Agency issues its written statement. If the Agency fails to issue a written statement, paragraph (I), below, shall apply.

E. If the Contractor disputes the Agency's written response, or if the Agency fails to respond to a claim issued pursuant to this Section within the time prescribed, the Contractor may demand in writing an informal conference to meet and confer for settlement of the issues in dispute. A demand by the Contractor for a meet and conference shall be sent within fifteen (15) days of issuance or deadline for issuance of the Agency's written statement on the claim. Upon receipt of a demand in writing sent by registered mail or certified mail, return receipt requested, the Agency shall schedule a meet and confer conference to be held within 30 days for settlement of the dispute.

F. If Contractor does not request a meet-and-confer conference within the required time period, the parts of the claim remaining in dispute shall be subject to the claims process set forth in the Government Claims Act (Government Code Section 810 et seq.).

G. Within 10 business days following the conclusion of the meet and confer conference, if the claim or any portion of the claim remains in dispute, the Agency shall provide the Contractor a written statement identifying the portion of the claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the Agency issues its written statement. Any disputed portion of the claim, as identified by the Contractor in writing, shall be submitted to nonbinding mediation, with the Agency and the Contractor sharing the associated costs equally. The Agency and Contractor shall mutually agree to a mediator within 10 business days after the disputed portion of the claim has been identified in writing. If the parties cannot agree upon a mediator, each party shall select a mediator, and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the claim. Each party shall bear the fees and costs charged by its respective mediator in connection with the selection of the neutral mediator. If mediation is unsuccessful, the parts of the claim remaining in dispute shall be subject to the claims process set forth in the Government Claims Act (Government Code Section 810 et seq.).

H. For purposes of this Section, mediation includes any nonbinding process, including, but not limited to, neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation. Any mediation utilized shall conform to the timeframes in this Section.

I. Failure by the Agency to respond to a claim from the Contractor within the time periods described in this Section or to otherwise meet the time requirements of this Section shall result in the claim being deemed rejected in its entirety. A claim filed pursuant to this Section 9-18 that is denied by reason of the Agency's failure to have responded to a claim, or its failure to otherwise meet the time requirements of this Section, shall not constitute an adverse finding with regard to the merits of the claim or the responsibility or qualifications of the claimant.

J. If a Subcontractor at any tier lacks legal standing to assert a claim against the Agency because privity of contract does not exist, the Contractor may present to the Agency a claim on behalf of a Subcontractor.

#### **9-18.05 Qualifications of A Mediator**

The Mediator selected must have expertise in the area of the dispute and be knowledgeable in the mediation process. No person can serve as a Mediator in a dispute in which that person has a financial or personal interest in the result of the mediation. Before accepting an appointment, the prospective Mediator must disclose any circumstances likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of the information, the parties must meet and confer and decide whether to select another Mediator.

#### **9-18.06 Vacancies**

If a Mediator becomes unwilling or unable to serve, another Mediator may be selected unless the parties agree otherwise.

#### **9-18.07 Representation**

Any party may be represented by persons of their choice who has full authority to negotiate on the party's behalf. The names and addresses of those persons must be communicated in writing to all parties and to the Mediator.

**9-18.08 Time and Place of Mediation**

The Mediator will set the time of each mediation session. The mediation will be held at a convenient location agreeable to the Mediator and the parties, as the Mediator determines. All reasonable efforts will be made by the parties and the Mediator to schedule the first session within 30 Calendar Days after selection of the Mediator.

**9-18.09 Identification of Matters In Dispute**

At least 10 Working Days before the first scheduled mediation session, each party must provide the Mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. The memoranda will be mutually exchanged by the parties. At the first session, the parties will be expected to produce all information reasonably required for the Mediator to understand the issue presented. The Mediator may require each party to supplement the information.

**9-18.10 Authority of Mediator**

The Mediator does not have authority to impose a settlement upon the parties but will attempt to help the parties reach a satisfactory resolution of their dispute. The Mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the Mediator may obtain expert advice concerning technical aspects of the dispute, provided the parties agree and assume the expenses of obtaining said advice. Arrangements for obtaining advice will be made by the Mediator or the parties, as the Mediator determines. The Mediator is authorized to end the mediation whenever, in the Mediator's judgment, further efforts at mediation will not contribute to a resolution of the dispute between the parties.

**9-18.11 Privacy**

Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the Mediator.

**9-18.12 Confidentiality**

Confidential information disclosed to a Mediator by the parties or by witnesses in the course of the mediation will not be divulged by the Mediator. All records, reports, or other documents received by a Mediator while serving as Mediator will be confidential. The Mediator cannot be compelled to divulge the records or to testify in regard to the mediation in any adversary proceeding or judicial forum. The parties must maintain the confidentiality of the mediation and cannot rely on, or introduce as evidence in an arbitration, judicial or other proceedings or any of the following: (a) Views expressed or suggestions made by the other party with respect to a possible settlement of the dispute; (b) Statements made by the other party in the course of the mediation proceedings; (c) Proposals made or views expressed by the Mediator; or (d) Whether the other party had or had not indicated willingness to accept a proposal for settlement made by the Mediator.

**9-18.13 No Stenographic Record**

There will be no stenographic record of the mediation.

**9-18.14 Termination of Mediation**

The mediation will be terminated (a) by the execution of a settlement agreement by the parties;  
(b) by a written declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; or (c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

**9-18.15 Exclusion of Liability**

No Mediator will be a necessary party in judicial proceedings related to the mediation. No Mediator is liable to any party for any act or omission in connection with a mediation conducted hereunder.

**9-18.16 Interpretation and Application of These Mediation Provisions**

The Mediator will interpret and apply these mediation provisions insofar as they relate to the Mediator's duties and responsibility.

**9-18.17 Expenses**

The expenses of witnesses for either side must be paid by the party producing the witnesses. All other expenses of the mediation, including required traveling and other expenses of the Mediator, the expenses of witnesses called by the Mediator, and the cost of any proofs or expert advice produced at the request of the Mediator, will be split equally between the parties.

**9-19 RESERVED**

**9-20 RESERVED**

**9-21 NO ALTERNATIVE CLAIMS PROCEDURE**

Nothing in the Contract constitutes an agreement for an alternative claim procedure under the provisions of Government Code Section 930.2, nor relieves the Contractor of the requirements of Government Code section 900 et seq.

**9-22 ASSIGNMENT OF CLAIMS**

The Contractor cannot assign any portion of the moneys due the Contractor without written Agency approval. No person other than the party signing the Contract has any claim under the Contract, except as provided in the Contract.

**9-23 NO WAIVER OF GOVERNMENT CLAIM PROCESS**

No statement in these Specifications or in the Special Provisions constitutes a waiver of government claim filing requirements pursuant to Government Code Section 810 et seq. or as otherwise set forth in local, state and federal law.