

**SECTION 9 - CHANGES AND CLAIMS**  
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## **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 as 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 Section 9-2, "Ordering of Changes", in this Section of these Specifications.

The Contractor shall 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", in this Section 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 shall comply with the order. Changes to the Work shall in no way affect, vitiate, or make void the Contract or any part thereof, except that which is necessarily affected by such changes and is clearly the evident intention 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)", in this Section of these Specifications. Failure of the Agency and Contractor to agree to terms of any order for change shall 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 program 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 shall not apply to Agency contracts of less than one hundred thousand dollars (\$100,000). The Contractor and Subcontractors may participate in the CICP Program. Participation of Subcontractors shall be through the Contractor, and the Contractor and his Subcontractor must agree upon the sharing arrangement; written evidence of such agreement must be submitted with the CICP.

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

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

A CICP is a formally written proposal for a Contract Change Order. A CICP must be initiated, developed, and identified as such 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 shall comply with the following conditions:

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

- The proposed change shall not cause undue interruption of the Work, nor shall it extend the Contract Time.
- The proposed change shall comply with all applicable permits, regulations, and code requirements, and any other requirements as set forth in the Contract. The proposed change shall not involve payment of royalties by the Agency to the Contractor.

**9-3.03 Submittal**

The Contractor shall submit a brief description of the proposed CICIP prior to preparing the detailed submittal as outlined below.

A CICIP submittal must contain pertinent information in supporting documents for Agency evaluation. As a minimum, the following information shall be submitted:

1. Name of individuals associated with the development and preparation of the CICIP.
2. A detailed description and duly signed plans and specifications showing work as presently designed and the proposed changes.
3. A clear identification 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 shall include all necessary Contract amendments. Also indicated must be the latest date that the CICIP can be approved for implementation.
5. A summary of estimated costs, including the following:
  - a. Project construction costs before and after the CICIP. This shall 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 mark ups
    - 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", in this Section 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 any CICIP or the supporting data submitted pursuant to this program. Suggested wording for inclusion in CICIP's is as follows:

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

The Agency may modify, accept, or reject the CICIP. However, 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)”, in this Section 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 shall not appeal the decision.

**9-3.05 Sharing Provisions and Formula**

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

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

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

The CICIP implementation costs include, when appropriate, engineering costs for reviewing and redesigning the changes. However, Agency costs for processing the CICIP are excluded.

**9-4 CHANGES TO THE CONTRACT**

If directed by the Agency, within fourteen (14) Calendar Days of issuance of an order for a change or a Notice of Potential Claim, the Contractor shall provide a cost and time proposal prepared in accordance with the requirements of Sections 9-8, “Payment for Changes”, and 9-12, “Time Extensions for Changes”, in this Section of these Specifications. The Contractor’s proposal shall 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”, in this Section of these Specifications. A proposal for additional cost and/or time resulting from a Notice of Potential Claim must also include an explanation of why the Contractor believes there is entitlement to the additional cost and/or time. In the event the Agency, for whatever reason, opts to not proceed with the change, the Agency will reimburse the Contractor for the actual costs associated with the preparation of the proposal. Contractor shall submit an invoice prepared in accordance with Section 9-8.03 of these Specifications.

If the Contractor does not submit a proposal within fourteen (14) Calendar Days, and unless the Agency is otherwise notified within fourteen (14) Calendar Days of a potential cost impact, the Contractor agrees to perform the work described in the order for change with no additional compensation. 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”, in this Section of these Specifications.

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

The Contractor shall 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 shall have 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”, in this Section of these Specifications.

When the Agency and Contractor cannot agree on the credit for deleted work, 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 shall 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 also be included in the Special Provisions. The Agency shall have access to the records supporting such cost and pricing data in accordance with the following Section (Section 9-7, "Access to Records").

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

Upon reasonable notice and during normal business hours, the Agency shall have access to the Contractor's and Subcontractors' records for the purpose of verifying and evaluating the Agreement and the Work, including the accuracy of cost and pricing data submitted by the Contractor. "Records" as used in this Section shall include, but not be limited to: 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 shall include the original Bid and all documents related to the Bid and its preparation, the as-planned construction schedule and all related documents. Such access shall include the right to examine and audit such records and make excerpts, transcriptions, and photocopies at the Agency's cost.

#### **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, shall be set forth in the order for change.

The three methods of payment are as follows:

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

The Contractor shall submit a lump sum price proposal. The proposal shall include an estimate of labor, material, equipment, Subcontractor, and material supplier costs. The proposal shall include labor surcharges of twenty-six percent (26%), sales tax, and markups as stipulated in Section 9-9, "Markups for Changed Work", in this Section of these Specifications.

##### **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 upon 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 allowed.

If an ordered change in the plans or specifications materially changes the character of the work of a Contract item from that on which the Contractor based the bid price, and if the change increases or decreases the actual unit cost of the changed item as 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 therefore will be made in accordance with the following:

The basis of the adjustment in compensation will be the difference between the actual unit cost to perform the work of that item or portion thereof involved in the change as originally planned and the actual unit cost of performing the work of the item or portion thereof involved in the change, as changed. Actual unit costs will be determined by the Agency in the same manner as if the work were to be paid for on a force account basis as provided in Section 9-8.03, "Force Account", of these Specifications, or the adjustment will be as agreed to by the Contractor and the Agency. The adjustment will apply only to the portion of the work of the item actually changed in character. At the option of the Agency, the work of the item or portion of item which is changed in character will be paid for by force account as provided in 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 the change, the Agency may direct the Contractor to proceed with the changed work on a force account basis. The Contractor shall 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 this Section of these Specifications in Sections 9-8.03.A, "Labor", 9-8.03.B, "Materials", and 9-8.03.C, "Equipment"; 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 shall notify the Agency not less than four (4) hours prior to starting force account work. The Contractor shall submit Daily Work Reports (DWR's) for signature not later than 9:00 a.m. the day following performance of any force account work. DWR's shall 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. The Contractor shall use the Agency's DWR's in preparing billings for force account work.

All documentation supporting the Force Account work must be priced out and turned in to the Agency no later than thirty (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 DWR's as required, or turn in the 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. Except as otherwise provided, 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 of any classification, 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 twenty-six percent (26%) surcharge for taxes, insurance, and all other payments made to or on the behalf of the employee shall 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 such materials, the cost will be the lowest current wholesale price at which such 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 shall have no claims for costs or profit on such 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 shall be paid such hourly rental rates as are agreed upon by the Contractor and the Agency prior to use of the equipment, plus thirty-three and one-third percent (33-1/3%) for the cost of fuel, oil, lubrication, and field repairs and maintenance. In no case shall the hourly rental rates exceed those of established distributors or equipment rental agencies serving the area.

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 of any kind, depreciation, storage, insurance, labor (except for equipment operators) and any and all costs to the Contractor incidental to the use of such 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 five hundred dollars (\$500) or less shall be considered tools or small equipment and no payment will be made for those pieces of equipment.

**9-8.03.D Subcontracts**

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

**9-9 MARKUPS FOR CHANGED WORK**

Only the direct costs directly attributable to the performance of the changed work shall be allowed. All other costs shall be 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 shall constitute full compensation for all costs not included as actual



labor, materials, equipment, or Subcontractor costs. Markups for changed work shall not exceed the following:

Labor	25%
Materials	15%
Equipment Rental	15%
Bonds and Insurance	2%

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 any higher tiered Subcontractor may add as mark-up to the total of allowable costs an amount not to exceed five percent (5%), subject to the limitations of this Section. The 2% for Bonds and Insurance is to be added to the TOTAL of Labor, Materials, and Equipment Rental, and associated markups, INCLUDING all subcontractor costs. The Agency only requires bonds and insurance on the prime contractor and therefore will only pay these costs once. When the Agency is entitled to credit for deleted work, a ten percent (10%) credit for deleted overhead of the Contractor or Subcontractor, as applicable, will be added to such 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 eight (8) hours per day.
- Compensation will only be paid for equipment that was actually idle; Agency shall not compensate for any 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 shall be 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 twenty-six percent (26%) surcharge for taxes, insurance, and all other payments made to or on the 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 (Section 9-10.03, “Markup for Compensable Unavoidable Delays”).

**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, fifteen percent (15%) shall be added to job-site indirect costs for onsite plant, incidentals, overhead, home and branch office costs, bonds, insurance, and profit. The Contractor shall 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 five percent (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 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”, in this Section of these Specifications shall 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**

No alterations, time extensions, extra or additional work or other changes authorized by these conditions or any part of the Contract shall affect 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 shall not be entitled to any 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.

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

The Contractor's written agreement of a Contract Change Order, Field Instruction, or other written directive will constitute his 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 any Subcontractors or suppliers. If the Contractor disagrees with any 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 of Potential Claim", in this Section of these Specifications. Disagreement with the provisions of a Change Order, Field Instruction, or other written directive will 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 whether or not any work or other matter is within the scope of the Contract, the Contractor shall nevertheless immediately perform such work upon receipt of a written Field Instruction or other written directive. Within fourteen (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 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 shall 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. Protests and claims denied by the Agency will be so stated in writing.

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

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

The Contractor shall not be entitled to payment of any additional compensation for any cause, including any disagreement, protest, or change, any act or failure to act by the Agency, or the happening of any event, thing or occurrence, unless the Contractor has given the Agency advance written notice of potential claim (NOPC) as hereinafter specified. The NOPC shall set forth the reasons for which the Contractor believes additional compensation and/or time will or may be due, the nature of the costs and/or time involved, insofar as possible, the amount of the potential claim, a request for equitable adjustment, and written and verifiable documentation and support.

Except as required below in Section 9-18, "Submission of Claims", of these Specifications, the Contractor shall promptly provide written notification to the Agency upon discovery of concealed or unknown conditions or any disagreement, protest, situation, event, or occurrence that may result in a claim. This notice shall be submitted no more than seven (7) Calendar Days after the discovery or occurrence of any 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 can not be reasonably determined at the time the notice of potential claim is provided, the contractor shall amend its notice of potential to include cost and/or time within seven (7) days of identifying said cost and/or time but not later than thirty (30) days after work has ceased on the event that caused the notice of potential claim; failure to do so waives the claim. For notice of potential claim events that extend more than thirty (30) days the contractor

shall provide a monthly accounting of on going costs and/or time it believes it is due no later than the fifth (5<sup>th</sup>) 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 any potential current or future claim it perceives as a result of any act or failure to act on the part of the Agency, or as a result of any event, thing or occurrence. Written notice by the Contractor of a potential claim shall not excuse the Contractor from pursuing the mitigation of any 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. In evaluating a delay, if the delay could have been avoided by due care of the Contractor, the Contractor is responsible for the additional costs attributed to the failure to mitigate

**9-18 SUBMISSION OF CLAIMS**

**9-18.01 Claims Less Than \$375,000**

Claims for three hundred seventy-five thousand dollars (\$375,000) or less shall be in accordance with Section 20104 of the Public Contract Code.

**9-18.02 Claims Greater Than \$375,000**

For claims greater than three hundred seventy-five thousand dollars (\$375,000), the Contractor shall furnish claim documentation as herein specified.

Contractor shall submit three (3) certified copies of all claim documentation. All claim documentation shall be complete when submitted. The evaluation of the Contractor's claim will be based on Agency's records and the claim documentation submitted by Contractor.

Claim documentation shall conform to generally accepted auditing standards and shall 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 analysis
4. Productivity and damages exhibits
5. Summary of issues and damages

Supporting documentation of merit for each issue shall be cited by reference, photocopies, or explained. Supporting documentation may include, but not be 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 shall be cited, photocopied, or explained. Supporting documentation may include, but not be 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 any other accounting materials.

Each copy of claim documentation shall 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 such inability is attributable to falsity of such certification or misrepresentation of fact or fraud by the Contractor, the Contractor shall be liable to the Agency for three (3) times the amount of damages which the Agency sustains, plus the cost of civil action, and may be liable to the Agency for a civil penalty of up to ten thousand dollars (\$10,000) for each false claim.

### **9-19 ENGINEER'S DECISION**

The Engineer may be requested to consider a dispute or claim if the Agency and Contractor representatives reach an impasse. A request for an Engineer's Decision shall be made by the Contractor, in writing, within fourteen (14) days of the date of impasse. In requesting an Engineer's Decision, each party shall provide a detailed description of their position and state the objections to the position of the other party. Evidence, records, and supporting information shall be included. Copies of all correspondence and information shall be provided to both parties.

The Engineer will review the facts of the dispute and may request additional information, evidence, or testimony. The Engineer will render a fair, impartial decision based on the Contract, and the evidence submitted by the Agency and Contractor representatives.

The Engineer may decline to consider a dispute. The Engineer's Decision process is non-binding.

### **9-20 ALTERNATIVE DISPUTE RESOLUTION**

After all remedies and provisions of the Contract are exhausted, any dispute related to the Work or Contract may be resolved by Mediation if the Contractor and the Agency agree in writing. The Contractor shall submit a written request for Mediation no later than thirty (30) days after the Agency issues the final written decision.

Said Mediation is voluntary, non-binding, and intended to provide an opportunity for the parties to evaluate each other's cases and arrive at a mutually agreeable solution. These

provisions relating to voluntary Mediation shall not be construed or interpreted as mandatory arbitration.

**9-20.01 Initiation of Mediation**

Any party to a dispute or claim may initiate Mediation by notifying the other party or parties in writing.

**9-20.02 Request for Mediation**

A Request for Mediation shall contain a brief statement of the nature of the dispute or claim, and the names, addresses, and phone numbers of all parties to the dispute or claim, and those who will represent them, if any, in the Mediation.

**9-20.03 Selection Of Mediator**

Upon receipt of a Request for Mediation, within thirty (30) days, the parties will meet and confer to select an appropriate Mediator agreeable to all parties. If the parties cannot agree on a Mediator, they hereby agree to accept a Mediator appointed by a recognized association such as the American Arbitration Association.

**9-20.04 Qualifications Of A Mediator**

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

**9-20.05 Vacancies**

If any Mediator shall become unwilling or unable to serve, another Mediator shall be selected unless the parties agree otherwise.

**9-20.06 Representation**

Any party may be represented by persons of their choice, who shall have full authority to negotiate. The names and addresses of such persons shall be communicated in writing to all parties and to the Mediator.

**9-20.07 Time and Place Of Mediation**

The Mediator shall set the time of each Mediation session. The Mediation shall be held at any convenient location agreeable to the Mediator and the parties, as the Mediator shall determine. All reasonable efforts will be made by the parties and the Mediator to schedule the first session within thirty (30) days after selection of the Mediator.

**9-20.08 Identification Of Matters In Dispute**

At least ten (10) days before the first scheduled Mediation session, each party shall provide the Mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. Such memoranda shall 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 such information.

**9-20.09 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 also obtain expert

advice concerning technical aspects of the dispute, provided the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the parties, as the Mediator shall determine. The Mediator is authorized to end the Mediation whenever, in the Mediator's judgment, further efforts at Mediation would not contribute to a resolution of the dispute between the parties.

**9-20.10 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.

**9-20.11 Confidentiality**

Confidential information disclosed to a Mediator by the parties or by witnesses in the course of the Mediation shall not be divulged by the Mediator. All records, reports, or other documents received by a Mediator while serving as Mediator shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regard to the Mediation in any adversary proceeding or judicial forum. The parties shall maintain the confidentiality of the Mediation and shall not rely on, or introduce as evidence in any 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.

**9-20.12 No Stenographic Record**

There shall be no stenographic record of the Mediation.

**9-20.13 Termination Of Mediation**

The Mediation shall 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.

**9-20.14 Exclusion Of Liability**

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

**9-20.15 Interpretation and Application Of These Mediation Provisions**

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

**9-20.16 Expenses**

The expenses of witnesses for either side shall 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 any witness called by the Mediator, and the cost of any proofs or expert advice produced at the request of the Mediator, shall be split equally between the parties.

**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, Part 3, Chapters 1 and 2 and Title 1, Division 3.6, Chapters 1, 2, 3, and 4.

**9-22 ASSIGNMENT OF CLAIMS**

The Contractor shall not 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.