

**MEMORANDUM OF
AGREEMENT**

**CONSTRUCTION CONTRACT CHANGE ORDER APPROVAL
REQUIREMENTS FOR FEDERAL-AID PROJECTS**

Background

Federal regulation at 23 CFR Part 635 CONSTRUCTION AND MAINTENANCE, and specifically Section 635.120 Changes and Extra Work and Section 635.121 Contract Time and Contract Time Extensions contain the governing criteria involving change approval requirements. All changes to Federal-aid construction contracts (both participating and non-participating) ultimately require formal approval from the Federal Highway Administration (FHWA) Division Office. Major changes, as further defined below, must have formal approval by FHWA **in advance** of the effective date of the change to preserve the eligibility for Federal-aid funding. The regulation allows for formal approval of non-major changes and non-major extra work, to be given retroactively at the discretion of the FHWA Division Administrator. However, all major changes and all major extra work must be approved in writing by FHWA before the work is started. This Memorandum of Agreement (MOA) sets out the guidelines for this process.

The Federal-aid Highway Program (FAHP) is a Federally-assisted program of State-selected projects. FHWA and the Delaware Departments of Transportation (DelDOT) have long worked as partners to deliver the FAHP in accordance with Federal requirements. In enacting 23 U.S.C. 106(c), as amended, Congress recognized the need to give the States more authority to carry out project responsibilities traditionally handled by FHWA. Congress also recognized the importance of a risk-based approach to FHWA oversight of the FAHP, establishing requirements in 23 U.S.C. 106(g). The Stewardship and Oversight Agreement sets forth the agreement between FHWA and DelDOT on the roles and responsibilities of the FHWA and DelDOT with respect to Title 23 project approvals and related responsibilities, and FAHP oversight activities.

The current FHWA and DelDOT Stewardship and Oversight Agreement clarifies FHWA's involvement in projects that are selected to be Projects of Division Interest (PoDI). Each project that is selected to be a PoDI will have a project specific Stewardship and Oversight Plan which will specify the level of oversight on change order approvals. FHWA can make adjustments to the plan as is required to satisfy the level of risk of the project. DelDOT employees involved

with project management should review the PoDI requirements with the FHWA Engineer to understand the level of oversight that is required for their project as it relates to the project and change orders.

Projects of Division Interest (PoDI)

Projects of Division Interest (PoDI) are projects that may have an elevated risk, contain elements of higher risk, or present a meaningful opportunity for FHWA involvement to enhance meeting program or project objectives. Each FHWA Division Office identifies those projects, within its limited resources, where FHWA should assert a positive leadership influence to help assure a high level of public confidence that projects and programs are administered with integrity, are in compliance with applicable requirements, and yield maximum value for the public. Project selection is risk-based and stewardship and oversight activities are directed toward addressing identified risks. This may include retaining certain project approvals or directing stewardship or oversight activities to a specific phase or element of the project. FHWA Division Office will document retained approval authorities in a project specific oversight plan. The project specific oversight plan is shared with appropriate DelDOT offices.

Scope

This MOA specifically outlines the procedures to be used by FHWA's Delaware Division Office and DelDOT for those Federal-aid projects that have been selected as PoDIs and for which FHWA has retained approval authority for change orders (as outlined in the project specific Stewardship and Oversight Plans).

In addition, this MOA outlines DelDOT's responsibilities for reviewing and approving change orders for Non-PoDI (state administered) projects and PoDI projects on which FHWA has not retained CO approval authority.

Definitions

Change: A modification, deletion, or addition of work to a project, with a uniquely defined scope of work, which differs from the original project scope or another change. A change may be a new negotiated contract item or items, an increase or decrease to the original quantity of a single or multiple contract unit price items, work performed by force account, or a change in contract time.

Contract Change Order: A binding contractual document between the contractor and DelDOT, describing either a single change or multiple changes.

Effective Date: The date of agreement to a change between the contractor and DelDOT. This date of agreement for the change is the date of the executed written agreement.

Draft FHWA Approval: Draft approval will take the form of an email, ink or digital signature on a non-executed change order that contains supporting documentation.

Final FHWA Approval: Final approval will take the form of an ink or digital signature on an executed change order that contains supporting documentation. In cases where formal approval must be expedited, formal approval may also be provided by e-mail, but will need to be followed up with an ink or digital signature on the executed document. Unless a major change qualifies as an emergency or unusual condition (see "Major Changes, 4. Exception:" under Procedure for Approval of Changes), formal approval is not provided verbally.

Major Change: A change that significantly affects the cost of the project to the Federal Government or alters the termini, character or scope of the work. For the purpose of this memorandum of agreement, "major changes" are defined in Attachment 1.

Non-Major Change (minor): A change that does not meet the definition of a major change. (Non-major changes still require formal FHWA approval, but such approval may be provided after the effective date of the change.)

Non-PoDI (State Administered) Projects: Federal-aid projects not selected to be PoDI projects by FHWA. DelDOT assumes oversight responsibilities for FHWA; see Change Order Approval Matrix in Appendix 1. (All Federal rules and regulations still apply to these projects.)

PoDI Projects: Federal-aid projects where FHWA has made a risk-based determination that there will be FHWA involvement in project actions.

Procedure for Approval of Change Orders

Major Changes:

Draft Major Change Approval

1. DelDOT determines the change to be a *major change* as defined in this MOA.
2. After negotiation of the *major change* is completed with the contractor, but prior to the *effective date* of the *major change*, DelDOT submits a request for *draft FHWA approval* to FHWA with supporting documentation detailing the scope and cost of the *major change*. This documentation will include:
 - a. Description of the change
 - b. Justification of the need for the change
 - c. CPM analysis if appropriate
 - d. Adjustment to contract time (greater than 5 calendar days) and CPM analysis if appropriate
 - e. Unit item estimated quantities and prices
 - f. Total estimated cost of the change
 - g. A statement as to the project schedule impacts of this change
 - h. Report of apparent design errors and omissions if appropriate
 1. A statement as to the environmental impacts of this change if appropriate
 - J. Impact on DBE goals if appropriate
3. FHWA will provide and ink or digital signature on the draft change order if the change order is acceptable and return to DelDOT. This action will constitute formal approval for the *major change* as required by 23 CFR Part 635. Upon *draft approval* by FHWA, DelDOT may give verbal notice to proceed or execute a written agreement for the change with the contractor.
4. If the change order is not approved, FHWA will indicate its determination by writing "Not Approved for Federal Funding" on the DelDOT draft change order and return to DelDOT.
5. FHWA will provide a review of the draft change order within five (5) business days.
6. Exception: In the case of a *major change* resulting from an emergency or unusual condition, where the safety of the traveling public or project personnel is jeopardized or where the highway facility is imperiled by climate or other outside forces, FHWA may provide tentative advance approval verbally (with an email to document) to such

changes and ratify such approval with *final approval* as soon as practicable thereafter.

Adjustment to contract time: Changes in contract time that is more than 5 calendar days, as related to the changes or extra work, will be submitted at the same time as the respective work change for approval by the FHWA. An extension of contract time will be considered when an analysis of the effects on the CPM schedule has been performed and it is shown that the change will affect the controlling operation. If a change order represents issues for which the effect on contract time can be readily determined, then any adjustment will be agreed upon by DelDOT and the Contractor prior to final execution of the change order. If the issues represented by the change order require further analysis and review in order to accurately and equitably evaluate the effect on contract time then DelDOT will provide FHWA with an interim estimate of the possible time adjustment prior to execution of the change order. In such instances, the change order may be executed without final resolution of the adjustment to contract time between DelDOT and the Contractor. In these cases, final resolution of any time related issues will be made within 30 days of work completion associated with the change order. (All adjustments to contract time will be done prior to the end of contract time.)

Any time extensions, regardless of the length, related to utility, railroad, permits, or right-of-way clearance; or delays caused by the DelDOT require advance written FHWA approval. These types of time extensions are typically non-participating therefore Federal funds cannot be used to pay for extension-related costs such as increased project supervision and maintenance of traffic. Since projects are unique the determination of Federal participation will need to be made on a case by case basis.

Major Change Final Approval

After completing the review of the supporting documentation, the FHWA engineer will:

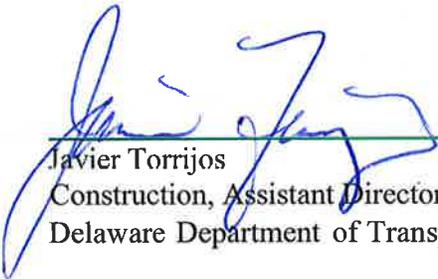
1. Provide an ink or electronic signature on the change order.
2. Return change order to DelDOT or upload to the project data site.
3. FHWA gives *final approval* to the *major change* within five (5) workdays after all satisfactory documentation is received.

Note: In order to expedite the *final approval* process for a *major change*, DelDOT should maintain close coordination with the respective FHWA engineer, preferably notifying FHWA when a *change* is being considered to obtain concurrence in the eligibility of the *change*. When necessary, if the appropriate project engineer is unavailable, *final*

approval can be obtained from another FHWA engineer. See FHWA Contact Information in Attachment 2.

Non-Major Changes:

1. DelDOT determines the *change* to be *non-major change* as defined in this MOA.
2. DelDOT negotiates the *non-major change* with the contractor, gives written notice to proceed with the *change* to the contractor, and proceeds with the work.
3. DelDOT provides a copy of the executed *contract change order* to FHWA within 15 days of final DelDOT approval date. The executed *contract change order* is approved and returned to DelDOT for their records. This is formal approval for the *non-major change* as required by 23 CFR Part 635.
4. Note: In practice DelDOT will provide draft copies of change orders to FHWA such that an early determination can be made concerning eligibility.



Javier Torrijos 7/14/16
Construction, Assistant Director Date
Delaware Department of Transportation



Mary Ridgeway 7/14/16
for Division Administrator Date
FHWA, Delaware Division

Attachment 1

CHANGE ORDER APPROVAL MATRIX

APPROVAL MATRIX

Major Change	Agency Authorized to Approve		
	PoDI Projects	Non-PoDI	
		Projects on NHS	Projects Non-NHS
1. Changes in geometric design requiring a design exception.	FHWA	DelDOT	DelDOT
2. Changes in the type of structure (i.e. retaining wall, foundation, bridge type, etc.)	FHWA	DelDOT	DelDOT
3. Changes to the typical section.	FHWA	DelDOT	DelDOT
4. Addition of new specifications and/or special provisions.	FHWA	DelDOT	DelDOT
5. Settlement of a contractor's claim.	FHWA	DelDOT	DelDOT
6. Changes to staging or the traffic control plans.	FHWA	DelDOT	DelDOT
7. Addition of patented and proprietary products.	FHWA	DelDOT	DelDOT
8. Use of foreign steel and iron not in accordance with the Buy America provisions.	FHWA	FHWA	FHWA
9. Value engineering or cost-reduction proposals.	FHWA	DelDOT	DelDOT
10. Any change in contract time in excess of 5 days, including accelerations, extensions, and suspensions.	FHWA	DelDOT	DelDOT
11. Change resulting in an increase or decrease in the cost of an individual contract unit price item by \$100,000 or more.	FHWA	DelDOT	DelDOT
12. Absolute change resulting in a total increase or decrease in cost of \$250,000 or more when all items affected by the changes are considered.	FHWA	DelDOT	DelDOT
13. Orders for Force Account Work	FHWA	DelDOT	DelDOT
14. Changes which affect environmental mitigation or comments.	FHWA	DelDOT	DelDOT
15. Addition of, or revisions to, warranty provisions.	FHWA	DelDOT	DelDOT
16. Revisions to access control.	FHWA	DelDOT	DelDOT
17. Re-revisions to Right-of-Way limits, or purchase of additional right-of-way or easement	FHWA	DelDOT	DelDOT
18. Changes to the scope of work or extension of the contract limits shown in the project documents approved by FHWA.	FHWA	DelDOT	DelDOT
19. Changes that eliminate work part of the Affirmative Action Plan.	FHWA	DelDOT	DelDOT

Attachment 2

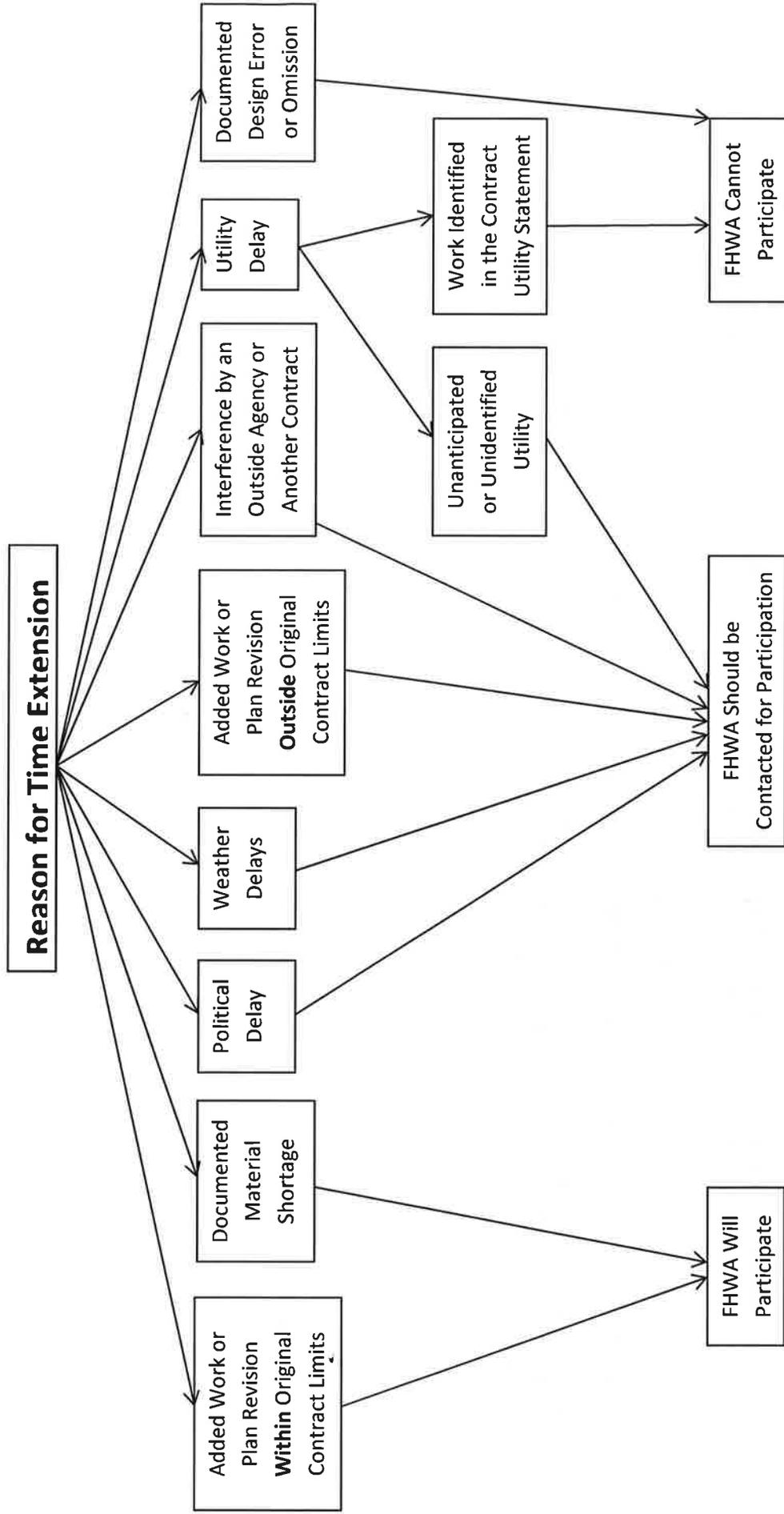
FHWA CONTACT INFORMATION

FHWA Delaware Division
1201 College Park Drive, Suite 102
Dover, DE 19904

Dan Montag (Senior Area Engineer)	Daniel.Montag@dot.gov	302-734-1719
Ryan O'Donoghue (Area/Materials Engineer)	Ryan.O'Donoghue@dot.gov	302-734-2745
Patrick Kennedy (Safety/Mobility Program Manager)	Patrick.Kennedy@dot.gov	302-734-5326
Carlos Castro (Bridge Engineer)	Carlos.Castro@dot.gov	302-734-2617
Vacant (Project Delivery Team Supervisor) - To Be Updated		
FHWA Delaware Division Main Line		302-734-5323
FHWA Delaware Fax		302-734-3066

Potential Time Extension Flow Chart for PoDI and Non-PoDI Projects

Note: For PoDI and Non-PoDI (State Administered) Projects, the same general principles will apply. However since DeIDOT has the delegated authority under the Stewardship and Oversight Agreement to manage projects that have Federal funds, DeIDOT will need to make decisions for FHWA on Non-PoDI (State Administered Projects). Decisions should be justified with adequate documentation where applicable.



If you are not sure of FHWA Participation, then contact the District FHWA Office for clarification on their position.

***Notes**

Added Work or Plan Revision Within Original Contract Limits-if the proposed change falls within the previously authorized scope of work and if it does not violate competitive bidding requirements. The value of the work should not be excessive compared to the original value of the project.

Documented material Shortage- The contractor is responsible for the timely order and delivery of materials for the project. A delay in delivery of materials does not in itself generally support an extension of contract time. However, if an **unusual** market condition (i.e., an industry wide strike, natural disaster, or area-wide shortage) occurs, a time extension may be in order.

Utility Delays – Any utility delay will need to be fully documented and justified.

FHWA should be contracted on Full and State Administered Projects for any delays determined to be Political Delays.

Weather delays-Delays due to inclement weather should be expected and should generally not be the basis for a change in contract time except in cases where the weather has impacted the Critical Path activity. On PoDI projects, FHWA must give prior approval to any additional contract time. For Non-PoDI (State Administered) projects, DelDOT will need to fully document the justification for additional time.