

## SECTION 242 Change Orders

### 242.1 General

It is the contractor's responsibility and duty to construct the project in accordance with the requirements of the plans, special provisions, and specifications as originally drawn and written, unless revised by approved written change orders. Change orders (CO's) represent alterations or revisions of plans and item quantities, revisions of bid item method of measurement, omission of work items found unnecessary during construction, and extra work required to properly complete the project.

There are three components to consider when a contractor requests a change order:

1. **Entitlement:** If a contractor is seeking additional compensation or additional contract time, they must show a contractual basis of entitlement. Is payment or contract time already covered under the existing contract? Entitlement must be decided first before discussing the remaining components.
2. **Impact:** If the parties agree that there is a basis of entitlement, the contractor must provide evidence that their work activities are affected. It is possible for a contractor to have entitlement, but not have their work impacted. If there is no impact, there is no need for additional compensation or time.
3. **Cost:** Cost should only be discussed and negotiated after determining that the contractor has a basis of entitlement and confirming that their work is impacted.

In general, AASHTOWare Project Construction and Materials® considers any changes or modifications to the contract once awarded to be a change order. Not all modifications must go through the change order process with electronic approvals from WisDOT and contractor representatives. Examples of these include adding an existing bid item to a different category or adding an administrative or non-bid item to the contract as discussed in [238](#). When items are added in this fashion, a sequential number is assigned automatically to change orders as they are entered. Therefore, change orders (CO) will not be in sequential order if a non-CO modification is made.

The CO is a written agreement executed between the contractor and the department that provides the ability to alter the contract. Change orders are specified in [standard spec 104.2](#). The department reserves the right to alter the plans and terms of the contract by changes, additions, or omissions necessary to properly complete work under the contract. Alterations can include changes in plans, specifications, special provisions, item quantities, the performance of extra work, and other changes in the contract necessary for the acceptable completion of the project. It is a change in the contract that upon execution becomes a part of the contract.

During the progress of the work, the project engineer should anticipate alterations necessary to acceptably complete the project and furnish the detail to the region if needed in sufficient time to obtain prior approval without unnecessary delay to the contractor. Generally, consideration should not be given to alterations, unless one or more of the following conditions are satisfied:

1. The project cannot reasonably be constructed as specified.
2. A substantially equal product can be furnished with a cost savings to the project.
3. A superior product can be furnished at the original contract price.

Please refer to [CMM 110.4.2.5](#) - Change Management for a discussion of change from a project management perspective.

### 242.2 Reasons for Change Orders

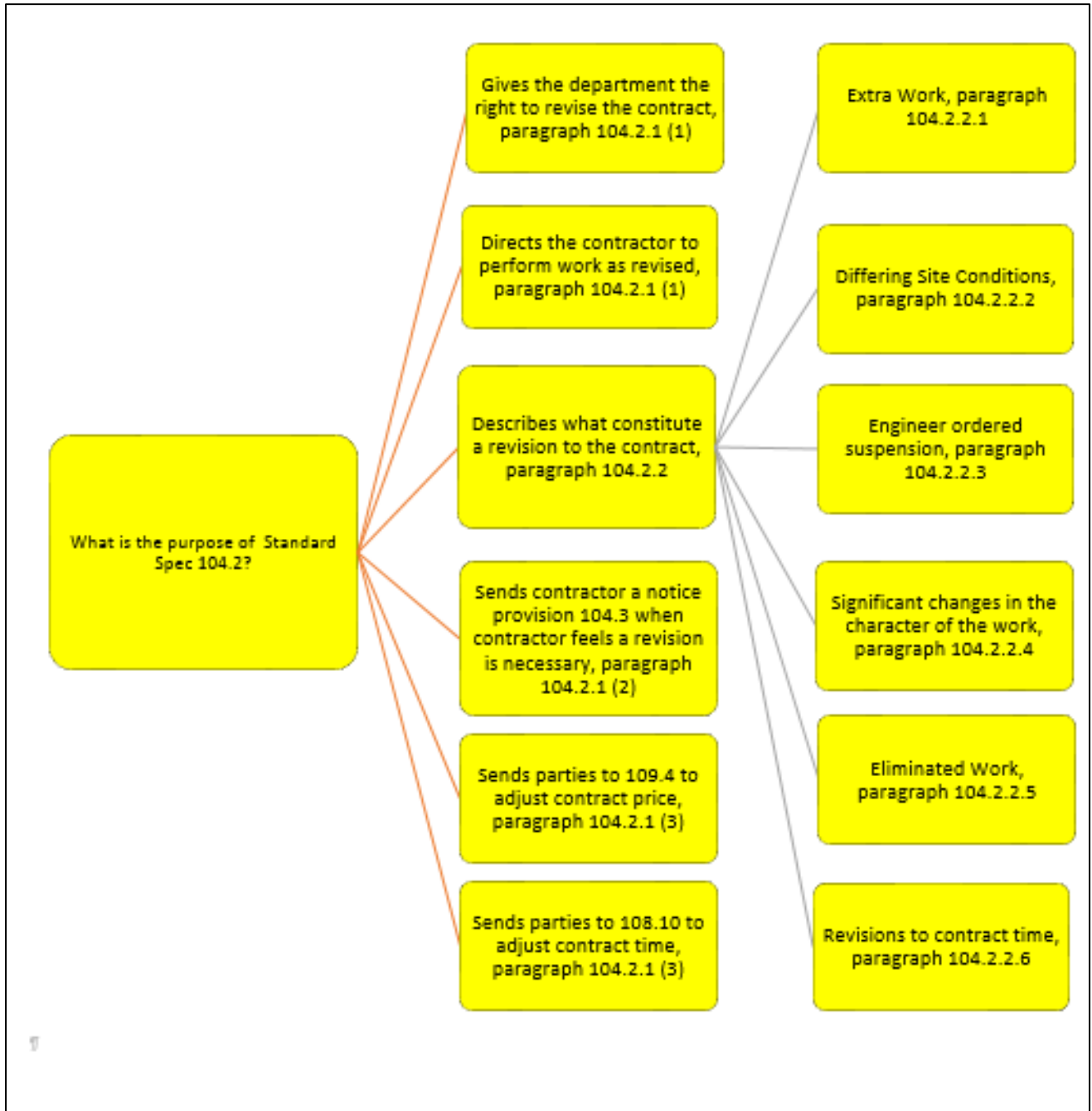
Change orders (CO) are not required for normal increases or decreases in the quantity of a contract item. They are not required for omission of minor items where no prior costs are involved; nor are they required where adjustment of an item is provided for in the specifications.

There are several reasons why a CO should be processed:

- Extra work.
- Differing site conditions.
- Engineer-ordered suspensions.
- Significant changes in character of work.
- Eliminated work.
- Revisions to contract time.
- Unauthorized or unacceptable work.

No contract adjustment that results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice.

FIGURE 242-1 Revisions to Contract



### 242.2.1 Extra Work

Extra work is defined as all work performed by the contractor, with approval of the project engineer or, that does not appear in the proposal or contract as a specific bid item accompanied by a unit price, and that is not included under the price bid for other bid items in the contract. Extra work may also consist of additions to, or changes in, design of contract bid items or portions of contract bid items, if additions are wholly disassociated from or outside the scope of work in the contract, and if the work caused by these additions or changes must be performed under conditions or in a manner materially different from the conditions and manner existent for contract bid items under the original scope of work.

Work and materials that have been ordered performed by the project engineer that do not appear in the contract as specific items, and that are not included under other contract items, are considered to be extra work.

Extra work may also be additions or changes in the design occurring outside the original project scope, resulting in work performed under conditions and in a manner differing from the original. Extra work must be authorized before performance except when otherwise directed by the project engineer.

When the required extra work is essentially the same in character as that covered by unit prices in the contract, the change order will be drawn to perform the extra work at the contract unit prices. However, if the contract does not contain unit prices for the required items of work, or if the nature of the work or conditions associated with its performance are materially and inherently different from that intended for such items of work in the original contract, the change order will be drawn to perform the work at agreed unit prices or at an agreed lump sum price. If negotiations with the contractor fail to reach an agreement on fair and reasonable prices for doing the work, the project engineer may order the work to be performed on a force account basis and the change order will be written accordingly.

When the extra work is relatively minor in extent and can be performed concurrently with other contract work, the change order need not include any reference to contract time. However, if the work cannot be done concurrently, or if the amount of time required to perform the extra work is disproportionate to the time that would automatically accrue due to the increased value, the change order should provide for an appropriate time extension to avoid the assessment of unwarranted liquidated damages.

#### **242.2.2 Differing Site Condition**

A change order can be justified during the progress of work if one of two types of condition is encountered:

Type I Condition - Subsurface or latent (not clearly visible) physical conditions are encountered at the site differing materially from those indicated in the contract.

Type II Condition - Unknown physical conditions of an unusual nature are encountered, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract.

The party discovering such conditions must promptly notify the other party, in writing, of the specific differing conditions before they are disturbed and before the affected work is performed. One example of a differing site condition is the discovery of non-rippable bedrock of significant extent and not noted on the plans.

Upon written notification, the project engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding loss of anticipated profits, will be made and the contract modified in writing accordingly. The project engineer will notify the contractor of the determination whether or not an adjustment of the contract is warranted.

If differing site conditions require a change in operations to an activity or area that requires an environmental permit, the contractor must verify whether existing permits cover the change, or whether new permits are needed.

##### **242.2.2.1 Type I Condition**

Some examples of potential Type I conditions include encountering the following: more rock than indicated in the contract, larger rock, rock that is harder to drill, permafrost when the boring had given no indication of its general extent, or unexpected quantities of underground water not indicated on the boring logs.

While these are potential Type I conditions, in order to receive compensation, the contractor must prove the following by a preponderance of evidence:

1. Contract documents must have affirmatively indicated or represented the subsurface or latent physical conditions which form the basis of the contractor's claim.
2. Contractor must have acted as a reasonably prudent contractor in interpreting the contract documents.
3. Contractor must have reasonably relied on the indications of subsurface or latent physical conditions in the contract.
4. Subsurface or latent physical conditions actually encountered within the contract area must have differed materially from the conditions indicated in the same contract area.
5. Actual subsurface conditions or latent physical conditions encountered must have been reasonably unforeseeable.
6. Contractor's claimed excess costs must be shown to be solely attributable to the materially different subsurface or latent physical conditions within the contract site.

To prove these six elements, the contractor is only required to use a simple logical process in evaluating the information in the contract documents to determine the expected subsurface or latent physical conditions.

##### **242.2.2.2 Type II Condition**

Some examples of a potential Type II conditions include unanticipated hazardous waste deposits or unanticipated archaeological sites.

To recover costs under a Type II condition, the contractor must prove:

1. Contractor did not know about the condition.
2. Contractor could not have reasonably anticipated the condition after a review of the contract documents, a site inspection, and the contractor's general experience in that area.
3. Condition was unusual because it varied from the norm in similar construction work.

### **242.2.3 Engineer-Ordered Suspensions**

Suspension of work may be included in the contract provisions or may be ordered by the project engineer. Complete suspension of work operations normally is related to seasonal or weather restrictions. However, the contract may also provide for complete suspension of operations for other reasons such as coordination of road or lane closures with off peak traffic volumes. See [CMM 248](#) for more information on Engineer-ordered suspensions.

### **242.2.4 Significant Changes in Character of Work**

At any time during the work, the department has the right to make, in writing, changes in the work necessary to acceptably complete the project. If the change involves a significant change in the character of the work, the department will grant price adjustments in two separate and distinct instances: significant alterations in the nature of the original proposed construction or quantity changes.

When the change involves alterations in the nature of the original proposed construction, the price should be adjusted as provided in [standard spec 109.4.4](#).

A quantity change alone does not necessarily justify a price adjustment. To qualify for a contract change, the contractor must be able to show that the quantity change significantly changed the character of the work. If the quantity change meets the variation criteria in [standard spec 104.2.2.4](#) and affects how the contractor is able to complete the work, then a price adjustment may be warranted.

The basis for the adjustment must be agreed upon before the performance of the work. The price adjustment should not include loss of anticipated profits. If a basis cannot be agreed upon, then an adjustment will be made either for or against the contractor, in an amount the department determines to be fair and equitable.

The revision of unit prices must be adjusted on the basis of actual increased cost due solely to the change, plus a reasonable allowance for profit and applicable overhead. The work involved in significant changes will be paid for at adjusted contract unit prices except when portions of it qualify as extra work. If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.

### **242.2.5 Eliminated Work**

The department has the right to partially eliminate or completely eliminate work the project engineer finds to be unnecessary for the project. If the project engineer partially eliminates or completely eliminates an item, the project engineer will issue a change order to compensate the contractor for bid preparation, overhead, and restocking charges, as specified in [standard spec 109.5](#).

### **242.2.6 Revisions to Contract Time**

If a contractor wants to request an extension of the time allowed for contract completion, the contractor should submit in writing a request to the project engineer, including progress schedules and an analysis of the contract delay, consistent with the requirements specified in [standard spec 108.10](#). Approval of requests for extensions of contract time has been delegated to the region office.

In analyzing requests, a thorough review of the contractor's progress schedule and the project engineer's diary and records is necessary. Of prime importance is the daily recording of information that will clearly establish the reason for delays in the progress of the work. The project engineer should identify and log in the diary delays to contract operation on a day-to-day basis. Recording of daily delays and clear indication of the percentage of delay to the item of work affecting overall progress is of particular benefit in the review of requests. If doubt exists as to whether a delay is important, it is better to record it, specifying the item of work affected by the interruption. It is far easier to disregard a superfluous daily entry than to retrieve truly factual and objective information from memory.

A contractor progress schedule is required under [standard spec 108.4](#).

#### **242.2.6.1 Excusable Delays**

Excusable delays are unanticipated delays not resulting from the contractor's fault or negligence. Excusable delays are considered to be justification for granting a time extension only if the delay affects a controlling item of work. Contractors must provide documentation and schedule updates to support their requested time extensions, as specified in [standard spec 108.10](#). The department may choose not to

consider time extensions for delays unless the contractor notifies the project engineer and provides the correct documentation.

A telescoping delay is an excusable delay that occurs after the expiration of a granted time extension, when work could not be completed within the extended time, due to an unavoidable delay during the granted time extension. Telescoping delays will be considered for time extension.

#### **242.2.6.2 Excusable Delays - Non-Compensable**

Non-compensable delays are excusable delays that are not the contractor's or the department's fault. The Engineer will not pay for the delay costs listed in standard spec 109.4.7 for non-compensable delays. However, the Engineer will extend contract time under calendar day and completion date contracts if the contractor provides the proper documentation and the department deems the delay as excusable. The department will relieve the contractor of associated liquidated damages if the Engineer extends contract time.

The following delay examples are subject to [standard spec 108.10.2](#) but are not to be considered all-inclusive.

- Extraordinary adverse weather delays. A certain amount of lost time due to adverse weather is anticipated and included in the calculation of contract time allowed for calendar day and completion date contracts. In analyzing requests for contract time extensions due to weather delays see [standard spec 108.10.2.2](#). Submit a request for severe weather days if the number of adverse weather days exceeds the anticipated number of adverse weather days specified in [standard spec 108.10.2.2](#). Fractions of one-half day will be rounded to the benefit of the contractor.
- Materials shortages or delay in delivery. Generally, a materials shortage is recognized as a basis for a time extension if it can be shown that it is area-wide, or a second-tier supplier possessing a virtual monopoly in a particular material or market area cannot or will not supply a first-tier supplier, and the first tier supplier can show reasonable efforts have been made to ensure there are no other sources of supply.
- Delays due to work suspension or extra work. If project work has been suspended by the Engineer due to job conditions, or caused by others, i.e., as by a court order or by an act or omission of the department, a request on this basis will be considered. If extra work will be or has been performed, a request on this basis would be considered. Normally, the change order for extra work will provide for an extension of time if justified.
- Labor strikes. An individual contractor has little, if any, control over events leading to an organized strike. Therefore, if the contractor sustains delay to work operations for this reason, it will be fully considered as basis for an extension of time.
- Cataclysmic phenomena. Earthquakes, flood, cyclones, tornadoes, etc., fall into this category. A request made on this basis will be fully considered.
- Delays due to third parties. If a contractor's operations have been adversely affected by a third party's failure to perform under a separate contract, such failure will be fully considered as basis for a contract time extension to the first contractor.
- Utility delays. When utility interference is claimed, the contractor must submit evidence that:
  - Construction work was actually delayed by the utility difficulty. These may be delays attributable to non-delivery of critical materials to the utility companies on the job, delays resulting from the relocation of underground utilities that were not known to exist before construction, or failure of the utility to complete their operation in a timely fashion.
  - The contractor did everything required by the contract to minimize the delay.
  - There was adequate basis to expect right of occupancy before construction.

#### **242.2.7 Unauthorized or Unacceptable Work**

Unauthorized and unacceptable work may be cause for a change order, but it does not always result in a change order. See [CMM 238](#) for administrative items used to deduct payment to the contractor. These items will provide a means to deduct payment without creating a change order.

##### **242.2.7.1 Unauthorized Work**

Unauthorized work is work performed beyond the limits indicated by the lines and grades shown on the plans or other terms of the contract. It can also be additional work not authorized by written agreement. Unauthorized work will not be paid for and may, at the discretion of the Engineer, be ordered removed or otherwise corrected by the contractor at the contractor's expense.

##### **242.2.7.2 Unacceptable Work**

Unacceptable work is that which is not within reasonably close conformity with the plans and specifications, resulting in an inferior product. The contractor is required to immediately remove and acceptably replace or otherwise correct unacceptable work at the contractor's expense. If the contractor fails to comply with written directions for such corrective work, the Engineer will direct unacceptable work

to be remedied, or to be removed and replaced by others. The cost will be deducted from any monies due or to become due the contractor.

[Standard spec 105.3](#) provides that, should the Engineer find that the work is not within reasonably close conformity with the plans and specifications but reasonably acceptable work has been produced, the work can be left in place and the contractor compensated as provided in the specifications for the particular item of work, or on a basis determined by the Engineer which reflects the reasonable value of the work. Examples of such work would be surface courses, base courses, and similar items which have minor defects, or which have been constructed with materials having minor defects.

[Standard spec 105.3](#) further provides that if the Engineer finds that the materials, finished product in which the materials are used, or the work performed are not in reasonably close conformity with the plans and specifications, and have resulted in an inferior product, the work or materials must be removed and replaced or otherwise corrected by and at the expense of the contractor.

### **242.3 Contractor Notification**

[Standard spec 104.3](#) describes the process to be used when contractors identify what they think is a potential change to the contract. This notification clause is intended to address communication problems and to have the following benefits:

- Early and clear notification of potential changes.
- Better exchange of information.
- Mechanisms to keep resolution process moving.
- Reduced number of claims.

The process is designed to resolve the issue as early as possible.

The sole purpose of the contractor notification process is to answer the entitlement question. Is the contractor entitled to a change order for the work in question, or is the department entitled to get the work done within the existing contract. The notification process is not used to negotiate the change order [standard spec 108.10](#) and [standard spec 109.4](#) provide direction to negotiate the time and cost aspects of the change.

The contractor starts by telling the project engineer what they perceive to be a contract change. If the project engineer would decide that this is a change, then both parties would proceed to revise the contract, or the project engineer could decide that it isn't a change and discuss it to the contractor's satisfaction such that the contractor would drop the issue.

In the event the issue hasn't been resolved in the first 5 days, one of the two following options could have happened. The project engineer didn't respond, or the contractor disagreed with the project engineer's initial decision that the situation isn't a change to the contract.

If the contractor decides to pursue the change, the contractor can provide a 5-day written statement. The content requirements for the 5-day statement are specified in [standard spec 104.3](#).

The project engineer will attempt to resolve the issue and decide if there is a change to the contract. The specification requires the project engineer to respond in writing within 5 business days and the content of this response is described in [standard spec 104.3.6](#). The project engineer can respond yes, no, or request for more information (Diamond 9). Once this is decided the contractor can then drop the issue, provide requested information, or pursue the unresolved change by filing a notice of claim as described in [standard spec 105.13](#).

### **242.4 Change Order Types**

CO's involving a change in the contract price, whether an increase or a decrease, must be fair and reasonable and adequately supported in the justification document, which must include a cost analysis.

The change order will provide for payment by one of the following methods:

- Contract unit price.
- Agreed unit price.
- Agreed lump sum for the work.
- Force account.

A CO may provide for payment for one or more items of work by one method, and for other items by another method. The project engineer should be alert for situations that might require a change order and should discuss the possible need with the region well in advance of the work to be done under the CO.

CO's relative to consultant construction engineering and inspection contracts will be directly submitted to the Consultant Services unit for processing.



#### **242.4.1 Contract Unit Price**

When payment for the work is by contract unit price, the CO language should include a statement that the work was negotiated at contract unit price.

#### **242.4.2 Lump Sum and Unit Price Agreements**

In presenting a change order for approval when payment for the work is on an agreed unit price or agreed lump sum basis, evidence of the method of arriving at the agreed unit or lump sum price should accompany it.

For CO work performed at contract unit price or at an agreed unit price, each unit as completed is measured and recorded. The CO should be concise and specific in detail. It should identify in what respect the contract is changed (plans, special provisions, standard specifications, etc.) and clearly stipulate any change involved in method of measurement and basis of payment. It should, where appropriate, show the increase or decrease in contract value.

COs should not include the reason for the change order; instead, the reason should be detailed in the project diary and should be fully explained in the justification document that supports and accompanies the CO. Also, the transmitting memo will include a description of the changed work and a cost analysis or justification if applicable. If a change order authorizes work in an area that requires an environmental permit, the memo must state whether the existing permits cover the change, or whether new permits or permit modifications are required. If permit modifications are required, the memo must state whether they have been obtained or applied for. Pertinent plan drawings are to be attached to the order.

#### **242.4.3 Force Account Work**

When extra work described in a change order is to be performed on a force account basis, evidence of the method of arriving at the estimated cost should accompany the order. Refer to [CMM 246](#) for more detailed guidance on force accounts.

#### **242.5 Creating the Change Order**

The change order report is a legal contractual document identifying the details of the change order and should read as such. The contractual changes should read just as they do in the standard specifications and special provisions. Any item that is added that is not a standard bid item or does not have a standard special provision written for it should include the description, method of measurement, and basis of payment. The justification for the change needs to be documented on [DT2355](#), Contract Modification Justification (CMJ).

The CMJ is used internally and not distributed to the contractor. The CMJ includes:

- Description and need for the change.
- Consequences if the change order is not approved.
- Alternatives considered.
- Estimated price.
- Justification of price.
- Consideration for affecting contract time.
- Local program projects to notify the local public agency as instructed in [CMM 242.6.2](#).
- If the contract is subject to Federal oversight, then special attention should be given to completing the form conforming to the instructions in [CMM 242.6.2](#).

If the CMJ estimate changes by more than \$25,000 or 25%, or the CMJ is determined to no longer be required, a new CMJ should be drafted and routed appropriately for approval. The new CMJ will void the previous one. Attach a copy of the original CMJ to the new CMJ.

A CMJ is also required for administrative items that are not already in the proposal schedule of items. Administrative items are listed in [CMM 238.1](#).

#### **242.5.1 Reason Codes**

Enter one of the following reason codes as the first 2 digits of the reason for each item entered on the change order report. It's important to enter the reason code that best describes the basis for the change order because the reason codes can help central office to identify statewide or region wide trends in areas requiring additional attention.

##### **242.5.1.1 CR (Cost Reduction)**

Items to compensate the contractor for cost saving proposals under [standard spec 104.10](#).

##### **242.5.1.2 MI (Miscellaneous)**

Items not covered by other codes. Examples: On-the-Job training, time extensions, railroad conflict, abnormal or poor weather conditions.

### 242.5.1.3 PC (Plan Change)

Addition or deletion of items not originally contemplated, or a changed condition not known during design but determined to be necessary or advisable to construct the project. Example: retaining wall, change in pavement type, extending the project limits, change in scope, change in actual ground compared to borings.

### 242.5.1.4 PI (Plan Inadequacy)

Addition or deletion of items that are required to build the project but were not included or portrayed inaccurately. Example: concrete flumes, EBS (Unclassified).

### 242.5.1.5 RO (Request by Others)

Post-let items of work added by request from others. Example: request by a city, county, or town official or other agency.

### 242.5.1.6 SE (Safety Enhancement)

Addition to contract to safely construct the project. Example: traffic control, barrier, or sheeting.

### 242.5.1.7 SS (Change/Credit Standards and Specifications)

Items modified in original contract due to negotiation of change, or acceptance of items of substandard or different specifications. Example: defective material, change in plan to incorporate new standard details, change in asphalt specifications.

### 242.5.1.8 UC (Utility Conflict)

Compensation or contract time provided to the contractor due to utility conflicts, as allowed by the contract specifications.

### 242.5.1.9 DB (Disadvantaged Business)

Changes to previously approved DBE subcontractor commitments as described in [CMM 242.6.3](#).

## 242.6 Approvals for Change Orders

### 242.6.1 General

For contracts administered in AASHTOWare Project Construction and Materials®, a change order is submitted for approval electronically within the application. Based on pre-established change order approval groups, the system will send email notifications to each approver when it is their turn to review the change order.

**TABLE 242-1 Change Order Types, Approval Levels, and Order of Approval**

Change Order Type	Description	Approval Levels / Order
ADMIN	Administrative change order Administrative items, time extensions, or contract modifications (contract language changes only)	1 - Project engineer 2 - Project manager * Additional approval levels can be added including supervisor, chief, contractor, and FHWA.
STANDARD	Standard change order If FHWA approval is required, the project engineer will add them as an approval group and they will be the final approval group for the change order.	1 - Project engineer (all) 2 - Contractor (all) 3 - Project manager (up to \$24,999) 4 - Supervisor (\$25,000 - \$49,999) 5 - Chief (\$50,000 +) 6 - FHWA (optional - add when required)
MAJORS	Majors change order If FHWA approval is required, the project engineer will add them as an approval group and they will be the final approval group for the change order.	1 - Project engineer (all) 2 - Contractor (all) 3 - Project manager (up to \$99,999) 4 - Supervisor (\$100,000 - \$499,999) 5 - Chief (\$500,000 +) 6 - FHWA (optional - add when required)
PbM	Performance Based Maintenance (PbM) change order	1 - County (all) 2 - Project engineer (up to \$10,000) 3 - Supervisor (up to \$50,000)

A copy of the change order report should be distributed as follows:



**TABLE 242-2 Change Order Distribution**

Project Type	FHWA Prior Approval of CMJ	Approval for Participation in Changes and Extra Work	COPIES SENT TO: Region Office Submits one Copy of Executed change order report		
			FHWA	Bureau of Project Development	Bureau of Financial Services
FHWA Oversight Projects	> \$100,000 +/- per Change or as listed below	FHWA	YES	YES	YES
Non-FHWA Oversight Projects	N/A	Region Office	NO	YES	YES
Local Program Projects	N/A	Local Public Agency Notification	NO	YES	YES

**242.6.2 Local Program Project Changes**

When changes occur to local program projects, notification to the local public agency (LPA) is required. The CMJ serves as notification to the LPA of the change and becomes the basis for a contract modification.

The department will notify the LPA of all CMJs and records the LPA contact's name and date notified, on the [DT2355](#). Comments received from the LPA can be attached to the CMJ packet.

**242.6.3 DBE Subcontractor Commitment Changes**

When changes occur to a DBE subcontractor commitment, coordination with the department's DBE office is required. Examples requiring coordination are:

- Adding a DBE contractor.
- Removing or replacing a DBE contractor.
- Modifying a DBE contractor's work.

Changes that reduce an approved DBE commitment must be approved by the DBE office before completing a change order unless the change is initiated by WisDOT. If WisDOT initiates the change, the project engineer should notify the DBE office as soon as practicable to confirm that the prime contractor has communicated with the DBE.

Field staff needs to conform to the following process:

1. The prime contractor must notify the DBE office and copy the project engineer to request a change to a previously approved DBE commitment.
2. The DBE office approves or denies the change, informs the prime contractor and copies the project engineer.
3. The project engineer executes a change order if the DBE office approves the modification and informs the DBE office at the following email address: [DBE\\_Alert@dot.wi.gov](mailto:DBE_Alert@dot.wi.gov)
4. The DBE office follows up with the prime contractor and project engineer regarding all commitment modifications.
5. The project engineer withholds payment from the prime contractor for unapproved changes.

At every weekly project meeting, the project engineer needs to discuss DBE participation with the prime contractor to ensure the amended commitment is still on track and inform the DBE office if it is not.

**242.6.4 Changes to FHWA Oversight Projects**

When changes occur to oversight projects, Federal Regulation 23 CFR 635.120 must be followed. This regulation requires WisDOT to effectively document change justifications. Our process uses CMJs to document these changes.

To determine if the project is a FHWA Oversight project, check the folder on SharePoint called "FHWA Reports", It is located at:

<https://wigov.sharepoint.com/sites/dot-dtsd/bpd/cspm/pmu/Reports/Forms/AllItems.aspx>

There is a Federal Oversight Report placed on this site called "FHWA oversight project listing". This report in combination with the "FHWA oversight letter" placed on this site quarterly identifies all current FHWA oversight projects. The proposal should also document if the project is subject to federal oversight.

If the project is a FHWA Oversight project and any of the three conditions below occur, the department is to obtain FHWA prior approval before any work begins on changes to the plans, specifications, special provisions, significant plan quantities or extra work. The three conditions are:

- Is a change of \$100,000 or greater, based on the sum of the absolute value(s) of the estimated cost change(s) in the contract. For example, if the contract originally called for 6" concrete pavement, valued at \$50,000. The area was reevaluated, and it was determined that 7" concrete pavement was required and it's value is \$80,000. The net cost change is a plus \$30,000 (\$80,000 -\$50,000), the absolute value of the change is \$30,000 + \$80,000 = \$130,000. Since the absolute cost change is over \$100,000, the CMJ has to be approved by FHWA.
- Changes the scope or intent of the project, regardless of cost impact.
- Accepts nonconforming materials, work or non-performance of QMP, regardless of cost impact.

Work outside the project limits is not an acceptable practice and cannot be added to the project by change order. However, if there is an emergency or other unique and compelling reasons that support this approach, FHWA prior approval is required, regardless of participation in the change.

A [DT2355](#), Contract Modification Justification (CMJ) is used to document issues that change the contract.

The CMJ serves as notification to FHWA of the change and becomes the basis for a change order. The project engineer completes a CMJ for each separate issue regardless if prior approval is required. An issue may involve/include multiple related items of work that will be included in one CMJ.

The CMJ should capture all adjustments to the contract as a result of the change, such as:

- Impacts to schedule (*required per 23 CFR §635.120(c)*). Include an indication how changed item(s) affect the critical path and include documentation that supports why the revised time is appropriate.
- Changes to interim completion dates or changes to Interim Liquidated Damage rates.
- TMP changes.
- Materials testing requirements.

The department will send all CMJs to FHWA. This includes CMJs for non-participating items. FHWA will review all CMJs. The only CMJs approved by FHWA are ones requiring prior approval. FHWA will notify the department if there is any concern regarding the CMJs reviewed before the Contract Modification is processed. The benefit of reviewing all CMJs in advance is that it will speed up the process of reviewing the final change order.

An initial independent cost analysis supporting the estimated cost should be attached to the CMJ with the prior approval request. Show the rationale behind the proposed lump sum or unit cost, such as average unit price history, actual bid history from As-read bids, Estimator®, or Bid Express®, or from labor, equipment, materials and time estimates. The department should discuss with the Federal Oversight Engineer the acceptable cost justification required for the issue.

A change order can include multiple CMJs. This allows for consolidation of accumulated CMJs and fewer Contract Modifications submitted for review. The net dollar amount of the change order can exceed \$100,000. The need for prior approval is not based on the change order total but is instead based on the value of the individual CMJs as indicated above and as long as each CMJ represented does not exceed the \$100,000 cost change threshold (based on the sum of the absolute value(s) of the estimated cost changes. Indicate which CMJs are included as part of the change order This will allow FHWA to track the CMJs and review the change order quickly.

The department is to obtain FHWA final approval for all change orders on contracts designated for federal oversight regardless of the dollar amount or change on all oversight projects. This includes those that do not require prior approval. change orders will be electronically submitted to FHWA close to the time that the work is taking place. If a change order is submitted at a later time, the modification should document the reason for the delay in processing. FHWA's approval will appear electronically within AASHTOWare Project Construction.

Changes that affect a local unit of government do not require the approval of the local unit. (The change order does not require the local unit's signature). However, the region should keep the local unit informed of proposed changes and send them a copy of each approved change order that affects them.

Each region has its own process for change order distribution once the approval process is complete Please direct any questions to the region office.

#### **242.6.5 Prior Approval**

FHWA prior approval is provided formally via the CMJ. FHWA prior approval requests are to be made via e-mail. The e-mail is to include the Contract Modification Justification. If immediate prior approval is required by FHWA, it can be given in person or over the phone. The project engineer is to follow up with an e-mail documenting the conversation including date and time it took place and print it. Copies of all

CMJs for federal oversight contracts should be provided to FHWA. FHWA will only sign and return those that require FHWA's approval.

FHWA will electronically sign all change orders (for oversight contracts), regardless of whether prior approval (via the CMJ) was required. This includes administrative item modifications.

FHWA will not participate in funding the change orders and the project for instances where prior approval of a CMJ has not been granted. Only under unusual circumstances, with compelling justification, will FHWA consider participating in work that should have been given prior approval but was not. If there is any doubt on whether prior approval is needed on a CMJ, the FHWA Field Operations Engineer (FOE) or Project Oversight Manager (POM) can be contacted and provide clarity. FHWA's preference would be to address the question earlier, rather than wait and there be a chance of Federal Non-Participation due to lack of notification.

It is FHWA's goal to give prior approval or reasons for denying approval via e-mail within five working days. The FHWA Project Team Leader should be copied to ensure back-up coverage in the event the FOE or POM is out of the office. If approval is needed within a shorter timeframe, this should be conveyed in the request to FHWA.

In rare instances FHWA will grant a conceptual prior approval, this approval can come via e-mail or phone. This is done only when work must be started at once, like in an emergency or unusual condition and an agreement on the price of the work or FHWA's participation, has not been determined. Conceptual prior approval is requested via e-mail or documented by the department via e-mail following the conversation. The department is to submit a fully documented change orders and Contract Modification Justification, or request for time extension, to FHWA via e-mail within five working days of receiving FHWA's conceptual prior approval.

#### **242.6.6 Proprietary Items**

If a change order specifies proprietary products, a proprietary product justification must be prepared for and approved by the region project development chief before the change order can be approved. Further guidance on the incorporation of proprietary products into WisDOT projects can be found in [FDM 19-1-5](#).

### **242.7 Unacceptable Reasons for Change Orders**

#### **242.7.1 Out of Scope Work on Federal Aid Projects**

Due to the congressional mandate to select contractors based on low bids, federal laws and regulations limit the ability of state departments to add work to federal aid work. This congressional requirement is not overridden by cost or convenience issues. Where safety does create an urgent need, the department should use emergency contracts to select contractors, not change orders. There is no set rule regarding the scope of a contract, but factors to consider include whether the work to be added falls within the physical area of the project work, and whether the work is within the environmental document.

#### **242.7.2 Insufficient Time Allowed by the Contract**

Generally, this is not considered a legitimate excuse. If the contractor believes there is insufficient time allowed in a proposed contract, the contractor should point this out before submitting a bid and get it corrected then. The only way shortage of time can be considered as basis for a contract time extension is if there is a demonstrated impossibility resulting directly from the terms of the contract.

There are three traditionally accepted criteria that may establish impossibility in state contracts.

1. Performance becomes impossible by operation of the law.
2. A contract relates to a specific subject matter and that subject matter has ceased to exist.
3. The contemplated means of performance have been destroyed or have ceased to exist.

#### **242.7.3 Labor Shortages**

While the department is aware of the difficulties a contractor faces when the contractor cannot obtain adequate number of skilled workers, the contractor is actually only competing with other contractors in the area for a work force. By absolving a contractor of responsibility for procuring an adequate work force on one job, the department would, in effect, be placing other contractors in that area at a competitive disadvantage.

Skilled and semi-skilled workers are often in short supply. This is a recognizable fact that should be evident to recruiters for construction firms. It is aggravated in larger metropolitan areas because of generally greater number of projects competing for a limited work force. Because of this, a labor shortage claim would not ordinarily be considered as sufficient reason for a time extension request.