

Appendix 1 - Contract Disputes Act of 1978/FAR 33.2
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## Contract Disputes Act of 1978 (Federal Acquisition Regulation - Subpart 33.2)

This appendix contains the complete SUBPART 33.2--DISPUTES AND APPEALS of the Federal Acquisition Regulation (FAR), which is the implementation of the Contract Disputes Act of 1978 along with updates through 1996.

### SUBPART 33.2--DISPUTES AND APPEALS

#### 33.201 Definitions.

"Accrual of a claim" occurs on the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred.

However, monetary damages need not have been incurred.

"Alternative dispute resolution (ADR)" means any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. These procedures may include, but are not limited to, assisted settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration.

"Claim," as used in this part, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

"Defective certification," as used in this subpart, means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

"Issue in controversy" means a material disagreement between the Government and the

contractor which (1) may result in a claim or (2) is all or part of an existing claim.

"Misrepresentation of fact," as used in this part, means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

"Neutral person," as used in this subpart, means an impartial third party, who serves as a mediator, fact finder, or arbitrator, or otherwise functions to assist the parties to resolve the issues in controversy. A neutral person may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties. A neutral person shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral person may serve (5 U.S.C. 583).

#### 33.202 Contract Disputes Act of 1978.

The Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613) (the Act), establishes procedures and requirements for asserting and resolving claims subject to the Act. In addition, the Act provides for: (a) the payment of interest on contractor claims; (b) certification of contractor claims; and (c) a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

#### 33.203 Applicability.

(a) Except as specified in paragraph (b) of this section, this part applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with (1) a foreign government or agency of that government, or (2) an international organization or a subsidiary body of that organization, if the agency head determines that the application of the Act to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCA's) authorized under the Act continue to have all of the authority they possessed

before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, recognizes the "all disputes" authority established by the Act and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Act or to constrain the authority of the statutory agency BCA's in the handling and deciding of contractor appeals under the Act.

#### **33.204 Policy.**

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), Pub. L. 101-522, agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.

#### **33.205 Relationship of the Act to Public Law 85-804.**

(a) Requests for relief under Public Law 85-804 (50 U.S.C. 1431-1435) are not claims within the Contract Disputes Act of 1978 or the Disputes clause at 52.233-1, Disputes, and shall be processed under Part 50, Extraordinary Contractual Actions. However, relief formerly available only under Public Law 85-804; i.e., legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Contract Disputes Act of 1978 and the Disputes clause. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Act. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of

legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied or not approved in its entirety under paragraph (b) above may be cognizable as a request for relief under Public Law 85-804 as implemented by Part 50. However, the claim must first be submitted to the contracting officer for consideration under the Contract Disputes Act of 1978 because the claim is not cognizable under Public Law 85-804, as implemented by Part 50, unless other legal authority in the agency concerned is determined to be lacking or inadequate.

#### **33.206 Initiation of a claim.**

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

#### **33.207 Contractor certification.**

(a) Contractors shall provide the certification specified in 33.207(c) when submitting any claim--

(1) Exceeding \$100,000; or

(2) Regardless of the amount claimed when using--

(i) Arbitration conducted pursuant to 5 U.S.C. 575-580; or

(ii) Any other ADR technique that the agency elects to handle in accordance with the ADRA

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(c) The certification shall state as follows:  
"I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor."

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the

dollar thresholds requiring certification are met (see example in 15.804-2(a)(1)(iii) regarding cost or pricing data).

(e) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.

(f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

#### **33.208 Interest on claims.**

(a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that--

(1) The contracting officer receives the claim (certified if required by 33.207(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See 32.614 for the right of the Government to collect interest on its claims against a contractor.)

(c) With regard to claims having defective certifications, interest shall be paid from either the date that the contracting officer initially receives the claim or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate.

#### **33.209 Suspected fraudulent claims.**

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

#### **33.210 Contracting officer's authority.**

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Act. In accordance with agency policies and 33.214, contracting officers are authorized to use ADR procedures to resolve

claims. The authority to decide or resolve claims does not extend to--

(a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment, or adjustment of any claim involving fraud.

#### **33.211 Contracting officer's decision.**

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall--

- (1) Review the facts pertinent to the claim;
- (2) Secure assistance from legal and other

advisors;

- (3) Coordinate with the contract administration office or contracting office, as appropriate; and
- (4) Prepare a written decision that shall include

a--

- (i) Description of the claim or dispute;
- (ii) Reference to the pertinent contract terms;
- (iii) Statement of the factual areas of agreement and disagreement;

(iv) Statement of the contracting officer's decision, with supporting rationale;

- (v) Paragraph substantially as follows:

"This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

(vi) Demand for payment prepared in accordance with 32.610(b) in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return

receipt requested, or by any other method that provides evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of \$100,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over \$100,000, 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account--

(1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) The contracting officer shall have no obligation to render a final decision on any claim exceeding \$100,000 which contains a defective certification, if within 60 days after receipt of the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a specified time period determined by the tribunal.

(g) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(h) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

### **33.212 Contracting officer's duties upon appeal.**

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be

required by the agency BCA for use on a pending appeal from the contracting officer's decision.

### **33.213 Obligation to continue performance.**

(a) In general, before passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, Section 6(b) of the Act authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending final decision on a claim relating to the contract. In recognition of this fact, an alternate paragraph is provided for paragraph (h) of the clause at 52.233-1, Disputes. This paragraph shall be used only as authorized by agency procedures.

(b) In all contracts that include the clause at 52.233-1, Disputes, with its Alternate I, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance; provided, that the Government's interest is properly secured.

### **33.214 Alternative dispute resolution (ADR).**

(a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include--

(1) Existence of an issue in controversy;

(2) A voluntary election by both parties to participate in the ADR process;

(3) An agreement on alternative procedures and terms to be used in lieu of formal litigation;

(4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy; and

(5) Certification by the contractor in accordance with 33.207 when using ADR procedures to resolve all or part of a claim under the authority of the ADRA.

(b) If the contracting officer rejects a request for ADR from a small business contractor, the contracting officer shall provide the contractor written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(c) ADR procedures may be used at any time that

the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may be applied to all or a portion of the claim. When ADR procedures are used subsequent to the issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the final decision.

(d) When appropriate, a neutral person may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.

(e) The confidentiality of ADR proceedings shall be protected consistent with 5 U.S.C. 574.

#### **33.215 Contract clause.**

The contracting officer shall insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.203(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its Alternate I.

## Appendix 2 - FAR 52.2 Text of Provisions and Clauses

### **The Federal Acquisition Regulation (FAR) – Select Clauses**

This appendix contains select clauses from the **Federal Acquisition Regulation (FAR)**. This set of clauses is from *Subpart 52 - Text of Provisions and Clauses*, which represent the “General Conditions” of the contract. **Table A4-1** contains a summary of the clauses in this section. This is followed by a **Table A4-2** containing a more comprehensive listing of most of the standard clauses used on construction contracts, including a cross reference to their counterparts from the old Standard Form 23.

#### **Notes on the F.A.R.**

The Federal Acquisition Regulation System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulation System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

The FAR is prepared, issued, and maintained, and the FAR System is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities.

Copies of the FAR in Federal Register, loose-leaf, and CFR form may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402. Additionally, the FAR is maintained on the Internet at [/www.arnet.gov/far](http://www.arnet.gov/far).

**Selected Federal Acquisition Regulation (F.A.R.) Clauses**

<b>F.A.R. Clause No.</b>	<b>Description</b>	<b>Appendix 2 Page No.</b>
52.211-12	Liquidated Damages-Construction	167
52.211-13	Time Extensions	167
52.211-18	Variation in Estimated Quantity	167
52.222-11	Subcontracts (Labor Standards)	167
52.222-12	Contract Termination - Debarment	167
52.231-3	Site Investigations	167
52.232-27	Prompt Payment	167
52.233-1	Disputes	171
52.236-1	Performance of work by the Contractor	172
52.236-2	Differing Site Conditions	172
52.236-3	Site Investigations and Conditions Affecting the Work	172
52.236-4	Physical Data	172
52.236-5	Materials and Workmanship	172
52.236-6	Superintendence by Contractor	173
52.236-7	Permits and Responsibilities	173
52.236-15	Schedules for Construction Contracts	173
52.236-16	Quality Surveys	173
52.236-21	Specifications and Drawings for Construction	174
52.242-14	Suspension of Work	175
52.242-15	Stop Work Order	175
52.243-4	Changes	175
52.244-1	Subcontractors	176
52.246-12	Inspection of Construction	177
52.246-21	Warranty of Construction	177
52.248-3	Value Engineering Incentive	178
52.249-2 (A.L.T. I)	Termination for Convenience of the Government	180
52.249-10	Termination for Default - Damages for Delay-Time Extensions	183
52.249-14	Excusable Delays	184

**Reference List F.A.R. Clauses and Previous Standard Form 23**

Form 23	Description	F.A.R. No.
1.1 & 1.2	Definitions	52.202-1
2.	Specifications and Drawings	52.236-21
3.	Changes	52.243-4
4.	Differing Site Conditions	52.236-2
5.	Termination for Default - Damages for Delay - Time Extensions	52.249-10
6.	Disputes	52.233-1
7.	Payments to contractor	52.232-5
8.	Assignment of Claims	52.232-23
9.	Materials and Workmanship	52.236-5
10.	Inspection and Acceptance	52.246-12
11.	Superintendence by Contractor	52.236-6
12.	Permits and Responsibilities	52.236-7
13.	Conditions Affecting the Work	
14.	Other Contracts	52.236-8
15.	Patent Indemnity	52.227-14
16.	Additional Bond Security	52.228-2
17.	Covenant Against Contingent Fees	52.203-5
18.	Officials Not to Benefit	52.203-6
19.	Buy American Act	52.225-5
20.	Convict Labor	52.222-3
21.	Equal Opportunity	52.222-26
22.	Utilization of Small Business Concerns	52.219-8
23.	Suspension of Work	52.242-14
24.	Davis-Bacon Act	52.222-6
25.	Contract Work Hours and Safety Standards Act - Overtime Compensation	52.223-4
26.	Apprentices and Trainees	52.232-9
27.	Payrolls and Basic Records	52.232-8
28.	Compliance With Copeland Regulations	52.222-10
29.	Withholding of Funds	52.222-7
30.	Subcontracts	52.222-11
31.	Contract Termination - Debarment	52.222-12
32.	Contractor Inspection System	52.246-12
33.	Gratuities	52.203-3
34.	Small Business Subcontracting Program (Maintenance, Repair and Construction)	52.219-9
35.	Federal, State and Local Taxes	52.229-3
36.	Renegotiation	
37.	Termination for Convenience of the Government	52.249-2 (ALT. I)
38.	Notice and Assistance Regarding Patent and Copyright Infringement	52.227-2
39.	Authorization and Consent	52.227-1
40.	Composition of Contractor	
41.	Site Investigation	52.231-3

Form 23	Description	F.A.R. No.
42.	Protection of Existing Vegetation, Structures, Utilities, and Improvements	52.236-9
43.	Operations and Storage Areas	52.236-10
44.	Modification Proposals - Price Breakdown	
45.	Subcontractors	52.244-1
46.	Use and Possession Prior to Completions	52.236-11
47.	Cleaning Up	52.236-12
48.	Additional Definitions	
49.	Accident Prevention	52.236-13
50.	Government Inspectors	52.246-12
51.	Rights in Shop Drawings	
52.	Affirmative Action for Handicapped Workers	52.222-36
53.	Clean Air and Water	52.223-2
54.	Notice to the Government of Labor Disputes	
55.	Contract Prices - Bidding Schedule	
56.	Examination of Records by Comptroller General	
57.	Priorities, Allocations, and Allotments	
58.	Price Reduction for Defective Cost or Pricing Data - Price Adjustments	52.215-23
59.	Interest	52.237-17
60.	Audit by Department of Defense	
61.	Subcontractor Cost or Pricing Data - Price Adjustments	52.215-25
62.1	Government - Furnished Property (Short Form)	52.245-4
62.2	Government Property ( Fixed Price )	52.245-2
63.	Disputes Concerning Labor Standards	
64.	Variations in Estimated Quantities	52.211-18
65.	Progress Charts and Requirements for Overtime Work	
66.	Value Engineering Incentive	52.243-3
67.	Pricing of Adjustments	
68.	Listing of Employment Openings	
69.	Utilization of Minority Business Enterprises	
70.	Minority Business Enterprises Subcontracting Program	
71.	Payment of Interest on Contractors Claims	
72.	Environmental Litigation	

**52.211-12 Liquidated Damages--Construction.**

(APR 1984)

(a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of \_\_\_\_\_ [Contracting Officer insert amount] for each day of delay.

(b) If the Government terminates the Contractor's right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If the Government does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.

(End of clause)

*Alternate 1* (APR 1984). If different completion dates are specified in the contract for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.

**52.211-13 Time Extensions.**

(APR 1984)

Notwithstanding any other provisions of this contract, it is mutually understood that the time extensions for changes in the work will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of construction. The change order granting the time extension may provide that the contract completion date will be extended only for those specific elements so delayed and that the remaining contract completion dates for all other portions of the work will not be altered and may further provide for an equitable readjustment of liquidated damages under the new completion schedule.

(End of clause)

**52.211-18 Variation in Estimated Quantity.**

(APR 1984)

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgement of the Contracting Officer, is justified.

(End of clause)

**52.222-11 Subcontracts (Labor Standards).**

(FEB 1988)

(a) The Contractor or subcontractor shall insert in any subcontracts the clauses entitled Davis-Bacon Act, Contract Work Hours and Safety Standards Act--Overtime Compensation, Apprentices and Trainees, Payrolls and Basic Records, Compliance with Copeland Act Requirements, Withholding of Funds, Subcontracts (Labor Standards), Contract Termination--Debarment, Disputes Concerning Labor Standards, Compliance with Davis-Bacon and Related Act Regulations, and Certification of Eligibility, and such other clauses as the Contracting Officer may, by appropriate instructions, require, and also a clause requiring subcontractors to include these clauses in any lower tier subcontracts. The Prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with all the contract clauses cited in this paragraph.

(b)(1) Within 14 days after award of the contract, the Contractor shall deliver to the Contracting Officer a completed Statement and Acknowledgment Form (SF 1413) for each subcontract, including the subcontractor's signed and dated acknowledgment that the clauses set forth in paragraph (a) of this clause have been included in the subcontract.

(2) Within 14 days after the award of any subsequently awarded subcontract the Contractor shall deliver to the Contracting Officer an updated completed SF 1413 for such additional subcontract.

(End of clause)

**52.222-12 Contract Termination--Debarment.**

(FEB 1988)

A breach of the contract clauses entitled *Davis-Bacon Act, Contract Work Hours and Safety Standards Act--Overtime Compensation, Apprentices and Trainees, Payrolls and Basic Records, Compliance with Copeland Act Requirements, Subcontracts (Labor Standards), Compliance with Davis-Bacon and Related Act Regulations, or Certification of Eligibility* may be grounds for termination of the contract, and for debarment as a Contractor and subcontractor as provided in 29 CFR 5.12.

(End of clause)

**52.232-27 Prompt Payment for Construction Contracts.**

(MAR 1994)

Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. Definitions of pertinent terms are set forth in 32.902. All days referred to in this clause are calendar days, unless otherwise specified.

(a) *Invoice Payments.*

(1) For purposes of this clause, there are several types of invoice payments which may occur under this contract, as follows:

(i) Progress payments, if provided for elsewhere in this contract, based on Contracting Officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project.

(A) The due date for making such payments shall be 14 days after receipt of the payment request by the designated billing office. However, if the designated billing office fails to annotate the payment request with the actual date of receipt, the payment due date shall be deemed to be the 14th day after the date the Contractor's payment request is dated, provided a proper payment request is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) The due date for payment of any amounts retained by the Contracting Officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, shall be as specified in the contract or, if not specified, 30 days after approval for release to the Contractor by the Contracting Officer.

(ii) Final payments based on completion and acceptance of all work and presentation of release of all claims against the Government arising by virtue of the contract, and payments for partial deliveries that have been accepted by the Government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract):

(A) The due date for making such payments shall be either the 30th day after receipt by the designated billing office of a proper invoice from the Contractor, or the 30th day after Government acceptance of the work or services completed by the Contractor, whichever is later. However, if the designated billing office fails to annotate the invoice with the date of actual receipt, the invoice payment due date shall be deemed to be the 30th day after the date the Contractor's invoice is dated, provided a proper invoice is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(2) An invoice is the Contractor's bill or written request for payment under the contract for work or services performed under the contract. An invoice shall be prepared and submitted to the designated billing office. A proper invoice must include the items listed in subdivisions (a)(2)(i) through (a)(2)(ix) of this clause. If the invoice does not comply with these requirements, the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated billing office. Untimely notification will be taken into account in the computation of any interest penalty owed the Contractor in the manner described in subparagraph (a)(4) of this clause.

(i) Name and address of the Contractor.

(ii) Invoice date.

(iii) Contract number or other authorization for work or services performed (including order number and contract line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (e.g., prompt payment discount terms).

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(viii) For payments described in subdivision (a)(1)(i) of this clause, substantiation of the amounts requested and certification in accordance with the requirements of the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.

(ix) Any other information or documentation required by the contract.

(3) An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the conditions listed in subdivisions (a)(3)(i) through (a)(3)(iii) of this clause are met, if applicable.

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in sub-paragraph (a)(2) of this clause, then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the Contractor.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor for payments described in subdivision (a)(1)(ii) of this clause, Government acceptance or approval shall be deemed to have occurred constructively on the

7th day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract. In the event that actual acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1.00 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

(5) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(6) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor--

(i) Is owed an interest penalty;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

(b) *Contract Financing Payments.*

(1) For purposes of this clause, if applicable, "contract financing payment" means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government, other than progress payments based on estimates of amount and value of work performed. Contract financing payments include advance payments and interim payments under cost-type contracts.

(2) If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (insert day as prescribed by Agency head, if not prescribed, insert 30th day) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified. For advance payments, loans, or other arrangements that do not involve recurrent submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer. Contract financing payments shall not be assessed an interest penalty for payment delays.

(c) The Contractor shall include in each subcontract for property or services (including a material supplier) for the purpose of performing this contract the following:

(1) A payment clause which obligates the Contractor to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days from receipt of payment out of such amounts as are paid to the Contractor under this contract.

(2) An interest penalty clause which obligates the Contractor to pay to the subcontractor an interest penalty for each payment not made in accordance with the payment clause--

(i) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(ii) Computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(3) A clause requiring each subcontractor to include a payment clause and an interest penalty clause conforming to the standards set forth in subparagraphs (c)(1) and (c)(2) of this clause in each of its subcontracts, and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(d) The clauses required by paragraph (c) of this clause shall not be construed to impair the right of Contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions which--

(1) Permit the Contractor or a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(2) Permit the Contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(3) Permit such withholding without incurring any obligation to pay a late payment penalty if--

(i) A notice conforming to the standards of paragraph (g) of this clause has been previously furnished to the subcontractor; and

(ii) A copy of any notice issued by a Contractor pursuant to subdivision (d)(3)(i) of this clause has been furnished to the Contracting Officer.

(e) If a Contractor, after making a request for payment to the Government but before making a payment to a subcontractor for the subcontractor's performance covered by the payment request, discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the Contractor shall--

(1) Furnish to the subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(2) Furnish to the Contracting Officer, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to subparagraph (e)(1) of this clause;

(3) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (e)(1) of this clause;

(4) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency, and--

(i) Make such payment within--

(A) Seven days after correction of the identified subcontract performance deficiency (unless the funds therefor must be recovered from the Government because of a reduction under subdivision (e)(5)(ii) of this clause; or

(B) Seven days after the Contractor recovers such funds from the Government; or

(ii) Incur an obligation to pay a late payment interest penalty computed at the rate of interest established by the Secretary of the Treasury, and published in the *Federal Register*, for interest payments under section 12 of the Contracts Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty;

(5) Notify the Contracting Officer upon--

(i) Reduction of the amount of any subsequent certified application for payment; or

(ii) Payment to the subcontractor of any withheld amounts of a progress payment, specifying--

(A) The amounts withheld under subparagraph (e)(1) of this clause; and

(B) The dates that such withholding began and ended; and

(6) Be obligated to pay to the Government an amount equal to interest on the withheld payments (computed in the manner provided in 31 U.S.C. 3903(c)(1)), from the 8th day after receipt of the withheld amounts from the Government until--

(i) The day the identified subcontractor performance deficiency is corrected; or

(ii) The date that any subsequent payment is reduced under subdivision (e)(5)(i) of this clause.

(f)(1) If a Contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a "second-tier subcontractor") a written notice in accordance with section 2 of the Act of August 24, 1935 (40 U.S.C. 270b, Miller Act), asserting a deficiency in such first-tier subcontractor's performance under the contract for which the Contractor may be ultimately liable, and the Contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, then the Contractor may, without incurring an obligation to pay an interest penalty under subparagraph (e)(6) of this clause--

(i) Furnish to the first-tier subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon making such determination; and

(ii) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subdivision (f)(1)(i) of this clause.

(2) As soon as practicable, but not later than 7 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the Contractor shall pay the amount withheld under subdivision (f)(1)(ii) of this clause to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate of interest established by the Secretary of the Treasury, and published in the *Federal Register*, for interest payments under section 12 of the Contracts Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(g) A written notice of any withholding shall be issued to a subcontractor (with a copy to the Contracting Officer of any such notice issued by the Contractor), specifying--

(1) The amount to be withheld;

(2) The specific causes for the withholding under the terms of the subcontract; and

(3) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) The Contractor may not request payment from the Government of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contracting Officer that the subcontractor is entitled to the payment of such amount.

(i) A dispute between the Contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract pursuant to paragraph (c) of this clause does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(j) Except as provided in paragraph (i) of this clause, this clause shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to the Contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by the Contractor or deficient subcontract performance or nonperformance by a subcontractor.

(k) The Contractor's obligation to pay an interest penalty to a subcontractor pursuant to the clauses included in a subcontract under paragraph (c) of this clause shall not be construed to be an obligation of the United States for such interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such interest penalty.

(End of clause)

#### 52.233-1 Disputes.

(OCT 1995)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph (d)(2) of this clause. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim--

(A) Exceeding \$100,000; or

(B) Regardless of the amount claimed, when using--

(1) Arbitration conducted pursuant to 5 U.S.C. 575-580, or

(2) Any other alternative means of dispute resolution (ADR) technique that the agency elects to handle in accordance with the Administrative Dispute Resolution Act (ADRA).

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use ADR. If the Contractor refuses an offer for alternative disputes resolution, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the request. When using arbitration conducted pursuant to 5 U.S.C. 575-580, or when using any other ADR technique that the agency elects to handle in accordance with the ADRA, any claim, regardless of amount, shall be accompanied by the certification described in subparagraph (d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

*Alternate 1 (DEC 1991).* If it is determined under agency procedures, that continued performance is necessary pending resolution of any claim arising under or relating to the contract, substitute the following paragraph (i) for the paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or

relating to the contract, and comply with any decision of the Contracting Officer.

**52.236-1 Performance of Work by the Contractor.**

(APR 1984)

The Contractor shall perform on the site, and with its own organization, work equivalent to at least \_\_\_\_\_ [insert the appropriate number in words followed by numerals in parentheses] percent of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the Government.

(End of clause)

**52.236-2 Differing Site Conditions.**

(APR 1984)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in paragraph (a) of this clause for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

(End of clause)

**52.236-3 Site Investigation and Conditions Affecting the Work.**

(APR 1984)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3)

uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(End of clause)

**52.236-4 Physical Data.**

(APR 1984)

Data and information furnished or referred to below is for the Contractor's information. The Government shall not be responsible for any interpretation of or conclusion drawn from the data or information by the Contractor.

(a) The indications of physical conditions on the drawings and in the specifications are the result of site investigations by ..... [insert a description of investigational methods used, such as surveys, auger borings, core borings, test pits, probings, test tunnels].

(b) Weather conditions ..... [insert a summary of weather records and warnings].

(c) Transportation facilities ..... [insert a summary of transportation facilities providing access from the site, including information about their availability and limitations].

(d) ..... [insert other pertinent information].

(End of clause)

**52.236-5 Material and Workmanship.**

(APR 1984)

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in

the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(b) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

(c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

(End of clause)

#### 52.236-6 Superintendence by the Contractor.

(APR 1984)

At all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

(End of clause)

#### 52.236-7 Permits and Responsibilities.

(NOV 1991)

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(End of clause)

#### 52.236-15 Schedules for Construction Contracts.

(APR 1984)

(a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the

Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

(b) The Contractor shall enter the actual progress on the chart as directed by the Contracting Officer, and upon doing so shall immediately deliver three copies of the annotated schedule to the Contracting Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

(c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

(End of clause)

#### 52.236-16 Quantity Surveys.

(APR 1984)

(a) Quantity surveys shall be conducted, and the data derived from these surveys shall be used in computing the quantities of work performed and the actual construction completed and in place.

(b) The Government shall conduct the original and final surveys and make the computations based on them. The Contractor shall conduct the surveys for any periods for which progress payments are requested and shall make the computations based on these surveys. All surveys conducted by the Contractor shall be conducted under the direction of a representative of the Contracting Officer, unless the Contracting Officer waives this requirement in a specific instance.

(c) Promptly upon completing a survey, the Contractor shall furnish the originals of all field notes and all other records relating to the survey or to the layout of the work to the Contracting Officer, who shall use them as necessary to determine the amount of progress payments. The Contractor shall

retain copies of all such material furnished to the Contracting Officer.

(End of clause)

*Alternate I* (APR 1984). If it is determined at a level above that of the Contracting Officer that it is impracticable for Government personnel to perform the original and final surveys, and the Government wishes the Contractor to perform these surveys, substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) The Contractor shall conduct the original and final surveys and surveys for any periods for which progress payments are requested. All these surveys shall be conducted under the direction of a representative of the Contracting Officer, unless the Contracting Officer waives this requirement in a specific instance. The Government shall make such computations as are necessary to determine the quantities of work performed or finally in place. The Contractor shall make the computations based on the surveys for any periods for which progress payments are requested.

#### 52.236-21 Specifications and Drawings for Construction.

(FEB 1997)

(a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(b) Wherever in the specifications or upon the drawings the words "directed", "required", "ordered", "designated", "prescribed", or words of like import are used, it shall be understood that the "direction", "requirement", "order", "designation", or "prescription", of the Contracting Officer is intended and similarly the words "approved", "acceptable", "satisfactory", or words of like import shall mean "approved by," or "acceptable to", or "satisfactory to" the Contracting Officer, unless otherwise expressly stated.

(c) Where "as shown," "as indicated", "as detailed", or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word "provided" as used herein shall be understood to mean "provide complete in place," that is "furnished and installed".

(d) Shop drawings means drawings, submitted to the Government by the Contractor, subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural

elements, and (2) the installation (i.e., fit, and attachment details) of materials or equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the contractor to explain in detail specific portions of the work required by the contract. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(e) If this contract requires shop drawings, the Contractor shall coordinate all such drawings, and review them for accuracy, completeness, and compliance with contract requirements and shall indicate its approval thereon as evidence of such coordination and review. Shop drawings submitted to the Contracting Officer without evidence of the Contractor's approval may be returned for resubmission. The Contracting Officer will indicate an approval or disapproval of the shop drawings and if not approved as submitted shall indicate the Government's reasons therefor. Any work done before such approval shall be at the Contractor's risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below.

(f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(g) The Contractor shall submit to the Contracting Officer for approval four copies (unless otherwise indicated) of all shop drawings as called for under the various headings of these specifications. Three sets (unless otherwise indicated) of all shop drawings, will be retained by the Contracting Officer and one set will be returned to the Contractor.

(End of clause)

*Alternate I* (APR 1984). When record shop drawings are required and reproducible shop drawings are needed, add the following sentences to paragraph (g) of the basic clause:

Upon completing the work under this contract, the Contractor shall furnish a complete set of all shop drawings as finally approved. These drawings shall show all changes and revisions made up to the time the equipment is completed and accepted.

*Alternate II* (APR 1984). When record shop drawings are required and reproducible shop drawings are not needed, the following sentences shall be added to paragraph (g) of the basic clause:

Upon completing the work under this contract, the Contractor shall furnish \_\_\_\_\_ [Contracting Officer complete by inserting desired amount] sets of prints of all shop drawings as finally approved. These drawings shall show changes and revisions made up to the time the equipment is completed and accepted.

(End of clause)

#### 52.242-14 Suspension of Work.

(APR 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

(End of clause)

#### 52.242-15 Stop-Work Order.

(AUG 1989)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either--

(1) Cancel the stop-work order; or  
(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery

schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if--

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; *provided*, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(End of clause)

#### 52.243-4 Changes.

(AUG 1987)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes--

(1) In the specifications (including drawings and designs);  
(2) In the method or manner of performance of the work;  
(3) In the Government-furnished facilities, equipment, materials, services, or site; or  
(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; *Provided*, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the

Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

(End of clause)

#### 52.244-1 Subcontracts (Fixed-Price Contracts).

(FEB 1995)

(a) This clause does not apply to firm-fixed-price contracts and fixed-price contracts with economic price adjustment. However, it does apply to subcontracts resulting from unpriced modifications to such contracts.

(b) "Subcontract," as used in this clause, includes but is not limited to purchase orders, and changes and modifications to purchase orders. The Contractor shall notify the Contracting Officer reasonably in advance of entering into any subcontract if the Contractor does not have an approved purchasing system and if the subcontract--

(1) Is proposed to exceed \$100,000; or

(2) Is one of a number of subcontracts with a single subcontractor, under this contract, for the same or related supplies or services, that in the aggregate are expected to exceed \$100,000.

(c) The advance notification required by paragraph (b) above shall include--

(1) A description of the supplies or services to be subcontracted;

(2) Identification of the type of subcontract to be used;

(3) Identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the competition obtained;

(4) The proposed subcontract price and the Contractor's cost or price analysis;

(5) The subcontractor's current, complete, and accurate cost or pricing data and Certificate of Current Cost or Pricing Data, if required by other contract provisions;

(6) The subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract; and

(7) A negotiation memorandum reflecting--

(i) The principal elements of the subcontract price negotiations;

(ii) The most significant considerations controlling establishment of initial or revised prices;

(iii) The reason cost or pricing data were or were not required;

(iv) The extent, if any, to which the Contractor did not rely on the subcontractor's cost or pricing data in determining the price objective and in negotiating the final price;

(v) The extent, if any, to which it was recognized in the negotiation that the subcontractor's cost or pricing data were not accurate, complete, or current; the action taken by the Contractor and subcontractor; and the effect of any such defective data on the total price negotiated;

(vi) The reasons for any significant difference between the Contractor's price objective and the price negotiated; and

(vii) A complete explanation of the incentive fee or profit plan when incentives are used. The explanation shall identify each critical performance element, management decisions used to quantify each incentive element, reasons for the incentives, and a summary of all trade-off possibilities considered.

(d) The Contractor shall obtain the Contracting Officer's written consent before placing any subcontract for which advance notification is required under paragraph (b) above. However, the Contracting Officer may ratify in writing any such subcontract. Ratification shall constitute the consent of the Contracting Officer.

(e) Even if the Contractor's purchasing system has been approved, the Contractor shall obtain the Contracting Officer's written consent before placing subcontracts identified below:

(f) Unless the consent or approval specifically provides otherwise, neither consent by the Contracting Officer to any subcontract nor approval of the Contractor's purchasing system shall constitute a determination (1) of the acceptability of any subcontract terms or conditions, (2) of the acceptability of any subcontract price or of any amount paid under any subcontract, or (3) to relieve the Contractor of any responsibility for performing this contract.

(g) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement subcontracts shall not exceed the fee limitations in subsection 15.903(d) of the Federal Acquisition Regulation (FAR).

(h) The Government reserves the right to review the Contractor's purchasing system as set forth in FAR Subpart 44.3.

(End of clause)

*Alternate 1 (APR 1984).* If the Contracting Officer elects to delete the requirement for advance notification of, or consent to, any subcontracts that were evaluated during negotiations (this election is not authorized for acquisition of major systems and subsystems or their components), add the following paragraph (i) to the basic clause:

(i) Paragraphs (b) and (c) of this clause do not apply to the following subcontracts, which were evaluated during negotiations: [*list subcontracts*]

**52.246-12 Inspection of Construction.**

As prescribed in 46.312, insert the following clause:

**INSPECTION OF CONSTRUCTION (AUG 1996)**

(a) Definition. "Work" includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not--

- (1) Relieve the Contractor of responsibility for providing adequate quality control measures;
- (2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;
- (3) Constitute or imply acceptance; or
- (4) Affect the continuing rights of the

Government

after acceptance of the completed work under paragraph (i) of this section.

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

(e) The Contractor shall promptly furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Government may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Government shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor

shall promptly segregate and remove rejected material from the premises.

(g) If the Contractor does not promptly replace or correct rejected work, the Government may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or (2) terminate for default the Contractor's right to proceed.

(h) If, before acceptance of the entire work, the Government decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.

(i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

(End of clause)

**52.246-21 Warranty of Construction.**

(MAR 1994)

(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (i) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the Government takes possession.

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of--

(1) The Contractor's failure to conform to contract requirements; or

(2) Any defect of equipment, material, workmanship, or design furnished.

(d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for 1 year from the date of repair or replacement.

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall--

(1) Obtain all warranties that would be given in normal commercial practice;

(2) Require all warranties to be executed, in writing, for the benefit of the Government, if directed by the Contracting Officer; and

(3) Enforce all warranties for the benefit of the Government, if directed by the Contracting Officer.

(h) In the event the Contractor's warranty under paragraph (b) of this clause has expired, the Government may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty.

(i) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government nor for the repair of any damage that results from any defect in Government-furnished material or design.

(j) This warranty shall not limit the Government's rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

(End of clause)

*Alternate 1 (APR 1984).* If the Government specifies in the contract the use of any equipment by "brand name and model," the contracting officer may add a paragraph substantially the same as the following paragraph (k) to the basic clause:

(k) Defects in design or manufacture of equipment specified by the Government on a "brand name and model" basis, shall not be included in this warranty. In this event, the Contractor shall require any subcontractors, manufacturers, or suppliers thereof to

execute their warranties, in writing, directly to the Government.

### 52.248-3 Value Engineering--Construction.

(MAR 1989)

(a) *General.* The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's) voluntarily. The Contractor shall share in any instant contract savings realized from accepted VECP's, in accordance with paragraph (f) below.

(b) *Definitions.* "Collateral costs," as used in this clause, means agency costs of operation, maintenance, logistic support, or Government-furnished property.

"Collateral savings," as used in this clause, means those measurable net reductions resulting from a VECP in the agency's overall projected collateral costs, exclusive of acquisition savings, whether or not the acquisition cost changes.

"Contractor's development and implementation costs," as used in this clause, means those costs the Contractor incurs on a VECP specifically in developing, testing, preparing, and submitting the VECP, as well as those costs the Contractor incurs to make the contractual changes required by Government acceptance of a VECP.

"Government costs," as used in this clause, means those agency costs that result directly from developing and implementing the VECP, such as any net increases in the cost of testing, operations, maintenance, and logistic support. The term does not include the normal administrative costs of processing the VECP.

"Instant contract savings," as used in this clause, means the estimated reduction in Contractor cost of performance resulting from acceptance of the VECP, minus allowable Contractor's development and implementation costs, including subcontractors' development and implementation costs (see paragraph (h) below).

"Value engineering change proposal (VECP)" means a proposal that--

(1) Requires a change to this, the instant contract, to implement; and

(2) Results in reducing the contract price or estimated cost without impairing essential functions or characteristics; *provided*, that it does not involve a change--

(i) In deliverable end item quantities only; or

(ii) To the contract type only.

(c) *VECP preparation.* As a minimum, the Contractor shall include in each VECP the information described in subparagraphs (1) through (7) below. If the

proposed change is affected by contractually required configuration management or similar procedures, the instructions in those procedures relating to format, identification, and priority assignment shall govern VECP preparation. The VECP shall include the following including any suggested specification revisions.

(3) A separate, detailed cost estimate for (i) the affected portions of the existing contract requirement and (ii) the VECP. The cost reduction associated with the VECP shall take into account the Contractor's allowable development and implementation costs, including any amount attributable to subcontracts under paragraph (h) below.

(4) A description and estimate of costs the Government may incur in implementing the VECP, such as test and evaluation and operating and support costs.

(5) A prediction of any effects the proposed change would have on collateral costs to the agency.

(6) A statement of the time by which a contract modification accepting the VECP must be issued in order to achieve the maximum cost reduction, noting any effect on the contract completion time or delivery schedule.

(7) Identification of any previous submissions of the VECP, including the dates submitted, the agencies and contract numbers involved, and previous Government actions, if known.

(d) *Submission.* The Contractor shall submit VECP's to the Resident Engineer at the worksite, with a copy to the Contracting Officer.

(e) *Government action.* (1) The Contracting Officer shall notify the Contractor of the status of the VECP within 45 calendar days after the contracting office receives it. If additional time is required, the Contracting Officer shall notify the Contractor within the 45-day period and provide the reason for the delay and the expected date of the decision. The Government will process VECP's expeditiously; however, it shall not be liable for any delay in acting upon a VECP.

(2) If the VECP is not accepted, the Contracting Officer shall notify the Contractor in writing, explaining the reasons for rejection. The Contractor may withdraw any VECP, in whole or in part, at any time before it is accepted by the Government. The Contracting Officer may require that the Contractor provide written notification before undertaking significant expenditures for VECP effort.

(3) Any VECP may be accepted, in whole or in part, by the Contracting Officer's award of a modification to this contract citing this clause. The Contracting Officer may accept the VECP, even though an agreement on price reduction has not been reached, by issuing the

Contractor a notice to proceed with the change. Until a notice to proceed is issued or a contract modification applies a VECP to this contract, the Contractor shall perform in accordance with the existing contract. The Contracting Officer's decision to accept or reject all or part of any VECP shall be final and not subject to the Disputes clause or otherwise subject to litigation under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

(f) *Sharing.* (1) *Rates.* The Government's share of savings is determined by subtracting Government costs from instant contract savings and multiplying the result by (i) 45 percent for fixed-price contracts or (ii) 75 percent for cost-reimbursement contracts.

(2) *Payment.* Payment of any share due the Contractor for use of a VECP on this contract shall be authorized by a modification to this contract to--

(i) Accept the VECP;

(ii) Reduce the contract price or estimated cost by the amount of instant contract savings; and

(iii) Provide the Contractor's share of savings by adding the amount calculated to the contract price or fee.

(g) *Collateral savings.* If a VECP is accepted, the instant contract amount shall be increased by 20 percent of any projected collateral savings determined to be realized in a typical year of use after subtracting any Government costs not previously offset. However, the Contractor's share of collateral savings shall not exceed (1) the contract's firm-fixed-price or estimated cost, at the time the VECP is accepted, or (2) \$100,000, whichever is greater. The Contracting Officer shall be the sole determiner of the amount of collateral savings, and that amount shall not be subject to the Disputes clause or otherwise subject to litigation under 41 U.S.C. 601-613.

(h) *Subcontracts.* The Contractor shall include an appropriate value engineering clause in any subcontract of \$50,000 or more and may include one in subcontracts of lesser value. In computing any adjustment in this contract's price under paragraph (f) above, the Contractor's allowable development and implementation costs shall include any subcontractor's allowable development and implementation costs clearly resulting from a VECP accepted by the Government under this contract, but shall exclude any value engineering incentive payments to a subcontractor. The Contractor may choose any arrangement for subcontractor value engineering incentive payments; *provided*, that these payments shall not reduce the Government's share of the savings resulting from the VECP.

(i) *Data.* The Contractor may restrict the Government's right to use any part of a VECP or the

supporting data by marking the following legend on the affected parts:

"These data, furnished under the Value Engineering-- Construction clause of contract \_\_\_\_\_, shall not be disclosed outside the Government or duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate a value engineering change proposal submitted under the clause. This restriction does not limit the Government's right to use information contained in these data if it has been obtained or is otherwise available from the Contractor or from another source without limitations."

If a VECP is accepted, the Contractor hereby grants the Government unlimited rights in the VECP and supporting data, except that, with respect to data qualifying and submitted as limited rights technical data, the Government shall have the rights specified in the contract modification implementing the VECP and shall appropriately mark the data. (The terms "unlimited rights" and "limited rights" are defined in Part 27 of the Federal Acquisition Regulation.)

(End of clause)

*Alternate 1* (APR 1984). When the head of the contracting activity determines that the cost of calculating and tracking collateral savings will exceed the benefits to be derived in a construction contract, delete paragraph (g) from the basic clause and redesignate the remaining paragraphs accordingly.

#### 52.249-2 Termination for Convenience of the Government (Fixed-Price).

(SEP 1996)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

- (1) Stop work as specified in the notice.
- (2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.
- (3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by the Contracting Officer, transfer title and deliver to the Government (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subparagraph (b)(6) of this clause; *provided*, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(c) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(d) After expiration of the plant clearance period as defined in Subpart 45.6 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the

Government will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (f) or paragraph (g) of this clause, exclusive of costs shown in subparagraph (g)(3) of this clause, may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated. The contract shall be modified, and the Contractor paid the agreed amount. Paragraph (g) of this clause shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(g) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (f) of this clause:

(1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under subparagraph (b)(9) of this clause) not previously paid for, adjusted for any saving of freight and other charges.

(2) The total of--

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs

attributable to supplies or services paid or to be paid under subparagraph (g)(1) of this clause;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(2)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(2)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including--

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(h) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (g) of this clause, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer.

(i) The cost principles and procedures of Part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(j) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (e), (g), or (l) of this clause, except that if the Contractor failed to submit the termination settlement proposal or request for equitable adjustment within the time provided in paragraph (e) or (l), respectively, and failed to request a time extension, there is no right of appeal.

(k) In arriving at the amount due the Contractor under this clause, there shall be deducted--

(1) All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

(1) If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the Contracting Officer.

(m)(1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(n) Unless otherwise provided in this contract or by statute, the Contractor shall maintain all records and documents relating to the terminated portion of this contract for 3 years after final settlement. This includes all books and other evidence bearing on the Contractor's costs and expenses under this contract. The Contractor shall make these records and documents available to the Government, at the Contractor's office, at all reasonable times, without any direct charge. If approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

(End of clause)

*Alternate I* (SEP 1996). If the contract is for construction, substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor

because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of--

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including--

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

*Alternate II* (SEP 1996). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete subparagraph (m)(2) of the basic clause.

*Alternate III* (SEP 1996). If the contract is for construction and with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, substitute the following paragraph (g) for paragraph (g) of the basic clause. Subparagraph (m)(2) may be deleted from the basic clause if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of--

- (i) The cost of this work;
- (ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and
- (iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including--

- (i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;
- (ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and
- (iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

#### 52.249-10 Default (Fixed-Price Construction).

(APR 1984)

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if--

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

*Alternate 1* (APR 1984). If the contract is for dismantling, demolition, or removal of improvements, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revert in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

*Alternate II* (APR 1984). If the contract is to be awarded during a period of national emergency, subparagraph (b)(1) below may be substituted for subparagraph (b)(1) of the basic clause:

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

*Alternate III* (APR 1984). If the contract is for dismantling, demolition, or removal of improvements and is to be awarded during a period of national emergency, substitute the following paragraph (a) for paragraph (a) of the basic clause. The following subparagraph (b)(1) may be substituted for subparagraph (b)(1) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revert in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if--

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

#### 52.249-14 Excusable Delays.

As prescribed in 49.505(d), insert the following clause in solicitations and contracts for supplies, services, construction, and research and development on a fee basis whenever a cost-reimbursement contract is contemplated. Also insert the clause in time-and-material contracts, labor-hour contracts, consolidated facilities contracts, and facilities acquisition contracts. When used in construction contracts, substitute the words "completion time" for "delivery schedule" in the last sentence of the clause. When used in facilities contracts, substitute the words "termination of work" for "termination" in the last sentence of the clause.

##### EXCUSABLE DELAYS (APR 1984)

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the

Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless--

(1) The subcontracted supplies or services were obtainable from other sources;

(2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and

(3) The Contractor failed to comply reasonably with this order.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.

(End of clause)

## Appendix 3 - AIA A201

### AIA - A201 General Conditions - Selected Clauses

This Appendix contains selected clauses from the Standard General Conditions of the Construction Contract (1997 Edition) prepared by the American Institute of Architects.<sup>1</sup> The clauses included here are:

#### Article 4 - Administration of the Contract

- 4.3 Claims and Disputes
- 4.4 Resolution of Claims and Disputes
- 4.5 Mediation
- 4.6 Arbitration

#### Article 7 - Changes in the Work

- 7.1 General
- 7.2 Change Orders
- 7.3 Construction Change Directives
- 7.4 Minor Changes in the Work

#### Article 8 - Time

- 8.1 Definitions
- 8.2 Progress and Completion
- 8.3 Delays and Extensions of Time

#### Article 14 Termination or Suspension of the Contract

- 14.1 Termination by the Contractor
- 14.2 Termination by the Owner for Cause
- 14.3 Suspension by the Owner for Convenience
- 14.4 Termination by the Owner for Convenience

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### ARTICLE 4 ADMINISTRATION OF THE CONTRACT

#### 4.3 CLAIMS AND DISPUTES

**4.3.1 Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

**4.3.2 Time Limits on Claims.** Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

**4.3.3 Continuing Contract Performance.** Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

**4.3.4 Claims for Concealed or Unknown Conditions.** If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

**4.3.5 Claims for Additional Cost.** If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

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<sup>1</sup> Reprinted with permission, American Institute of Architects, Washington, DC.

**4.3.6** If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

**4.3.7 CLAIMS FOR ADDITIONAL TIME**

**4.3.7.1** If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

**4.3.7.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated, and that weather conditions had an adverse effect on the scheduled construction.

**4.3.8** **Injury or Damage to Person or Property.** If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after first discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

**4.3.9** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

**4.3.10** **Claims for Consequential Damages.** The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for less profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

**4.4 RESOLUTION OF CLAIMS AND DISPUTES**

**4.4.1** **Decision of Architect.** Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 90 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

**4.4.2** The Architect will review Claims and within 10 days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

**4.4.3** In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner authorize retention of such persons at the Owner's expense.

**4.4.4** If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

**4.4.5** The Architect will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

**4.4.6** When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

**4.4.7** Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's

default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

4.4.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or by arbitration.

#### 4.5 MEDIATION

4.5.5 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.1.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.6 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.7 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

#### 4.6 ARBITRATION

4.6.5 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.5.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

4.6.6 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.7 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.6.8 **Limitation on Consolidation or Joinder.** No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

4.6.9 **Claims and Timely Assertion of Claims.** The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

4.6.10 **Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgement may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

### ARTICLE 7 CHANGES IN THE WORK

#### 7.1 GENERAL

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

## 7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- .1 a change in the Work;
- .2 the amount of the adjustment in the Contract Sum; and
- .3 the extent of the adjustment in the Contract Time.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph.

## 7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

- .1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 Pending final determination of cost a Construction Change Directive to the Owner, amounts not in dispute may be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

## 7.4 MINOR CHANGES IN THE WORK

7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

## ARTICLE 8 TIME

### 8.1 DEFINITIONS

8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

8.1.2 The date of commencement of the Work is the date established in the Agreement.

8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

## 8.2 PROGRESS AND COMPLETION

8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

## 8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

8.3.3 This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

## ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

### 14.1 TERMINATION BY THE CONTRACTOR

14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

- .1 issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;
- .2 an act of government, such as a declaration of national emergency which requires all Work to be stopped;
- .3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4 the Owner has failed to finish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

14.1.3 If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon seven additional days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

14.1.4 If the Work is stopped for a period of 60 days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.3.

### 14.2 TERMINATION BY THE OWNER FOR CAUSE

14.2.1 The Owner may terminate the Contract if the Contractor:

- .1 persistently or repeatedly refuses or fails to supply enough property skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority, having jurisdiction; or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any rights of the surety:

- .1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 accept assignment of subcontracts pursuant to Paragraph 5.4; and
- .3 finish the Work by whatever reasonable method the owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

14.2.3 When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

#### 14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by the suspension, delay or interruption as described in Subparagraph 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

#### 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

- .1 cease operations as directed by the Owner in the notice; or
- .2 take actions necessary, or that the Owner may direct for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts, and purchase orders.

14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

**Appendix 4 - EJCDC 1910-8**

**Appendix 4 - EJCDC 1910-8 General Conditions - Selected Clauses**

This Appendix contains selected clauses from the **Standard General Conditions of the Construction Contract** (1996 Edition) prepared by Engineers Joint Contract Documents Committee.<sup>2</sup> The clauses included here are:

- Article 4 - Availability of Lands; Subsurface and Physical Conditions; Reference Points
- Article 10 - Changes in the Work, Claims
- Article 11 - Cost Of The Work; Cash Allowances; Unit Price Work
- Article 12 - Change Of Contract Price; Change Of Contract Times
- Article 15 - Suspension Of Work And Termination
- Article 16 - Dispute Resolution
- Article 17 - Miscellaneous

**ARTICLE 4 - AVAILABILITY OF LANDS; SUBSURFACE AND PHYSICAL CONDITIONS; REFERENCE POINTS**

**4.01 Availability of Lands**

A. OWNER shall furnish the Site. OWNER shall notify CONTRACTOR of any encumbrances or restrictions not of general application but specifically related to use of the Site with which CONTRACTOR must comply in performing the Work. OWNER will obtain in a timely manner and pay for easements for permanent structures or permanent changes in existing facilities. If CONTRACTOR and OWNER are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, as a result of any delay in OWNER's furnishing the Site, CONTRACTOR may make a Claim therefor as provided in paragraph 10.05.

B. Upon reasonable written request, OWNER shall furnish CONTRACTOR with a current statement of record legal title and legal description of the lands upon which the Work is to be performed and OWNER's interest therein as necessary for giving notice of or filing a mechanic's or construction lien against such lands in accordance with applicable Laws and Regulations.

C. CONTRACTOR shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

**4.02 Subsurface and Physical Conditions**

A. Reports and Drawings: The Supplementary Conditions identify:

1. those reports of explorations and tests of subsurface conditions at or contiguous to the Site that ENGINEER has used in preparing the Contract Documents; and
2. those drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site (except Underground Facilities) that ENGINEER has used in preparing the Contract Documents.

B. Limited Reliance by CONTRACTOR on Technical Data Authorized: CONTRACTOR may rely upon the general accuracy of the "technical data" contained in such reports and drawings, but such reports and drawings are not Contract Documents. Such "technical data" is identified in the Supplementary Conditions. Except for such reliance on such "technical data," CONTRACTOR may not rely upon or make any Claim against OWNER, ENGINEER, or any of ENGINEER's Consultants with respect to:

1. The completeness of such reports and drawings for CONTRACTOR's purposes, including, but

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not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by CONTRACTOR, and safety precautions and programs incident thereto; or

2. Other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or

3. Any CONTRACTOR interpretation of or conclusion drawn from any "technical data" or any such other data, interpretations, opinions, or information.

#### 4.03 Differing Subsurface or Physical Conditions

A. Notice.- If CONTRACTOR believes that any subsurface or physical condition at or contiguous to the Site that is uncovered or revealed either:

1. Is of such a nature as to establish that any "technical data" on which CONTRACTOR is entitled to rely as provided in paragraph 4.02 is materially inaccurate; or

2. Is of such a nature as to require a change in the Contract Documents; or

3. Differs materially from that shown or indicated in the Contract Documents; or

4. Is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents; then CONTRACTOR shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by paragraph 6.16.A), notify OWNER and ENGINEER in writing about such condition. CONTRACTOR shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

B. ENGINEER'S Review. After receipt of written notice as required by paragraph 4.03.A, ENGINEER will promptly review the pertinent condition, determine the necessity of OWNER's obtaining additional exploration or tests with respect thereto, and advise OWNER in writing (with a copy to CONTRACTOR) of ENGINEER's findings and conclusions.

#### C. Possible Price and Times Adjustments

1. The Contract Price or the Contract Times, or both, will be equitably adjusted to the extent that the existence of such differing subsurface or physical condition causes an increase or decrease in CONTRACTOR's cost of, or

time required for, performance of the Work; subject, however, to the following:

a. such condition must meet any one or more of the categories described in paragraph 4.03.A; and

b. with respect to Work that is paid for on a Unit Price Basis, any adjustment in Contract Price will be subject to the provisions of paragraphs 9.08 and 11.03.

2. CONTRACTOR shall not be entitled to any adjustment in the Contract Price or Contract Times if:

a. CONTRACTOR knew of the existence of such conditions at the time CONTRACTOR made a final commitment to OWNER in respect of Contract Price and Contract Times by the submission of a Bid or becoming bound under a negotiated contract; or

b. the existence of such condition could reasonably have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site and contiguous areas required by the Bidding Requirements or Contract Documents to be conducted by or for CONTRACTOR prior to CONTRACTOR's making such commitment; or

c. CONTRACTOR failed to give the written notice within the time and as required by paragraph 4.03.A.

3. If OWNER and CONTRACTOR are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, a Claim may be made therefor as provided in paragraph 10.05. However, OWNER, ENGINEER, and ENGINEER'S Consultants shall not be liable to CONTRACTOR for any claims, costs, losses, or damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by CONTRACTOR on or in connection with any other project or anticipated project.

#### 4.04 Underground Facilities

A. Shown or Indicated: The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the Site is based on information and data furnished to OWNER or ENGINEER by the owners of such Underground Facilities, including OWNER, or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:

1. OWNER and ENGINEER shall not be responsible for the accuracy or completeness of any such information or data; and

2. the cost of all of the following will be included in the Contract Price, and CONTRACTOR shall have full responsibility for:

- a. reviewing and checking all such information and data,
- b. locating all Underground Facilities shown or indicated in the Contract Documents,
- c. coordination of the Work with the owners of such Underground Facilities, including OWNER, during construction, and
- d. the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work.

**B. Not Shown or Indicated**

1. If an Underground Facility is uncovered or revealed at or contiguous to the Site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Contract Documents, CONTRACTOR shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by paragraph 6.06.A), identify the owner of such Underground Facility and give written notice to that owner and to OWNER and ENGINEER. ENGINEER will promptly review the Underground Facility and determine the extent, if any, to which a change is required in the Contract Documents to reflect and document the consequences of the existence or location of the Underground Facility. During such time, CONTRACTOR shall be responsible for the safety and protection of such Underground Facility.

2. If ENGINEER concludes that a change in the Contract Documents is required, a Work Change Directive or a Change Order will be issued to reflect and document such consequences. An equitable adjustment shall be made in the Contract Price of Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or indicated or not shown or indicated with reasonable accuracy in the Contract Documents and that CONTRACTOR did not know of and could not reasonably have been expected to be aware of or to have anticipated. If OWNER and CONTRACTOR are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment in Contract Price or Contract Times, OWNER or CONTRACTOR may make a Claim therefor as provided in paragraph 10.05.

**4.05 Reference Points**

A. OWNER shall provide engineering surveys to establish reference points for construction which in ENGINEER's

judgment are necessary to enable CONTRACTOR to proceed with the Work. CONTRACTOR shall be responsible for laying out the Work, shall protect and preserve the established reference points and property monuments, and shall make no changes or relocations without the prior written approval of OWNER. CONTRACTOR shall report to ENGINEER whenever any reference point or property monument is lost or destroyed or requires relocation because of necessary changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such reference points or property monuments by professionally qualified personnel.

**4.06 Hazardous Environmental Condition at Site**

A. Reports and Drawings: Reference is made to the Supplementary Conditions for the identification of those reports and drawings relating to a Hazardous Environmental Condition identified at the Site, if any, that have been utilized by the ENGINEER in the preparation of the Contract Documents.

B. Limited Reliance by CONTRACTOR on Technical Data Authorized: CONTRACTOR may rely upon the general accuracy of the "technical data" contained in such reports and drawings, but such reports and drawings are not Contract Documents. Such "technical data" is identified in the Supplementary Conditions. Except for such reliance on such "technical data," CONTRACTOR may not rely upon or make any Claim against OWNER, ENGINEER or any of ENGINEER's Consultants with respect to:

1. the completeness of such reports and drawings for CONTRACTOR's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences and procedures of construction to be employed by CONTRACTOR and safety precautions and programs incident thereto; or
2. other data, interpretations, opinions and information contained in such reports or shown or indicated in such drawings; or
3. any CONTRACTOR interpretation of or conclusion drawn from any "technical data" or any such other data, interpretations, opinions or information.

C. CONTRACTOR shall not be responsible for any Hazardous Environmental Condition uncovered or revealed at the Site which was not shown or indicated in Drawings or Specifications or identified in the Contract Documents to be within the scope of the Work. CONTRACTOR shall be responsible for a Hazardous Environmental Condition created with any materials brought to the Site by CONTRACTOR, Subcontractors, Suppliers, or anyone else for whom CONTRACTOR is responsible.

D. If CONTRACTOR encounters a Hazardous Environmental Condition or if CONTRACTOR or anyone for

whom CONTRACTOR is responsible creates a Hazardous Environmental Condition, CONTRACTOR shall immediately: (i) secure or otherwise isolate such condition; (ii) stop all Work in connection with such condition and in any area affected thereby (except in an emergency as required by paragraph 6.16); and (iii) notify OWNER and ENGINEER (and promptly thereafter confirm such notice in writing). OWNER shall promptly consult with ENGINEER concerning the necessity for OWNER to retain a qualified expert to evaluate such condition or take corrective action, if any.

E. CONTRACTOR shall not be required to resume Work in connection with such condition or in any affected area until after OWNER has obtained any required permits related thereto and delivered to CONTRACTOR written notice: (i) specifying that such condition and any affected area is or has been rendered safe for the resumption of Work; or (ii) specifying any special conditions under which such Work may be resumed safely. If OWNER and CONTRACTOR cannot agree as to entitlement to or on the amount or extent, if any, of any adjustment in Contract Price or Contract Times, or both, as a result of such Work stoppage or such special conditions under which Work is agreed to be resumed by CONTRACTOR, either party may make a Claim therefor as provided in paragraph 10.05.

F. If after receipt of such written notice CONTRACTOR does not agree to resume such Work based on a reasonable belief it is unsafe, or does not agree to resume such Work under such special conditions, then OWNER may order the portion of the Work that is in the area affected by such condition to be deleted from the Work.

If OWNER and CONTRACTOR cannot agree as to entitlement to or on the amount or extent, if any, of an adjustment in Contract Price or Contract Times as a result of deleting such portion of the Work, then either party may make a Claim therefor as provided in paragraph 10.05. OWNER may have such deleted portion of the Work performed by OWNER's own forces or others in accordance with Article 7.

G. To the fullest extent permitted by Laws and Regulations, OWNER shall indemnify and hold harmless CONTRACTOR, Subcontractors, ENGINEER, ENGINEER's Consultants and the officers, directors, partners, employees, agents, other consultants, and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to a Hazardous Environmental Condition, provided that such Hazardous Environmental Condition: (i) was not shown or indicated in the Drawings or Specifications or identified in the Contract Documents to be included within the scope of the Work, and (ii) was not created by CONTRACTOR or by anyone for whom CONTRACTOR is responsible. Nothing in this paragraph 4.06.E shall obligate OWNER to indemnify any individual or

entity from and against the consequences of that individual's or entity's own negligence.

H. To the fullest extent permitted by Laws and Regulations, CONTRACTOR shall indemnify and hold harmless OWNER, ENGINEER, ENGINEER's Consultants, and the officers, directors, partners, employees, agents, other consultants, and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to a Hazardous Environmental Condition created by CONTRACTOR or by anyone for whom CONTRACTOR is responsible. Nothing in this paragraph 4.06.F shall obligate CONTRACTOR to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence.

The provisions of paragraphs 4.02, 4.03, and 4.04 are not intended to apply to a Hazardous Environmental Condition uncovered or revealed at the Site.

#### ARTICLE 10 - CHANGES IN THE WORK; CLAIMS

##### 10.01 Authorized Changes in the Work

A. Without invalidating the Agreement and without notice to any surety, OWNER may, at any time or from time to time, order additions, deletions, or revisions in the Work by a Written Amendment, a Change Order, or a Work Change Directive. Upon receipt of any such document, CONTRACTOR shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Contract Documents (except as otherwise specifically provided).

B. If OWNER and CONTRACTOR are unable to agree on entitlement to, or on the amount or extent, if any, of an adjustment in the Contract Price or Contract Times, or both, that should be allowed as a result of a Work Change Directive, a Claim may be made therefor as provided in paragraph 10.05.

##### 10.02 Unauthorized Changes in the Work

A. CONTRACTOR shall not be entitled to an increase in the Contract Price or an extension of the Contract Times with respect to any work performed that is not required by the Contract Documents as amended, modified, or supplemented as provided in paragraph 3.04, except in the case of an emergency as provided in paragraph 6.16 or in the case of uncovering Work as provided in paragraph 13.04.B.

##### 10.03 Execution of Change Orders

A. OWNER and CONTRACTOR shall execute appropriate Change Orders recommended by ENGINEER (or Written Amendments) covering:

1. changes in the Work which are: (i) ordered by OWNER pursuant to paragraph 10.01.A, (ii) required

because of acceptance of defective Work under paragraph 13.08.A or OWNER's correction of defective Work under paragraph 13.09, or (iii) agreed to by the parties;

2. changes in the Contract Price or Contract Times which are agreed to by the parties, including any undisputed sum or amount of time for Work actually performed in accordance with a Work Change Directive; and

3. changes in the Contract Price or Contract Times which embody the substance of any written decision rendered by ENGINEER pursuant to paragraph 10.05; provided that, in lieu of executing any such Change Order, an appeal may be taken from any such decision in accordance with the provisions of the Contract Documents and applicable Laws and Regulations, but during any such appeal, CONTRACTOR shall carry on the Work and adhere to the progress schedule as provided in paragraph 6.18.A.

#### 10.04 Notification to Surety

A. If notice of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Times) is required by the provisions of any Bond to be given to a surety, the giving of any such notice will be CONTRACTOR'S responsibility. The amount of each applicable Bond will be adjusted to reflect the effect of any such change.

#### 10.05 Claims and Disputes

A. Notice: Written notice stating the general nature of each Claim, dispute, or other matter shall be delivered by the claimant to ENGINEER and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. Notice of the amount or extent of the Claim, dispute, or other matter with supporting data shall be delivered to the ENGINEER and the other party to the Contract within 60 days after the start of such event (unless ENGINEER allows additional time for claimant to submit additional or more accurate data in support of such Claim, dispute, or other matter). A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of paragraph 12.01.B. A Claim for an adjustment in Contract Time shall be prepared in accordance with the provisions of paragraph 12.02.B. Each Claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. The opposing party shall submit any response to ENGINEER and the claimant within 30 days after receipt of the claimant's last submittal (unless ENGINEER allows additional time).

B. ENGINEER's Decision: ENGINEER will render a formal decision in writing within 30 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any. ENGINEER's written decision on such Claim, dispute, or other matter will be final and binding upon OWNER and CONTRACTOR unless:

1. an appeal from ENGINEER's decision is taken within the time limits and in accordance with the dispute resolution procedures set forth in Article 16; or

2. if no such dispute resolution procedures have been set forth in Article 16, a written notice of intention to appeal from ENGINEER's written decision is delivered by OWNER or CONTRACTOR to the other and to ENGINEER within 30 days after the date of such decision, and a formal proceeding is instituted by the appealing party in a forum of competent jurisdiction within 60 days after the date of such decision or within 60 days after Substantial Completion, whichever is later (unless otherwise agreed in writing by OWNER and CONTRACTOR), to exercise such rights or remedies as the appealing party may have with respect to such Claim, dispute, or other matter in accordance with applicable Laws and Regulations.

C. If ENGINEER does not render a formal decision in writing within the time stated in paragraph 10.05.B, a decision denying the Claim in its entirety shall be deemed to have been issued 31 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any.

D. No Claim for an adjustment in Contract Price or Contract Times (or Milestones) will be valid if not submitted in accordance with this paragraph 10.05.

#### ARTICLE 11 - COST OF THE WORK; CASH ALLOWANCES; UNIT PRICE WORK

##### 11.01 Cost of the Work

A. Costs Included: The term Cost of the Work means the sum of all costs necessarily incurred and paid by CONTRACTOR in the proper performance of the Work. When the value of any Work covered by a Change Order or when a Claim for an adjustment in Contract Price is determined on the basis of Cost of the Work, the costs to be reimbursed to CONTRACTOR will be only those additional or incremental costs required because of the change in the Work or because of the event giving rise to the Claim. Except as otherwise may be agreed to in writing by OWNER, such costs shall be in amounts no higher than those prevailing in the locality of the Project, shall include only the following items, and shall not include any of the costs itemized in paragraph 11.01.B.

1. Payroll costs for employees in the direct employ of CONTRACTOR in the performance of the Work under schedules of job classifications agreed upon by OWNER and CONTRACTOR. Such employees shall include without limitation superintendents, foremen, and other personnel employed full time at the Site. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits, which shall include social security contributions, unemployment, excise, and payroll taxes, workers' compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. The expenses of performing Work outside of regular working hours, on Saturday, Sunday, or legal holidays, shall be included in the above to the extent authorized by OWNER.

2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers' field services required in connection therewith. All cash discounts shall accrue to CONTRACTOR unless OWNER deposits funds with CONTRACTOR with which to make payments, in which case the cash discounts shall accrue to OWNER. All trade discounts, rebates and refunds and returns from sale of surplus materials and equipment shall accrue to OWNER and CONTRACTOR shall make provisions so that they may be obtained.

3. Payments made by CONTRACTOR to Subcontractors for Work performed by Subcontractors. If required by OWNER, CONTRACTOR shall obtain competitive bids from subcontractors acceptable to OWNER and CONTRACTOR and shall deliver such bids to OWNER, who will then determine, with the advice of ENGINEER, which bids, if any, will be acceptable. If any subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work plus a fee, the Subcontractor's Cost of the Work and fee shall be determined in the same manner as CONTRACTOR's Cost of the Work and fee as provided in this paragraph 11.01.

4. Costs of special consultants (including but not limited to engineers, architects, testing laboratories, surveyors, attorneys, and accountants) employed for services specifically related to the Work.

5. Supplemental costs including the following:

a. The proportion of necessary transportation, travel, and subsistence expenses of CONTRACTOR's employees incurred in discharge of duties connected with the Work.

b. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office, and temporary facilities at the Site, and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost, less market value, of such items used but not consumed which remain the property of CONTRACTOR.

c. Rentals of all construction equipment and machinery, and the parts thereof whether rented from CONTRACTOR or others in accordance with rental agreements approved by OWNER with the advice of ENGINEER, and the costs of transportation, loading, unloading, assembly, dismantling, and removal thereof. All such costs shall be in accordance with the terms of said rental agreements. The rental of any such equipment, machinery, or parts shall cease when the use thereof is no longer necessary for the Work.

d. Sales, consumer, use, and other similar taxes related to the Work, and for which CONTRACTOR is liable, imposed by Laws and Regulations.

e. Deposits lost for causes other than negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, and royalty payments and fees for permits and licenses.

f. Losses and damages (and related expenses) caused by damage to the Work, not compensated by insurance or otherwise, sustained by CONTRACTOR in connection with the performance of the Work (except losses and damages within the deductible amounts of property insurance established in accordance with paragraph 5.06.D), provided such losses and damages have resulted from causes other than the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable. Such losses shall include settlements made with the written consent and approval of OWNER. No such losses, damages, and expenses shall be included in the Cost of the Work for the purpose of determining CONTRACTOR's fee.

g. The cost of utilities, fuel, and sanitary facilities at the Site.

h. Minor expenses such as telegrams, long distance telephone calls, telephone service at the Site, expressage, and similar petty cash items in connection with the Work.

i. When the Cost of the Work is used to determine the value of a Change Order or of a Claim, the cost of premiums for additional Bonds and insurance

required because of the changes in the Work or caused by the event giving rise to the Claim.

j. When all the Work is performed on the basis of cost-plus, the costs of premiums for all Bonds and insurance CONTRACTOR is required by the Contract Documents to purchase and maintain.

B. *Costs Excluded:* The term Cost of the Work shall not include any of the following items:

1. Payroll costs and other compensation of CONTRACTOR's officers, executives, principals (of partnerships and sole proprietorships), general managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expeditors, timekeepers, clerks, and other personnel employed by CONTRACTOR, whether at the Site or in CONTRACTOR's principal or branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in paragraph 11.01.A.1 or specifically covered by paragraph 11.01.A.4, all of which are to be considered administrative costs covered by the CONTRACTOR's fee.

2. Expenses of CONTRACTOR's principal and branch offices other than CONTRACTOR's office at the Site.

3. Any part of CONTRACTOR's capital expenses including interest on CONTRACTOR's capital employed for the Work and charges against CONTRACTOR for delinquent payments.

4. Costs due to the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied, and making good any damage to property.

5. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in paragraphs 11.01.A and 11.01.B.

C. *CONTRACTOR's Fee:* When all the Work is performed on the basis of cost-plus, CONTRACTOR's fee shall be determined as set forth in the Agreement. When the value of any Work covered by a Change Order or when a Claim for an adjustment in Contract Price is determined on the basis of Cost of the Work, CONTRACTOR's fee shall be determined as set forth in paragraph 12.01.C.

D. *Documentation:* Whenever the Cost of the Work for any purpose is to be determined pursuant to paragraphs 11.01.A and 11.01.B, CONTRACTOR will establish and maintain records thereof in accordance with generally accepted accounting

practices and submit in a form acceptable to ENGINEER an itemized cost breakdown together with supporting data.

#### 11.02 *Cash Allowances*

A. It is understood that CONTRACTOR has included in the Contract Price all allowances so named in the Contract Documents and shall cause the Work so covered to be performed for such sums as may be acceptable to OWNER and ENGINEER. CONTRACTOR agrees that:

1. the allowances include the cost to CONTRACTOR (less any applicable trade discounts) of materials and equipment required by the allowances to be delivered at the Site, and all applicable taxes; and

2. CONTRACTOR's costs for unloading and handling on the Site, labor, installation costs, overhead, profit, and other expenses contemplated for the allowances have been included in the Contract Price and not in the allowances, and no demand for additional payment on account of any of the foregoing will be valid.

B. Prior to final payment, an appropriate Change Order will be issued as recommended by ENGINEER to reflect actual amounts due CONTRACTOR on account of Work covered by allowances, and the Contract Price shall be correspondingly adjusted.

#### 11.03 *Unit Price Work*

A. Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the unit price for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Determinations of the actual quantities and classifications of Unit Price Work performed by CONTRACTOR will be made by ENGINEER subject to the provisions of paragraph 9.08.

B. Each unit price will be deemed to include an amount considered by CONTRACTOR to be adequate to cover CONTRACTOR's overhead and profit for each separately identified item.

C. OWNER or CONTRACTOR may make a Claim for an adjustment in the Contract Price in accordance with paragraph 10.05 if:

1. the quantity of any item of Unit Price Work performed by CONTRACTOR differs materially and significantly from the estimated quantity of such item indicated in the Agreement; and

2. there is no corresponding adjustment with respect any other item of Work; and

3. if CONTRACTOR believes that CONTRACTOR is entitled to an increase in Contract Price as a result of having incurred additional expense or OWNER believes that OWNER is entitled to a decrease in Contract Price and the parties are unable to agree as to the amount of any such increase or decrease.

#### ARTICLE 12 - CHANGE OF CONTRACT PRICE; CHANGE OF CONTRACT TIMES

##### 12.01 *Change of Contract Price*

A. The Contract Price may only be changed by a Change Order or by a Written Amendment. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted by the party making the Claim to the ENGINEER and the other party to the Contract in accordance with the provisions of paragraph 10.05.

B. The value of any Work covered by a Change Order or of any Claim for an adjustment in the Contract Price will be determined as follows:

1. where the Work involved is covered by unit prices contained in the Contract Documents, by application of such unit prices to the quantities of the items involved (subject to the provisions of paragraph 11.03); or

2. where the Work involved is not covered by unit prices contained in the Contract Documents, by a mutually agreed lump sum (which may include an allowance for overhead and profit not necessarily in accordance with paragraph 12.01.C.2); or

3. where the Work involved is not covered by unit prices contained in the Contract Documents and agreement to a lump sum is not reached under paragraph 12.01.B.2, on the basis of the Cost of the Work (determined as provided in paragraph 11.01) plus a CONTRACTOR's fee for overhead and profit (determined as provided in paragraph 12.01.C).

C. *CONTRACTOR's Fee:* The CONTRACTOR's fee for overhead and profit shall be determined as follows:

1. a mutually acceptable fixed fee; or

2. if a fixed fee is not agreed upon, then a fee based on the following percentages of the various portions of the Cost of the Work:

a. for costs incurred under paragraphs 11.01.A.1 and 11.01.A.2, the CONTRACTOR's fee shall be 15 percent;

b. for costs incurred under paragraph 11.01.A.3, the CONTRACTOR's fee shall be five percent;

c. where one or more tiers of subcontracts are on the basis of Cost of the Work plus a fee and no fixed fee is agreed upon, the intent of paragraph 12.01.C.2.a is that the Subcontractor who actually performs the Work, at whatever tier, will be paid a fee of 15 percent of the costs incurred by such Subcontractor under paragraphs 11.01.A.1 and 11.01.A.2 and that any higher tier Subcontractor and CONTRACTOR will each be paid a fee of five percent of the amount paid to the next lower tier Subcontractor;

d. no fee shall be payable on the basis of costs itemized under paragraphs 11.01.A.4, 11.01.A.5, and 11.01.B;

e. the amount of credit to be allowed by CONTRACTOR to OWNER for any change which results in a net decrease in cost will be the amount of the actual net decrease in cost plus a deduction in CONTRACTOR's fee by an amount equal to five percent of such net decrease; and

f. when both additions and credits are involved in any one change, the adjustment in CONTRACTOR's fee shall be computed on the basis of the net change in accordance with paragraphs 12.01.C.2.a through 12.01.C.2.e, inclusive.

##### 12.02 *Change of Contract Times*

A. The Contract Times (or Milestones) may only be changed by a Change Order or by a Written Amendment. Any Claim for an adjustment in the Contract Times (or Milestones) shall be based on written notice submitted by the party making the claim to the ENGINEER and the other party to the Contract in accordance with the provisions of paragraph 10.05.

B. Any adjustment of the Contract Times (or Milestones) covered by a Change Order or of any Claim for an adjustment in the Contract Times (or Milestones) will be determined in accordance with the provisions of this Article 12.

##### 12.03 *Delays Beyond CONTRACTOR's Control*

A. Where CONTRACTOR is prevented from completing any part of the Work within the Contract Times (or Milestones) due to delay beyond the control of CONTRACTOR, the Contract Times (or Milestones) will be extended in an amount equal to the time lost due to such delay if a Claim is made therefor as provided in paragraph 12.02.A. Delays beyond the control of CONTRACTOR shall include, but not be limited to, acts or neglect by OWNER, acts or neglect of utility owners or other contractors performing other work as contemplated by Article 7,

fires, floods, epidemics, abnormal weather conditions, or acts of God.

12.04 *Delays Within CONTRACTOR's Control*

A. The Contract Times (or Milestones) will not be extended due to delays within the control of CONTRACTOR. Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of CONTRACTOR.

12.05 *Delays Beyond OWNER's and CONTRACTOR's Control*

A. Where CONTRACTOR is prevented from completing any part of the Work within the Contract Times (or Milestones) due to delay beyond the control of both OWNER and CONTRACTOR, an extension of the Contract Times (or Milestones) in an amount equal to the time lost due to such delay shall be CONTRACTOR's sole and exclusive remedy for such delay.

12.06 *Delay Damages*

A. In no event shall OWNER or ENGINEER be liable to CONTRACTOR, any Subcontractor, any Supplier, or any other person or organization, or to any surety for or employee or agent of any of them, for damages arising out of or resulting from:

1. delays caused by or within the control of CONTRACTOR; or

2. delays beyond the control of both OWNER and CONTRACTOR including but not limited to fires, floods, epidemics, abnormal weather conditions, acts of God, or acts or neglect by utility owners or other contractors performing other work as contemplated by Article 7.

B. Nothing in this paragraph 12.06 bars a change in Contract Price pursuant to this Article 12 to compensate CONTRACTOR due to delay, interference, or disruption directly attributable to actions or inactions of OWNER or anyone for whom OWNER is responsible.

ARTICLE 15 - SUSPENSION OF WORK AND TERMINATION

15.01 *OWNER May Suspend Work*

A. At any time and without cause, OWNER may suspend the Work or any portion thereof for a period of not more than 90 consecutive days by notice in writing to CONTRACTOR and ENGINEER which will fix the date on which Work will be resumed. CONTRACTOR shall resume the Work on the date so

fixed. CONTRACTOR shall be allowed an adjustment in the Contract Price or an extension of the Contract Times, or both, directly attributable to any such suspension if CONTRACTOR makes a Claim therefor as provided in paragraph 10.05.

15.02 *OWNER May Terminate for Cause*

A. The occurrence of any one or more of the following events will justify termination for cause:

1. CONTRACTOR's persistent failure to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adjust to the progress schedule established under paragraph 2.67 as adjusted from time to time pursuant to paragraph 6.04);

2. CONTRACTOR's disregard of Laws or Regulations of any public body having jurisdiction;

3. CONTRACTOR's disregard of the authority of ENGINEER; or

4. CONTRACTOR's violation in any substantial way of any provisions of the Contract Documents.

B. If one or more of the events identified in paragraph 15.02.A occur, OWNER may, after giving CONTRACTOR (and the surety, if any) seven days written notice, terminate the services of CONTRACTOR, exclude CONTRACTOR from the Site, and take possession of the Work and of all CONTRACTOR's tools, appliances, construction equipment, and machinery at the Site, and use the same to the full extent they could be used by CONTRACTOR (without liability to CONTRACTOR for trespass or conversion), incorporate in the Work all materials and equipment stored at the Site or for which OWNER has paid CONTRACTOR but which are stored elsewhere, and finish the Work as OWNER may deem expedient. In such case, CONTRACTOR shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by OWNER arising out of or relating to completing the Work, such excess will be paid to CONTRACTOR. If such claims, costs, losses, and damages exceed such unpaid balance, CONTRACTOR shall pay the difference to OWNER. Such claims, costs, losses, and damages incurred by OWNER will be reviewed by ENGINEER as to their reasonableness and, when so approved by ENGINEER, incorporated in a Change Order. When exercising any rights or remedies under this paragraph OWNER shall not be required to obtain the lowest price for the Work performed.

C. Where CONTRACTOR's services have been so terminated by OWNER, the termination will not affect any rights or remedies of OWNER against CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of moneys due CONTRACTOR by OWNER will not release CONTRACTOR from liability.

**15.03 OWNER May Terminate For Convenience**

A. Upon seven days written notice to CONTRACTOR and ENGINEER, OWNER may, without cause and without prejudice to any other right or remedy of OWNER, elect to terminate the Contract. In such case, CONTRACTOR shall be paid (without duplication of any items):

1. for completed and acceptable Work executed in accordance with the Contract Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Work;

2. for expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Contract Documents in connection with uncompleted Work, plus fair and reasonable sums for overhead and profit on such expenses;

3. for all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred in settlement of terminated contracts with Subcontractors, Suppliers, and others; and

4. for reasonable expenses directly attributable to termination.

B. CONTRACTOR shall not be paid on account of loss of anticipated profits or revenue or other economic loss arising out of or resulting from such termination.

**15.04 CONTRACTOR May Stop Work or Terminate**

A. If, through no act or fault of CONTRACTOR, the Work is suspended for more than 90 consecutive days by OWNER or under an order of court or other public authority, or ENGINEER fails to act on any Application for Payment within 30 days after it is submitted, or OWNER fails for 30 days to pay CONTRACTOR any sum of money determined to be due, then CONTRACTOR may, upon seven days written notice to OWNER and ENGINEER, and provided OWNER or ENGINEER do not remedy such suspension or failure within that time, terminate the Contract and recover from OWNER payment on the same terms as provided in paragraph 15.03. In lieu of terminating the Contract and without prejudice to any other right or remedy, if ENGINEER has failed to act on an Application for Payment within 30 days after it is submitted, or OWNER has

failed for 30 days to pay CONTRACTOR any sum finally determined to be due, CONTRACTOR may, seven days after written notice to OWNER and ENGINEER, stop the Work until payment is made of all such amounts due CONTRACTOR, including interest thereon. The provisions of this paragraph 15.04 are not intended to preclude CONTRACTOR from making a Claim under paragraph 10.05 for an adjustment in Contract Price or Contract Times or otherwise for expenses or damage directly attributable to CONTRACTOR's stopping the Work as permitted by this paragraph.

**ARTICLE 16 - DISPUTE RESOLUTION**

**16.01 Methods and Procedures**

A. Dispute resolution methods and procedures, if any, shall be as set forth in the Supplementary Conditions. If no method and procedure has been set forth, and subject to the provisions of paragraphs 9.09 and 10.05, OWNER and CONTRACTOR may exercise such rights or remedies as either may otherwise have under the Contract Documents or by Laws or Regulations in respect of any dispute.

**ARTICLE 17 - MISCELLANEOUS**

**17.01 Giving Notice**

A. Whenever any provision of the Contract Documents requires the giving of written notice, it will be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the notice.

**17.02 Computation of Times**

A. When any period of time is referred to in the Contract Documents by days, it will be computed to exclude the first and include the last day of such period. If the last day of any such period falls on a Saturday or Sunday or on a day made a legal holiday by the law of the applicable jurisdiction, such day will be omitted from the computation.

**17.03 Cumulative Remedies**

A. The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by Laws or Regulations, by special warranty or guarantee, or by other provisions of the Contract Documents, and the provisions of this paragraph will be as effective as if repeated specifically in the Contract Documents in connection with each particular duty, obligation, right, and remedy to which they apply.

17.04 *Survival of Obligations*

A. All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with the Contract Documents, as well as all continuing obligations indicated in the Contract Documents will survive final payment, completion, and acceptance of the Work or termination or completion of the Agreement.

17.05 *Controlling Law*

A. This Contract is to be governed by the law of the state in which the Project is located.

**Appendix 5 - Site Investigation Report Form**

## Site Investigation Report

This outline is for use as a general guide in preparing for and conducting a site visit. It is not all inclusive and should be supplemented for the specific type construction your company performs.

1. Name of Project \_\_\_\_\_  
Owner \_\_\_\_\_  
Location of project \_\_\_\_\_  
Bid Date \_\_\_\_\_  
Date and times site is available for visit \_\_\_\_\_
2. Date of visit \_\_\_\_\_
3. Site Demographics and Access  
Nearest city \_\_\_\_\_ Distance to this city \_\_\_\_\_  
*Highways* (Describe road access, including any bridge or road restrictions, along with seasonal limitations. If haul roads are involved, include a full description on a separate page.):  
\_\_\_\_\_  
*Railroad* (Describe type and location of loading/unloading locations):  
\_\_\_\_\_  
*Airport* (Nearest. Include commercial services available): \_\_\_\_\_  
*Water* (Describe river or ocean access, harbors, channel depth, etc., including commercial carriers. Use a separate page if more room is required.)  
\_\_\_\_\_  
\_\_\_\_\_
4. Utilities:
  - a. Power company (Name, address, telephone and capacities): \_\_\_\_\_
  - b. Telephone company (Name, address, telephone and capacities): \_\_\_\_\_
  - c. Gas company (Name, address, telephone and capacities): \_\_\_\_\_
  - d. Water company (Name, address, telephone and capacities): \_\_\_\_\_
5. Staging, storage, housing and trailer facilities (Location, availability and cost): \_\_\_\_\_
6. Working season (Note typical weather patterns, seasons and conditions): \_\_\_\_\_
7. Local trade association chapters
  - a. (List names, addresses and telephone):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- b. (Obtain information on unusual working conditions, labor availability, union contacts, pay scales, benefits, etc.)

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8. Local subcontractors or suppliers:

Refer to bid schedule and prepare a separate list of subcontractors and suppliers. Obtain local/regional phone book(s) to begin making contacts.

9. Visit owner's facilities:

- a. List names and titles; telephone numbers of persons contacted

Name \_\_\_\_\_

Title \_\_\_\_\_ Phone \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_ Phone \_\_\_\_\_

- b. Prepare a list of items to discuss with owner during site visit. If possible, provide list to owner and request written response. Include items such as general job requirements, questions about the drawings and specifications, local geology, ground water situation, availability of special reports, photos, maps, boring logs and other data (obtain copies) both referenced and not referenced in the contract documents, local environmental regulations, safety requirements, easements,

- c. Request conducted tour of proposed work

- d. Examine all cores, test locations and logs of test holes available

- 10. Describe site: Take photographs. Compare and note both similarities and differences of observations at the site with those specified in the contract drawings and specifications.

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- 11. Initiate site preparation estimate (including location of facilities, foundations, drinking water, etc.):

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- 12. Determine any special conditions that will enhance or prevent usage of special equipment.

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**RULES OF CONTRACT INTERPRETATION**  
(Restatement of Contracts)

**Primary Rules**

- a. The ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable.
- b. Technical terms and words of art are given their technical meaning unless the context or a usage which is applicable indicates a different meaning.
- c. A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together.
- d. All circumstances accompanying the transaction may be taken into consideration, except that when the parties adopt a written statement of their agreement, oral statements of their intentions concerning the agreement made prior to, or contemporaneous with, the writing may not generally be considered.
- e. If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.

**Secondary Rules**

- a. An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect.
- b. The principal apparent purpose of the parties is given great weight in determining the meaning to be given to manifestations of intention or to any part thereof.
- c. Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.
- d. Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law.
- e. Where written provisions are inconsistent with printed provisions, an interpretation is preferred which gives effect to the written provisions.
- f. Where a public interest is affected an interpretation is preferred which favors the public.

## Appendix 7

### Sources of Overtime Statistics

1. "Hours of Work and Output," Bulletin No. 917, United States Department of Labor, Bureau of Labor Statistics, 1947.
2. "How Much Does Overtime Really Cost," Bulletin No. 18A, Management Methods Committee of the Mechanical Contractors Association of America.
3. James Howerton, "Do You Know the Hidden Loss of Overtime?" *Qualified Contractor*.
4. "Overtime and Productivity in Electrical Construction," *A Report on a Continuing Study* by the National Electrical Contractors' Association.
5. "Field Construction, Loss of Productivity Curves," United Engineers and Constructors, Inc.
6. "Scheduled Overtime" *Coming to Grips with Some Major Problems in the Construction Industry*, The Business Roundtable, 1975



**Appendix 9 - Change Order Initiation Form - Instructions**

**CHANGE ORDER INITIATION (COI) FORM**

**Instruction Sheet**

In order to establish a well organized and complete claims and change order program, it is necessary to have an accurate and detailed history of each change. To insure that such a history is set up and maintained, the attached form shall be put into effect each time a potential claim or change order is identified. This form should be made out by the project engineer or his staff.

Such a record will insure that all necessary background information is documented and that necessary actions are taken. Such a record will greatly aid in the composition of proposals and in support of negotiations. It will also assist the project engineer in ascertaining that supervisors and subcontractors are aware of changes and that proper actions on their part are being taken. Last, such a record will help in making and maintaining more accurate cost-revenue forecasts.

A work order number should be established each time a potential claim or change is identified, or a change order issued, whether or not there will be any costs. This will insure that every contract modification will have a cost account number to facilitate job accounting procedures.

The attached form should be attached to each extra work order folder. A separate notebook containing all extra work orders should be maintained for ready reference. Additionally, a copy should be given to the project manager for his information and concurrence upon initiation of each extra work order number.

WPL Trackwork Constructors

CHANGE ORDER INITIATION (COI) FORM

Owner's Change Order No. \_\_\_\_\_ Date: \_\_/\_\_/\_\_  
Contractor's Extra Work Order No. \_\_\_\_\_  
Contract Modification No. \_\_\_\_\_ Date Modification Received: \_\_/\_\_/\_\_

Title of Change \_\_\_\_\_

Description: (What, where, which, why, who, how; refer to specification and contract drawing) \_\_\_\_\_

Directed to do work \_\_\_\_\_ Date \_\_/\_\_/\_\_  
(whom & how)

Notice given to owner \_\_\_\_\_ Date \_\_/\_\_/\_\_

Proposal Submitted \_\_\_\_\_ Date \_\_/\_\_/\_\_

Proposal Resubmitted \_\_\_\_\_ Date \_\_/\_\_/\_\_

Negotiations Begun \_\_\_\_\_ Date \_\_/\_\_/\_\_

Negotiations Complete \_\_\_\_\_ Date \_\_/\_\_/\_\_

Settlement Amount \_\_\_\_\_ Time Extension \_\_\_\_\_ (Calendar Days)



**Appendix 10 - Change Order Status Cover Letter**

**WPL TRACKWORK CONSTRUCTORS, INC.**  
P.O. Box 1617  
Washington, D.C. 20002

April 8, 1997  
Ref #: 433

Owner's Representative, Inc.  
Main Rail Yard Project  
400 New York Ave. N.E.  
Washington, D.C. 20002

Attention: Mr. B.P. Pong  
Resident Engineer

RE: Contract Number 8C0033  
Change Order Status Report No. 24

Gentlemen:

Submitted herewith is our monthly *Change Order Status Report No. 24* outlining the current status of all unresolved claims and change orders. We call your attention to the following figures and request you take whatever action necessary to process these items into contract modifications.

1. Outstanding Change Orders \_\_\_\_\_.
2. Outstanding Work Order Accounts \_\_\_\_\_. These \_\_\_\_\_ represent, in addition to the outstanding change orders in (1) above, a combination of: directives by the Resident Engineer (RE), claims by WPL Trackwork, and changes initiated by us with the RE's concurrence. All but \_\_\_\_\_ of these have been reduced to writing yet there have been no change orders issued for any of them by the owner.
3. WPL Trackwork has submitted cost proposals for \_\_\_\_\_ outstanding change orders (totaling \$ \_\_\_\_\_) and \_\_\_\_\_ outstanding work orders (totaling \$ \_\_\_\_\_) for a total dollar value of \$ \_\_\_\_\_.
4. The remaining claims and change orders represents a projected total dollar value of \$ \_\_\_\_\_, of which \$ \_\_\_\_\_ has been expended by us to date. We expect to have proposals for these items to you shortly.

We look forward to your earliest attention to these open items. Thank you.

Very truly yours,

A. Romeo  
Project Manager

**Appendix 11 - Sample Schedule Cover Letter**

**WPL TRACKWORK CONSTRUCTORS, INC.**  
P.O. Box 1617  
Washington, D.C. 20002

February 8, 1997  
Ref #: 467

Owner's Representative, Inc.  
Main Rail Yard Project  
400 New York Ave. N.E.  
Washington, D.C. 20002

Attention: Mr. B.P. Pong  
Resident Engineer

RE: Contract Number 8CO033 CPM Schedule

Gentlemen:

Enclosed please find our proposed CPM schedule submitted in accordance with Section 6 of the Special Conditions.

Except for contractual milestone dates required by the contract documents, the duration times shown on the attached schedules are not commitments. These times are estimates based on presently known or represented conditions and any changes therein may result in changes to the overall schedule. Please note those items of work which are dependent on the owner's actions or those of other contractors performing work for the owner. Reliance on those dates has been placed by us in preparing both our bid and the enclosed schedule. Delays to some or all of these relied upon dates may adversely affect the contract completion dates.

We will assume that this schedule is acceptable to you and in conformance with the contract requirements unless notified otherwise within the next 30 days. Thank you.

Very truly yours,

A. Romeo  
Project Manager

## Appendix 12 - AGC/ASA/ASC

### Appendix 12 - AGC/ASA/ASC Standard Form Construction Contract

This Appendix contains selected clauses from the **AGC/ASA/ASC Standard Form Construction Contract (1994 Edition)** developed through the joint efforts of the Associated General Contractors of America, the American Subcontractors Association, Inc. and the Associated Specialty Contractors. The clauses included here are:

#### Article 6 - Performance of Work

##### 6.2 Schedule of Work

#### Article 7 - Subcontract Interpretation

##### 7.1 Inconsistencies and Omissions

#### Article 8 - Contractor's Obligations

##### 8.3 Timely Communications

#### Article 9 - Subcontractor's Obligations

##### 9.2 Subcontractor's Obligations for Site Visitation

#### Article 13 - Changes, Claims and Delays

##### 13.1 Changes

##### 13.2 Claims

##### 13.3 Delay

#### Article 15 - Dispute Resolution

##### 15.1 Initial Dispute Resolution

##### 15.2 Agreement to Arbitrate

##### 15.3 Stay of Proceedings and Consolidation

##### 15.4 Notice of Demand

##### 15.5 Award

##### 15.6 Work Continuation and Payment

##### 15.7 No Limitation of Rights and Remedies

##### 15.8 Same Arbitrators

#### Article 16 - Recourse by Contractor

##### 16.1 Failure of Performance

##### 16.2 Bankruptcy

##### 16.3 Stoppage of Work

##### 16.4 Suspension by Owner for Convenience

##### 16.5 Termination by Owner

##### 16.6 Contingent Assignment of Subcontract

##### 16.7 Suspension by Contractor for Convenience

#### Article 17 - Termination by Subcontractor

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20814-5372, (301) 657-3110.

**ARTICLE 6  
PERFORMANCE OF WORK**

**6.2 SCHEDULE OF WORK** In a timely fashion, the Subcontractor shall provide the Contractor with any scheduling information proposed by the Subcontractor for the Subcontract Work. In consultation with the Subcontractor, the Contractor shall prepare the schedule for performance of the Contract (hereinafter called the "Schedule of Work") and shall revise and update such schedule, as necessary, as the work progresses. Both the Contractor and the Subcontractor shall be bound by the Schedule of Work. The Schedule of Work and all subsequent changes and additional details thereto shall be submitted to the Subcontractor promptly and reasonably in advance of the required performance. The Contractor shall have the right to determine and, if necessary, change the time, order and priority in which the various portions of the work shall be performed and all other matters relative to the timely and orderly conduct of the Subcontract Work.

**ARTICLE 7  
SUBCONTRACT INTERPRETATION**

**7.1 INCONSISTENCIES AND OMISSIONS** Should inconsistencies or omissions appear in the Subcontract Documents, it shall be the duty of the Subcontractor to so notify the Contractor in writing within three (3) working days of the Subcontractor's discovery thereof. Upon receipt of such notice, the Contractor shall instruct the Subcontractor as to the measures to be taken and the Subcontractor shall comply with the Contractor's instructions. If the Subcontractor performs work knowing it to be contrary to any applicable laws, statutes, ordinances, building codes, rules or regulations without notice to the Contractor and advance approval by appropriate authorities, including the Contractor, then the Subcontractor shall assume full responsibility for such work and shall bear all associated costs, charges, fees and expenses necessarily incurred to remedy the violation.

**ARTICLE 8  
CONTRACTOR'S OBLIGATIONS**

**8.3 TIMELY COMMUNICATIONS** The Contractor, with reasonable promptness, shall transmit to the appropriate parties all submittals, transmittals, and written approvals relating to the Subcontract Work. Unless otherwise specified in the Subcontract Documents, communications by and with the Subcontractor's subcontractors, materialmen and suppliers shall be through the Subcontractor.

**ARTICLE 9  
SUBCONTRACTOR'S OBLIGATIONS**

**9.2 SUBCONTRACTOR'S OBLIGATIONS FOR SITE VISITATION** The Subcontractor acknowledges that it has visited the Project site and visually inspected the general and local conditions which could affect the Subcontract Work. Any failure of the Subcontractor to reasonably ascertain from a visual inspection of the site, the general and local conditions which could affect the Subcontract Work, will not relieve the Subcontractor from its responsibility to properly complete the Subcontract Work without additional expense to the Contractor.

**ARTICLE 13  
CHANGES, CLAIMS AND DELAYS**

**13.1 CHANGES**  
**13.1.1 SUBCONTRACT CHANGE** A Subcontract Change is any change in the Subcontract Work within the general scope of the Subcontract including a change in the drawings, specifications or technical requirements of the Subcontract and/or a change in the Schedule of Work affecting the performance of the Subcontract.

**13.1.2 CHANGE ORDER** When the Contractor orders in writing, the Subcontractor, without nullifying this Subcontract, shall make any and all changes in the Subcontract Work which are within the general scope of this Subcontract. Adjustments in the Subcontract Price or Subcontract Time, if any, resulting from such changes shall be set forth in a Subcontract Change Order or a Subcontract Construction Change Directive pursuant to the Subcontract Documents. No such adjustments shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the scope of the Subcontract Work, adjustment in the Subcontract Price and/or Subcontract Time. A Subcontract Construction Change Directive is a written instrument prepared by the Contractor directing a change in the Subcontract Work and stating a proposed adjustment, if any, in the Subcontract Price or Subcontract Time or both. A Subcontract Construction Change Directive shall be used in the absence of agreement on the terms of a Subcontract Change Order.

**13.1.3 SUBCONTRACT CONSTRUCTION CHANGE DIRECTIVE** The Subcontractor shall comply with all Subcontract Construction Change Directives received from the Contractor and perform the required changes in the Subcontract Work in a prompt and expeditious manner. The Subcontractor shall evaluate the proposed adjustment in the Subcontract Price or Subcontract Time, if any, as set forth in the Subcontract Construction Change Directive and respond, in writing, to the Contractor stating the Subcontractor's acceptance or rejection of the proposed adjustment and the reasons therefor.

The Subcontractor may agree to the Subcontract Construction Change Directive and the terms of the proposed adjustment, if any, by signing the Subcontract Construction Change Directive and returning it forthwith to the Contractor. Subcontract Construction Change Directives agreed to by the Subcontractor are effective immediately and become Subcontract Change Orders in accordance with their terms.

**13.1.4 ADJUSTMENT IN SUBCONTRACT PRICE** If a Subcontract Change Order or Subcontract Construction Change Directive requires an adjustment in the Subcontract Price, the adjustment shall be established by one of the following methods:

- (a) Mutual agreement on a lump sum with sufficient information to substantiate the amount;
- (b) Unit prices already established in the Subcontract Documents or if not established by the Subcontract Documents then established by mutual agreement for the adjustment;
- (c) A mutually determined cost plus a jointly acceptable markup for overhead and profit; or
- (d) As may otherwise be required by the Subcontract Documents.

**13.1.5 SUBSTANTIATION OF ADJUSTMENT** If the Subcontractor does not advise the Contractor promptly of the Subcontractor's agreement or disagreement with a proposed adjustment, or if the Subcontractor disagrees with the proposed method of adjustment, the method and the adjustment shall be determined by the Contractor on the basis of reasonable Subcontractor expenditures and savings attributable to the change, including, in the case of an increase in the Subcontract Price, a reasonable markup for overhead and profit. The Subcontractor may contest the reasonableness of any adjustment determined by the Contractor. Pending final determination of costs to the Contractor and/or Owner, the Subcontractor may include in Subcontractor Applications for Payment to Contractor amounts not in dispute for work performed pursuant to properly authorized Subcontract Construction Change Directives.

**13.1.6 INCIDENTAL CHANGES IN THE SUBCONTRACT WORK** The Contractor may direct the Subcontractor to perform incidental changes in the Subcontract Work which do not involve adjustments in the Subcontract Price or Subcontract Time. Incidental changes shall be consistent with the scope and intent of the Subcontract Documents. The Contractor shall initiate an incidental change in the Subcontract Work by issuing a written order to the Subcontractor. Such written orders shall be carried out promptly and are binding on the parties.

## 13.2 CLAIMS

**13.2.1 CLAIM** A claim is a demand or assertion made in writing by the Contractor or the Subcontractor seeking an

adjustment in the Subcontract Price and/or Subcontract Time, an adjustment or interpretation of the Subcontract terms, or other relief arising under or relating to this Subcontract, including the resolution of any matters in dispute between the Contractor and Subcontractor in connection with the Project.

**13.2.2 CLAIMS RELATING TO OWNER** The Subcontractor agrees to make all claims against the Contractor for which the Owner is or may be liable in the same manner and within the time limits provided in the Contract for like claims by the Contractor against the Owner and in sufficient time for the Contractor to make such claims against the Owner in accordance with the Contract. The Contractor agrees to permit the Subcontractor to prosecute a claim in the name of the Contractor for the use and benefit of the Subcontractor in the manner provided in the Contract for like claims by the Contractor against the Owner. The Contractor shall make available to the Subcontractor, prior to the execution of this Subcontract Agreement, copies of all Contract provisions pertaining to claims by the Contractor against the Owner.

**13.2.3 CLAIMS RELATING TO CONTRACTOR** The Subcontractor shall give the Contractor written notice of all claims not included in Subparagraph 13.2.2 or 16.7.3 within seven (7) calendar days of the date when the Subcontractor knew of the facts giving rise to the event for which claim is made; otherwise, such claims shall not be valid.

**13.2.4 UNRESOLVED CLAIMS, DISPUTES AND OTHER MATTERS** All unresolved claims, disputes and other matters in question between the Contractor and the Subcontractor, not relating to claims included in Paragraph 12.5, shall be resolved in the manner provided in Article 15 herein.

## 13.3 DELAY

**13.3.1** If the Subcontractor is delayed in the performance of the Subcontract Work for any reason beyond the Subcontractor's control, and without the Subcontractor's fault or negligence, including delays caused in whole or in part by the Contractor, Owner, Architect or any other persons, entities or events, or if the Subcontract Work is delayed by order of the Contractor, Owner or an authorized representative of either, or if the Subcontract Work is delayed for any reason or cause for which the Contractor, Owner or Architect concludes has resulted in excusable delay, then the Subcontractor is entitled to an extension of the Subcontract Time in which to complete its work. Said extension shall be set forth in a Subcontract Change Order for such time as the parties may agree is reasonable.

**13.3.2** Claims relating to time shall be made in accordance with applicable provisions of the Subcontract Documents. This Article 13 does not preclude recovery of damages for delay by either party.

**13.3.3 LIQUIDATED DAMAGES** If the Contract provides for liquidated or other damages for delay beyond the completion date set forth in the Contract, and such damages are assessed by the Owner against the Contractor, then the

Contractor may assess such damages against the Subcontractor in proportion to its share of the responsibility for such delay and damage, but no more. The amount of such assessment against the Subcontractor, if any, shall not exceed the Subcontractor's proportionate share of the responsibility for such delay and damage and shall never exceed the amount assessed against the Contractor by the Owner.

Nothing in Subparagraph 13.3.3 shall limit the Contractor's right to claim all actual damages sustained by the Contractor as a result of Subcontractor delay.

## ARTICLE 15 DISPUTE RESOLUTION

**15.1 INITIAL DISPUTE RESOLUTION** If a dispute arises out of or relates to this Subcontract, or the breach thereof, the parties may endeavor to settle the dispute first through direct discussions. If the dispute cannot be settled through direct discussions, the parties may endeavor to settle the dispute by mediation before recourse to arbitration. Unless the parties agree otherwise, the mediation shall be conducted in accordance with the Construction Mediation Rules of the American Arbitration Association. Mediation will be commenced within the time limits for arbitration stipulated in the Subcontract Documents. The time limits for any subsequent arbitration will be extended for the duration of the mediation process plus fourteen (14) calendar days, or as otherwise provided in the Subcontract Documents. Issues to be mediated are subject to the exceptions in Paragraph 15.3 for arbitration. The location of the mediation shall be the same as the location for arbitration identified in Paragraph 15.4.

**15.2 AGREEMENT TO ARBITRATE** All claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. Notwithstanding other provisions in this Subcontract, or choice of law provisions to the contrary, this agreement to arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, which shall not be superseded or supplemented by any other arbitration act, statute or regulation.

**15.3 STAY OF PROCEEDINGS AND CONSOLIDATION** In the event the Contractor and Subcontractor determine that all or a portion of any claim, dispute or other matter in question between them is the responsibility in whole or in part of a person or entity who is under no obligation to arbitrate said claim, dispute or matter with Contractor and Subcontractor in the same proceeding, then the Contractor and Subcontractor may agree in writing to delay or stay any arbitration between them pending the determination, in a separate proceeding, of the responsibility and liability of said person or entity for the claim, dispute or matter involved. The Subcontractor agrees that any arbitration instituted under this Article 15 may, at the Contractor's election, be consolidated

with any other arbitration proceeding involving a common question of fact or law between the Contractor and any other subcontractors performing work in connection with the Contract.

In any dispute concerning the application of this paragraph 15.3, the question of arbitrability shall be decided by the appropriate court and not by arbitration.

**15.4 NOTICE OF DEMAND** Notice of the demand for arbitration shall be filed in writing with the other party to this Subcontract and with the American Arbitration Association. The demand for arbitration shall be made as required in the Subcontract Documents or within a reasonable time after written notice of the claim, dispute or other matter in question has been given, but in no event shall it be made when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitation. The location of the arbitration proceedings shall be at the office of the American Arbitration Association nearest the Project site, unless the parties agree otherwise.

**15.5 AWARD** The award rendered by the arbitrators shall be final and judgment may be entered upon it in accordance with the Federal Arbitration Act in any court having jurisdiction.

**15.6 WORK CONTINUATION AND PAYMENT** The Subcontractor shall carry on the Subcontract Work and maintain the Schedule of Work pending final resolution of a claim including arbitration, unless the Subcontract has been terminated or the Subcontract Work suspended as provided for in the Subcontract, or the parties otherwise agree in writing to a partial or total suspension of the Subcontract Work. If the Subcontractor is continuing to perform in accordance with the Subcontract, the Contractor shall continue to make payments as required by the Subcontract.

**15.7 NO LIMITATION OF RIGHTS AND REMEDIES** Nothing in this Article shall limit any rights or remedies not expressly waived by the Subcontractor which the Subcontractor may have under lien laws or surety bonds.

**15.8 SAME ARBITRATORS** To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and others involved with the Project, concerning a common question of fact or law, shall be heard by the same arbitrators in a single proceeding.

## ARTICLE 16 RECOURSE BY CONTRACTOR

### 16.1 FAILURE OF PERFORMANCE

**16.1.1 NOTICE TO CURE** If the Subcontractor refuses or fails to supply enough properly skilled workers, proper materials, or maintain the Schedule of Work, or it fails to make prompt payment to its workers, subcontractors or suppliers,

disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Subcontract, the Subcontractor may be deemed in default of this Subcontract. If the Subcontractor fails within three (3) working days after written notification to commence and continue satisfactory correction of such default, with diligence and promptness, then the Contractor without prejudice to any other rights or remedies, shall have the right to any or all of the following remedies:

- (a) Supply such number of workers and quantity of materials, equipment and other facilities as the Contractor deems necessary for the satisfactory correction of such default, which the Subcontractor has failed to complete or perform after the aforesaid notice, and charge the cost thereof to the Subcontractor, who shall be liable for the payment of same including reasonable overhead, profit and attorneys' fees;
- (b) Contract with one or more additional contractors, to perform such part of the Subcontract Work as the Contractor shall determine will provide the most expeditious correction of the default and charge the cost thereof to the Subcontractor;
- (c) Withhold payment of moneys due the Subcontractor in accordance with Subparagraph 16.1.3 of this Subcontract Agreement; and
- (d) In the event of an emergency affecting the safety of persons or property, the Contractor may proceed to commence and continue satisfactory correction of such default, without first giving three (3) working days' written notice to the Subcontractor, but shall give prompt written notice of such action to the Subcontractor.

**16.1.2 TERMINATION BY CONTRACTOR** If the Subcontractor fails to commence and satisfactorily continue correction of a default within three (3) working days after written notification issued under Subparagraph 16.1.1, then the Contractor may, in lieu of or in addition to the remedies set forth in Subparagraph 16.1.1, issue a second written notification to the Subcontractor and the Subcontractor's surety, if any. Such notice shall state that if the Subcontractor fails to commence and continue correction of the default within seven (7) working days of the second written notification, the Subcontract may be terminated and the Contractor may use any materials, implements, equipment, appliances or tools furnished by or belonging to the Subcontractor to complete the Subcontract Work. A written notice of termination shall be issued by the Contractor to the Subcontractor at the time the Subcontract is terminated.

The Contractor also may furnish those materials, equipment and/or employ such workers or subcontractors as the Contractor deems necessary to maintain the orderly progress of the work.

All costs incurred by the Contractor in performing the Subcontract Work, including reasonable overhead, profit and attorneys' fees, shall be deducted from any moneys due or to become due the Subcontractor under this Subcontract. The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Subcontract Price. If the unpaid balance of the Subcontract Price exceeds the expense of finishing the Subcontract Work, such excess shall be paid to the Subcontractor.

**16.1.3 USE OF SUBCONTRACTOR'S EQUIPMENT** If the Contractor performs work under this Article, or subcontracts such work to be so performed, the Contractor and/or the persons to whom work has been subcontracted shall have the right to take and use any materials, implements, equipment, appliances or tools furnished by, belonging or delivered to the Subcontractor and located at the Project for the purpose of completing any remaining Subcontract Work. Immediately upon completion of the Subcontract Work, any remaining materials, implements, equipment, appliances or tools not consumed or incorporated in performance of the Subcontract Work, and furnished by, belonging to, or delivered to the Project by or on behalf of the Subcontractor, shall be returned to the Subcontractor in substantially the same condition as when they were taken, normal wear and tear excepted.

## **16.2 BANKRUPTCY**

**16.2.1 TERMINATION ABSENT CURE** If Subcontractor files a petition under the Bankruptcy Code, this Subcontract shall terminate if the Subcontractor or the Subcontractor's trustee rejects the Subcontract or, if there has been a default, the Subcontractor is unable to give adequate assurance that the Subcontractor will perform as required by this Subcontract or otherwise is unable to comply with the requirements for assuming this Subcontract under the applicable provisions of the Bankruptcy Code.

**16.2.2 INTERIM REMEDIES** If the Subcontractor is not performing in accordance with the Schedule of Work at the time a petition in bankruptcy is filed, or at any subsequent time, the Contractor, while awaiting the decision of the Subcontractor or its trustee to reject or to assume this Subcontract and provide adequate assurance of its ability to perform hereunder, may avail itself of such remedies under this Article as are reasonably necessary to maintain the Schedule of Work.

The Contractor may offset against any sums due or to become due the Subcontractor under this Subcontract all costs incurred in pursuing any of the remedies provided hereunder, including, but not limited to, reasonable overhead, profit and attorneys' fees.

The Subcontractor shall be liable for the payment of any amount by which such expense may exceed the unpaid balance of the Subcontract Price.

**16.3 STOPPAGE OF WORK** Should the Owner order the Contractor in writing to stop the performance of the Contract or any portion which affects the Subcontract Work

due to any act or omission of the Contractor, or any other person or entity for whose acts or omissions the Contractor may be liable, then the Contractor shall so notify the Subcontractor in writing and upon written notification the Subcontractor shall stop that portion of the Subcontract Work as ordered by the Contractor.

#### **16.4 SUSPENSION BY OWNER FOR CONVENIENCE**

16.4.1 Should the Owner order the Contractor in writing to suspend, delay, or interrupt the performance of the Contract or any part which affects the Subcontract Work for such period of time as may be determined to be appropriate for the convenience of the Owner, and not due to any act or omission of the Contractor, or any other person or entity for whose acts or omissions the Contractor may be liable, then the Contractor shall so notify the Subcontractor in writing and, upon written notification, the Subcontractor shall immediately suspend, delay or interrupt that portion of the Subcontract Work as ordered by Contractor.

16.4.2 In the event of an Owner suspension, delay or interruption for convenience as described in Subparagraph 16.4.1, the Contractor's liability to the Subcontractor for any damages caused by said order, including any claims for adjustments in the Subcontract Price and/or Subcontract Time, shall be extinguished by the Contractor pursuing said damages and claims against the Owner, on the Subcontractor's behalf, and by awarding and paying over to the Subcontractor any additional time and/or money obtained from the Owner on the Subcontractor's behalf, if accepted by the Subcontractor.

16.4.3 If the Subcontractor's damages and claims resulting from an Owner suspension, delay or interruption for convenience as described in Subparagraph 16.4.1, cannot be resolved through negotiation under the Contract, then the Contractor agrees to cooperate with the Subcontractor, at the Subcontractor's expense, in the prosecution of said damages and claims against the Owner through mediation, arbitration and/or litigation, and to permit the Subcontractor to prosecute said damages and claims, in the name of the Contractor and for the use and benefit of the Subcontractor. The Contractor's liability to the Subcontractor for any damages and claims caused by the Owner suspension, delay or interruption for convenience shall be fully extinguished by the Contractor awarding and paying over to the Subcontractor any additional time and/or money obtained from the Owner on the Subcontractor's behalf through the conclusion of the mediation, arbitration, and/or litigation process.

#### **16.5 TERMINATION BY OWNER**

16.5.1 Should the Owner terminate its Contract with the Contractor, or any part which includes the Subcontract Work, the Contractor shall so notify the Subcontractor in writing within three (3) calendar days of the termination and, upon written notification, this Subcontract shall be terminated and the Subcontractor shall immediately stop the Subcontract Work,

follow the Contractor's instructions regarding shutdown and termination procedures, and mitigate all costs.

16.5.2 In the event that the Owner terminates its Contract with the Contractor for the convenience of the Owner, and not due to any act or omission of the Contractor, then the Contractor's liability to the Subcontractor for any damages incurred or claims resulting from the Owner termination, shall be extinguished by the Contractor pursuing said damages and claims against the Owner on the Subcontractor's behalf, and by paying over to the Subcontractor any additional money obtained by the Contractor from the Owner on the Subcontractor's behalf, if accepted by the Subcontractor.

16.5.3 In the event that the Owner terminates its Contract with the Contractor for the convenience of the Owner, and the Subcontractor's damages and claims cannot be resolved through negotiation in accordance with the Contract or otherwise, then the Contractor agrees to cooperate with the Subcontractor, at the Subcontractor's expense, in the prosecution of said damages and claims against the Owner through mediation, arbitration and/or litigation, and to permit the Subcontractor to prosecute said damages and claims, in the name of the Contractor and for the use and benefit of the Subcontractor. The Contractor's liability to the Subcontractor for any damages and claims caused by the Owner termination for convenience shall be fully extinguished by the Contractor awarding and paying over to the Subcontractor any additional time and/or money obtained from the Owner on the Subcontractor's behalf through the conclusion of the mediation, arbitration and/or litigation process.

#### **16.6 CONTINGENT ASSIGNMENT OF SUBCONTRACT**

The Contractor may assign this Subcontract to the Owner if required under the Contract. The assignment shall be effective only when the Owner: (a) has terminated the Contract for cause, and (b) has accepted the assignment by notifying the Subcontractor in writing. The contingent assignment is subject to the prior rights of a surety that may be obligated under the Contractor's bond, if any. Subcontractor hereby consents to such assignment and agrees to be bound to the Owner, as assignee, by the terms of this Subcontract.

#### **16.7 SUSPENSION BY CONTRACTOR FOR CONVENIENCE**

16.7.1 The Contractor may order the Subcontractor in writing to suspend, delay or interrupt all or any part of the Subcontract Work for such period of time as may be determined to be appropriate for the convenience of the Contractor. The short/incidental stoppage of the Subcontract Work, shall not be deemed a suspension, delay or interruption of work.

16.7.2 The Subcontractor shall notify the Contractor in writing within fourteen (14) calendar days after receipt of the Contractor's order of the effect of such order upon the Subcontract Work. The Subcontract Price and/or Subcontract Time shall be adjusted by Subcontract Change Order for any

increase in the time and/or cost of performance of this Subcontract caused by such suspension, delay or interruption.

16.7.3 No claim under this Paragraph 16.7 shall be allowed for any costs incurred more than fourteen (14) calendar days prior to the Subcontractor's notice to the Contractor.

16.7.4 The Subcontract Price shall not be adjusted under this Paragraph 16.7 for any suspension, delay or interruption to the extent that the performance of the Subcontract is, was or would have been so suspended, delayed or interrupted by the fault or neglect of the Subcontractor, by a cause for which the Subcontractor is responsible, or by a cause for which the Subcontractor is entitled only to a time extension under this Subcontract.

#### **ARTICLE 17 TERMINATION BY SUBCONTRACTOR**

If the Subcontract Work has been stopped for thirty (30) calendar days because the Subcontractor has not received progress payments as required under Article 14, or has been abandoned or suspended for an unreasonable period of time not due to the fault or neglect of the Subcontractor, then the Subcontractor may terminate this Subcontract upon giving the Contractor seven (7) calendar days' written notice. Upon such termination, Subcontractor shall be entitled to recover from the Contractor payment for all Subcontract Work satisfactorily performed but not yet paid for, including reasonable overhead, profit and damages. However, if the Owner has not paid the Contractor for the satisfactory performance of the Subcontract Work through no fault or neglect of the Contractor, and the Subcontractor terminates the Subcontract under this Article because it has not received corresponding progress payments as required under Article 14, then the Subcontractor shall be entitled to recover from the Contractor, within a reasonable period of time following termination, payment for all Subcontract Work satisfactorily performed but not yet paid for, including reasonable overhead and profit thereon. The Contractor's liability for any other damages claimed by the Subcontractor under such circumstances shall be extinguished by the Contractor pursuing said damages and claims against the Owner, on the Subcontractor's behalf, in the manner provided for in Subparagraphs 16.5.2 and 16.5.3 of this Subcontract Agreement.

## Appendix 13 - Flat Rate Pricing System

### FLAT RATE PRICING SYSTEM FOR CHANGES UNDER \$15,000

The Contract is hereby changed as follows

To reduce time and effort for administrative processing of contract modifications, the following "flat rates" are agreed to for computing indirect costs for modification under above contract provisions when the agreed net additional or deductive direct costs do not exceed \$15,000.00 and increase or decrease in contract time is within + or - five(5) calendar days if specifically agreed to between the Engineer and the Contractor. When the change in contract time is increased, the change in contract amount will include the indirect impact costs of extended performance and no further consideration of such costs arising from the specific modification and cited change orders will be given.

JOB OFFICE OVERHEAD will be the sum of:

- a. 10% of direct labor costs [including fringe benefits, excluding FICA and FUTA, and State Unemployment Insurance (SUI)].
- b. 10% of direct material costs.
- c. 5% of direct equipment costs. Small tools, defined as equipment less than \$1,000 in acquisition cost, are included and computed at 5% of direct base-labor wages.
- d. 5% of subcontract costs.

HOME OFFICE GENERAL AND ADMINISTRATIVE COSTS will be 3% of the sum of direct costs and job office overhead costs.

BOND will be allowed at actual cost without mark-up.

In using the above, the following apply:

*Payroll Tax* (FICA, FUTA, and SUI) amounts are added immediately after all direct and indirect costs are totaled.

*Subcontractor indirect costs* will be computed in the same manner as above if the subcontractor elects to use the "flat rates." The Contractor agrees to furnish to the Engineer the names of subcontractors who do and do not so elect.

*Indirect costs will not be duplicated in direct costs.*

The above flat rates are for use *in lieu of the submission of a price breakdown justifying any increases or decreases* to any elements of the Contractor's indirect costs which are caused by a modification to the contract. Under this Agreement the "flat rates" are used for all modifications to this contract where negotiated direct costs do not exceed +\$15,000. If a Subcontractor elects not to use the above "flat rates," his proposal for each contract modification shall include a price breakdown justifying the proposed increased indirect costs in accordance with the *General Provisions - Contract Modifications - Requirements for Proposals, Price Breakdown and Negotiation of Profit.*

The Contractor can expect to have the finalized modification form completed within 60 days after the Record of Negotiations is signed by the RE and Project Manager. If he becomes dissatisfied with performance under this criterion, the Contractor may withdraw his election and return to the method (price breakdown) of substantiating increased indirect costs as well as direct costs.

**Accepted:**

\_\_\_\_\_  
Name of contractor

Owner:

By: \_\_\_\_\_  
Signature      Date

By: \_\_\_\_\_  
Signature      Date

\_\_\_\_\_  
Typed name

\_\_\_\_\_  
Typed name

**Appendix 14 - Change Order Proposal Form**

**PROPOSAL SUMMARY SHEET**

Extra Work Order No. _____ Change Order No. _____ Date _____		
<u>Description:</u>		
<b>GENERAL CONTRACTOR'S COSTS</b>		
Outside Professional Fees	_____	
Construction Equipment	_____	
Materials	_____	
Labor	_____	
Fringe Benefits (____%)	_____	
Workmen's Comp & Liab Ins (____%)	_____	
<b>SUBTOTAL</b>		_____
Home Office Fee (____%)	_____	
<b>SUBTOTAL</b>		_____
Overhead (____%)	_____	
<b>SUBTOTAL</b>		_____
Profit (____%)	_____	
FICA & FUTA (____%)	_____	
<b>GENERAL CONTRACTOR'S COSTS</b>		=====
<b>SUBCONTRACTOR'S COSTS</b>		
Outside Professional Fees	_____	
Construction Equipment	_____	
Materials	_____	
Labor	_____	
Fringe Benefits (____%)	_____	
Workmen's Comp & Liab Ins (____%)	_____	
<b>SUBTOTAL</b>		_____
Overhead (____%)	_____	
<b>SUBTOTAL</b>		_____
Profit (____%)	_____	
FICA & FUTA (____%)	_____	
<b>SUBTOTAL - SUBCONTRACTOR'S COSTS</b>		_____
General Contractor's Profit (____%)	_____	
<b>TOTAL SUBCONTRACTOR'S COSTS</b>		=====
<b>TOTAL COSTS</b>		=====

\*If overhead costs are in detail, attach supporting computations

**Appendix 15**

**PRICING CHECKLIST**

**DIRECT COSTS**

Labor  
Equipment  
Plant  
Material: Permanent and Job Supplies; Freight & Storage  
Small Tools  
Subcontractors  
Testing

**INDIRECT COSTS**

Management  
Supervision  
Engineering  
Overhead  
Permits  
Depreciation  
Taxes  
Interest  
Insurance  
Bond  
Home Office Fee  
Inspection

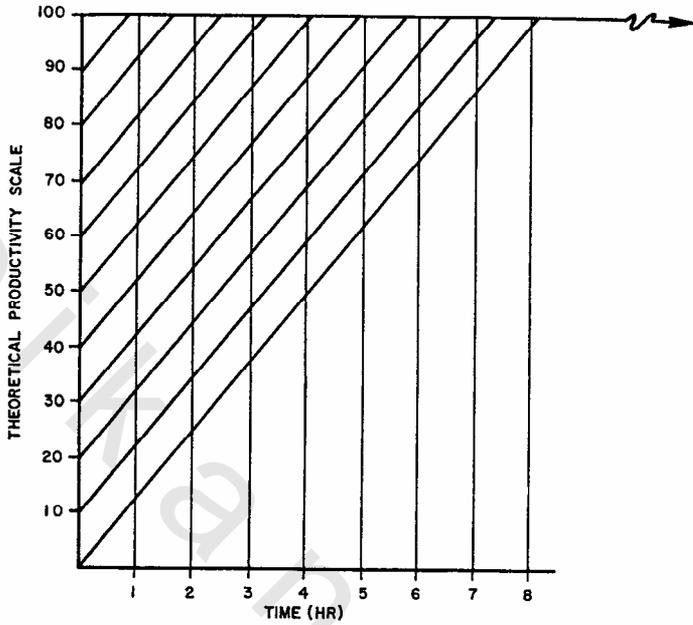
**IMPACT COSTS**

Time  
Resequencing  
Rescheduling  
Disruption  
Delays  
Acceleration  
Overtime  
Additional Mobilization  
Additional Equipment  
Changed Labor Force  
Increased Workload  
Worker Attitude  
Maintenance and Storage  
Redesign  
Idle Equipment  
Idle Labor  
Escalation

**CLAIM PREPARATION COSTS**

**PROFIT**

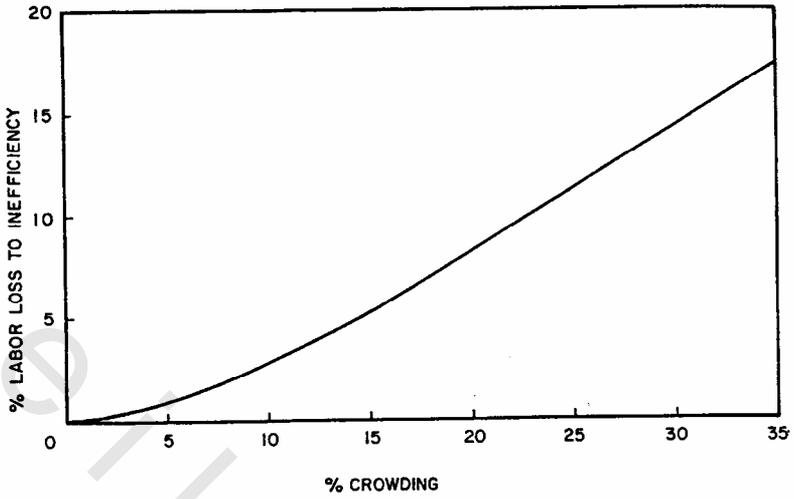
**Appendix 16 - Construction Operations Learning Centers**



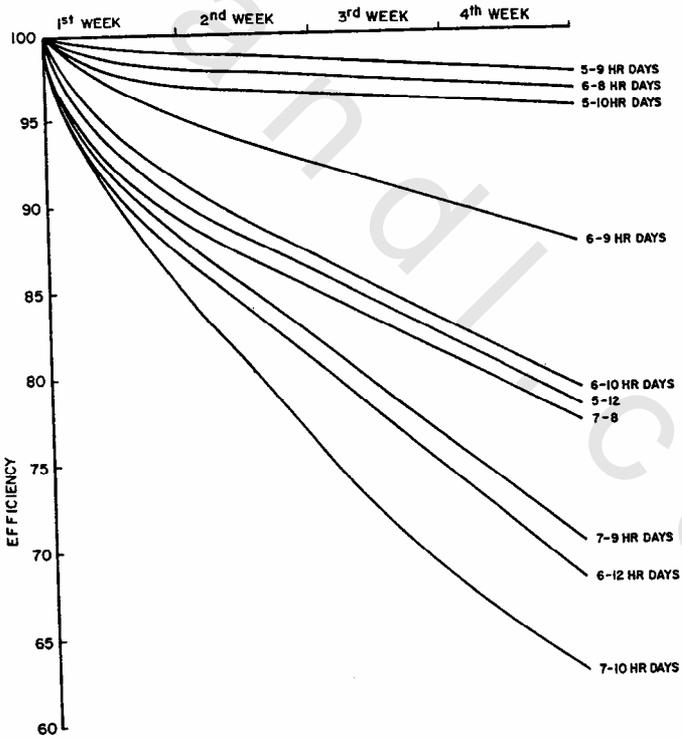
\*100 REPRESENTS THE PRODUCTIVITY RATE REQUIRED TO MAINTAIN SCHEDULED PROGRESS

(BASED ON CONSTRUCTION OPERATIONS  
ORIENTATION / LEARNING CHART)

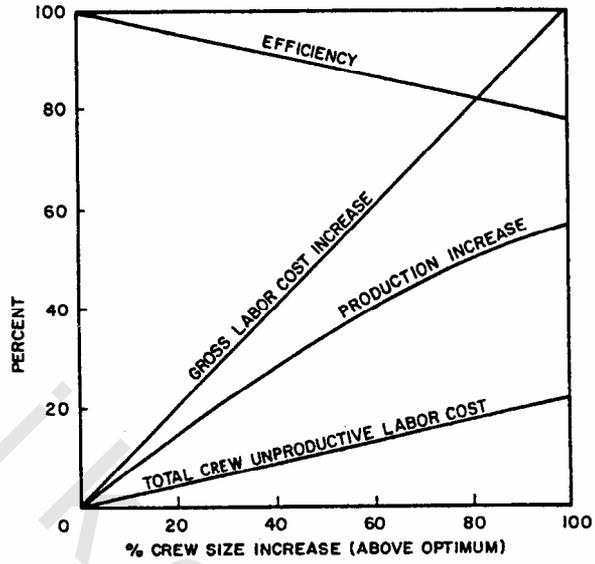
PRODUCTIVITY STARTING POINT	DURATION (HR)	AVERAGE LOSS (HR)
100	0	0
90	0.8	0.4
80	1.6	0.8
70	2.4	1.2
60	3.2	1.6
50	4.0	2.0
40	4.8	2.4
30	5.6	2.8
20	6.4	3.2
10	7.2	3.6
0	8.0	4.0



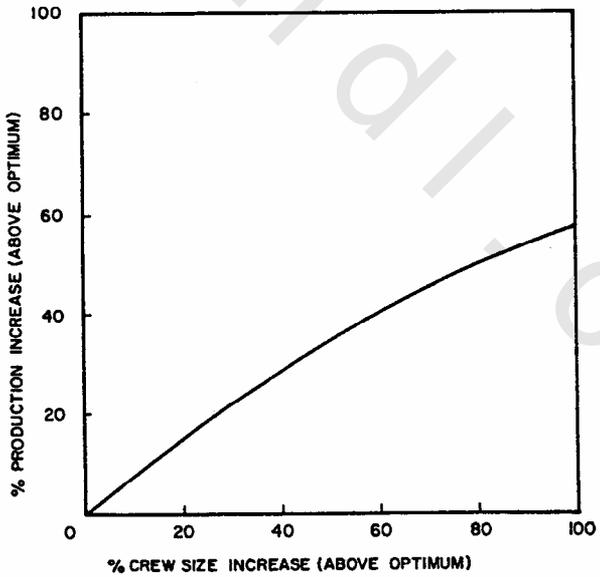
Effect of crowding on labor efficiency.



Effect of work schedule on efficiency.



Composite effects of crew overloading



Unproductive labor at crew overloading.

% PRODUCTIVITY

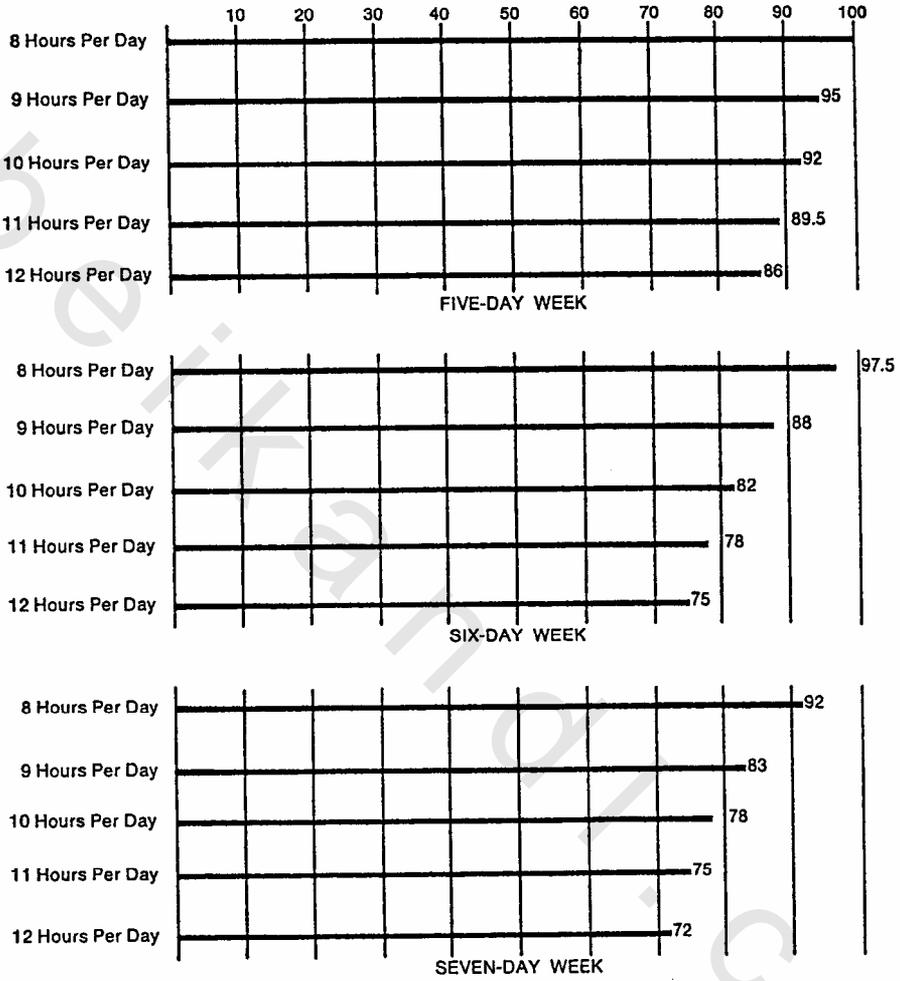
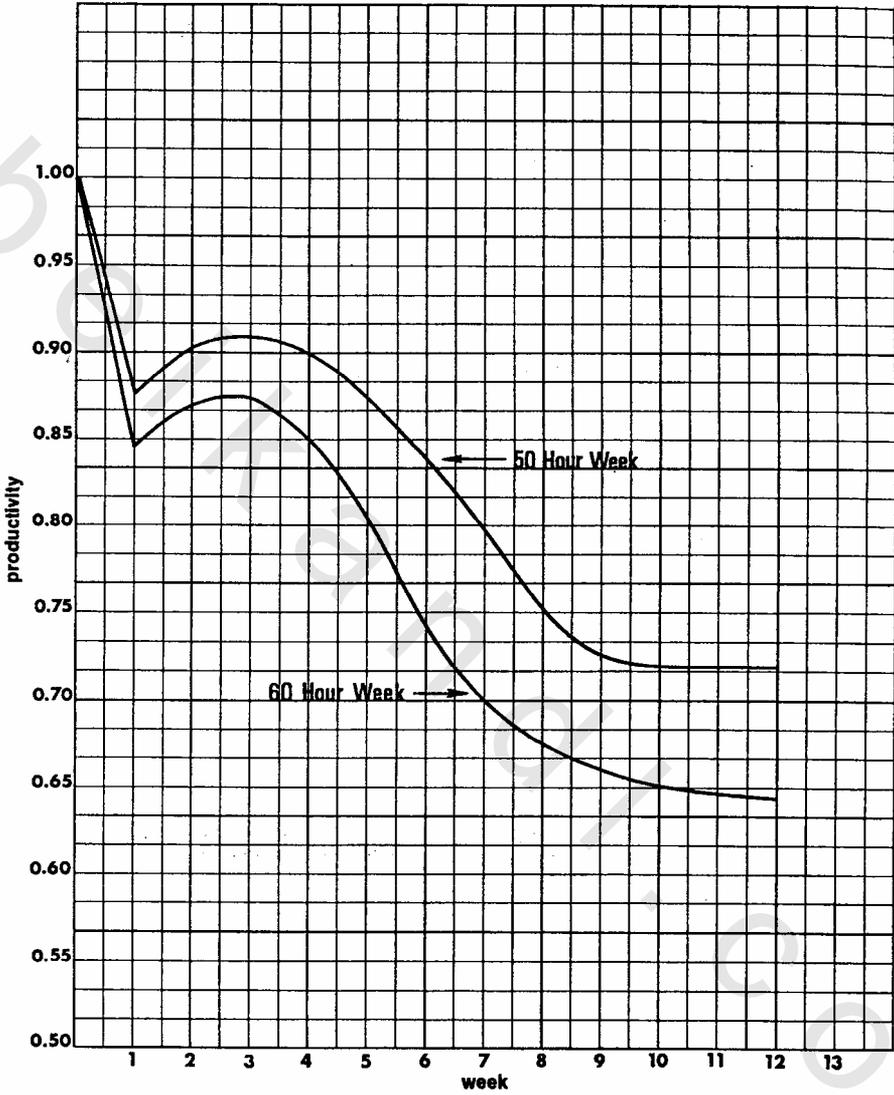


Figure 1. Productivity as a Function of Work Days Per Week and Work Hours Per Day (BLS #917 Findings)

**Figure 2. Cumulative Effect of Overtime on Productivity  
50 and 60 Hour Workweeks**



**Appendix 17 - Federal Acquisition Regulation**

**PART 31 – CONTRACT COST PRINCIPLES AND PROCEDURES**

This appendix contains sections 31.000 to 31.204 of the Federal Acquisition Regulation Section 31 - *Contract Cost Principles and Procedures*. Intended mainly as guidelines for types of costs allowed on cost reimbursable government contracts, these principles may be used to determine direct and/or indirect costs for contract modifications on fixed price contracts. Section 31.205, due to its length and to its involvement more with cost-reimbursable "supply" contracts, is not reproduced here. The complete section can be downloaded from the internet at [www.gsa.gov/far/](http://www.gsa.gov/far/).

<b>FAR Clause No.</b>	<b>Description</b>	<b>FAR Clause No.</b>	<b>Description</b>
31.000	Scope of part.	31.205-19	Insurance and indemnification
31.001	Definitions	31.205-20	Interest and other financial costs
31.105	Construction and architect-engineer contracts	31.205-21	Labor relations costs
31.201	General	31.205-22	Legislative lobbying costs
31.201-1	Composition of total cost	31.205-23	Losses on other contracts
31.201-2	Determining allocability	31.205-24	Maintenance and repair costs
31.201-3	Determining reasonableness	31.205-25	Manufacturing and production engineering costs
31.201-4	Determining allocability	31.205-26	Material costs
31.201-5	Credits	31.205-27	Organization costs
31.201-6	Accounting for unallowable costs	31.205-28	Other business expenses
31.201-7	Construction and architect-engineer contracts	31.205-29	Plant protection costs
31.202	Direct costs	31.205-30	Patent costs
31.203	Indirect costs	31.205-31	Plant reconversion costs
31.204	Application of principles and procedures	31.205-32	Precontract costs
31.205	Selected costs	31.205-33	Professional and consultant service costs
31.205-1	Public relations and advertising costs	31.205-34	Recruitment costs
31.205-2	Automatic data processing equipment leasing costs	31.205-35	Relocation costs
31.205-3	Bad debts	31.205-36	Rental costs
31.205-4	Bonding costs	31.205-37	Royalties and other costs for use of patents
31.205-5	Civil defense costs	31.205-38	Selling costs
31.205-6	Compensation for personal services	31.205-39	Service and warranty costs
31.205-7	Contingencies	31.205-40	Special tooling and special test equipment costs
31.205-8	Contributions or donations	31.205-41	Taxes
31.205-9	[Reserved]	31.205-42	Termination costs
31.205-10	Cost of money	31.205-43	Trade, business, technical, and professional activity costs
31.205-11	Depreciation	31.205-44	Training and education costs
31.205-12	Economic planning costs	31.205-45	Transportation costs
31.205-13	Employee morale, health, welfare, food service, and dormitory costs and credits	31.205-46	Travel costs
31.205-14	Entertainment costs	31.205-47	Costs related to legal and other proceedings
31.205-15	Fines, penalties, and mischarging costs	31.205-48	Deferred research and development costs
31.205-16	Gains and losses on disposition of depreciable property or capital assets	31.205-49	Goodwill
31.205-17	Idle facilities and idle capacity costs	31.205-50	Executive lobbying costs
31.205-18	Independent research and development and bid and proposal costs	31.205-51	Costs of alcoholic beverages
		31.205-52	Asset valuations resulting from business combinations

### 31.000 Scope of part.

This part contains cost principles and procedures for (a) the pricing of contracts, subcontracts, and modifications to contracts and subcontracts whenever cost analysis is performed (see 15.805-3) and (b) the determination, negotiation, or allowance of costs when required by a contract clause.

### 31.001 Definitions.

"Accrued benefit cost method" means an actuarial cost method under which units of benefit are assigned to each cost accounting period and are valued as they accrue; i.e., based on the services performed by each employee in the period involved. The measure of normal cost under this method for each cost accounting period is the present value of the units of benefit deemed to be credited to employees for service in that period. The measure of the actuarial liability at a plan's inception date is the present value of the units of benefit credited to employees for service prior to that date. (This method is also known as the unit credit cost method.)

"Accumulating costs" means collecting cost data in an organized manner, such as through a system of accounts.

"Actual cash value" means the cost of replacing damaged property with other property of like kind and quality in the physical condition of the property immediately before the damage.

"Actual costs," as used in this part (other than Subpart 31.6), means amounts determined on the basis of costs incurred, as distinguished from forecasted costs. Actual costs include standard costs properly adjusted for applicable variances.

"Actuarial assumption" means a prediction of future conditions affecting pension costs; e.g., mortality rate, employee turnover, compensation levels, pension fund earnings, and changes in values of pension funds assets.

"Actuarial cost method" means a technique which uses actuarial assumptions to measure the present value of future pension benefits and pension fund administrative expenses, and which assigns the cost of such benefits and expenses to cost accounting periods.

"Actuarial gain and loss" means the effect on pension cost resulting from differences between actuarial assumptions and actual experience.

"Actuarial liability" means pension cost attributable, under the actuarial cost method in use, to years before the date of a particular actuarial valuation. As of such date, the actuarial liability represents the excess of the present value of the future benefits and administrative expenses over the present value of future contributions, for the normal cost for all plan participants and beneficiaries. The excess of the actuarial liability over the value of the assets of a pension plan is the unfunded actuarial liability.

"Actuarial valuation" means the determination, as of a specified date, of the normal cost, actuarial liability, value of

the assets of a pension fund, and other relevant values for the pension plan.

"Allocate" means to assign an item of cost, or a group of items of cost, to one or more cost objectives. This term includes both direct assignment of cost and the reassignment of a share from an indirect cost pool.

"Business unit" means any segment of an organization, or an entire business organization which is not divided into segments.

"Compensated personal absence" means any absence from work for reasons such as illness, vacation, holidays, jury duty, military training, or personal activities for which an employer pays compensation directly to an employee in accordance with a plan or custom of the employer.

"Cost input" means the cost, except general and administrative (G&A) expenses, which for contract costing purposes is allocable to the production of goods and services during a cost accounting period.

"Cost objective," as used in this part (other than Subpart 31.6), means a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc.

"Cost of capital committed to facilities" means an imputed cost determined by applying a cost of money rate to facilities capital.

"Deferred compensation" means an award made by an employer to compensate an employee in a future cost accounting period or periods for services rendered in one or more cost accounting periods before the date of the receipt of compensation by the employee. This definition shall not include the amount of year end accruals for salaries, wages, or bonuses that are to be paid within a reasonable period of time after the end of a cost accounting period.

"Defined-benefit pension plan" means a pension plan in which the benefits to be paid, or the basis for determining such benefits, are established in advance and the contributions are intended to provide the stated benefits.

"Defined-contribution pension plan" means a pension plan in which the contributions to be made are established in advance and the benefits are determined thereby.

"Directly associated cost" means any cost which is generated solely as a result of the incurrence of another cost, and which would not have been incurred had the other cost not been incurred.

"Estimating costs" means the process of forecasting a future result in terms of cost, based upon information available at the time.

"Expressly unallowable cost" means a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable.

"Facilities capital" means the net book value of tangible capital assets and of those intangible capital assets that are subject to amortization.

"Final cost objective," as used in this part (other than Subparts 31.3 and 31.6), means a cost objective that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points.

"Fiscal year," as used in this part, means the accounting period for which annual financial statements are regularly prepared, generally a period of 12 months, 52 weeks, or 53 weeks.

"Funded pension cost," as used in this part, means the portion of pension costs for a current or prior cost accounting period that has been paid to a funding agency.

"General and administrative (G&A) expense" means any management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general management and administration of the business unit as a whole. G&A expense does not include those management expenses whose beneficial or causal relationship to cost objectives can be more directly measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period.

"Home office" means an office responsible for directing or managing two or more, but not necessarily all, segments of an organization. It typically establishes policy for, and provides guidance to, the segments in their operations. It usually performs management, supervisory, or administrative functions, and may also perform service functions in support of the operations of the various segments. An organization which has intermediate levels, such as groups, may have several home offices which report to a common home office. An intermediate organization may be both a segment and a home office.

"Immediate-gain actuarial cost method" means any of the several actuarial cost methods under which actuarial gains and losses are included as part of the unfunded actuarial liability of the pension plan, rather than as part of the normal cost of the plan.

"Independent research and development (IR&D) cost" means the cost of effort which is neither sponsored by a grant, nor required in performing a contract, and which falls within any of the following four areas: (a) basic research, (b) applied research, (c) development, and (d) systems and other concept formulation studies.

"Indirect cost pools," as used in this part (other than Subparts 31.3 and 31.6), means groupings of incurred costs identified with two or more cost objectives but not identified specifically with any final cost objective.

"Insurance administration expenses" means the contractor's costs of administering an insurance program; e.g., the costs of operating an insurance or risk-management department, processing claims, actuarial fees, and service fees paid to insurance companies, trustees, or technical consultants.

"Intangible capital asset" means an asset that has no physical substance, has more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the benefits it yields.

"Job," as used in this part, means a homogeneous cluster of work tasks, the completion of which serves an enduring purpose for the organization. Taken as a whole, the collection of tasks, duties, and responsibilities constitutes the assignment for one or more individuals whose work is of the same nature and is performed at the same skill/responsibility level--as opposed to a position, which is a collection of tasks assigned to a specific individual. Within a job, there may be pay categories which are dependent on the degree of supervision required by the employee while performing assigned tasks which are performed by all persons with the same job.

"Job class of employees," as used in this part, means employees performing in positions within the same job.

"Labor cost at standard" means a preestablished measure of the labor element of cost, computed by multiplying labor-rate standard by labor-time standard.

"Labor market," as used in this part, means a place where individuals exchange their labor for compensation. Labor markets are identified and defined by a combination of the following factors: (1) geography, (2) education and/or technical background required, (3) experience required by the job, (4) licensing or certification requirements, (5) occupational membership, and (6) industry.

"Labor-rate standard" means a preestablished measure, expressed in monetary terms, of the price of labor.

"Labor-time standard" means a preestablished measure, expressed in temporal terms, of the quantity of labor.

"Material cost at standard" means a preestablished measure of the material elements of cost, computed by multiplying material-price standard by material-quantity standard.

"Material-price standard" means a preestablished measure, expressed in monetary terms, of the price of material.

"Material-quantity standard" means a preestablished measure, expressed in physical terms, of the quantity of material.

"Moving average cost" means an inventory costing method under which an average unit cost is computed after each acquisition by adding the cost of the newly acquired units to the cost of the units of inventory on hand and dividing this figure by the new total number of units.

"Normal cost" means the annual cost attributable, under the actuarial cost method in use, to years subsequent to a particular valuation date.

"Original complement of low cost equipment" means a group of items acquired for the initial outfitting of a

tangible capital asset or an operational unit, or a new addition to either. The items in the group individually cost less than the minimum amount established by the contractor for capitalization for the classes of assets acquired but in the aggregate they represent a material investment. The group, as a complement, is expected to be held for continued service beyond the current period. Initial outfitting of the unit is completed when the unit is ready and available for normal operations.

"Pay-as-you-go cost method" means a method of recognizing pension cost only when benefits are paid to retired employees or their beneficiaries.

"Pension plan" means a deferred compensation plan established and maintained by one or more employers to provide systematically for the payment of benefits to plan participants after their retirements; provided, that the benefits are paid for life or are payable for life at the option of the employees. Additional benefits such as permanent and total disability and death payments, and survivorship payments to beneficiaries of deceased employees may be an integral part of a pension plan.

"Pension plan participant" means any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit from a pension plan which covers employees of such employer or members of such organization who have satisfied the plan's participation requirements, or whose beneficiaries are receiving or may be eligible to receive any such benefit. A participant whose employment status with the employer has not been terminated is an active participant of the employer's pension plan.

"Pricing" means the process of establishing a reasonable amount or amounts to be paid for supplies or services.

"Profit center," as used in this part (other than Subparts 31.3 and 31.6), means the smallest organizationally independent segment of a company charged by management with profit and loss responsibilities.

"Projected average loss" means the estimated long-term average loss per period for periods of comparable exposure to risk of loss.

"Projected benefit cost method" means any of the several actuarial cost methods which distribute the estimated total cost of all the employees' prospective benefits over a period of years, usually their working careers.

"Proposal" means any offer or other submission used as a basis for pricing a contract, contract modification, or termination settlement or for securing payments thereunder.

"Residual value" means the proceeds, less removal and disposal costs, if any, realized upon disposition of a tangible capital asset. It usually is measured by the net proceeds from the sale or other disposition of the asset, or its fair value if the asset is traded in on another asset. The

estimated residual value is a current forecast of the residual value.

"Segment" means one of two or more divisions, product departments, plants, or other subdivisions of an organization reporting directly to a home office; usually identified with responsibility for profit and/or producing a product or service. The term includes Government-owned contractor-operated (GOCO) facilities, and joint ventures and subsidiaries (domestic and foreign) in which the organization has a majority ownership. The term also includes those joint ventures and subsidiaries (domestic and foreign) in which the organization has less than a majority of ownership, but over which it exercises control.

"Self-insurance" means the assumption or retention of the risk of loss by the contractor, whether voluntarily or involuntarily. Self-insurance includes the deductible portion of purchased insurance.

"Self-insurance charge" means a cost which represents the projected average loss under a self-insurance plan.

"Service life" means the period of usefulness of a tangible capital asset (or group of assets) to its current owner. The period may be expressed in units of time or output. The estimated service life of a tangible capital asset (or group of assets) is a current forecast of its service life and is the period over which depreciation cost is to be assigned.

"Spread-gain actuarial cost method" means any of the several projected benefit actuarial cost methods under which actuarial gains and losses are included as part of the current and future normal costs of the pension plan.

"Standard cost" means any cost computed with the use of preestablished measures.

"Tangible capital asset" means an asset that has physical substance, more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the services it yields.

"Termination gain or loss" means an actuarial gain or loss resulting from the difference between the assumed and actual rates at which pension plan participants separate from employment for reasons other than retirement, disability, or death.

"Unallowable cost" means any cost which, under the provisions of any pertinent law, regulation, or contract, cannot be included in prices, cost-reimbursements, or settlements under a Government contract to which it is allocable.

"Unfunded pension plan," as used in this part, means a defined benefit pension plan for which no funding agency is established for the accumulation of contributions.

"Variance" means the difference between a preestablished measure and an actual measure.

"Weighted average cost" means an inventory costing method under which an average unit cost is computed periodically by dividing the sum of the cost of

beginning inventory plus the cost of acquisitions by the total number of units included in these two categories.

#### **31.002 Availability of accounting guide.**

Contractors needing assistance in developing or improving their accounting systems and procedures may request a copy of the guide entitled "Guidance for New Contractors" (DCAAP 7641.90). The guide is available from: Headquarters, Defense Contract Audit Agency, Operating Administrative Office, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, Virginia 22060-6219; Telephone No. (703) 767-1066; Telefax No. (703) 767-1061.

### **SUBPART 31.1--APPLICABILITY**

#### **31.100 Scope of subpart.**

This subpart describes the applicability of the cost principles and procedures in succeeding subparts of this part to various types of contracts and subcontracts. It also describes the need for advance agreements.

#### **31.101 Objectives.**

In recognition of differing organizational characteristics, the cost principles and procedures in the succeeding subparts are grouped basically by organizational type; e.g., commercial concerns and educational institutions. The overall objective is to provide that, to the extent practicable, all organizations of similar types doing similar work will follow the same cost principles and procedures. To achieve this uniformity, individual deviations concerning cost principles require advance approval of the agency head or designee. Class deviations for the civilian agencies require advance approval of the Civilian Agency Acquisition Council. Class deviations for the National Aeronautics and Space Administration require advance approval of the Associate Administrator for Procurement. Class deviations for the Department of Defense require advance approval of the Director of Defense Procurement, Office of the Under Secretary of Defense for Acquisition and Technology.

#### **31.105 Construction and architect-engineer contracts.**

(a) This category includes all contracts and contract modifications negotiated on the basis of cost with organizations other than educational institutions (see 31.104), State and local governments (see 31.107), and nonprofit organizations except those exempted under OMB Circular A-122 (see 31.108) for construction management or construction, alteration or repair of buildings, bridges, roads, or other kinds of real property. It also includes architect-engineer contracts related to construction projects. It does not include contracts for vessels, aircraft, or other kinds of personal property.

(b) Except as otherwise provided in (d) below, the cost principles and procedures in Subpart 31.2 shall be used

in the pricing of contracts and contract modifications in this category if cost analysis is performed as required by 15.805-3.

(c) In addition, the contracting officer shall incorporate the cost principles and procedures in Subpart 31.2 (as modified by (d) below) by reference in contracts in this category as the basis for--

(1) Determining reimbursable costs under cost-reimbursement contracts, including cost-reimbursement subcontracts thereunder;

(2) Negotiating indirect cost rates;

(3) Proposing, negotiating, or determining costs under terminated contracts;

(4) Price revision of fixed-price incentive contracts;

and

(5) Pricing changes and other contract modifications.

(d) Except as otherwise provided in this paragraph (d), the allowability of costs for construction and architect-engineer contracts shall be determined in accordance with Subpart 31.2.

(1) Because of widely varying factors such as the nature, size, duration, and location of the construction project, advance agreements as set forth in 31.109, for such items as home office overhead, partners' compensation, employment of consultants, and equipment usage costs, are particularly important in construction and architect-engineer contracts. When appropriate, they serve to express the parties' understanding and avoid possible subsequent disputes or disallowances.

(2) "Construction equipment," as used in this section, means equipment (including marine equipment) in sound workable condition, either owned or controlled by the contractor or the subcontractor at any tier, or obtained from a commercial rental source, and furnished for use under Government contracts.

(i) Allowable ownership and operating costs shall be determined as follows:

(A) Actual cost data shall be used when such data can be determined for both ownership and operations costs for each piece of equipment, or groups of similar serial or series equipment, from the contractor's accounting records. When such costs cannot be so determined, the contracting agency may specify the use of a particular schedule of predetermined rates or any part thereof to determine ownership and operating costs of construction equipment (see subdivisions (d)(2)(i)(B) and (C) of this section). However, costs otherwise unallowable under this part shall not become allowable through the use of any schedule (see 31.109(c)). For example, schedules need to be adjusted for Government contract costing purposes if they are based on replacement cost, include unallowable interest costs, or use improper cost of money rates or computations. Contracting officers should review the computations and factors included within the specified schedule and ensure that unallowable or unacceptably computed factors are not allowed in cost submissions.

(B) Predetermined schedules of construction equipment use rates (e.g., the Construction Equipment Ownership and Operating Expense Schedule, published by the U.S. Army Corps of Engineers, industry sponsored construction equipment cost guides, or commercially published schedules of construction equipment use cost) provide average ownership and operating rates for construction equipment. The allowance for operating costs may include costs for such items as fuel, filters, oil, and grease; servicing, repairs, and maintenance; and tire wear and repair. Costs of labor, mobilization, demobilization, overhead, and profit are generally not reflected in schedules, and separate consideration may be necessary.

(C) When a schedule of predetermined use rates for construction equipment is used to determine direct costs, all costs of equipment that are included in the cost allowances provided by the schedule shall be identified and eliminated from the contractor's other direct and indirect costs charged to the contract. If the contractor's accounting system provides for site or home office overhead allocations, all costs which are included in the equipment allowances may need to be included in any cost input base before computing the contractor's overhead rate. In periods of suspension of work pursuant to a contract clause, the allowance for equipment ownership shall not exceed an amount for standby cost as determined by the schedule or contract provision.

(ii) Reasonable costs of renting construction equipment are allowable (but see paragraph (C) of this subsection).

(A) Costs, such as maintenance and minor or running repairs incident to operating such rented equipment, that are not included in the rental rate are allowable.

(B) Costs incident to major repair and overhaul of rental equipment are unallowable.

(C) The allowability of charges for construction equipment rented from any division, subsidiary, or organization under common control, will be determined in accordance with 31.205-36(b)(3).

(3) Costs incurred at the job site incident to performing the work, such as the cost of superintendence, timekeeping and clerical work, engineering, utility costs, supplies, material handling, restoration and cleanup, etc., are allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.

(4) Rental and any other costs, less any applicable credits incurred in acquiring the temporary use of land, structures, and facilities are allowable. Costs, less any applicable credits, incurred in constructing or fabricating structures and facilities of a temporary nature are allowable.

## **SUBPART 31.2--CONTRACTS WITH COMMERCIAL ORGANIZATIONS**

### **31.201 General.**

#### **31.201-1 Composition of total cost.**

(a) The total cost of a contract is the sum of the direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits, plus any allocable cost of money pursuant to 31.205-10. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used, including standard costs properly adjusted for applicable variances. See 31.201-2(b) and (c) for Cost Accounting Standards (CAS) requirements.

(b) While the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs which are allowable pursuant to Part 31 and applicable agency supplements.

#### **31.201-2 Determining allowability.**

(a) The factors to be considered in determining whether a cost is allowable include the following:

(1) Reasonableness.

(2) Allocability.

(3) Standards promulgated by the CAS Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

(b) Certain cost principles in this subpart incorporate the measurement, assignment, and allocability rules of selected CAS and limit the allowability of costs to the amounts determined using the criteria in those selected standards. Only those CAS or portions of standards specifically made applicable by the cost principles in this subpart are mandatory unless the contract is CAS-covered (see Part 30). Business units that are not otherwise subject to these standards under a CAS clause are subject to the selected standards only for the purpose of determining allowability of costs on Government contracts. Including the selected standards in the cost principles does not subject the business unit to any other CAS rules and regulations. The applicability of the CAS rules and regulations is determined by the CAS clause, if any, in the contract and the requirements of the standards themselves.

(c) When contractor accounting practices are inconsistent with this Subpart 31.2, costs resulting from such inconsistent practices shall not be allowed in excess of the amount that would have resulted from using practices consistent with this subpart.

(d) A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost which is inadequately supported.

### 31.201-3 Determining reasonableness.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.

Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

(b) What is reasonable depends upon a variety of considerations and circumstances, including--

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's-length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.

### 31.201-4 Determining allocability.

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it--

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

### 31.201-5 Credits.

The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund.

See 31.205-6(j)(4) for rules related to refund or credit to the Government upon termination of an over-funded defined benefit pension plan.

### 31.201-6 Accounting for unallowable costs.

(a) Costs that are expressly unallowable or mutually agreed to be unallowable, including mutually agreed to be unallowable directly associated costs, shall be identified and excluded from any billing, claim, or proposal applicable to a Government contract. A directly associated cost is any cost which is generated solely as a result of incurring another cost, and which would not have been incurred had the other cost not been incurred. When an unallowable cost is incurred, its directly associated costs are also unallowable.

(b) Costs which specifically become designated as unallowable or as unallowable directly associated costs of unallowable costs as a result of a written decision furnished by a contracting officer shall be identified if included in or used in computing any billing, claim, or proposal applicable to a Government contract. This identification requirement applies also to any costs incurred for the same purpose under like circumstances as the costs specifically identified as unallowable under either this paragraph or paragraph (a) above.

(c) The practices for accounting for and presentation of unallowable costs will be those as described in 48 CFR 9904.405, Accounting for Unallowable Costs.

(d) If a directly associated cost is included in a cost pool which is allocated over a base that includes the unallowable cost with which it is associated, the directly associated cost shall remain in the cost pool. Since the unallowable costs will attract their allocable share of costs from the cost pool, no further action is required to assure disallowance of the directly associated costs. In all other cases, the directly associated costs, if material in amount, must be purged from the cost pool as unallowable costs.

(e)(1) In determining the materiality of a directly associated cost, consideration should be given to the significance of (i) the actual dollar amount, (ii) the cumulative effect of all directly associated costs in a cost pool, or (iii) the ultimate effect on the cost of Government contracts.

(2) Salary expenses of employees who participate in activities that generate unallowable costs shall be treated as directly associated costs to the extent of the time spent on the proscribed activity, provided the costs are material in accordance with subparagraph (e)(1) above (except when such salary expenses are, themselves, unallowable). The time spent in proscribed activities should be compared to total time spent on company activities to determine if the costs are material. Time spent by employees outside the normal working hours should not be considered except when it is evident that an employee engages so frequently in company activities during periods outside normal working hours as to indicate that such activities are a part of the employee's regular duties.

(3) When a selected item of cost under 31.205 provides that directly associated costs be unallowable, it is intended that such directly associated costs be unallowable only if determined to be material in amount in accordance with the criteria provided in subparagraphs (e)(1) and (e)(2) above, except in those situations where allowance of any of the directly associated costs involved would be considered to be contrary to public policy.

### **31.201-7 Construction and architect-engineer contracts.**

Specific principles and procedures for evaluating and determining costs in connection with contracts and subcontracts for construction, and architect-engineer contracts related to construction projects, are in 31.105. The applicability of these principles and procedures is set forth in 31.100 and 31.100.

### **31.202 Direct costs.**

(a) A direct cost is any cost that can be identified specifically with a particular final cost objective. No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

(b) For reasons of practicality, any direct cost of minor dollar amount may be treated as an indirect cost if the accounting treatment--

(1) Is consistently applied to all final cost objectives; and

(2) Produces substantially the same results as treating the cost as a direct cost.

### **31.203 Indirect costs.**

(a) An indirect cost is any cost not directly identified with a single, final cost objective, but identified with two or more final cost objectives or an intermediate cost objective. It is not subject to treatment as a direct cost. After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated to the several cost objectives. An indirect cost shall not be allocated to a final cost objective if other costs incurred for the same purpose in like circumstances have been included as a direct cost of that or any other final cost objective.

(b) Indirect costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring such costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives. Commonly,

manufacturing overhead, selling expenses, and general and administrative (G&A) expenses are separately grouped. Similarly, the particular case may require subdivision of these groupings, e.g., building occupancy costs might be separable from those of personnel administration within the manufacturing overhead group. This necessitates selecting a distribution base common to all cost objectives to which the grouping is to be allocated. The base should be selected so as to permit allocation of the grouping on the basis of the benefits accruing to the several cost objectives. When substantially the same results can be achieved through less precise methods, the number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(c) Once an appropriate base for distributing indirect costs has been accepted, it shall not be fragmented by removing individual elements. All items properly includable in an indirect cost base should bear a pro rata share of indirect costs irrespective of their acceptance as Government contract costs. For example, when a cost input base is used for the distribution of G&A costs, all items that would properly be part of the cost input base, whether allowable or unallowable, shall be included in the base and bear their pro rata share of G&A costs.

(d) The contractor's method of allocating indirect costs shall be in accordance with standards promulgated by the CAS Board, if applicable to the contract; otherwise, the method shall be in accordance with generally accepted accounting principles which are consistently applied. The method may require examination when--

(1) Substantial differences occur between the cost patterns of work under the contract and the contractor's other work;

(2) Significant changes occur in the nature of the business, the extent of subcontracting, fixed-asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances; or

(3) Indirect cost groupings developed for a contractor's primary location are applied to offsite locations. Separate cost groupings for costs allocable to offsite locations may be necessary to permit equitable distribution of costs on the basis of the benefits accruing to the several cost objectives.

(e) A base period for allocating indirect costs is the cost accounting period during which such costs are incurred and accumulated for distribution to work performed in that period. The criteria and guidance in 30.406 for selecting the cost accounting periods to be used in allocating indirect costs are incorporated herein for application to contracts subject to full CAS coverage. For contracts subject to modified CAS coverage and for non-CAS-covered contracts, the base period for allocating indirect costs will normally be the contractor's fiscal year. But a shorter period may be appropriate (1) for contracts in which performance involves only a minor portion of the fiscal year, or (2) when it is general practice in the industry to use a shorter period. When a

contract is performed over an extended period, as many base periods shall be used as are required to represent the period of contract performance.

(f) Special care should be exercised in applying the principles of paragraphs (b), (c), and (d) above when Government-owned contractor-operated (GOCO) plants are involved. The distribution of corporate, division, or branch office G&A expenses to such plants operating with little or no dependence on corporate administrative activities may require more precise cost groupings, detailed accounts screening, and carefully developed distribution bases.

#### **31.204 Application of principles and procedures.**

(a) Costs shall be allowed to the extent they are reasonable, allocable, and determined to be allowable under 31.201, 31.202, 31.203, and 31.205. These criteria apply to all of the selected items that follow, even if particular guidance is provided for certain items for emphasis or clarity.

(b) Costs incurred as reimbursements or payments to a subcontractor under a cost-reimbursement, fixed-price incentive, or price redeterminable type subcontract of any tier above the first firm-fixed-price subcontract or fixed-price

subcontract with economic price adjustment provisions are allowable to the extent that allowance is consistent with the appropriate subpart of this Part 31 applicable to the subcontract involved. Costs incurred as payments under firm-fixed-price subcontracts or fixed-price subcontracts with economic price adjustment provisions or modifications thereto, when cost analysis was performed under 15.805-3, shall be allowable only to the extent that the price was negotiated in accordance with 31.102.

(c) Section 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items. When more than one subsection in 31.205 is relevant to a contractor cost, the cost shall be apportioned among the applicable subsections, and the determination of allowability of each portion shall be based on the guidance contained in the applicable subsection. When a cost, to which more than one subsection in 31.205 is relevant, cannot be apportioned, the determination of allowability shall be based on the guidance contained in the subsection that most specifically deals with, or best captures the essential nature of, the cost at issue.

## Appendix 18 - ASBCA ADR Sample Forms

ARMED SERVICES BOARD OF CONTRACT APPEALS  
SKYLINE SIX  
5109 LEESBURG PIKE  
FALLS CHURCH, VA 22041-3208

### NOTICE REGARDING ALTERNATIVE METHODS OF DISPUTE RESOLUTION

The Contract Disputes Act of 1978, 41 U.S.C. § 607, states that boards of contract appeals "shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of dispute all. Resolution of a dispute at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. To that end, the Board suggests that the parties consider Alternative Disputes Resolution (ADR) procedures.

The ADR methods described in this Notice are intended to suggest techniques which have worked in the past. Any method which brings the parties together in settlement, or partial settlement, of their disputes is a good method. The ADR methods listed are not intended to preclude the parties' use of other ADR techniques which do not require the Board's participation, such as settlement negotiations, fact finding conferences or procedures, mediation, or minitrial not involving use of the Board's personnel. The ADR methods described below are designed to supplement existing "extrajudicial" settlement techniques, not to replace them. Any method, or combination of methods, including one which will result in a binding decision, may be selected by the parties without regard to the dollar amount in dispute.

Requests to the Board to utilize ADR procedures must be made jointly by the parties. If an ADR method involving the Board's participation is requested by the parties, the presiding administrative judge or member of the Board's legal staff will forward the request to the Board's Chairman for consideration. Unilateral requests or motions seeking ADR will not be considered. The presiding administrative judge or member of the Board's legal staff may also schedule a conference to explore the desirability and selection of an ADR method. If a non-binding ADR method involving the Board's participation is requested and approved by the Chairman, a settlement judge or a neutral advisor will be appointed. Usually the person appointed will be an administrative judge or hearing examiner employed by the Board.

If a non-binding ADR method fails to resolve the dispute, the appeal will be restored to the active docket for processing under the Board's Rules. To facilitate full, frank and open discussion and presentations, any settlement judge or neutral advisor who has participated in a non-binding ADR procedure which has failed to resolve the underlying dispute will ordinarily not participate in the restored appeal. Further, the judge or advisor will not discuss the merits of the appeal or substantive matters involved in the ADR proceedings with other Board personnel. Unless the parties explicitly request to the contrary, and such request is approved by the Chairman, the assigned ADR settlement judge or neutral advisor will be recused from consideration of the restored appeal.

Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings between representatives of the parties and a settlement judge or a neutral advisor are confidential and, unless otherwise specifically agreed by the parties, inadmissible as evidence in any pending or future Board proceeding involving the parties or matter in dispute. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in a ADR proceeding.

Guidelines, procedures, and requirements implementing the ADR method selected will be prescribed by agreement of the parties and the settlement judge or neutral advisor. ADR methods can be used successfully at any stage of the litigation. Adoption of an ADR method as early in the appeal process as feasible will eliminate substantial cost and delay. Generally, ADR proceedings will be concluded within 120 days following approval of their use by the Chairman.

The following ADR methods are consensual and voluntary. Both parties and the Board must agree to use of any of these methods.

1. **Settlement Judge:** A settlement judge, is an administrative judge or hearing examiner who will not hear or have any format or informal decision-making authority in the appeal and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's position with the settlement judge. The agenda for meetings with the settlement judge will be flexible to accommodate the requirements of the individual appeal. To further the settlement effort, the settlement judge may meet with the parties either jointly or individually. A settlement judge's recommendations are not binding on the parties.

2. **Minitrial:** The minitrial is a highly flexible, expedited, but structured, procedure where each party presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and to a Board-appointed neutral advisor. The parties determine the form of presentation without regard to customary judicial proceedings and rules of evidence. Principals and the neutral advisor participate during the presentation of evidence in accordance with their advance agreement on procedure. Upon conclusion of these presentations, settlement negotiations are conducted. The neutral advisor may assist the parties in negotiating a settlement. The procedures for each minitrial will be designed to meet the needs of the individual appeal. The neutral advisor's recommendations are not binding.

3. **Summary Trial With Binding Decision:** A summary trial with binding decision is a procedure whereby the scheduling of the appeal is expedited and the parties try their appeal informally before an administrative judge or panel of Judges. A summary, "bench" decision generally will be issued upon conclusion of the trial or a summary written decision will be issued no later than ten days following the later of conclusion of the trial or receipt of a trial transcript. The parties must agree that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no precedential value. The length of trial and the extent to which scheduling of the appeal is expedited will be tailored to the needs of each particular appeal. Pretrial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

4. **Other Agreed Methods:** The parties and the Board may agree upon other informal methods which are structured and tailored to suit the requirements of the individual appeal.

The above-listed ADR procedures are intended to shorten and simplify the Board's more formalized procedures. Generally, if the parties resolve their dispute by agreement, they benefit in terms of cost and time savings and maintenance or restoration of amicable relations. The Board will not view the parties' participation in ADR proceedings as a sign of weakness. Any method adopted for dispute resolution depends upon both parties having a firm, good faith commitment to resolve their differences. Absent such intention, the best structured dispute resolution procedure is unlikely to be successful.

These documents are provided for reference only and are subject to change. Reprinted with permission of the Armed Services Board of Contract Appeals, 1997

ARMED SERVICES BOARD OF CONTRACT APPEALS  
SKYLINE SIX  
5109 LEESBURG PIKE  
FALLS CHURCH, VA 22041-3208

14 December 1993

[NOTE: The following sample agreement is provided in response to requests the Board receives for examples of ADR agreements that may be suitable for use in ADR proceedings under the Board's "Notice Regarding Alternative Methods of Dispute Resolution." This sample is offered as an aid to the parties in focusing their thoughts on the ground rules that will best serve their interests in resolving a particular dispute. The Board recognizes that one of the strengths of the ADR process would be lost if the same procedural format were insisted on in every case. Thus, the Board by offering this sample does not intend to restrict the parties' discretion in tailoring the agreement to meet their particular needs. Paragraphs 13 and 14, however, are key features of the Summary Trial with Binding Decision Method of ADR. In all cases consultation with the presiding judge is encouraged.]

SAMPLE

AGREEMENT TO UTILIZE THE  
PROCEDURE OF SUMMARY TRIAL WITH BINDING DECISION  
UNDER THE ASBCA'S NOTICE REGARDING  
ALTERNATIVE METHODS OF DISPUTE RESOLUTION

THIS AGREEMENT is entered into by and between \_\_\_\_\_ (hereinafter "Appellant") and the Department of \_\_\_\_\_ (hereinafter the "Government").

WHEREAS, Appellant and the Government entered into Contract No: \_\_\_\_\_; and

WHEREAS, Appellant filed with the Armed Services Board of Contract Appeals (hereinafter the "ASBCA") an appeal under said contract; and

WHEREAS, said appeal is designated ASBCA No. \_\_\_\_\_ and

WHEREAS, ASBCA No. \_\_\_\_\_ involves claims by [Appellant for] [Government for] in the amount of \$ \_\_\_\_\_; and

WHEREAS, the parties wish to resolve the appeal by alternative dispute resolution, specifically summary trial with binding decision, under the Contract Disputes Act; and

WHEREAS, the ASBCA is authorized to resolve disputes by alternative disputes resolution under its Charter and the Contract Disputes Act; and

NOW THEREFORE, the parties mutually stipulate and agree as follows:

1. Motion practice in this appeal is waived.
2. Discovery will be concluded by \_\_\_\_\_.
3. The documentary record will be limited to those documents which have been submitted, identified and indexed pursuant to Rule 4 or as exhibits no later than \_\_\_\_\_.

[NOTE: The parties may agree to have the appeal decided on the documentary record in accordance with ASBCA Rule 11. If so, such procedure may be provided in additional paragraphs and should include the concepts in 11 12-14 below modified as may be necessary. If the parties seek an oral hearing on the appeal, the following ADR paragraphs should be considered:]

4. Each party's hearing presentation will be limited to \_\_\_\_\_ hours [day], including time for examination of witnesses, presentation of rebuttal evidence and oral argument, if any.

5. The appeal shall be tried informally, and the rules of evidence are waived. The parties agree, nonetheless, that the presiding judge shall retain discretion to limit evidence where necessary for the reasonable conduct of the hearing.

6. Witnesses shall be examined orally under oath or affirmation. A party shall be allowed to cross-examine the adverse party's witnesses.

7. Pre- and post-hearing briefs are waived. [A very brief (three to five page) preheating submission is often useful to the presiding judge.]

8. A transcript of the proceedings will be prepared. [Preparation of a transcript is waived.]

9. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding;

10. The hearing on this appeal is scheduled for \_\_\_ day(s), namely: \_\_\_\_\_;

11. The issues in dispute shall be presented in the following order:

- a. \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_
- d. \_\_\_\_\_
- and
- e. [Other issues, if any]

12. The Board shall issue a bench decision at the conclusion of the hearing, or, at the option of the presiding judge, no later than business days after receipt of the transcript [or conclusion of the hearing if no transcript].

13. The decision will contain no findings of fact or conclusions of law.

14. The Board's decision shall be final, conclusive, not subject to reconsideration or appeal, and may not be set aside, except for fraud. The decision shall have no precedential value.

APPELLANT

GOVERNMENT AGENCY

By: \_\_\_\_\_  
Dated \_\_\_\_\_

By: \_\_\_\_\_  
Dated \_\_\_\_\_

ARMED SERVICES BOARD OF CONTRACT APPEALS  
SKYLINE SIX  
5109 LEESBURG PIKE  
FALLS CHURCH, VA 22041-3208

14 May 1994

[NOTE: The following sample agreement is provided in response to requests the Board receives for examples of ADR agreements that may be suitable for use in ADR proceedings under the Board's "Notice Regarding Alternative Methods of Dispute Resolution." This sample is offered solely as an aid to the parties in focusing their thoughts on the ground rules that will best serve their interests in resolving a particular dispute. The Board recognizes that one of the strengths of the ADR process would be lost if the same procedural format were insisted on in every case. Thus, the Board by offering this sample does not intend to restrict the parties' discretion in tailoring the agreement to meet their particular needs. Paragraphs 2, 6 and 9, however, are key features of the settlement judge method of ADR. In all cases consultation with the presiding judge is encouraged.]

SAMPLE

AGREEMENT TO UTILIZE THE PROCEDURE OR SETTLEMENT JUDGE  
UNDER THE ASBCA'S "NOTICE REGARDING  
ALTERNATIVE METHODS OF DISPUTE RESOLUTION"

THIS AGREEMENT is entered into by and between \_\_\_\_\_ (hereinafter "Appellant") and the Department of \_\_\_\_\_ (hereinafter the "Government").

WHEREAS, Appellant and the Government entered into Contract No. \_\_\_\_\_; and

WHEREAS, Appellant filed with the Armed Services Board of Contract Appeals (hereinafter the "ASBCA") an appeal under said contract; and

WHEREAS, said appeal is designated ASBCA No. \_\_\_\_\_ and

WHEREAS, ASBCA No. \_\_\_\_\_ involves claims [Appellant for] [Government for] in the amount of \$ \_\_\_\_\_; and

WHEREAS, the parties wish to resolve the appeal by alternative dispute resolution, specifically with the assistance of a settlement judge, under the Contract Disputes Act; and

WHEREAS, the ASBCA is authorized to resolve disputes by alternative disputes resolution under its Charter and the Contract Disputes Act; and

NOW THEREFORE, the parties mutually stipulate and agree as follows:

1. Schedule. The ADR proceeding on the appeal is scheduled \_\_\_\_\_ for days(s), namely: \_\_\_\_\_, at the Board (or other agreed location).
2. Settlement judge. The judge's role will be to facilitate the parties' settlement efforts. The judge may meet with the parties either jointly or individually and to the extent necessary to foster a negotiated settlement of the dispute. The judge's recommendations are not binding on the parties. [Note: The settlement judge will normally not participate further in the appeal if the parties' efforts are unsuccessful, unless the parties seek the continued involvement of the judge.]
3. Record. (The parties should agree on what documents will be included in the record for consideration by the settlement judge in assessing the merits of the parties' positions)
4. Transcript. A transcript of the proceedings will not be prepared.
5. Agenda. The presentations of the parties will be informal and the rules of evidence are waived. The settlement judge may, nonetheless, guide the presentation of evidence. [The parties should spell out how they wish to make their informal presentations and agree on time to be allotted to various phases of the process. It is often helpful for each party to submit a brief position paper (3 to 5 pages) sufficiently in advance of the proceeding for the judge to consider it in connection with the record agreed to by the parties.]
6. Participants. Each party will include among its representatives a principal with authority to settle the appeal.
7. Use of statements and documents. The admissibility of statements made or documents used in connection with the ADR proceeding will be governed by Federal Rule of Evidence 408.
8. Fees and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding.
9. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

APPELLANT

GOVERNMENT AGENCY

By: \_\_\_\_\_  
Dated \_\_\_\_\_

By: \_\_\_\_\_  
Dated \_\_\_\_\_

ARMED SERVICES BOARD OF CONTRACT APPEALS  
SKYLINE SIX  
5109 LEESBURG PIKE  
FALLS CHURCH, VA 22041-3208

25 October 1996

[NOTE: The following sample agreement is provided in response to requests the Board receives for examples of agreements that may be suitable for use in Alternative Dispute Resolution (ADR) proceedings under the Board's "Notice Regarding Alternative Methods of Dispute Resolution." This sample is offered as an aid to the parties in focusing their thoughts on the ground rules that will best serve their interests in resolving a particular dispute. The Board recognizes that one of the strengths of the ADR process would be lost if the same procedural format were insisted on in every case. Thus, the Board by offering this sample does not intend to restrict the parties' discretion in tailoring the agreement to meet their particular needs. Paragraphs 2, 3 and 4, however, are key features of the minitrial method of ADR. In all cases consultation with the presiding judge is encouraged.]

SAMPLE

AGREEMENT TO UTILIZE THE MINITRIAL PROCEDURE  
UNDER THE ASBCA'S "NOTICE REGARDING  
ALTERNATIVE METHODS OF DISPUTE RESOLUTION"

THIS AGREEMENT is entered into by and between \_\_\_\_\_ (hereinafter the Appellant) and (hereinafter the Government).

WHEREAS, the Appellant and the Government entered into contract No. \_\_\_\_\_; and

WHEREAS, the Appellant and the Government are currently engaged in litigation before the Armed Services Board of Contract Appeals (ASBCA or Board), which is docketed as ASBCA No(s) \_\_\_\_\_; and

WHEREAS, the Appellant and the Government wish to resolve their dispute through the use of the minitrial method of alternative dispute resolution (ADR) under the Contract Disputes Act; and

WHEREAS, the ASBCA is authorized to resolve disputes by ADR under its Charter and the Contract Disputes Act;

NOW THEREFORE, the Appellant and the Government mutually stipulate and agree as follows:

- 1. Scope of the ADR.** The Appellant and the Government will voluntarily engage in a non-binding minitrial on the claim(s) of \_\_\_\_\_.  
[Spell out the parties' claims (including the amounts) that are to be resolved during the proceeding to a level of detail that satisfies the parties.]
- 2. Good Faith Efforts to Resolve the Dispute.** The goal of the ADR proceeding is to resolve the matters in dispute between the parties through negotiation by the parties' principal representatives, guided as necessary by a neutral advisor. To this end the minitrial proceeding will be aimed at informing the principal representatives and the neutral advisor of the underlying bases of the parties' positions. Each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum. The presentations will be made primarily through the parties' counsel. Other persons may attend in the discretion of each party. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the goal of resolving the dispute.
- 3. The Principal Representatives.** The principal representatives for the purpose of this proceeding will be:  
For the Appellant  
For the Government:  
Each party represents that its principal representative will come to the ADR proceeding with full authority to settle the matter, and that it will obtain any required reviews or approvals in advance of the proceeding. Each party will bear its own expenses associated with the ADR proceeding.
- 4. The Neutral Advisor.** The ASBCA will designate the neutral advisor. The neutral advisor will preside during the ADR proceeding and will participate in the negotiations between the parties. The neutral advisor may comment on any of the issues involved and may express an opinion on the relative strength and weaknesses of positions taken by either or both of the parties. The neutral advisor may meet with the parties or their counsel, jointly or individually, to the extent the neutral advisor deems desirable to foster a negotiated settlement of the dispute. The neutral advisor's recommendations are not binding on the parties. In the event the ADR proceeding does not result in settlement of the issues in dispute, the neutral advisor will not participate further in the appeal. (Recusal is the normal practice if the ADR is unsuccessful; however, the parties may seek the continued involvement of the neutral advisor.) The neutral advisor will serve at no expense to either party.
- 5. Discovery.** [Parties should take into account the discovery necessary for the minitrial. Board practice is to stay discovery during the ADR proceeding if it is reasonable to do so.] Discovery will be stayed from the date of this Agreement. If this matter is not resolved as a result of the ADR

proceeding, the Board will lift the stay. The Appellant and the Government will remain entitled to pursue such additional discovery as they believe necessary and as the Board may allow.

6. **The Record for Purpose of the ADR Proceeding.** The Appellant and the Government in consultation with the neutral advisor will agree on the composition of the record upon which the ADR proceeding will be based. (Generally, the parties will designate key portions of the R4 file and often prepare special exhibits. The extent of the record and the time of its submission to the parties' representatives and the neutral advisor is left to the parties, keeping in mind that the record must be manageable and the time to assimilate it sufficient.) No later than \_\_\_\_\_ weeks prior to commencement of the proceeding, the parties will provide to the neutral advisor and exchange copies of all documentary evidence proposed for utilization at the conference, inclusive of a listing of all witnesses with a brief statement of the subject matter of their testimony.

7. **The Position Paper.** No later than \_\_\_\_\_ weeks prior to commencement of the proceeding, the parties will exchange and submit to the principal representatives and the neutral advisor a position paper of no more than 30 double-spaced pages. The position paper will spell out a party's factual and legal position on each claim to be resolved. Each party may submit a reply of no more than 10 pages no later than \_\_\_\_\_ weeks prior to the commencement of the proceeding.

8. **The Schedule.** The minitrial will be held on \_\_\_\_\_, at \_\_\_\_\_ [a mutually agreed location or the offices of the Board]. The ADR proceeding will take \_\_\_\_\_ day(s). The parties have agreed to the following schedule [sample one day schedule]:

#### MINITRIAL CONFERENCE SCHEDULE

**Day 1**

9:00 a.m. - 10:30 a.m.	Appellant's statement of case & presentation of position
10:45 a.m. - 12:15 p.m.	Government's Rebuttal
12:15 p.m. - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	Appellant's Reply
2:15 p.m. - 3:15 p.m.	Open question & answer period
3:15 p.m. - 5:00 p.m.	Negotiations/Discussions between parties and neutral advisor

If the parties are unable to resolve the dispute, the minitrial shall be deemed terminated and the appeal will continue.

9. **Manner of Proceeding.** At the ADR proceeding counsel for the parties have the discretion to structure the content of their presentations as they desire. The presentations may include, for example, remarks by fact or expert witnesses, audio-visual aids, demonstrative evidence, affidavits, and oral argument. The rules of evidence will not apply and witnesses may provide testimony in narrative form. The principal representatives and the neutral advisor may ask any relevant question of the witnesses that they deem appropriate.

10. **Record of the Proceeding.** No transcript or recording shall be made of the ADR proceeding.

11. **Use of Statements and Documents.** The admissibility of statements made and documents used in connection with the ADR proceeding will be governed by Federal Rule of Evidence 408.

12. **Termination of the ADR Proceeding.** Each party has the right to terminate the minitrial at any time for any reason. The neutral advisor may terminate the proceeding if he/she believes that one or both of the parties are not committed to the process.

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Principal Representative for  
Government  
\_\_\_\_\_  
Attorney for the Government

By: \_\_\_\_\_  
Principal Representative for  
Appellant  
\_\_\_\_\_  
Attorney for the Appellant

Dated \_\_\_\_\_

Dated \_\_\_\_\_

## Appendix 19 - DART Declaration

# DART

## DART DECLARATION Principles for Prevention and Resolution of Disputes in the Construction Industry

This Declaration has been prepared by the Dispute Avoidance and Resolution Task Force (DART) of the Construction Industry and has been endorsed by organizations listed below. Members of the Industry are encouraged to express their good faith commitment to adopt it wherever they build.

### IMPORTANT NOTICE

This Declaration is solely concerned with voluntary participation in techniques and processes designed to prevent and resolve construction disputes without the need to resort to formal, binding dispute resolution processes. Therefore, it is important to understand that **this Declaration is not a contract and does not change contract provisions**. In addition, all provisions of a construction contract regarding disputes and the manner of dispute resolution remain in full force and effect. In the event that the parties avail themselves of the procedures provided in this Declaration and they are not successful, the rights of the parties are governed entirely by their contract.

ABA Forum on Construction Industry  
ABA Public Contracts Section  
Air Conditioning Contractors of America  
American Arbitration Association  
American College of Construction Lawyers  
American Consulting Engineering Council  
American Institute of Architects  
American Road & Transportation Builders Association  
American Society of Civil Engineers  
American Subcontractors Association  
Associated Builders & Contractors  
Associated General Contractors of America  
Associated Specialty Contractors  
Association of the Wall & Ceiling Industries International  
Building Future's Council  
Business Roundtable, Construction Section  
Construction Financial Management Association  
Construction Management Association of America  
Construction Specifications Institute  
Design Build Institute  
DPIC Companies

Engineers Joint Contract Document Committee  
General Services Administration  
Independent Electrical Contractors  
Mechanical Contractors Association of America  
National Association of Minority Contractors  
National Association of Surety Bond Producers  
National Association of Women to Construction  
National Concrete Masonry Association  
National Contractors Association  
National Electrical Contractors Association  
National Roofing Contractors Association  
National Society of Professional Engineers  
National Utility Contractors Association  
North American Society of Trenchless Technology  
Office of Federal Procurement Policy  
Painting & Decorating Contractors of America  
Power & Communication Contractors Association  
Specialized Carriers & Rigging Association  
Victor O. Schinnerer & Company, Inc.  
US Army Corps of Engineers  
US Department of Defense

# DART

## THE DART DECLARATION OF PRINCIPLES

The Construction Industry acknowledges that problems and disputes can arise on construction projects. The Industry further acknowledges that these problems and potential disputes do not need to result in litigation or other formal binding dispute resolution processes. It is in the best interests of all industry members to resolve problems and potential disputes in a non adversarial manner and in a way more constructive to the relationships among the participants in the project.

The industry recommends that participants in a project consider the following principles:

### PRINCIPLES FOR THE PREVENTION AND RESOLUTION OF DISPUTES

#### TEAM BUILDING

Participation in "Partnering" or other team-building procedures with participants in a project tends to establish relationships based upon mutual respect for the legitimate concerns and goals of each of the participants in the project. These efforts are likely to directly contribute to a successful completion of a project. Since there will be some expense and substantial dedication of effort required in order for it to be successful, participants desiring to employ Partnering should agree in advance on a fair sharing of the cost involved. The parties also may wish to consider the establishment of a standing Neutral, a Dispute Review Board, or other similar non-binding processes to facilitate dispute avoidance and resolution.

#### DISPUTES DURING PERFORMANCE

Disputes may arise during the performance of a project. Failure to resolve disputes early may have an adverse impact on the best interests of the project and the parties themselves. Therefore, the Industry recommends that in the event of a dispute during performance of a project the parties dedicate appropriate efforts to achieve a negotiated resolution using lines of authority within their respective organizations as may be agreed. The parties may identify individuals from their organizations who are not directly involved in the project but who have the authority to resolve disputes during performance. It is recommended that the individuals named below be of equivalent authority and at a level within their respective organizations so that they may exercise independence and objectivity. The efforts to achieve a negotiated resolution should take into consideration prior discussions between the parties and any subsequent recommendations of a Standing Neutral, or Dispute Review Board used on the project.

\_\_\_\_\_ is designated for \_\_\_\_\_  
\_\_\_\_\_ is designated for \_\_\_\_\_

In the event that parties, by their designated representatives, are unable to reach resolution of a dispute within thirty days, it is recommended that the parties submit that dispute to Mediation following the on procedures included in the construction documents, if any.

#### POST PERFORMANCE DISPUTES

If a dispute arises after the project has been completed, it is recommended that the parties consider Mediation before they engage in the formal, binding dispute resolution procedure provided in the Contract documents. In appropriate circumstances, mediation is a demonstrated method to facilitate successful settlement of disputes. Where technical matters, such as statutes of limitation, govern the commencement of a lawsuit or arbitration, the parties should nonetheless consider Mediation or some other form of Alternative Dispute Resolution (ADR) during the pendency of the matter before engaging in expensive and highly adversarial procedures.

#### AN ACKNOWLEDGMENT

Participants in a construction project may evidence their support of these Principles by signing this Declaration. By doing so, the parties are not entering into a binding agreement. This Declaration is rather an expression by each party to the other of their serious and good faith desire to cooperatively achieve solutions to problems and resolution of claims and disputes in a manner which will avoid engaging in formal dispute resolution procedures.

We, the undersigned, have read this Declaration, accept the importance of its purposes, and pledge our good faith efforts to cooperate with one another in achieving those purposes.

Party \_\_\_\_\_

Party \_\_\_\_\_

Produced by the Dispute Avoidance and Resolution Task Force, Washington, DC, April 15, 1996

## INDEX TO LEGAL CITATIONS

- A.S. Wikstrom, Inc. v. State*, N.Y. Supreme Court, App. Div. (April 8, 1976). p. 47.
- Aerodex, Inc. v. U.S.*, 189 Ct. Cl. 344 (1969). p. 40.
- American Dredging Co. v. U.S.*, 207 Ct. Cl. 1010 (1977). p. 48.
- American Dredging Co.*, ENGBCA Nos. 2920 et al. 72-1 BCA ¶9316. p. 48.
- American Structures, Inc. & Mining Equipment Manufacturing Cooperation*, ENGBCA 3408 75-1 BCA ¶11,283. p. 25.
- Bateast Construction Co., Inc.*, ASBCA No. 35818 (December 31, 1991). p. 113.
- Beacon Construction Co. v. U.S.*, 161 Ct. Cl. 1 (1963). p. 44.
- Bechtold Paving, Inc. v. City of Kenmore*, 446 N.W.2d(N.D. 1989). p. 49.
- Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 15431 (Fed Cir. 1995). p. 118.
- Blake Construction Co., Inc.*, GSBCA 1345, 65-1 BCA ¶4624. p. 33.
- Blake Construction Co., Inc.*, ASBCA No. 39937 (July 24, 1990). p. 63.
- Blount Bros. Const. Co.*, 171 Ct.Cl.478, 496, 346 F.2d 962,973 (1965). p. 45, 46.
- Blount Brothers Corporation*, NASA BCA 865-29, 67-2 BCA ¶6562. p. 33.
- Brock & Blevins Co. v. U.S.*, 170 Ct. Cl. 52 (1965). p. 63.
- Bromley Contracting Co.*, ASBCA 14884, 72-1 BCA ¶9252. p. 39.
- Bruce-Anderson Co., Inc.*, ASBCA No. 29411 (August 1, 1988). p. 44.
- Bruno Law & Richard Marlink, Trustees v. U.S.*, 195 Ct. Cl. 370 (1971). p. 113.
- C & C Plumbing and Heating*, ASBCA No. 44270 (July 29, 1994). p. 58.
- C.H. Leavell & Co.*, ASBCA 16099, 72-2 BCA ¶9694. p. 17.
- C.A. Fielland, Inc.*, GSBCA 2903, 71-1 ¶BCA 8734. p. 60.
- Capital Electric Co. v. United States*, 729 F.2d 743 (Fed.Cir. 1984). p. 111.
- Centex Construction Co., Inc.*, ASBCA No. 29323 (September 30, 1985). p. 41.
- Century Construction Company v. U.S.*, 22 Ct. Cl. 63 (1990). p. 21.
- Chaney & James Co. v. United States*, 190 Ct. Cl. 699 (1970). p. 77.
- Chaney & James Construction Company v. U.S.*, 190 Ct. Cl. 699 (1970). p. 56.
- Commonwealth of Pennsylvania DOT v. Mitchell's Structural Steel Painting Co.*, 336A2-913 Commonwealth Court of Pennsylvania (1975). p. 30.
- Continental Consolidated Corp.*, Ct. Cl. 214-69, 17 CCF ¶81,1137. p. 62.
- Co-Operative C. Store Builders, Inc. v. Arcadia Foods, Inc.*, 291 So. 2d 403 (La. App. 1974). p. 17.
- Corbetta Construction Co. v. U.S.*, 198 Ct. Cl. 712 (1972). p. 33.
- D'Annunzio Brothers, Inc. v. New Jersey Transit Corp.*, 586 A.2d 301 (N.J.Sup-er.A.D. 1991). p. 17.
- Delcon Construction v. U.S.*, 27 Fed. Cl. 634 (1993). p. 29.
- Department of Transportation v. Mosites Construction Co.*, 494 A.2d 41 (Pa.Cmwltth. 1985). p. 37.

*Department of Transportation v. Semanderes*, 5-31 A.2d 815 (Pa.Cmwlt. 1987). p. 34.

*Donald R. Stewart & Associates*, AGBCA No. 89-222-1 (January 16, 1992). p. 62.

*E. W. Bliss Company*, ASBCA 9489, 68-1 BCA ¶6906. p. 59.

*Eichleay Company*, ASBCA 5183, 60-2 BCA ¶2688. p. 110.

*Electronic & Missile Facilities*, ASBCA 9031, 1964 BCA ¶4338. p. 63.

*Firestone Tire & Rubber Co. v. U.S.*, 195 Ct. Cl. 21 (1971). p. 34.

*Fort Mechanical, Inc.*, GSBCA No. 6350 (July 18, 1983). p. 35.

*Frank Briscoe Company, Inc.*, GSBCA 3330, 72-2 BCA ¶9714. p. 60.

*G.C. Casebolt Co. v. United States*, 421 F.2d 710, 712 (Ct.Cl. 1970). p. 148.

*Gaston & Associates v. U.S.*, 27 Fed Cl. 243 (1992). p. 45.

*Gaudelli Brothers, Inc.*, GSBCA No. 7123 (March 5, 1984). p. 48.

*George Bennett v. U.S.*, 178 Ct. Cl. p. 37.

*Gevyn Construction Corp. v. United States*, 827 F.2d 752 (Fed.Cir. 1987). p. 117.

*Gholson, Byars and Holmes Construction Co. v. U.S.*, 173 Ct. Cl. 374 (1965). p. 36.

*Gibbs v. U.S.*, 175 Ct. Cl. 411 (1966). p. 36.

*Gilbane Building Co. v. U.S.*, 166 Ct. Cl. 347 (1964). p. 56.

*Gordon H. Ball, Inc.*, ENGBCA No. 3563, 78-1 BCA. p. 29.

*Granite Construction Co.*, ENGBCA No. 3561, 76-1 11,748. p. 49.

*Green Construction Co. v. Department of Transportation*, 643 A.2d 1129 (Pa. Cmwlt. 1994). p. 30.

*Green Construction Co. v. Kansas Power & Light Co.*, 1 F.3d 1005 (10th Cir. 1993). p. 25.

*Griffin and Dickvon*, AGBCA No. 74-104-4 (December 4, 1985). p. 104.

*H.A. Kaufman Co.*, GSBCA No. 10687 (December 20, 1990). p. 56.

*H.N. Bailey & Associates v. U.S.*, 196 Ct. Cl. 166 (1971). p. 42.

*Harrison Western/Franki-Denys, Inc.*, ENGBCA No. 552-3 (Nov. 22, 1991). p. 39.

*Harrod & Williams, Inc.*, DOT BCA 72-10, 73-2 BCA ¶10,266. p. 60.

*Head Construction Company*, ENG BCA 3537, 77-1 BCA ¶12,226. p. 57.

*Hedin Construction Co. v. U.S.*, 171 Ct. Cl. 70 (1965). p. 104.

*Helene Curtis Industries, Inc. v. U.S.*, 160 Ct. Cl. 437 (1963). p. 42.

*Helene Curtis Industries, Inc. v. U.S.*, 160 Ct. Cl. 437 (1963). p. 46.

*Hibbitts Construction Co., Inc.*, ASBCA No. 37070 (January 4, 1990). p. 60.

*Hicks Corp.*, ASBCA 10760, 66-1 BCA ¶5469. p. 59.

*Hills Materials Co. v. Rice*, 982 F.2d 514 (Fed. Cir. 1992). p. 35.

*Hol-Gar Manufacturing Corp. v. U.S.*, 169 Ct. Cl. 384 (1965). p. 35.

*Hull-Hazard, Inc.*, ASBCA No. 34645 (June 29, 1990). p. 35.

*Hyde Construction Co.*, ASBCA 8393, 1963 BCA ¶3911. p. 62.

*Hydromar Corp. v. U.S.*, 25 Cl. Ct. 555 (1992). p. 29.

*Hydrospace Electronics & Instrument Corp.*, ASBCA 17922, 74-2 BCA ¶10682. p. 49.

*Ideker, Inc.*, ENG BCA Nos. 4389, 4602, 87-3 BCA ¶20,145 at 101,974. p. 149.

*Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053 (Fed.Cir. 1993). p. 111.

*J.A. Tobin Construction Co. v. State Highway, Commission of Missouri*, 680 S.W.2d 183 (Mo.App. 1984). p. 57.

*J.J. Brown Co. v. J.L. Simmons Co.*, 2 111. App. 2d. 132,118 N.W. 2d 781 (1954). p. 90.

*J.W. Bateson Co., Inc.*, VABCA No. 1148 (December 4, 1985). p. 117.  
*Jarbet Co.*, ASBCA 14554, 72-1 BCA ¶9379. p. 35.  
*John A. Johnson & Sons v. U.S.* (12 CCF 81,196), 180 Ct. Cl. 969 990. p. 58.  
*John A. Johnson Contracting Co. v. U.S.*, 132 Ct. Cl. 645, (1955). p. 26.  
*Joseph Bell v. United States*, 404 F.2d 975 (Fed.Cir. 1969). p. 117.  
*Kammer Construction Co. v. U.S.*, 203 Ct. Cl. 182 (1973). p. 50.  
*Keco Industries, Inc.*, ASBCA 15131, 72-1 9262. p. 69.  
*Keco Industries, Inc.*, ASBCA 15181, 15,547, 72-1 9576. p. 69.  
*Kelley Control Systems, Inc.*, VABCA No. 2,337 (July 24, 1987). p. 50.  
*Kirk Brothers Mechanical Contractors, Inc.*, ASBCA No. 35771. p. 118.  
*Koppers/Clough, a Joint Venture v. U.S.*, 201 Ct. Cl. 344 (1973). p. 57.  
*Laburnum Construction Corp. v. U.S.*, 163 Ct. Cl. 339 (1963). p. 43.  
*Lakeview Construction Co. v. U.S.*, 21 Cl. Ct. 269 (1990). p. 20.  
*Lewis v. Anchorage Asphalt Paving Co.*, F. 2d 1188 (Alaska 1975). p. 46.  
*M.I.T. Alaska*, PSBCA No. 1348 (September 3, 1986). p. 56.  
*Machinery Associates, Inc.*, ASBCA 14510, 72-2 BCA ¶9476. p. 17.  
*Massachusetts Port Authority v. U.S.*, 197 Ct. Cl. 721 (1972). p. 34.  
*Max Drill, Inc. v. U.S.*, 192 Ct. Cl. 608 (1970). p. 39.  
*Maxima Corporation v. United States*, 847 F.2d 1549, 1553 (Fed Cir. 1988). p. 148.  
*Maxwell Dynamometer Co. v. U.S.*, 181 Ct. Cl. 607 (1967). p. 38.  
*Metropolitan Sewerage Commission v. R.W. Construction, Inc.*, 241 N.W 2d 371, (1976). p. 28..  
*Minter Roofing Co., Inc.*, ASBCA No. 31137 (August 24, 1989). p. 25.  
*Missouri Research Lab Inc.*, ASBCA 12355, 69-1 BCA ¶7762. p. 16.  
*Mobil Chemical Co. v. Blount Brothers Corp.*, 809 F.2d 1175 (5th Cir. 1987). p. 62.  
*Monitor Plastics Co.*, ASBCA 11 187, 67-2 BCA ¶6408. p. 48.  
*Moorhead Construction Co., Inc. v. City of Grand Forks*, 508 F. 2d 1008 (8th Circuit, 1975). p. 25.  
*Mountain Home Contractors v. U.S.*, 192 Ct. Cl. 16, 425 F.2d 1264. p. 45.  
*Natus Corporation v. U.S.*, 178 Ct. Cl. 1 (1967). p. 41.  
*Neal & Co. v. U.S.*, 19 Cl. Ct. 463 (1990). p. 41.  
*Oneida Construction Co., Inc./David Boland, Inc., Joint Venture*, ASBCA No. 44194 (October 6, 1994). p. 43.  
*P.T. & L. Construction Co. v. State of New Jersey, Department of Transportation*, 5-31 A.2d 1330 (N.J. 1987). p. 29.  
*Peter Kiewit Sons' Co. v. U.S.*, 109 Ct. Cl. 517 (1947). p. 37.  
*Peterson Construction Co., Inc.*, ASBCA No. 44197 (November 12, 1992). p. 26.  
*Phillips Construction Co. v. U.S.*, 184 Ct. Cl. 249 (1968). p. 26.  
*Pool & Canfield, Inc.*, ASBCA No. 4-3399 (March 4, 1992). p. 33.  
*Reliance Insurance Company v. U.S.*, 20 Cl. Ct. 715 (1990). p. 53.  
*River Construction Corp. v. U.S.*, 159 Ct. Cl. 254 (1962). p. 104.  
*Royal Painting Co., Inc.*, ASBCA 20034, 75-1 BCA ¶11,311. p. 56.  
*S. O. G. of Arkansas v. U.S.*, Ct. Cl. 546 F 2d 367 (Dec. 15, 1976). p. 45.  
*Saddler v. U.S.*, 287 F.2d 411 (Ct. Cl. 1961). p. 39.  
*Santa Fe, Inc.*, VABCA No. 2167. p. 36.  
*Sante Fe Engineers, Inc. v. U.S.*, 801 F.2d 379 (Fed. Cir. 1986). p. 53.  
*Servidone Construction Corp. v. United States*, 931 F.2d 860 (Fed.Cir. 1991). p. 104.

*Severin v. U.S.*, 99 Ct. Cl. No. 435 (1943). p. 95.  
*Sherman Construction Corp.*, VABCA No. 1942 (December 13, 1984). p. 44.  
*Sun Electric Corporation*, ASBCA 13031, 70-2 8371. p. 69.  
*Sylvania Electric Products, Inc. v. U.S.*, 198 Ct. Cl. 106 (1972). p. 36.  
*Sylvania Electric Products, Inc.*, ASBCA 11206, 67-2 BCA ¶6428. p. 63.  
*Teichert & Son, Inc.*, ASBCA 10265, et al., 68-2 BCA ¶1175. p. 62.  
*Tele-Sentry Security, Inc.*, GSBCA No. 7037 (May 7, 1984). p. 118.  
*The Little Susitna Co.*, PSBCA No. 2216 (May 24, 1990). p. 17.  
*Titan Mountain States Construction Corp.*, ASBCA No. 2-3095 p. 77.  
*Titan Pacific Construction Corp. v. United States*, 17 Cl. Ct. 630 p. 77.  
*Torncello v. United States*, 681 F.2d 756, 759 (Ct. Cl. 1982). p. 148.  
*U.S. for the Use & Benefit of Leonardo Mariana v. Piracci Construction Co., Inc.*, 405 F. Supp. 904 (District of Columbia, 1975). p. 96.  
*U.S. for the Use and Benefit of Superior Insulation Co., Inc. v. Robert E. McKee, Inc.*, 702 F.Supp. 1298 (N.D.Tex. 1988). p. 96.  
*U.S. v. Spearin*, 248 U.S. 132 (1918). p. 39.  
*Uhley v. Tapio Construction Co., Inc.*, 573 So.2d 391 (Fla.App. 1991). p. 42.  
*Unicon Management Corp. v. U.S.*, 179 Ct. Cl. 534 (1967). p. 34.  
*Unis v. JTS Constructors/Managers, Inc.*, 541 So.2d 278 (La.App. 1989). p. 90.  
*United States v. Turner Construction Co.*, 827 F.2d (Fed.Cir.1987). p. 21.  
*Vanlar Construction, Inc. v. County of Los Angeles*, 217 Cal.Rptr. 53 (Cal.App. 1985). p. 60.  
*W.G. Cornell Co. v. U.S.*, 179 Ct. Cl. 651 (1967). p. 36.  
*Weaver-Bailey Contractors, Inc. v. U.S.*, 19 Cl. Ct. 474 (1990). p. 60, 82-83.  
*Weeks Dredging and Contracting, Inc. v. United States*, 13 Cl. CT. 193 (1987). p. 28.  
*Wickham Contracting Co., Inc. v. Fischer*, 12 F.3d 1574 (Fed. Cir. 1994). p. 111.  
*WPC Enterprises, Inc. v. U.S.*, 163 Ct. Cl. 1 (1963). p. 44.  
*WRB Corp. v. U.S.*, 183 Ct. Cl. 409 (1968). p. 104.

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## ثبت المصطلحات



Fédération Internationale des Ingénieurs Conseile	الاتحاد الدولي للمهندسين الاستشاريين
Association Specialty Contractors, ASC	اتحاد المقاولين المتخصصين
Changed Conditions	الأحوال المتغيرة
Massachusetts Highway Department	إدارة الطرق السريعة بماساشوستس
Arizona Department of Transportation, ADOT	إدارة النقل بأريزونا
Main Department of Transportation, (Main DOT)	إدارة النقل لولاية ماين
Colorado and Washington state Department of Transportation, DOT	إدارة النقل لولايتي كولورادو وواشنطن
Construction Methods and Equipment	أساليب ومعدات التشييد
Constructive Acceleration	الإسراع الاستتاجي
Owner Directed Acceleration	الإسراع بتوجيه من المالك

Voluntarily Acceleration	إسراع تطوعي
trackwork	أعمال المسار
Liens	امتيازات - حقوق حجز
Early Completion	الانتهاء المبكر
Interruptions	الانقطاعات
Termination for Default	الإنهاء بسبب الإهمال أو التقصير
Termination for Convenience	الإنهاء من دون إبداء الأسباب
Change Orders	أوامر تغيير

ب

Alternative Dispute Resolution, ADR	بدائل حل النزاع
Scheduling Program	برنامج جدولة
Computer Software	برنامج حاسوبي
Time Cards	بطاقات الوقت
World Bank	البنك الدولي

ت

Ripple Effect	التأثير المتعرج
No Damage for Delay	التأخير بدون غرامات
Excusable Delay	تأخير مبرر
Excusable Noncompensable Delay	تأخير مبرر وغير معوض

Excusable and Compensable Delay	تأخير مبرر ومعوض
Concurrent Delay	تأخير متزامن
Compensable Delay	تأخير معوض
Nonexcusable Delays	التأخيرات غير المبررة
Arbitration	التحكيم
Resource Loading	تحميل الموارد
Interference	تدخلات
Cash Flow	تدفق مالي
Demobilization	التسريح
Postpricing	التسعير اللاحق
Forward Pricing	التسعير المسبق
Disruptions	تعطيلات العمل
Constructive Suspension of Work	تعليق استراتيجي للعمل
Suspension for Work - Suspensions	تعليق العمل - تعليقات
Suspension for Convenience	التعليق من دون إبداء الأسباب
Constructive Change	التغيير الاستراتيجي
Cardinal Changes	التغييرات الرئيسية
Geotechnical baseline report, (GBR)	التقرير المرجعي للتربة
Site Investigate Report	تقرير فحص الموقع

But For Technique	تقنية "لكن بالنسبة"
Collapsed As-Built Technique	تقنية الجدول الفعلي المتقلص
Windows Technique	تقنية النافذه
Impacted As-planned Technique	تقنية تأثير الجدول الابتدائي
Time Impact Analysis Technique	تقنية تحليل تأثير الوقت
empowerment	التقوية
Actual cost	التكاليف الفعلية
Direct Cost	التكاليف المباشرة
Overhead Cost	تكاليف النفقات العامة
Indirect Cost	التكاليف غير المباشرة
Unit Cost	تكلفة الوحدة
Mobilization	التهيئة والتجهيز

ج

As-Planned Schedule	الجدول الابتدائي - البرنامج الزمني كما تم تخطيطه
Impacted As-planned Schedule	الجدول الابتدائي المتأثر
Short-Interval Schedule	جدول الفترة القصيرة
As-Built Schedule	الجدول الفعلي - البرنامج الزمني كما تم تنفيذه
Impacted Schedule	الجدول المتأثر

Updated Schedule	الجدول المحدث
Critical Path Schedule	جدول المسار الحرج
Associated Builders and Contractors	جمعية "البنائين والمقاولين المتحدين"
Engineering Advancement Association of Japan	جمعية "التقدم الهندسي باليابان"
Associated General Contractors	جمعية "المقاولين العموميين المتحدين"
American Subcontractors Association, Inc., ASA	جمعية "المقاولين من الباطن الأمريكية"
Associated General Contractors of America, AGC	جمعية "مقاولي أمريكا العاميين المتحدين"
American Institute of Architect, AIA	الجمعية الأمريكية للمعماريين
National Electrical Contractor's Association	الجمعية الوطنية للمقاولين الكهربائيين
Computer Hardware	جهاز حاسوبي
<b>ح</b>	
Personal Computer	حاسوب شخصي
Latent Conditions	الحالات الكامنة
Differing Site Conditions	حالات تغييرات الموقع
Takeoff	حصص الكميات
<b>خ</b>	
Salient Characteristics	الخصائص البارزة

د

Bureau of Labor Statistics	دائرة إحصائيات العمالة
Guide to Electrical Contractors' Claims Management	دليل إدارة مطالبات مقاولي الكهرباء
Audit Guidance Delay and Disruption Claims	الدليل الإرشادي لمطالبات التأخير والتعطيل
Impact Guide	دليل التأثير
Construction Contract Negotiating Guide	دليل التفاوض لعقود التشييد
Modification Impact Evaluation Guide	دليل تقويم تأثير التعديلات

ز

Float Time	الزمن العائم
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س

Engineering News-Record	سجل الأخبار الهندسية
Unit Price	سعر الوحدة
Corp of Engineer	سلاح المهندسين
U.S. Army Corps of Engineers	سلاح المهندسين بالجيش الأمريكي

ش

Fragnet	الشبكة الفرعية
Standard General Conditions of the Construction Contract	الشروط القياسية العامة لعقد التشييد

ص

photographic negatives

الصور السلبية

ض

Implied Warranties

الضمانات الضمنية

Express Warranties

الضمانات الواضحة

ط

Measured Mile Approach

طريقة الأميال المقيسة

Total Cost Method

طريقة التكلفة الكلية

Modified Total Cost

طريقة التكلفة الكلية المعدلة

Critical Path Method, CPM

طريقة المسار الحرج

Request for Equitable Adjustment, REA

طلب تعديل عادل

Change Order Initiation, COI

طلب لأمر تغيير

ع

Unbalanced Bid

عطاءات غير متوازنة

غ

Liquidated Damages

غرامات التأخير

International Chamber of Commerce

الغرفة التجارية الدولية

ف

Loose Leaf

فضفاض

Losse of Efficiency

فقدان الفعالية

ق

Administrative Dispute Resolution Act,  
ADRA

القانون الإداري لحل النزاع

Federal Streamlining Act

القانون الانسيابي الفيدرالي

Miller Act

قانون ميلر

Contract Disputes Act, CDA

قانون نزاعات العقود

Earned Value

القيمة المكتسبة

ك

Construction Dispute Review Board Manual

كتيب هيئة مراجعة نزاعات التشييد

ل

Federal Acquisition Regulation, FAR

لائحة المشتريات الفيدرالية

Construction Industry Dispute Avoidance  
and Resolution Task Force

اللجنة التنفيذية لتجنب وحل نزاعات  
صناعة التشييد

Toronto Transit Commission

لجنة المحطات بتورنتو

Engineer's Joint Contract Documents  
Committee General Conditions, EJCDC

لجنة مستندات العقود المشتركة الخاصة  
بالمهندسين

Scanners	ماسح ضوئي
Severin Doctrine	مبدأ التعديل
Force Accounting	محاسبة الموارد
U.S. Court of Federal Claims	المحاكم الأمريكية للمطالبات الفيدرالية
United States Court of Claims	محاكم الولايات المتحدة للمطالبات
New York Supreme Court	محكمة نيويورك العليا
Network Diagram	مخطط الشبكة
Bar Chart	مخطط المستقيمات
Flow Chart	مخطط تناعي
Shop Drawing	مخططات التنفيذ
Equal Access to Justice Act, (EAJA)	المدخل المتساوي لقانون العدل
Contracting Officer	مسؤول العقود
Escrow bid documents, (EBDs)	مستندات العطاء
Acceleration Claims	مطالبات الإسراع
Weighted factor	معامل الوزن
American Reinforcement Steel Institute	المعهد الأمريكي لفولاذ التسليح
American Concrete Institute	معهد الخرسانة الأمريكي
American Law Institute in Restatement of the Law of Contract	المعهد القانوني الأمريكي في صياغة قانون العقود

U.K. Institution of Civil Engineering

معهد المملكة المتحدة للهندسة المدنية

video clips

مقاطع الفيديو

Learning Curve

منحنى التعلم

Crowding loss curve

منحنى خسارة الازدحام

American Arbitration Association, AAA

المنظمة الأمريكية للتحكيم

Resources

موارد

ن

Contingency

نسبة الاحتياطي إلى التكلفة

Financing Costs

النفقات المالية

Overhead

نفقات عامة

Joint Contract Documents Committee  
Standard Form

النموذج القياسي للجنة وثائق العقد المشترك

Form of Contract for Engineering  
Construction Projects

نموذج عقد لمشاريع التشييد الهندسية

ه

Markup

هامش الربح

Value Engineering

الهندسة القيمة

Board of Contract Appeals

هيئة استئناف العقود

Armed Services Board of Contract  
Appeals, ASBCA

هيئة استئناف العقود بالخدمات المسلحة

U.S Armed Services Board of Contract Appeals, ASBCA

هيئة استئناف العقود بالخدمات المسلحة الأمريكية

U.N. Commission International Trade Law  
Dispute Resolution Board

هيئة الأمم المتحدة لقانون التجارة الدولية  
هيئة حل النزاعات

Dispute Review Boards, (DRBs)

هيئة مراجعة النزاعات

و

Word processing Document

وثيقة معالج الكلمات

Mediation

الوساطة

Early Activity Time

الوقت المبكر للنشاط

Late Activity Time

الوقت المتأخر للنشاط

Agency Board of Contract Appeals

وكالة هيئة استئناف العقود

- :

A

Acceleration Claims	مطالبات الإسراع
Actual cost	التكاليف الفعلية
Administrative Dispute Resolution Act, ADRA	القانون الإداري لحل النزاع
Agency Board of Contract Appeals	وكالة هيئة استئناف العقود
Alternative Dispute Resolution, ADR	بدائل حل النزاع
American Arbitration Association, AAA	المنظمة الأمريكية للتحكيم
American Concrete Institute	معهد الخرسانة الأمريكي
American Institute of Architect, AIA	الجمعية الأمريكية للمعماريين
American Law Institute in Restatement of the Law of Contract	المعهد القانوني الأمريكي في صياغة قانون العقود
American Reinforcement Steel Institute	المعهد الأمريكي لفولاذ التسليح
American Subcontractors Association, Inc., ASA	جمعية "المقاولين من الباطن الأمريكية"
Arbitration	التحكيم
Arizona Department of Transportation, ADOT	إدارة النقل بأريزونا
Armed Services Board of Contract Appeals, ASBCA	هيئة استئناف العقود بالخدمات المسلحة
As-Built Schedule	الجدول الفعلي - البرنامج الزمني كما تم تنفيذه

As-Planned Schedule

الجدول الابتدائي - البرنامج الزمني كما  
تم تخطيطه

Associated Builders and Contractors

جمعية "البنايين والمقاولين المتحدين"

Associated General Contractors

جمعية "المقاولين العموميين المتحدين"

Associated General Contractors of  
America, AGC

جمعية "مقاولي أمريكا العاميين المتحدين"

Association Specialty Contractors, ASC

اتحاد المقاولين المتخصصين

Audit Guidance Delay and Disruption  
Claims

الدليل الإرشادي لمطالبات التأخير والتعطيل

## B

Bar Chart

مخطط المستقيمات

Board of Contract Appeals

هيئة استئناف العقود

Bureau of Labor Statistics

دائرة إحصائيات العمالة

But For Technique

تقنية "لكن بالنسبة"

## C

Cardinal Changes

التغييرات الرئيسية

Cash Flow

تدفق مالي

Change Order Initiation, COI

طلب لأمر تغيير

Change Orders

أوامر تغيير

Changed Conditions

الأحوال المتغيرة

Collapsed As-Built Technique	تقنية الجدول الفعلي المتقلص
Colorado and Washington state Department of Transportation, DOT	إدارة النقل لولايتي كولورادو وواشنطن
Compensable Delay	تأخير معوض
Computer Hardware	جهاز حاسوبي
Computer Software	برنامج حاسوبي
Concurrent Delay	تأخير متزامن
Construction Contract Negotiating Guide	دليل التفاوض لعقود التشييد
Construction Dispute Review Board Manual	كتيب هيئة مراجعة نزاعات التشييد
Construction Industry Dispute Avoidance and Resolution Task Force	اللجنة التنفيذية لتجنب وحل نزاعات صناعة التشييد
Construction Methods and Equipment	أساليب ومعدات التشييد
Constructive Acceleration	الإسراع الاستراتيجي
Constructive Change	التغيير الاستراتيجي
Constructive Suspension of Work	تعليق استراتيجي للعمل
Contingency	نسبة الاحتياطي إلى التكلفة
Contract Disputes Act, CDA	قانون نزاعات العقود
Contracting Officer	مسؤول العقود
Corp of Engineer	سلاح المهندسين

Critical Path Method, CPM

طريقة المسار الحرج

Critical Path Schedule

جدول المسار الحرج

Crowding loss curve

منحنى خسارة الازدحام

## D

Demobilization

التسريح

Differing Site Conditions

حالات تغييرات الموقع

Direct Cost

التكاليف المباشرة

Dispute Resolution Board

هيئة حل النزاعات

Dispute Review Boards, (DRBs)

هيئة مراجعة النزاعات

Disruptions

تعطيلات العمل

## E

Early Activity Time

الوقت المبكر للنشاط

Early Completion

الانتهاء المبكر

Earned Value

القيمة المكتسبة

empowerment

التقوية

Engineer's Joint Contract Documents  
Committee General Conditions, EJCDC

لجنة مستندات العقود المشتركة الخاصة  
بالمهندسين

Engineering Advancement Association of Japan

جمعية "التقدم الهندسي باليابان"

Engineering News-Record

سجل الأخبار الهندسية

Equal Access to Justice Act, (EAJA)	المدخل المتساوي لقانون العدل
Escrow bid documents, (EBDs)	مستندات العطاء
Excusable and Compensable Delay	تأخير مبرر ومعوض
Excusable Delay	تأخير مبرر
Excusable Noncompensable Delay	تأخير مبرر وغير معوض
Express Warranties	الضمانات الواضحة

## F

Federal Acquisition Regulation, FAR	لائحة المشتريات الفيدرالية
Federal Streamlining Act	القانون الانسيابي الفيدرالي
Financing Costs	النفقات المالية
Float Time	الزمن العائم
Flow Chart	مخطط تتابعي
Force Accounting	محاسبة الموارد
Form of Contract for Engineering Construction Projects	نموذج عقد لمشاريع التشييد الهندسية
Forward Pricing	التسعير المسبق
Fragnet	الشبكة الفرعية
Fédération Internationale des Ingénieurs Conseile	الاتحاد الدولي للمهندسين الاستشاريين

## G

Geotechnical baseline report, (GBR)

التقرير المرجعي للتربة

Guide to Electrical Contractors' Claims Management

دليل إدارة مطالبات مقاولي الكهرباء

## I

Impact Guide

دليل التأثير

Impacted As-planned Schedule

الجدول الابتدائي المتأثر

Impacted As-planned Technique

تقنية تأثير الجدول الابتدائي

Impacted Schedule

الجدول المتأثر

Implied Warranties

الضمانات الضمنية

Indirect Cost

التكاليف غير المباشرة

Interference

تدخلات

International Chamber of Commerce

الغرفة التجارية الدولية

Interruptions

الانقطاعات

## J

Joint Contract Documents Committee Standard Form

النموذج القياسي للجنة وثائق العقد المشترك

## L

Late Activity Time

الوقت المتأخر للنشاط

Latent Conditions	الحالات الكامنة
Learning Curve	منحنى التعلم
Liens	امتيازات - حقوق حجز
Liquidated Damages	غرامات التأخير
Loose Leaf	فضفاض
Losse of Efficiency	فقدان الفعالية

## M

Main Department of Transportation, (Main DOT)	إدارة النقل لولاية ماين
Markup	هامش الربح
Massachusetts Highway Department	إدارة الطرق السريعة بماساشوستس
Measured Mile Approach	طريقة الأميال المقيسة
Mediation	الوساطة
Miller Act	قانون ميلر
Mobilization	التهيئة والتجهيز
Modification Impact Evaluation Guide	دليل تقويم تأثير التعديلات
Modified Total Cost	طريقة التكلفة الكلية المعدلة

## N

National Electrical Contractor's Association	الجمعية الوطنية للمقاولين الكهربائيين
--	---------------------------------------

Network Diagram

مخطط الشبكة

New York Supreme Court

محكمة نيويورك العليا

No Damage for Delay

التأخير بدون غرامات

Nonexcusable Delays

التأخيرات غير المبررة

O

Overhead

نفقات عامة

Overhead Cost

تكاليف النفقات العامة

Owner Directed Acceleration

الإسراع بتوجيه من المالك

P

Personal Computer

حاسوب شخصي

photographic negatives

الصور السلبية

Postpricing

التسعير اللاحق

R

Request for Equitable Adjustment, REA

طلب تعديل عادل

Resource Loading

تحميل الموارد

Resources

موارد

Ripple Effect

التأثير المتموج

## S

Salient Characteristics	الخصائص البارزة
Scanners	ماسح ضوئي
Scheduling Program	برنامج جدولة
Severin Doctrine	مبدأ التعديل
Shop Drawing	مخططات التنفيذ
Short-Interval Schedule	جدول الفترة القصيرة
Site Investigate Report	تقرير فحص الموقع
Standard General Conditions of the Construction Contract	الشروط القياسية العامة لعقد التشييد
Suspension for Work - Suspensions	تعليق العمل - تعليقات
Suspension for Convenience	التعليق من دون إبداء الأسباب

## T

Takeoff	حصر الكميات
Termination for Convenience	الإنهاء من دون إبداء الأسباب
Termination for Default	الإنهاء بسبب الإهمال أو التقصير
Time Cards	بطاقات الوقت
Time Impact Analysis Technique	تقنية تحليل تأثير الوقت
Toronto Transit Commission	لجنة المحطات بتورنتو

Total Cost Method

طريقة التكلفة الكلية

trackwork

أعمال المسار

## U

U.K. Institution of Civil Engineering

معهد المملكة المتحدة للهندسة المدنية

U.N. Commission International Trade Law

هيئة الأمم المتحدة لقانون التجارة الدولية

U.S Armed Services Board of Contract Appeals, ASBCA

هيئة استئناف العقود بالخدمات المسلحة الأمريكية

U.S. Army Corps of Engineers

سلاح المهندسين بالجيش الأمريكي

U.S. Court of Federal Claims

المحاكم الأمريكية للمطالبات الفيدرالية

Unbalanced Bid

عطاءات غير متوازنة

Unit Cost

تكلفة الوحدة

Unit Price

سعر الوحدة

United States Court of Claims

محاكم الولايات المتحدة للمطالبات

Updated Schedule

الجدول المحدث

## V

Value Engineering

الهندسة القيمة

video clips

مقاطع الفيديو

Voluntarily Acceleration

إسراع تطوعي

W

Weighted factor

معامل الوزن

Windows Technique

تقنية النافذه

Word processing Document

وثيقة معالج الكلمات

World Bank

البنك الدولي

ObaidiKandil.com

## كشاف الموضوعات

الانقطاعات ٧٠، ١٥٠  
الإنهاء بسبب الإهمال أو التقصير ٢٠٥،  
٢٠٦، ٢٠٧  
الإنهاء دون إبداء الأسباب ٢٠٩، ٢١٠،  
٢١١  
أوامر تغيير ١١٣، ١٣١، ١٥٦، ١٦٦

## ب

بدائل حل النزاع ٩، ١٧٩، ١٨٥،  
١٩٥، ١٩٨، ١٩٩، ٢١٩  
برنامج جدولة ١٠٧  
برنامج حاسوبي ١٠٤  
بطاقات الوقت ٩١، ٩٢، ٩٧، ٩٩،  
١٤٩  
البنك الدولي ١٩٠

## أ

الاتحاد الدولي للمهندسين الاستشاريين ١٩٠  
اتحاد المقاولين المتخصصين ١٣٥  
الأحوال المتغيرة ٣٥  
إدارة الطرق السريعة بماساشوستس ١٨٥  
إدارة النقل بأريزونا ١٨١  
إدارة النقل لولاية ماين ١٨٥  
إدارة النقل لولايتي كولورادو وواشنطن  
١٨٥  
أساليب ومعدات التشييد ٤٢  
الإسراع الاستنتاجي ٨٢، ٨٤، ١١٧  
الإسراع بتوجيه من المالك ٨٢، ١١٧  
إسراع تطوعي ٨٢، ٨٣، ١١٧  
امتيازات ٢٠٢  
الانتهاء المبكر ٨١، ١٠٨، ١١٣، ١١٥،  
١١٧

## ت

- التغيرات الرئيسية ٥٥
- التقرير المرجعي للتربة ١٩٢ ، ١٩٣
- تقرير فحص الموقع ٤٢
- تقنية "لكن بالنسبة" ١١٨
- تقنية الجدول الفعلي المتقلص ١١٨ ، ١٢٠
- تقنية النافذة ١١٨ ، ١٢٠
- تقنية تأثير الجدول الابتدائي ١١٧
- تقنية تحليل تأثير الوقت ٧ ، ١١٨ ، ١٢٠
- التكاليف الفعلية ٩٣ ، ١٤٤ ، ١٥٨
- التكاليف المباشرة ٧٢ ، ٨٠ ، ١٣٩
- تكاليف النفقات العامة ١٥٠ ، ١٥١
- التكاليف غير المباشرة ٧٣ ، ١٦٧
- تكلفة الوحدة ٨٦ ، ١٤٥
- التأثير المتزوج ٨٠
- التأخير بدون غرامات ٨١
- تأخير مبرر ٧٦ ، ١١٦
- تأخير مبرر وغير معوض ١١٦
- تأخير مبرر ومعوض ٧٠
- تأخير متزامن ٧٨
- تأخير معوض ٧٠
- التأخيرات غير المبررة ٦٩ ، ٧١
- التحكيم ٩ ، ١٣٦ ، ١٨٦ ، ١٩٣
- تحميل الموارد ١١٠
- تدخلات ٨١ ، ١٧٩
- تدفق مالي ٩٢ ، ٩٤ ، ١٥٤
- التسعير اللاحق ١٣٩ ، ١٤٢
- التسعير المسبق ١٣٩ ، ١٤٠
- تعطيلات العمل ٦٩ ، ٧٩ ، ٨٦
- تعليق استنتاجي للعمل ٧٨
- تعليق العمل - تعليقات ١٣٧ ، ١٥١
- التعليق من دون إبداء الأسباب ٢١١ /
- ٢١٢
- التغيير الاستنتاجي ١٧ ، ٨٣

## ج

- الجدول الابتدائي ١٠٧ ، ١١٠ ، ١٢٢
- الجدول الابتدائي المتأثر ١١٨ ، ١٢٢
- جدول الفترة القصيرة ١٠٣
- الجدول الفعلي ١٠٩
- الجدول المتأثر ١١٩
- الجدول المحدث ١١٨

الدليل الإرشادي لمطالبات التأخير والتعطيل

١٥٥

دليل التأثير ١٦٠، ١٦٢

دليل التفاوض لعقود التشييد ١٤٩، ١٧١

دليل تقويم تأثير التعديلات ١١٩،

١٤٠، ١٦٠

ز

الزمن العائم ١١٢، ١١٣، ١١٨

س

سجل الأخبار الهندسية ٩٦

سعر الوحدة ٨١، ١٤٥

سلاح المهندسين ٥٩، ١٤٠، ١٤١،

١٨٠

سلاح المهندسين بالجيش الأمريكي ١٤٠

ش

الشبكة الفرعية ١١٧، ١١٨

الشروط القياسية العامة لعقد التشييد

٢١٤

جدول المسار الحرج

جمعية البنائين والمقاولين المتحدين " ١٤٨

جمعية التقدم الهندسي باليابان " ١٩٠

جمعية المقاولين العموميين المتحدين " ١٨٤

جمعية المقاولين من الباطن الأمريكية "

١٣٥، ١٣٤

جمعية "مقاولي أمريكا العاميين المتحدين "

١٣٥، ٢١٣

الجمعية الأمريكية للمعماريين ٢، ٢٢،

٧٠، ٧٣، ١٣٥، ٢١١

الجمعية الوطنية للمقاولين الكهربائيين

١٣٤

ح

حالات تغييرات الموقع ٩، ١٣، ٣١،

٣٨، ٣٩

حصر الكميات ٤٩، ٩٢

د

دائرة إحصائيات العمالة ٨٧، ١٦٢

دليل إدارة مطالبات مقاولي الكهرباء

١٣٤

## ض

الضمانات الضمنية ١٢٩

الضمانات الواضحة ١٠٩ ، ١٢٨

## ط

طريقة الأميال المقيسة ١٤٦

طريقة التكلفة الكلية ١٤٣ ، ١٤٥

طريقة التكلفة الكلية المعدلة ١٤٣

طريقة المسار الحرج ٧٩ ، ٨١ ، ٨٧

٩٤ ، ١٠٣ ، ١٠٤ ، ١٠٥ ، ١٠٦

١٠٧ ، ١٠٨ ، ١١١ ، ١١٩ ، ١٢٣

١٢٦ ، ١٦٦

طلب تعديل عادل ١٤٦

طلب لأمر تغيير ٩٩

## ع

عطاءات غير متوازنة ١٤٣

## غ

غرامات التأخير ٧٠ ، ٧٩ ، ١٠١

الغرفة التجارية الدولية ١٩٠

## ف

فقدان الفعالية ٧٩ ، ١٦٣

## ق

القانون الانسيابي الفيدرالي ٢٠٠

قانون ميلر ١٣٢ ، ١٣٣

قانون نزاعات العقود ٢٥ ، ٢٩ ، ١٣٣ ،

١٦٤ ، ٢٠١

القيمة المكتسبة ١٠٥

## ك

كاتب هيئة مراجعة نزاعات التشييد

١٨٧ ، ١٨٩

## ل

لائحة المشتريات الفيدرالية ٤ ، ١٧ ،

٢١ ، ٢٦ ، ٣١ ، ٣٨ ، ٤٥ ، ٧٠ ،

١٦٦ ، ١٩٨ ، ٢٠٦ ، ٢١٠

اللجنة التنفيذية لتجنب وحل نزاعات

صناعة التشييد ٢١٨

لجنة المحطات بتورنتو ١٨٥

مطالبات الإسراع ٦٩، ٨٦، ١٠٣  
معامل الوزن ١٥١  
المعهد الأمريكي لفولاذ التسليح ٦٤  
معهد الخرسانة الأمريكي ٦٤  
المعهد القانوني الأمريكي في صياغة  
قانون العقود ٤٦  
معهد المملكة المتحدة للهندسة المدنية  
١٩٠  
منحنى التعلم ٧٩، ١٥٠، ١٦٠  
منحنى خسارة الازدحام ١٦١  
المنظمة الأمريكية للتحكيم ١٩٣،  
١٩٦، ١٩٥  
موارد

## ن

نسبة الاحتياطي للتكلفة ١٤١، ١٥٠  
نفقات عامة ٨٦، ١١٤، ١٤٨  
النموذج القياسي للجنة وثائق العقد  
المشترك ٢١٤  
نموذج عقد لمشاريع التشييد الهندسية  
٢١٣

لجنة مستندات العقود المشتركة الخاصة  
بالمهندسين ٢٢، ٢٣، ٣٢

## م

مبدأ التعديل ١٣٢  
محاسبة الموارد ١٤٠، ١٤٩  
المحاكم الأمريكية للمطالبات الفيدرالية  
٢٠١  
محاكم الولايات المتحدة للمطالبات ٢٦  
محكمة نيويورك العليا ٦٢  
مخطط الشبكة ١٠٤  
مخطط المستقيمات ١٠٣  
مخطط تتابعي ١٠٣  
مخططات التنفيذ ٧٢، ٧٥، ٩٥، ١٢٨،  
١٣١  
المدخل المتساوي لقانون العدل ١٦٥  
مسؤول العقود ١٧، ١٨، ٢١، ٢٤،  
٢٦، ٢٧، ٢٨، ٥١، ٦٣، ٧٣، ٨٥،  
٨٦، ١٤٧، ١٦٤، ١٦٥، ١٩٠،  
١٩٣، ٢٠١  
مستندات العطاء ٤١، ٥٩، ١٩١، ١٩٢

## هـ

هيئة حل النزاعات ٢١٨

هيئة مراجعة النزاعات

هامش الربح ١٣٩، ١٤٨، ١٥٠،

١٥١، ١٥٢، ١٥٣

الهندسة القيمة ١٨٤

هيئة استئناف العقود ٣٣، ٤٧، ٧٧،

١٣٠، ١٧٤، ١٩٨، ١٩٩

هيئة استئناف العقود بالخدمات

المسلحة ٣٣، ٤٧، ١٣٠، ١٩٩

هيئة الأمم المتحدة لقانون التجارة

الدولية ١٩٠

## و

الوساطة ٩، ١٩٤، ١٩٥، ١٩٦،

١٩٧، ١٩٨، ٢١٩

الوقت المبكر للنشاط ٨٢

الوقت المتأخر للنشاط ١١٢

وكالة هيئة استئناف العقود ١٩٨