

# Local Agency Program & Florida Highway Administration Certification & Recertification Computer Based Training

## Module 4 Part 4 – Federal Statutes and Regulations

Until 1986 - a certification was required after the bid opening on the low bidder only.

Today, since 1987, certification is a requirement on all bidders. A bid without the certification is considered “non responsive”.

As part of 49 CFR 18.42 the state must keep the certifications for 3 years. If within the 3 years litigation occurs, certifications must be kept until litigation ends.

The contractor may incur unexpected cost increases if all or part of the project is shut down. The suspension notice must be in writing from the Engineer and it must be for an item that is out of the contractor’s control.

Other suspensions could be for an activity not customary to highway construction; not due to contractor’s actions and the Contractor requests compensation or time.

There are many possible reasons why a contractor might be delayed by the owner. Some of the compensable delays that are documented in Federal case law include:

Failure to make timely progress payments - The government’s failure to pay a contractor has often been held to be sufficient cause for the prime contractor to suspend performance.

Delay in issuing the notice to proceed. Unless a date is specified in the proposal, the owner merely has to issue the notice to proceed or NTP within a reasonable time. “Reasonable” depends on circumstances. However, a delay in issuing the NTP is no reason to reduce or halt performance.

Delayed Approvals - Many contracts require the submittal of shop drawings, schedules, samples and other items for the owner’s approval. What is an unreasonable delay? Unless the contract indicates a specific time period, courts have generally looked at the facts of each case. They consider how complex the approval process should be.

Improper Inspections - Most contracts state that the owner will take reasonable steps to inspect the work in such a manner that it will not delay the performance. Contractor’s costs, precipitated by a government caused delay, are normally treated as a constructive suspension. However, if the owner has a legitimate reason for conducting inspections in a manner that causes delay, the courts have found in the owner’s favor in some cases.

Failure to Act on Contractor requests - Some courts have found in the contractor’s favor for the owner’s failure to act upon requests for assistance or information critical to the performance of the work. These situations included a deviation from contract requirements, interpretation of contract provisions, and

instructions. The Federal cases also cite delays for failure to provide models, plans, drawings and manufacturing standards. In one case, a delay in investigating the contractor's request for a time extension itself was even considered a delay with recoverable damages.

Non-cooperation - There is an implied duty of good faith for parties that sign the contract. In the 1991 case, *Tyger-Saylor*, the board ruled against the Government because its representatives did not promptly furnish a punch list as requested. They failed to appear at the scheduled inspection without notification to the contractor, and often did not respond to the contractor's telephone calls and messages.

An adjustment of the contract terms may occur, if the Engineer orders, in writing, an alteration in the work or in the quantities that significantly change the character of work. The term "significant change" shall be construed to apply only to the following circumstances:

- the altered character of the work differs materially from that of the original contract, or
- a major item of work, as defined in the contract, is increased or decreased by more than 25 percent of the original contract quantity. Adjustments shall apply only to that portion in excess of 125 percent of original contract quantity, or in case of a decrease, to the actual quantity performed.

This clause provides for adjustments resulting from formal change orders by the Engineer, in writing, to the extent that the impacted work is part of the contract. Either party may initiate an adjustment and both must be in agreement before the work is performed. As with the suspension of work provision, this clause does not preclude the recognition of constructive suspensions or delays.

In Florida, a "major item" is defined as any item of work having an original contract value in excess of five (5) percent of the original total contract amount.

# LINKS

LAP Website

<http://www.dot.state.fl.us/projectmanagementoffice/LAP/default.shtm>

Florida Statutes

<http://www.leg.state.fl.us/statutes/>

Wage Tables and related info

<http://www.dot.state.fl.us/construction/wage.htm>

Federal Statutes and Regulations

<http://www.fhwa.dot.gov/programadmin/contracts/core02.cfm#s2A02>

Environmental Process Acronyms

<http://www.fhwa.dot.gov/programadmin/contracts/coregloss.cfm>

FHWA 1273

<http://ecfr.gpoaccess.gov/cgi/t/text/textidx?c=ecfr&rgn=div6&view=text&node=23:1.0.1.7.22.1&idno=23>

Civil Rights Act of 1964

[http://www.fhwa.dot.gov/environment/title\\_vi.htm](http://www.fhwa.dot.gov/environment/title_vi.htm)

Section II.1 EEO

<http://www.fhwa.dot.gov/programadmin/contracts/core02.cfm#s2A02>

Davis Bacon Act

<http://www.gpo.gov/davisbacon/>

Federal aid policy guide 6011.10 has additional information:

<http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1>

“Guidelines on Preparing Engineer's Estimate, Bid Reviews and Evaluation”

<http://www.fhwa.dot.gov/programadmin/contracts/ta508046.cfm>