

**THE COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
HIGHWAY DIVISION
INTEROFFICE MEMORANDUM**

TO: District Highway Directors, District Construction Engineers

FROM: Michael McGrath, Deputy Administrator/Chief of Construction Engineering
Michael A. McGrath

CC: District Highway Directors
District Construction Engineers
District Maintenance Engineers

DATE: September 3, 2021

RE: **Preliminary Assessment of COVID-19 Related Costs and Impacts- Part 2**

Since March of 2020, MassDOT has received numerous notice letters requesting a contract amendment or claiming for delays and/or additional costs related to the COVID-19 virus. Certain contractors have provided requests for specific costs and/or specific time extensions and Districts have been responding accordingly to request supplemental information where needed.

The purpose of this memorandum is to provide further guidance to the Preliminary Assessment of COVID-19 Related Costs and Impacts Memorandum, dated June 23, 2020, in establishing an initial assessment of contractor requests or potential claims related to the COVID-19 virus. This updated memorandum provides examples where additional costs and/or time extensions could be considered to have merit. As stated in the previous memorandum, Districts shall take into consideration executive orders, directives and guidelines issued at the Federal, State and local levels. As with any request or claim, unique circumstances may be involved. Therefore, this memorandum should not substitute for the due diligence Districts must conduct when reviewing any and all elements of a request or claim as specified in SOP CSD 25-14-1-000, Claim Administration and Dispute Resolution Process.

A number of contractor letters received to date have not identified the specific contract provisions applicable to the request or claim submitted and do not provide comprehensive details of proposed costs. It is imperative that contractors provide this information to enable Districts to perform its due diligence in review of proposed costs. Districts are reminded that, as part of the review process, Districts shall inquire if the contractor has applied for or is receiving relief from the Federal or State government, such as the Small Business Administration Paycheck Protection Program. Districts shall require certification of the final proposal that the contractor has not and will not receive relief for the costs requested or claimed.

The following are a few of the more common issues included in contractor correspondence with guidelines to utilize in responding to contractors. With any contractor request or claim, it is important that sufficient information be submitted to support the request or claim. Many notice letters to date have lacked specific information to enable Districts to make determinations on the merit of the request or claim. Districts shall request supplemental information before addressing the full extent of the request or claim.

1. Time Extensions:

Contractors claiming delay due to virus related issues must comply with the requirements of Division-I, Subsection 8.10, Determination and Extension of Contract Time for Completion (Time Extensions). A time extension shall only be granted if entitlement to a time extension has been clearly demonstrated by a documented Time Entitlement Analysis (TEA) indicating the delay was due exclusively to reasonable causes beyond the control and without the fault or negligence of the Contractor. A number of time extensions have been approved to date. A majority of time extensions reference lack of access to the work site, material unavailability, COVID-related utility delays, and quarantined work force.

2. Claims for Delay or Suspension of the Work:

With limited exceptions, Division-I, Subsection 8.05, Claim for Delay or Suspension of the Work, provides the sole allowance for any delay or suspension of work to be an Extension of Time. Requests or claims for COVID-19 delay related costs including, lack of productivity, inefficiencies, and/or acceleration, are unallowable costs per Division-I, Subsection 8.05. In situations where either the Department or a third party has denied a contractor access to a site, certain additional costs may be compensable under Division-I, Subsection 8.05. If the Department determines that a Time Extension is not in the general public's best interest and requests the work be accelerated, the Department may be subject to additional costs for such acceleration. Time extensions have been approved for certain contracts where municipalities suspended construction projects. This shall be reviewed on a case by case basis to determine if an Extension of Time is warranted.

3. March 27, 2020 Safety Stand-Down:

Many contractors have provided notice of additional costs for the March 27th Owner-directed safety stand-down. Per Division-I, Subsections 8.05, certain actual direct costs, if submitted, may be compensable if computed in accordance with Subsection 9.03. Districts shall review properly documented contractor price proposals for allowable costs in accordance with Subsections 8.05 and 9.03. Such actual direct costs may include direct labor costs and equipment on standby. No allowance shall be made for general superintendence, small tools or manual equipment and actual costs shall exclude overhead and profit.

4. Field Office Cleaning:

Contractors have submitted requests or claims for additional cleaning of field offices. Subsection 740, Engineer's Field Office and Materials Laboratory, includes cleaning requirements as well as cleaning frequency. Certain costs may be compensable if a contractor can clearly demonstrate that the cleaning effort performed was extraordinary and well beyond the effort required by the contract specifications and what would reasonably be expected. When considering merit to additional costs, Districts shall refer to the specific cleaning requirements stated in the version of Subsection 740 included in the contract and including any Special Provisions. EWOs approved to date include costs for one-time "deep cleanings" or disinfecting that were considered above and beyond the contract requirements.

5. Local Carpenters Union Suspension of Work:

Certain contractors have requested additional costs due to the Local Carpenters Union suspending work. The Governor's direction stated that essential work was to continue. All Locals complied with the direction, with the exception of the Carpenters Local. The decision to suspend work was that of the Carpenters Union alone and therefore, is not a MassDOT directive to suspend work. Any costs claimed that have resulted from the Carpenters' suspension of work are not allowable per Subsection 8.05, Claims for Delay or Suspension of the Work.

6. Personal Protective Equipment (PPE) and Cleaning Supplies:

Certain PPE costs or cleaning supplies may be compensable if a contractor can clearly demonstrate that the PPE costs or cleaning supplies were extraordinary and well beyond the contract specifications and what would have been reasonably expected. The contractor must detail what level of PPE and cleaning supplies were required on site prior to COVID-19 and what was required because of the Governor's Executive Order No. 13. Costs may include masks, gloves, wash stations, hand sanitizer dispensers and disinfectants with proper documentation.

7. Other Costs:

On a limited number of projects, contractors have requested compensation for payment of quarantined workers, safety briefings or extended worker breaks. Except as noted above, all the above costs are considered unallowable per the terms of the contract, including, but not limited to, Division-I Subsections 5.09 (Inspection of Work), 7.01 (Laws to be Observed), 8.05 (Claim for Delay or Suspension of the Work), and 8.09 (Delay and Suspension of Work). A limited number of EWOs have been approved for unique circumstances involving one-time additional costs resulting from COVID-related impacts, such as winter conditions.

If you require any additional information, please contact. David Spicer, State Construction Engineer at David.A.Spicer@dot.state.ma.us.

cc: D. Spicer
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Boston Area Engineers