

**MEMORANDUM OF AGREEMENT**  
**CONSTRUCTION CONTRACT CHANGE APPROVAL REQUIREMENTS**  
**FOR**  
**FEDERAL-AID OVERSIGHT PROJECTS**

**BACKGROUND**

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

**DEFINITIONS**

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

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

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

**Formal FHWA Approval:** Approval from FHWA of a contract change. Approval will normally be written and take the form of a stamp of approval on a request from DelDOT containing supporting documentation for major changes and a stamp of approval on the executed Contract Change Order for non-major changes. In cases where formal approval must be expedited, formal approval may also be provided by e-mail or be provided on the job-site in the form of a signed field memo or on FHWA form 1365 "Record of Authorization to Proceed with Major Contract Provision" (form attached). Unless a major change qualifies as an emergency or unusual condition (see "Major Changes, 4. Exception:" under Procedure for Approval of Changes), formal approval is not provided verbally.

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

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

**State Administered (Exempt) Projects:** Federal-aid projects not subject to full oversight by FHWA. DelDOT assumes oversight responsibilities for FHWA, see Change Order Approval Matrix in Appendix. (All federal rules and regulations still apply to these projects.)

**Full Oversight (Non-exempt) Projects:** Federal-aid projects subject to full FHWA oversight. These projects require FHWA to review and approve actions pertaining to design, plans, specifications, estimates, right-of-way certification statements, contract awards, change orders, design changes, and other project specific actions.

## **PROCEDURE FOR APPROVAL OF CHANGES (see Approval Matrix)**

### **Major Changes:**

1. DelDOT determines the change to be a *Major Change* as defined in this MOA.
2. After negotiation of the *Major Change* is completed with the contractor, but prior to the *effective date* of the *major change*, DelDOT submits a request for *formal approval* to FHWA with supporting documentation detailing the scope and cost of the *major change*. This documentation will include:
  - a. Description of the change
  - b. Justification of the need for the change
  - c. CPM analysis if appropriate
  - d. Adjustment to contract time and CPM analysis if appropriate
  - e. Unit item estimated quantities and prices
  - f. Total estimated cost of the change
  - g. A statement as to the project schedule impacts of this change
  - h. Report of apparent design errors and omissions if appropriate
  - i. A statement as to the environmental impacts of this change if appropriate
  - j. Impact on DBE goals if appropriate

*Adjustment to contract time:* Changes in contract time, as related to the changes or extra work, will be submitted at the same time as the respective work change for approval by the FHWA. An extension of contract time will be considered when an analysis of the effects on the CPM schedule has been performed and it is shown that the change will affect the controlling operation. If a change order represents issues for which the effect on contract time can be readily determined, then any adjustment will be agreed upon by DelDOT and the Contractor prior to final execution of the change order. If the issues represented by the change order require further analysis and review in order to accurately and equitably evaluate the effect on contract time, then DelDOT will provide FHWA with an interim estimate of the possible time adjustment prior to execution of the change order. In such instances, the change order may be

executed without final resolution of the adjustment to contract time between DelDOT and the Contractor. In these cases, final resolution of any time related issues will be made within 30 days of work completion associated with the change order. (All adjustments to contract time will be done prior to the end of contract time.)

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

After completing the review of the supporting documentation, FHWA Area Engineer will:

1. Stamp and sign “Approved for Federal Funding” or “Not Approved for Federal Funding” DelDOT Change Order Form
2. Send a copy of the stamped CO to the project file and return the original signed copy or digital copy to DelDOT (one each to Finance and District Construction Office).
3. FHWA gives *formal approval* to the *major change* within ten (10) workdays after all satisfactory documentation is received. This is formal approval for the *major change* as required by 23 CFR Part 635. Upon *formal approval* by FHWA, DelDOT may give verbal notice to proceed or execute a written agreement for the change with the contractor.
4. Exception: In the case of a *major change* resulting from an emergency or unusual condition, where the safety of the traveling public or project personnel is jeopardized or where the highway facility is imperiled by climate or other outside forces, FHWA may provide tentative advance approval verbally (with an email to document) to such changes and ratify such approval with *formal approval* as soon as practicable thereafter.

**Note:** In order to expedite the *formal approval* process for a *major change*, DelDOT should maintain close coordination with the respective FHWA project engineer, preferably notifying FHWA when a *change* is being considered to obtain concurrence in the eligibility of the *change*. When necessary, if the appropriate project engineer is unavailable, *formal approval* can be obtained from another FHWA engineer. See FHWA Contact Information in Attachment 1.

**Non-Major Changes:**

1. DelDOT determines the *change* to be a *non-major change* as defined in this MOA.
2. DelDOT negotiates the *non-major change* with the contractor, gives written notice to proceed with the *change* to the contractor, and proceeds with the work.
3. DelDOT provides a copy of the executed *Contract Change Order* to FHWA within 15 days of final DelDOT approval date for *formal approval*. The executed *Contract Change Order* is approved and returned to DelDOT for their records. This is formal approval for the *non-major change* as required by 23 CFR Part 635.

Natalie Barnhart 3/7/11  
Natalie Barnhart Date  
Chief Engineer,  
Delaware Department of Transportation

Jitesh Parikh 3/3/11  
Jitesh Parikh Date  
Project Delivery Team Leader,  
FHWA, DelMar Division

## Attachment 1

### CHANGE ORDER APPROVAL MATRIX

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

## FHWA CONTACT INFORMATION

Jitesh Parikh (Project Delivery Team Leader)

[Jitesh.Parikh@dot.gov](mailto:Jitesh.Parikh@dot.gov)

(410) 779-7136

Dan Montag (Sr. Area Engineer)

[Daniel.Montag@dot.gov](mailto:Daniel.Montag@dot.gov)

(443) 829-8865

Ryan O'Donoghue (Assistant Area Engineer)

[Ryan.O'Donoghue@dot.gov](mailto:Ryan.O'Donoghue@dot.gov)

(302) 734-1719

Patrick Kennedy (Safety/Mobility Program Manager)

[Partrick.Kennedy@dot.gov](mailto:Partrick.Kennedy@dot.gov)

(302) 734-2745

FHWA DelMar Delaware Main Line

(302) 734-5326

FHWA DelMar Maryland Main Line

(302) 734-5323

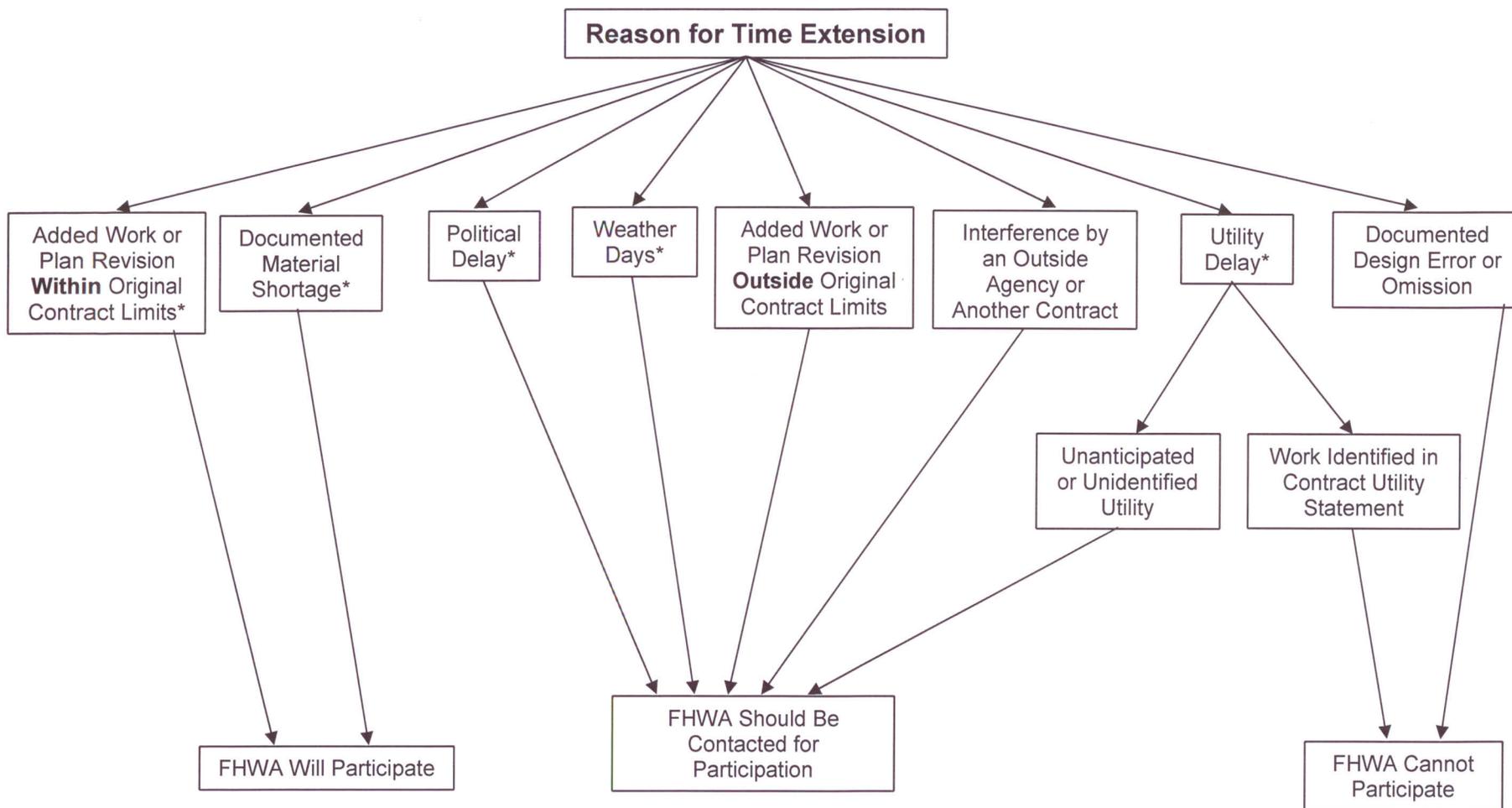
FHWA Delaware Fax

(410) 962-4440

(302) 734-3066

## Potential Time Extension Flow Chart for Full Oversight Projects

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



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

\*Notes

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

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

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

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

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