



Charles D. Baker, Governor
Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO
Steve Poftak, General Manager



To: Capital Programs ^{DS}
From: Jay Neider
Chief of Capital Programs
Date: April 26, 2021
RE: Construction Contract Extended Overhead

Attached is the Capital Programs Construction Contract Extended Overhead Policy including guidelines relative to the analysis and resolution of Contractor's request for additional time and compensation arising from changes in the work, extra work or delay claims. The purpose of this document is to better align the ongoing business practices on existing construction contracts executed prior to July 1st 2021 with the language contained within those contracts.

All project offices shall distribute this policy to all contractors on projects with contracts executed prior to July 1st 2021. This document is in effect for all requests for time extensions and compensation on these contracts going forward as well as for all requests currently under review.

DocuSigned by:
Thank you *Jay Neider*
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CC: Construction Industry of Massachusetts (CIM)
American Council of Engineering Consultants (ACEC) Massachusetts Chapter

**CAPITAL PROGRAMS
CONSTRUCTION CONTRACT EXTENDED
OVERHEAD POLICY**

INTRODUCTION

It has recently come to the attention of Capital Program's management team that the current long time practice of authorizing delay damages on construction projects is inconsistent with the MBTA standard construction contract language. The MBTA contracts are written to ensure adherence to federal regulations and Massachusetts General Laws. Therefore it is critical that our business practices align with our contracts.

The following Rules and Instructions prescribe the manner in which Time Impact Analysis (TIA) shall be evaluated and how decisions related to compensation of "eligible costs" may be authorized on an existing MBTA construction contract executed prior to July 1st 2021. It is imperative that Capital Programs adheres to these Rules and Instructions and that all Project Offices work collaboratively with the Project Controls Group and the Change Order Management Group to address these issues in a consistent and legitimate manner. If the Project Office's resolution differs significantly from the Strainer produced by Change Order Management, by more than 15%, or does not incorporate the time entitlement determinations approved by Project Controls, the recommended resolution shall be reviewed and approved by the Chief of Capital Programs Support.

With respect to contracts executed on or after July 1st 2021, the standard language for our contracts is currently under review by our Contract Services group and MBTA Legal. The intent is that our standard contract language will be aligned with the business practices outlined in this policy.

CONSTRUCTION CONTRACT TIME EXTENSION EVALUATION

Every Construction Contract includes a Contract Duration stating the number of days in which the construction shall be completed. Over the course of the contract, the Contractor may be entitled to an extension in contract time under two potential scenarios:

- The Contractor is authorized to perform changes in the work or extra work and a TIA analysis confirms that the changes in the work or extra work impacts the critical path and necessitates additional time for the contractor to perform the changes in the work or extra work.

- The Contractor is delayed and a TIA analysis confirms that the delay impacted the critical path and is an excusable delay meaning it was not the Contractor's responsibility consistent with the terms of the Contract.

The Contractor is required to submit a request for a contract time extension justified by a TIA. The evaluation of TIA's submitted by contractors will be performed by MBTA Project Controls staff or the MBTA's project controls consultant. It is the MBTA's Project Controls staff responsibility to determine if a Contractor is entitled to a contract time extension. TIA evaluations performed by MBTA project controls consultants shall be reviewed and approved by MBTA Project Controls staff.

The evaluation of TIA's and all recommendations shall be consistent with the requirements of the Contract General Conditions and the MBTA's Project Controls Manual (current edition). The TIA evaluation will determine if a Scope Change entitles the Contractor to an extension in contract time and/or if a delay is excusable and therefore entitles the Contractor to an extension in contract time. The evaluation results will be documented in a TIA Report. The Contractor shall not be entitled to an extension in contract time if the scope change does not impact the critical path or in the case of the delay if it is non-excusable.

For any documented excusable delays, MBTA Project Controls or its consultant shall also identify the cause of the excusable delay including a determination as to whether or not the delay or any part of the delay is an Owner Caused Delay (OCD) which means that the delay was solely caused by the actions or decisions of the MBTA. Any such OCD's shall be documented in the TIA Report. Owner Caused Delays do not include delays caused by any other 3rd party including the Designer. MBTA Project Controls and all MBTA consultants performing TIA evaluations shall refrain from any commentary about compensability or authorization of delay damages.

CONSTRUCTION CONTRACT TIME EXTENSION COMPENSATION

The Contractor may be entitled to compensation of "eligible costs" related to a documented extension in contract time under the following potential scenarios:

- If the TIA evaluation documents that a change in the contract work or extra work has proven entitlement to an extension in time, the Contractor shall be entitled to compensation of "eligible costs" for the number of days authorized by Project Controls except to the extent that there is a concurrent delay by the Contractor.
- If the TIA analysis documents that an excusable delay caused in whole or in part by an Owner Caused Delay (OCD) has proven entitlement to an extension in time, the Project Office may negotiate compensation of "eligible costs" for the number of days approved

by Project Controls as an Owner Caused Delay except to the extent that there is a concurrent delay by the Contractor. If the cause of the excusable delay is not an Owner Caused Delay, the Contractor shall not be entitled to compensation of “eligible costs”. In addition, there will be a 15 day grace period afforded the MBTA meaning that there will be no compensation allowed for the first 15 days of Owner Caused Delay on the contract.

It is important to note that concurrency of a non-excusable or contractor-caused delay invalidates any entitlement to compensation.

If Project Controls has determined there is a concurrent delay by the Contractor, the number of days approved as a time extension either as a result of a scope change or an Owner Caused Delay shall be reduced by the number of concurrent days in order to determine the number of days of compensation.

COMPENSATION OF “ELIGIBLE COSTS”

Eligible Costs are defined as proven, time dependent costs that could not be mitigated by the Contractor using reasonable efforts. Such Eligible Costs shall be limited to On-site Labor, Project Management and Supervisory personnel including PM, Superintendent, Safety Supervisor, Office Manager, Scheduler and QC Engineer, Site Vehicles, Site Office Rental, Site Office Utilities & Internet & Phone, Site Office Supplies including Copiers and Cell Phones and Insurance Costs. The Contractor shall not be entitled to any home office overhead, profit, fixed costs or any costs that could have been mitigated using reasonable efforts.

If the Contractor is to be compensated for “eligible costs”, the MBTA Change Order Management Group shall review costs and develop an acceptable Eligible Costs Per Diem. For any future authorizations of compensation, the MBTA Change Order Management Group shall review the previously approved Eligible Costs Per Diem and adjust as appropriate. If the use of the Eligible Costs Per Diem is the result of an Owner Caused Delay, the Director of Change Order Management shall provide a written memo describing the negotiated settlement supporting the recommendation for compensation.

The Project Office shall use the number of days authorized by MBTA Project Controls and the Eligible Costs Per Diem recommended by MBTA Change Order Management to negotiate the Change Order. If the MBTA and the Contractor cannot agree on a reasonable resolution pursuant to the recommendation made by MBTA Project Controls and MBTA Change Order Management, the MBTA reserves the right to deny the Contractor’s request based upon the contract and Legal reserves the right to fully enforce the no damages for delay provision in the current contract in

any dispute resolution or litigation relating to this issue, notwithstanding any prior settlement efforts.