

Damages During Construction

June 20, 2008

Construction Staff,

Statement of the Issue:

At spring meeting I promised to provide you guidance on how to deal with damage that occurs to a project, when we should reimburse the contractor for such damage, and the process to do so. Since summer officially began last Friday I thought it about time to get this to you.

The relevant section of the 2006 *Standard Specifications for Construction* is Subsection 107.18 CONTRACTOR'S RESPONSIBILITY FOR WORK. Paragraph (a) General states the following:

“Until acceptance of the project by the Engineer the Contractor shall be responsible therefore and shall take every precaution against injury or damage to any part thereof by the action of the elements or from any other cause, whether arising from the execution or from the non-execution of the work. The Contractor shall rebuild, repair, restore and make good all injuries or damages to any portion of the work before acceptance and shall bear the expense thereof except damage to the work due to unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to acts of God, of a public enemy, or governmental authorities. For purposes of this paragraph the term work shall exclude Contractor owned, rented, leased, materials, equipment and incidentals.”

So, the quick interpretation is that if the damage is not in any way the fault of the contractor, the Agency will reimburse the contractor the cost to rebuild, repair, or restore the work. Key here are the phrases **“unforeseeable causes beyond the control of and without the fault or negligence of the Contractor.”** Whether this condition is met can only be determined on a case by case basis.

Also, the Agency will not reimburse the Contractor **for “Contractor owned, rented, leased, materials, equipment and incidentals.”** The contractors need to carry their own insurance on these items. So, under no circumstances will the Agency reimburse a contractor for rebuilding, repairing, or replacing such items.

Guidance As Examples:

Therefore, a determination must be made in each instance if the damage **is “beyond the control of and without the fault or negligence of the Contractor”**. Use the following examples as guidance. All examples are during the construction of a project before the work is accepted.

Example 1.

A citizen turns onto new pavement from a side road, and containers of diesel fuel in the vehicle tip over and proceed to spill diesel fuel on the new pavement, causing damage. All necessary and proper traffic control features according to the Contract were in place, and the transition from the side road to the project was a properly prepared fillet providing a smooth transition. The damage requires that the pavement be removed and replaced. In this case the Agency would cover the cost to repair this work.

On the other hand, if the situation shows that the contractor is at fault – for example, if necessary and proper traffic control was not in place, resulting in the citizen becoming confused and driving in a location not intended for traffic or the transition from the side road to the project was not smooth – the Agency would most likely determine that it would not pay to remove and replace the damaged pavement.

Example 2.

Delineators are installed per the project plans. Some of the delineators are knocked over by mowing operations of the Agency or a third party not a subcontractor of the prime contractor. In this case the Agency would cover the cost to repair this work.

Again, if the contractor is at fault – for example, the damage was done by the subcontractor hired to perform the mowing – the Agency would likely determine that it would not pay for repair/replacement of the damaged delineators.

Example 3.

Guardrail and end sections are installed per the project plans. The project spans two seasons, and during the winter, when the project is inactive, terminal sections are destroyed and panels are damaged due to motor vehicle crashes and/or plow damage other than by the contractor. In this case the Agency would cover the cost to repair this work.

Example 4.

A section of road is being reclaimed. After normal work hours, a severe storm cause damage to the roadway, creating potholes and washouts. The contractor returns to the project the morning of the next business day and finds that a crash occurred damaging a signal pole. While the storm is an act of God, the contractor failed to return to the project during or immediately after the storm to inspect and maintain the project so it was safe and traversable. The Agency would not reimburse the contractor for repair/replacement of the signal pole.

Example 5.

On a day when severe storms are predicted, the contractor proceeds to commence installation of a large culvert. When a storm arrives, the contractor suspends operation and the storm proceeds to overpower the stream diversion, undermine the work, wash the culvert downstream and damage it. Again, while the storm is an act of God, the contractor chose to proceed despite the weather forecast. The contractor cannot be determined to be without fault and should not be reimbursed for repair/replacement/restoration of the damaged culvert.

Example 6

The location of a utility conduit is changed slightly because of interference with other utilities. The guard rail subcontractor drives guard rail posts through the conduit and damages the conduit and communication lines. The Agency would not reimburse the contractor for repair/replacement of the conduit (or the damaged communications lines). The prime contractor knew the new location and was responsible to complete the work without harm to the project or other property.

Example 7

A paver breaks a hydraulic hose and leaks hydraulic fluid. The Agency would not reimburse the contractor for repairs to the work or equipment.

The Process:

The process once damage is discovered is as follows:

1. Have the contractor immediately track down the responsible party(ies) and gather all possible information concerning the damage. This will include information such as police reports, eyewitness accounts, and inquiry of the Agency's Operations (Maintenance) staff and others.
2. Notify the contractor that no decision has been made as to who will be responsible for the cost of repair/replacement/restoration of the work and that the first step is to try to determine who did the damage and the circumstances that resulted in the damage.

The point is that until the Agency can determine whether is the damage was ***“beyond the control of and without the fault or negligence of the Contractor,”*** the contractor needs to protect its interests; that

includes finding out as much information as possible regarding the circumstances of the event(s) that caused the damage.

3. Notify the contractor that its failure to adequately investigate and report information may result in a finding of fault or negligence on its part.

4. The Resident Engineer will discuss the situation and issues with the Regional Construction Engineer with the goal of determining whether the Agency should pay for the repair/replacement/restoration of the work.

5. If the Agency determines the damage was ***“beyond the control of and without the fault or negligence of the Contractor,”*** in addition to paying the cost to repair/replace/restore the work, the Resident Engineer will provide all information concerning the event to Risk Management.

6. If the Agency determines the damage was not ***“beyond the control of and without the fault or negligence of the Contractor,”*** the Resident Engineer will notify the contractor in writing of the Agency’s decision. As always, the contractor has the right to file a claim if it so wishes.

7. The Resident Engineer shall contact Operations staff (Maintenance District or Area) to determine what, if anything Operations staff know concerning the event. The same is true for law enforcement and emergency personnel, both local or State. In an appropriate situation, doing so will also serve as a check on the thoroughness of the contractor’s efforts to obtain the relevant information.

8. Also, people who do damage to State property – usually guard rail and light posts, but not limited to them – are sometimes pursued for the damage by Operations or Risk Management. If the Agency holds a contractor responsible for damage and is later reimbursed by the person responsible for the damage, we need to make sure the contractor is reimbursed to the extent the State is.

I hope this helps clarify Subsection 107.18 of the *Standard Specifications*. Each case must be looked at individually, as no two are alike. I will be providing a copy of this message to AGC so most of our contractors will be aware of the process.

If you have comments please discuss with your Regional Construction Engineer.

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