CHAPTER 12

CONSTRUCTION CONTRACT REQUIREMENTS
CONTENTS

OVERVIEW OF CHAPTER 12 REVISIONS ................................................................. iv
CHECKLIST ........................................................................................................ vi
12.1 INTRODUCTION .......................................................................................... 1
12.2 PROJECT MANAGEMENT ............................................................................. 1
  12.2.1 Project Management Plan (PMP) ............................................................ 1
  12.2.2 Construction Management Plan (CMP) ................................................ 1
12.3 CONTRACT REQUIREMENTS (FOR ALL CONTRACTS) ............................... 2
  12.3.1 NYSDOT Standard Specifications ......................................................... 2
  12.3.2 APPENDIX 12-1 INCLUSIVE ................................................................. 2
    12.3.2.1 Certification for Federal-Aid Contracts ............................................ 2
    12.3.2.2 Disclosure of Lobbying Activities .................................................. 2
    12.3.2.3 Non-Collusive Bidding and Other Certifications .............................. 3
    12.3.2.4 Report Violations of Non-Collusive Bidding or Other Prohibited Contract Activities 3
    12.3.2.5 Equal Employment Opportunity Requirements ............................ 3
    12.3.2.6 Required Contract Provisions for Federal-Aid Construction Contracts (FHWA 1273) ........................................................................................................... 4
    12.3.2.7 Authority Delegation ....................................................................... 4
  12.4 ADDITIONAL CONTRACT REQUIREMENTS .............................................. 4
    12.4.1 APPENDIX 12-2 INCLUSIVE ................................................................. 4
      12.4.1.1 Prevailing Wage Rates, Use of Convict Labor and Materials ............. 4
      12.4.1.2 Buy America Requirements and Waivers ....................................... 5
      12.4.1.3 Disadvantaged Business Enterprise Utilization ............................... 5
      12.4.1.4 Special Training Provisions ............................................................. 5
      12.4.1.5 Changed Conditions and Disputed Work Provisions ....................... 6
      12.4.2 Retainage Provisions ........................................................................ 6
  12.5 CONTRACT GUIDANCE AND COMPLIANCE .......................................... 7
    12.5.1 Force Account Work by Sponsors ....................................................... 7
      12.5.1.1 Use of Sponsors’ Equipment or Materials ...................................... 8
    12.5.2 Civil Rights Requirements ................................................................ 8
    12.5.3 Residency Requirements .................................................................... 8
    12.5.4 Specialized Experience Requirements ................................................ 8
    12.5.5 Wicks Law Requirements .................................................................. 9
    12.5.6 Prequalification .................................................................................. 9
    12.5.7 Project Labor Agreement ................................................................... 10
    12.5.8 Warranties and Specialty Items ......................................................... 10
    12.5.9 Using Alternate Bidding .................................................................... 10
      12.5.9.1 Format for Alternate Bidding ......................................................... 10
    12.5.10 Insurance Provisions ........................................................................ 12
      12.5.10.1 New York State Insurance Requirements .................................... 12
APPENDICES

Appendix 12-1 CONTRACT REQUIREMENTS
FOR ALL LOCALLY ADMINISTERED FEDERAL-AID CONSTRUCTION CONTRACTS

Appendix 12-2 ADDITIONAL CONTRACT REQUIREMENTS
FOR LOCALLY ADMINISTERED FEDERAL-AID CONSTRUCTION CONTRACTS WHICH DO NOT USE NYS DOT STANDARD SPECIFICATIONS

Appendix 12-3 EXAMPLE CONSTRUCTION MANAGEMENT PLAN (CMP)

Appendix 12-4 EXAMPLE PUBLIC INTEREST FINDING LETTERS (PIF)
OVERVIEW OF CHAPTER 12 REVISIONS

Chapter 12 has been rewritten, reorganized and renamed to concisely explain Construction Contract Requirements. A checklist is included for users to “check-off” for overall compliance PRIOR to developing construction contract documents. The chapter is organized in four main sections: Introduction, Project Management, Contract Requirements, and Contract Guidance and Compliance. The main sections are followed by detailed subsections except for the Introduction.

The following have been included in this Chapter:

- NEW Addition of checklist.
- NEW Emphasis on the importance of developing a Project Management Plan (PMP) as part of overall project and contract management.
- NEW Development and incorporation of a standardized Construction Management Plan (CMP) between: the New York State Department of Transportation (NYSDOT), the Sponsor, the Prime Contractor, subcontractor(s), and suppliers. The CMP should be amended to the Project Management Plan (PMP). See Appendix 12-3 Construction Management Plan (CMP).
- NEW Section 12.3.2.5, text on Equal Employment Opportunity Requirements.
- NEW Section 12.3.2.7, text on Authority Delegation.
- REVISED Section 12.4.1.2, text on Buy America Requirements and Waivers.
- NEW Section 12.4.1.3, text on Disadvantaged Business Enterprise Utilization.
- NEW Section 12.4.1.4, text on Special Training Provisions.
- NEW Section 12.4.2, text on Retainage and Prompt Payment Provisions.
- NEW Section 12.5.1, text on Force Account Work by Sponsors.
- NEW Section 12.5.1.1, text on Use of Sponsors’ Equipment or Materials.
- NEW Section 12.5.2, text on Civil Rights Requirements.
- REVISED Section 12.5.5, New York State’s Wicks Law Requirements have been updated to reflect new provisions and increased dollar threshold.
- NEW Section 12.5.6, text on Prequalification.
- NEW Section 12.5.7, text on Project Labor Agreement.
- NEW Section 12.5.10, text on Insurance Provisions.
- NEW Section 12.5.10.1, text on New York State Insurance Requirements
- REVISED Appendix 12-1.1, updated form relating to disclosure of lobbying activities.
- NEW Appendix 12-3 Construction Management Plan (CMP).
- NEW Appendix 12-4 Sample Public Interest Finding (PIF).
As you read Chapter 15 Administer Construction Contracts and Chapter 12 Construction Contract Requirements, be sure the following have been completed:

CHECKLIST

Chapter 1 Introduction and Overview
☐ Verify the project is eligible for Federal-aid.

Chapter 2 Roles and Responsibilities
☐ Complete PMP, who is doing what.

Chapter 3 Project Funding, Local Participation and Project Authorization
☐ Identify who is paying for what, and where the money is coming from.
☐ Identify funding sources for each element of the project.
☐ The project has been included in an approved Transportation Improvement Program and Statewide Transportation Improvement Program (TIP/STIP).

Chapter 4 Local Project Agreements
☐ Ensure the State/Local Agreement is in place (all projects).
☐ Ensure the Local Resolution for the construction phase (or entire project) has been passed (does not apply to NYC).
☐ The “Contract Encumbrance Request” (Form AC340) has been submitted on behalf of Sponsor by NYSDOT to the Office of the State Comptroller (OSC) with executed SLA.

Chapter 5 Accounting and Reimbursement Procedures
☐ The proper accounting procedures have been explained to the Sponsor.
☐ Federal “Authorization to Proceed” has been received prior to expending funds.

Chapter 6 Consultant Procurement and Administration
If utilizing a consultant:
☐ A consultant has been selected in accordance with procedures provided in Chapter 6.
☐ The consultant contract has been executed and “Notice to Proceed” has been issued to the selected consultant.

Chapter 7 Environmental Process and Studies
☐ Level of required environmental review has been completed Categorical Exclusion (Cat Ex), Environmental Assessment (EA), or Environmental Impact Statement (EIS)
to satisfy NEPA and SEQRA requirements.

Chapter 8 Design Procedures

☐ Approved Design Documents with Record of Decision/Design Approval.

☐ Environmental Permits are completed.

☐ The Plans, Specifications and Estimate (PS&E) package has been completed.

Chapter 10 Railroads and Utilities

☐ Railroad agreements are being negotiated.

☐ Utility agreements are in process.

Chapter 11 Right of Way

☐ The Right of Way Clearance Certificate has been obtained prior to advertisement.
12.1 INTRODUCTION

Chapter 12 describes the requirements that apply to Federal-aid contracts let by project Sponsors. The requirements are from the United States Code, specifically Title 23, Highways, and Title 49, Transportation. This legislation is codified in the Code of Federal Regulations (CFR). Regulations in 49 CFR apply to the United States Department of Transportation (USDOT), and all agencies within the Department. Regulations in 23 CFR are specific to the Federal Highway Administration. Project Sponsors MUST adhere to the requirements in 23CFR, 49CFR and other parts of the regulations before and during the process of planning a construction project using Federal funds. Chapter 3 of this manual provides additional information on Federal Highway Administration (FHWA) funded programs and eligibility. All CFRs are accessible at http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1.

12.2 PROJECT MANAGEMENT

12.2.1 Project Management Plan (PMP)

As noted in Chapter 2 (Roles & Responsibilities), NYSDOT requires ALL Sponsors to develop a written project management plan (PMP), outlining the implementation strategy of the project. The PMP outlines: milestones, products, reviews and approvals. The PMP is the primary communication tool between NYSDOT and the Sponsor that provides clear assignment of authority and accompanying responsibility for the duration of the project.

12.2.2 Construction Management Plan (CMP)

As noted in Chapter 2 (Roles & Responsibilities), NYSDOT requires ALL Sponsors to have a written construction management plan (CMP), detailing how the construction contract will be administered at the time of construction. The CMP is part of the overall Project Management Plan (See Chapter 2). 23 CFR 635.105(c)(4) requires a Sponsor to provide a full-time employee to be in responsible charge of the project even if using consultants to provide engineering and construction inspection services or project management. Since each Sponsor has different resources and experience, the CMP will provide NYSDOT and others with an understanding of how the Sponsor plans to actively manage, monitor and progress the project. In general, the plan should address: contract administration, closeout, labor relations, construction inspection, civil rights, contract documentation, order-on-contract procedures, subcontractor approvals, record retention, quality control and quality assurance (QC/QA) as well as any project specific issues. The plan should describe how the Sponsor intends to provide adequate supervision and inspection, including materials inspection and acceptance and independent quality assurance to ensure projects are completed in conformance with the approved plans and specifications.

Between contract letting and contract award: the Sponsor, the Sponsor’s engineer/inspector, the apparent low bid Contractor and the Regional Local Projects Liaison (RLPL) shall meet to modify the CMP to include data initially not available to the Sponsor. The CMP should be updated to include a description of the people involved, their qualifications, responsibilities and the hierarchy of supervision. The plan should also consist of a brief outline of applicable Federal requirements: wage reports, safety plan, Occupational Safety and Health Administration (OSHA) rules, labor requirements, Personal Protective Equipment requirements (PPE), how they are to be addressed, and who is responsible for implementing the plan. The CMP may be modified by agreement between the contractual parties as necessary due to: personnel changes, changed conditions, scope changes, schedule changes or other reasons. A sample CMP is available in Appendix 12-3, Construction Management Plan.
For all Projects, the Sponsor’s Construction Management Plan must be approved by NYSDOT before contract award.

12.3 CONTRACT REQUIREMENTS (FOR ALL CONTRACTS)

12.3.1 NYSDOT Standard Specifications

NYSDOT specifications contain a number of contract provisions (See Section 100) that must be included in ALL Federal-aid contracts. Current metric NYSDOT Standard Specifications are accessible at https://www.nysdot.gov/main/business-center/engineering/specifications


NYSDOT Standard Specifications include provisions for the following contract requirements:

- Non-Collusive Bidding and Other Certifications NYSDOT Standard Specifications, Section 102-08.
- Federal Changed Conditions Clauses and Disputed Work Provisions, NYSDOT Standard Specifications, Section 104-03, 04 and 05.

12.3.2 APPENDIX 12-1 INCLUSIVE

Specific guidance provided in Appendix 12-1 contract provisions must be included in ALL Federal-aid contracts.

12.3.2.1 Certification for Federal-Aid Contracts

23 CFR 635.112(g) requires all Contractors or firms intending to conduct business with the Federal government, or wishing to participate in contracts funded with Federal-aid, to disclose all lobbying activities to the Federal government. In addition, the Contractor or firm must certify that no lobbying activity has been paid for with Federal funds (49CFR 20.100).

12.3.2.2 Disclosure of Lobbying Activities

Appendix 12-1 Disclosure of Lobbying Activities contains the certification which must be completed by the Contractor that indicates the Contractor has not paid any Federal funds for any lobbying efforts. In addition, the Contractor agrees to complete and submit forms Disclosure of Lobbying Activity (SF-LLL) and Disclosure of Lobbying Activity Continuation (SF-LLL-A) sheet disclosing any lobbying efforts undertaken by or on behalf of the Contractor, regardless of how it was financed. Instructions for completing forms are provided in Appendix 12-1 under Disclosure of Lobbying Activities. The certification and forms disclosing lobbying activities must be included in the contract bid documents.
12.3.2.3 Non-Collusive Bidding and Other Certifications

23 CFR 633.112(f), non-collusive bidding and other certifications are required in **ALL** Federal-aid contracts. The CFR requires bidders to certify that the bid submitted was arrived at without resorting to any collusive bidding practices. *Collusion is defined as any activity that artificially affects prices when bidding on a Federal-aid contract or activity that restricts competition among bidders or potential bidders by exchanging or sharing information with firms presumed to be competing for the same contract.* Additionally, Federal law requires bidders to certify they are eligible to compete for contracts under Federal regulations and are not under sanction of any Federal agency nor are any sanctions pending against the firm or an owner of the firm. 49 CFR, Part 29.300 also requires the bidder to certify that he or she has not been subject to legal action regarding fraud or misconduct. A sample signature page (See Appendix 12-1 Non-Collusive Bidding Certifications) allows for one signature to provide multiple certifications. NYSDOT recommends using this or a similar form to simplify signing for various certifications for the same contract.

12.3.2.4 Report Violations of Non-Collusive Bidding or Other Prohibited Contract Activities

The laws noted in the **Non-Collusive Bidding Requirements** section encourage any person with knowledge of collusive bidding or other misconduct to report possible violations to the appropriate Federal and/or State authorities. Appendix 12-1 Reporting Violations of Non-Collusive Bidding Procedures Misconduct, Or Other Prohibited Contract Activities provides information on how to report such activities. This information is required for inclusion in **ALL** Federal-aid contracts.

12.3.2.5 Equal Employment Opportunity Requirements

23 CFR, Part 230 Subpart A and D, requires **ALL** Federal-aid contracts, administered by NYSDOT, **MUST** include Equal Employment Opportunity (EEO) utilization goals. The term Equal Opportunity Requirements is generally used to mean all contract provisions relative to Equal Employment Opportunity EEO, subcontracting and training. It is the Sponsor’s responsibility to ensure that the contract includes EEO utilization goal and that the Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, disability or marital status. The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, national origin, age, disability or marital status. Such actions shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Additionally, the Sponsor shall ensure the Contractor shall post notices in conspicuous places, available to employees and applicants for employment. Notices are available from the United States Department of Labor (USDOL) setting forth the provisions of this non-discrimination clause. The Contractor shall not use the goals or affirmative action requirements to discriminate against any person because of race, color, religion, sex, national origin, age, disability or marital status. The Federal statutory authority for Equal Employment Opportunity provisions is contained in 23 U.S.C. 140(a), 23 CFR 230, 41 CFR 60-1 and 60-4, and Executive Order 11246. State statutory authority is contained in Section 85 of the Highway Law, Section 428 of the Transportation Law, NYS Executive Law Article 15-A, 5 NYCRR 140 et seq and the rules promulgated there under. See Appendix 12-1 Equal Opportunity Requirements for Federal-aid Contracts for a more detail discussion on EEO requirements.
12.3.2.6 Required Contract Provisions for Federal-Aid Construction Contracts (FHWA 1273)

**ALL** Federal-aid highway contracts are bound by a variety of requirements under Federal laws, rules and regulations. These requirements address issues such as: general contract administration, non-discrimination, non-segregated facilities, payment of predetermined minimum wage, statements and payrolls, records of materials, supplies and labor, subletting and assigning of the contracts, safety and accident prevention, false statements concerning highway projects, clear air and water pollution control, contractor lobbying activities, and other aspects of the contract and/or Contractor responsibilities. FHWA-1273 *Required Contract Provisions Federal-Aid Construction Contracts* (Appendix 12-1) includes detailed descriptions and explanations of these requirements and **MUST** be included in **ALL** Federal-aid contract documents.

12.3.2.7 Authority Delegation

NYSDOT Specifications refer to NYSDOT employees (Chief Engineer, Deputy Chief Engineer Structures, etc.,) and functional units (Structures, Traffic and Safety, etc.,) to provide for approvals or to perform functions. Local Project Sponsors may or may not have access to these resources depending on NYSDOT’s level of oversight.

Full NYSDOT oversight projects will use the Standard Specification ‘as is’ with no modifications unless approved by NYSDOT. Sponsored projects with no direct NYSDOT oversight must define the authorities and functional responsibilities for projects using NYSDOT standard specifications.

Typically, approval authority will be delegated to the Responsible Local Official (RLO.) In the event the RLO is not a Licensed Professional, he can still have approval authority if he is acting on a certification provided by a Licensed Professional. Functional Unit actions may need to be performed by Contract. An example; Subsurface exploration would be performed by an approved Geotechnical Consultant and not the NYSDOT Geotechnical Engineering Bureau.

These delegated authorities should have been approved by the RLPL and documented in the Project Management Plan and can now also be included in the Construction Management Plan that should be in development at this time in the project delivery process.

**12.4 ADDITIONAL CONTRACT REQUIREMENTS**

12.4.1 APPENDIX 12-2 INCLUSIVE

In addition to the contract requirements identified in Appendix 12-1, the following contract requirements **MUST** be included from Appendix 12-2 if NYSDOT Standard Specifications are **NOT** used.

12.4.1.1 Prevailing Wage Rates, Use of Convict Labor and Materials

Appendix 12-2 Provisions Relating to The New York State Labor Law, Prevailing Wages, and The Use of Convict Labor and Materials on Federal and State Contracts describes the requirements that **ALL** contracts let by NYS Agencies, Municipalities, Sponsors and/or Public Authorities **MUST** comply by including current Federal and State requirements regarding prevailing wage rates, various employment practices, and the use of convicts and/or convict-produced materials. The Appendix **MUST** be included in the contract documents.

Federal wage rates and New York State prevailing wage rates **MUST** be included in the contract
proposal. A Contractor is obligated to pay the higher of the two, as both are stated as minimum rates. Historically, New York State’s wage rates are higher than the Federal wage rates. The only exception is for contracts for projects off the highway right-of-way or on highways classified as local streets or minor rural collectors where Federal rates are not required to be in the contract.

Federal wage rates **MUST** be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, (202) 512-1800. The wage rates are posted at [http://www.gpo.gov/davisbacon](http://www.gpo.gov/davisbacon). If internet access is not available, the Federal wage rates may be obtained from the RLPL. New York State wage rates should be obtained from the New York State Department of Labor’s website at [http://www.labor.state.ny.us](http://www.labor.state.ny.us). The Sponsor **MUST** file for a Public Rate Case (PRC) determination from the NYSDOL, Bureau of Public Work, Bldg. 12, Room 130, State Office Campus, Albany, New York 12240, Phone (518) 457-5589. The PRC determination **MUST** be included in the contract proposal.

### 12.4.1.2 Buy America Requirements and Waivers

Appendix 12-2 Buy America Provisions contains language regarding "Buy America Requirements and Waivers for Federal and State Contracts" and **MUST** be incorporated into the contract documents.

23 CFR 635.410 requires **ALL** bidders for Federal or Federal-aid contracts to submit bids based on furnishing domestic steel and iron materials (manufacturing processes including application of coatings **MUST** be performed domestically). The contract will be awarded to the bidder who submits the lowest total bid based on furnishing domestic steel and iron materials. Foreign source materials may be used if the total project bid using foreign source materials is 25% less than the lowest total bid using domestic materials. When steel and iron materials are used in a project, the requirements of this section do not prevent a minimal use of foreign steel and iron materials if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or $2,500, whichever is greater. The cost is the value of the steel and iron products as they are delivered to the project. NYSDOT may request a waiver of the provisions of this section if: (i) The application of those provisions would be inconsistent with the public interest; or (ii) Steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities that are of a satisfactory quality.

### 12.4.1.3 Disadvantaged Business Enterprise Utilization

49 CFR Part 26 requires **ALL** Federal-aid contracts, administered by NYSDOT with a dollar value of at least $1 million dollars, **MUST** include Disadvantaged Business Enterprise (DBE) utilization goals. It is the Sponsor’s responsibility to ensure that the contract includes DBE utilization goal. NYSDOT has a DBE plan approved by FHWA. Based on that plan, NYSDOT has established contract goals. If a Sponsor chooses to use a different goal than that established by NYSDOT, the Sponsor **MUST** either demonstrate that insufficient opportunities exist within the contract to support the goal, or they **MUST** present a DBE Plan to NYSDOT for approval by FHWA which will typically take six months for review and approval. Local preference programs **MUST** be approved by FHWA and are not typically allowed. See Appendix 12.2-1 for more details on NYSDOT’s DBE program. The New York State DBE Registry is accessible at [http://biznet.nysucp.net/](http://biznet.nysucp.net/).

### 12.4.1.4 Special Training Provisions

Appendix 12-2 Requirements Regarding Training in Federal Aid Contracts Training Special Provision discusses the objectives of the Special Training Provision. The purpose is to provide training opportunities to minority, socio-economically disadvantaged persons and women in the construction trade for the following purposes:
1. To maintain a pool of qualified minority, socio-economically disadvantaged persons and women to replace those journey workers who, in the natural course of events, will leave the workforce; and

2. To provide minority, socio-economically disadvantaged persons and women as indentured apprentices or trainees in those geographic areas where shortages of journey workers are recognized because of the Contractor’s inability to meet the Equal Employment Opportunity (EEO) goals set forth in the contract.

12.4.1.5 Changed Conditions and Disputed Work Provisions

23 CFR 635 112(e) requires ALL FHWA funded contracts let by NYS Agencies, Municipalities, Sponsors, and/or Public Authorities to provide a process for equitable contract adjustments and to resolve contract disputes. 23 CFR 635.109, entitled Standardized Changed Conditions Clauses, contains three contract clauses (found in Appendix 12-2) that MUST be included in each contract VERBATIM. For Sponsors using NYSDOT Specifications, these clauses are included and do not have to be incorporated in the Construction Contact.

12.4.2 Retainage Provisions

In accordance with New York State Finance Law, Section 139-f, NYSDOT does not hold retainage or permit Contractors to withhold retainage. Also, in accordance with 49 CFR 26.29, NYSDOT does not hold retainage from the Prime Contractor and prohibits the Prime Contractor from holding retainage from subcontractors. Payments MUST be made within seven calendar (7) days of the acceptance of completed work.

49 CFR 26 allows the Sponsor three options to comply with Federal-aid retainage provisions. All Sponsors utilizing NYSDOT’s Disadvantaged Business Enterprise (DBE) Program Plan are restricted to option (1) as specified in 49 CFR 26.29. Sponsors who have their own DBE plan approved by FHWA may use options (2) or (3).

(1) Hold no retainage from the Prime Contractor:
   - Prohibit the Prime Contractor from holding retainage from subcontractors.

(2) Hold no retainage from the Prime Contractor:
   - Allow the Prime Contractor to hold retainage from subcontractors.
   - Require the Prime Contractor to make prompt and full payment of any retainage held within thirty days* (30) after subcontractor’s work is satisfactorily completed. Per NYS General Municipal Law, Section 106-b, payments must be made within seven calendar (7) days. (Because of the conflict between federal and State Law, the stricter requirements of the NYS General Municipal Law will apply.)

(3) Hold retainage from the Prime Contractor:
   - Provide for prompt and regular incremental acceptances of portions of the Prime Contract.
   - Pay retainage to the Prime Contractor based on these acceptances.
   - Require the Prime Contractor to pay all retainage owed the subcontractor for satisfactory completion of work within thirty days* (30) after payment to the Prime Contractor. Per NYS General Municipal Law, Section 106-b, payments must be

---

Footnotes:
3. As of the issuance of this document no Sponsor working with NYSDOT has their own FHWA approved DBE plan.
made within seven calendar (7) days. (Because of the conflict between federal and State Law, the stricter requirements of the NYS General Municipal Law will apply.)

**12.4.3 Prompt Payment Provisions**

NYS General Municipal Law Section 106-b and NYS Finance Law Article 9, § 139-f were modified to require the Prime Contractor to pay their subcontractors and suppliers within seven (7) calendar days (formerly fifteen calendar days) of receipt of payment from the public owner/sponsor, and provides for interest on late payments for all public works contracts after July 21, 2008. Any contract provisions stating any other payment schedule will not be allowed; contracts cannot modify state finance law.

**12.5 CONTRACT GUIDANCE AND COMPLIANCE**

Failure to comply with ALL Federal and State laws, rules and regulations may result in NYSDOT and FHWA removing their participation from the project and resulting in the loss of Federal-aid. Costs found to be ineligible after payment was made to the Sponsor MUST be repaid to New York State. The NYSDOT will reduce current or future reimbursement claims on the same or other projects the Sponsor may have with NYSDOT if the Sponsor fails to repay. The State may deduct other State or Federal-aid due to the Sponsor from future payments to the Sponsor. All Sponsors should refer to Chapter 4 Local Project Agreements for rules and regulations regarding possible repayment of funds to the NYSDOT. For additional construction contract administration and compliance, refer to Chapter 15 Administer Construction Contracts.

23 CFR 635 describes Federal regulations governing construction contracts let by a Sponsor for which the Sponsor anticipates Federal reimbursement. 23 CFR 635.104(a) requires construction contracts to be awarded to the lowest responsible bidder as determined by a competitive bidding process. The Sponsor MUST comply with Federal-aid competitive bidding requirements. The NYSDOT is the primary recipient of FHWA funding, therefore, NYSDOT MUST monitor and assure compliance with Federal regulations on contracts initiated by a project Sponsor, or subcontracts initiated by the Prime Contractor, that anticipates receiving Federal funds.

- **For contracts off the State Highway System or National Highway System (NHS)** - A written certification from the Sponsor to the RLPL that ALL requirements and appropriate appendices were included in the contract bid documents is required.
- **For contracts on the State Highway System or NHS** - Contract bid documents MUST be submitted to the RLPL for a completeness review and approval by the Regional Director (RD) and/or FHWA prior to contract advertisement.
- See Table 8-1 of Chapter 8 Design Procedures for approval requirements.

**12.5.1 Force Account Work by Sponsors**

23 CFR 635.104(a) requires competitive bidding for construction contracts unless, as provided in 23 CFR 635.104(b), some other method is more cost effective. Force account construction is one of the other methods utilized. 23 CFR 635.201-205 documents the Federal requirements for Force Account Construction. NYSDOT or FHWA MUST approve ALL requests to use Force Account Work on Local let construction projects, (See Table 8.1 Design Related Approval Matrix). The Sponsor’s request MUST justify why a ”no bid force account work” is included in the contract. This can be justified by showing how it is cost effective to use the force account method vs. the competitive bidding (i.e., during emergency conditions). This request is called a
Public Interest Finding (PIF). See sample PIF letters in Appendix 12-4, Sample Public Interest Finding Letters.

12.5.1.1 Use of Sponsors’ Equipment or Materials

Generally, municipal Sponsors **CANNOT** require the Prime Contractor to use the Sponsor's equipment or materials as a condition or pre-condition of awarding the contract. However, if documented in the Public Interest Finding, exceptions may be allowed by FHWA. Equipment **MUST** be acquired through competitive bidding or produced by municipal forces; the Contractor **MUST** have the option to use their own equipment. Cost for equipment **MUST** be based on rental rates or unit prices and points of availability shall be documented in the PS&E package.

**Note:** Sponsors cannot profit from the rental of their equipment or materials.

12.5.2 Civil Rights Requirements

**ALL** Federal-aid contracts, administered by NYSDOT, **MUST** include required Civil Rights provisions. Sponsors **MUST** comply with NYSDOT’s Civil Rights provisions by adhering to the NYSDOT’s EEO and DBE requirements.

12.5.3 Residency Requirements

23 CFR 635.110(b) prohibits the Sponsor from imposing unusual contract specifications including conditions for award or submitting a bid such as residency requirements, geographical or other restrictions which tend to restrict competition. Such conditions **CANNOT** be part of the solicitation for bids or the bid proposal package nor appear in any advertisement for bids.

12.5.4 Specialized Experience Requirements

Occasionally, contracts will require specific expertise or specialized experience, such as historic preservation contracts or computerized, integrated traffic signal systems. It is permissible to include expertise or experience requirements for specialized work in a local contract as a condition of award. The special requirements for determining the lowest responsible bidder should be clear, reasonable and consistent with standard industry practices. For instance, on historic preservation, several years of experience in the historic preservation field, or at least three completed historical preservation contracts similar in size and scope would be a reasonable requirement if the contract required that level of expertise. Requirements of special expertise **CANNOT** be written to preclude any bidder from submitting a bid and can only be used to determine the lowest responsible bidder. Below is an example of an appropriate clause for historic preservation work which may be included in a bid proposal package.

**Due to the highly sensitive nature of the historic preservation work in this contract, as a condition of award, bidders must have at least ______ years experience working with historic structures, including work on similar contracts or structures. The bidder must include in its bid package a list of current and previously completed historic preservation contracts, including the name of the contract owner, a contact person, and telephone number so that references can be verified. The contract will be awarded to the lowest responsible bidder who meets the experience specifications.**
12.5.5 Wicks Law Requirements

Wicks Law, NYS General Municipal Law, Section 106-b, modifications went into effect on July 1, 2008. These provisions apply if a local let contract involves building construction and the total contract value exceeds:

- $3 million in Bronx, Kings, New York, Queens, and Richmond Counties,
- $1.5 million in Nassau, Suffolk and Westchester Counties, or
- $500,000 in all other counties in New York State.

NYS General Municipal Law, Section 106-b requires the contract owner to bid and execute separate contracts for general construction, plumbing, heating/ventilating/air conditioning and electrical components for building construction. For ANY project, which does not meet the above thresholds and not “let” with separate contracts this law applies in the following ways:

- All bidders **MUST** submit with their bid a sealed list of the subcontractors that will perform the Plumbing, H/V/AC and Electrical work.

- The successful low bidder’s sealed list will be opened, and the Contractor is required to use the list of subcontractors unless there is a legitimate construction need to change the subcontractor. The Sponsor’s approval is required.

- The sealed lists are returned unopened to the non-selected bidders.

Section 106-b of the NYS General Municipal Law, known as Wicks Law, applies to state agencies, certain public benefit corporations, municipalities, school districts and boards of cooperative educational services, but does not apply to private building construction. This is a New York State statute and the NYSDOT has no authority to grant waivers.

12.5.6 Prequalification

NYS General Municipal Law, Section 103 allows political subdivisions (municipalities) with populations over 50,000 to prequalify bidders. The prequalification program establishes guidelines governing the qualifications of bidders for construction/procurement contracts. These programs are allowed so long as the Sponsor maintains an appropriate list of qualified bidders who meet the Sponsors’ established standards. The established standards shall consider the prospective bidder’s experience and the past performance of work completed by the prospective bidder as well as:

1. the prospective bidders’ ability to undertake the type and complexity of work;
2. the financial capability, responsibility and reliability of the prospective bidder for such type and complexity of work;
3. the record of the prospective bidder in complying with existing labor standards and maintaining harmonious labor relations;
4. the prospective bidder’s compliance with equal employment opportunity requirements and anti-discrimination laws, and demonstrated commitment to working with minority and women-owned businesses through joint ventures of subcontractor relationships; and
5. the record of the prospective bidder in protecting the health and safety of workers on public works projects and job sites as demonstrated by the prospective bidder’s experience modification rate for each of the last three years.

The Sponsor’s prequalification process **MUST** have a documented appeals process for firms denied a place on a pre-qualified list. **NYSDOT MUST** review and approve any prequalification provisions.
12.5.7 Project Labor Agreement

NYS Labor Law, Section 222 allows Sponsors to use Project Labor Agreements (PLAs). Project labor agreement shall mean a pre-hire collective bargaining agreement between a Contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only Contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work. NYSDOT MUST review and approve all PLAs.

12.5.8 Warranties and Specialty Items

23 CFR 635.413 generally prohibits the Sponsor from requiring a Contractor to warrant or guarantee its overall workmanship for some time after the contract work is accepted. Warrantees and guarantees are not generally allowed on Federal-aid contracts and should not be part of the bid proposals. Routine maintenance warranties and warranties for items not within the control of the Contractor are prohibited. Federal regulations allow states to use their own approved procedures for the design and construction of Federal-aid contracts off the National Highway System (NHS), but since New York State does not use warranty procedures, any specific Sponsor requests to use warranty clauses would have to be submitted to the RLPL for NYSDOT approval. Standard manufacturers and suppliers’ warranties on installed equipment and materials are allowed under Federal regulations without additional approval. See Chapter 9 Standards and Specifications.

12.5.9 Using Alternate Bidding

If the Sponsor utilizes an alternate bid process to stay within budget limits, the alternate bid process MUST be clearly described in the bid proposal (Format for Alternate Bidding in this chapter). A Sponsor CANNOT use an alternate process whereby the Sponsor may randomly choose from among the alternative bid items. A random process may create an impression of impropriety. The method described in the Alternative Bidding Section of this chapter has been accepted by the FHWA.

A Sponsor may choose alternate bidding to maximize the benefits of the funding available for a contract. In general, the concept allows for Contractors to bid first on the elements of the basic contract scope, and submit alternate bids on work outside of the basic contract scope: the alternate bid items. These alternates can be additions or deletions from the basic contract scope, or both. If the Sponsor receives bids on the basic scope which are less than the Engineer’s Estimate for the basic scope, bids on the alternate items are considered according to a predetermined order of priority, so long as the total bid price remains under the total contract budget. Bids on the basic scope of the contract and the alternate items are submitted at the same time and opened at the same time. Conversely, if all bids exceed the Engineer’s Estimate, some Sponsors may delete alternate bid items subject to a priority ranking to stay within the contract budget.

12.5.9.1 Format for Alternate Bidding

The use of alternate bid items is permissible under strict circumstances. To assure bidders of the integrity of the competitive bid process, the criteria and formula for determining the low bidder, in an alternate bid process, MUST be fully and clearly described in the bid proposal documents. The bid solicitation MUST advise potential bidders that alternate bidding will be used. Whether adding or deleting alternate items, the Sponsor MUST prioritize the alternate bid items and follow a rational sequence when selecting the alternate items. The Sponsor is not free to pick and choose among the alternates. The following format MUST be adhered to.
EXAMPLE: If a budgeted figure **CANNOT** be exceeded, the total budget figure should be announced at the public bid opening just prior to opening the bids. The bid proposal should clearly state the criteria on which award will be based, as follows:

- If any bids for the base bid plus Alternates 1-3 come under the budget figure, the award will be made based on the base bid plus Alternates 1-3; however,

- If all bids for the base bid plus Alternates 1-3 exceed the budget figure, the award will be based on the base bid plus Alternates 1 and 2; however,

- If all bids for the base bid plus Alternates 1 and 2 exceed the budget figure, the award will be based on the base bid plus Alternate 1; however,

- If all bids for the base bid exceed the budget figure, the award will be based on the base bid and Alternate 4 (deduct item); however,

- If all bids for the base bid and Alternate 4 (deduct item) exceed the budget figure, the award will be based on the base bid and Alternates 4 and 5 (deduct items); however,

- If all bids for the base bid and Alternates 4 and 5 (deduct items) exceed the budget figure, the award will be based on the base bid plus Alternates 4, 5, and 6 (deduct items).

Scenarios #1, #2, and #3 on the following page illustrate the above example in determining the low bidder when alternate bid items are used.

### SCENARIO #1

**BUDGET FIGURE $200,000**

<table>
<thead>
<tr>
<th>BIDDER</th>
<th>BASE BID</th>
<th>ALT.#1</th>
<th>ALT.#2</th>
<th>ALT.#3</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$150,000</td>
<td>$20,000</td>
<td>$20,000</td>
<td>$20,000</td>
</tr>
<tr>
<td>B</td>
<td>$170,000</td>
<td>$15,000</td>
<td>$ 7,000</td>
<td>$ 7,000</td>
</tr>
<tr>
<td>C</td>
<td>$185,000</td>
<td>$17,000</td>
<td>$10,000</td>
<td>$ 3,000</td>
</tr>
<tr>
<td>D</td>
<td>$175,000</td>
<td>$18,000</td>
<td>$ 5,000</td>
<td>$15,000</td>
</tr>
</tbody>
</table>

**BIDDER B is the low bidder, using base bid plus Alternates 1-3, for a total of $199,000.**

### SCENARIO #2

**BUDGET FIGURE $200,000**

<table>
<thead>
<tr>
<th>BIDDER</th>
<th>BASE BID</th>
<th>ALT.#1</th>
<th>ALT.#2</th>
<th>ALT.#3</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$196,000</td>
<td>$ 8,000</td>
<td>$ 8,000</td>
<td>$ 8,000</td>
</tr>
<tr>
<td>B</td>
<td>$192,500</td>
<td>$10,000</td>
<td>$ 2,000</td>
<td>$ 8,000</td>
</tr>
<tr>
<td>C</td>
<td>$194,000</td>
<td>$11,000</td>
<td>$ 6,000</td>
<td>$ 9,000</td>
</tr>
<tr>
<td>D</td>
<td>$190,000</td>
<td>$15,000</td>
<td>$ 5,000</td>
<td>$15,000</td>
</tr>
</tbody>
</table>

**BIDDER D is the low bidder based on the base bid only. All other applications of the formula exceed the budget figure.**
### SCENARIO #3

**BUDGET FIGURE $200,000**

<table>
<thead>
<tr>
<th>BIDDER</th>
<th>BASE BID</th>
<th>ALT.#1</th>
<th>ALT.#2</th>
<th>ALT.#3</th>
<th>ALT.#4</th>
<th>ALT.#5</th>
<th>ALT. #6</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$220,000</td>
<td>$ 8,000</td>
<td>$ 9,000</td>
<td>$ 8,000</td>
<td>($10,000)</td>
<td>($10,000)</td>
<td>($10,000)</td>
</tr>
<tr>
<td>B</td>
<td>$225,000</td>
<td>$ 7,000</td>
<td>$ 7,000</td>
<td>$ 8,000</td>
<td>($ 8,000)</td>
<td>($ 7,000)</td>
<td>($ 8,000)</td>
</tr>
<tr>
<td>C</td>
<td>$215,000</td>
<td>$10,000</td>
<td>$ 7,000</td>
<td>$ 6,000</td>
<td>($10,000)</td>
<td>($ 6,000)</td>
<td>($ 5,000)</td>
</tr>
<tr>
<td>D</td>
<td>$230,000</td>
<td>$10,000</td>
<td>$10,000</td>
<td>$ 7,000</td>
<td>($12,000)</td>
<td>($10,000)</td>
<td>($ 8,000)</td>
</tr>
</tbody>
</table>

**BIDDER C is the low bidder, based on the base bid plus Alternates 4 and 5 ($215,000 minus $10,000) (Alt. #4) and minus $6,000 (Alt. #5), total price $199,000 in accordance with the formula.**

### 12.5.10 Insurance Provisions

Insurance is recommended in all Federal-aid contracts. See NYSDOT’s Standard Specifications, Section 107-06 for more details. If NYSDOT Standard Specifications are not used, the following types of insurance are recommended in each contract:

- Liability and Property Damage Insurance
- Contractor’s Liability (A and B)
- Owners Protective Liability Insurance
- Contractor’s Protective Liability Insurance
- Completed Operations Liability Insurance
- Commercial General Liability Insurance

#### 12.5.10.1 New York State Insurance Requirements

The following insurance provisions are required when Contractors and their suppliers intend to conduct business in New York State.

- Workers’ Compensation Insurance
- Automobile Liability and Automobile Property Damage Insurance

Please include any insurance policy riders in Bid package.