



<p>SUBJECT Approval of Specification Modifications (<i>Project Special Provisions and Contract Change Orders</i>)</p>	<p>FINAL NUMBER TSB13-01(B)</p>	<p>EFFECTIVE DATE 05/07/2013</p>	<p>VALIDATION DATE 00/00/0000</p>	<p>SUPERSEDES or RESCINDS NEW</p>
<p>TOPIC/PROGRAM Specifications</p>	<p>APPROVED SIGNATURE Original signed by: Catherine M. Nelson, P.E. Technical Services Manager/Chief Engineer</p>			

PURPOSE

To provide clarification concerning Department of Justice (DOJ) review and approval of modifications to the Standard Specifications or Boilerplate Special Provisions, and new project-specific special provisions.

GUIDANCE

The 2008 Modified Exemption from DOJ Legal Sufficiency Review and Approval for ODOT Highway Construction Contracts (“Exemption”) identifies the conditions under which ODOT is required to obtain DOJ review and approval for modifications made to the Standard Specifications and Boilerplate Special Provisions

DEFINITIONS

Standard Specifications –The Standard Specifications describe the contractual relationship and responsibilities between the contractor and the Agency. It provides directions, provisions, and requirements necessary for performing public improvement projects.

Boilerplate Special Provisions – The Boilerplate Special Provisions modify the Standard Specifications by adding, replacing or deleting information from them. Sections of the Standard Specifications may have a related Boilerplate Special Provision. Some Boilerplate Special Provisions are also stand-alone specifications. The Boilerplate Special Provisions are selected and assembled for the Project Special Provisions. All Boilerplate Special Provisions have been reviewed and approved for use by the ODOT Sr. Specifications Engineer, the Department of Justice Business Transactions Section and Federal Highway (FHWA), when required.

Project Special Provisions – The Project Special Provisions is a single document consisting of a set of assembled Boilerplate Special Provisions and any project-specific special provisions specific to an individual project. The Project Special Provisions and the Standard Specifications together make up the contract specifications.

Contract Change Order – A written order issued by the Agency to the contractor modifying work required by the contract, or adding work within the scope of the contract, and, if applicable, establishing the basis of payment for the modified work.

BACKGROUND/REFERENCE

This guidance is intended to help ensure ODOT, local agency and consultant staff will remain in compliance with the Exemption issued to ODOT by DOJ. Compliance with the requirements of the Exemption will ensure ODOT does not lose its ability to operate under the current, or any future Exemptions.

EXPLANATION

2008 Modified Class Exemption - The 2008 Modified Class Exemption issued by DOJ provides the Agency with an exemption from the requirement contained in OAR 137-045-0060 for DOJ legal sufficiency review and approval of all public improvement contracts. Without this Exemption, **all** construction contracts and Contract Change Orders would be required to be submitted for DOJ review and approval which would have a significant impact on both the project delivery timeline and budget.

The Exemption contains several conditions that must be met in order for the Exemption to apply:

1. **Scope** – The Exemption applies to all competitively bid (Low-Bid) public improvement contracts bid and awarded by ODOT. It does not apply to contracts exempted from competitive bidding (*such as Design-Build, A+B,C,D and CM/GC alternative contracts*), which require full DOJ review and approval of all contract documents and Contract Change Orders.
2. **Specifications** – All contracts must use the 2008 version of the Oregon Standard Specifications for Construction and Boilerplate Special Provisions previously approved for legal sufficiency by DOJ as follows:
 - (a) Other than fill-in-the-blank portions, using the options provided, of the Part 00100 – General Conditions of the Standard Specifications, ODOT or its contractors may not add to, delete from or otherwise modify the Part 00100 – General Conditions without first obtaining DOJ approval.
 - (b) The Part 00200 through 03000 – Technical Specifications of the Standard Specifications is excluded from legal sufficiency review and approval. However, ODOT may not add, delete or modify any general legal requirements to the Technical Specifications without first obtaining DOJ approval. Legal requirements, as determined by DOJ, include:
 - Warranties
 - Surety Bonds
 - Liquidated Damages
 - Penalties and Bonuses
 - Incentives / Disincentives

- General legal requirements of the type addressed in the Part 00100 – General Conditions. *This includes additions, deletions or modifications to any of the measurement and payment provisions.*

DOJ has determined that the conditions of the Exemption apply to all modifications made:

- Before the procurement is initially issued (*prior to advertisement*);
- During the procurement phase by addendum;
- Before or at the time the original contract is signed; or
- By Contract Change Order after the original contract is signed.

Legal Provisions – Measurement and Payment - The measurement and payment subsections for parts 00200 through 03000 (Technical Specifications) are considered legal provisions. Among the most fundamental elements of a contract are payment and how one determines or measures payment. The inclusion of measurement and payment in the Part 00100 – General Conditions (Sections 00190 and 00195), further reflect their status as legal provisions.

General Rule - Under the conditions of the Exemption, the general rule is that adding any new general legal requirements, or changing (by modification, addition or deletion) any of the general or specific legal terms (including measurement and payment terms or approach) requires DOJ review and approval prior to incorporation.

Exceptions to General Rule – For measurement and payment provisions, DOJ and ODOT have reached an agreement on the following exceptions to the general rule:

(a) Using Boilerplate Special Provisions – The ODOT Specifications Unit is charged with obtaining DOJ review and approval on all Boilerplate Special Provisions prior to release for general use. Each Boilerplate Special Provisions includes instructions to the user on how the language is to be used and what modifications can be made. If the instructions are followed correctly, and no additions, modifications or deletions are made to the measurement or payment provisions, further reviews, concurrences or approvals are ***not required*** by the Sr. Specifications Engineer, the Measurement and Payment Technical Resource, or DOJ.

(b) Project Special Provisions or Contract Change Orders – If the Project Special Provisions or Contract Change Order modifies any of the measurement or payment terms from one basis (such as “acre”) that is specifically identified in the Technical Specifications, to another measurement or payment basis (such as “Sq Yd”) that is already identified in Sections 00190 or 00195, and the description of how to arrive at or pay for the chosen measurement approach is not altered, then review and approval by DOJ is ***not required***. The modification must still be submitted to the Measurement and Payment Technical Resource for review and concurrence. Allow 14 calendar days for this review and concurrence.

EXAMPLE

<u>Pay Item</u>	<u>Unit of Measure</u>
Weed Control	Acre Sq Yd

When DOJ Review/Approval is Required: All other deletions, additions or modifications to the measurement or payment requirements of the Technical Specifications, not identified under “Exceptions (a) or (b)” above, must be submitted to the Measurement and Payment Technical Resource for review and concurrence prior to incorporation. Allow 14 calendar days for this review.

If DOJ review and approval of the measurement or payment modification is required, the Measurement and Payment Technical Resource will either:

- Submit the modification to the Sr. Specifications Engineer who will coordinate with DOJ for review and approval (prior to contract award), or
- Coordinate with DOJ for review and approval (after contract award).

Allow an additional 21 calendar days for DOJ review and approval.

As noted above, other than fill-in-the-blank portions, no part of the Part 00100 – General Conditions may be modified in any way at any time without prior DOJ review and approval.

RESPONSIBILITIES

This guidance applies to all state and federal aid projects regardless of delivery by Agency or outsourced forces.

Responsible Party	Action
Designer, Specification Writer, Professional of Record	Submit all Project Special Provisions to the applicable Technical Resource for review and concurrence.
ODOT Technical Resources	Provide timely review and response to all requests for review of Project Special Provisions and Contract Change Order modifications.
Project Manager	When applicable, submit all legal modifications to the contract Specifications, which are intended to be incorporated into the Contract by Contract Change Order, to the Measurement and Payment Technical Resource or Contract Administration Engineer for review and concurrence or approval.
Measurement and Payment Technical Resource (<i>Contract Administration Engineer or designee</i>)	<p>Pre-Award: Review all Project Special Provisions measurement and payment modifications and coordinate with the Sr. Specifications Engineer to obtain DOJ review and approval when required.</p> <p>Post-Award: Review all additions, deletions or modifications to the contract Specifications measurement and payment provisions and Section 00100 modifications which are incorporated by Contract Change Order, and coordinate with DOJ for review and approval when required.</p>

<p>ODOT Sr. Specifications Engineer</p>	<p>Pre-award: Review all Project Special Provisions that either:</p> <ul style="list-style-type: none"> ▪ Add, delete or modify any of the Standard Specifications, Volume 1 (Part 00100 – General Conditions) or related Boilerplate Special Provisions, ▪ Add, delete or modify any of the general legal requirements in the Standard Specifications, Volume 2 (Parts 00200 through 03000 – Technical Specifications) or related Boilerplate Special Provisions. <p>Coordinate with DOJ for review and approval when required.</p> <p>Post-Award: Support the Measurement and Payment Technical Resource in the Contract Change Order review, concurrence and approval process.</p>
<p>Department of Justice (DOJ) Business Transactions Section</p>	<p>Provide review and approval on Project Special Provision and Contract Change Order specification modifications as requested.</p>

ACTION REQUIRED

1. When there are project-specific, special circumstances that warrant the use of something other than the Agency’s Standard Specifications and Boilerplate Special Provisions, the expectations and guidance in TSB12-01(B) – Project-specific Special Provisions will be followed.
2. All edits to the Standard Specifications, Volume 1 – General Conditions and related Boilerplate Special Provisions, other than fill-in-the-blank sections using only the options listed, are required to be reviewed and granted approval by DOJ before they can be used. Prior to contract award, the Sr. Specifications Engineer shall be contacted for approval before these types of modifications are incorporated. The Sr. Specifications Engineer will coordinate with DOJ for review and approval. After contract award, the Contract Administration Engineer (CAE) shall be contacted for approval before these types of modifications are incorporated by Contract Change Order. The CAE will coordinate with DOJ for review and approval.
3. All edits to the Standard Specifications, Volume 2 – Technical Specifications, that add, delete or modify any general legal requirements are required to be reviewed and granted approval by DOJ before they can be used. Prior to contract award, the Sr. Specifications Engineer shall be contacted for approval before these types of modifications are incorporated. The Sr. Specifications Engineer will coordinate with DOJ for review and approval. After contract award, the CAE shall be contacted for approval before these types of modifications are incorporated by Contract Change Order. The CAE will coordinate with DOJ for review and approval.
4. **Project Special Provisions:** Prior to contract award, any additions, deletions or modifications made to any of the measurement or payment provisions in the Standard Specifications, Volume 2 – Technical Specifications, associated, approved Boilerplate Special Provisions, or new project-specific special provisions, except for

those modifications identified as Exceptions under the Explanation section, are required to be submitted to the Measurement and Payment Technical Resource for review and concurrence prior to incorporation. The Measurement and Payment Technical Resource will work with the Sr. Specifications Engineer to jointly reach agreement on which measurement and payment modifications will require DOJ review and approval. The Sr. Specifications Engineer will coordinate with DOJ for the required review and approval. Once DOJ approval of the modification is received, the Sr. Specifications Engineer will return the approval to the Spec Writer with a copy to the Measurement and Payment Technical Resource. Allow 14 calendar days for the Technical Resource review and concurrence, and an additional 21 calendar days for DOJ review and approval when required.

- 5. Contract Change Orders:** After contract award, all additions, deletions and modifications to measurement or payment provisions in the contract Specifications (*Standard Specifications and Project Special Provisions*), which are incorporated into the contract by Contract Change Order, must be submitted to the Measurement and Payment Technical Resource for review, concurrence or comment prior to the execution of the Contract Change Order. The Measurement and Payment Technical Resource will determine if DOJ review and approval is also required and will coordinate the DOJ review and approval process. The Sr. Specifications Engineer will provide support to the Measurement and Payment Technical Resource in this process. Allow 14 calendar days for the Technical Resource review and concurrence, and an additional 21 calendar days for DOJ review and approval when required.

SPECIAL INSTRUCTIONS

This guidance is effective immediately. This guidance will remain in effect until it is incorporated into the ODOT Construction Manual and ODOT Specification and Writing Style Manual, or superseded by a revised DOJ Class Exemption.

CONTACT INFORMATION

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