

EP 1165-2-2

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U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL HIGHWAY ADMINISTRATION  
BUREAU OF PUBLIC ROADS  
WASHINGTON, DC 20591

28 January 1970

Lieutenant General F. J. Clarke  
Chief of Engineers  
Department of the Army  
Washington, DC 20310

Dear General Clarke:

Under Title 23, United States Code, Highways, and the Regulations for the Administration of Federal Aid for Highways (Title 23, Code of Federal Regulations, Chapter 1), which are applicable to all Federal-aid highway projects regardless of the amount of Federal-aid funds involved, certain basic requirements must be met as a prerequisite to the participation of Federal-aid highway funds in the cost of highway construction to be undertaken in accordance with agreements between the Corps of Engineers, a State and Public Roads.

To aid in the solution of questions and problems encountered in connection with the construction of highways necessitated by reservoir and other developments undertaken by the Corps, when there is to be Federal-aid participation in the cost of such construction, the Corps of Engineers and the Bureau of Public Roads have a Memorandum of Understanding dated 3 April 1967. In consideration of statutory regulatory and procedural changes which have become effective since April 3, 1967, it has been determined advisable to revise the present Memorandum of Understanding.

The understandings set forth below have been drafted to incorporate appropriate modifications and additions into this new Memorandum of Understanding. To insure compliance with these basic requirements, your concurrence in the following understandings is requested. Such concurrence will effect the termination of the Memorandum of Understanding dated April 3, 1967.

1. Right-of-way Acquisition. Federal-aid participation in the acquisition of rights-of-way by or in behalf of a State is restricted to the cost of rights-of-way actually acquired and dedicated for highway purposes subsequent to Public Roads authorization to proceed with right-of-way acquisition for the project for which such costs are incurred. Since costs may include costs incurred and paid pursuant to State law for damages to property and relocation assistance resulting from the taking of rights-of-way or construction of highways, provided the State has submitted, and the Director of

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Engineering charges for preliminary and construction engineering may be negotiated on a lump-sum basis by agreement between the Corps and the State, provided, a showing is made that the charge is fair and reasonable. Public Roads cannot reimburse the States for construction engineering on any project in excess of 10 percent of the Public Roads share of the contract construction cost except that such limitation shall be 15 percent for primary, secondary, and urban projects in any State with respect to which the Secretary of Transportation finds such higher limitation to be necessary.

Where preliminary engineering is performed by the State, Federal-aid participation in the State's pro rata share of the costs will be in accordance with usual Public Roads-State procedures.

Employment of a consulting engineer by a State to perform the preliminary engineering or construction engineering shall be in accordance with Bureau of Public Roads Policy and Procedure Memorandum 40-6.

3. Public Hearings. The responsibility for holding public hearings pursuant to Public Roads Policy and Procedure Memorandum 20-8 rests upon the State. The State must furnish the certified transcripts of the hearings to the Public Roads division engineer before the latter may approve the plans, specifications, and estimates, and authorize the advertisement for bids except as otherwise provided in Article 12 of this memorandum for projects constructed under an approved Secondary Road Plan agreement.

4. Approval of Plans, Specifications, and Estimates. Pursuant to Section 106, Title 23, United States Code, Public Roads shall approve all plans, specifications, and estimates whether prepared by the State or the Corps except as otherwise provided in Article 12 of this memorandum for projects constructed under an approved Secondary Road Plan agreement.

Plans, specifications, and estimates, prepared by the Corps shall be approved by the State prior to submittal to Public Roads.

The Corps shall approve all plans, specifications, and estimates prepared by the State. However, in such cases, when the construction work is to be performed pursuant to a contract awarded by the State, the approval of the Corps shall not constitute a warranty as to the structural and engineering soundness and integrity of such plans, specifications, and estimates, but is limited to a determination that the substitute facility is consistent with the financial and legal responsibility of the Corps. In all other cases, the approval of the plans, specifications, and estimates by the Corps shall constitute an unqualified approval.

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9. Certificate of Materials. The State is required to certify that all of the materials used on the project meet the pertinent specification requirements of the contract. The requirements of Public Roads will be met if the State's certificate is based on a corresponding certificate from the Corps. All test reports covering materials used in the project shall be available for examination by Public Roads.

10. Contract Provisions. When the contract is awarded by the Corps, it is understood that Standard Forms 23-A, General Provisions, and 19-A, Labor Standards Provisions, will be incorporated into the construction contract. When requesting a wage rate decision from the Department of Labor for a project, the Corps will include a reference to Section 113, Title 23, United States Code.

It is further understood that the Corps will require the successful bidder to submit a sworn statement to Public Roads certifying that the bidder has not taken any action in restraint of free competitive bidding.

When the contract is awarded by the State, the contract provisions and notice regarding non segregated facilities shall be in accordance with those required for Federal-aid projects as set forth in the Exhibits to Public Roads Policy and Procedure Memorandum 40-4.

11. Changes. The party awarding the contract, i.e., the State or the Corps, will notify Public Roads and the Corps or the State, as appropriate, of proposed changes in the project work as soon as the need for such changes becomes apparent.

All change orders must be approved by Public Roads in accordance with the provisions of Public Roads Policy and Procedure Memorandum 21-6.3, as a condition of Federal-aid participation in the change order except as otherwise provided in Article 12 of this memorandum for projects constructed under an approved Secondary Road Plan agreement.

The Corps shall approve all change orders. However, in those instances where the plans, specifications, and estimates are prepared by the State, and the State subsequently awards the contract, the approval of the Corps shall not constitute a warranty as to the structural and engineering soundness and integrity of work covered by such change orders, but is limited to a determination that the change order is consistent with the financial and legal requirements of the Corps. In all other circumstances, the approval of change orders by the Corps shall constitute an unqualified approval.

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Six copies of the Instructional Memorandum and the Policy and Procedure Memorandums cited in this Memorandum of Understanding are enclosed for your convenience. Additional copies may be obtained by Corps field offices from any regional or division office of Public Roads.

Sincerely yours,

/s/

R. R. Bartelsmeyer  
Director of Public Roads

Approved:

/s/

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Lieutenant General F. J. Clarke  
Chief of Engineers  
Department of the Army

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Date