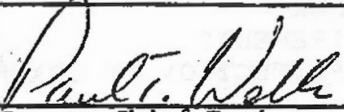


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| MODIFIED BY EI 92-033 EFFECTIVE 7/10/92 | <h1>ENGINEERING INSTRUCTION</h1> <p>NEW YORK STATE DEPARTMENT OF TRANSPORTATION</p> | |
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This Department is committed to protecting the health and safety of all persons who have contact with its construction projects. This includes Department employees, the public, and employees of Department contractors and consultants. Specific responsibilities for protecting health and safety are spelled out in all construction contracts, and in various Department policies and procedures.

In spite of the best intentions of Department staff and our contractors, situations occasionally arise where the contractor's attention to health and safety responsibilities or other items of work does not measure up to the Department's expectations. In such cases, specific steps must be taken by the Department to obtain contractor compliance with the contract requirements. It is essential that the steps taken are consistent with the terms and provisions of the contract and Department policies and procedures. In particular, the contractor must be given proper notice of deficiencies and an opportunity to correct them.

Transmitted with this Engineering Instruction is a publication entitled "Guidelines for Obtaining Contractor Compliance with Health and Safety Requirements and Other Contract Provisions". The subject matter covered is quite lengthy, and the principles involved are complex. To provide adequate discussion and explanation, the resulting publication is considerably longer than would normally be transmitted as an Engineering Instruction. Therefore, the full publication is appended to this Instruction, with a brief summary provided in the following paragraphs. Highlighted paragraph headings below correspond to Sections in the full publication.

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|---------------------------------------------------------------------------------------------------|-------------------|------------------|----------------|
| Manual - ENGINEERING INSTRUCTION | Code EI-92-017 | Date 04/13/92 | Page 2 of 4 |
| Subject: CONTRACTOR COMPLIANCE WITH HEALTH AND SAFETY REQUIREMENTS & OTHER CONTRACT PROVISIONS | | | |

CONTRACTOR RESPONSIBILITIES for carrying out health and safety are spelled out in the Standard Specifications, and in some cases in the contract documents (such as in special notes and design details). Relevant sections include:

- § 107-01 LAWS, PERMITS AND LICENSES
- § 107-05 SAFETY AND HEALTH REQUIREMENTS
- § 619-1.02M BASIC MAINTENANCE AND PROTECTION OF TRAFFIC - PROJECT SITE PATROL
- § 102-14 ITEMIZED PROPOSAL
- § 102-17, Article 1, WORK TO BE DONE
- § 105-02 ORDERS TO FOREMAN
- § 105-08 COOPERATION BY THE CONTRACTOR

Additional details are provided in EB 86-11, "Construction Division Policy Statement on Safety and Summary of Responsibilities".

CONTRACT COMPLIANCE PROVISIONS are discussed in detail. The primary provisions of the Standard Specifications include:

- § 102-17, Article 8 NO ESTIMATE ON CONTRACTOR'S NON-COMPLIANCE
- § 102-17, Article 11 RIGHT TO SUSPEND WORK AND CANCEL CONTRACT
- § 103-03 RIGHT TO SUSPEND WORK AND CANCEL CONTRACT
- § 105-01 STOPPING WORK
- § 102-17, Article 13 DELAYS, INEFFICIENCIES AND INTERFERENCE
- § 619-5 MAINTENANCE AND PROTECTION OF TRAFFIC - BASIS OF PAYMENT
- § 105-08 COOPERATION BY THE CONTRACTOR
- § 108-03 FAILURE TO COMPLETE WORK ON TIME
- § 108-04 EXTENSION OF TIME

These provisions generally apply to any failure by the contractor to adhere to contract requirements, whether for health and safety issues, or for other items of work. A basic difference, however, is that most items of work can be corrected after the fact or payment adjustments made if deficiencies are noted. Failure to address health and safety concerns, however, may result in a serious accident or injury which cannot be reversed or corrected.

HEALTH AND SAFETY PLANNING is essential to ensure project safety. Proactive management of health and safety is as essential as managing other aspects of the work. The following steps are routinely used for this purpose:

| | | | |
|---------------------------------------------------------------------------------------|-----------|----------|--------|
| Manual | Code | Date | Page |
| - ENGINEERING INSTRUCTION | EI-92-017 | 04/13/92 | 3 of 4 |
| Subject: | | | |
| CONTRACTOR COMPLIANCE WITH HEALTH AND SAFETY REQUIREMENTS & OTHER CONTRACT PROVISIONS | | | |

- Pre-bid constructibility reviews of proposed contract documents by Regional Construction Group for health and safety issues, including M&PT.
- Routine review of health and safety requirements in preconstruction conferences.
- Project health and safety plan provided by the contractor.
- Periodic project-level meetings on health and safety.

BASIC PRINCIPLES OF CONTRACT MANAGEMENT must be followed when dealing with health and safety issues, the same as for all other issues relating to contractor compliance. These basic principles are that all actions must be PROGRESSIVE, CONSTRUCTIVE, DOCUMENTED, and INFORMED. Sound contract management includes routine monitoring of contractor performance commensurate with the type of work, and the risks associated with it.

STEPS TO GAIN COMPLIANCE are spelled out in detail. While the specific actions must be based on the circumstances of the particular project situation, there are a number of basic steps that must be followed for the procedure to be effective in obtaining the desired results. It is expected that sound, businesslike management of all contracts will routinely result in compliance with all contract requirements without the need to proceed past the first few steps. In the normal order they occur, these include:

1. Inform the contractor of noted deficiencies, document in project records.
2. Follow up to ensure deficiency is corrected.
3. Imminent Danger situations (high likelihood of serious accident) require immediate corrective action or work stoppage.
4. Verbal instructions when appropriate, progressing to written notice.
5. Regional Construction Group kept informed.
6. Project-level meeting with Regional Construction Group participation for deliberate or willful deficiencies of a serious nature, with Main Office notification.
7. Withholding payments, ordering dismissal of uncooperative or incompetent workers.
8. Correction of M&PT deficiencies, including work stoppage.
9. Payment deductions, liquidated damages for M&PT deficiencies.
10. Regional Office Meeting, with notice of possible termination.
11. Main Office Meeting with Deputy Chief Engineer (Construction).
12. Contract Review Unit review of contractor responsibility.
13. Contract Termination.

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|---------------------------------------------------------------------------------------------------|-------------------|------------------|----------------|
| Manual - ENGINEERING INSTRUCTION | Code EI-92-017 | Date 04/13/92 | Page 4 of 4 |
| Subject: CONTRACTOR COMPLIANCE WITH HEALTH AND SAFETY REQUIREMENTS & OTHER CONTRACT PROVISIONS | | | |

DISPUTED WORK AND CONTRACT CLAIMS by the contractor may result if the contractor disagrees with the actions ordered by the Department. Section 105-14, "DISPUTED WORK" details the procedure to be followed by the contractor to pursue any disputes. However, during the dispute process, the contractor is required by the contract to progress work as ordered.

INVOLVEMENT OF OSHA AND OTHER REGULATORY AGENCIES is often helpful in providing technical assistance to Department staff in interpreting technical requirements of health and safety regulations. However, this Department has a vital interest in having the contract health and safety requirements met by the contractor, and those interests transcend the regulatory and punitive issues involved. The contract provides adequate means to obtain contractor compliance with health and safety requirements, and referrals to enforcement agencies are not to be considered a first or preferred step to resolving health and safety issues. Referrals to enforcement agencies are to be made only on a coordinated basis through the Regional Construction Group, after adequate consideration of all available options, and after the contractor has been made fully aware of the deficiencies and the consequences of failing to correct them. The Main Office Construction Division is to be informed of all such referrals.

This brief SUMMARY provides the highlights of management policies and the contract administration procedures available to ensure contractor compliance with health and safety requirements, and will serve to provide a general introduction to the topic. Those involved in project situations involving failure by a contractor to meet health and safety responsibilities are referred to the full-length document for specific details on the procedures to be followed. That document is also suggested as a training guide to be used to develop an improved understanding of contract administration procedures by Department Construction staff. Eventually, it is the intention of the Construction Division to prepare a detailed Construction Health and Safety Manual. At that time, this material will be incorporated in that Manual. In the meantime, this Engineering Instruction and attached Guidelines should be distributed to EICs and other staff involved in contract management.

NEW YORK STATE DEPARTMENT OF TRANSPORTATION
GUIDELINES FOR OBTAINING CONTRACTOR COMPLIANCE
WITH HEALTH AND SAFETY REQUIREMENTS
AND OTHER CONTRACT PROVISIONS

INTRODUCTION

This Department's Safety and Health Policy, issued on May 29, 1991, emphasizes this Department's commitment to "an aggressive, pro-active safety and health program to ensure minimal risk for its employees, for the employees of contractors and consultants, and to protect members of the public exposed to Transportation operations." This policy clearly includes all construction operations, contractors, and consultants. These Guidelines review Contractor responsibility for health and safety requirements, and summarize procedures to be used to obtain compliance with those responsibilities. As for all other aspects of Department construction contracts, sound, businesslike management and open communication with the contractor will routinely result in compliance with all contract requirements without the need to invoke specific compliance measures. However, the procedures discussed herein are to be followed when it becomes necessary to direct extra attention to compliance with contract requirements.

CONTRACTOR RESPONSIBILITIES

Department award of construction contracts assumes that the contractor will use the right materials, will follow the right construction procedures, and will adhere to appropriate safety practices (among other considerations). It is the responsibility of Department staff to secure reasonably close conformity with these requirements, to communicate a clear and consistent message to that effect, and to effectively administer the contract to achieve this expectation.

The Standard Specifications include a number of contractual provisions requiring contractors to protect the health and safety of workers and the public:

Section 107-01 - The Contractor must adhere to all Federal, State, and local laws and regulations.

Section 107-05 - The contractor is required to perform all work with due regard to the health and safety of workers and

the public. Included are requirements to comply with Title 29 Code of Federal Regulations, Part 1926, Safety and Health Regulations for Construction (OSHA), as well as hardhat requirements, blasting and pipeline safety requirements, and protection of excavations.

Section 619-1.02M - The Contractor is placed on notice that maintenance and protection of traffic is as important as the construction itself. All operations must be conducted in a manner to ensure the convenience of all travelers and the abutting property owners and their safety, as well as the safety of the Contractor's employees.

Both the Itemized Proposal (§102-14) and Article 1 of the Agreement (§102-17) clearly state that the work is to be completed "in accordance with the plans and specifications." Two additional sections of the specifications further address the Contractor responsibilities for completing and directing the work in a manner consistent with the contractual and specification requirements:

Section 105-02 - Requires orders given by the Engineer or his representative to be received and obeyed by the foremen having charge of the work, as well as by the Contractor or his superintendent. This relieves the Engineer and his representatives from the responsibility of supervising and directing the Contractor's workers. This is especially important in the case of health and safety requirements, because it requires that the Contractor, or his superintendent or foreman, rather than the individual workers, must receive orders from the Engineer and take the steps necessary to obey them. Except in rare circumstances or emergencies, directives relative to health and safety matters are to be made to the Contractor's supervisory staff, not to individual workers.

Section 105-08 - Requires the Contractor to personally direct the work, or to provide a competent superintendent, and to employ labor and equipment sufficient to complete the work in the manner and time specified. It further requires that all workers must have sufficient skill and experience to properly perform the work. These requirements apply to health and safety provisions as well as to other requirements of the contract and specifications.

The provisions cited above clearly establish Contractor responsibility for protecting the health and safety of the public and all workers on the project. Those responsibilities are further explained in EB 86-11, "Construction Division Policy Statement on Safety and Summary of Responsibilities".

CONTRACT COMPLIANCE PROVISIONS

The provisions cited above establish the responsibility of the contractor for addressing and carrying out the work in compliance with health and safety requirements to protect both the workers and the public. Responsible contractors generally meet these requirements without the need for constant reminders or direction by Department staff. The recent addition of a specification requirement to provide project health and safety plans further clarifies the contractor's responsibilities, and will strengthen management of health and safety by contractor's staff. However, situations sometimes arise where legitimate differences of opinion result in responses to safety concerns by the contractor that do not satisfy Department requirements. In more extreme cases, individual contractor's workers, project supervisors, or even company managers may fail to adequately address health and safety issues. This may result in failure to address a single specific concern in an adequate manner, or it may result in continuing lapses in addressing safety concerns. When either occurs, Department staff must take appropriate steps to ensure that the contractor is made aware of the deficiencies, is directed to correct those deficiencies in a timely manner, and follows through to ensure that deficiencies are corrected.

The Standard Specifications include several provisions addressing lack of contractor compliance with contract requirements, and the Department has developed operating procedures designed to obtain compliance when that becomes necessary. Generally, these provisions and procedures apply to any failure by the contractor to adhere to contract requirements, whether for health and safety issues, or for other items of work. A basic difference, however, is that most items of work can be corrected after the fact or payment adjustments made if deficiencies are noted. Failures to address health and safety concerns, however, may lead to a serious accident or injury which cannot be reversed or corrected. The correction of health and safety deficiencies, therefore, must be addressed at once. Under no circumstances is it acceptable to permit a recurring pattern of known health and safety violations to continue, even if they seem relatively minor, or to overlook a serious deficiency even briefly to enable completion of a task or operation. In short, health and safety violations must be corrected as soon as they are identified, and must not be permitted to recur.

Provisions in the Standard Specifications to gain compliance if a contractor does not willingly address health and safety requirements include the following:

Section 102-17, Article 8 of the Agreement - Provides that as long as lawful or proper direction concerning the work

remains uncomplished with, no estimate shall be made or paid. This includes failure by the contractor to comply with health and safety requirements.

Section 103-03 and 102-17, Article 11 of the Agreement - Provides that work by the Contractor may be suspended or terminated if the work upon the contract is not being performed according to the contract or for the best interest of the State.

Section 105-01 - Permits the Engineer to stop work (or any part of the work) by written order if conditions on the project are considered sufficiently deficient as to seriously affect the safety of the public or the workers, or is causing serious disruption to traffic operations.

Section 102-17, Article 13 of the Agreement - Precludes the Contractor from making any claims for costs incurred due to a stop-work order issued pursuant to Section 105-01.

Section 619-5 - Provides that no payment for Basic Maintenance and Protection of Traffic shall be made for any days in which there are substantial deficiencies in any of the requirements for maintenance and protection of traffic. It further requires the assessment of liquidated damages for each subsequent calendar day that a deficiency previously cited is not corrected or is permitted to recur. In addition to the payment deduction and assessment of liquidated damages, the Engineer is empowered by this section to correct deficiencies by any means he deems appropriate, if the contractor fails to provide adequate maintenance and protection of traffic for a period of 24 hours. The cost of such work shall be deducted from any monies due the Contractor. Finally, this section permits the Engineer to stop all contract work in the event of major nonconformance with maintenance and protection of traffic requirements if prompt Contractor compliance is deemed not to be obtainable.

Section 105-08 - Permits the Engineer to require the discharge of any worker deemed incompetent or unfit to perform the work.

Sections 108-03 and 108-04 - These sections empower the Department to assess engineering costs against the contractor for any extension of the project completion date necessitated by undue delays caused by the Contractor. Liquidated damages may be assessed in addition to the engineering costs. Delays caused by stop-work orders issued pursuant to Section 105-01 are considered undue delays

caused by the Contractor, and would thus result in the assessment of Engineering costs and liquidated damages, to the extent that those delays necessitate an extension of time.

HEALTH AND SAFETY PLANNING

As for other areas of the work, the preferred manner to deal with compliance problems relative to safety is to avert them before they develop. This is best accomplished by clearly defining health and safety requirements in the contract documents, and by discussing the approaches to be taken with the Contractor prior to the start of the work. The following steps are routinely utilized for this purpose:

1. Constructibility review of PS&E by the Regional Construction Group is important to ensure that the project Traffic Control Plan adequately addresses project needs, and that any special or extraordinary health and safety concerns are identified so the Contractor can take them into consideration in preparing the bid.
2. Discussion of health and safety matters must be included in the preconstruction conference. A standard format or checklist should be utilized to ensure that all important points are covered. Although the Regional Construction Safety Coordinator needs to be involved in the process, scheduling often prevents routine attendance. The procedure should thus be standardized to permit the Construction Supervisor, or whomever chairs the meeting, to cover the material.
3. A Project Safety and Health Plan is required for all projects. It must be adequate to document the Contractor's commitment to health and safety responsibilities, and to identify the approach to be taken to address project-specific health and safety concerns. Engineering Bulletin 92-04 provides guidelines to be added to the Construction Supervision Manual for Project Safety and Health Plans.
4. Periodic meetings at the project level involving project managers from the Contractor, the Department, and the Consultant are important to make certain that all parties understand the specific actions to be utilized on the project to protect workers and the public. An initial meeting coinciding with the start of work is to be followed by periodic meetings throughout the life of the project as appropriate. Additional guidance was added to the Construction Supervision Manual by EB 92-04.

These steps are intended to see to it that all staff involved in the project are aware of the health and safety requirements, and that adequate procedures are in place to address them. Active management of health and safety issues and open communication between Department and contractor staff are regarded as the best approach to secure contractor compliance with all contract health and safety provisions.

BASIC PRINCIPLES OF CONTRACT MANAGEMENT

Effective management of Department construction projects is based on the premise that adequate advance planning, sound, businesslike dealings with the contractor, and open communications between all project personnel will routinely result in completion of the project in compliance with all requirements of the contract documents. It includes routine monitoring of contractor performance commensurate with the type of work, and the risks associated with it. However, in those rare instances when a contractor fails to address health and safety responsibilities or any other contract requirements, the Department's project staff must initiate appropriate steps to ensure that deficiencies are corrected in a timely manner, and are not permitted to recur. Each situation that arises represents a unique combination of factors, and it is thus impossible to prescribe a standardized corrective procedure that will always be appropriate. To the contrary, the Department staff involved must utilize good judgement and rely upon their knowledge and experience to select appropriate steps to deal with each particular situation in the most effective manner. Department staff must acknowledge their dual roles as engineers/technicians and contract managers/administrators. The contract is a legal document, and disagreements with the contractor ultimately become legal issues. There are several principles that must always be followed to achieve the desired results. Basically, the actions taken must be progressive, constructive, documented, and informed. These principles are defined as follows:

Progressive - A recurring pattern of the same or similar deficiencies cannot be addressed effectively by repeating the same corrective actions over and over. Each time it becomes necessary to address a recurring deficiency, the level of action should be intensified. It is not productive to repeatedly note a deficiency and bring it to the contractor's attention, without taking additional steps to gain the desired result. To the contrary, repeated warnings issued without follow-up action may signal to the contractor that the Department is not serious in its desire to obtain compliance, but is merely providing lip-service or attempting to protect its interest if an accident should

occur. It is thus a basic principle that corrective action must be progressive, with each successive deficiency addressed more intensely than the preceding one.

Constructive - Any compliance actions are primarily designed to improve future performance rather than to punish the contractor for deficiencies that have already been addressed. Referring a contractor to sources of technical assistance needed to correct a deficiency is constructive. On the other hand, assessing liquidated damages or withholding payment to address a deficiency that was promptly and properly corrected may be counter-productive. Likewise, addressing a noted health and safety deficiency through an OSHA referral that results in a citation and fine may not be constructive. The problem can be more effectively addressed through contractual procedures to gain immediate correction, rather than relying upon OSHA enforcement, which may ultimately result in the imposition of a fine, but only after a very lengthy process.

Documented - Other than for minor concerns which are quickly and permanently addressed by the contractor, health and safety deficiencies and the associated corrective actions must be documented in the project records. This means noting the deficiency in the inspector's report and Engineer's diary, along with the specific steps needed to resolve the deficiency. If verbal instructions are issued to the contractor, it is to be noted to whom and when the instruction was given. In the case of recurring or serious deficiencies, it is necessary to issue written instructions to the contractor. Once instructions are issued, it is especially important to document the contractor's response. In most cases, concerns will be addressed by the contractor in a timely and effective manner, and this should be documented in subsequent IRs or diary entries. If an adequate response is not provided, or if the deficiency is permitted to recur, that must also be documented, along with the progression to the next step. Without full documentation of deficiencies, and the Department's attempts to resolve them, it is difficult to apply stronger contractual remedies in cases where a contractor repeatedly fails to meet health and safety responsibilities. Although such documentation may appear to be burdensome paperwork to project staff, it is essential if the Department is to successfully address contractor deficiencies through contractual remedies (including contract termination) and to successfully defend its actions in any subsequent legal proceedings.

Informed - To be effective and defensible, compliance actions initiated at the project level must be in full conformance with the plans, specifications, and all other contract provisions, as well as being technically sound. In addition, compliance actions that go beyond routine project inspection and supervision are to be undertaken with the knowledge and concurrence of appropriate managers. At any time it becomes necessary to initiate actions more substantial than the issuance of verbal instructions or simple written instructions, the EIC must discuss the situation with the Construction Supervisor. This will help to ensure that the actions taken are consistent and appropriate, and will be supported if the contractor objects. Likewise, the Regional Construction Engineer and the Regional Director need to be informed if serious or recurring problems are not permanently and effectively resolved. In addition, it is appropriate to consult the Regional Construction Safety Coordinator for assistance and advice, as well as other technical staff in the Regional office. However, it is important that such contacts are coordinated and handled in a consistent manner to guard against piecemeal or inconsistent approaches to problem solving.

Finally, in the case of very serious or recurring problems, it is necessary to coordinate with the Main Office. By working through the Construction Division, additional assistance and coordination can be provided to address difficult situations. Once alerted, Construction Division staff will decide whether it is appropriate to involve other Main Office units, such as the Office of Legal Affairs or other appropriate groups. However, it is important that the Regions first contact the Construction Division before other Main Office units are involved to ensure consistent, coordinated responses.

STEPS TO GAIN COMPLIANCE

Considering these four basic principles, project staff must select appropriate procedures to address any observed health and safety deficiencies at the project level. Typically, the procedures followed will include the following, to the extent necessary to achieve the desired results:

1. Inform the contractor of observed deficiencies relating to health and safety requirements. Appropriate judgement must be used relative to the urgency of other tasks and the nature of the deficiency. The instruction will normally be provided by the EIC or inspection staff to a foreman or superintendent, depending upon the seriousness of the

deficiency and required immediacy of response. In some cases, the required corrective action will be clearly described, based on the contract documents. In other cases, it may be the responsibility of the contractor to determine the appropriate response. It is not the responsibility of Department staff to go beyond the specific details provided in the contract documents to determine how a contractor meets health and safety requirements. Except for minor concerns which are addressed essentially on-the-spot, the deficiency and instructions given must be documented in the project records.

2. Adequate follow-up must be provided to make sure that the contractor addresses the deficiency adequately and in a timely manner. The corrections made are to be documented, to the same extent the deficiency was documented.
3. If the deficiency results in an imminent danger situation, the EIC, or his representative, must issue an order to the contractor to alleviate the imminent danger situation immediately. This may mean temporarily suspending or stopping an operation until the hazard can be removed, removing workers from a dangerous situation, temporarily stopping or rerouting traffic, or changing the method used to complete a task. Imminent danger is defined as a situation in which it is possible for an accident to occur at any moment without further warning, and which would result in a serious or fatal injury if it were to occur. Typical examples include workers installing pipe in a deep trench without shoring, high-speed vehicular traffic exposed to a sharp dropoff immediately adjacent to the traveled way with no channelizing devices in place at night, and workers on a narrow scaffold at a considerable height with no railings or other fall protection present. In each of these situations, the contractor must either immediately remove the workers or alleviate the hazard. If a stop-work order is issued, the verbal order is to be followed as soon as practical by a written order.
4. When verbal instructions provided to the contractor by the EIC or his representatives do not achieve a satisfactory response, it becomes essential to issue a written notice to the contractor, calling his attention to the deficiency and the required response. It is generally appropriate to reference specific contract provisions and requirements to substantiate the instructions provided.
5. The Construction Supervisor is to be informed in a timely manner of any compliance actions other than routine

instructions responded to by the contractor, and with any problem of recurrence.

6. If a contractor deliberately and willfully violates or neglects a contract requirement, resulting in the exposure of workers or the public to a serious hazard, immediate steps are necessary to require the contractor to correct the situation (if not already resolved), and to implement safeguards to prevent a recurrence. This may require a full or partial stop-work order. It almost always involves a meeting with the contractor's project superintendent, the EIC, the Construction Supervisor, and other appropriate contractor and Department staff to review the concerns, and to reach an agreement on their resolution. A similar meeting is appropriate for any situation in which the same or similar safety and health deficiencies recur, and the contractor has failed to implement effective procedures to prevent the recurrence. In such cases, the Construction Division is to be notified by the Region.
7. In addition to issuing a stop-work order, other contract provisions may be invoked at this stage to obtain compliance. These include withholding the processing of an estimate until corrections are made, and directing the removal of an individual worker or supervisor who is unable or unwilling to adhere to health and safety regulations. It is especially important, however, that work not be continued to proceed in such a manner that health or safety of the workers or public is substantially endangered, and then attempting to rectify the situation after the fact by withholding payment or other reactive steps. Instead, the steps taken must be sufficient to correct the deficiency and ~~alleviate the exposure of the workers and the public to the hazard.~~
8. In the case of deficiencies in maintenance and protection of traffic requirements, the actions must be designed to correct the deficiency as quickly and completely as possible. This again may require stopping the work until adequate traffic protection can be provided. In extreme cases, if a contractor cannot or will not address the concerns, other steps must be initiated by the EIC to restore an acceptable level of safety, according to the provisions of Section 619-5 of the Specifications.
9. It is not the intention of these procedures to penalize a contractor. However, it is also the Department's policy not to pay for services not provided. Therefore, the daily M&PT deduction is to be imposed for all substantial deficiencies or omissions. Adjustments to traffic controls are made

routinely throughout the life of most projects, with devices and treatments added or moved by the contractor as the need is identified. Obviously, a payment deduction should not be imposed in such cases. However, when an inadequacy occurs because the contractor did not provide devices or procedures that were clearly required by the contract, the deduction should ordinarily be imposed as soon as the deficiency is noted, even if Department staff had not directly called the deficiency to the contractor's attention. If not corrected at once, liquidated damages should also be assessed, pursuant to Section 619-5.

10. If the above steps are not sufficient to obtain a suitable and lasting response from the contractor, the next step is to direct the principal of the construction company to appear before the Regional Director or designated representative. Such a meeting would be held to inform the contractor's management of the nature of the deficiencies, the corrective actions required, and the contractor's responsibilities to address the health and safety concerns. At this time, the contractor will be placed on notice that continued failure to meet contractual responsibilities for health and safety may result in termination of the contract.
11. If at any time during the life of the contract it appears to the Region that the contractor is not making a reasonable and effective effort to meet contractual health and safety responsibilities, it is essential to inform the Construction Division of the situation. If the steps listed above are unsuccessful in obtaining compliance, the Construction Division (in consultation with the Region) will then direct the contractor to appear at a meeting in the Main Office to address all outstanding concerns, and to provide a plan of action suitable to the Department to ensure that health and safety responsibilities will be met for the remainder of the contract. The Region will be involved as a participant throughout this step.
12. The Contract Review Unit is authorized by the Commissioner to address matters dealing with contractor responsibility and performance, and to determine whether a contract should be awarded or terminated in the best interest of the State of New York. This three-member panel consists of Assistant Commissioners of various Offices, or their designated representatives. If the preceding steps are unable to obtain satisfactory performance, the Construction Division, with input from the Region, will recommend to the CRU a review of the situation, a meeting with the contractor, or other appropriate steps to compel compliance by the contractor. Following notification to the contractor, an

informal meeting is scheduled. At that time, the Construction Division presents facts relative to the alleged failures to meet health and safety responsibilities, and recommends appropriate remedies, which may include termination. The contractor is permitted to respond to the Department's presentation, and to present such facts as it deems relevant. The contractor is permitted legal representation, and in most cases, both the Department's legal counsel and the contractor's counsel may play important roles in the meeting. Following the presentations, the CRU discusses the matter and renders a decision. In extreme cases, a contract may be terminated if it is determined to be in the best interest of the Department. The CRU may also direct the contractor to take specific steps to address health and safety concerns in a responsible manner, with the understanding that further shortcomings may lead to termination.

13. Nearly all health and safety concerns will be effectively addressed by the first few steps listed above. Even in those rare instances in which a contractor fails or refuses to respond to the Department's instructions, resulting in a CRU review, the Department's goal remains to require the contractor to complete the work in compliance with the terms and conditions of the contract. Before termination of the contract can occur, the contractor must be provided ample opportunity to correct deficient performance. Therefore, if a contractor demonstrates to the CRU a firm resolve and an adequate plan of action to correct past deficiencies, the contractor may be given another chance to demonstrate acceptable performance. Although this may seem to the project staff and Regional Construction Group to be a rejection of their efforts to compel responsible performance by the contractor, it is in fact another step in the procedures mandated by law. If a CRU review results in another chance for the contractor to correct health and safety deficiencies, it becomes especially important for the Region to document subsequent performance, and to report immediately any significant deficiencies to the Construction Division. A follow-up meeting with the CRU would then be likely to result in termination with no further opportunities for corrective action provided.

DISPUTED WORK AND CONTRACT CLAIMS

Although every effort is made to spell out the health and safety requirements of the contract as clearly and completely as possible, it is not unreasonable to anticipate that honest differences of opinion will occasionally arise between the Department's staff and the contractor. The steps listed above

provide a number of opportunities to discuss and resolve such differences in a positive manner. In most cases, both parties will reach agreement on what constitutes reasonable compliance with the health and safety provisions. However, if agreement cannot be reached, the Department is empowered by the contract to require that the contractor complete the work as directed. The contractor's recourse is to follow the provision of the "Disputed Work" clause in Section 105-14 of the Specification. While every reasonable effort is made to resolve such disputes as early as possible, it is inevitable that some contract disputes lead to a contractor claim. This makes it even more imperative that basic principles -- documented, progressive, constructive, informed -- are adhered to, and that each of the steps in the compliance guidelines is utilized effectively. Adherence to these principles and steps provides the best chance of resolving differences before they progress to disputed work or claims. Furthermore, it offers the best chance for the Department to prevail in those rare cases where the differences cannot be resolved at an earlier stage, and progress to the Court of Claims.

INVOLVEMENT OF OSHA AND OTHER REGULATORY AGENCIES

Sections of the Standard Specifications cited in the introduction require contractor adherence to Federal, State, and local laws, rules, and regulations. These requirements are enforced by various agencies, including the U.S. Department of Labor OSHA, NYS Department of Labor, NYS Department of Environmental Conservation, NY State Police, Environmental Protection Agency, and others. It is in the vital interest of the State of New York for its contractors to comply with health and safety requirements and other regulations because these provisions impact directly on the cost and quality of its construction program, as well as the health and safety of its employees and the public. When deficiencies are noted that endanger health and safety on a Department project, our first response should be to invoke the relevant contract provisions to ensure that the contractor corrects the noted deficiencies at once.

Referrals to enforcement agencies are not to be considered a first step, especially in cases of contract requirements in which the Department has a direct interest. While the legal requirements incumbent upon the contractor as an employer to adhere to OSHA safety regulations cannot be overlooked, enforcement activities by OSHA are coincidental to the Department's concern for protecting the health and safety of workers and the public. In cases of ongoing serious or flagrant violations, when directions from Department staff have been ineffective in gaining lasting correction of the deficiency by the contractor, it is recognized that enforcement efforts by

OSHA are helpful in supporting Department efforts. After a full discussion of the situation by the EIC, the Regional Construction Safety Coordinator, and the Construction Supervisor or Regional Construction Engineer, a referral may be made to an OSHA District Office, providing details of alleged violations of OSHA Regulations by a contractor. However, before proceeding to this step, it is important that the contractor be notified of the alleged deficiencies, that efforts are initiated at the project level to correct them, and that the contractor is made aware that continued failure to correct the deficiencies will result in an OSHA referral. Under no circumstances should a contractor be "blind-sided" by making a referral to OSHA in an attempt to obtain enforcement citations, unless the contractor has first been informed of the deficiencies and the corrective action expected. Any OSHA referrals made by the Regional Office are to be reported to the Main Office at the time they are initiated.

Department staff, especially the Regional Construction Safety Coordinators, are expected to establish good working relationships with OSHA staff and other enforcement agencies in their Region, and to use those relationships as a source of technical support. Both OSHA and NYSDOL staff have considerable expertise in health and safety matters, and provide a valuable resource for identifying appropriate solutions to health and safety concerns, and for determining correct interpretations of health and safety regulations. While it is recognized that other Department staff may also initiate technical inquiries to these agencies, it is important that such inquiries are coordinated within the Region. It is desirable for such contacts to be initiated through, or with the knowledge of, the Regional Construction Safety Coordinator, or through an appropriate staff person in the Regional Construction Group. This coordination is essential to avoid over-burdening these agencies with redundant requests for information or assistance, and to ensure that the information obtained is interpreted and applied in a consistent manner.

The same principle applies to referrals or inquiries to other regulatory and enforcement agencies for matters other than health and safety. Such contacts should generally be pursued only after contractual remedies have been initiated, and only when they may be helpful in obtaining the desired performance, or to obtain technical information and assistance. Outside enforcement should not be sought to "punish" a contractor for unsatisfactory performance. The decision to initiate such contacts, especially for enforcement, are to be coordinated through the Regional Construction Group. Staff other than the Regional Construction Safety Coordinator typically have responsibility for matters such as environmental protection, labor laws, and other regulations. None-the-less, it is equally important to coordinate these

efforts to obtain and implement consistent results, and to avoid duplication of efforts.

SUMMARY

This Department, as an agency of the State of New York, has a vital interest in requiring that its contractors conduct all work in a manner that adequately safeguards the health and safety of the public and the workers. Specific health and safety requirements, as well as other rules and regulations, are spelled out in the Standard Specifications and other contract documents. Contract documents also include a number of provisions designed to ensure that the contractor adheres to these requirements.

Adequate advance planning, sound businesslike dealings with the contractor, and open communications between all project personnel will routinely result in completion of the project in compliance with all requirements of the contract documents. Occasional reminders and other directions to a contractor, for health and safety concerns as well as other issues, are a routine part of inspecting and supervising Department contracts. EICs and their staff are knowledgeable in the skills needed to provide such direction in an effective manner. On occasion, however, honest differences of opinion may arise between Department staff and its contractors as to what constitutes acceptable performance. In more rare instances, contractors may fail or refuse to meet contractual requirements relative to health and safety, as well as other requirements. In those cases, project staff must initiate specific steps to require contractor compliance with the terms and conditions of the contract.

In many respects, health and safety issues are no different than ~~issues relating to the materials supplied or the workmanship~~ provided. However, while faulty material or workmanship can be corrected after-the-fact, or payment denied or reduced, health and safety deficiencies cannot be made whole after a serious accident has occurred. It is therefore imperative that health and safety deficiencies are regarded with the utmost urgency, and that corrective action is provided before the work is allowed to progress.

When it becomes necessary to initiate action to obtain compliance, it is essential that the actions follow four basic principles -- they must be documented, progressive, constructive and informed. Although the specific steps to be taken must be selected to fit the specific job situation, there is a general pattern of steps that must always be followed to make sure that the contractor is provided proper notice, and to provide the best chance of achieving the desired results. These steps progress from informing the contractor of the required action, to job-site

and Regional Office meetings, meeting with the Construction Division, and ultimately to a termination hearing before the Contract Review Unit.

In situations involving imminent danger or other substantial risks to the health and safety of the workers or the public, the EIC must order the work stopped until that threat is alleviated or until the issues can be otherwise resolved. In certain situations, other contractual remedies may also be imposed. In addition, the assistance of outside agencies such as OSHA may be requested, either for technical assistance or for enforcement. However, outside enforcement is not to be used as a substitute for effective management of the contract using the provisions included for that purpose.

To avoid disappointment and disillusionment, it is important to recognize that contract management is a complex process. When honest differences of opinion arise between the Department and a contractor, or for whatever other reasons, the expected level of performance is not provided, adequate provisions are available to compel contractor compliance with the terms and conditions of the contract. The contractor also has rights under the contract, which include proper notification during the resolution of differences or deficiencies. Adherence to the basic principles and procedures described herein is essential to ensure that the desired results are achieved in a timely manner.