

DB Section 195 - Payment

DB195.00 Scope and Limit

(a) General - Agency will pay only for Price Centers incorporated into the Project or performed in accordance with the terms of the Contract. Price Centers listed in the Schedule of Prices do not govern payment.

Payment constitutes full compensation to Design-Builder for furnishing all Materials, Equipment, tools, labor, and Incidentals necessary to complete the Work; and for risk, loss, damage, and expense arising from the nature or prosecution of the Work or from the action of the elements, subject to the provisions of **DB General Provisions**, Subsection 170.80. Design-Builder shall include the costs of bonds and insurance for the Project in the Unit Price for each Price Item of Work to be performed.

(b) Essential or Incidental Materials or Work - When the Contract Specifications state that the Price Center Value (PCV) is compensation for certain Materials or Work essential or Incidental to the Price Center, the same Materials or Work will not be measured or paid under any other Price Center.

DB195.10 Asphalt Cement Material Price Escalation/De-escalation – An asphalt cement escalation/de-escalation clause will be in effect during the life of the Contract.

Agency reserves all of its rights under the Contract, including, but not limited to, its rights for suspension of the Work under **DB General Provisions**, Subsection 180.70, and its rights for termination of the Contract under **DB General Provisions**, Subsection 180.90, and this escalation/de-escalation provision shall not limit those rights

(a) Monthly Asphalt Cement Material Price (MACMP) - The Monthly Asphalt Cement Material Price (MACMP) will be established by Agency each month. For information regarding the calculation of the MACMP, and for the actual MACMP, go to Agency website at:

http://www.oregon.gov/ODOT/HWY/ESTIMATING/asphalt_fuel.shtm

If Agency selected index ceases to be available for any reason, Agency in its discretion will select and begin using a substitute price source or index to establish the MACMP each month. The MACMP will apply to all asphalt cement including but not limited to paving grade, polymer modified, and emulsified asphalts, and recycling agents. Agency does not guarantee that asphalt cement will be available for purchase at the MACMP.

(b) Base Asphalt Cement Material Price (Base) - The Base asphalt cement material price for the Project is the MACMP published on Agency website for the month immediately preceding the Proposal due date.

DB 195.10(c)

(c) Monthly Asphalt Cement Adjustment Factor (MACMP) - The Monthly Asphalt Cement Adjustment Factor will be determined each month as follows:

- If the MACMP is within $\pm 5\%$ of the Base, there will be no adjustment
- If the MACMP is more than 105% of the Base, then:
Adjustment factor = (MACMP) - (1.05 x Base)
- If the MACMP is less than 95% of the Base, then:
Adjustment factor = (MACMP) - (0.95 x Base)

(d) Asphalt Cement Price Adjustment – A price adjustment will be made for the Materials containing asphalt cement listed below. The price adjustment as calculated in (c) above will use the MACMP for the month the asphalt is incorporated into the Project. The price adjustment will be determined by multiplying the asphalt incorporated during the month for subject Materials by the adjustment factor.

The Materials for which price adjustments may be applicable are:

- Asphalt in HMAC
- Emulsified Asphalt in Fog Coat
- Asphalt in Tack Coat
- Asphalt in Emulsified Asphalt Surface Treatment
- Asphalt in Multiple Application Emulsified Asphalt Surface Treatment
- Emulsified Asphalt in Mixture
- Recycling Agent

DB195.11 Fuel Cost Price Escalation/De-escalation – A fuel escalation/de-escalation clause will be in effect during the life of the Contract.

Agency reserves all of its rights under the Contract, including, but not limited to, its rights for suspension of the Work under **DB General Provisions**, Subsection 180.70, and its rights for termination of the Contract under **DB General Provisions**, Subsection 180.90, and this escalation/de-escalation provision shall not limit those rights.

(a) Monthly Fuel Price (MFP) - A Monthly Fuel Price (MFP) will be established by Agency each month. For the actual MFP, go to Agency website at:

http://www.oregon.gov/ODOT/HWY/ESTIMATING/asphalt_fuel.shtml

The MFP for a given month will be the average weekly price obtained from the OPIS weekly listing dated the first Monday of that month for No. 2 diesel fuel for Portland, Oregon. Prices are based solely on rack and resellers' prices exclusive of freight, taxes, and special discounts. If the average weekly price is not posted by OPIS or is otherwise not available to Agency for the first Monday of any month for any reason, Agency may use the average weekly price posted by OPIS immediately before or after the first Monday of that month. If the average weekly prices cease to be available from OPIS for any reason, Agency in its

discretion, will select and begin using a substitute price source or index to establish the MFP each month. Agency does not guarantee that fuel will be available at the MFP.

(b) Base Fuel Price (Base) – The Base fuel price for this Project is the MFP published on Agency website for the month immediately preceding the Proposal due date.

(c) Monthly Fuel Adjustment Factor - A Monthly Fuel Adjustment Factor will be determined each month as follows:

- If the MFP is within $\pm 25\%$ of the Base, there will be no adjustment
- If the MFP is more than 125% of the Base, then:
Adjustment factor = $(\text{MFP}) - (1.25 \times \text{Base})$
- If the MFP is less than 75% of the Base, then:
Adjustment factor = $(\text{MFP}) - (0.75 \times \text{Base})$

(d) Fuel Price Adjustment – The fuel price adjustment for fluctuations in the cost of fuel may apply to the following major fuel usage items:

- General Excavation
- Embankment in Place
- Subgrade Stabilization
- Trench Excavation
- Stone Embankment
- Other Excavation
- Cold Plane Removal
- Concrete Pavement Diamond Grinding
- Base Aggregate, Shoulder Aggregate and Sub-base Aggregate (combined)
- Shoulder Aggregates (overlays)
- Cement Treated Base
- bituminous Base
- AC Mixture
- Aggregate in Chip Seal
- Emulsified AC Mixture
- Concrete Pavement
- Other PCC

At the time Design-Builder submits its Readiness-for-Construction (RFC) Plans and estimated quantities as required by **DB General Provisions**, Subsection 155.14(d), Design-Builder shall provide estimated fuel usage quantities for all major fuel usage items listed in the paragraph above or in **DB Special Provisions**, SP195.11(d) and that are applicable to the Project. Design-Builder is cautioned to consider that its operations may require more or less fuel.

(e) Fuel Consumption – Design-Builder shall submit monthly to Agency PM, the quantities installed for each of the major fuel usage items listed above and in **DB Special Provisions**, SP195.11(d). A price adjustment (\pm) to Design-Builder for fuel cost changes may be made if the MFP of a major fuel usage item differs 25% or more from the Base Fuel Price. This adjustment, if allowed by Agency, will be the product of the Monthly Fuel Adjustment Factor and the estimated monthly fuel used. The monthly fuel used will be determined by Agency PM by multiplying the quantities of Work accomplished during the month for the subject items, by the appropriate fuel factors.

If Design-Builder elects to use an alternate fuel (natural gas, wood pellets, propane, or other) the estimated fuel requirements will not be revised. Fuel cost adjustments will continue to be made as specified and will not be revised.

DB195.12 Steel Material Price Escalation/De-Escalation Clause – Subsections 195.12 through 195.12(d) contain the price escalation/de-escalation clause relating to steel materials (as defined in Subsection 195.12(d)) that is included in this Contract. For purposes of this Subsection, "Steel Material" means structural and reinforcing steel, steel studs, sheet piling, guardrail, ductile iron pipe and other steel products used for the construction, reconstruction or major renovation of a road or Highway. The steel escalation/de-escalation program applies only to Steel Material incorporated into permanent structures of the Project. This exclusive steel material price escalation/de-escalation clause, and the steel escalation/de escalation program described in this Subsection, are in effect for the life of this Contract, regardless of the number of steel material items, if any, that are included, and whether or not Design-Builder elects to participate in the steel escalation/de-escalation program according to Subsection 195.12(d).

(a) Steel Material Price Escalation/De-Escalation Participation - Design-Builder may elect to participate in the steel escalation/de-escalation program for the Project by submitting to Agency PM within 45 Calendar Days from NTP a completed Form TSE (Table of Steel Escalation) indicating each item of Steel Material for which Design-Builder elects to participate in the steel escalation/de-escalation program for the term of the Contract, and the estimated quantities of each selected item. Failure to submit Form TSE shall constitute an election by Design-Builder not to participate in the program. Failure to designate any particular item, or to provide a quantity estimate for any designated item, shall constitute Design-Builder's election not to participate in the program with regard to that item.

Agency reserves all of its rights under the Contract, including but not limited to its rights for suspension of the Work under **DB General Provisions**, Subsection 180.70 and its rights for termination the Contract under **DB General Provisions**, Subsection 180.90, and this steel material price escalation/de-escalation provision will not limit those rights. Adjustments for fluctuations in the cost of steel material will apply only to those steel items listed on Form TSE, and will be made using the respective steel Cost Basis (CB) listed.

(b) Monthly Steel Materials Value (MV) and Base Steel Materials Value (BV) - The Monthly Steel Materials Value (MV) will be established by Agency from the IDWPUSISTEEL1 Bureau of Labor Statistics (BLS), Producer Price Indexes (PPI), using non-seasonally-adjusted indexes only. Preliminary numbers may be referenced on the IDWPUSISTEEL1 BLS PPI for six (6) months or more before IDWPUSISTEEL1 BLS PPI determines they are final numbers.

Base Steel Material Value (BV) for the Project will be the MV published on Agency website for the month immediately preceding the Proposal due date. Agency will only publish values on the ODOT website for use after the IDWPUSISTEEL1 BLS PPI establishes the numbers as final numbers. The final values of MV and BV will be available at the following Agency website:

<http://www.oregon.gov/ODOT/HWY/ESTIMATING/steel.shtml>

Agency has no control over when the IDWPUSISTEEL1 BLS PPI establishes final values. Agency steel material price escalation/de-escalation adjustments made under Subsections 195.12 through 195.12(d) may not be reflected on payments made to Design-Builder for up to two (2) months after the applicable IDWPUSISTEEL1 BLS PPI values become final. The timing of Steel Material price escalation/de-escalation adjustments is an agreed term of this Contract and shall not constitute late payment under ORS 279C.570; nor shall Agency be responsible for paying interest on any such steel material price adjustments.

If Agency selected index ceases to be available for any reason, Agency in its discretion will select and begin using a substitute price source or index to establish the MV each month. The MV will only apply to steel material items selected by Design-Builder and provided in writing on Form TSE to the Agency PM. Agency does not guarantee that steel material will be available at any stated or implied materials price.

(c) Monthly Steel Materials Price Adjustment – If Design-Builder has properly submitted Form TSE to Agency PM identifying steel material items to be included in the steel escalation/de-escalation program, a price adjustment evaluation will be made for all steel material items selected. No adjustments will be made using the BV or MV until such time as they are listed as final values by the IDWPUSISTEEL1 BLS PPI. The price adjustment calculated in this provision for a given steel material item will use the MV for the month during which the Steel Material is incorporated into the Project, and added to the monthly Progress Estimate. A price adjustment will only be made if the MV for the month the steel material is incorporated and added to the monthly progress estimate differs by more than 10% from the BV. A price adjustment will be made, as and when required by Subsections 195.12 through 195.12(d), only for steel material items that were identified by Design-Builder on Form TSE.

The Monthly Steel Materials Price Adjustment will be determined as follows:

- If the MV is within 10% ± of the BV, there will be no adjustment
- If the MV is more than 110% of the BV, then:

$$PA = (((MV-BV) \div BV) - 0.10) \times (CB \times PIP)$$
- If the MV is less than 90% of the BV, then:

$$PA = (((MV-BV) \div BV) + 0.10) \times (CB \times PIP)$$

Where:

PA = Price Adjustment, dollars
 MV = Monthly Steel Materials Value from the BLS PPI for the month determined above (after it becomes final)

DB 195.12(c)

- BV = Base Steel Materials Value from the month of the Proposal due date (after it becomes final)
- PIP= Amount paid for the item of Steel Material for the month for which the price adjustment is requested
- CB = Cost basis, in percent, established in Form TSE for the applicable Steel Material.

(d) Payment of Price Adjustment

(1) Agency will reimburse Design-Builder once every six (6) months upon receipt of proper documentation, as described below, a preliminary price adjustment for all Steel Materials incorporated into the permanent Structures of the Project during the six month period (“Adjustment Period”). Agency will reconcile the price adjustment by the end of the subsequent six-month period according to the final published IDWPUSISTEEL1 BLS PPI price data. In the event the reconciliation indicates that Design-Builder was overpaid, Agency will deduct from the next payment due to Design-Builder the amount of the overpayment. In the event the reconciliation indicates Design-Builder was underpaid, Agency will include in the next payment due to Design-Builder the amount remaining due.

(2) Design-Builder shall submit to Agency PM every six (6) months during the term of the Contract Form TSEs for each month of the Adjustment Period. Each Form TSE submitted must include each type of Steel Material for which a price adjustment is sought, together with the quantity of each type of Steel Material incorporated into the permanent Structures of the Project during the month covered by the Form TSE, and the unit price paid. Each Form TSE shall be signed and certified as to accuracy by the Project Quality Manager.

DB195.20 Changes to Plans or Character of Work

(a) Insignificant Changed Work - If Agency-required changes in the Work do not significantly change the character or cost of the Work to be performed under the Contract, Agency will pay for such Work at the Schedule of Prices price.

If the Work involved in the change is measured on a unit price basis and its character is not significantly changed, payment for the Changed Work will be determined:

- As described in the applicable section of **Agency-Supplied Specifications**
- If not described there, on a theoretical unit price determined by dividing Design-Builder’s fixed-price for the affected Price Center by the estimated quantity of the item listed
- If neither of the above apply, Agency will make an equitable adjustment

(b) Significant Changed Work - If Agency-required changes in the Work significantly alter the character or fixed-price cost of the Work, Agency will adjust the Contract. Adjustments will exclude any loss of anticipated profits. The Parties shall agree upon the basis for payment and the amount of adjustment prior to Design-Builder commencing the Changed Work. If the basis and amount cannot be agreed upon, Agency will make an equitable adjustment, which may increase or decrease the Contract Amount and/or Contract Time.

Any such adjustments shall not be more than the amount justified by Agency on the basis of the established procedures set out in **DB General Provisions**, Section 199 for determining rates.

The term “Significant Changed Work” shall apply only to that circumstance in which the character of the Work, as changed, differs materially in kind, nature, or cost from that involved or included in the original Scope of Work.

DB195.30 Differing Site Conditions - Upon written notification, Agency will investigate the identified conditions. If Agency determines that the conditions materially differ and cause an increase or decrease in the cost or time required to perform any Work under the Contract, an adjustment in Contract Amount or Contract Time, excluding loss of anticipated profits, will be made, and the Contract modified accordingly, in writing. Agency PM will notify Design-Builder as to whether or not an adjustment of the Contract is warranted.

No Contract adjustment which benefits Design-Builder will be allowed unless Design-Builder has provided the required written notice.

DB195.40 Unreasonable Delay by Agency - If Design-Builder believes that performance of all or any portion of the Work is suspended, delayed, or interrupted for an unreasonable period of time in excess of that originally anticipated or customary in the construction industry, due to acts or omissions of Agency or persons acting for Agency, and that additional compensation, Contract Time, or both, are due Design-Builder because of the suspension, delay or interruption, Design-Builder shall immediately file a written notice of delay in accordance with **DB General Provisions**, Subsection 180.60. Design-Builder shall then promptly submit a properly supported request for additional compensation, Contract Time, or both, in accordance with the applicable provisions in **DB General Provisions**, Subsections 180.60 through 180.80.

Agency will promptly evaluate a properly submitted request for additional compensation. If Agency determines that the delay was unreasonable, and that the cost required for Design-Builder to perform the Contract has increased as a result of the unreasonable suspension, delay or interruption, Agency will make an equitable adjustment, excluding profit, and modify the Contract in writing accordingly. Agency will notify Design-Builder of the determination and whether an adjustment to the Contract Amount is warranted.

Under this provision, no Contract adjustment will be allowed:

- Unless Design-Builder has provided the written notice required by **DB General Provisions**, Subsection 180.60
- For costs incurred more than 10 Calendar Days before Agency receives Design-Builder’s properly-submitted written request
- For any portion of a delay that Agency deems to be a reasonable delay, or for which an adjustment is provided for or excluded under other terms of the Contract
- To the extent that performance would nevertheless have been suspended, delayed or interrupted by causes other than those described in this Subsection

DB195.50 Progress Payments and Retained Amounts

(a) Progress Payments – Agency’s payment of progress payments shall not be construed as acceptance or approval of any part of the Work, and shall not relieve Design-Builder of responsibility for defective Materials or workmanship.

The estimates upon which progress payments are based are not represented to be accurate estimates. All estimated quantities are subject to correction in the final estimate. If Design-Builder uses these estimates as a basis for making payments to Subcontractors, Design-Builder assumes all risk and bears any losses that result.

If the estimated amount due Design-Builder for any given month is less than \$1,000, Agency will make no payment for that month unless requested by Design-Builder.

Agency will make progress payments only in accordance with the provisions of this Subsection and only if the following have occurred:

- Progress Estimate conforming to Contract requirements has been submitted to Agency PM and approved by Agency.
- A Pay Request conforming to Contract requirements, and all required accompanying submittals, prepared in accordance with Contract requirements, have been submitted to Agency PM.

(1) Submittal of Progress Estimates – At the same time each month, the Project Quality Manager shall submit to Agency PM for review an estimate of the amount and value of Work completed through the previous month, calculated based on the Baseline Progress Schedule and the Schedule of Prices price allocation for each activity. Sufficiently-detailed information shall be provided to support partial payment of fixed-price Price Centers. The Project Quality Manager shall verify and certify satisfactory completion of all Work being submitted for payment and that the Work complies with all quality requirements of the Contract.

Notwithstanding the foregoing, the amount of each progress payment will not exceed the reasonable value of the Work performed, as determined by Agency. If Work is not performed per Contract requirements, payment will be suspended at the previous month’s level until Work is brought into compliance.

(2) Value of Materials on Hand – Subject to the provisions of Subsection 195.60, Agency will also make an estimate of the amount and value of acceptable Materials on hand (i.e., already delivered and stored in accordance with the requirements of this Subsection to be incorporated into the Project.

(3) Value of Work Accomplished – The sum of the values in (1) and (2) above will be collectively referred to in this Subsection as the “value of Work accomplished,” subject to (4) below.

(4) Limitations on Value of Work Accomplished – In determining the value of Work accomplished, Agency’s estimate will be based on the Schedule of Prices provided and the Work completed.

(5) Reductions to Progress Payments - With each progress payment, Design-Builder will receive a Contract payment voucher and summary setting forth the value of Work accomplished, reduced by the following:

- Amounts previously paid
- Amounts deductible or owed to Agency for any cause specified in the Contract
- Additional amounts retained to protect Agency's interests pursuant to Subsection (e) below

(b) Retainage – The amount to be retained from progress payments shall be 2.5% of the value of Work accomplished, and shall be retained in one of the forms specified in Subsection (c) below. If Agency determines that satisfactory progress is not being made on the Work, Agency may withhold up to 5% of the value of Work accomplished from subsequent progress payments. No retainage will be withheld from Work performed as Force Account Work, escalation/de-escalation, bonuses (or other items decided by Agency).

(c) Forms of Retainage - Forms of acceptable retainage are set forth below. "Cash," is Agency-preferred form of retainage. If Agency incurs additional costs as a result of Design-Builder's election to use a form of retainage other than Cash, Agency may recover such costs from Design-Builder by a reduction of the final payment.

(1) Cash - Retainage will be deducted from progress payments and held by Agency until final payment is made, unless otherwise specified in the Contract.

Agency will deposit the cash retainage withheld in an interest-bearing account in a bank, trust company, or savings association for the benefit of Agency, as provided by ORS 279C.560(4). Interest earned on the account shall accrue to Design-Builder. Amounts retained and interest earned will be included in the final payment made in accordance with Subsection 195.90.

Any retainage held on Work performed by a Subcontractor shall be released to Design-Builder as provided in Subsection 195.50(d).

(2) Cash and Retainage Surety Bond - Upon receipt of an approved retainage Surety bond, Agency will limit the amount of cash retainage withheld to \$10,000 which will be held in an interest-bearing account as described in (1) above. The Surety bond must be in the bond form provided by Agency. The bond must be provided by the same Surety that provides the Performance and Payment Bonds.

If Design-Builder elects this form of retainage, Agency will withhold from progress payments 2.5% of the value of Work accomplished as cash retainage until the retained amount equals \$10,000. After that amount is retained, no further cash retainage will be withheld until the additional retainage required exceeds the face amount of the retainage Surety bond provided. Thereafter, retainage will be withheld from progress payments as provided in this Subsection. As provided in Subsection 195.50(d), if at any time Agency determines that satisfactory progress is not being made on the Work, Agency may withhold up to 5% of the value of the Work accomplished from subsequent progress payments.

DB 195.50(c)(2)

If an acceptable retainage Surety bond is provided, Design-Builder shall notify all Subcontractors of the existence of the retainage Surety bond and shall advise them of their rights under ORS 279C.560(6).

Amounts of retainage withheld under the provision will be included in the final payment in accordance with Subsection 195.90.

Any retainage withheld on Work performed by a Subcontractor will be released to Design-Builder as provided in this Subsection.

(3) Bonds and Securities - Design-Builder may deposit bonds or securities with Agency or with any bank or trust company, to be held instead of cash retainage for the benefit of Agency.

Bonds and securities deposited instead of cash retainage shall be assigned or made payable to Agency (ORS 279C.560). In such event, Agency will reduce the retainage by an amount equal to the value of the bonds and securities. Interest on the bonds and securities shall accrue to Design-Builder.

Bonds and securities deposited instead of cash retainage shall be assigned to or made payable to Agency, and shall be of a kind approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

- Bills, certificates, notes or bonds of the United States
- Other obligations of the United States or its agencies
- Obligations of any corporation wholly owned by the federal government
- Indebtedness of the Federal National Mortgage Association

Design-Builder shall execute and provide such documentation respecting the bonds and securities as Agency may require to protect its interests. When Agency determines that all requirements for the protection of Agency's interest have been fulfilled, the bonds and securities deposited instead of cash retainage will be released to Design-Builder.

(d) Reduction of Retainage – As the Work progresses, the amounts to be retained are subject to reduction in Agency's sole discretion. Retainage reductions will be considered only as follows:

- When the Work is 97.5% or more completed, Agency may, without application by Design-Builder, reduce the retained amount to 100% of the value of the Work remaining.
- When a Subcontractor has satisfactorily completed all of its work, it may request release of retainage for that work from Design-Builder. Design-Builder shall request reduction of retainage in the amount withheld for the Subcontractor's work after certifying to Agency that the Subcontractor's work is complete, and that all contractual requirements pertaining to the Subcontractor's work have been satisfied. Within 60 Calendar Days of the end of the month in which Agency receives Design-Builder's certification regarding the Subcontractor's work, Agency will either notify Design-Builder of any deficiencies which require completion before release of retainage, or verify that the Subcontractor's work complies with the Contract and release all retainage for that work with the next scheduled progress payment.

Within 10 Calendar Days of receipt of retainage, Design-Builder shall pay to the Subcontractor all such retainage released.

- Agency will only release retainage for satisfactorily-completed portions of the Work represented by Price Centers in the Schedule of Prices, or Price Centers or unit-priced Work added by Change Order. Work not represented by a Price Center, but which constitutes part of an uncompleted Price Center, will not be regarded as satisfactorily completed Work for the purposes of this Subsection.

If retainage has been reduced or eliminated, Agency reserves the right to protect its interests by retaining amounts from further progress payments at the rates provided in Subsection 195.50(b).

(e) Withholding Payments – Agency may withhold such amounts from progress payments or final payment as may reasonably protect Agency’s interests until Design-Builder has:

- Complied with all orders issued by Agency PM
- Satisfied all legal actions filed against Agency, Agency’s governing body and its members, and Agency employees that Design-Builder is obliged to defend

Notwithstanding ORS 279C.555 or 279C.570, if Design-Builder is required to file certified statements confirming payment of prevailing rates of wage but fails to do so, Agency will retain 25% of any amount earned as required in **DB General Provisions** Subsection 170.65.

(f) Prompt Payment Policy – Payments shall be made promptly in accordance with ORS 279C.570.

DB195.55 Unit Price Work - Design-Builder shall submit a summary table of quantities with each Progress Estimate indicating Work Location; item number; and description, quantity, Unit Price, and total amount due for the period covered by the Progress Estimate. Design-Builder shall attach copies of quantity measurement notes or field book entries stamped and signed by an Oregon-licensed professional engineer or surveyor assigned to Design-Builder’s construction Quality Management organization. Design-Builder’s Project Manager and the Project Quality Manager must sign and date the summary table.

DB195.60 Advance Allowance for Materials on Hand

(a) General - If the total value of Materials on hand is at least \$1,000 or the total value of a single class of Materials on hand is at least \$500, Agency may authorize an advance allowance for the Materials in the progress payments. Agency will not make advance allowances on the Materials unless the following three (3) conditions are satisfied:

(1) Request for Advance Allowance – If Materials on hand meet the requirement of (2) below, an advance allowance will be made if:

- A written request for advance allowance for Materials on hand has been received by Agency at least five (5) Calendar Days before the pay period cutoff date; and
- The request is accompanied by written consent of Design-Builder’s Surety.

DB 195.60(a)(2)

(2) Stored or Stockpiled Conditions - The Materials shall have been delivered and/or acceptably stored or stockpiled in accordance with the **Design-Builder Specifications** and as follows:

- At the Project Site
- On Agency-owned property
- On property in the State of Oregon on which the property owner has authorized storage in writing. The written authorization must allow Agency to enter upon the property and remove Materials for at least six (6) months after completion of the Project. Design-Builder has furnished a copy of the written permission to Agency.
- On property outside the State of Oregon on which the property owner has authorized storage in writing, provided that such storage location is authorized in writing by the Agency PM. The permit must allow Agency to enter upon the property and remove Materials for at least six (6) months after completion of the Project. Design-Builder has furnished a copy of the written permission to Agency.

To be eligible for advance allowance, the Materials shall:

- Conform to Contract Specifications
- Have the required Materials conformance and quality compliance documents on file (See **DB General Provisions**, Section 165)
- Be in a form ready for incorporation into the Project
- Be clearly marked and identified as being specifically fabricated, or produced, and reserved for use on the Project

(3) Responsibility for Protection – Design-Builder has full control and responsibility for the protection of Materials on hand from the elements and against damage, loss, theft, or other impairment until the entire Project has been completed and accepted by Agency.

If Materials are damaged, lost, stolen, or otherwise impaired while stored, the monetary value advanced for them, if any, will be deducted from the next progress payment.

If these conditions of Subsection 195.60(a-1) through (a-3) have been satisfied, the amount of advance allowance, less retainage, will be determined by one of the following methods as elected by Agency:

- Net cost to Design-Builder of the Materials, f.o.b. the Project Site or other approved site
- Price (or portion of it attributable to the Materials), less the cost of incorporating the Materials into the Project, as estimated by Agency

(b) Proof of Payment - Design-Builder shall provide Agency PM with proof of payment to the Materials suppliers for purchased Materials within 30 Calendar Days of the date of the progress payment that includes the advance allowance.

If proof of payment is not provided, sums advanced will be deducted from future progress payments, and Agency will not approve further prepayment advance allowance requests.

(c) Terminated Contract - If the Contract is terminated, Design-Builder shall provide Agency immediate possession of all Materials for which advance allowances have been received, as provided above. If, for any reason, immediate possession of the Materials cannot be provided, Design-Builder shall immediately refund to Agency the total amount advanced for the Materials. Agency may deduct any amount not refunded from final payment.

DB195.70 Payment under Terminated Contract - Payment for Work performed under a Contract that is terminated pursuant to the provisions of **DB General Provisions**, Subsection 180.90, will be determined under (a) or (b) of this Subsection.

(a) Termination for Default - Upon termination of the Contract for Design-Builder's default, Agency will make no further payment until the Project has been completed.. Agency will make progress payments to the Entity to whom the Contract is assigned, but may withhold an amount sufficient to cover anticipated Agency costs, as determined by Agency, to complete the Project.

Upon completion of the Project, Agency will determine the total amount that the defaulting Design-Builder would have been entitled to receive for the Work under the terms of the Contract, had Design-Builder completed the Work (the "Cost of the Work").

If the Cost of the Work, less the sum of all amounts previously paid to Design-Builder, exceeds the expense incurred by Agency in completing the Work, including without limitation expenses for additional managerial and administrative services, Agency will pay the excess to Design-Builder, subject to the consent of Design-Builder's Surety.

If the expense incurred by Agency in completing the Work exceeds the Contract Amount, Design-Builder or Design-Builder's Surety shall pay to Agency the amount of the excess expense.

Agency will determine the expense incurred by Agency and the total amount of Agency damage resulting from Design-Builder's default. The determination will be final as provided in **DB General Provisions**, Section 150.

If a termination for default is determined by a court of competent jurisdiction to be unjustified, it shall be deemed a termination for public convenience, and payment to Design-Builder will be made as provided below.

(b) Termination for Public Convenience

(1) General - Full or partial termination of the Contract shall not relieve Design-Builder of responsibility for completed portions of the Work, or relieve Design-Builder's Surety of the obligation for any just claims arising from the completed Work.

(2) Mobilization - If mobilization is not included as an activity within a separate Price Center, and is not otherwise allowable as a reimbursable item under the Contract, Agency may pay Design-Builder for mobilization expenses, including moving Equipment to and from the Project Site. If allowed, payment of mobilization expenses will be based on cost documentation submitted by Design-Builder to Agency PM.

(3) All Other Work - Agency will pay Design-Builder at the price stipulated in the Contract for the number of Price Centers of completed, accepted Work. For Price Centers partially completed, payment will be as mutually agreed, or, if not agreed, as Agency determines to be fair and equitable. No claim for loss of anticipated profits will be allowed. Agency will purchase Materials left on hand in accordance with 195.80 below.

DB195.80 Allowance for Materials Left on Hand

(a) Purchase of Unused Materials – If Materials are delivered to the Project Site, or otherwise acceptably stored at the order of Agency, but not incorporated into the Work due to complete or partial elimination of Work, Agency required changes in Plans, or termination of the Contract for public convenience pursuant to **DB General Provisions**, Subsection 180.90, and it is not commercially feasible for Design-Builder to return them for credit or otherwise dispose of them on the open market, Agency will purchase them according to the formula and conditions set forth below:

(b) Purchase Formula and Conditions:

(1) Formula – Agency will apply the following formula in determining Design-Builder's allowance for Materials left on hand:

Design-Builder's Actual Cost, plus 5% Overhead Allowance, minus Advance Allowances under Subsection 195.60, but no markup or profit.

(2) Conditions – Agency will not purchase Design-Builder's Materials left on hand unless Design-Builder satisfies the following conditions:

- Requests Agency's purchase of unused Materials
- Shows acquisition of the Materials in accordance with **DB General Provisions**, Subsection 160.10
- Shows that the Materials meet the requirements of the Contract
- Provides receipts, bills and other records of actual cost of Materials delivered to the designated delivery points

DB195.90 Final Payment

(a) Final Estimate - As soon as practicable after Final Inspection of the Project, Agency PM will prepare a final estimate of the Price Centers performed. With this estimate as a base, the total amount due Design-Builder will be determined according to the terms of the Contract, including without limitation any amounts due for Extra Work performed.

(b) Final Payment - The amount of final payment will be the difference between the total amount due Design-Builder and the sum of all payments previously made. All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

After computation of the final amount due, and after Final Acceptance of the Project, final payment will be mailed to Design-Builder's last known address, as shown in the records of Agency.

Beginning 30 Calendar Days after the date of Third Notification, interest will begin to accrue at the rate established by ORS 279C.570 on any money due and payable to Design-Builder as final payment, determined as described above. No interest will be paid on money withheld due to outstanding amounts owed by Design-Builder under the provisions of **DB General Provisions**, Subsection 170.10.

(c) No Waiver of Right to Make Adjustment - The fact that Agency has made any measurement, estimate, or certification either before or after completion of the Project, Final Acceptance, Agency assumption of possession of the Project Site, or payment for any part of the Work, shall not prevent either Party from:

- Showing the true amount and character of the Work
- Showing that any measurement, estimate or certification is incorrect
- Recovering from the other Party damages that may have been suffered because the other Party failed to comply with the Contract

DB195.95 Error in Final Quantities and Amounts

(a) Request for Correction of Compensation – If Design-Builder believes the amounts detailed in the final Contract payment voucher prepared by Agency to be incorrect, Design-Builder shall submit an itemized statement to Agency PM detailing all proposed corrections.

This statement must be submitted to Agency PM within 90 Calendar Days from the date the voucher was mailed to Design-Builder in accordance with Subsection 195.90(b). Any request for compensation not submitted and supported by an itemized statement within the 90 Calendar Day period will not be paid by Agency. This does not limit the application of **DB General Provisions**, Section 199.

(b) Acceptance or Rejection of Request

(1) Consideration of Request – Agency will consider and investigate Design-Builder's request for correction of compensation submitted in accordance with Subsection 195.95(a), and will promptly advise Design-Builder of acceptance or rejection of the request in full or in part.

(2) Acceptance of Request - If Agency accepts Design-Builder's request(s) in full or in part, Agency will prepare a post-final Contract payment voucher including all accepted corrections, and will forward it to Design-Builder.

(3) Rejection of Request - If Agency rejects the request(s) in full; Agency will issue a written notice of rejection and mail it to Design-Builder.

(4) Design-Builder Objection to Revised Voucher or Notice of Rejection - If Design-Builder disagrees with the revised voucher or notice of rejection, Design-Builder may request review pursuant to the procedure set forth in **DB General Provisions**, Subsection 199.40. If Design-Builder fails to submit a request for **DB General Provisions**, Section 199 review within 30 Calendar Days after Agency mails a post-final Contract payment voucher or notice of rejection, Design-Builder waives all rights to a claim based on errors in quantities and amounts.

