

## Section 108 PROSECUTION AND PROGRESS

**108.01 Subcontracting of Contract Work.** Contract work amounting to not less than 40 percent of the original total contract price shall be performed by the Contractor's own organization. All items identified as Designated or as Specialty Classifications may be performed by subcontract. The amount of Specialty Classification work performed may be deducted from the original total contract price before computing the amount of work required to be performed by the Contractor's own organization. The Contractor's "own organization" shall be construed to include only workers employed and paid directly by the Contractor and equipment owned or rented by the Contractor, with or without operators. The 60 percent available for subletting shall include work identified in the contract as "Designated Classification" and all other work except Specialty Classification.

The value of the subcontracted work will be determined by multiplying the number of units of any contract item by the contract unit price. If any portion of a contract item is subcontracted, only that portion of the work to be performed by the Subcontractor will be used for the purpose of determining the percentage of the total work subcontracted. The Department will determine if the subdivision of the item subcontracted and the unit cost is reasonable.

The Contractor shall not subcontract any portion of the contract, except the furnishing of necessary materials, without the written approval of the Department. Approval of a subcontract shall not relieve the Contractor of full responsibility for the performance of the contract. The Contractor shall not sell or assign any portion of the contract without the written consent of the Michigan Department of Transportation.

Any bonds furnished by the Subcontractor shall not reduce the Contractor's bonding requirements.

No subcontract will be approved unless the Subcontractor is prequalified by the Department to perform the classification of work and amount proposed. The Contractor shall also have filed with the Michigan Department of Transportation a notarized or true copy of the subcontract. It is understood and agreed that the Department's prequalification of a Subcontractor and approval of a subcontract is for the benefit of the Department and is not for the benefit of the Contractor or any other person. The Department's prequalification is not a guarantee or warranty of the Subcontractor's ability to perform or complete the work subcontracted.

The Contractor remains fully responsible to the Department for completion of the work according to the contract as if no portion of it had been subcontracted.

No Subcontractor or supplier may maintain an action against the Department for payment relating to goods or services provided in connection with the contract; any such action must be brought against the Contractor or other responsible party.

A Subcontractor shall perform not less than 50 percent of the total value of the subcontracted work with the Subcontractor's own organization. This requirement is also applicable to and binding upon successive subcontracts.

The Engineer may direct the immediate removal of any Subcontractor working or of any Subcontractor's equipment being operated in violation of this subsection. Any costs or damages incurred are assumed by the Contractor by the acceptance of the contract. It is further understood

that the Contractor's responsibilities in the performance of the contract, in case of an approved subcontract, are the same as if the Contractor had handled the work with the Contractor's own organization.

**108.02 Performance of the Work.** No work shall begin until after the award of the contract. After being notified by the Department of the award of the contract, the Contractor shall perform the work according to the detailed progress schedule and with sufficient work force and equipment to adequately complete the work within the allotted time.

In case of failure to proceed with the work as provided in the detailed progress schedule, or if the Department determines that the work is not being performed to ensure its completion within the allotted time, the Engineer may direct the Contractor to furnish and place in operation additional work force and equipment to meet the requirements of the detailed progress schedule. If the Contractor fails to perform as directed, the Engineer may place the Contractor in default according to subsection 108.12.

**108.03 Limitations of Operations.** The Contractor shall not perform construction operations on Sunday, unless otherwise specified in the contract or approved by the Engineer. The Contractor may perform emergency repairs or install proper protection of the work on Sundays.

The Engineer may require the Contractor to cease construction operations during holiday periods or at other times as may be determined to be in the interest of the public.

In case of a dispute arising between two or more Contractors or others as to the respective rights of each under these specifications, the Engineer shall determine the matters at issue and shall define the respective rights of the various interests involved, in order to secure the completion of all parts of the work in general harmony and with satisfactory results. The Engineer's decision shall be final and binding on all parties concerned and shall not be cause for a claim for extra compensation by any of the parties against the Department.

**108.04 Competence of Contractor Supervision.** The Contractor shall provide project management to properly oversee the work. The project management shall be responsible for handling for the Contractor any delays or problems with workmanship. Also, the project management shall anticipate construction impacts on property owners and businesses and work with them well before the impact to minimize conflict.

**108.05 Competence of Workers.** The Contractor shall employ sufficient labor to perform the work required by the contract. Workers shall have sufficient skill and experience to perform the work assigned to them in conformance with the contract.

**108.06 Adequacy of Methods and Equipment.** The Contractor shall use equipment of sufficient size and in a mechanical condition needed to do the work of the contract.

When the methods and equipment to be used are not prescribed in the contract, the Contractor may use any method or equipment that will accomplish the work in conformity with the requirements of the contract.

When the contract specifies that the construction is to be performed by using certain methods and equipment, and the Contractor wants to use another method or type of equipment, approval may be requested from the Engineer. The request shall be in writing and include a full description of the proposed methods and equipment and the reasons for requesting the change. If the request is approved, the Contractor remains fully responsible for producing construction work in conformance with the contract. If, after a reasonable trial, the Engineer determines that the work produced does not meet contract requirements, the Contractor shall stop using the substitute method or equipment. The Contractor shall remove the deficient work and replace it with work of specified quality, or take other corrective action approved by the Engineer. Approval to change methods or equipment under this provision cannot be used to justify an upward adjustment in the basis of payment for the construction items involved or for an extension of contract time.

#### **108.07 Determination of Contract Time for Work Day Contracts.**

##### **A. Full Work Days Will Be Charged.**

1. Starting no earlier than on the tenth day after receiving notice of award, or on the date agreed upon with the Engineer: in no case shall any work be commenced prior to receipt of formal notice of award by the Department.
2. For every day when it is possible for the Contractor to effectively carry out work on the controlling operation, except as listed in subsection 108.07.C below.
3. On Sundays or legal holidays on which the Contractor works.
4. For days that no work is performed on the controlling operation due to delayed delivery of materials unless it is documented that the delay is the result of an industry-wide shortage.
5. If required work, designated by the Engineer, to make the project acceptable for traffic and winter maintenance including emergency work or erosion control maintenance is not completed before or during seasonal suspension, work days will be charged until the required work is completed.
6. For days where work is performed for six hours or more on the controlling operation.
7. For days when delays or suspension of work is the fault of the Contractor.

##### **B. Half Work Days Will Be Charged, If In The Opinion of the Engineer.**

1. The Contractor can only work, for reasons beyond the Contractor's control, between three and six hours on the controlling operation.
2. Circumstances beyond the Contractor's control, including work stoppages due to a labor dispute, make it impossible to prosecute the work on the controlling operation with full and normal efficiency.

**C. Work Days Will Not Be Charged.**

1. For Saturdays, unless provided in the contract.
2. For any day on which it is impossible for the Contractor to work on the controlling operation more than three hours, due to circumstances beyond the Contractor's control, including work stoppages due to a labor dispute.
3. When the controlling operation is suspended by the Department for reasons beyond the control and without the fault or negligence of the Contractor.
4. For any work performed during the off-construction season (November 15 through April 15), unless otherwise specified in the contract and in subsection 108.07.A.5 above.
5. For work on the controlling operation performed outside the seasonal limitations for that item, unless this scheduling is required in the contract.
6. When suspension of work on the controlling operation is required, through no fault of the Contractor, due to the following:
  - a. Right-of-way or right-of-entry was not available when a controlling operation was required to start.
  - b. Utilities were not moved out of the Contractor's work area and created a delay.
  - c. Work on other related contracts were not completed to a point where the construction could proceed.

The Engineer will notify the Contractor, in writing, of the number of working days charged to the project each week within 6 days after the week covered by the report. If the Contractor is not in agreement with the number of working days charged in a report, the Contractor shall notify the Engineer in writing, setting forth the reasons for disagreement, within 21 days after the week covered by the report. Failure to notify the Engineer will constitute a waiver of claim for any additional working days.

**108.08 Extension of Time on Work Day Contracts.** When the contract time is specified in work days, extension of the time, without liquidated damages, for opening to traffic and the contract time will be allowed by the Engineer on the following basis:

- A. If, on a controlling operation, there is an increase in the quantities set forth in the contract and this is not offset by decreases in similar contract items, then the extension of time will be based on the formula:

$$E = T \times I/Q$$

where:

- E = Extension of time in work days
- T = Work days assigned to the item on the progress schedule
- I = Increased quantity of the contract item
- Q = Contract quantity of the item

or,

- B. If there is Extra Work that delays the controlling operation, as shown on the progress schedule, the extension of time will be the time the Extra Work delayed the controlling operation.

**108.09 Extension Of Time On Calendar Day Or Calendar Date Contracts.** When the contract time is specified in calendar days or by calendar date, an extension of the time for opening to traffic and the contract time will be allowed by the Engineer without liquidated damages on each of the following basis:

- A. If there is a failure to award the contract within 28 calendar days after all required documents specified in subsection 102.16 are received from the Bidder the extension will be the time of the delay.
- B. If there are delays due to suspension of work ordered by the Engineer, the extension will be the time of the delay. The suspension must be for causes other than negligence, faulty work, failure or refusal of the Contractor to carry out the provisions of the contract or the orders of the Engineer.
- C. If there are delays due to unforeseen causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to: acts of God, acts of the public enemy, acts of Government, acts of State or any political subdivision, fires, floods, epidemics, labor disputes, or delayed delivery of materials when it is documented that the delay is an industry-wide shortage of materials, then the extension will be the time the delay affects the controlling operation.
- D. If there are delays due to unusual weather conditions, then the extension of time will be the time the delay affects the controlling operation. Unusual weather conditions may be analyzed for each calendar month or portion of it during the normal construction season (April 16 through November 14) each year. The contract completion date for standard projects is based on a progress schedule using a 4 workday week, which assumes the Contractor will lose 1 workday per week because of weather. Workdays are considered to be Monday through Friday only. If, during a calendar month, the Contractor is prevented from working on the controlling operation because of unusual weather conditions in excess of the average of 1 workday per week, the Contractor may request an extension of contract time based on the difference between the actual workdays lost that month compared to the normal workdays lost per month. Normal workdays lost per month will be considered to be 4.5 workdays for May through October and 2.25 workdays for the partial months of April and November. The workdays will be converted to calendar days by multiplying by 1.75.

On expedited projects, the contract completion date is based on a 5 workday week, which assumes the Contractor will lose 1 workday per week because of weather. Workdays are considered to be Monday through Saturday on these projects. If, during a calendar month, the Contractor is prevented from working on the controlling operation because of unusual weather conditions in excess of the average of 1 workday per week, the Contractor may request an extension of contract time based on the difference between the actual workdays lost that month compared to the normal workdays lost per month. Normal workdays lost per month will be considered to be 4.5 workdays for May through October and 2.25 workdays for the partial months of April and November. The workdays will be converted to calendar days by multiplying by 1.4 on expedited projects.

- E. On a controlling operation, when there is an increase in the quantities set forth in the contract and this is not offset by decreased similar controlling items of work, the extension of time will be based on the formula:

$$E = T \times I/Q$$

where:

- E = Extension of time in calendar days
  - T = Contract time assigned to the item on the progress schedule
  - I = Increased quantity of the contract item
  - Q = Contract quantity of the item
- F. If the Extra Work delays the controlling operation, as shown in the progress schedule, the extension of time will be the time required to do the Extra Work.
- G. Another equitable method, supported by an acceptable rationale, may be used to determine extensions with the approval of the Engineer.

**108.10 Request For Extension Of Time For Work Day, Calendar Day And Calendar Date Contracts.** Requests for extension of time, shall be filed by the Contractor with the Engineer. The request shall be in writing and state the reasons for the extension. In case of delays due to adverse weather, the request for extension of time shall be filed within 14 days following the end of the calendar month in which the delay occurred. All other delays shall be filed within 14 days following the end of the delay. Failure to notify the Engineer as provided herein, will constitute a waiver of claim for an extension of time.

Extension of time may be granted either with or without liquidated damages and will be stated in the same terms as the original contract time is stated. The number of working days, or calendar days, granted for each extension will be recorded by authorization. The time for opening to traffic and the contract time as extended shall thereafter be binding upon the Contractor and Surety as if they appeared in the contract originally.

If the Contractor intends to file a claim based upon the denial of an extension of time request for any reason not specifically covered elsewhere in the contract, the Contractor shall notify the Engineer in writing within seven days after receipt of the denial.

The Engineer, by permitting the Contractor or the Surety to continue and finish all or any part of the work after the original or extended time, shall not be deemed to waive any rights under the contract.

**108.11 Liquidated Damages.** If the contract provides for maintaining through traffic while the project is being constructed, or if the contract does not contain a time requirement for opening to traffic, the provisions herein shall apply to the contract time only.

Liquidated Damages for failure to open to traffic on time and for failure to complete on time will not be assessed simultaneously.

- A. **Failure To Open To Traffic On Time.** The Contractor shall complete sufficient work so that the project, or a portion of it, can be safely opened to traffic according to subsection 107.21, on or before the specified contract time or authorized extension. The Contractor will be charged the amount shown in Table 108-1 for each calendar day that the project cannot be opened to traffic including time within the seasonal suspension. The Contractor shall continue work on the project until the Engineer designates that the project is "Accepted for Traffic" and the work is suspended except as otherwise provided in the contract. This may include the work necessary to make the project ready for seasonal suspension. For seasonal suspension, the Engineer will not designate the project "Accepted for Traffic" until the project is in an acceptable condition for travel and winter maintenance including necessary traffic control devices and erosion control measures.

Unless shown otherwise in the contract, when the project has been "Accepted for Traffic" as provided in subsection 107.21, the assessment of Liquidated Damages will be discontinued until the contract time has elapsed.

- B. **Failure To Complete On Time.** The Contractor shall complete the entire project on or before the contract time specified in the contract or by authorized extension without liquidated damages. The Contractor will be charged the amount shown in Table 108-1 for each calendar day that the work shall remain uncompleted, except as follows:
1. For projects where traffic is not maintained on the facility during construction, the amount of Liquidated Damages set forth in Table 108-1, will be reduced to 50 percent after the date the project is accepted for traffic.
  2. For periods of seasonal suspension, Liquidated Damages will not be assessed except as provided in subsection 108.11.A, or as otherwise shown in the contract.
- C. **Assessment Of Liquidated Damages.** Sums assessed as Liquidated Damages shall be considered and treated not as a penalty but as fixed, agreed upon and liquidated damages due the Department from the Contractor by reason of inconvenience to the public, added cost of Engineering and supervision, maintenance of detours and other items that have caused an expenditure of public funds resulting from the Contractor's failure to complete the work or open the project to traffic within the time specified in the contract.

**Table 108-1 Schedule of Liquidated Damages**

Original Contract Amount		Liquid Damages per Calendar Day
\$ 0	to 49,999	75
50,000	to 99,999	150
100,000	to 499,999	450
500,000	to 999,999	900
1,000,000	to 1,999,999	1,300
2,000,000	to 4,999,999	1,550
5,000,000	to 9,999,999	2,650
10,000,000	and above	3,000

**108.12 Default of Contract.**

- A. The Engineer may give the Contractor and Surety written notice specifying the delay constituting default and the action required to be taken by them if the Contractor does any of the following:
1. Fails to prosecute the work with the labor, equipment, or materials sufficient to complete the work within the contract time and according to the progress schedule;
  2. Performs the work improperly;
  3. Neglects or refuses to remove material and to reconstruct work that has been rejected as defective and unsuitable;
  4. Fails, for any other reason, to carry on the work according to the contract.
- B. If any of the following happens, the Department will have full power and authority to take the work out of the hands of the Contractor and Surety, including appropriation and use of any materials on the project, and use contract or any other method that the Department determines may be required to complete the work:
1. The Contractor or Surety, within a period of 10 days after the notice of default, does not proceed satisfactorily .
  2. The Contractor commits any act of bankruptcy, becomes insolvent or is declared bankrupt.
  3. A final judgment against the Contractor is allowed to remain unsatisfied for 5 days.
  4. The Contractor makes an assignment for the benefit of the Contractor's creditors.
  5. The Contractor files or if there has been filed against the Contractor, proceedings for reorganization, under the Bankruptcy Act.
- C. When the Department takes over the uncompleted work, all additional costs and damages, and the costs and charges of completing the same, shall be deducted from monies due or

to become due the Contractor. If the total of the damages, costs and charges exceeds the balance of the contract price that would have been payable to the Contractor had the Contractor completed the work, then the Contractor and Surety shall, on demand, pay to the Department the amount of the overage.

**108.13 Termination of Contract.** The Department may terminate the entire contract or any portion thereof, if the Department determines that termination is in the Department's interest. When the Department orders termination of a contract effective on a certain date, completed or partially completed work as of that date will be paid for at the contract unit prices or on a force account basis, as determined by the Engineer. In the event that only portions of the contract work are deleted, the Department may stop delivery and payment for materials made unnecessary. Items that are eliminated in their entirety by the termination will be paid according to subsection 109.05.

Acceptable materials, obtained by the Contractor for the work but not used, may, at the option of the Department, be purchased from the Contractor at actual cost delivered to a prescribed location, plus 15 percent, or otherwise disposed of as mutually agreed.

Any claim for additional damages or costs not covered in the contract, shall be submitted within 60 days of the effective termination date, or as otherwise authorized. The Contractor agrees to make records available to support the validity and amount of the claim. Any settlement agreement will not include loss of anticipated profits.

Total or partial termination of a contract shall not relieve the Contractor of contractual responsibilities for the work completed, nor shall it relieve the Surety of its obligation for any just claim arising out of the work performed.

- A. Termination of the contract would occur after determining that, for reasons beyond either the Department's or Contractor's control, the Contractor is prevented from proceeding with or completing the contract work. Reasons for termination may include, but need not be limited to the following:
1. Executive orders of the President relating to prosecution of war or national defense.
  2. A national emergency that creates a serious shortage of materials.
  3. Orders from duly constituted authorities relating to energy conservation, preservation of archaeological and historical findings, funding problems, and/or a change in project priorities.
  4. Restraining orders or injunctions obtained by third-party citizen action resulting from national or local environmental protection laws or where the issuance of the order or injunction is primarily caused by acts or omissions of persons or agencies other than the Contractor.
  5. A differing site condition or altered character of work amounting to significant contract costs.

- B. The Engineer will deliver to the Contractor a Notice of Termination specifying the extent of termination and the effective date. After receipt of a Notice of Termination, the Contractor shall immediately proceed with the following obligations:
1. Stop work as specified in the notice.
  2. Place no further subcontracts or orders or materials, services, or facilities, except as necessary to complete the continued portion of the contract.
  3. Terminate all subcontracts to the extent they relate to the work terminated.
  4. Transfer title and deliver to the Department (1) for the fabricated, partially fabricated, or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (2) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Department.
  5. Complete performance of the work not terminated.
  6. Acceptable materials obtained by the Contractor for the Project that have not been incorporated in the work shall be inventoried in conjunction with the Engineer at a date identified by the Engineer.
  7. Take any action necessary, or that the Engineer may direct, for the protection and preservation of the property related to the contract that is in the possession of the Contractor and in which the Department has or may acquire an interest.