

concerning Stormwater Management on State Construction Project Right-of-Ways, with assignment of responsibilities as follows:

The Department's role as Co-Permittee shall be that of the Owner. This shall be limited to development of the original Stormwater Management Plan (SMP) that shall be included in the Project Plans. For Projects that do not include a specific SMP, the Contractor shall use the applicable portion of the Plans, Special Provisions and the Standard Specifications for the SMP.

The Contractor's role shall be that of the Operator having day-to-day responsibilities for implementation of the SMP for the Project. The Contractor shall be responsible for initiating any modification to the original permit connected with the location of his/her storage yard, plant sites and borrow areas located on or off the State right-of-ways. Modifications to the original permits may require modification of an existing SMP or development of an additional SMP.

The Contractor shall be responsible for submitting the Contractor's copy of the Notice of Intent (NOI) to the Office Engineer with the Contractor-executed Contract.

When the permanent erosion control measures have stabilized the project to not less than 70 percent, the Contractor shall submit to the Resident Engineer a Notice of Termination (NOT). The Resident Engineer shall assemble and submit NOTs to the DEQ. This action transfers the operational responsibility for Stormwater Management to the Department or the local government entity, as applicable.

SECTION 108 PROSECUTION AND PROGRESS

108.01. SUBLETTING OF CONTRACT.

The Contractor shall not sublet, sell, transfer, assign, or otherwise dispose of the Contract or Contracts or any portion thereof, or any of his/her rights, title, or any interests therein, without written consent of the Director or his/her authorized representative. In case such consent to Subcontract is given, the Contractor will be permitted to sublet a portion of the work as specified, but shall perform with his/her own organization, work amounting to not less than fifty (50) percent of the Contract amount, unless the Contract shall allow a greater percentage to be subcontracted. Any items designated in the Contract as "specialty items" may be performed by subcontract and the cost of any such specialty items so performed by subcontract may be deducted from the total cost before computing the amount of work required to be performed by the Contractor with his/her own organization.

Requests for permission to sublet, or otherwise dispose of any portion of the Contract work shall be in writing to the Resident Engineer. Requests shall be accompanied by a statement showing that the organization which will perform the work is particularly experienced and equipped for such work. All subcontracts shall incorporate and include all federally imposed requirements pertaining to equal opportunity, disadvantage business opportunity, Title VI of the Civil Rights Act of 1964 of the Davis-Bacon Act, and such other requirements as may be contractually imposed. The Contractor shall give assurance that the minimum wage for labor as stated in his/her Proposal shall apply to labor performed on all work sublet. No subcontracts, or transfer of Contract, shall in any case release the Contractor of his/her liability under the Contract and bonds.

Should the Contractor assign any of his/her right, title or interest in the Contract, said assignment shall be made only with the full knowledge and written consent of the Surety. It is specifically understood that a violation of the Subsection will constitute an act of default on the part of the Contractor.

108.02. NOTICE TO PROCEED.

The Notice to Proceed will stipulate the date on which it is expected the Contractor will begin the construction. In no case shall work, other than mobilization, start prior to issuance of the Notice to Proceed. When work starts prior to the effective date of the Notice to Proceed, time will be charged from time work actually starts, but not later than the effective date of the Notice to Proceed.

108.03. PROSECUTION AND PROGRESS.

Sufficient materials, equipment, and labor shall be provided by the Contractor to guarantee the completion of the project within the Contract time.

The Contractor shall submit a Progress Schedule to the Resident Engineer for review and acceptance prior to commencement of project work. The Progress Schedule shall be used to establish the Contractor's planned construction operations and to monitor the progress of the work.

The Progress Schedule chart may be in the form specified in 108.03.a. or 108.03.b., unless the Contract requires a critical path method schedule. The critical path method schedule must be in the form specified in 108.03.b.

- (a) **Activities Schedule Chart (ASC) and Written Narrative (WN)** The ASC and WN prepared shall break down into detail the time (working days or completion date) involved in performing major construction activities for the duration of the Project. The ASC shall be used for the coordination and Department monitoring of major work under the Contract including the activities of subcontractors, vendors, and suppliers.

1. Schedule Requirements:

All Activity Schedule Charts provided by the Contractor shall include:

- a) A bar chart chronologically sequenced and to time scale with a number of activities appropriate to the Project showing construction prosecution or preparation activities.
- b) Activity descriptions for each bar on the chart.
- c) Activity durations by calendar days.

2. All Written Narratives provided by the Contractor shall provide:

- a) The proposed work process sequence that will show major work activities required for the complete performance of all items of work under Contract, including major shop drawing submittals, permits, fabrication and delivery activities, etc.
- b) A description of activities so that work is readily identifiable.
- c) A description for each bar identifying the trade or entity performing the work, the duration of the activity in work days, and the location of the work.
- d) A description indicating work days per week, holidays, number of shifts per day, number of hours per shift, and major equipment to be used.

- 3. Preparation of Initial Schedule.** The Contractor shall complete development of the initial ASC and WN and present two (2) copies of each to the Resident Engineer at the prework conference.

The construction time indicated by the ASC and WN, for the entire Project or any milestone, shall not exceed the specified Contract time. Following a review of the initial ASC and WN by the Department, the Resident Engineer, and Contractor shall meet for a joint review, correction, and adjustment of the schedule if required.

If necessary this process will be repeated, however, the schedule must be finalized by the Contractor within thirty (30) calendar days after the prework conference. Failure to provide a complete final ASC and WN by that date will result in withholding all Contract payments until an acceptable schedule is received.

- 4. Progress Meetings.** Progress meetings between Contractor and the Department shall be held to coincide with submission of progressive estimates so as to verify actual agreed progress. In addition, job site progress meetings may be required by the Department to accommodate change orders, time extensions (whenever such time extensions total twenty-one (21) or more calendar days), or other circumstances as the Resident Engineer may deem appropriate. Copies of revised ASC shall be furnished to the Department.

- (b) **Critical Path Progress Schedule.** The Contractor's progress schedule prepared pursuant to this Subsection shall employ a network analysis system as described below when specified on the Plans or in the Contract. Implementing this system for the planning and scheduling of construction shall be the responsibility of the Contractor. As a minimum, the network analysis system shall be prepared in a form acceptable to the Department. Scheduling methods, other than CPM, will be considered on an individual basis.

The system shall consist of logic diagrams, computer mathematical analysis, calendar, and narration.

The logic diagram shall show the order and interdependence of activities and the sequence in which the work is to be accomplished as planned by the Contractor in coordination with all Sub-contractors and other prime Contractors. The basic concept of the logic diagram shall be followed to show how the start of a given activity is dependent on the completion of preceding activities and its completion restricts the start of following activities.

The detailed network activities shall include, in addition to construction activities, the submittal, approval of materials and shop drawings, procurement, installation and testing of materials and equipment that are significant as determined by the Resident Engineer. The system shall show early completion of certain portions of the Project as specified herein.

No activity duration shall be longer than thirty (30) work days without the Department's approval. The Department reserves the right to limit the number of activities on the schedule to between 50-500 activities. Detailed networks shall show a continuous flow from left to right and be drafted on paper 24 inches (610 mm) in width and 36 inches (914 mm) in length. The drafted network diagram alphanumeric characters (numbers and letters) shall be large enough to be easily read. The network diagram arrangement shall allow sufficient room between diagram paths for "red line" modification of existing activity and/or diagram arrangement. The following information shall be shown on diagrams for each activity: Activity identification number, description of the

activity, and activity duration in calendar days. The critical path shall be highlighted in order to be distinguished from other diagram paths.

The application software used shall be capable of compiling all completed and partially completed activities. The program shall be capable of accepting revised completion dates as modified by approved time adjustments and recomputations of all tabulation dates and total float accordingly.

The program shall list the activities in sorts or schedules as follows:

1. In order of activity numbers.
2. Total float sort, by the amount of total float order of least to highest.

The mathematical analysis of the network diagram shall be updated monthly unless waived by the Resident Engineer in writing.

The cover sheet for each monthly update shall list the following: State job number, Project number and description, Contractor, reporting period, scheduled completion date and actual completion date and variation from schedule.

A preliminary network analysis system defining the Contractor's planned operation during the first sixty (60) calendar days after the date of the notice to proceed shall be submitted at the prework conference. The Contractor's general approach for the balance of the Project shall be indicated.

The complete network analysis system consisting of the computer mathematical analysis and diagram shall be submitted within thirty (30) calendar days after the date of the prework conference unless extended in writing by the Resident Engineer.

The initial submittal of the diagram, calendar, and computer analysis shall be in four (4) copies. The monthly updated computer analysis shall be submitted in four (4) copies.

The detailed network analysis system will be reviewed by the Resident Engineer for logic and conformance to the requirements as set forth herein, and for conformance to any special notations in the Plans pertaining to sequence of operations. Within fifteen (15) calendar days after the receipt of the detailed network analysis system, the Contractor and the Resident Engineer shall meet for joint review, correction and adjustment of the schedule, if required. The construction time, as determined by the schedule, for the entire Project or any milestone for the Project shall not exceed the specified Contract time. In the event that any milestone date or Contract completion date is exceeded in the schedule, logic and/or time estimates will be revised. After this meeting but within fifteen (15) calendar days after any changes in the logic and/or time estimates have been agreed upon, another submission of the schedule, including four (4) copies of the diagram, an activity number order sort, and a total float sort, will be transmitted to the Resident Engineer. If necessary, this process will be repeated; however, the schedule must be finalized within thirty (30) days after the prework conference. Failure to finalize the schedule by that date will result in withholding all Contract payments until the schedule is approved. Time charges shall begin no later than the date specified in the Notice to Proceed.

Job site progress meetings will be held monthly by the Department and the Contractor for the purpose of updating the Project work schedule. Progress will be reviewed to verify start and finish dates of completed activities, remaining duration of uncompleted activities, and any proposed logic and/or time estimate revisions. It is the Contractor's responsibility to provide the Department with the

status of activities at this progress meeting and with the progress schedule updates based on this information once it has been verified.

The Contractor will create new CPM activities to reflect any precise period of delays which will affect the completion date of the Contract. The Contractor and the Department will agree on the start date and the finish date of the delay activities and the logic-dependent relationship to the activities of the affected predecessor and successor activities.

Not later than the fifth day of each month of the Project, the Contractor will submit four (4) copies of an updated activity number and total float sort illustrating verified progress. Included shall be a written narrative describing the critical path and logic revisions or modifications to the schedule, including, but not limited to, changes in the method or manner of the work, changes in Specifications, extra work, changes in duration, reasons for delay, etc. No logic revisions or modifications shall be made without prior approval of the Department. Failure to submit the required monthly network analysis system updates will cause the Department to withhold the monthly progressive pay estimate until such time as the update is received by the Department.

The Contractor will further submit two (2) copies of revised diagrams for the following: delay in completion of any critical activity; actual prosecution of the work which is, as determined by the Department, significantly different than that represented on the schedule; the addition, deletion, or revision of activities required by Contract modification; or any logic revisions or calendar revisions. The Contract completion time will be adjusted only for causes specified in the Contract.

As determined by computer analysis, only delays in activities which affect milestone dates, critical path, or Contract completion dates will be considered for a time extension under this Subsection.

If the Contractor does seek a time extension of any milestone or Contract completion date, he/she shall furnish documentation as required by the Department to enable the Department to determine whether a time extension is appropriate under the terms of the Contract.

It is understood by the Department and the Contractor that float is a shared commodity.

108.04. LIMITATION OF OPERATIONS.

Construction operations shall be conducted to assure the least interference with traffic with due regard to the location of detours and to the provisions for handling traffic. The Resident Engineer may require the Contractor to finish a section before work is started on any additional sections if the opening of the section is essential to public convenience.

108.05. CHARACTER OF WORKERS.

The Contractor shall employ sufficient resources for prosecuting all classes of work in the manner and time required by the Contract.

Workers shall have sufficient skill and experience to properly perform their assigned work. Workers engaged in work requiring special skills shall be sufficiently experienced in work and in the operation of the equipment required to perform the work satisfactorily.

Any person employed by the Contractor or by any subcontractor who does not perform the work in a proper and skillful manner or is intemperate or disorderly shall, at the written request of the

Resident Engineer, be removed from the work, and shall not be reemployed without the approval of the Resident Engineer.

Should the Contractor or subcontractor fail to remove the person or persons or fail to furnish suitable and sufficient personnel for the proper prosecution of the work, the work may be suspended by written notice as provided in Section 104.05. until the Resident Engineer's orders are followed.

The Contractor shall comply with all Federal and State requirements for nondiscrimination and equal employment opportunity. On all Projects, Special Provisions which set forth minimum wage rates and required reports, shall be included in the Contract.

108.06. METHODS AND EQUIPMENT.

All equipment used on the Project shall be of sufficient size and mechanical condition to meet the requirements of the work and to produce a satisfactory quality of work. Equipment used shall not cause injury to the roadway, adjacent property, or other highways.

When the methods and equipment to be used are specified, other methods and equipment shall not be used unless requested in writing and approved by the Resident Engineer. The request shall include a description of the methods and equipment proposed and the reasons for making the change. If approval is given, the Contractor shall be responsible for producing work meeting the Contract requirements. If the Resident Engineer determines that the work produced does not meet Contract requirements, the use of the substitute methods or equipment shall be discontinued and the remaining work shall be completed with the specified methods and equipment. Deficient work shall be removed and replaced or repaired to the specified quality by and at the Contractor's expense. No change will be made in the basis of payment for the construction items involved nor in Contract time as a result of approving a change in methods or equipment.

108.07. DETERMINATION AND EXTENSION OF CONTRACT TIME.

The time allowed for the completion of the work will be stated in the Proposal and Contract, and will be known as the "Contract Time." The Resident Engineer will furnish the Contractor a semi-monthly statement showing the number of days charged to the Contract for the preceding period and the number of days specified for completion of the Contract. The Contractor will be allowed ten (10) days in which to file a separate written protest setting forth in what respect said statement is incorrect. If the Contractor fails to file separate written protest within the time specified, the Contractor waives all rights to protest that time charge. If the Contractor should fail, refuse, or neglect to sign the semi-monthly statement of time charge and further should fail, refuse, or neglect to file a separate written protest of the time charges within the specified time, the Contractor waives all rights to protest the charges. It is hereby agreed and understood that a separate written protest of the time charges filed within ten (10) days as set forth herein is in all cases a condition precedent for the correction of the time charge.

When the Contract time is on a calendar day basis, it shall consist of the number of calendar days stated in the Contract counting from the effective date of the Notice to Proceed or from the date the Contractor begins work whichever is earlier, including all Sundays, holidays, and non-work days.

All calendar days elapsing between effective dates of any orders of the Resident Engineer to suspend work and to resume work for suspensions, not the fault of the Contractor, shall be excluded.

When the Contract completion time is a fixed calendar date, that date shall be the date on which all work on the Project shall be satisfactorily completed in accordance with Subsection 105.17.

All requests for adjustment to Contract time must identify delays actually encountered which interfered with Project work critical to timely completion of the Project work at a point in time when such work was scheduled to be in progress. Only a Contractor's Progress Schedule provided to the Department pursuant to Subsection 108.03.a. or 108.03.b. prior to commencement of Project work may be used to support the Contractor's request for additional Contract time or delay damages. No schedule prepared subsequent to commencement of Project work is acceptable for this purpose.

- (a) **Excusable (Noncompensable Delay).** Contract time allowed for the performance of the work may be extended for delays caused by acts of God, acts of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, documented national, or regional material shortages which are industry wide, unusually severe weather, or delays not caused by the Contractor's fault or negligence. Delays necessitated by compliance with certain federally mandated programs which occur after the Contract is let may provide a basis for an excusable delay. No additional compensation shall be due to the Contractor for such delays.
- (b) **Unusually Severe Weather.** The occurrence of unusually severe weather during the life of the Contract will be considered a basis for extending Contract time when work is not already suspended for other reasons. Unusually severe weather means weather which, at the time of year it occurs, is unusual for the place in which it occurs.

Extension of time for unusually severe weather will be determined on a monthly basis and will include only those actual adverse weather days in excess of the normal adverse weather days included in the Contract time. Normal adverse weather means adverse weather which, regardless of its severity, is to be reasonably expected for that particular place at that particular time of year. The normal adverse weather days included in the Contract time are based on historical records of temperature and precipitation for the eight Department Field Divisions as shown in Table A.

Actual adverse weather days are those days meeting one or more of the criteria in "1", "2", "3" and "4" below. Time extensions for days meeting more than one criteria will take into consideration only that criteria having the greatest impact. Those actual adverse weather days covered by criteria "1", "2" or "3" that are in excess of the days in Table A will be allowed without regard to when they occur (except prior to mobilization or during suspension for other reasons) or their impact on Contract completion. However, those days covered by criterion "4" will be subject to the limitations as noted.

1. Days with Maximum temperature of +32 degrees Fahrenheit (0 degrees Celsius) or less - one full day allowed.
2. Days with Minimum temperature of +32 degrees Fahrenheit (0 degrees Celsius) or less, but whose Maximum temperature is over +32 degrees Fahrenheit (0 degrees Celsius) - one-half day allowed.

3. Days when ½ inch (12.7 mm) or more precipitation (rain or snow equivalent) occurs - one full day allowed.
4. Days when weather related conditions exist which prohibit proper performance of work as specified - one full day allowed. Allowance of such days will be subject to the work which is being delayed, being critical to timely Contract completion and the Contractor making every reasonable effort to minimize the adverse impact of the conditions.

**TABLE A
NORMAL ADVERSE WEATHER DAYS
BY
ODOT DIVISION**

MONTH	DIVISIONS							
	1	2	3	4	5	6	7	8
JANUARY	8	7	8	8	7	9	8	9
FEBRUARY	6	6	6	7	6	7	6	7
MARCH	6	5	5	5	4	6	3	6
APRIL	4	4	4	3	2	3	3	3
MAY	4	4	4	3	3	3	3	3
JUNE	3	2	3	3	2	2	2	3
JULY	2	2	2	2	2	2	2	2
AUGUST	2	2	2	2	1	2	2	2
SEPTEMBER	3	3	2	2	2	1	2	3
OCTOBER	3	3	3	3	2	2	3	3
NOVEMBER	5	4	4	4	4	5	4	5
DECEMBER	7	7	6	7	7	8	6	7

The number of days for performance allowed in the Contract as awarded is based on the original quantities as defined in Subsection 102.05. If satisfactory fulfillment of the Contract requires performance of work in greater quantities than those set forth in the Proposal, the Contract time allowed for performance may be increased on a basis commensurate with the amount and difficulty of the added work. If the Contractor finds it impossible, for reasons beyond his/her control, to complete the work within the Contract time as specified or as extended in accordance with the provisions of this Subsection, he/she may at any time prior to the expiration of the Contract time, as extended, make a written request to the Resident Engineer for an extension of time, setting forth therein the reasons which he/she believes will justify the granting of his/her request. To evaluate additional time, a Contractor may use scheduling methods described in 108.03.a., unless scheduling methodology prescribed in 108.03.b. is required by the Contract. Only additional work or delays beyond the

Contractor's control which affect milestone dates, incentive/disincentive dates, or Contractor completion will be considered for time extensions. If the Resident Engineer determines that a time extension is justified, the Contract shall be modified by Change Order. The Contractor's plea that insufficient time was specified in the Proposal and the Contract or that previously unprotested time charges were incorrect shall not be grounds for an extension of time. The extended time for completion shall be in full force and effect the same as though it were the original time for completion. Daily time charges will cease when the Project is completed in accordance with Subsection 105.17.

- (c) **Compensable Delay.** Contract time allowed for performance of the work may be extended for delays caused by the Department. Compensation may be paid only when completion of the delayed work element prevents the start of work on a successive work element and will adversely impact on Project completion. Float time in the scheduling of successive work elements is a shared commodity and no compensation will be paid to the Contractor by the Department for the use of float time. The Contractor may be granted an extension of time and additional compensation under Subsection 109.10.
- (d) **Notification of Delay.** Within five (5) calendar days of the occurrence of a delay to the prosecution of the work, the Contractor shall notify the Resident Engineer in writing of such a delay and indicate that a request for delay consideration will be filed with the Department.
- (e) **Procedures Following Notification of Delay.** After notifying the Resident Engineer of the request for delay consideration, the Contractor shall keep daily records of all non-salaried labor, material costs, and equipment expenses for all operations that are affected by the delay.

The Contractor shall maintain a daily record of each operation affected by the delay and the station location of the operations affected. Daily records of the affected operations' stations will also be maintained by the Department. Each Monday, Contractor shall compare the previous week's daily records with the records kept by the Department. The Contractor shall also prepare and submit written reports to the Resident Engineer containing the following information each Monday:

1. Number of days behind schedule.
2. A summary of all operations that have been delayed, or will be delayed.
3. In the case of a compensable delay, the Contractor shall explain how the Department's act or omission delayed each operation, and estimate the amount of time required to complete the Project.
4. Contractor may request compensation for extra costs incurred as such costs are identified in Section 109.04.

The Contractor shall provide written notice to the Resident Engineer within ten (10) calendar days of the results of the comparison of the detailed reports performed each Monday and define any disagreements between specific records.

Failure to meet to review the Department's records or to report disagreements between the records will be considered conclusive evidence that the Department's records are accurate. Delay costs allegedly incurred prior to notifying the Resident Engineer that operations have been delayed will not be allowed.

- (f) **Procedures Following Completion of Work Alleged to be Delayed.** Within fifteen (15) calendar days of Project completion, or phase of work allegedly delayed, the Contractor shall submit a report to the Resident Engineer containing the following information:
1. A description of the operations that were delayed and the documentation and explanation of the reason for the delay, including all reports prepared for the Contractor by consultants, if utilized, and;
 2. An as-built chart, or other graphic depiction of how the operations were delayed, and;
 3. An item by item measurement and explanation of extra costs requested for reimbursement due to the delay.

The Resident Engineer will review the data contained in the Contractor's report and the inspection diaries and records and reports available to him/her. A written decision will be provided to the Contractor within sixty (60) calendar days of the receipt of the Contractor's report which will contain notification of any additional time which may have been granted.

In the case of compensable delays, if the Resident Engineer determines that the Department is responsible for delays to the Contractor's operation, the Resident Engineer's written decision will identify the nature and extent of any delay and the compensation which may be due to the Contractor under the provisions of Subsection 109.10.

108.08. INCENTIVE/DISINCENTIVE FOR EARLY/LATE COMPLETION.

If it is in the public's interest to complete the Project at the earliest possible date, an incentive/disincentive provision will be included in the Contract detailing applicable dates and work stages covered by the provision.

For each calendar day the project or phase is opened to unrestricted continuous traffic before or after the date established in the Contract, payment will be increased or decreased by the amount established.

The statement "unrestricted continuous traffic" means no lane closures will be granted for any of the Contractor's operations necessary to complete the Project, and that traffic will be following the final lane arrangement as proposed for the finished surface for the roadway with lane striping and permanent safety features completed.

The Resident Engineer will determine when the work stage or Project is complete to open the roadway to unrestricted continuous traffic.

Subsection 108.09. relating to liquidated damages remains in effect and is applicable to the total Contract time; however, there will not be concurrent assessment of liquidated damages with disincentive assessments.

The Contractor shall be paid the amount of incentive, as it is earned, in the progress payment schedule. The Resident Engineer shall deduct the amount of disincentive, as it occurs, in the progress payment schedule.

Should the amount of disincentive or liquidated damages exceed the amount due for work performed in a specific pay period, the Contractor shall submit a check to the Department in the amount of the difference within forty-five (45) calendar days of notice that payment is due.

Under an incentive/disincentive plan, no time extension will be granted for labor disputes or delays in material deliveries unless it can be shown that such delays are industry wide. No time extension will be granted for quantity overruns or adverse weather conditions. No time extensions will be granted for obtaining permits to cross or perform construction on or over railroad property or for railroad approval of plans or drawings.

108.09. FAILURE TO COMPLETE ON TIME.

For each calendar day or work day that work remains uncompleted after the Contract time, the sum specified in the Contract will be deducted from any money due the Contractor. This sum shall not be considered and treated as a penalty but as liquidated damages due the Department by reason of inconvenience to the public, added cost of engineering and supervision, and other extra expenditures of public funds due to the Contractor's failure to complete the work on time. Any adjustment of the Contract time for completion of the work granted under the provisions of Subsection 108.07. will be considered in the assessment of liquidated damages.

Permission for the Contractor or Surety to continue and finish work after the Contract time and approved extensions have elapsed shall not waive the Department's rights under the Contract.

The assessment of all or any portion of the liquidated damages that accrue may be terminated if the Department has determined the work is substantially complete and is in a condition for safe and convenient use by the traveling public, except when the Contract time is a fixed calendar date.

The work will be considered substantially complete when all necessary signing, striping, guardrail, and other safety appurtenances have been installed. For Projects that will not be opened to the traveling public, the Contract will be considered substantially complete when it is ready for a subsequent Project or its designed usage. This shall not be construed as a contractual right and its application will be contingent upon the Contractor's diligence in completing the remaining items of work.

108.10. DEFAULT OF CONTRACT.

- (a) The Engineer may declare the Contract in default to the Contractor and the Surety advising them of the actions required for remedy if the Contractor:
1. Fails to begin the work under the Contract within the time specified to begin work, or
 2. Fails to perform the work with sufficient resources to assure the timely completion of the work, or
 3. Fails to perform the work in accordance with the Contract requirements or neglects or refuses to remove and replace rejected materials or unacceptable work, or
 4. Discontinues the prosecution of the work, or
 5. Fails to resume work that has been discontinued within a reasonable time after notice to do so, or
 6. Becomes insolvent, is declared bankrupt, or commits any act of bankruptcy or insolvency, allows any final judgement to remain unsatisfied for a period of ten (10) calendar days, makes an assignment for the benefit of creditors, or

7. Fails to comply with Contract requirements regarding minimum wage payments or EEO requirements, or
8. Is a party to fraud.

The Engineer will give notice in writing to the Contractor and the Surety of such delay, neglect, or default.

- (b) If the Contractor or Surety does not proceed in accordance with the notice within ten (10) calendar days of receipt, the Department has full power and authority, without violating the Contract, to take the prosecution of the work from the Contractor. The Department may appropriate or use materials at the project site and enter into an agreement with another Contractor for the completion of the work remaining. Acceptable materials obtained by the Contractor for use on the project and not yet included in the work, may be purchased by the Department from the Contractor at actual cost.
- (c) The methods used for completion of the Contract will be determined by the Department. All costs and charges incurred by the Department, as a result of the default, including the cost of completing the work under Contract, and any applicable liquidated damages or disincentives will be deducted from monies due the Contractor for completed work. If such costs exceed the sum that would have been payable under the Contract, the Contractor and Surety shall be liable and shall pay the Department the balance of such costs in excess of the Contract price.
- (d) If it is determined, after termination of the Contractor's right to proceed, that the Contractor was not in default, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Department under Subsection 108.11. Thus damages to which a Contractor may be entitled as a result of the improper default termination will be limited to appropriate amounts for the items listed in Subsection 108.11.

108.11. TERMINATION OF CONTRACT FOR CONVENIENCE OF THE DEPARTMENT.

The Department may terminate the entire Contract or any portion thereof, if the Resident Engineer determines that a termination is in the Department's interest. The Resident Engineer will deliver to the Contractor a notice of termination specifying the extent of termination and the effective date.

- (a) **Submittals and Procedures.** 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 for 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. Settle all outstanding liabilities and termination settlement proposals arising from the termination of the Contract.
 5. Transfer title and deliver to the Department (1) for the fabricated, partially fabricated, or unfabricated parts, work in progress, 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.

6. Complete performance of the work not terminated.
 7. Acceptable materials obtained by the Contractor for the Project that have not been incorporated in the work shall be inventoried in conjunction with the Resident Engineer at a date identified by the Resident Engineer.
 8. Take any action necessary, or that the Resident 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.
- (b) **Settlement Provisions.** When the Department orders termination of all or part of the Contract effective on a certain date, completed items of work as of that date will be paid for at the Contract bid price. Payment for partially completed work will be made either at agreed prices or under the provisions below. Items that are eliminated in the entirety by such termination shall be paid for as provided in Subsection 109.05.

1. **Additional Costs.** Within sixty (60) calendar days of the effective termination date, the Contractor shall submit a claim for additional damages or costs not covered above or elsewhere in the Contract. Such claim may include such cost items as reasonable idle equipment time, mobilization efforts, bidding and project investigative costs, overhead expenses attributable to the project terminated, subcontractor costs not otherwise paid for, actual idle labor cost if work is stopped in advance of termination date, guaranteed payments for private land usage as part of the original Contract, and any other cost or damage for which the Contractor feels reimbursement should be made. Anticipated profits will not be considered as part of any settlement.

The Contractor and the Department may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. The agreed amount may not exceed the total Contract price as reduced by the amount of payments previously made, and the Contract price of work not terminated. The Contract shall be amended, and the Contractor paid the agreed amount.

2. **Additional Cost Review.** If the Contractor and the Department fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Department will pay the amounts determined as follows, but without duplication of any amounts agreed upon above:
 - a) For Contract work performed before the effective date of termination, the total (without duplication of any items) of:
 - (1) The cost of work performed;
 - (2) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the termination portion of the Contract if not included in subparagraph 1 above; and
 - (3) A sum, as profit on (1) above determined by the Department to be fair and reasonable. The Department shall allow no profit under this subdivision if the Contractor's costs incurred on work performed exceed the bid item payments made.

- b) The reasonable costs of settlement of the work terminated, including:
 - (1) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and support data;
 - (2) The termination and settlement of subcontracts (excluding the amounts of such settlements); and
 - (3) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.
- c) Except for normal spoilage, and to the extent that the Department expressly accepts the risk of loss, Department will exclude from the fair value, as that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Department or to the buyer.
- d) In arriving at the amount due the Contractor under this clause, there will be deducted
 - (1) All unliquidated advance or other payments to the Contractor under the Contract; and
 - (2) Any claim that the Department has against the Contractor under the Contract; and
 - (3) The agreed price for, or the proceeds from the sale of materials, supplies, or other things acquired and sold by the Contractor not recovered by or credited to the Department.

If the termination is partial, the Contractor may file a proposal with the Department for and request review of the unit price(s) on the continued portion of the Contract. The Department will review unit prices for the continued portion of the Contract and will revise such prices when appropriate. Any proposal for a review of unit prices under this clause shall be requested within ninety (90) calendar days from the effective date of termination unless extended in writing by the Engineer.

The Department may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the Contract, if these payments will not exceed the amount to which the Contractor is entitled.

The Contractor shall maintain and make available all project cost records to the Department for audit to the extent necessary to determine the validity and amount of each item claimed. This includes all books and other evidence bearing on the Contractor's costs and expenses under the Contract. These records and documents shall be made available to the Department at the Contractor's office, at all reasonable times, without any direct charge. If approved by the Department, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

Termination of the Contract or portion thereof shall not relieve the Contractor of contractual responsibilities for the work completed, nor shall it relieve the Surety of its obligation for and concerning any just claim arising out of the work performed.