

SECTION 108 -- PROSECUTION AND PROGRESS

108.01 -- Subletting or Assigning of Contract

1. a. (1) The Contractor will not be allowed to sublet, assign, sell, transfer, or otherwise dispose of any portion of the contract or any right, title, or interest therein; or to either legally or equitably assign any of the money payable under the contract or the claims without the prior written consent of the Engineer.

(2) With the Engineer's consent, the Contractor may sublet up to 70 percent of the work.

(3) Any items designated in the contract as "specialty items" may be performed by subcontract.

(4) The cost of any subcontracted "specialty items" may be deducted from the total contract cost before computing the percentage of work required to be performed by the Contractor.

(5) Subcontracts, or transfer of contract, will not release the Contractor of any liability under the contract and bonds.

b. Certain items of work may be performed without a subcontract. A list of items not requiring a subcontract is available from the Engineer.

2. The performance of any work by a Subcontractor before the date of written authorization by the Department shall subject both the Contractor and Subcontractor to the imposition of appropriate sanctions by the Department.

3. The Contractor's request to sublet work shall be in writing to the NDR Construction Engineer. The request shall include a certification from the Contractor that a signed subcontract agreement is on file in the Contractor's office. The subcontract agreement must provide that the subcontracted work will be completed according to the terms of the contract. The required and special provisions contained in the proposal shall be physically included in any subcontract.

4. Second tier subcontracts will be allowed except for subcontracts or portions of subcontracts used to meet DBE goals. All requests for second tier subcontracting shall be submitted to and approved by the prime Contractor before they are forwarded to the NDR Construction Engineer for approval.

5. All subcontract documents relating to the contract shall be maintained during the course of the work and preserved for a period of three years thereafter. These documents shall be available for inspection by authorized representatives of State and Federal agencies. Copies of subcontract agreements shall be furnished to the Department upon request.

6. The Contractor may discuss a proposed subcontract with the Engineer before entering into a signed subcontract agreement, but final approval will not be granted until a formal request and proper certification has been received by the Department.

7. A copy of all executed subcontracts, written agreements, and/or lease agreements used to meet DBE goals shall be submitted to the

NDR Construction Engineer with the subcontracting request. These copies must show labor cost, material prices, overhead, and profit.

8. On projects requiring submittal of certified payrolls, all Subcontractor payrolls shall be checked by the Contractor before submittal to the Engineer.

9. a. The prime Contractor shall include a "Prompt Payment Clause" as a part of every subcontract (including second tier subcontracts) for work and materials. The "Prompt Payment Clause" will require payment to all subcontractors for all labor and materials, for work completed, within 20 calendar days of receipt of progress payments from the Department for said work. The "Prompt Payment Clause" will also stipulate the return of retainage within 30 calendar days after the satisfactory completion of work by the subcontractor. Any delay of payment from the above time frame may occur only for good cause following written approval of the Department.

b. The failure by the prime Contractor to carry out the requirements of the "Prompt Payment Clause" and/or the timely return of retainage, without just cause, is a material breach of this contract, which may result in the Department withholding the amount of payment from the prime Contractor that should have been paid to the subcontractor, termination of this contract, or other such remedy as the Department deems necessary.

c. The prime Contractor may withhold payment only for just cause and must notify the Department in writing of its intent prior to withholding payment. The prime Contractor shall not withhold, delay, or postpone payment without first receiving written approval from the Department.

108.02 -- Contract Time Allowance

1. a. The proposal will show a "tentative starting date" the Contractor may begin operations and a specified number of working days or calendar days to complete the work.

b. The Department will establish a starting date and by issuing a written "Notice to Proceed", normally but not necessarily coinciding with the tentative starting date, after the award and execution of the contract. The Contractor may, however, make a written request to the NDR Construction Engineer to begin work on a different date. (See Subsection 108.03)

c. If an earlier starting date is approved by the NDR Construction Engineer, the work and the count of working days or calendar days shall start on the revised starting date unless the Contractor gives a subsequent written notice at least seven calendar days in advance of the revised starting date. Such notice shall indicate the date to which the start has been changed and the reason for the change. Unless authorized by the NDR Construction Engineer, the counting of working days or calendar days shall not be delayed beyond the "tentative starting date" shown in the contract.

d. If a later starting date is approved by the NDR Construction Engineer, the count of working days or calendar days shall start on the revised starting date or on the actual starting date, whichever is earlier. The Contractor shall give the Engineer 72 hours notice of the intent to start work prior to the revised starting date.

2. a. If the Contractor elects to begin work before the "tentative starting date", no consideration will be given for a suspension of the working day or calendar day count or for an adjustment of the contract time allowance because of delays in delivery of materials, except for critical defense materials.

b. In the event that utility lines or conduits, fences, or any other conflicting appurtenances are encountered during the performance of the work before the "tentative starting date," no consideration will be given for a suspension of the working day or calendar day count or for an adjustment or extension of the contract time allowance, nor will any additional compensation be allowed for any delays, inconvenience, or damages sustained by the Contractor due to interference from the conflicting appurtenances.

c. The Contractor assumes responsibility for all additional costs resulting from his/her requested change in the start date. This includes those cases when the contract is "tied" or related to another contract.

3. a. The determination of the days which constitute "working days" or "calendar days" to be charged against the time allowance for completion of the work shall be made by the Engineer in accordance with the definitions shown in Subsections 101.0313 and 101.0399.

b. Charging of working days or calendar days shall begin on the actual beginning date or on the date established in the written "Notice to Proceed", whichever is earlier. The count shall continue until all work is completed unless the Engineer authorizes a temporary suspension of the operations in accordance with Subsection 108.06.

c. Working days or calendar days will be charged during temporary work suspensions when the work suspension resulted from the Contractor failing to:

(1) Correct conditions unsafe for the workers, State employees, or the general public.

(2) Meet environmental quality regulations.

(3) Carry out provisions of the contract.

(4) Carry out orders given by the Engineer.

d. When a Contractor is the apparent low bidder for work included in two or more time allowances, the individual time allowances shown in the proposal shall apply. The use of a combined time allowance for work included in two or more time allowances will not be allowed.

4. The Contractor will not be charged working days or calendar days when performing the following types of work:

a. Driving test piling, provided that the Contractor is not engaged in any other items of contract work included in the contract time allowance and provided that the performance of such work does not interfere with the normal use of the road by traffic.

b. Channel excavation work that facilitates bridge and culvert work, provided that the Contractor is not engaged in any other items of the contracted work except work performed under the conditions described in Paragraph 4. of this Subsection.

c. Clearing and grubbing work, provided that weather and soil conditions, as determined by the Engineer, are such that other items of work included in the same contract time allowance cannot be performed, except channel excavation work described in Paragraph 4.b. of this Subsection.

d. The production and stockpiling of aggregates prior to the actual beginning date, provided that other items of work included in the same contract time allowance, except those listed in Paragraph 4. of this Subsection, are not being performed on the project.

e. Any work which does not require an inspector, performed entirely outside the limits of the project before the actual beginning date, provided that other items of work included in the same contract time allowance, except those listed in Paragraph 4. of this Subsection, are not being performed on the project.

f. Backfilling of bridge abutments after the grading operations have been suspended for a period of time awaiting completion of structures, provided that all other items included in the grading group of the contract have been completed.

g. Maintenance operations performed during prescribed maintenance periods for bituminous base, provided that all other items included in those contract groups have been completed.

h. (1) Minor miscellaneous or finishing work, provided that all significant pay items are complete and all other work has been completed to the extent that the work could be opened to traffic and the prosecution of the minor work would not interfere with the normal use of the highway by traffic.

(2) Working days or calendar days shall be charged during this period if the Engineer determines that the Contractor is not prosecuting the remaining work in a manner which is conducive to a timely completion of all work included in the contract.

(3) If the Contractor allows more than three working days to elapse without significant minor miscellaneous or finishing work being completed, then the Contractor will have failed to satisfactorily prosecute the remaining work. The Engineer shall be the sole judge of whether significant minor work is being accomplished.

i. Clearing and grubbing work and the furnishing and placement of right-of-way markers in advance of the beginning date established in the "Notice to Proceed" in order to facilitate utilities' rehabilitation, relocation of other facilities, or other construction work.

j. Pre-watering of excavation or borrow areas in advance of the beginning date established in the "Notice to Proceed".

k. Ground preparation for landscape planting work performed in advance of the beginning date established in the "Notice to Proceed", work during the establishment period for landscape plantings, and for the work of any subsequent replanting.

l. Installation of traffic control signs done in advance of the established beginning date, provided the signs are properly covered until work begins.

m. Surveying and staking done before the construction start date established in the "Notice to Proceed".

5. Each week, the Engineer will furnish the Contractor a report of working days or calendar days charged. The Contractor then has 14 days after receipt of the Engineer's report to provide a written explanation of why he/she does not concur with the working days or calendar days as assessed.

6. a. If the Contractor finds that he/she will be unable to complete the work within the authorized number of working/calendar days, he/she may promptly make a written request to the Engineer for a time extension. Such a request shall:

(1) Describe the nature of the delay involved.

(2) Describe the conditions beyond the Contractor's control which are responsible for the delay.

(3) State the length of time that his/her operations have been delayed or it is anticipated that they will be delayed and submit sufficient evidence to substantiate the fact that the delay resulted from conditions beyond his/her control.

b. If the Engineer finds that the delay was caused by conditions beyond the Contractor's control, he/she will either:

(1) Authorize a temporary suspension of operations.

(2) Adjust the number of working days or calendar days previously charged.

(3) Grant, in writing, an extension of the working day or calendar days time allowance consistent with the facts presented.

c. The action taken will depend upon the nature and extent of the delay involved. The Engineer's decision shall be final and conclusive.

7. When the special provisions require work to be performed in cold weather, consideration in the determination of work days will not be given because of possible loss of efficiency due to prosecution of the work during cold weather.

8. a. The Department will not consider delayed material delivery and/or fabrication justification for a contract time extension unless:

(1) The Contractor provides written documentation that the delay was caused by an industry-wide strike, natural disaster, area-wide shortage, or other unusual market condition occurring after contract award, or

(2) The Contractor demonstrates that the delay was due to demand for critical defense materials such as steel, copper, or aluminum.

b. A request for a time extension due to delays in material deliveries or fabrication should include the following items:

(1) A letter from the Contractor explaining the situation, including how the delay will affect the remainder of the project.

(2) A letter from the supplier, (raw material or finished product as appropriate) or fabricator confirming the pertinent material order dates and causes for the delay.

(3) Information about the Contractor's efforts to obtain the material from other suppliers.

c. After reviewing the request, the Engineer may:

(1) Authorize a temporary suspension of operations.

(2) Adjust the number of working days or calendar days previously charged.

(3) Grant, in writing, an extension of the working day or calendar day time allowance consistent with the facts presented.

(4) Deny the request.

9. A shortage of labor in counties near the project will not be considered justification for an extension in the specified time allowances. The Contractor shall investigate the anticipated availability of labor in the area during the contract period and give consideration in preparing the proposal to the necessity and cost of importing labor.

10. a. The Engineer may allow additional working days or calendar days when extra work not in the original contract or additional quantities of contract items are required.

b. Time extensions will be granted in proportion to the value of extra and additional work compared to the total amount of the original contract. Further consideration may be given when the Contractor can show that the extra or additional work required more time than its proportional value.

c. Increases in the quantities of work associated with traffic control items measured by the day will not be considered for extending the contract time allowance. Overruns of traffic control items that are measured by methods other than time will be considered for extending the contract time allowance.

108.03 -- Prosecution of Work

1. a. The Contractor shall start work and working days or calendar days will be assessed starting on the date specified in the written "Notice to Proceed". If circumstances prevent the Contractor from beginning work on the originally designated start date, the Contractor must request from the Department a new starting date, in writing, seven days before the originally designated contract start date.

b. This notification must include the reason for the delay. Working days or calendar days will still be charged from the originally designated contract start date unless the Contractor also requests the start date to be postponed.

c. The start date will be postponed if the Engineer determines the postponement is beyond the control of the Contractor or if postponement benefits the Department. In such case, the Engineer will change the start date and notify the Contractor before the original contract start date.

2. a. The Engineer reserves the right to designate where the work shall start. When the Contractor's operations are materially affected by changes to the plans or if he/she has failed to comply with the requirements of Subsection 108.07, the Engineer may request a revised progress schedule.

b. This revised progress schedule shall show how the Contractor proposes to prosecute the balance of the work.

c. The Contractor shall submit the progress schedule within seven days after receipt of the Engineer's request. The Contractor's progress schedule shall include any special provision requirements regarding the order of performance of the remaining work.

108.04 -- Limitation of Operations

1. The Contractor shall work to minimize interference with traffic. The Contractor shall have due regard to the location of detours and to the provisions for handling traffic. The Contractor shall not open up work to the prejudice of work already started.

2. The Engineer may require the Contractor to finish a section on which work is in progress before work is started on any additional section.

3. Placing right-of-way markers shall be one of the first orders of work.

108.05 -- Contractor Employees, Methods, and Equipment

1. The Contractor shall employ sufficient labor and equipment for completing all work required by the contract.

2. All Contractor employees must have sufficient skill and experience to perform their assigned work. All employees engaged in special or skilled work shall have sufficient experience in such work and in the operation of the equipment so as to perform all work in accordance with the plans, specifications, and industry standards.

3. Any Contractor employee or Subcontractor employee who, in the judgment of the Engineer, does not perform the work in a proper and skillful manner or acts unprofessionally or disorderly shall, at the written request of the Engineer, be removed from the worksite and not allowed on site again without the approval of the Engineer.

4. Should the Contractor fail to remove such person or persons as required above or fail to furnish suitable and sufficient personnel for the proper prosecution of the work, the Engineer may withhold all payments which become due and suspend the work until such orders are implemented.

5. a. All equipment shall be of sufficient size and proper mechanical condition to meet the requirements of the plans, specifications, and industry standards. The Engineer may require replacement of any unsatisfactory equipment.

b. Specified equipment and methods shall be used and followed unless changes are authorized by the Engineer.

c. The Contractor may request a change of method or equipment from the Engineer. The written request shall include a complete description of the methods and equipment and an explanation of the reasons for the change. If approval is given, the Contractor will be responsible for producing work that conforms with original contract requirements.

d. If, after trial use of the substituted methods or equipment, the Engineer determines that the work produced does not meet contract requirements, the Engineer will direct the Contractor to discontinue the use of the substitute methods or equipment and complete the remaining construction with the originally specified methods and equipment. The Contractor shall remove the deficient work and replace it with work of specified quality or take other corrective action as the Engineer may direct.

4. When the Engineer grants permission to use any particular methods, equipment, or appliances, this action does not:

a. Relieve the Contractor from furnishing other equipment or appliances or adopting other methods when it appears necessary to prosecute the work as specified.

b. Bind the Department to accept work which does not meet contract specifications.

c. Preclude the Engineer from requiring other methods, equipment, or appliances at any time when in his/her judgment the methods, equipment, or appliances which he/she has allowed the Contractor to use prove to be inadequate, insufficient, or unsatisfactory.

108.06 -- Temporary Suspension of Work

1. a. The Engineer has the authority to suspend the work, wholly or in part, by written order, for such periods as he/she may deem necessary due to unsuitable weather or any other conditions considered unfavorable for prosecution of the work.

b. The Engineer has the authority to suspend work for the Contractor's failure to carry out orders given by the Engineer or for failure to comply with any provision of the contract.

c. The Contractor shall not suspend work without the Engineer's written authorization.

2. Suspensions of Work Ordered by the Engineer:

a. If the performance of all or any portion of the work is suspended or delayed by the Engineer for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry) and the Contractor believes that additional compensation and/or contract time is due as a result of such suspension or delay, the Contractor shall submit to the Engineer a written request for adjustment within seven calendar days of receipt of the notice to resume work. The request shall describe the reasons and support for such adjustment.

b. Upon receipt, the Engineer will evaluate the Contractor's request. If the Engineer agrees that the cost and/or time required for the performance of the contract has increased as a result of such suspension and the suspension was caused by conditions beyond the control of and not the fault of the Contractor, suppliers, or Subcontractors at any approved tier and not caused by the weather, the Engineer will make an adjustment (excluding profit) and modify the contract accordingly. The Engineer will notify the Contractor of the determination of whether or not an adjustment of contract is warranted.

c. No contract adjustment will be allowed unless the Contractor submits the request for adjustment as prescribed in Paragraph 2.a. of this Subsection.

d. No contract adjustment will be allowed under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided for or excluded under any other term or condition of this contract.

108.07 -- Contractor's Work Schedule

1. a. The Contractor shall complete all requirements on or before the expiration of the contract time allowance.

b. The Contractor shall develop and submit for approval a progress schedule. The schedule shall be presented and briefed to the Engineer at the Preconstruction Conference. This schedule and any supplemental schedule shall show:

- (1) Completion of all work within the specified contract time.
- (2) The proposed order of work for all bid items.
- (3) Projected starting and completion times for major phases of the work and for the total project.
- (4) Whether portions of the work are to be accomplished by the Contractor or a Subcontractor.

c. The schedule shall be developed using a method that will clearly and unmistakably identify the critical path of interrelated tasks or items of work required to complete the project. (The critical path is defined as the sequential path of activities through a network diagram from beginning to end of the project which provides for the completion of the project in the least amount of time.) The Contractor shall provide sufficient material, equipment, and labor to meet the completion times in this schedule.

d. The Contractor shall furnish four copies of the schedule to the Engineer.

e. Progress estimates, except for certain authorized materials which may be paid for as provided in Subsection 109.07, will not be made until the Contractor's original schedule is approved.

f. The Department will accept a progress schedule indicating an early completion but cannot guarantee the Department's resources will be available to meet the accelerated schedule. No additional compensation will be allowed if the Contractor is not able to meet his/her accelerated schedule due to the unavailability of the Department's resources.

2. a. If the Contractor's progress falls behind his/her schedule, the Engineer may put the Contractor on notice and direct the Contractor to take whatever action is necessary to expedite completion of the work.

b. Additionally, the Engineer may request that the Contractor submit, within seven days, a revised progress schedule that demonstrates how and when the Contractor intends to complete the work. The Engineer may suspend progress payments until the revised schedule is submitted if the Contractor fails to submit a revised progress schedule within seven days.

c. If the Contractor fails to make satisfactory arrangements to adjust his/her performance and schedule within seven days, his/her qualification for submitting bids at future lettings may be suspended until the Contractor's performance and schedule demonstrate that the contract will be completed by a time satisfactory to the Department. The Engineer will also issue a written decision as to whether to allow the Contractor to proceed or to stop work and terminate the contract.

3. When the Contractor desires to change the approved schedule, he/she must submit the proposed revised schedule to the Engineer for approval at least seven days before any significant deviation from the currently approved schedule.

108.08 -- Liquidated Damages

1. Liquidated damages are intended to compensate for expenses incurred by the Department due to the Contractor's failure to complete the work within the authorized number of working days or calendar days. Such amounts are not to be considered as penalties.

2. The Department utilizes the following formula to calculate liquidated damages when a contract is not completed on time. The value of liquidated damages determined by this formula represents a portion of the Department's costs incurred because of delays in completing the contract.

LIQUIDATED DAMAGES FORMULA

$$LD = \frac{R \times C}{T}$$

- where: LD = Liquidated damages per working day or calendar day (rounded to the nearest dollar).
- C = Original contract amount (includes all work completed and unfinished).
- T = Original number of calendar days or working days, whichever is specified in the contract.
- R = 0.06 for working day contracts.
- R = 0.12 for calendar day contracts.

3. a. The Contractor agrees:

(1) To pay, according to the formula in Paragraph 2. of this Subsection, liquidated damages for each working day/calendar day beyond the number of working days/calendar days authorized for completion of the contract, and

(2) To authorize the Engineer to deduct liquidated damages from any money due or coming due the Contractor.

b. If no monies are due the Contractor, the Department shall have the right to recover liquidated damages from the Contractor, from the surety, or from both the Contractor and the surety.

4. Liquidated damages will not be assessed for any days covered by an approved time extension. Deductions or payment of liquidated damages will not release the Contractor from further obligations and liabilities to complete the entire contract.

108.09 -- Completion of Contracts in Default

1. The Engineer shall give the Contractor and the Contractor's surety written notice of default, delay, and/or neglect, as appropriate, whenever the Contractor:

a. Fails to perform the work with sufficient employees, equipment, or materials to ensure the contract's prompt completion.

b. Does not perform work which meets the standards established in the plans and specifications.

- c. Neglects or refuses to remove excess or unacceptable materials.
- d. Fails to correct any work rejected as defective or unsuitable.
- e. Discontinues the prosecution of the work without the Engineer's approved written authorization.
- f. Fails to resume work within 30 days after the Engineer directs resumption of work.
- g. Becomes insolvent, declares bankruptcy, commits any act of bankruptcy or insolvency, or allows any final judgement to stand unsatisfied for a period of ten days.
- h. Makes an assignment for the benefit of creditors.
- i. For any other cause does not carry on the work in an acceptable manner.

2. If the Contractor or Contractor's surety does not proceed according to the Department's default, delay and/or neglect notice within ten days of its receipt, the Department has full power and authority, without violating the contract, to take the prosecution of the work out of the hands of the Contractor. The Department may appropriate or use any or all materials and equipment at the worksite as may be suitable and acceptable and may enter into an agreement with others for the completion of the contract according to the terms and provisions thereof, or use such other methods as shall be required for the completion of the contract in an acceptable manner.

3. All costs and charges incurred by the Department, together with the cost of completing the work under contract, shall be deducted from any money due or which may become due the Contractor. In case the expense so incurred by the Department shall be less than the sum which would have been payable under the contract if it had been completed by the Contractor, then the Contractor shall be entitled to receive the difference, and in case such expense shall exceed the sum which would have been payable under the contract, then the Contractor and the surety shall be liable and shall pay to the State the amount of said excess.

108.10 -- Termination Clause - National Emergency

1. The Department may terminate the contract or a portion thereof by written notice when the Contractor is prevented from proceeding with the construction contract as a direct result of an Executive Order of the President with respect to the prosecution of war or in the interest of national defense.

2. When a contract, or any portion thereof, is terminated before completion of all items of work in the contract, payment will be made for the actual number of units or items of work completed at the contract unit price, or as mutually agreed for items of work partially completed or not started. No claim for loss of anticipated profits shall be considered.

3. Reimbursement for organization of the work, other overhead expenses (when not otherwise included in the contract), and moving equipment and materials to and from the job will be considered, the intent being that the Contractor shall receive an equitable settlement.

4. At the Contractor's option, the Department will purchase any acceptable materials obtained or ordered by the Contractor for the work but not incorporated in the project at their actual costs as shown by receipted bills and actual cost records at such point of delivery as may be designated by the Engineer.

5. Termination of a contract or a portion thereof shall not relieve the Contractor of his/her responsibilities for the completed work, nor shall it relieve the surety of its obligation for and concerning any just claim arising out of the actual work performed.

108.11 -- Termination Clause - Other Reasons

1. The contract, or portions thereof, may also be terminated for the convenience of or if in the best interest of the State by written notice at the sole discretion of the Engineer.

2. When a contract or portions thereof is terminated under the terms of this Subsection, final settlement shall be made in accordance with the provisions of Subsection 108.10.