

7 **SECTION 108**
8 **PROSECUTION AND PROGRESS**

9 **108-1 GENERAL**

10 It is the intent of these Specifications that the Contractor shall commence work on the date of
11 availability shown in the contract or as soon thereafter as practicable, except that when
12 required by permits included in the proposal, that work in jurisdictional waters and wetlands
13 shall not begin until a meeting is held between the Department, Regulatory Agencies and the
14 Contractor. The Contractor shall not begin work before the date of availability without
15 written approval of the Engineer. If such approval is given, the Department will assume no
16 responsibility for any delays caused before the date of availability by any reason whatsoever,
17 and such delays, if any, will not constitute a valid reason for extending the completion date.

18 The Contractor shall pursue the work diligently with workmen in sufficient numbers, abilities
19 and supervision, and with equipment, materials and methods of construction as may be
20 required to complete the work described in the contract or as may be amended by the
21 completion date.

22 **108-2 PROGRESS SCHEDULE**

23 The Contractor shall prepare and submit for review and approval a schedule of proposed
24 working progress. This schedule shall be submitted on forms supplied by the Engineer or in
25 a format that is approved by the Engineer. A detailed Critical Path Method (CPM) schedule
26 shall not be submitted to replace the progress schedule details required below.

27 The proposed progress schedule shall be submitted no later than 7 calendar days before the
28 date of the project preconstruction conference and shall be approved before any payments will
29 be processed for the project.

30 When the Engineer has extended the completion date or if the project overrun is anticipated to
31 exceed 5%, the Contractor may submit a revised progress schedule to the Engineer for review
32 and approval. If plan revisions are anticipated to change the sequence of operations in such
33 a manner as will affect the progress but not the completion date, then the Contractor may
34 submit a revised progress schedule for review and approval but the completion date shall
35 remain unchanged.

36 The proposed progress schedule shall contain the following items:

37 **(A)** A time scale diagram with major work activities and milestone dates clearly labeled.

38 (1) For purposes of composing the progress schedule, major work activities are defined
39 as components comprising more than 5% of the total project cost or occupying more
40 than 10% of total contract time and shall include, if applicable, the following:

- 41 (a) Clearing and grubbing
- 42 (b) Grading
- 43 (c) Drainage
- 44 (d) Soil stabilization
- 45 (e) Aggregate base course
- 46 (f) Pavement
- 47 (g) Culverts
- 48 (h) Bridges (including removal)

- 1 (i) Signals, ITS and lighting
- 2 (j) Overhead signs
- 3 (2) For purposes of composing the progress schedule, major milestones are derived from
- 4 the project construction phasing and shall include, if applicable, the following:
 - 5 (a) Start of construction
 - 6 (b) Intermediate completion dates or times
 - 7 (c) Seasonal limitation/observation periods/moratoriums
 - 8 (d) Traffic shifts
 - 9 (e) Beginning and end of each traffic control phase or work area
 - 10 (f) Road openings
 - 11 (g) Completion date
- 12 (B) A cash curve corresponding to the milestones and work activities established in
- 13 Subarticle 108-2(A) above.
- 14 (C) A written narrative that explains the sequence of work, the controlling operations,
- 15 intermediate completion dates, milestones, project phasing, anticipated work schedule
- 16 and estimated resources. In addition, explain how permit requirements, submittal
- 17 tracking and coordination with subcontractors, utility companies and other entities will be
- 18 performed.

19 **108-3 PRECONSTRUCTION CONFERENCE**

20 Immediately after receipt of notice of award, the Division Engineer and the Contractor will
21 establish a mutually agreeable date on which the preconstruction conference will be held. The
22 Contractor's project superintendent and other individuals representing the Contractor who are
23 knowledgeable of the Contractor's proposed progress schedule or who will be in charge of
24 major items of the work shall attend the preconstruction conference.

25 **108-4 CONSTRUCTION CONFERENCES**

26 After work on the project has begun, construction conferences will be held periodically. The
27 construction conferences are to be scheduled at times that are mutually agreeable to both the
28 project superintendent and the Resident Engineer. It shall be the superintendent's
29 responsibility to attend the conferences.

30 **108-5 CHARACTER OF WORKMEN, METHODS AND EQUIPMENT**

31 The Contractor shall at all times employ sufficient labor and equipment for prosecuting the
32 several classes of work to full completion in the manner and time required by the *Standard*
33 *Specifications*.

34 Department employees who elect to become employed by a Contractor may not perform any
35 function on a project with which they have been involved during employment with the
36 Department without written consent of the State. Any person employed by the Contractor and
37 assigned to a project who has previously been involved in the project as a Department
38 employee shall be, at the written direction of the Engineer, removed from the project.
39 An exception to these terms may be granted when recommended by the Secretary and
40 approved by the Board.

41 Failure of the Contractor to comply may be justification for disqualifying him from further
42 bidding in accordance with Article 102-15 and shall be grounds for termination of this
43 contract.

44 No person shall be employed by the Contractor or by any subcontractor who has been
45 determined by the Engineer to have engaged in fraudulent activities in connection with any
46 work for the Department.

Section 108

1 Any person employed by the Contractor or by any subcontractor who, in the opinion of the
2 Engineer, does not perform his work in a proper and skillful manner or is disrespectful,
3 intemperate, or disorderly or who has been determined by the Engineer to have engaged in
4 fraudulent activities in connection with any work for the Department shall, at the written
5 request of the Engineer, be removed forthwith by the Contractor or subcontractor employing
6 such person and shall not be employed again in any portion of the work without the approval
7 of the Engineer.

8 Should the Contractor fail to remove such persons as required above, the Engineer may
9 suspend the work in accordance with Article 108-7.

10 All equipment proposed to be used on the work is to be of sufficient size and in such
11 mechanical condition as to meet the requirements of the work and to produce a satisfactory
12 quality of work. Equipment used on any portion of the project shall be such that no injury to
13 the roadway, adjacent property, or other highways will result from its use. The Engineer may
14 order in writing the removal and replacement of any unsatisfactory equipment.

15 When the methods and equipment to be used by the Contractor in accomplishing the
16 construction are not prescribed in the contract, the Contractor is free to use any methods or
17 equipment that he demonstrates to the satisfaction of the Engineer will accomplish the
18 contract work in conformity with the contract.

19 When the contract specifies that the construction be performed by the use of certain methods
20 and equipment, such methods and equipment shall be used unless others are approved by the
21 Engineer. If the Contractor desires to use a method or type of equipment other than those
22 specified in the contract, he may request approval from the Engineer to do so. The request
23 shall be in writing and shall include a full description of the methods and equipment proposed
24 to be used and an explanation of the reasons for desiring to make the change. If approval is
25 given it will be on the condition that the Contractor will be fully responsible for producing
26 construction work in conformity with contract requirements. If, after trial use of the
27 substituted methods or equipment, the Engineer determines that the work produced does not
28 meet contract requirements, the Contractor shall discontinue the use of the substitute method
29 or equipment and shall complete the remaining construction with the specified methods and
30 equipment. The Contractor shall remove the unsatisfactory work and replace it with work of
31 specified quality, or take such other corrective action as the Engineer may direct. No change
32 will be made in basis of payment for the construction items involved or in the completion date
33 as a result of authorizing a change in methods or equipment under these provisions.

34 108-6 SUBLETTING OF CONTRACT

35 The Contractor shall not sublet, sell, transfer, assign, or otherwise dispose of the contract or
36 any portion thereof; or of his right, title, or interest therein; without written consent of the
37 Engineer. All requests to sublet work shall be submitted within 30 calendar days of the date of
38 availability or prior to expiration of 20% of the contract time, whichever date is later, unless
39 otherwise approved by the Engineer. In case such consent is given, the sublet work shall be
40 performed by the subcontractor unless otherwise approved in writing by the Engineer. Failure
41 of the Contractor to comply with the *Standard Specifications* will be just cause for the work to
42 be considered unauthorized in accordance with Article 105-12. A firm that has been
43 disqualified due to its failure to maintain satisfactory progress under Article 108-8 will not be
44 approved as a subcontractor until the firm demonstrates the ability to perform the work in a
45 satisfactory manner. When directed by the Engineer, the Contractor shall submit a certified
46 copy of the actual subcontract agreement executed between the Contractor and subcontractor
47 before written consent being issued by the Engineer. In case such consent is given, the
48 Contractor will be permitted to sublet a portion thereof, but shall perform with his own
49 organization, work amounting to not less than 40% of the total original contract amount,
50 except:

51 (A) Any items designated in the contract as specialty items may be performed by subcontract
52 and the cost of any such special items so performed by subcontract will be deducted from

1 the total amount bid before computing the amount of work required to be performed by
2 the Contractor with his own organization, and

3 **(B)** Any other items sublet to Disadvantaged Business Enterprise (DBE), Minority
4 Business (MB) or Women's Business (WB), up to the value of the contract DBE, MB or
5 WB goal, will be deducted from the total amount bid before computing the amount of
6 work required to be performed by the Contractor with his own organization.

7 In any event, the Contractor shall perform with his own organization work amounting to not
8 less than 35% of the difference between the total amount bid and the value of specialty items
9 that have been sublet. Purchasing materials for subcontractors is not included in the
10 percentage of work required to be performed by the Contractor. If the Contractor sublets
11 items of work but elects to purchase material for the subcontractor, the value of the material
12 purchased will be included in the total dollar amount considered to have been sublet.

13 Extra work performed in accordance with Article 104-7 will not be considered in the
14 computation of work required to be performed by the Contractor.

15 An assignment by operations of law or assignment for the benefit of creditors, or the
16 bankruptcy of the Contractor, shall not vest any right in this contract in the Trustee in
17 bankruptcy, the Contractor's creditors, or the agent of the creditors.

18 A subcontractor shall not sublet, sell, transfer, assign, or otherwise dispose of his contract
19 with a contractor or any portion thereof; or of his right, title, or interest therein; without
20 written consent of the Engineer. When directed by the Engineer, the contractor shall submit
21 a certified copy of the actual subcontract agreement executed between the subcontractor and
22 the second tier subcontractor. In the event of an assignment by operations of law or the
23 bankruptcy of the subcontractor, the contractor shall have the right, power and authority, in its
24 discretion, without violating the contract or releasing the Surety, to terminate the subcontract.
25 An assignment by operations of law or assignment for the benefit of creditors or the
26 bankruptcy of the subcontractor shall not vest any right in this contract in the Trustee in
27 bankruptcy, nor the subcontractor's creditors or agents of the creditors.

28 Neither the Contractor, nor any subcontractor, shall enter into any written or oral equipment
29 lease or rental agreement, materials purchase agreement or labor agreement that circumvents
30 this article.

31 If the Contractor or a subcontractor enters into a lease or rental agreement for equipment
32 based upon payment for a unit of work, such agreement will be considered subletting of the
33 contract unless the lease or rental agreement is with a commercial equipment company,
34 manufacturer or commercial leasing agency and such firm has been approved by the
35 Engineer. An equipment lease or rental agreement that is based upon unit prices per unit of
36 time will not be considered subletting of the contract.

37 The approval of any subcontract will not release the Contractor of his liability under the
38 contract and bonds, nor will the subcontractor or the second tier subcontractor have any claim
39 against the Department by reason of the approval of the subcontract. The Chief Engineer will
40 review and consider subcontractor claims for additional time or compensation provided such
41 claims are submitted by the Contractor in accordance with Article 107-24 and NCGS § 136-
42 29.

43 Failure of the Contractor to comply with any of the requirements of this article may be
44 justification for disqualifying the Contractor from further bidding in accordance with
45 Article 102-15.

46 **108-7 TEMPORARY SUSPENSION OF THE WORK**

47 The Engineer will have the authority to suspend the work wholly or in part by written order
48 for such periods, as he may deem necessary for any of the following reasons:

49 **(A)** Conditions considered unfavorable for the suitable prosecution of the work, or

Section 108

1 (B) The Contractor's failure to correct conditions unsafe for workmen or the general public,
2 or

3 (C) The Contractor has not carried out orders given to him by the Engineer, or

4 (D) The Contractor's failure to perform any provisions of the contract.

5 No extension of the completion date will be allowed for the above suspensions except as may
6 be provided for in Article 108-10.

7 **108-8 FAILURE TO MAINTAIN SATISFACTORY PROGRESS**

8 The Engineer will check the Contractor's progress at the time each partial pay estimate is
9 prepared. The Contractor's progress may be considered as unsatisfactory as follows:

10 (A) The Contractor's progress is found to be less than that described in either count below:

11 (1) The dollar value of the work completed, excluding material payments allowed by
12 Article 109-5, is less than the dollar value of the work that should have been
13 completed, on the basis of the Contractor's approved progress schedule, by more than
14 15% of the current contract amount.

15 The dollar value of the work completed will be the total estimate to date shown in
16 the latest partial pay estimate, excluding material payments allowed by
17 Article 109-5. The current contract amount will be the total amount bid plus
18 accumulated overruns less accumulated underruns shown in the latest partial pay
19 estimate.

20 (2) The percentage of the work completed is less than the percentage of contract time
21 elapsed on the work by more than 15%. The percentage of work completed will be
22 the dollar value of the work completed as defined above, divided by the current
23 contract amount as defined above.

24 The percentage of contract time elapsed will be the number of calendar days elapsed
25 as shown in the latest partial pay estimate divided by the total contract time in
26 calendar days.

27 (B) The Contractor fails to begin and pursue the work in accordance with Article 108-1
28 before the expiration of 5% of the original contract time after the date work was
29 scheduled to begin based upon the approved progress schedule.

30 (C) The Engineer anticipates the Contractor will not complete the work described in the
31 contract by the intermediate contract time or the contract completion date.

32 When the Contractor's progress is found to be unsatisfactory as described in
33 Subarticles 108-8(A), 108-8(B) and 108-8(C) above, the Engineer may make written demand
34 of the Contractor to state in writing the reason for the unsatisfactory progress and produce
35 such supporting data as the Engineer may require or the Contractor may desire to submit. The
36 Engineer will consider the justifications submitted by the Contractor and extensions of the
37 completion date have or may be allowed in accordance with Subarticle 108-10(B).

38 When the Contractor cannot satisfactorily justify the unsatisfactory progress, the Engineer
39 may invoke one or more of the following sanctions:

40 (1) Withhold anticipated liquidated damages from amounts currently due or that become
41 due.

42 (2) Remove the Contractor from the Department's Prequalified Bidders List.

43 When any of the above sanctions have been invoked, they shall remain in effect until
44 rescinded by the Engineer.

Section 108

1 **108-9 DEFAULT OF CONTRACT**

2 **(A) Declaration of Default**

3 The Department shall have the right to declare default of the contract for breach by the
4 Contractor of any material term or condition of the contract as determined by the
5 Department. Material breach by the Contractor shall include, but specifically shall not be
6 limited to failure to begin work under the contract within the time specified; failure to
7 provide workmen, equipment, or materials adequate to perform the work in conformity
8 with the contract by the completion date; unsatisfactory performance of the work; refusal
9 or failure to replace defective work; failure to maintain satisfactory work progress; failure
10 to comply with equal employment opportunity contract requirements; insolvency or
11 bankruptcy, or any act of insolvency or bankruptcy; and making an assignment for
12 benefit of creditors.

13 **(B) Corrective Actions upon Default**

14 In the event of a breach of the contract by the Contractor, the Department shall have the
15 right, power and authority, in its sole discretion, without violating the contract or
16 releasing the Surety: to assume full control of the prosecution of the contract in the place
17 and stead of the Contractor in directing Contractor's agents, employees and
18 subcontractors in the performance of the work and in utilizing all materials, tools,
19 machinery, equipment and structures located on the project; to perform the work or any
20 part thereof with Department personnel and equipment or to use any or all materials and
21 equipment located on the project that are suitable and acceptable; to relet the work upon
22 such terms and conditions as the Department shall deem appropriate; to employ any other
23 methods that it may determine are required for completion of the contract in
24 an acceptable manner; and to withhold any sums due the Contractor under the contract
25 without penalty or interest until the work is completed and accepted by the Department.

26 **(C) Notice**

27 Before invoking any of the corrective actions provided for herein, the Department will
28 give the Contractor at least 7 calendar days written notice with a copy to the Surety, that
29 will set forth the breach of contract involved and the corrective actions to be imposed.
30 The Department, in its discretion, may grant the Contractor time in excess of 7 calendar
31 days within which to comply with the contract and the time allowed will be set forth in
32 writing. If the Department determines during such period that the Contractor is not
33 proceeding satisfactorily to compliance, it may impose the corrective actions after
34 24 hours' notice to the Contractor. If the Department determines that the Contractor is
35 not in compliance at the end of the time allowed, it may immediately impose any of the
36 corrective actions set forth herein and will advise the Contractor, in writing, with a copy
37 to the Surety of the corrective actions imposed.

38 **(D) Payment**

39 After declaration of default has been made final, the Contractor will be entitled to receive
40 payment for work satisfactorily completed or portions of work satisfactorily completed,
41 less any sums that may be due the Department from the Contractor but in no event shall
42 payment exceed the contract unit or lump sum price for such work. The Department, at
43 its election, may retain the sum due the Contractor, or any portion thereof, without
44 interest or penalty, until the contract work is completed; or it may make payment to the
45 Contractor upon declaration of default for work satisfactorily completed to the date that
46 notice of default is received by the Contractor. The Contractor may be required by the
47 Engineer to carry to a stage of completion satisfactory to the Engineer any work in
48 progress, the value of which, otherwise, would be lost by immediate cessation of work.
49 Payment for such work will be made upon the basis hereinafter set out.

50 In the event that the Contractor's employees, equipment, or materials are used in
51 prosecution of the work, or any part thereof, after default is declared, payment to the

Section 108

1 Contractor may be by contract unit or lump sum prices for the work performed, or, if the
2 Engineer determines that such prices do not represent the value of the work performed,
3 payment for the type of work or services performed will be made on a force account
4 basis, as set forth in Article 109-3, less any sums that may be due the Department; but in
5 no event shall payment exceed the contract unit or lump sum price for such work or
6 services. Determination of the method of payment shall be in the sole discretion of the
7 Engineer, and he will advise the Contractor, in writing, of his determination with
8 reference to the specific type of work or service to be performed.

9 If all costs and expenses incurred by the Department arising out of the breach and
10 imposition of sanctions, together with the total cost to the Department of securing the
11 performance of the work set forth in the contract, exceed the sum that would have been
12 payable under the contract, the Contractor and the Surety shall be liable to the
13 Department for such excess and shall pay such amount to the Department.

(E) Power of Engineer

15 The Engineer will exercise the powers and discretion vested in him by the contract in
16 carrying out the terms of this article. He will have full power and authority to carry out
17 any orders, directives, or resolutions issued by the Department in connection with
18 a declaration of default. In the event that the Department fails to specify the sanctions to
19 be imposed, the notice to be given or the method of completing the work, the Engineer
20 may, at his discretion, impose such sanctions, give such notice and select such methods
21 of completing the work, as are authorized by this article; and such actions shall have the
22 same effect and validity as if taken pursuant to an express order, directive or resolution of
23 the Department.

(F) Obligation of Contractor and Surety

25 No term or terms of this article and no action taken pursuant hereto by the Department of
26 Transportation, its agents, or employees, will be construed to release or discharge the
27 Contractor or the Surety upon the obligation set forth in the contract bonds, and the
28 Contractor and the Surety shall remain bound thereon unto the Department until the work
29 set forth in the contract has been completed and accepted by the Department and all
30 obligations of the Contractor and the Surety arising under the contract and contract bond
31 have been discharged.

(G) Provision Not Exclusive

33 The provisions shall be in addition to and not in place of, any other provisions relating to
34 default, breach of contract and sanctions to be imposed in connection therewith appearing
35 in the contract.

108-10 CONTRACT TIME AND INTERMEDIATE CONTRACT TIME

(A) General

37 The contract time will be as defined in Section 101. No extensions to the completion
38 date will be authorized except as allowed by this article. No modifications in the date of
39 availability will be made for any reason whatsoever.

41 Intermediate contract time, as defined in Section 101 will be that as allowed in the
42 contract to complete a part, portion or phase of the total work covered in the contract.
43 Intermediate completion dates and intermediate completion times set forth in the contract
44 may be extended on the same basis as completion dates and as described in this article.

45 When the liquidated damages stipulated in the contract are to be hourly, extensions, as
46 described in this article, will be considered on an hourly basis.

1 **(B) Completion Date, Intermediate Completion Date and Intermediate Completion**
2 **Time Extensions**

3 No extension of the completion date, intermediate completion date, or intermediate
4 completion time will be allowed for any reason except as provided for below:

5 (1) If the total dollar value of the final quantities adjusted as provided below, less the
6 dollar value of quantities represented by supplemental agreements that previously
7 extended the completion date, intermediate completion date or intermediate
8 completion time, exceeds the dollar value of the total amount bid, the completion
9 date, intermediate completion date, or intermediate completion time will be extended
10 by the number of calendar days or hours obtained by multiplying the contract time
11 (days), intermediate contract time (days), or intermediate contract time (hours) as set
12 forth in the contract by that percentage that such reduced final dollar value exceeds
13 the total amount bid. The total dollar value of the final quantities for pro-rata
14 computations shall be adjusted by excluding the following:

- 15 (a) Unit bid price changes caused by price adjustments to asphalt cement,
16 (b) Fuel adjustments,
17 (c) Unit price reductions under Article 105-3,
18 (d) Payment for trainees and
19 (e) Unit price changes due to pay factors established by the *Standard Specifications*.

20 (2) If supplemental agreements covering the performance of extra work include
21 provisions for an extension of the completion date, intermediate completion date, or
22 intermediate completion time and the final dollar value of the extra work exceeds the
23 estimated dollar value, the number of days or the number of hours by which the
24 completion date, intermediate completion date or intermediate completion time was
25 extended will be increased by the percentage that the final dollar value exceeds the
26 estimated value.

27 (3) If the Contractor's current controlling operation is delayed by circumstances
28 originating from work required under the contract and beyond his control and
29 without his fault or negligence, he may, at any time before payment of the final
30 estimate, make a written request to the Engineer on the Contractor Claim Submittal
31 Form, available through the Construction Unit, for an extension of the completion
32 date, intermediate completion date, or intermediate completion time. This request
33 shall include:

- 34 (a) The circumstances resulting in the alleged delay and documentation of said
35 circumstances as may be required by the Engineer,
36 (b) The controlling operation alleged to have been delayed,
37 (c) The calendar dates or calendar dates and times on which the controlling
38 operation was delayed and
39 (d) The number of calendar days or hours by which he is requesting the completion
40 date, intermediate completion date, or intermediate completion time to be
41 extended.

42 If the Engineer determines that the controlling operation was delayed because of
43 circumstances beyond the control of and without the fault or negligence of the
44 Contractor, and that the Contractor has pursued the work in accordance with
45 Article 108-1, he will extend the completion date, intermediate completion date, or
46 intermediate completion time unless otherwise precluded by other provisions of the
47 contract. No extension of the completion date, intermediate completion date, or
48 intermediate completion time will be allowed for delays caused by restrictions,
49 limitations or provisions contained in the contract.

Section 108

1 Consideration will be given for an extension in the completion date, intermediate
2 completion date, or intermediate completion time involving an intermediate contract
3 time of more than 96 hours if the Contractor's current controlling operation(s) is
4 delayed in excess of 40% of the total contract time (days), as defined in Section 101,
5 excluding the time between December 15 and March 16; the total intermediate
6 contract time (days), as defined in Section 101, excluding the time between
7 December 15 and March 16; or the total intermediate contract time (hours), as
8 defined in Section 101; due to weather or conditions resulting from weather. No
9 other consideration will be given for extensions in the completion date, intermediate
10 completion date, or intermediate completion time due to delays caused by weather.

11 Where the intermediate contract time is 96 hours or less, no consideration
12 whatsoever will be given for an extension in the intermediate completion time due to
13 weather or conditions resulting from weather.

14 (4) If changes in the work from that originally contemplated in the contract are ordered
15 by the Engineer and these changes result in reduction in quantities, elimination of
16 items, additional work or extra work, the Engineer will allow an extension in the
17 completion date, intermediate completion date, or intermediate completion time as
18 he may deem warranted by such changes. Pursuit of the work with adequate forces
19 and equipment and efficiency of the Contractor's operations will be considered by
20 the Engineer in determining an extension in the completion date, intermediate
21 completion date, or intermediate completion time. It is, however, the Contractor's
22 responsibility to show just cause for an extension in the completion date,
23 intermediate completion date, or intermediate completion time due to the aforesaid
24 conditions. If the Contractor elects to file a written claim or requests an extension of
25 contract time, it shall be submitted on the Contractor Claim Submittal Form available
26 through the Construction Unit.

27 (5) In the event accumulated authorized extensions in the completion date or
28 intermediate completion date resulting from Subarticles 108-10(B)(1) through
29 108-10(B)(4) above extend the completion date or intermediate completion date
30 beyond December 15 following expiration of the completion date or intermediate
31 completion date as established in the contract, the completion date will be further
32 extended by the number of calendar days between December 15 of one year and
33 March 16 of the following year. If any portion of such accumulated authorized
34 extensions are for delays that occurred after the original contract time or intermediate
35 contract time (days) expired and during the period between December 15 of one year
36 and March 16 of the following year, this portion of the extension will be deducted
37 from the number of additional calendar days awarded due to extension of the
38 completion date or intermediate completion date beyond December 15.

39 The Contractor's claim that insufficient contract time (days), intermediate contract
40 time (days), or intermediate contract time (hours) was specified in the contract will
41 not be considered as a valid reason for an extension in the completion date,
42 intermediate completion date, or intermediate completion time.

43 When all work on the project is totally complete, with the exception of an item or items on
44 which work is precluded by seasonal limitations set forth in the contract, the Engineer may,
45 provided that the Contractor has, as determined by the Engineer, diligently pursued the work
46 with adequate forces and equipment, waive the assessment of liquidated damages during the
47 period of time from the date all work other than that precluded by seasonal limitations was
48 completed until the date of expiration of the seasonal limitations. The Contractor shall make
49 the request to waive the assessment of liquidated damages in writing before the beginning
50 date of the requested waiver. The non-assessment of liquidated damages during the aforesaid
51 period shall not operate to waive any other liquidated damages that may be assessable, or any
52 other terms of the contract.

108-11 LIQUIDATED DAMAGES

The parties acknowledge that time is of the essence for the performance of the work under the contract. Time is an essential element of the contract. Delay in completing the work will result in damages including but not limited to public inconvenience, obstruction to traffic, interference with business and the increasing of engineering, inspection and administrative costs to the Department. It is therefore agreed that in view of the difficulty of making a precise determination of such damages, a sum of money in the amount stipulated in the contract, will be charged against the Contractor for each calendar day, each hour, or portion thereof that the work, or any portion of the work as described in the contract, remains uncompleted after the expiration of the completion date, intermediate completion date, or intermediate completion time shown in the contract, not as a penalty but as liquidated damages.

Should the Contractor or, in case of default, the Surety fail to complete the work or any portion of the work by any of the applicable completion dates, intermediate completion dates, or intermediate completion times shown in the contract, a deduction of the amount stipulated in the contract as liquidated damages will be made for each and every calendar day, for each and every hour, or portion thereof that the work or any portion of the work remains uncompleted after the expiration of any completion date, intermediate completion date, or intermediate completion time applicable to the uncompleted work. This amount will be deducted from any money due the Contractor or his Surety under the contract and the Contractor and his Surety will be liable for any liquidated damages in excess of the amount due.

In the event that the contract establishes one or more intermediate completion dates or times in addition to the completion date, each of the liquidated damages stipulated will be considered to be cumulative to any other liquidated damages stipulated.

In case of Contractor default of the contract and the completion of the work by the Department, the Contractor and his Surety will be liable for the liquidated damages under the contract, but no liquidated damages will be chargeable for any delay in the final completion of the work by the Department due to any action, negligence, omission, or delay of the Department.

In any suit for the collection of or involving the assessment of liquidated damages, the reasonableness of the amount stipulated in the contract will be presumed. The liquidated damages referred to herein are intended to be and are cumulative and will be in addition to every other remedy now or hereafter enforceable at law by statute or under the contract.

Permitting the Contractor to continue and finish the work or any part thereof after the expiration of the completion date, intermediate completion date, or intermediate completion time shall in no way operate as a waiver on the part of the Department of any of its rights under this contract.

108-12 EXTENSION OF CONTRACT TIME AND APPORTIONMENT OF LIQUIDATED DAMAGES

In accordance with Articles 108-10 and 108-11, when a contract is not completed by the completion date, intermediate completion date, or intermediate completion time, the Contractor shall be entitled to an extension of the completion date, intermediate completion date, or intermediate completion time and apportionment and remittance of liquidated damages to the extent that the failure to complete was due to the conditions set forth in Article 108-10. The Contractor, however, shall be entitled to an extension of the completion date, intermediate completion date, or intermediate completion time, or an apportionment and remittance of liquidated damages only to the extent and in the proportion that such delays were caused by the conditions set forth in Article 108-10, and it is understood that any extension granted shall not operate to waive any liquidated damages or any claim which the Department has or may have against the Contractor by reason of failure of the Contractor to

Section 108

1 complete the said contract by the completion date, intermediate completion date, or
2 intermediate completion time specified therein or as revised by authorized extensions.

3 **108-13 TERMINATION OF CONTRACT**

4 The Department may terminate the contract in accordance with the following provisions:

5 **(A)** The Department will consider termination of the contract upon written notification by the
6 Contractor that any of the following circumstances exist. The Contractor shall include
7 adequate documentation of these circumstances along with such notification:

8 (1) If it is impossible for the Contractor to obtain critical materials for completion of
9 the contract within a practical time limit, or

10 (2) If it is impossible for the Contractor to complete the work in accordance with the
11 contract by reason of unanticipated conditions at the site, including slides and
12 unstable subsoil, without a major change in the design of the project and the
13 Contractor will be unduly delayed in completing the project by reason of such
14 unanticipated conditions and changes in design, or

15 (3) If the Contractor is prevented from proceeding with the contract as a direct
16 result of an Executive Order of the President with respect to the prosecution of
17 war or in the interest of national defense, or

18 (4) If the Contractor is prevented from proceeding with the work required by the
19 contract as a direct result of a restraining order, or other court order, or by
20 reason of a permit requirement, and the Contractor will be unduly delayed in
21 completing the project by reason of such order or requirement, or

22 (5) If the Contractor is prevented from proceeding with the work due to the
23 unavailability of the site

24 **(B)** The Contract will be terminated under this article if:

25 (1) Request by Contractor

26 (a) The Department concurs in the determination by the Contractor of the
27 circumstances or makes an independent determination that such circumstances
28 herein above indicated exist, and

29 (b) The Department determines that such circumstances are beyond the control of
30 the Contractor, and the Contractor was not at fault in creating the circumstances,
31 and

32 (c) The Department determines that a termination of the contract is in the best
33 public interest.

34 (2) Authority of the Department

35 The Department determines that a termination of the contract is in the best public
36 interest.

37 **(C)** The Contractor will be notified in writing by the Engineer of the action of the
38 Department.

39 **(D)** After a contract is terminated in accordance with this termination provision, the following
40 provisions shall be applicable:

41 (1) When the contract is terminated before completion of all items of work in the
42 contract, payment will be made for the actual number of acceptably completed items
43 of work or acceptably completed portions thereof at the contract unit or lump sum
44 prices. When the contract is terminated before completion of all items of work in the
45 contract and items of work are partially completed or not begun, payment will be
46 made in accordance with Article 104-6.

1 (2) Payment for costs incurred in organization of the work will be based on verified
2 actual costs and will be included in the adjusted contract lump sum price for
3 Mobilization in accordance with Subarticle 108-13(D)(1). The Contractor shall
4 demonstrate through submission of appropriate documentation that these costs were
5 included in the bid item of Mobilization. After reviewing the submitted cost records
6 and the submitted documentation, the Engineer will make such adjustments as he
7 deems warranted.

8 (3) Upon request from the Contractor, materials meeting the requirements of the contract
9 that were to have been incorporated into the work or were to remain the property of
10 the Department but are not used in the work will be paid in accordance with
11 Article 109-6.

12 (4) No claim for loss of anticipated profits will be considered and no payment will be
13 made for loss of anticipated profits.

14 (5) Termination of a contract shall not relieve the Contractor of his responsibilities for
15 any completed portion of the work, nor shall it relieve his Surety of its obligation for
16 and concerning any just claims arising out of the work performed.

17 **108-14 TERMINATION OF CONTRACTOR'S RESPONSIBILITY**

18 After the project has been completed and accepted, as provided for in Article 105-17, the
19 Contractor's responsibility will cease except as provided in Article 107-20 and as set forth in
20 his contract bonds or any warranties provided for under the contract. The Contractor shall
21 remain responsible for any amounts determined to be owed the Department in the processing
22 of the final estimate and such amounts shall be paid by the Contractor upon notification by the
23 Department before processing of the final estimate.