

**SECTION 108
PROSECUTION AND PROGRESS**

108-1 GENERAL

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

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

108-2 PROGRESS SCHEDULE

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

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

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

The proposed progress schedule shall contain the following items:

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

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

- (a) Clearing and grubbing
- (b) Grading
- (c) Drainage
- (d) Soil stabilization
- (e) Aggregate base course
- (f) Pavement
- (g) Culverts
- (h) Bridges (including removal)
- (i) Signals, ITS and lighting
- (j) Overhead signs

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

17 **108-3 PRECONSTRUCTION CONFERENCE**

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

23 **108-4 CONSTRUCTION CONFERENCES**

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

28 **108-5 CHARACTER OF WORKMEN, METHODS AND EQUIPMENT**

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

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

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

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

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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. In case such consent is given, the sublet work shall be performed by the
38 subcontractor unless otherwise approved in writing by the Engineer. Failure of the Contractor
39 to comply with the *Standard Specifications* will be just cause for the work to be considered
40 unauthorized in accordance with Article 105-12. A firm that has been disqualified due to its
41 failure to maintain satisfactory progress under Article 108-8 will not be approved as
42 a subcontractor until the firm demonstrates the ability to perform the work in a satisfactory
43 manner. When directed by the Engineer, the Contractor shall submit a certified copy of the
44 actual subcontract agreement executed between the Contractor and subcontractor before
45 written consent being issued by the Engineer. In case such consent is given, the Contractor
46 will be permitted to sublet a portion thereof, but shall perform with his own organization,
47 work amounting to not less than 40% of the total original contract amount, except:

48 (A) Any items designated in the contract as specialty items may be performed by subcontract
49 and the cost of any such special items so performed by subcontract will be deducted from
50 the total amount bid before computing the amount of work required to be performed by
51 the Contractor with his own organization, and

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

5 In any event, the Contractor shall perform with his own organization work amounting to not
6 less than 35% of the difference between the total amount bid and the value of specialty items
7 that have been sublet.

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

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

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

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

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

32 The approval of any subcontract will not release the Contractor of his liability under the
33 contract and bonds, nor will the subcontractor or the second tier subcontractor have any claim
34 against the Department by reason of the approval of the subcontract. The State Highway
35 Administrator will review and consider subcontractor claims for additional time or
36 compensation provided such claims are submitted by the Contractor in accordance with
37 Article 107-24 and NCGS § 136-29.

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

41 **108-7 TEMPORARY SUSPENSION OF THE WORK**

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

- 44 (A) Conditions considered unfavorable for the suitable prosecution of the work, or
- 45 (B) The Contractor's failure to correct conditions unsafe for workmen or the general public,
46 or
- 47 (C) The Contractor has not carried out orders given to him by the Engineer, or
- 48 (D) The Contractor's failure to perform any provisions of the contract.

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

3 **108-8 FAILURE TO MAINTAIN SATISFACTORY PROGRESS**

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

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

7 (1) The dollar value of the work completed, excluding material payments allowed by
8 Article 109-5, is less than the dollar value of the work that should have been
9 completed, on the basis of the Contractor's approved progress schedule, by more than
10 15% of the current contract amount.

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

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

20 The percentage of contract time elapsed will be the number of calendar days elapsed
21 as shown in the latest partial pay estimate divided by the total contract time in
22 calendar days.

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

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

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

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

36 (1) Withhold anticipated liquidated damages from amounts currently due or that become
37 due.

38 (2) Remove the Contractor and all firms prequalified under the Contractor's
39 Prequalification Number from the Department's Prequalified Bidders List.

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

108-9 DEFAULT OF CONTRACT**(A) Declaration of Default**

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

(B) Sanctions

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

(C) Notice

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

(D) Payment

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

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

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

16 (E) Power of Engineer

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

26 (F) Obligation of Contractor and Surety

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

34 (G) Provision Not Exclusive

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

38 108-10 CONTRACT TIME AND INTERMEDIATE CONTRACT TIME

39 (A) General

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

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

47 When the liquidated damages stipulated in the contract are to be hourly, extensions, as
48 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.

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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 plea 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 diligently pursued the work with adequate forces and
46 equipment, waive the assessment of liquidated damages during the period of time from the
47 date all work other than that precluded by seasonal limitations was completed until the date of
48 expiration of the seasonal limitations. The Contractor shall make the request to waive the
49 assessment of liquidated damages in writing before the beginning date of the requested
50 waiver. The non-assessment of liquidated damages during the aforesaid period shall not
51 operate to waive any other liquidated damages that may be assessable, or any other terms of
52 the contract.

1 108-11 LIQUIDATED DAMAGES

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

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

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

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

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

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

37 108-12 EXTENSION OF CONTRACT TIME AND APPORTIONMENT OF
38 LIQUIDATED DAMAGES

39 In accordance with Articles 108-10 and 108-11, when a contract is not completed by the
40 completion date, intermediate completion date, or intermediate completion time, the
41 Contractor shall be entitled to an extension of the completion date, intermediate completion
42 date, or intermediate completion time and apportionment and remittance of liquidated
43 damages to the extent that the failure to complete was due to the conditions set forth in
44 Article 108-10. The Contractor, however, shall be entitled to an extension of the completion
45 date, intermediate completion date, or intermediate completion time, or an apportionment and
46 remittance of liquidated damages only to the extent and in the proportion that such delays
47 were caused by the conditions set forth in Article 108-10, and it is understood that any
48 extension granted shall not operate to waive any liquidated damages or any claim which the
49 Department has or may have against the Contractor by reason of failure of the Contractor to
50 complete the said contract by the completion date, intermediate completion date, or
51 intermediate completion time specified therein or as revised by authorized extensions.

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108-13 TERMINATION OF CONTRACT

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

(A) Consideration will be given to termination of the contract if any of the following circumstances exist:

- (1) If it is impossible for the Contractor to obtain critical materials for completion of the contract within a practical time limit, or
- (2) If it is impossible for the Contractor to complete the work in accordance with the contract by reason of unanticipated conditions at the site, including slides and unstable subsoil, without a major change in the design of the project and the Contractor will be unduly delayed in completing the project by reason of such unanticipated conditions and changes in design, or
- (3) If the Contractor is prevented from proceeding with the 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, or
- (4) If the Contractor is prevented from proceeding with the work required by the contract as a direct result of a restraining order, or other court order, or by reason of a permit requirement, and the Contractor will be unduly delayed in completing the project by reason of such order or requirement, or
- (5) If the Contractor is prevented from proceeding with the work due to the unavailability of the site.

(B) The Contractor shall determine when the circumstances in Subarticle 108-13(A) exist and are beyond his control and shall notify the Department in writing of his determination and include adequate documentation of these circumstances along with such notification.

(C) The Contract will be terminated under this article if:

(1) Request by Contractor

- (a) The Department concurs in the determination by the Contractor of the circumstances or makes an independent determination that such circumstances herein above indicated exist, and
- (b) The Department determines that such circumstances are beyond the control of the Contractor, and the Contractor was not at fault in creating the circumstances, and
- (c) The Department determines that a termination of the contract is in the best public interest.

(2) Authority of the Department

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

(D) The Contractor will be notified in writing by the State Highway Administrator of the action of the Department.

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

- (1) When the contract is terminated before completion of all items of work in the contract, payment will be made for the actual number of acceptably completed items of work or acceptably completed portions thereof at the contract unit or lump sum prices. When the contract is terminated before completion of all items of work in the contract and items of work are partially completed or not begun, payment will be 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(E)(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.

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. The Contractor shall remain responsible for any amounts determined to be
21 owed the Department in the processing of the final estimate and such amounts shall be paid
22 by the Contractor upon notification by the Department before processing of the final estimate.

**SECTION 109
MEASUREMENT AND PAYMENT**

109-1 MEASUREMENT OF QUANTITIES

26 All work completed under the contract will be measured by the Engineer according to United
27 States standard measures unless otherwise stated in the contract.

28 The method of measurement and computations used in the determination of quantities of
29 material furnished and of work performed under the contract will be those methods generally
30 recognized as conforming to accepted engineering practice.

31 The terms “gauge” and “thickness,” when used in connection with the measurement of plates,
32 sheets and steel wire, shall be applied as follows:

Item	Test Method
Uncoated Steel Sheets and Light Plates	United States Standard Gauge
Galvanized Sheets	AASHTO M 218 or M 167
Aluminum Sheets	AASHTO M 196 or M 197
Steel Wire	AASHTO M 32

33 The term “ton” will mean short ton (mass) consisting of 2,000 lb.

34 Trucks used to haul material being paid by weight will be either weighed empty before each
35 loading or weighed empty daily. When trucks are weighed empty daily, each truck shall be
36 weighed before hauling its first load of the day and shall bear a legible identification mark.

37 Where aggregates that are to be paid by weight have been stockpiled after being produced,
38 measurement for purposes of payment will be made after the aggregates have been loaded on
39 trucks for direct delivery to the project.

40 When a complete structure or structural unit, as may be indicated by the unit, lump sum or
41 each, is specified as the unit of measurement, the unit will be construed to include all
42 necessary fittings and accessories.