

**STANDARD SPECIFICATIONS  
FOR  
HIGHWAY AND BRIDGE  
CONSTRUCTION**

**NEW MEXICO ~~STATE~~  
DEPARTMENT  
OF  
TRANSPORTATION**

**201894 EDITION**

**Markup**

Insertions: Underline Color: Red

Deletions: Strikethrough Color: Dark Yellow

Changed lines: Outside border

Comments: Bright Green

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**Moves**

Track moves

Moved from: Double strikethrough Color: Green

Moved to: Double underline Color: Turquoise

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**Table cell highlighting**

Inserted cells: Light Blue Merged cells: Light Yellow

Deleted cells: Pink Split cells: Light Orange

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**Formatting**

Track formatting

Formatting: (none) Color: Bright Green

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**Balloons**

Preferred width: 3.7" Measure in: Inches

Margin: Right

Show lines connecting to text

Paper orientation in printing: Preserve

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## SECTION 101: ABBREVIATIONS, SYMBOLS, TERMS, AND DEFINITIONS

### 101.1 ACTIVE VOICE, IMPERATIVE MOOD, REFERENCES, USE OF LANGUAGE

The New Mexico Department of Transportation publishes this edition of the Standard Specifications for Highway and Bridge Construction with an emphasis on the active voice. In a sentence written in the active voice, someone acts on something. For example: "The Engineer will take a sample." A similar sentence in the passive voice "A sample will be taken" would be unclear about who was responsible for taking the sample.

This edition of the Standard Specifications also makes use of the imperative mood. The imperative mood is used when the party issuing an instruction and the party receiving it are already understood. In these Standard Specifications, the Department is stating its requirements or directions for Work to the Contractor; such statements have the same force as if they contained the word "shall." In an imperative sentence such as, "Pour the concrete," the Department is indicating that it requires the Contractor to pour the concrete. Before an Award of a Contract, imperative statements are directed to the Bidder. After a Contract has been awarded, imperatives are directed to the Contractor. The Standard Specifications are divided into various parts in this order: divisions, sections and subsections. Then define each.

The Department will identify parties other than the Bidder or Contractor to whom it gives a responsibility in these Standard Specifications. In phrasings where the responsible party has already been clearly identified or in factual statements when it is not important to do so, the Department may use the passive voice.

The word "shall" is used in a mandatory or imperative sense and signifies that the Department is imposing a duty on a person or body that is the subject in the sentence. The word "may" is used to signify the conferring of a discretionary power, privilege, or right. However, use of the term "may not" signifies that a right, privilege, or power is intended to be denied.

The titles or headings of the sections and subsections herein are intended for convenience of reference and shall not be considered as having any bearing on their interpretation.

The Contractor, having an obligation to comply with, observe, and comply with all federal and State law and regulations, any reference to any federal or State law or regulation shall constitute a reference to any applicable amendment or successor law or regulation.

### 101.2 ABBREVIATIONS

When the following abbreviations are used in the Plans, the Specifications, other Contract documents, and Department correspondence, their meaning is as follows:

<b>Acronym or short form</b>	<b>Full name or meaning</b>
AASHTO	American Association of State Highway and Transportation Officials
ACI	American Concrete Institute
AI	Aggregate Index
AMRL	AASHTO Material Reference Laboratory
ASTM	American Society for Testing and Materials
AWG	American Wire Gauge
AWPA	American Wood Preservers' Association
AWWA	American Water Works Association
CBC	concrete box culvert
CCD	closed circuit detection
CD	compact disc
CFR	Code of Federal Regulations
CMP	corrugated metal pipe

**Table 101.2:1  
Acronyms and Abbreviations**

<b>Acronym or short form</b>	<b>Full name or meaning</b>
CN	control number
CPM	critical path method
CTR	certified test report
CWB	concrete wall barrier
DBE	disadvantaged business enterprise
EA	entrance angle
ESAL	equivalent single axle loading
FHWA	Federal Highway Administration
GRT	gross receipt tax
HDPE	high density polyethylene
HFE	high-float emulsion
HID	high-intensity discharge
HMA	hot-mix asphalt
HMWM	high molecular weight methacrylate
IES	Illuminating Engineering Society
IMC	intermediate metallic conduit
ITE	Institute of Transportation Engineers
JMF	job mix formula
LCD	liquid crystal display
LL	liquid limit
<del>MSDS</del>	<del>Material</del> Safety Data Sheet
MTR	mill test report
MUTCD	Manual on Uniform Traffic Control Devices
<del>MFBM</del>	<del>Thousand Board Feet</del>
NCHRP	National Cooperative Highway Research Program
NEC®	National Electrical Code®
NEMA	National Electrical Manufacturers Association
NMAC	New Mexico Administrative Code
NMDA	New Mexico Department of Agriculture
NMED	New Mexico Environment Department
NMSA	New Mexico Statutes Annotated
NMSSPWC	New Mexico Standard Specifications for Public Works Construction
NPDES	National Pollutant Discharge Elimination System
NTSC	National Transmission Standards Committee
OA	observation angle
OGFC	open-graded friction course
OSHA	Occupational Safety and Health Administration
PCC	portland cement concrete
PCCP	portland cement concrete pavement
PCI	Prestressed Concrete Institute
PCT	process control technician
PE-P	penetrating emulsified prime
PI	plasticity index
PTL	private testing laboratory
PVC	polyvinyl chloride
QA	quality assurance
QC	quality control
QCT	quality control technician
QLA	quality level assurance
RAP	reclaimed asphalt pavement
ROW	right of way
SSPC	Society of Protective Coating (formerly Steel Structures Painting Council)
SWPPP	storm water pollution prevention plan

<b>Table 101.2:1</b>	
<b>Acronyms and Abbreviations</b>	
<b>Acronym or short form</b>	<b>Full name or meaning</b>
TERO	Tribal Employment Rights Organization
TTCP	Technician Training and Certification Program
TV	target value
UBC™	Uniform Building Code™
UL	Underwriters Laboratories
USEPA	United States Environmental Protection Agency
UV	Ultraviolet
VMA	voids in mineral aggregate
VTM	voids in total mix
WMA	warm mix asphalt

### 101.3 SYMBOLS

Within the Specifications and Contract, reference to the English system of measurement symbols is a reference to the U.S. Customary (Inch-pound) system.

Some of the symbols for units of measurement used in the Specifications and in the Bid Schedule Form are defined as shown in Table 101.3:1, "Measurement Symbols." The symbols for other units of measurement used in the Specifications are as defined in the various Specifications and tests referenced in the Specifications.

**Table 101.3:1**  
**Measurement Symbols**

<b>Physical Characteristic</b>	<b>Unit name</b>	<b>Symbol</b>
Length	Microinch	μin
	mil (0.001 inch)	Mil
	Inch	In
	Foot	Ft
	Yard	Yd
	Mile	Mi
Area	square inch	in <sup>2</sup>
	square foot	ft <sup>2</sup>
	square yard	yd <sup>2</sup>
	square mile	mi <sup>2</sup>
	Acre	Acre
Volume	Pint	Pt
	Quart	Qt
	Gallon	Gal
	cubic inch	in <sup>3</sup>
	cubic foot	ft <sup>3</sup>
	cubic yard	yd <sup>3</sup>
Mass (weight)	Ounce	Oz
	Pound	Lb
	ton, short (2,000 lb)	Ton
Temperature	degree Fahrenheit	°F
Time	Millisecond	Ms
	Second	S

**Table 101.3:1  
Measurement Symbols**

<b>Physical Characteristic</b>	<b>Unit name</b>	<b>Symbol</b>
	Minute	Min
	Hour	H
Speed	miles per hour	Mph
Pressure	pound-force per square inch	Psi
	Watt	W
	Kilowatt	kW
	Milliampere	mA
	Ampere	A
	Volt	V
Power, energy and electricity	Volt-ampere	VA
	Ohm	Ω
	Hertz	Hz
	Joule	J
	Lumen	Lm
	Footcandle	Fc
	Horsepower	Hp
Force	pound-force	Lbf
	1,000 pounds-force	Kip
Torque	pound-force foot	lbf·ft
Viscosity, dynamic	Centipoises	cP
	Poise	P
Viscosity, kinematic	Centistokes	cSt
Flow	gallons per minute	Gpm
Concentration	parts per million	Ppm
Inductance	Henries	H
Frequency, concrete consolidation	vibrations per minute	Vpm
Sound	Decibel, A-Scale	dbA

**101.3.1 Engineer's Estimate Symbols**

The measurement symbols shown on the Engineer's Estimate may differ from those found in the rest of Contract/Project documents. Table 101.3.1:1, "Symbols for Engineer's Estimate," lists and defines the symbols found in both the Engineer's Estimate and Contract documents.

**Table 101.3.1:1  
Symbols for Engineer's Estimate**

<b>Symbol</b>	<b>Unit of measure or meaning</b>
LS	Lump Sum
EACH	Each
ALLOW	Allowance
L.F.	Linear Foot
MILE	Mile
S.F.	Square Foot
S.Y.	Square Yard

**Table 101.3.1:1  
Symbols for Engineer's Estimate**

<b>Symbol</b>	<b>Unit of measure or meaning</b>
SYIN	Square Yard Inch
ACRE	Acre
C.Y.	Cubic Yard
LB	Pound
TON	Ton

**101.4 TERMS AND DEFINITIONS**

If the following terms are used in the ~~Plans, the Specifications, other~~ Contract documents, and **Department** correspondence, the intent and meaning shall be interpreted as follows:

**Acceptance.** (Also called **Accept, Accepted and Acceptable**) -1) The determination by the **Department** that Materials and Work are in compliance with the Contract. 2) The process by which the **Department** determines whether or not the quality of produced Material or Work is **Acceptable** pursuant to the Contract, including sampling, testing, certifications and assessment of test results. Acceptance shall not be construed as a warranty by the Department that the Contractor's methods will succeed or will be the most efficient or economical method of accomplishing the Work, nor shall the term be construed as a warranty that the actual Materials used in construction will perform as represented in test results supplied to the Department by the Contractor.

~~**Act of God.** - An unusual, sudden, and unexpected manifestation of the forces of nature, the effect of which could not have been prevented by reasonable human foresight, pains, and care.~~

**Addendum.** A change in the ~~Contract Plans or Specifications~~ issued after the **Advertisement** and before the Bid Opening, opening of the Bid.

~~**Advertisement.** - (Also called Invitation for Bids.)~~ A public announcement, as required by law, inviting **Bids for Work** to be performed or **Materials** to be provided. Also called Invitation for Bids.

**Apparent Low Bidder.** The **Bidder** who submits ~~at a Bid Opening~~ a **Total Bid Amount** that is numerically lower than the **Total Bid Amount** submitted by other **Bidders**, but who's **Bid** may later be subject to rejection, recalculation or other modification that may change the order of **Bidders**.

**Assistant District Engineer (ADE) - Construction.** The **Engineer** in charge of the construction operations in a ~~designated portion of a Department District.~~

~~**Award.** The written acceptance by the Department of a Contract Bid. Notice of Preliminary Award consideration period before execution of contract. The Department's selection of a Bidder's Bid subject to the Contractor's and Department's execution of the Contract.~~

**Base Course.** The layer or layers of specified **Material** placed on a **Subbase** or a **Subgrade** normally used to support a **Surface Course**.

~~**Baseline Schedule.** - A fixed Project schedule that is the standard by which Project performance is measured.~~

**Basis of Payment.** The terms under which **Work** is paid, as a designated **Pay Item** in accordance with the quantity measured and the **Pay Unit**. Basis of Payment includes the performance of all Work and furnishing of all labor, equipment, Materials and Incidentals described in the text of a specific item included in that Contract.

**Bid.** The offer of a **Bidder** ~~for, on the prescribed form, to~~ performing the **Work** at the prices

quoted.

**Bidder.** An individual, partnership, firm, corporation, joint venture, or their authorized representative submitting a **Bid**.

**Bid Form.** The approved form on which the **Department** requires **Bidders** to prepare and submit **Bids**.

**Bid Guaranty.** The security provided with a **Bid** to guarantee that the **Bidder** will enter into the **Contract** if the **Department** accepts its **Bid**.

**Bid Item (Contract Item, Pay Item).** A specifically described unit of **Work** for which a **Bidder** provides a **Bid Item Unit Price** and **Bid Item Price**. The **Bid Items** become **Contract Items** when the **Contract** is fully executed. The **Contract Items** become **Pay Items** when calculating **Progress Payments**.

**Bid Item Price.** The **extended** price established by the **Contractor** for each individual **Bid Item** on the **Bid Schedule Form**, which is the product of the **Bid Item** quantity, provided on the **Bid Form**, and the **Bid Item Unit Price**.

**Bid Item Unit Price.** The price established by the **Contractor** for each unit of an individual **Bid Item** on the **Bid Schedule Form**. A **Bid Item Unit Price** reflects a **Bidder's** actual and direct costs for the item plus a reasonable proportionate share of the **Bidder's** anticipated profit, overhead costs, and other indirect costs.

**Bid Opening.** A public reading of the properly submitted **Bids**, on a date established by the **Advertisement Advertisement Invitation for Bids**.

**Bid Package.** ~~The Bid documents submitted by a Bidder in accordance with Section 102, "Bidding Requirements and Conditions."~~

**Bid Schedule.** Listing or table of **Bid Items** containing the estimated quantities for which Bid Item Unit Prices are invited, also referred to as **Proposal Schedule**.

**Borrow Pit.** A **Contractor selected** source outside the **Roadway Prism** from where suitable **Material** ~~used primarily for Embankment~~ is obtained.

**Breakaway.** The ability of a system to yield at a predetermined impact force.

**Bridge.** A **Structure** having a length — as measured along the center of the **Roadway** — of more than 20 ft between undercopings of abutments or extreme ends of openings for multiple boxes or extreme ends of openings for Culverts placed in series with a spacing between Culverts not exceeding ½ the diameter, and carrying a pathway or **Roadway** over a depression or obstacle. It includes all appurtenances necessary to its proper use. The length of a **Bridge** structure is the distance along the line of survey stationing back-to-back of backwalls of abutments, if present, or end-to-end of the **Bridge** floor, and in no case less than the total clear opening of the structure. The **Bridge Roadway** width is that clear unobstructed width of **Bridge** deck available for vehicle use measured normal to the centerline of the **Bridge**.

**Business Hours.** The **Department's** Business Hours are from 7:45 a.m. to 4:30 p.m., Monday through Friday, official State **Holidays** and emergency closures excluded.

**Cabinet Secretary.** The individual in charge of the Department as defined by law. Also referred to as the **"Secretary"**.

**Calendar Day.** Each and every **Day** shown on the calendar, beginning and ending at midnight. Also referred to as "Day".

**Certificate of Compliance.** A certification, including a signature by a person having legal

authority to act for the manufacturer, stating that the product, assembly, or **Material** to be incorporated into the **Project** was fabricated in accordance with and meets the applicable terms of the **Contract**. A certificate provided by the **Contractor** proving that the relevant **Material** is in accordance with the **Contract**.

**Change Order.** A **Change Order** is the only method authorized for changing the **Contract**. A written order, with our without the consent of the **Contractor**, implementing the **Contract changes** ~~Contract changes, and issued to the **Contractor** by the **Department** covering contingencies, **Extra Work**, increases or decreases in **Contract** quantities, payments for items for which there is no **Bid Item Unit Price**, additions or alterations to the **Plans** or **Specifications** within the scope of the **Contract**, and establishing the **Basis of Payment** and time adjustments for the **Work** affected by the changes, or adjustments to the original **Contract**.~~ A **Change Order** may consist of a **Supplemental Agreement** or **Field Sheet**. ~~A **Change Order** is the only method authorized for changing the **Contract**. ODD addressing the differences between a **Field Sheet** v. **Change Order** and when to use each. GRT CO.~~

**Chief Engineer.** The **Engineer** in charge of the planning and design of **Projects**, acting either directly or through his duly authorized representatives, for the **Department**. ~~or the individual's designee.~~

**Chill Factor.** Is ~~The Chill Factor~~ is the ambient temperature (in degrees Fahrenheit) minus wind velocity (in miles per hour).

**Claim.** A timely **Contractor** request or demand for a **Contract** adjustment, equitable adjustment, additional time or compensation and other contractual damages, **Delay** damages, an extension of **Contract Time**, certified pass-through Subcontractor Claims, or for any other remedy arising from a dispute, disagreement, or controversy concerning respective rights and obligations under the **Contract**.

**Commercial Material Source.** A **Material** source that has been utilized by a private producer in a commercial operation from which **Material** has been sold within the last 24 months before the date of the letting.

**Completion Dates.** **Contracts** may have the following Completion Dates as defined herein:

- Substantial Completion Date;**
- Physical Completion Date;** ~~or "Completion" Date~~
- Mandatory Completion Date.**

**Construction Maintenance Easement (CME).** A real property interest in land acquired by the **Department** in conjunction with a **Highway, Street, or Road Project** to provide permanent access to private property to perform specific construction and maintenance functions.

**Construction Zone.** The area within the **Right of Way** from the first traffic control sign announcing the **Road** work to the last sign announcing the end of **Road** work within which the **Contractor** shall perform construction activities.

**Contract.** The entire and integrated written agreement between the **Department** and the **Contractor** setting forth the obligations of the parties, including, but not limited to, the performance of the **Work** and the **Basis of Payment**.

The **Contract** includes the **Advertisement**, ~~**Bid Form and Contract Bond**~~, **Required Documents for Bid Submittal**, **Standard Specifications**, **Supplemental Specifications**, **Special Provisions**, **Addenda**, **Notice To Contractors**, general and detailed **Plans**, **Standard Drawings** ~~serials~~, and **Notice to Proceed** — also any **Change Orders** and agreements that are required to complete the construction of the

**Work** in an **Acceptable** manner, including authorized extensions thereof, all of which constitute one (1) instrument.

**Contract Bonds.** The approved ~~form of security payment and performance bonds~~—executed by the **Contractor** and the **Contractor's Surety** or sureties. The performance bond—guarantees ~~ing~~ complete execution of the **Contract** and all **Change Orders** pertaining thereto, and the payment bond guarantees payment of all legal debts pertaining to the construction of the **Project**.

**Contractor.** The individual, partnership, firm, corporation, or joint venture contracting with the **Department** for performance of the **Work**.

**Contract Time.** The time specified in the Invitation For Bids Advertisement for completion of the **Contract**. This time may be defined as a specified fixed date(s), Mandatory Completion Date, a given number of **Working Days**, or a given number of **Calendar Days**—or a combination of the above. The Contract Time may be amended by a Supplemental Agreement ~~mutual written agreement~~ to include authorized time extensions as the performance of the **Contract** requires.

**County.** The County in which the **Work** herein specified is to be done.

**Cultural Resource.** Any prehistoric or historic period artifact, site, building, structure, material remains, or traditional use area resulting from, or associated with, human cultural activity. Historically important **Cultural Resources** are those eligible for inclusion on the National Register of Historic Places or Cite placed on the New Mexico register of cultural properties either permanently or temporarily per NMSA 1978, Section 18-6-3 and the National Historic Preservation Act- Section 106.

**Cultural Resource Professional.** ~~An individual with at least four (4) years of full-time paid experience in Cultural Resource investigations, including analyzing and preparing documentation needed to meet the requirements of Section 106 of the National Historic Preservation Act. The~~ An individual that is permitted to meet the requirements of the Cultural Properties Act, NMSA 1978, 18-6-1 through -17 and issued by the Cultural Properties Review committee with the concurrence of the State Archaeologist and the State historic preservation officer or appropriate tribal preservation officer, or federal land managing agency when applicable. An individual that is must be properly permitted to meet the requirements of the NM State historic preservation act and issued by the NM State historic preservation officer officer or appropriate tribal preservation officer when applicable.

**Culvert.** Any **Structure** not classified as **Bridge** or casing that provides an opening under a **Roadway**.

**Critical Path.** The longest continuous sequence of activities through the Project schedule that establishes the minimum overall Project duration to Substantial Completion.

**Critical Path Method Schedule.** ~~Method.~~ A Network based method to represent the Contractor's plan for constructing the Project. The Critical Path Method Schedule consists of two primary components 1) Activities that represent the entire Project scope of Work and 2) logic relationships that connect the activities to one another to determine the sequence of Work.

**Day. Calendar Day.** ~~unless otherwise noted.~~  
Default and Notice of Apparent Default (definitions needed)

**Delay.** Any event, action, ~~force or~~ factor that negatively impacts the Critical Path extends the time for the performance of the Work or on that negatively affects the critical path for the Project, whether it be excusable, inexcusable, nonexcusable, concurrent, compensable or noncompensable.



**Deleterious Material.** Unacceptable material detrimental harmful to the final product.

**Department.** The New Mexico Department of Transportation as constituted under the laws of the State for the administration of transportation Work. Any reference to **Contract** documents, **Plans, Special Provisions, Standard Drawings, Forms, Change Orders**, and any other pertinent written communication in which the terms "New Mexico State Highway Department" or "New Mexico State Highway and Transportation Department" appears shall be the same as the term New Mexico Department of Transportation or its designated agent.

**Detour.** A temporary route for traffic (vehicular or otherwise) around a closed portion of a ~~Project, Road.~~

~~Disadvantaged Business Enterprise (DBE). As defined in title 49 CFR part 26.~~

**District.** A subdivision of the **State** for the purpose of executing the **Department's** construction, maintenance, and administrative activities.

**District Engineer.** The **Engineer** in charge of a **Department District**.

~~Divided Highway. A Highway with separated Roadways for traffic, generally in opposite directions.~~

**Embankment.** The portion of a **Roadway** that is below the **Subbase, Base Course**, and **Surface Courses** and that is built up in layers consisting principally of soil and broken rock or a combination thereof.

**Engineer.** ~~A Department "Engineer" authorized as the Department's representative responsible for the engineering supervision of the work and means a person who is qualified and licensed by the board qualified to practice engineering per the Engineering and Surveying Practice Act. by reason of the person's intensive preparation and knowledge in the use of mathematics, chemistry, physics and engineering sciences, including the principles and methods of engineering analysis and design acquired by professional education and engineering experience. The designee of the Cabinet Secretary of the Department.~~

**Entrance Angle (EA).** The angle between the reference axis and the axis of incident light (Counter-clockwise rotation of the reference axis relative to the axis of incident light is considered positive.)

**Environmental Professional.** An individual qualified to perform hazardous material investigations. This individual must possess the qualifications described in 40 C.F.R. ~~Section Part~~ 312 ~~Subpart C(4)(E)~~, the USEPA's Standards and Practices for All Appropriate Inquiries.

**Environmental ~~Bureau~~Program Manager.** The individual in charge of the Environmental Bureau of the **Department**.

~~Environmental Geology Bureau Manager. The individual in charge of the Environmental Geology Bureau of the Department. XXXXX~~

**Environmental Resource.** The physical and biological components of the human and natural environment.

**Environmental Specialist.** An individual with at least four (4) years of full-time paid experience in environmental investigations, including analyzing and preparing documentation needed to meet the FHWA approval requirements for the National Environmental Policy

Act and related legislation.

**Equipment.** All machinery, tools, and Equipment, together with the necessary supplies for upkeep and maintenance, necessary for the construction and completion of the **Contract**.

**Extra Work.** Work not provided for in the **Contract** but found by the **Project Manager** to be essential to the satisfactory completion of the **Contract** within its intended scope. **Extra Work** means either 1) an item of **Work** ordered under the **Contract** for which there is no **Bid Item Unit Price** or 2) an increase or decrease of 25% in the original **Contract** quantity of a **Major Contract Item**. (See Section 104.2, "Significant Changes in the Character of Work.") Such **Work** shall be performed as directed and will be paid for only on one (1) of two (2) grounds as provided in Section 109.5, "Payment for Changes, Differing Site Conditions, and Extra Work," by **Bid Item Unit Price**, negotiated price agreement, or by **Force Account**.

**Fabricator.** A **Supplier** that fabricates or supplies **Structural Steel** or other structural items.

**Field Sheet.** A type of **Change Order** that does not require a **Contractor's** signature.

**Final Acceptance:** ~~Final Contract Acceptance.~~ The Department's payment of the balance due on the final payment voucher.

**Free Float:** The amount of time identified in a specific activity that can be delayed without causing a delay to successor activities.

**Total Float or Float:** The amount of time that an activity can be delayed without causing a delay to the **Critical Path** or negatively impacting the **Project** completion date. ~~Project float~~

**Force Account.** The **Basis Of Payment** for the directed performance of **Work**, with payment based on the actual cost of labor, **Equipment**, and **Materials**, and including various constant additives.

**Fractured Face.** At least one-half of the projected particle area exhibits a rough, angular, or broken texture with ~~well defined~~ well-defined edges.

**General Office (GO).** The **Department's** main headquarters.

**Hazardous Materials.** Any substance, product, waste, or other **Material** of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to all applicable laws all as amended, or any other federal, state, or local statute law, ordinance, resolution, code, rule, regulation, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning any hazardous, toxic, or dangerous waste, substance, or material.

**Highway, Street, or Road.** A general term denoting a public way for purposes of vehicular or pedestrian travel.

**Holiday.** Holidays recognized by the State of New Mexico are as follows, unless otherwise provided by the legislature:

1. 1<sup>st</sup> Day of January (New Year's Day);
2. 3<sup>rd</sup> Monday in January (Martin Luther King Jr. Day);
- ~~3.~~ ~~3<sup>rd</sup> Monday in February (Presidents' Day);~~
- ~~4.~~ ~~3.~~ Last Monday in May (Memorial Day);
- ~~5.~~ ~~4.~~ 4<sup>th</sup> Day of July (Independence Day);
- ~~6.~~ ~~5.~~ 1<sup>st</sup> Monday in September (Labor Day);
- ~~7.~~ ~~6.~~ 2<sup>nd</sup> Monday in October (Columbus Day);
- ~~8.~~ ~~7.~~ 11<sup>th</sup> Day of November (Veteran's' Day);

8. 4<sup>th</sup> Thursday in November (Thanksgiving Day);
9. 4<sup>th</sup> Friday in November (In observance of Presidents' Day Holiday)
10. 25<sup>th</sup> Day of December (Christmas Day).

If any Holiday above falls on a Saturday or Sunday, the previous Friday or following Monday, respectively, shall be considered a Holiday.

**Independent Assurance.** A construction management tool in which a third party, not directly responsible for process control or **Acceptance**, provides an independent assessment of the Work, Materials, or the reliability of test results obtained from process control and **Acceptance** testing.

**Incentive/Disincentive Provision.** Predetermined adjustments to the **Contract** price.

**Incidental.** Occurring or likely to occur at the same time or as a result of other items of **Work** as specified in the **Contract** for which no separate or additional payment will be made. Unless otherwise indicated in the Contract, Incidental costs shall be included in the Contractor's Bid Item Unit Price for Bid Item 621000 Mobilization.

**Inspector.** The Project Manager's authorized representative. Individual assigned to make detailed inspections of Contractor's Work.

Invitation for Bids. See Advertisement.

Invitation for Bids. A public announcement, as required by law, inviting Bids for Work to be performed or Materials to be provided.

**Job Mix Formula (JMF).** The combined aggregate gradation and the percentage of each **Material** component in the mix.

**Laboratory.** A testing **Laboratory** of the **Department, Contractor** or any other testing **Laboratory** that may be designated by the Engineer and is AASHTO Materials Reference Laboratory (AMRL) Certified.

**Landscape Architect.** The individual in charge of Cabinet Secretary's designee for Landscape Architecture for the Department.

**Lighting and Signal Engineer.** The **Engineer** in charge of the **Department's** signal and lighting design.

Luminarie. Luminaire (Luminaries) A lighting device designed to illuminate the surface of a specific area from a mounting on a **Standard**, including the housing, optical control, lamps, and necessary ballasts.

Lump. The mathematical quantity for a **Lump** sum item is one (1).

Lump SSum. The price bid by a Contractor as a single amount for a complete Contract Item as defined by the specifications, or price proposed by a Contractor as a single amount for the performance of **Extra Work**.

Machine Vision Vehicle Detection System. A system that tracks vehicles on a **Roadway** via processing of video images and provides detector outputs to a traffic controller.

Mandatory Pre Bid Conference. A meeting or conference to be conducted prior to the **Bid Opening** at which all **Bidders** are required to attend. A **Mandatory Pre Bid Conference** is conducted for the purpose of discussing **Contract** requirements, to inform **Bidders** of important information relating to the performance of the **Work**, to answer questions of prospective **Bidders** in order to better facilitate proper bidding, compliance with the **Contract**, performance of the **Work**, to reduce job in progress

~~disputes between the Department and Contractor, and to reduce the potential for Change Orders, Claims, Liquidated Damages, added costs and cost overruns. The requirement to attend a Mandatory Pre-Bid Conference shall be set forth in a Notice to Contractors, Special Provision or Addendum. A Bidder's failure to attend shall result in its Bid being rejected as non-responsive.~~

~~Maintaining Agency. Public entity such as a City or County responsible for the electrical energy costs and maintenance of the approved and Accepted signal and lighting system.~~

**Major Contract Item.** Any item, excluding mobilization, having a **Bid Item Price** of ten percent (10.0%) or more of the **Total Bid Amount** for the **Contract**, minus the amount **Bid** for mobilization.

**Mandatory Completion Date.** The date on which the **Project** shall be completed. This may be either **Substantial Completion** or **Physical Completion** as specified in the **Contract**. If neither is specified, it shall mean "**Substantial Completion**."

**Materials.** Any substances specified for use in the performance of the Work, in the construction of the Project and its appurtenances.

**Median.** That portion of a **Divided Highway, Street or Road** separating the **Traveled Way** for traffic in opposing directions.

**Method of Measurement.** The method in which a **Pay Item** is measured to conform with the **Pay Unit**.

**Nominal Maximum Sieve.** One (1) sieve size larger than the first sieve that retains ten percent (10%) or more of a given **Material**.

**Non-Conformance.** Contractor's failure to comply with the **Contract** ~~or to provide Acceptable Work to the Department.~~ **Non-Conformances** are subject to a withholding of 25% of the **Progress Payment**. **Non-Conformance** withholdings will be paid at the subsequent **Progress Payment** following resolution of all **Non-Conformances**.

**Notice of Preliminary Award of Contract** The Department's written notification issuing preliminary award that is provided before the Contractor and the Department execute the Contract.

**Notice to Proceed.** ~~(Work Order.)~~ Written notice to the **Contractor** to proceed with the **Contract Work** including the beginning date of **Contract Time**.

**Notice to Contractors.** An addition to the **Contract package**, made prior to Advertisement, to its issuance to the Contractor, indicating changes to the Plans and Specifications.

**Observation Angle.** The angle between the axis of incident light and the observation axis.

**Partial Suspension.** The suspension of **Work** on some, but not all **Contract Items**.

**Pavement Structure.** The combination of **Subbase, Base Course, and Surface Course** placed on a **Subgrade** to support and distribute the traffic load to the **Roadbed**.

**Pay Adjustment.** An adjustment to a payment for a specific portion of the **Work** based on the quality of the **Work** performed by the **Contractor** and **Accepted** by the **Department**. Other **Department** documents may refer to this term as disincentives, incentives, pay reductions, price adjustments, price reductions, or pay reductions.

**Pay Unit.** The unit of measurement for Acceptable Work.

**Petrographer.** Individual with credentials in the study of petrography.

**Physical Completion.** All the **Work** is physically completed on the **Project** and is **Accepted** by the **ADE-Construction, Project-Manager**. All documentation required by the **Contract** and by law shall be furnished by this date.

**Pit Agreement.** An agreement ~~between the Contractor and~~with a property owner to provide ~~borrow or surfacing Material, for Highway construction or maintenance.~~

**Plans.** The **Professional Engineer stamped and** approved **Contract** drawings showing profiles, typical cross sections, ~~or exact reproductions~~that shows the location, character, dimensions, and general or specific details of the **Work** to be done or exact reproductions of the same.

**Post Construction Plans.** Final drawings reflecting **Work** and quantities performed under the **Contract**.

**Pre-Bid Due Diligence.** The Bidder's exercise of due diligence before submittal of a Bid which includes the careful, independent examination of the site of the proposed Work, including Materials pits and haul Roads, the Bid Package, all Contract documents including Standard Specifications, Special Provisions, Supplemental Specifications, and standard and serial drawings and boring logs which are representative of the condition at the precise location where each boring was made but conditions may vary between boring locations.

**Pre-Cast Inspector.** The Department's authorized representative as indicated in the Contract.

**Pre-Construction Conference.** A meeting between the **Department** and the **Contractor** prior to any **Work** taking place to review and discuss **Contract** requirements, ~~construction details, the Baseline Schedule, Contract administration issues, and any items peculiar to the Project. See Section 108.2 "Notice to Proceed and Pre-Construction Conference" for specifics associated with the Pre-Construction Conference.~~

**Pre-Deck Conference.** A meeting between the Department and the Contractor prior to the commencement of deck placement operations to review, discuss and coordinate the Work associated with the deck placement.

**Pre-Drilled Shaft Conference.** A meeting between the Department and the Contractor prior to the commencement of drilling operation to review, discuss and coordinate the Work.

**Pre-Fabrication Conference.** A meeting between the Department and the Contractor prior to any fabrication Work taking place

**Pre-Pave Conference.** A meeting between the **Department** and the **Contractor** prior to the commencement of paving operations to review, discuss and coordinate the **Work** associated with paving operations.

**Pre-Pile Driving Conference.** A meeting between the Department and the Contractor prior to the commencement of pile driving operations to review, discuss and coordinate the Work.

**Pre-Seeding Conference.** A meeting between the Department and the Contractor prior to the commencement of seeding operations to review, discuss and coordinate the Work.

~~**Pre-Fabrication Conference.** A meeting between the Department and the Contractor prior to any fabrication Work taking place.~~

~~**Pre-Deck Conference.** A meeting between the Department and the Contractor prior to the commencement of deck placement operations to review, discuss and coordinate the~~

~~Work associated with the deck placement.~~

~~**Pre-Bid Due Diligence.** The Bidder's exercise of due diligence before submittal of a Bid which includes the careful, independent examination of the site of the proposed Work, including Materials pits and haul Roads, the Bid Package, all Contract documents including Standard Specifications, Special Provisions, Supplemental Specifications, and standard and serial drawings and boring logs which are representative of the condition at the precise location where each boring was made but conditions may vary between boring locations.~~

**Professional Service.** Is a service provider that may or may not be a Subcontractor, who provides a specialized service requiring professional licensure by the State of New Mexico, e.g. Professional Engineers, Professional Surveyors and Attorneys. The professional service distinction in this Contract is separate from the professional service definition in the Department of Workforce Solutions regulations.

**Profile Grade.** The location of the Profile Grade will be designated by the Department and shown on the Plans. The profile grade line is usually the centerline and elevation to which the roadway will be built. The line obtained from the trace of a vertical plane intersecting the top of the surfacing at the locations shown on the Plans and determined in accordance with the criteria set forth in the standard serials and drawings. Profile Grade means either the elevation or the gradient of such trace according to the context. The location of the Profile Grade will be designated by the Department and shown on the Plans. The Profile Grade may be used to designate the gradient and elevation of other construction features such as tops of curb, channels, Sidewalks, etc.

**Progress Payment.** A monthly payment including zero dollar (\$0.00), provided by the Department to the Contractor for Work, subject to adjustment by the Department withholdings for Non-Conformances and Retainage.

**Project.** The specific section of ~~the Highway~~ of property on which Work construction is to be performed as specified in the Contract.

**Project Manager.** The Department's representative who is delegated the responsibility for administration of the Project.

**Project Limits.** The beginning of the project (BOP) to the end of the project (EOP) as designated in the Contract. Add definition.

**Punch List.** A list, prepared by the Project Manager, of corrective Work items not conforming with the Contract and to be completed by the Contractor. The final Punchlist is provided after Substantial Completion but before Contractor's request for final inspection. The Punch List is limited to items of the Work that are necessary to correct minor imperfections, deficiencies and deviations from the requirements of the Contract but which have no material or adverse effect on the full operability of the Project for its intended purpose and may be safely and effectively used by the public without delay, disruption, or impediments.

**Quality Assurance (QA).** The Department's sampling, testing, inspection, and other activities to determine payment and make Acceptance decisions. Include quality control, acceptance by the agency, use of qualified laboratories by both parties

**Quality Control (QC).** The Contractor's actions and considerations necessary to assess production and construction processes so as to control the level of quality being produced in the end product. Quality control includes sampling and testing by the Contractor to monitor and adjust its process. Quality Control does not include Acceptance sampling and testing by the Department.

**Quality Level ~~Analysis~~ Assurance (QLA).** Is equivalent to QC/QA.

~~**R-value.** The measurement of the response of a compacted sample of soil or aggregate to a vertically applied pressure under specific conditions.~~

**Required Documents for Bid Submittal.** Those documents specified for Bid Submittal including, but not limited to, Advertisement, Bid Form, Bid Schedule, Bid Guaranty, Bidder's List of Quoters, Non-Debarment Certification, Pay Equity Acknowledgment, Disadvantaged Business Enterprise Goal Form A-585, Subcontractor's Fair Practices Act Compliance, ~~in the Bid Package required for Bid submittal.~~

**Resource Loading.** The Contractor's assigning of resources necessary to develop an Acceptable ~~Critical Path Method Schedule~~ for the **Project**. **Resource Loading** shall include personnel, production rates, **Contract** dollars earned, **Materials**, facilities and **Equipment** associated with each activity within the CPM.

**Lowest Responsible Bidder.** ~~The Department determined~~ **A Bidder** who submits the lowest adjusted monetary and **Responsive Bid**. ~~The Bidder shall also be responsible and when required who has furnished, when required,~~ information and data to prove that its ~~his~~ financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services, construction or items of tangible personal property as described in the Advertisement, Invitation For Bids as defined in NMSA 1978, § 13-1-82.

**Responsive Bid.** A **Bid** which conforms in all material respects to the requirements set forth in the Advertisement, Invitation For Bids and the Contract, documents, including Notice to Contractors, Special Provisions, Supplemental Specifications, and Addenda and which has not been rejected. Material respects of a **Bid** include but are not limited to price, quality, quantity or delivery requirements, as defined in NMSA 1978, § 13-1-84.

**Retainage.** Five percent (5%) of the **Total Original Contract Amount** as amended by **Change Order**. The five percent (5%) shall be retained when the **Progress Payments** equal 95% of the amended **Contract** amount. The **Retainage** shall be withheld until the Department pays the amount on the proposed final payment voucher. Physical Completion to assure that the Contractor shall satisfy its obligations and complete the Work.

**Right of Way (ROW).** A general term denoting land or property, or interest therein, usually in a strip, acquired for or devoted to transportation purposes.

**Roadbed.** The graded portion of the **Highway, Street or Road**, with top and side slopes prepared as a foundation for the **Subgrade, Pavement Structure**, and **Shoulders**.

**Roadway.** A general term denoting the **Traveled Way** and the **Shoulders**.

**Roadway Prism.** The **Roadway** construction limits within ~~between~~ the outside limits of the side slopes.

**Secretary.** See **Cabinet Secretary**.

**Shop drawings.** Contractor, supplier or fabricator-furnished drawings or sets of drawings typically required for Department review and approval of Work components. Shop drawings shall include detailed information to compare to the Contract for approval prior to fabrication.

**Shoulder.** The portion of the **Roadway** contiguous with the **Traveled Way** for accommodation of stopped vehicles, for emergency use, and for lateral support of **Base** and **Surface Courses**.

**Sidewalk.** That portion of the **Roadway** primarily constructed for use by pedestrians.

**Signal Assembly.** A housing containing the required illuminated **Traffic Signal** indications

(vehicular and pedestrian) mounted on a **Standard**.

~~**Small Business.** As defined in 5 USC Section 601 and 15 USC Section 632 of the Small Business Act.~~

**Special Provisions.** Additions and revisions to the **Standard** and **Supplemental Specifications** covering conditions applicable to an individual **Project**.

~~**Specialty Items.** Work not usually performed by **Highway Contractors** and so designated in the **Contract**.~~

**Specifications.** A general term applied to all written provisions and requirements pertaining to performance of the **Work**.

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**Specific Intensity.** Candlepower of the returned light at the chosen **Observation** and **Entrance Angles** for each lumen per square meter, foot-candle of illumination at the reflector on a plane perpendicular to the incident light.

**Standard.** In traffic lighting, a pole-type structure that supports and positions signal and lighting devices, including arms, mounting hardware, and lowering and **Breakaway** devices as required by the Contract.

**Standard Drawings.** Detailed drawings for specific items of **Work** approved for repetitive use.

**Standard Specifications.** The **Department's** book of **Specifications** approved for general application and repetitive use.

**State.** The State of New Mexico acting through its authorized representatives.

~~**State Geotechnical Engineer.** The **Engineer** in charge of the Department's Geotechnical Engineering/Exploration Section of the State Materials Bureau.~~

~~**State Pavement Engineer.** The **Engineer** in charge of the Department's Pavement Management and Design Bureau. **State Asphalt Engineer.** The **Engineer** in charge of the Department's Asphalt Unit of the State Materials Bureau.~~

~~**State Bridge Engineer.** The **Engineer** in charge of the Department's Bridge Design Bureau.~~

~~**State Concrete Engineer.** The **Engineer** in charge of the Concrete Unit of the State Materials Bureau.~~

~~**State Construction Engineer.** The **Engineer** in charge of the State Construction Bureau.~~

~~**State Geotechnical Engineer.** The **Engineer** in charge of the Geotechnical Unit of the State Materials Bureau.~~

~~**State Materials Engineer.** The **Engineer** in charge of the State Materials Bureau.~~

**State Transportation Commission.** The six (6) member policy board for the **Department**.

**State Transportation Commissioner.** An individual member of the **State Transportation Commission**.

**Structures.** **Buildings, Bridges, Culverts,** catch basins, drop inlets, retaining walls, cribbing, manholes, end-walls, ~~**buildings,**~~ sewers, service pipes, under drains, foundation drains, and other such features that may be encountered in the **Work**.

**Structural Steel.** Steel shapes, plates, H-piling, ~~and~~ sheet piling, and any other items identified



~~in the Contract. Shapes are pipes, structural tubing and all hot-rolled flanged sections. Hot-rolled flanged sections are rails and mill products having AISC shape designations of W, S, M, C, MC, HP, L, WT, ST and MT.~~

**Subbase.** The layer or layers of specified **Material** thickness placed on a **Subgrade** to support **Surface Courses**.

**Subcontractor.** ~~At any tier~~ An individual, partnership, firm, corporation, or joint venture, at any tier, other than a **Trucker**, ~~to whom the Contractor subcontracts part of the Contract who meets the requirements of a Subcontractor under Section 108.1, "Subcontracting who is performing Work on the Project."~~ The term **Subcontractor** ~~includes first tier, second tier and other tiered Subcontractors and Sub-subcontractors.~~ A **Subcontractor** has no privity of **Contract** with the **Department** and has no direct or indirect cause of action against the **Department** for any **Claim** or cause of action, including nonpayment by the **Contractor**, arising out of the **Project**.

**Subgrade.** The portion of the **Roadbed** prepared as a foundation for the **Pavement Structure**.

**Substantial Completion.** The day point following -at which the last charged day and when all the following items are met:-

1. All critical path activities on the **Project** have been completed and deemed Acceptable;
- ~~2. All Non-Conformance issues have been resolved without exception;~~
- ~~3.2. The Project is complete such that it can be safely and effectively used by the public without delays, disruption, or impediments;~~
- ~~4.3. The Contractor has requested a determination of Substantial Completion from the ADE - Construction; and~~
- ~~5.4. The ADE - Construction has made a determination that the Project is Substantially Complete.~~

For safe and effective use by the public conventional Bridge and Highway Work, it is the point at which all the following **Work** is complete (or as otherwise defined in the Contract): -for the safe and efficient use of the public (or as otherwise defined in the Contract):

- ~~1. Bridge deck;~~
2. Parapet;
  - Bridge deck;
- ~~3. Pavement Structure;~~
- ~~4. Shoulder;~~
- ~~5. Permanent signing;~~
- ~~6. A minimum of one (1) application of striping;~~
- ~~7. Traffic barrier;~~
- ~~8. Signalization and Lighting; and~~
- ~~9. Safety appurtenances.~~

**Substructure.** ~~The All of that part of the Bridge Structure~~ below the bearings of simple and continuous spans, skewbacks of arches, and tops of footings of rigid frames, together with the backwalls, wingwalls, and wing protection railings.

**Superintendent.** The **Contractor's** agent authorized in writing to be in responsible charge of the **Project**.

**Superstructure.** The entire **Bridge Structure** except the **Substructure**.

**Supplemental Agreement.** A type of **Change Order** that may require **Contractor** signature.

**Supplemental Specifications.** Approved additions and revisions to the **Standard Specifications**.

**Supplier.** Any individual, partnership, firm, corporation, or joint venture that manufactures, fabricates or supplies **Materials** to be incorporated into a construction **Project** but who performs no actual **Work** on the **Project** site.

**Surety.** The corporation, partnership, or individual, other than the **Contractor**, executing a bond furnished by the **Contractor**.

**Surface Course.** Layer or layers of a **Pavement Structure** designed to accommodate the traffic load, the top layer of which resists skidding, traffic abrasion, and the disintegrating effects of climate.

**Surfacing Pit.** A source from which suitable **Material** for the production of **Surface Course** aggregate is obtained.

~~**Suspension and Debarment.** The disqualification of a **Bidder** or **Contractor** from bidding or performing construction **Work** for a period of time determined by **Department Regulations (18-28.4 NMAC)**.~~

~~**System Master.** In traffic lighting, an electronic device normally installed in a controller cabinet capable of supervising an interconnected network of local controllers, providing coordinated traffic movement. System Masters in turn may be controlled by a computerized traffic control closed-loop system.~~

**Temporary Construction Permit (TCP).** A temporary interest in land acquired in conjunction with a **Highway Project** to provide for the temporary use of private property for the duration of the **Project** construction to perform construction activities as designated in the Contract, ~~in which the improvements are not intended to be permanent.~~

**Technical Irregularity.** A minor informality or irregularity that is not a material defect of a bid, that is a matter of form, that can be waived without prejudicing other bidders, or result in a change to the order of bidders. ~~the difference in the bid amount is negligible, failure of bidder to...~~

**Termini.** A general term used to describe the **Project Limits**, and including the beginning and end of the **Project**, its **Right of Way**, pit sites, haul **Roads**, and temporary and permanent construction or maintenance easements.

**Total Bid Amount.** The sum of all the **Bid Item Prices** on the **Bid Form**. The Total Bid Amount represents the total cost of performing all the Work described in the Contract based upon estimated quantities.

**Total Original Contract Amount.** The total amount **Bid** as compensation for the **Contract**.

**Town, City, County** or **District.** Subdivisions of the **State** used to designate or identify the location of the proposed **Work**.

**Traffic Lanes.** See **Traveled Way**.

**Traffic Services Engineer.** The **District Engineer's** representative for traffic engineering.

**Traffic Signal.** The complete installation of a traffic control system at an intersection, including the illuminated signal indications, supports, electrical controls, and distribution system.

**Traveled Way.** The portion of the **Right of Way** designated for the movement of vehicles,

exclusive of **Shoulders** and Auxiliary Lanes.

**Trucker.** (Also called Trucking, Trucking Deliveries, Deliveries and Hauling) A **Trucker** is an individual, partnership, firm, corporation, or joint venture that transports or delivers **Materials** to and from the **Project** and does not perform **Work** on the **Project** site. A **Trucker** transports, but does not place, **Materials** (i.e. pit **Materials**, plant **Materials**, fabricated **Materials**, demolished and milled **Materials**, trash and waste **Materials**).

**Unbalanced Bid.**

~~A Bid which is either materially or mathematically unbalanced. (A) Materially. A Bid that generates a reasonable doubt that awarding the Contract to the Bidder submitting a mathematically Unbalanced Bid will result in the lowest ultimate cost to the Department. (B) Mathematically. A Bid containing Lump sum or unit Bid Items that do not reflect reasonable actual costs plus a reasonable proportionate share of the Bidder's anticipated profit, overhead costs, and other indirect costs.~~

~~Az definition: If the A Bid containing Bid Item Unit Prices Department determines that any of the Unit Bid Prices that are materially unbalanced, to the potential detriment of the Department. There are two types of unbalanced bids; (1) mathematically unbalanced and, (2) materially unbalanced. The mathematically unbalanced bid is a bid containing lump sum or unit pay items which do not reflect reasonable actual costs plus a reasonable proportionate share of the bidders anticipated profit, overhead costs and other indirect costs but not necessarily to the detriment of the department. These costs should be related to the performance of the items in question. The materially unbalanced bid is a mathematically unbalanced bid which the Department determines leaves reasonable doubt that award will result in the lowest ultimate cost to the Department or that award is in the public interest.~~

**Value Engineering Cost Proposal.** A **Contractor**-provided form that details an alternative to the **Work** methods or **Materials** specified in the **Contract** that establishes a better or approved-equal product or result without affecting the functional purpose of the **Work** being revised, and that produce a net savings to the **Department**. ~~Areas exempted from Value Engineering Cost Proposals are mix designs and traffic control.~~

**Work.** ~~The providing of all documentation, supervision, labor, Materials, Equipment, transportation, and other Incidentals necessary for the successful completion of the Project, the successful completion of Pay Items, and the carrying out of the duties and obligations imposed by the Contract.~~

**Working Day.** Every **Day** except Saturdays, Sundays, and **Holidays**. Based on a review of weather conditions and the actual **Work** performed by the **Contractor**, the **Project Manager** will determine (between the end of the **Day** and noon of the next **Day**) if the **Department** will charge a **Working Day**. If the **Contractor** ~~was able to effectively prosecute Works on a critical path item~~ for six (6) or more hours on a Saturday, Sunday, or **Holiday**, a **Working Day** will be charged.

**Working Drawings.** **Contractor**-furnished documents including, but not necessarily limited to:

1. Stress sheets;
2. Shop drawings;
3. Bending diagrams for reinforcing steel;
4. Plans for erection, false **Work**, frames **Work**, cofferdams, and other items; and
5. Such other similar data required for the successful completion of the **Work**.

## SECTION 102: BIDDING REQUIREMENTS AND CONDITIONS

### 102.1 ~~RESERVED INVITATION FOR BIDS~~

~~The Department will issue Invitations for Bid for the construction of Projects on the date set for Project Advertisement. The Invitation for Bids will indicate the following:~~

- ~~1. The Project number;~~
- ~~2. The Contract Time;~~
- ~~3. The locations, length, and description of the Work;~~
- ~~4. The date, time and place for the Bid Opening; and~~
- ~~5. Information concerning the cost and availability of Plans and Required Documents for Bid Submittal.~~

### 102.2 PREQUALIFICATION ~~OF BIDDERS~~

Prequalification of Bidders is a condition for submitting a Bid as authorized by the New Mexico Procurement Code, NMSA 1978, § 13-1-82 and 13-1-134 (1984, amended 2011).

~~Bidders and Subcontractors, at all tiers, shall be prequalified in accordance with the requirements of the Department's prequalification regulations, 18.27.5 NMAC. The failure of a Bidder to be prequalified shall render the Bid non-responsive and the Bid shall be rejected.~~

### 102.3 SUSPENSION AND DEBARMENT

The Department may suspend, ~~or debar,~~ reject a Bid as non-responsive, prohibit from the performance of Work, or terminate a Contract with any a Bidder, Contractor, Subcontractor, at any tier, Suppliers, individual officers, directors in accordance with NMSA 1978, § 13-1-177 to 13-1-180 (1984, as amended 2011) and the Department's Suspension and Debarment rules as per 18.28.4 NMAC. ~~A suspended or debarred Bidder shall be ineligible to Bid or perform any Work on Department Projects during the period of its Suspension or Debarment.~~

~~A Bidder who is suspended or debarred by a federal agency, (i.e. as identified on the federal excluded parties list) shall be ineligible to Bid or and may be ineligible to perform any Work on any Project subject to federal reimbursement during the period of its Suspension or Debarment.~~

### 102.4 ~~REQUIRED DOCUMENTS FOR BID SUBMITTAL~~ BID PACKAGE

The Department will make available to prospective Bidders ~~a Bid Package consisting of the Required Documents for Bid Submittal.~~ The Project's Required Documents for Bid Submittal are comprised of the documents as those specified in the Contract's Index of Required Documents for Bid Submittal. ~~index of documents, including but not limited to the following: Bid Form, Bid Schedule and Bid Guaranty.~~

- ~~1. Only the Required Documents for Bid Submittal are to be submitted. All forms in this package are considered a part thereof and must not be detached or altered when the Bid is submitted.~~
- ~~2. All requirements for electronic submittals will be specified in the Department's Invitation for Bids. When specified in the Invitation for Bids, submit a Bid in electronic format.~~

### 102.5 ~~REFUSAL OR~~ REJECTION OF BIDS

#### 102.5.1 Mandatory Rejection of Bids

The Department reserves the right to reject any or all Bids, to waive technicalities, or to advertise for new Bids if, in the judgment of the Department, the best interests of the public and

~~the Department would be promoted thereby.~~ The Department ~~may refuse to receive or open a Bid, or will shall may~~ reject a Bid(s); for the following reasons:

1. A Bidder is not Prequalified;
2. A Bidder is determined to be a non-Responsible Bidder; A Bidder lacks competency, financial stability, or adequate machinery, plants or other Equipment, or the ability to commence the Work within 30 Days of the Notice to Proceed;
3. A Bidder fails to comply with any requirement in the Contract documents;
4. A Bidder omits any portion of the Required Documents for Bid Submittal when submitting its Bid;
5. A Bidder adds provisions reserving its right to accept or reject an Award, or reserving its right to refuse to enter into a Contract after an Award.;
- ~~3. A Bidder is responsible for uncompleted Work that in the judgment of the Department might reasonably be expected to hinder or prevent the prompt completion of additional Work;~~
- ~~4. A Bidder fails to timely pay, satisfactorily settle, or provide security for the payment of Claims for Labor, Equipment, Materials, supplies, or services legally due on previous or ongoing Contracts;~~
- ~~5. A Bidder is not Prequalified;~~
6. A Bidder defaults under a previous Contract, including Contracts with other public entities;
- ~~7. A Bidder performs previous Work unsatisfactorily, or fails to comply with Section 108.3, "Schedule;"~~
7. The Bidder or its principals, individual officers or corporate directors are presently suspended, debarred, declared ineligible, or voluntarily excluded from bidding;
8. The Department ~~issues~~ issued a notice of proposed Suspension or Debarment to the Bidder and the Bidder ~~failed~~ fails to timely respond to the notice of proposed Suspension or Debarment; ~~Bidder or the Bidder or its principals, individual officers or corporate directors are presently suspended, declared ineligible, or voluntarily excluded from bidding;~~
9. A Bidder submits more than one (1) Bid for the same Project control number Work; ~~under its own name, or under a different name;~~
- ~~10. Evidence exists of collusion among Bidders or prospective Bidders, in the preparation of a Bid for a Department Project;~~
- ~~11. A Bid Item Unit Price results in an un materially Unbalanced Bid, to the potential detriment of the public or the Department. The Department may require the Apparent Low Bidder to detail and justify in writing how its prices were determined, and to justify the basis for its prices;~~
- ~~12. A Bid Item Unit Price or total Contract Bid price differs significantly from the Engineer's estimate or from other Bids to the potential detriment of the public or the Department;~~
- ~~13. A Bid Item Unit Price does not include reasonable actual costs plus a reasonable proportionate share of the Bidder's anticipated profit, overhead costs, insurance, and other indirect costs including any insurance or overhead expenses necessary to complete that Bid Item to the potential detriment to the public or the Department;~~
- ~~14. A Bidder contacts or communicates with any State Transportation Commissioner or any Department personnel responsible for Bid review or and the Award of the Contract in relation to the Bid review or Award process- before the Department's execution of the Contract at any time prior to the notification that the Contract has been awarded to the lowest Responsible Bidder, except for a exercising a Bidder's right to file a written protest pursuant to Section 103.3 "Bidding Dispute Resolution Procedures" or in response to an inquiry from the Bid review committee; or~~
11.
- ~~15. 12. A potential benefit to the public or the Department exists if the Contract is re-advertised;~~

~~16. Failure to attend a Mandatory Pre-Bid Conference when so required by a Notice to Contractor, Special Provision or Addendum;~~

A Bidder is subject of a judgment or verdict imposing a civil or criminal penalty under either the Federal False Claims Act or the New Mexico Fraud against Taxpayers Act;

~~17. To redesign the Project or change Project Specifications;~~

~~18. If the Department becomes aware of an error in the quantity of a Bid Item shown in the Bid Schedule, Plans, or other Contract documents which may call into question the Department's ability to determine which Bid will result in the lowest ultimate cost to the Department; or~~

~~19. When it is in the best interests of the public or the Department to do so.~~

#### **102.5.2 Discretionary Rejection of Bids**

The Department may reject Bid(s) for the following reasons:

1. A Technical Irregularity exists;

4.2. A Bid Item Unit Price or Total Bid Amount differs significantly from the Engineer's Estimate or from other Bids;

3. A Bidder is responsible for uncompleted Work that might reasonably be expected to hinder or prevent the prompt completion of additional Work;

4. A Bidder fails to timely pay, satisfactorily settle, or provide security for the payment of Claims for labor, Equipment, Materials, supplies, or services legally due on previous or ongoing Contracts;

5. A Bidder performs previous Work unsatisfactorily, or fails to comply with Section 108.4, "Unsatisfactory Progress of Work";

6. The Department issues a notice of proposed Suspension or Debarment to the Bidder; Evidence exists of collusion among Bidders or prospective Bidders;

~~A Bid Item Unit Price results in a mathematically Unbalanced Bid to the potential detriment of the public or the Department. The Department may require the Apparent Low Bidder to detail and justify in writing how its prices were determined;~~

~~A Bid Item Unit Price or Total Bid Amount differs significantly from the Engineer's Estimate or from other Bids;~~

~~A Technical Irregularity exists;~~

7. A potential benefit to the public or the Department exists if the Contract is re-advertised;

~~If the Department becomes aware of an error in the quantity of a Bid Item shown in the Bid Schedule, Plans, or other Contract documents which may call into question the Department's ability to determine which Bid will result in the lowest ultimate cost to the Department;~~

~~To redesign the Project or change the Contract/Contract;~~

2.8. If the Department becomes aware of an error in the quantity of a Bid Item shown in the Bid Schedule, Plans, or other Contract documents which may call into question the Department's ability to determine which Bid will result in the lowest ultimate cost to the Department; or

9. To redesign the Project or change the Contract;

3. A potential benefit to the public or the Department exists if the Contract is re-advertised; or

10. If the Department becomes aware of an error in the quantity of a Bid Item shown in the Bid Schedule, Plans, or other Contract documents which may call into question

~~the Department's ability to determine which Bid will result in the lowest ultimate cost to the Department; or~~

~~When it is in the best interests of the public or the Department.~~

~~11.~~

## 102.6 INTERPRETATION OF QUANTITIES

The quantities appearing in the ~~Bid Schedule, Plans, or other Contract documents~~ are approximate only and are prepared for the comparison of Bids. Payment to the Contractor shall be made only for the actual quantities of Work performed and Accepted, or Materials furnished, or as otherwise specified (e.g., Computed Quantities) in the Contract.

## 102.7 EXAMINATION OF CONTRACT, SITE OF WORK, AND REQUESTS FOR CONTRACT INTERPRETATION, PLANS, SPECIFICATIONS, SPECIAL PROVISIONS, AND SITE OF WORK

- ~~The Department will prepare Plans and Specifications in accordance with acceptable engineering standards and will give such directions as may enable any competent Contractor to construct the Work. The submission of a Bid shall be considered conclusive prima facie evidence that the Bidder has exercised Pre-Bid Due Diligence and accepts the conditions to be encountered in performing the Work and accepts the provisions and requirements of the Contract. The Bidder must so certify on the Bid Form for the Bid to be considered a Responsive Bid;~~
- When available, boring logs and subsurface investigation records related to the Project other records of subsurface investigations including Borrow, surfacing Material, and other Materials pits will be provided by the Department through bid express. may be inspected by the Bidders. Bidders are informed that such information is for Department design and estimating purposes only. The Department does not warrant the adequacy of the subsurface records or subsurface investigations, and such information is not considered to be a part of the Contract. When a log of test borings is included in the subsurface investigation record, the data shown in the individual log of each test boring apply only to that particular boring and are not intended to be conclusive as to the character of any material between or around test borings. If Bidders use this information in preparing a Bid, it is used at its own risk, and Bidders are responsible for all conclusions, deductions, and inferences drawn from such information. Such information is made available to Bidders so that they and the Department have identical access to subsurface information. The Department does not warrant the sufficiency of such subsurface investigation records documentation, and if the Bidder requires additional information other than what the Department furnished, the Bidder may such subsurface investigation records documentation does not relieve the Bidder from, at its own expense, and with Department approval performing its own site investigation. The Department providing subsurface investigation information does not relieve the Bidder from: considering geotechnical data from previous Projects performed by the Bidder in the vicinity of the Project, and determining how subsurface conditions may affect the means, methods and cost of the Work. "The Bidder shall carefully study and compare all Contract documents and shall immediately report to the Chief Engineer any error, inconsistency or omissions that may be discovered.";

### 102.7.1 Requests for Contract Interpretation

- Requests for Contract interpretation shall be in writing, addressed to the Chief Engineer at chief.engineer@state.nm.us, and must be received by the Chief Engineer at least 72-96 hours before the prior Bid Opening time in the Advertisement to the date fixed for the opening of Bids in order to receive a written response to the request. The Department will not be bound by any statement or representation concerning the

Work unless it is included in the Contract. The Bidder shall only rely on written responses from the Chief Engineer or designee and oral responses, explanations, interpretations, or instructions given before the Bid Opening by the Department, its employees or agents, are not binding. No interpretation of the meaning of the Contract shall be made to any Bidder orally. The Contractor shall not rely on oral statements and shall only rely on written responses provided by the Chief Engineer or designee. Written responses from the Chief Engineer Any and all such interpretation and any supplemental instructions if issued by the Department will be in the form of an Addendum or posted to Bid Express. Written responses Such Addendum will be provided, to all prospective Bidders for such purposes and shall, whenever practicable, be issued no later than twenty-four (24) hours prior to Bid Opening.

~~3.2.~~ The Bidder shall take no advantage of any error or omission in the Contract. In the event the Bidder discovers an error or omission, the Bidder shall notify the Chief Engineer in writing. The Bidder also agrees that it will make no Claim because of misinterpretation or misunderstanding of the Contract or because of lack of information; and,

~~4.3.~~ The Contractor is not entitled to a written response by the Chief Engineer when Contract interpretation requests are received less than 48 hours before Bid Opening. If a written response by the Department to a request for Contract interpretation is not provided, the Bidder shall Bid the Contract according to the Contract documents.

## 102.8 PREPARATION OF BID

1. Submit the Bid as provided in the Advertisement Bid Package, and complete the blank spaces in the Required Documents for Bid Submittal; For each Bid Item, the Bidder shall state in numerals, either in ink or digital format, the Bid Item Unit Price for which the Bidder proposes to perform each Bid Item;
2. Specify a Bid Item Unit Price for each Bid Item, except when a Bid Item Unit Price is established by the Department. The Bid Item Unit Price shall include, and shall be conclusively presumed to include, reasonable actual costs plus a reasonable proportionate share of the Bidder's anticipated profit, overhead costs, insurance, and other indirect costs necessary to complete that Bid Item;
- ~~3.2.~~ Show the Bid Item Prices by multiplying the respective Bid Item Unit Prices and quantities, and also show the Total Bid Amount in the space provided on the Bid Schedule. The Total Bid Amount will be the sum obtained by adding the Bid Item Prices;
4. For paper Bid submittals make changes to any entry on the Required Documents for Bid Submittal by marking through the entry in ink and making the correct entry adjacent thereto in ink. Initial the change in ink;
- 5.3. Show the amounts for the respective Bid Item Unit Prices to a maximum of three (3) decimal places. RoundTruncate additional decimal places in excess of three (3);
4. Exclude the applicable State GRT, T and local option tax, Indian business tax, TERO tax, and other tax imposed by a tribal government. The Department will pay the applicable tax or increase in the applicable tax effective after the Contract is executed by the Department;
- 6.5. The Standard Specifications and, when applicable, supplemental Specifications are organized by section numbers that describe the Work, Materials, construction requirements, methods of measurement, and Basis of Payment. The Bid Item numbers correlate to section numbers; the first three digits of a Bid Item code correspond to the Specification section number with the same first three digits. Payment for Work will be made only for and under those Bid Items included in the Bid Schedule. If no Bid Item appears on the Bid Schedule for any Work or Materials required or specified by the Contract, such Work and Materials shall be Incidental to the Contract and the cost of such Work shall be included in any Bid Item(s) related to or associated with such Work. For the convenience of the Contractor, some Contract documents may specify Work which is incidental; identification of such incidental items of Work is not all inclusive.



7. ~~Exclude any Indian business tax, TERO tax, and other tax imposed by a tribal government;~~
8. ~~Submit Required Documents for Bid Submittal signed by the president, vice-president, owner, or other representative of the Bidder authorized in writing to bind the Bidder; and,~~
9. ~~Except in the exercise of a Bidder's right to file a written protest pursuant to Section 103.3, "Bidding Dispute Resolution Procedures," or in response to an inquiry from the Bid review committee, a Bidder shall not contact or communicate with any State Transportation Commissioner or any Department personnel in relation to the Bid review, Award process, or awarding of the Contract at any time prior to the notification that the Contract has been awarded to the lowest responsive and Responsible Bidder.~~

#### 102.9 INNOVATIVE INCENTIVE/DISINCENTIVE PROVISIONS ~~CONTRACT INCENTIVES~~

The Department reserves the right and may include innovative Incentive/Disincentive Provisions in the Contract ~~Incentives in the Special Provisions, Notice to Contractors, or Addenda.~~ The Department reserves the right, as may be provided in the Contract, to ~~escrow Bid Documents, to request information for informational purposes only, and to use innovative bidding approaches, including requiring Bidders to bid a daily overhead rate (cost / Day) as a Bid Item Unit Price.~~

#### 102.10 RESERVED ~~IRREGULAR BIDS~~

- A Bid will be deemed irregular and shall be rejected in the event a Bidder:
1. ~~Submits its Bid on forms different than the Required Documents for Bid Submittal;~~
  2. ~~Does not sign its Bid Form in accordance with Section 102.8, "Preparation of Bid," and thereby fails to bind the Bidder to its Bid;~~
  3. ~~Alters the Required Documents for Bid Submittal;~~
  4. ~~Omits any material portion of the Bid Package when submitting its Bid;~~
    5. ~~Submits a Bid containing irregularities, such as unauthorized additions and conditional or alternate proposals that tend to make the Bid incomplete, indefinite, or ambiguous;~~
  6. ~~Adds provisions reserving its right to accept or reject an Award, or reserving its right to refuse to enter into a Contract after an Award;~~
  7. ~~Omits both a Bid Item Unit Price and a Bid Item Price for each Bid Item;~~
  8. ~~Fails to initial (in ink) changes to Bid Item Unit Prices or Bid Item Prices in accordance with Section 102.8, "Preparation of Bid;"~~
  9. ~~Fails to deliver the Bid in accordance with Section 102.12, "Delivery of Bids;" or,~~
  10. ~~Fails to provide in its Bid the certification required by Section 102.7, "Examination of Contract, Plans, Specifications, Special Provisions, and Site of Work."~~

#### 102.11 BID GUARANTY

A Bidder shall submit with the Bid, a Bid Guaranty in the amount of ~~at least~~ five percent (5%) ~~of the Total Bid Amount.~~ The requirement of the Bid Guaranty is to ensure that the Bidder will promptly execute the Contract in accordance with the Advertisement and in the manner and form required by the Contract Documents and that the Bidder will furnish good and sufficient Contract Bonds and required insurance. ~~The Bid Guaranty shall be in the form in the Required Documents for Bid Submittal. The Bid Guaranty will remain in force up to 30 Days after Bid Opening, or until Award of Contract as it may be extended by the NMDOT, notice of which extension(s) to the surety is hereby waived.~~ ~~of one (1) of the following:~~

1. ~~Bid bond;~~
2. ~~Certified check; or~~
3. ~~Postal or Bank money order.~~

#### 102.12 ~~RESERVED~~ DELIVERY OF BIDS

~~A Bidder shall submit the Bid in a sealed envelope and plainly marked with the Project number, control number, location of the Project, and the name and address of the Bidder. If sent by United States Mail or private carrier, mail in accordance with the Invitation for Bids. The Department must receive the Bid before close of business the Day before the Bid Opening. In the alternative, a Bid may be hand-delivered by the Bidder prior to the Bid Opening to the official designated by the Department to open and read Bids at the Bid Opening.~~

~~Alternatively, the Bidder may submit its Bid electronically in accordance with the Invitation for Bids.~~

#### 102.13 ~~RESERVED~~ VISION OF BIDS

~~A Bidder may revise its Bid after submitting it to the Department, provided such revision is in writing, facsimile or electronically in portable document format (PDF) and is received by the Department before the Bid Opening in accordance with the Invitation for Bids.~~

~~A Bidder may revise electronic Bids anytime before Bid Opening.~~

#### 102.14 WITHDRAWAL OF BIDS

~~A Bidder may withdraw its Bid after it has been deposited with the Department and before the time set for Bid Opening or may choose circumstances for the operation of the automatic Bid withdrawal functionality. by requesting to do so in person, in writing, by facsimile, or electronically in PDF. Once a Bid Opening has commenced at the date, time and place designated in the Advertisement Invitation for Bids Bids may not be withdrawn. a Bidder may not withdraw its Bid, except that an opportunity will be given prior to the opening and reading of the Bids on each Project for a Bidder to withdraw the Bidder's own Bid for that Project and for any other Projects which have not yet been opened and read. Withdrawn Bids shall not be resubmitted.~~

~~Alternatively, the Bidder may withdraw its Bid electronically in accordance with the Invitation for Bids.~~

#### 102.15 ~~RESERVED~~ BID OPENING

~~Bids will be opened and read publicly in the presence of one (1) or more witnesses at the time and place designated in the Invitation for Bids. The amount of each Bid and each Bid Item, and such other relevant information as may be specified by the Department, together with the name of each Bidder, will be recorded, and the record and each Bid will be open to public inspection.~~

#### 102.16 ENGINEER'S ESTIMATE

The Engineer's Estimate shall be confidential and is not subject to the Inspection of Public Records Act and shall not be disclosed to, or be subject to inspection by, members of the public ~~before~~ prior to the Bid Opening. ~~At~~ When all Responsive Bids for the Project are received and read during the Bid Opening, the Engineer's Estimate for the Project will be publicly disclosed.

## 103.1 CONSIDERATION OF BIDS

~~After the Department opens and reads the Bids, a Bid review committee will check the extended unit prices and the sum of the extended unit prices and item Lump sums for accuracy and compare the resulting Total Bid Amounts. The Department's Bid Review Committee shall review, and evaluate Bids and make recommendations for rejection or issuance of the Notice of Preliminary Award. The Department's Bid Review Committee will review the Bid Item Unit Pricing to determine if the Bid Item Unit Pricing is responsive, unbalanced either materially or mathematically, or any other abnormalities exist. The Department reserves the right to request justification from the Bidder for any aspect relating to its Bid and the Bidder shall respond to the request. The results of the completed analysis will be available to the public after the Department issues the Notice of Preliminary Award of Contract letter.~~

~~If two (2) Contractors submit identical lowest Total Bid Amounts, the Department shall determine the successful Bidder by the flip of a coin.~~

~~Any or all Bids may be rejected when it is in the best interest of the public and the Department at any time prior to execution of the Contract. If all Bids are rejected the Department may issue a new Advertisement. A Department decision to reject all Bids, rescind the Notice of Preliminary Award of Contract, or to cancel the Award of Contract and issue a new Advertisement is wholly an exercise of executive discretion not subject to review at an informal hearing pursuant to Section 103.3, "Bidding Dispute Resolution Procedures". for a number of factors, which may include: comparison of Bids against the Engineer's Estimate; number of Bids submitted; unbalancing of Bids; Bid prices for the Project versus Bid prices for similar Projects; Unit Bid Price differences between a Bid, the Engineer's Estimate, and other Bids; Bid irregularities; whether a Unit Bid Price substantially reflects reasonable actual costs plus a reasonable proportionate share of the Bidder's anticipated profit, overhead costs, insurance, and other indirect costs necessary to complete that Bid Item; justification for any differences; and, any other factors the Department has determined to be in the public's interest. The results of the completed analysis will be available to the public after the Department issues the notice of preliminary preliminary award letter. Award of Contract.~~

~~If the Bid Item Unit Price is omitted, the Bid Item Price will be divided by the estimated quantity, thereby establishing a Bid Item Unit Price. If both the Bid Item Unit Price and the Bid Item Price are omitted, the Bid shall be rejected.~~

~~If a discrepancy exists between a Bid Item Unit Price and its extension, the Bid Item Unit Price shall govern. If two (2) Contractors submit identical lowest Total Bid Amounts, the Department shall determine the successful Bidder by the flip of a coin.~~

~~Mathematical errors in Bid Item Prices or Total Bid Amount shall be corrected by the Department during the review of Bids.~~

~~The Department reserves the right to request justification from the Bidder for any aspect relating to its Bid and the Bidder shall respond to the request, reject any or all Bids, to waive technicalities, or to advertise for new Bids if, in the judgment of the Department, the best interests of the public and the Department would be promoted thereby. Any or all Bids may be rejected when it is in the best interest of the public and the Department at any time prior to execution of the Contract. If all Bids are rejected the Department may request a new Invitation for Bids. A Department decision to cancel the Award of Contract or to reject all Bids and issue a new Invitation for Bids is wholly an exercise of executive discretion not subject to review at an informal hearing pursuant to Section 103.3, "Bidding Dispute Resolution Procedures".~~

~~Any or all Bids may be rejected when it is in the best interest of the public and the Department at any time prior to execution of the Contract. If all Bids are rejected the Department may issue a new Advertisement. A Department decision to cancel the Award of Contract or to reject all Bids and issue a new Advertisement is wholly an exercise of executive discretion not subject to review at an informal hearing pursuant to Section 103.3, "Bidding Dispute Resolution Procedures."~~

### **103.2 NOTICE OF PRELIMINARY AWARD OF CONTRACT**

~~Any or all Bids may be rejected when it is in the best interest of the public and the Department at any time prior to execution of the Contract. If all Bids are rejected the Department may issue a new Advertisement. A Department decision to cancel the Award of Contract or to reject all Bids and issue a new Advertisement is wholly an exercise of executive discretion not subject to review at an informal hearing pursuant to Section 103.3, "Bidding Dispute Resolution Procedures."~~

~~When required by the Department, the Bidder shall submit written answers to the Bidder Information Questionnaire. The Department will determine if the Apparent Low Bidder is a Responsible Bidder using the answers to this questionnaire. The Department will base its decision on whether the Bidder demonstrates adequate financial resources, production or service facilities, personnel, service reputation, and experience to make satisfactory delivery of the construction described in the Invitation for Bids.~~

Except as described in Section 103.3, "Bidding Dispute Resolution Procedures," the Department will issue the Notice of Preliminary in a notice in writing of the Award of the Contract within 30 Days after Bid Opening the opening of Bids to the lowest Responsible Bidder. ~~This Bidders~~ may agree to a later Notice of Preliminary Award time as requested by the Department, failure to agree to a later Notice of Preliminary Award time as requested by the Department will be deemed the Bidder's withdrawal of its Bid. ~~without penalty.~~ The Notice of Preliminary Award letter, if it is mailed within 30 45-Days of the Bid Opening, shall bind the lowest Responsible Bidder to accept the Contract or to reject the Contract and forfeit the Bid Guaranty it has provided.

~~Unless the Department determines to cancel the Invitation for Bids or to reject all Bids the Department will notify the lowest Responsible Bidder in writing that its Bid has been accepted and that it has received preliminary Award of the Contract. The Department will provide the Contract to be executed by the Contractor and returned to the Department.~~

### **103.3 BIDDING DISPUTE RESOLUTION PROCEDURES**

#### **403.3.1 Pre-Award**

~~In the event of a Bidding dispute, the following procedure shall control the Award of the Contract:~~

~~1.—A Bidder disputing the Bidding or pre-award process must file a written protest with the Cabinet Secretary:~~

~~a. —Disputes arising from the Department's pre bid opening process and solicitation of Bids, including issues arising from Invitation for Bids, Prequalification, irregularities with the Department's Bid Package, and irregular Bids must be raised by written protest no later than seven (7) Days from the date of the Bid Opening.~~

#### **103.3.1 Bidding Disputes 103.3.2 Post-Award**

~~1.—A Bidder aggrieved in connection with the solicitation or~~ 1.—A Bidder aggrieved in connection with the solicitation or ~~or~~ Notice of Preliminary disputing the preliminary Award process or ~~or~~ Award of a Contract shall ~~must~~ file a written protest with the Cabinet Secretary within fifteen (15) seven (7)-Days of the Notice of Preliminary Award of a Contract. Written protests filed prior to the Department's Notice of Preliminary Award of Contract may ~~will~~ be deferred at the sole discretion of the

~~Department and not considered until the Department has issued the Notice of Preliminary Award of the Contract.~~

- ~~a. Disputes arising from the Department's pre-bid opening process, and solicitation of Bids, including issues arising from the Advertisement Invitation for Bids, Prequalification, irregularities with the Department's Required Documents for Bid Submittal, Bid Package, and irregular Bids, must be raised by written protest no later than seven (7) Days from the date of the Bid Opening.~~
- ~~1. Disputes relating to the preliminary Award or Award of a Contract or any Department decision regarding the issuing, receiving, or opening of any Bid, or rejection or non-rejection of any Bid, must be brought within 12 Days of the date of the preliminary Award of Contract;~~
  - ~~b. —~~
  - ~~c. — The written protest must include facts supporting the protest, any pertinent contractual provisions, law, rules or regulations, and other legal authorities supporting the protest and a requested action;~~
  - ~~d. — Written protests filed prior to the Department's preliminary Award of Contract may be deferred at the sole discretion of the Department and not considered until the Department has preliminarily Awarded the Contract.~~

### **103.3.2 Reserved**

### **103.3.3 Informal Hearing Procedures**

- ~~1. Failure to file a timely protest shall constitute a waiver of the Bidder's right to protest and the Bidder is not entitled to an informal hearing;~~
- ~~2. The written protest must include facts supporting the protest, any pertinent contractual provisions, law, rules or regulations, and other legal authorities supporting the protest and a requested action;~~
- ~~3. Service of the written protest shall be made only upon the Cabinet Secretary, with a copy contemporaneously transmitted and separately served upon the Office of General Counsel for the Department, during the Department's regular Business Hours by delivery in person, or by certified mail, postage prepaid, return receipt requested, or by delivery by a nationally recognized overnight or same-day courier service that obtains receipts. — Electronic communication (i.e. e-mail, facsimile) shall not be considered. — Service of a written protest made after the Department's regular Business Hours shall not be effective until the next business Day.~~
- ~~4. Copies of the protest shall be contemporaneously transmitted by the disputing Bidder to every Bidder when the protest is served upon the Cabinet Secretary and the Office of General Counsel; and,~~

— Any Bidder, other than the disputing Bidder, that considers itself to be an interested party to the Bidding dispute may submit a written response to the protest in advance of the informal hearing. The response shall include a statement of the requested action, a rebuttal of any of the factual matters in the protest, facts supporting the response, and any contractual provisions, laws, rules, or regulations, or other authority supporting the response.
- ~~3.5.~~
- ~~4.6. When a timely protest is filed, the Cabinet Secretary will not proceed further with the Award by execution of Contract until the dispute is resolved, as detailed below, unless or until the Cabinet Secretary determines that the Award or execution of the Contract is necessary to protect the best substantial interests of the public and the Department. — The Cabinet Secretary retains the right to reject all Bids, to rescind the Notice of Preliminary Award of Contract, or cancel the Award of Contract or to reject all Bids and issue a new Advertisement w Invitation for Bids when it is in the best interest of the public and the Department;~~

- ~~5-7.~~ When a timely protest is filed, the Bids of both the Apparent Low Bidder and the next Apparent Low Bidder (or all Bidders) shall be automatically extended an additional 15 Days. -The Department will, subject to other provisions in the Specifications, may Award the Contract by executing the Contract within 45 Days of the Bid Opening;
- ~~6-8.~~ Within seven (7) Days of receiving a timely Bid protest, the Cabinet Secretary or the Cabinet Secretary's designated informal hearing officer will cause to be delivered by mail, postage prepaid, or by facsimile copy or by email transmission a letter notifying all parties to the protest grievance of the date, time and place to appear with all necessary material evidence for an informal hearing, ~~in the Department's General Office or elsewhere as identified.~~ Such letter shall include a copy of the written protest. Whenever practicable the parties will shall be afforded at least seven (7) Days notice of the scheduled informal hearing. -If an informal hearing officer is designated by the Cabinet Secretary, the designee shall not be a person who made or approved the Award decision under review or a subordinate of such person during the past 12 months;
- ~~9.~~ The formal rules of evidence or civil procedure do not apply to the informal hearing. The informal hearing officer has absolute discretion in establishing the degree of formality for the informal hearing and may limit the presentation of evidence or argument. ~~The formal rules of evidence or civil procedure do not apply to the informal hearing.~~ While parties to an informal hearing may call their own witnesses they are not afforded the opportunity to subpoena or cross-examine witnesses. Parties are permitted to submit documentary evidence and written arguments at the informal hearing. Parties may supplement the record or provide supplemental written arguments after the ~~informal hearing date~~ provided that such Materials are submitted provided to the informal hearing officer at least three (3) Days after the information hearing date. ~~prior to the deadline to issue a determination letter. The presentation of evidence and argument may be limited by the informal hearing officer.~~ The informal hearing officer shall have the authority to question any party or witness. ~~The informal hearing officer may limit the time for oral argument; exclude the participation or testimony of any person who becomes belligerent or unruly, or any representative who attempts to harass any witness; and, refuse to hear testimony or argument if it is cumulative, not relevant or is immaterial to the issues.~~
- ~~10.~~ At disposition, the informal hearing officer is not restricted to considering only these evidence or argument documents and testimony presented introduced at the informal hearing but may consider evidence that is reliable, accurate, and competently obtained, ~~from either party.~~ When such information is obtained the hearing officer shall provide it to both parties and provide 24 hours for rebuttal before the final decision.
- ~~7-11.~~ The informal hearing officer is responsible for maintaining a complete record of the informal hearing including all evidence, transcripts of the hearing, and written arguments submitted by the parties. A complete record of the testimony and argument at the informal hearing shall, whenever practicable, be either stenographically or electronically recorded by a certified court reporter or monitor. Transcripts or recordings of the proceeding, if available, may be supplied to any party at their own expense upon request to the court reporter or monitor;
- ~~8-12.~~ Within seven (7) Days of the ~~informal hearing~~ informal hearing date, the Cabinet Secretary or the Cabinet Secretary's designated informal hearing officer will issue a determination letter stating the reasons for the action taken and informing the losing party of its right, under NMSA 1978, § 13-1-183 (1984), to file an appeal in Santa Fe District Court within 30 Days of the issuance of the adverse determination. The determination letter shall constitute the final Department decision or order;
- ~~9-13.~~ The Award of the Contract to the lowest Responsible Bidder, based upon the Department's determination letter, shall be conditioned upon the unsuccessful party not appealing, under NMSA 1978, § 13-1-183 (1984), to the Santa Fe District Court within 30 Days of receiving the determination letter. -The Award letter, if it is mailed within ~~60~~45 Days of the Bid Opening, shall bind the lowest Responsible Bidder to accept the Contract or to reject the Contract and forfeit the Bid Guaranty it has provided;

~~40-14.~~ If an appeal is filed pursuant to NMSA 1978, § 13-1-183 (1984), the Department may extend the date of the Award letter to a later date as agreed upon by the Department and the lowest Responsible Bidder. When such an extension cannot be agreed upon or for any other reason, the Department may proceed with the Award to the next lowest Responsible Bidder if the Cabinet Secretary determines that the Award of the Contract is necessary to protect the substantial interests of the public and the Department, or may cancel the Award of the Contract, or reject all Bids and issue a new Advertisement Invitation for Bids when it is in the best interest of the public and the Department;

~~44-15.~~ If a Bidder successfully prevails on appeal, a Bidder is limited to one (1) of two (2) remedies arising from the Bidding dispute, Award of the Contract or, if the Contract can no longer be practicably awarded to the Bidder or it is not in the best interest of the public and the Department to Award the Contract to the Bidder, the Contractor's reasonable and documented Bid preparation costs; and,

~~42-16.~~ Each party shall bear its own attorney's fees and costs.

#### 103.4 CANCELLATION OF AWARD

The Department may reject all bids, rescind the Notice of Preliminary Award of Contract, and cancel the Award of any Contract or reject all Bids and issue a new Advertisement Invitation for Bids at any time prior to the execution of the Contract by all parties without incurring liability where such cancellation is deemed by the Cabinet Secretary to be in the best interests of the public and the Department. - No Bidder has a contractual, equitable, implied, or any other right to the Contract until executed by both parties.

#### 103.5 ~~RESERVED~~TURN OF BID GUARANTY

~~Immediately following the opening and checking of Bids, the Department will return all Bid Guaranties submitted in the form of a check, except for those of the two (2) lowest Bidders. The Department will return the Bid Guaranty of the unsuccessful of the two (2) lowest Bidders, if submitted in the form of a check, within ten (10) Days of the Contract Award. The Department will return the retained Bid Guaranty of the successful Bidder, if in the form of a check, after the successful Bidder has furnished satisfactory Contract bonds and the Contract has been executed. The Department will return Bid Guaranties in the form of Bid bonds only upon the request of an unsuccessful Bidder.~~

#### 103.6 ~~RE CONTRACTOR EXECUTED CONTRACT~~ REQUIREMENT OF CONTRACT BONDS

The Department will provide the Contract to be executed by the Contractor and returned to the Department. The Contractor shall return the signed Contract with Contract Bonds and other documents required by the Notice of Preliminary Award letter within the 15 Days from the date of the letter. The Contract Bonds shall become binding upon Contract execution.

~~-The value of each bond shall equal the Total Original Contract Amount. The Department must approve the Surety and the form of the Contract Bonds.~~

All Contract Bbonds shall be procured from Sureties with an A.M. Best Company financial strength rating level of A- or better, Class VII or better, unless otherwise approved in writing by the Department. - In no event shall the Department approve the use of a Surety with an A.M. Best Company financial strength rating level of B or worse.

#### 103.7 FAILURE TO EXECUTE CONTRACT

Failure by the lowest Responsible Bidder to return the signed Contract, Contract Bonds and other documents required by the Notice of Preliminary Award letter within 15 Days of receiving the letter shall constitute just cause for rescinding the Notice of Preliminary ~~cancellation of the Award of Contract and the forfeiture of the Bid Guaranty which shall become the property of the Department, not as a penalty but as liquidation of reasonable damages sustained. The Bid Guaranty remains in effect until the Department has fully executed the Contract. -The~~

Department may then issue the Notice of Preliminary Award of the Contract to the next lowest Responsible Bidder or take other actions as the Department may decide.

### **103.87 EXECUTION ~~AND APPROVAL~~ OF CONTRACT**

~~The successful Bidder shall sign and return the Contract and provide Contract Bonds and lists of all Subcontractors and Suppliers within 15 Days of receiving the Contract. If the Department fails to execute the Contract within 30 Days of receiving the signed Contract, t and Contract Bonds, and other documents required by the Notice of Preliminary Award Letter from the successful Bidder, the Bidder may withdraw its the Bid without penalty. No Contract shall be effective until it has been fully executed by the Department and the Contractor. In no event shall the Contractor commence Work until after execution of the Contract by all parties.~~

### **403.8 FAILURE TO EXECUTE CONTRACT**

~~Failure by the successful Bidder to return the signed Contract and Contract Bonds within 15 Days of receiving the Contract shall constitute just cause for cancellation of the Award and the forfeiture of the Bid Guaranty which shall become the property of the Department, not as a penalty but as liquidation of reasonable damages sustained. The Department may then Award the Contract to the Bidder with the next lowest Responsive Bid, reject all bids, reject all bids and issue a new Invitation for Bids or take other actions as the Department may decide.~~



**104.1 INTENT OF THE CONTRACT**

The intent of the Contract is to provide for the construction and completion of the Work to the satisfaction of the Department. The Contractor shall furnish experienced supervision and labor and all materials, equipment, tools, transportation and supplies required to complete the Work in accordance with the Plans, Specifications and terms of the Contract, in every manner and detail of the Work described in accordance with the Plans, Specifications, and Contract terms except for Materials supplied by the Department in accordance with Section 106.8, "Department Provided Material."

Unless otherwise specified in the Contract, the Contractor is vested with the discretion and is wholly and solely responsible for selecting and managing the means and methods for performing the Work, including determining the suitability of Equipment, experience of labor and staff, construction management and scheduling, production rates, Materials, and compliance with all Federal, State and local laws and regulations.

The Contract is a final, complete and exclusive statement of the written and executed agreement of the parties.

**104.1.1 CONTRACT MODIFICATIONS**

No modifications, limitations, waivers or discharge of the Contract or any of its terms shall bind the Department unless made in a written Change Order signed by the Project Manager. A course of performance or course of dealing on this Contract or any other contract between the Department and a Contractor shall not constitute a modification or waiver of the Contract and shall not give rise to any Claim including any cause of action based upon promissory estoppel, estoppel, waiver, or detrimental reliance.

**104.2 EXTRA WORK**

The Department reserves the right to modify the Contract at any time. Such revisions shall neither invalidate the Contract nor release the Surety. The Contractor agrees to complete the Contract as revised. The Contractor shall perform Work at the Department's written direction defining the scope of the Work and in accordance with the Specifications.

The Contractor shall provide to the Project Manager its proposal associated with the Work before starting the Work. The submission of the proposal shall not be considered Accepted by the Department until the Acceptance of the cost proposal is in writing from the Department.

If the proposal is accepted by the Department, then the Department will issue a Change Order and allow the Contractor three (3) Days to review and sign the Change Order. If, after the expiration of three (3) Days, the Contractor has failed to sign the Change Order the Department may process the Change Order unilaterally.

**104.2.1 SIGNIFICANT CHANGES IN THE CHARACTER OF THE WORK**

The Project Manager-Department reserves the right to make, in writing, at any time during the Work, modifications in quantity and alterations to the Work as are necessary to satisfactorily complete the Project. "Significant change" applies only to modifications or alterations that:

Such changes will not invalidate the Contract nor release the Contractor's Surety, and the Contractor shall perform the Work as altered. EBD NTC to breakdown major contract item costs. When a major contract item of work is increased in excess of 125% or decreased below 75% of

~~the original contract quantity. To the actual amount of Work performed, any allowance for an increase in quantity shall apply only to that portion in excess of 125% of original contract item quantity, and in case of a decrease below 75%.~~

~~1) Materially changes, in kind or nature, the character of the Work including the Critical Path from that which was previously involved or included in the original proposed construction. When the character of the Work is materially changed in kind or nature then the Project Manager and the Contractor shall agree upon the adjustment prior to the Contractor's performance of the Work. If an agreement is reached, the Project Manager will make an adjustment to the Contract which excludes anticipated profit. If an agreement is not reached, the Project Manager will direct the Contractor to perform the Work. The Project Manager and the Contractor will track the costs in accordance with 109.6 "Force Account".~~

~~When the character of the work, as altered, differs materially in kind or nature from that involved or included in the original proposed construction then If modifying the quantities or altering the Work significantly changes the character of the Work, the Project Manager will make an adjustment to the Contract which excludes anticipated additional profit. The Project Manager and the Contractor shall agree upon the adjustment prior to the Contractor's performance of the Work. If an agreement is reached, the Project Manager will make an adjustment to the Contract which excludes anticipated profit. If an agreement is not reached, the Project Manager will direct the Contractor to perform the Work and track the costs in accordance with 109.6 "Force Account", determine a fair and equitable adjustment.~~

~~(A) When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or~~

~~2) A Major Item of Work, as defined elsewhere in the Contract, has increased in excess fo 125 percent or decreased below 75 percent of the original contract quantity. The Project Manager and the Contractor may negotiate adjustments to the Contract when it is discovered that a Major Contract Item of Wwork, as defined elsewhere in the Contract, has~~

~~(B) When a major item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity. In the or in case of a decrease below 75 percent, the allowance will apply to the actual amount of work performed. For quantities below 75 percent, before an adjustment is made, the Contractor shall provide documents, including invoices, to the Project Manager justifying the requested adjustment and the total price for the adjustment shall not exceed 75 percent of the total original Bid Item pPrice.~~

~~(b) The provisions of this section shall~~

~~If the modifications or alterations do not significantly change the character of the Work, the Department will pay for the altered Work in accordance with the Contract Bid Items and as provided for elsewhere in the Contract.~~

~~"Significant change" applies only to modifications or alterations that:~~

~~1. MateriallyAs solely determined by the Project Manager, materially change, in kind or nature, the character of the Work; including the Critical Path; or,~~

~~2. Increase or decrease a Major Contract Item by twenty five percent (25%). Adjusted compensation shall apply only to the following:~~

~~a. For quantity in excess of one hundred twenty five percent (125%) of the original Contract item quantity; or,~~

~~b. For the case of a decrease, below seventy five percent (75%) of the original Contract item quantity, the adjusted compensation will apply to the total quantity placed. If the final quantities are reestablished to be within the thresholds of 75% to 125% of the original item quantity then the original bid item price applies.~~

~~3. 3) Affects~~ Work performed under a Subcontract, ~~Department approved subcontract as~~ ~~As solely determined by the Project Manager.~~ ~~†The~~ ~~the Project Manager~~ Department will make adjustments if, ~~prior to the Work,~~ the Contractor demonstrates that the change adversely affects the Subcontractor's Work ~~or payment.~~

The Department shall not consider customary increases or decreases in quantities necessary to complete the Work, ~~changed by the Contractor's schedule of operations,~~ the Contractor's ~~his or her~~ planning of the Work, or unscheduled mobilizations.

#### **104.2.2.3 DIFFERING SITE CONDITIONS**

~~The Contractor shall carefully study and compare the foundation reports and geotechnical reports and Contract documents and shall immediately report to the Project Manager any error, inconsistency, or omission that it discovers. If the Contractor does not understand information in the foundation report and geotechnical report, it shall immediately seek clarification from the Project Manager.~~ The Contractor and the Project Manager shall provide, ~~each other immediately upon discovery with prompt~~ written notice ~~to the Project Manager,~~ not to exceed two (2) Working Days, of the following conditions encountered on the Project during the progress of the Work:

1. Present but not visible ~~Latent~~ physical conditions differing materially from those shown in the Contract; or,
2. Unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the Work.

The Project Manager will decide, within a two (2) Working Days, after written notification, whether the conditions materially differ and cause an increase or decrease in the cost or time required to perform the Work.

The Project Manager will notify the Contractor of this decision and the Contractor shall not proceed with Extra Work until the Project Manager provides direction.

~~The party providing notice shall do so before the conditions are disturbed or as soon thereafter as practicable and before the affected Work continues. Pursuant to Section 108.3.2 "Schedule Format," the Contractor shall provide a revised schedule to the Project Manager within seven (7) Days of the discovery or notice of a differing site condition; this timeframe may be extended in writing by the Project Manager.~~

~~The Project Manager will decide, within a two (2) Working Days, after written notification, whether the conditions materially differ and cause an increase or decrease in the cost or time required to perform the Work. The Project Manager will notify the Contractor of this decision.~~

The Project Manager will adjust the Contract for differing site conditions in accordance with Section 109.5, "Payment for Changes, Differing Site Conditions, and Extra Work," and will include the costs of Delays but exclude anticipated profit in accordance with Section 109.11, "Compensation for Claims." The Department may grant time extensions only to the extent that the activities on the critical path of the Baseline Schedule in effect at the time of the delay are impacted. No Contract adjustment ~~or additional compensation or time~~ which results in a benefit to the Contractor will be allowed if a differing site condition could have been discovered or anticipated by the Contractor through the exercise of Pre-Bid Due Diligence.

~~The Contractor is not entitled to a Claim due to a differing site condition unless the Contractor has provided the required written notice pursuant to Section 105.10, "Notice of Potential Claim."~~

~~If the Contractor or the Project Manager fails to provide prompt written notice which results in additional costs to the Department which could have been mitigated, the Department shall adjust the Contract accordingly.~~

#### **104.2.3.4 DEPARTMENT ORDERED WORK EXTRA WORK**

~~The Contractor shall perform Extra Work at the Department's written direction defining the scope of the Extra Work and in accordance with the Specifications. The Contractor shall provide to the Project Manager its proposal associated with the Extra Work before starting the Extra Work. The submission of the proposal shall not be considered Accepted by the Department until the Acceptance of the cost proposal is in writing from the Department. The Department shall pay for Department ordered Work in accordance with Section 104.2, "Significant Changes in the Character of Work" and Section 109.5, "Payment for Extra Work", Payment for Changes, Differing Site Conditions, and Extra Work."~~

~~The Department may grant time extensions only to the extent that the activities on the critical path of the Baseline Schedule in effect at the time of the delay are impacted.~~

### **104.3 RESERVED**

### **104.4 RESERVED**

## **104.5 MAINTENANCE OF TRAFFIC**

~~The Contractor shall provide, erect, and maintain barricades, warning signs, flaggers and pilot cars in accordance with the version of the MUTCD current at the time of letting and the Accepted vehicular and pedestrian traffic control plan and Division 700, "Traffic Control Devices." The Contractor shall provide flaggers with proper training and Equipment in accordance with the MUTCD, current edition. The Contractor shall keep flagging Equipment clean and in good repair. The Contractor shall keep the existing Roadway open with a minimum of inconvenience to the traveling public or provide an approved alternate route.~~

~~The Contractor shall furnish traffic control devices, take protective and safety measures, and complete the Work. If the Contractor fails to do so, the Project Manager will notify the Contractor in writing of the deficiency and the Contractor shall take corrective action within the time frame specified by the Project Manager. Failure by the Contractor to take the corrective action as directed by the Project Manager shall result in the Department assessing to the Contractor the incurred costs for the corrections plus an additional 10% for administrative costs.~~

~~The Contractor shall not endanger the traveling public when moving Equipment on or across the open ROW and Roadway. The Contractor's Equipment shall enter and leave the ROW and Roadway open Roadway in the direction of the Traveled Way public traffic, except with the written approval of the Project Manager. The Contractor shall not endanger the traveling public when moving Equipment on or across the open Roadway.~~

~~The Project Manager may direct the Contractor to maintain the pavement surface, of open Traffic Lanes adjacent to the Work zone within the limits of the Project traffic control. The Department will pay for this Work in accordance with Section 109.5, "Payment For Changes, Differing Site Conditions, and Extra Work", and will either be negotiated or paid by Force Account.~~

~~The Department is responsible for snow removal on sections of Roadway open to the traveling public. The Project Manager will coordinate snow removal with the Contractor and the maintenance patrol. The Contractor is responsible for snow removal on sections of the Roadway not open to the traveling public, as necessary for protection of the Work.~~

~~The Contractor shall furnish warning devices, take protective and safety measures provided in this section, and complete Shoulder Work, drainage Structures, or other features of the Work. If the Contractor fails to do so, the Project Manager will notify the Contractor in writing of the deficiency and the Contractor shall take corrective action within the time frame specified by the Project Manager. If the Contractor does not take corrective action in this period, the Project Manager may make corrections or terminate the Contract in accordance with Section 108.9, "Default of Contract." The Contractor shall reimburse the Department for Department incurred costs of such corrections plus an additional ten percent (10%) for administrative costs.~~

The Contractor shall provide reasonable vehicular and pedestrian ingress and egress to adjoining properties during the duration of the Contract. The Contractor shall advise and schedule access modifications with local business owners and residences and the Project Manager at least 24 hours in advance.

The Contractor shall not open partially completed sections of the Traveled Way-Roadway to traffic unless directed or approved by the Project Manager. If the Traveled Way is opened at the Contractor's request, the Contractor remains liable for costs associated with the opening until final Acceptance of the Project. The Project Manager will provide written instructions approving any sections which are to be opened. Such an opening shall not constitute a full or partial Acceptance of the Work or a waiver of any Contract provisions.

under the following conditions:

1. At the Project Manager's direction;
2. As shown on the Plans; or,
3. If requested by the Contractor and approved by the Project Manager.

~~Such an opening shall not constitute a full or partial Acceptance of the Work or a waiver of any Contract provisions. The Project Manager will provide written instructions stating any sections not shown on the Plans which are to be opened.~~

~~If the Project Manager directs the opening of a Roadway section because of an unforeseen need that is not the fault of the Contractor, the Department will negotiate a Change Order for additional compensation or additional time, if any, qualifying under Section 104.2, "Significant Changes in the Character of the Work."~~

~~If a Roadway section is opened at the request of the Contractor, the Contractor shall remain liable for the section until final Acceptance of the Project and must repair, at its own expense, any resultant damage to the section except differing site conditions which shall be paid as Extra Work under Section 104.2, "Significant Changes in the Character of the Work," and Section 109.5, "Payment For Changes, Differing Site Conditions, and Extra Work."~~

#### **104.6 RIGHTS IN AND USE OF MATERIALS FOUND ON THE WORK**

~~The Department may authorize the Contractor's~~ may use of Materials found in the excavation for completing Pay Items other than the Work in Standard Specification Section 203. Payment will be made for both the excavation of such Materials at the corresponding Contract Unit Price and for the Pay Item for which the excavated Material is used.

~~If the excavated Material would have been used to construct Embankments or Bridge approaches or for other purposes, any of which would have been required to complete the Contract, the Contractor shall replace the excavated Material with Acceptable Material at no additional cost to the Department. The Department will not charge the Contractor for the use of the excavated Material. The Contractor shall obtain written authorization from the Project Manager before excavating Material that is within the Right of Way but outside the grading limits, as shown by the slope and grade lines. Prior to granting approval, the Project Manager will verify that the requirements of Section 107, "Legal Relations, Environmental Requirements, and Responsibility to the Public" have been met. If not previously cleared environmentally, meeting these requirements will be the responsibility of the Contractor.~~

~~Unless otherwise provided, the Contractor may temporarily use the Material from existing Structures in the erection of a new Structure but shall not, without the approval of the Project Manager, cut or otherwise damage such Materials. The Department may authorize the Contractor's use of Materials found in the excavation for completing Pay Items other than the Work in Standard Specification Section 203, excavation and borrow in Section 203.3.4. Payment will be made for both the excavation of such Materials at the corresponding Contract Unit Price and for the Pay Item for which the excavated Material is used. The Contractor may use stone, gravel, sand or other Material meeting Contract requirements and found in an excavation~~

~~required by the Contract. The Department will pay for the excavation at the Bid Item Unit Price for Excavation and will pay for the pay item for which the Contractor uses the Material.~~

~~The Contractor shall replace the removed Material with Acceptable Material at no additional cost to the Department. The Department will not charge the Contractor royalty or additional cost of select Material for the removed Material. The Contractor shall not excavate or remove any Material from within the Roadway which is not within the grading limits, as indicated by the slope and grade lines, without written authorization from the Project Manager.~~

~~The Contractor may use stone, gravel, sand or other Material meeting Contract requirements and found in an excavation required by the Contract. The Department will pay for the excavation at the Bid Item Unit Price for Excavation and will pay for the pay item for which the Contractor uses the Material.~~

~~If the excavated Material would have been used to construct Embankments or Bridge approaches or for other purposes, any of which would have been required to complete the Contract, the Contractor shall replace the excavated Material with Acceptable Material at no additional cost to the Department. The Department will not charge the Contractor for the use of the excavated Material. The Contractor shall obtain written authorization from the Project Manager before excavating Material that is within the Right of Way but outside the grading limits, as shown by the slope and grade lines. Prior to granting approval, the Project Manager will verify that the requirements of Section 107, "Legal Relations, Environmental Requirements, and Responsibility to the Public" have been met. If not previously cleared environmentally, meeting these requirements will be the responsibility of the Contractor.~~

~~Unless otherwise provided, the Contractor may temporarily use the Material from existing Structures in the erection of a new Structure but shall not, without the approval of the Project Manager, cut or otherwise damage such Materials.~~

#### **104.7 FINAL CLEANUP**

~~Pits located on state or federal land are governed by the appropriate requirements of their agency. The requirements of this section do not apply to a commercial source.~~

~~Before final Acceptance all areas occupied by the Contractor or in connection with the Work shall be cleaned of all Deleterious Material, rubbish, excess Materials, temporary Structures and Equipment, and all parts of the Work shall be left in a condition Acceptable to the Project Manager or otherwise required by the Contract. To avoid the requirement of removal of Equipment from private property before final Acceptance, the Contractor shall make appropriate arrangements with private property owners and provide documentation of the arrangement to the Project Manager.~~

~~Before final Acceptance, the Contractor shall clean waste (including concrete and asphalt chunks, loose rock, excess Materials, and temporary Structures) from the Roadway and pit sites and ground used in connection with the Work. Leave all parts of the Work in an Acceptable condition. To avoid the requirement of removal of Equipment from private property before final Acceptance, make appropriate arrangements with private property owners.~~

~~The Contractor shall re-vegetate Borrow Pits, haul Roads, and all occupied ground in accordance with Section 632, "Revegetation" and the Contract. Acceptance by the Project Manager of a letter of intent from the landowner for future use may exempt haul Roads or other areas from this requirement.~~

~~The Contractor shall strip Borrow Pits and Surfacing Pits when indicated on the Plans and stockpile topsoil. After construction operations are complete, place stockpiled Materials uniformly over the stripped area to form a seedbed for planting. The Contractor shall spread stockpiled waste that is not covered by a land owner agreement over the stripped area prior to placing the topsoil. Stripping, stockpiling, and replacement of topsoil and spreading of stockpiled waste shall be incidental to completion of the Work unless a Bid Item for them exists in the Bid.~~

The Contractor shall not allow Borrow Pits and Surfacing Pits to change the general pattern of existing drainage. Unless Borrow Pits or Surfacing Pits are suitable to develop as ponds or lakes and the property owner has notified the Department in writing that such development is planned, the Contractor shall where practicable leave all pits well drained.

The Contractor shall, when excavation is complete, contour grade pits, except quarry pits, to blend with the natural topography of the surrounding area or in accordance with the Contract or agreements with the property owners. ~~Wait on Environmental Agreement Wessel.~~

~~Pits located on state or federal land are governed by the appropriate requirements of their agency. The above requirements do not apply to a commercial source.~~

#### **104.8 VALUE ENGINEERING COST PROPOSAL (VECP)**

~~When the Total Original Contract Amount exceeds \$400,000, The Department under no circumstances will reimburse the Contractor for the costs of developing the VECP that is rejected or is not Accepted by the Department. The Contractor shall submit its VECP on the Department provided form only. Exempted Areas exempted from Value Engineering Cost Proposals are mix designs and traffic control. Any decision about whether to approve or Accept a VECP shall be in the sole discretion of the Department. A VECP shall not be considered Accepted until the Department approves a Change Order implementing the VECP. VECPs are reviewed on a case by case basis and apply only to the ongoing Contracts referenced in the VECP proposal and become the property of the Department upon approval of the Change Order. VECPs shall contain no restrictions imposed by the Contractor on their use or disclosure. The Department has the right to use, duplicate and disclose in whole or in part any data necessary for the utilization of the VECP. The Department retains the right to utilize any accepted proposal or part thereof on other Projects without obligation or compensation to the Contractor.~~

~~The Contractor's share of the VECP is fifty percent (50%) of the net savings.~~

~~In no event shall the Contractor be entitled to an extension of Contract Time for the Department's consideration a VECP, the refusal to accept or approve such a proposal, or any other matter connected with a VECP.~~

~~The Department will rely exclusively upon the accuracy of the engineering data upon which the VECP is based and will not be required to perform additional investigations, crosschecks, or site examinations. The Department's acceptance or adoption of a VECP shall not be construed to alleviate or reduce the Contractor's full and absolute liability if the implementation of the proposal fails to satisfactorily perform.~~

~~the Contractor may submit a VECP which does not impair or degrade any of the following:~~

- ~~1. Service life;~~
- ~~2. Economy of operation;~~
- ~~3. Ease of maintenance;~~
- ~~4. Desired appearance;~~
- ~~5. Safety;~~
- ~~6. Environmental requirements; or,~~
- ~~7. Any other essential functions and characteristics of the Project.~~

~~The Contractor shall provide sufficient information, in writing, for a VECP to stand on its own merit and require minimal verification as determined by the Department.~~

##### **104.8.1 Content Requirements**

~~The Contractor shall provide, at a minimum, the following information, in writing, in a VECP:~~

- ~~1. A statement identifying the submittal as a VECP;~~

2. ~~A description of the Work to be performed under the Contract and under the VECP;~~
3. ~~An engineering analysis including drawings, computations, and other documents necessary for an evaluation by the Department;~~
4. ~~A list of the Contract requirements that must be changed if the Department adopts the proposal and a recommended way to make these changes;~~
5. ~~A detailed estimate of the Contractor's cost to perform the Work under the existing Contract and under the proposal, including the cost of developing and implementing the change;~~
6. ~~A list of the pay items affected by the proposal and the resulting difference in quantities;~~
7. ~~An assessment of the effects that the adoption of the proposal will have on other Department costs, including future maintenance and operation;~~
8. ~~A deadline, if any, for the Department to accept the proposal; and,~~
9. ~~A statement of the effect that adoption of the proposal will have on the Contract Time and the schedule.~~

#### **104.8.2 Procedural Requirements**

The following requirements and procedures apply to VECP:

1. ~~In order to expedite the processing of a VECP and to minimize costly studies by the Contractor and Department, the Contractor may submit to the Department, on a Department form, a summary of the VECP. The Department will evaluate the summary for merit and submit a recommendation to the Contractor. A favorable recommendation to the Contractor shall not be construed as acceptance of all or any part of the submittal;~~
2. ~~The Department will not accept a VECP if it is similar to a change in the Plans or Specifications the Department is considering for the Project at the time the proposal is submitted or if the proposal is based upon or similar to the Standard Specifications, Special Provisions, standard drawing serials, or procedures the Department adopted after the Advertisement for the Contract;~~
3. ~~The Department will execute a Change Order with the necessary Contract modifications if it accepts a VECP;~~
4. ~~If the Department approves a VECP, only the Contractor who initially submitted the proposal will be eligible for payment in accordance with Section 104.8, "Value Engineering Cost Proposals (VECP)." In this case, the approved VECP will apply only to those Contracts which were awarded to the Contractor before submission of the VECP and for which the proposal was submitted;~~
5. ~~The Department will deduct from the net savings the costs it incurs implementing the accepted VECP and the changes;~~
6. ~~The Department will be the sole judge of the estimated net savings resulting from an approved VECP. In determining the estimated net savings, the Department may disregard the Bid Item Unit Price if, in the Department's judgment, the prices are not a fair measurement of the Work performed or deleted. The Department will also determine the net savings by considering actual JMFs, shrink and swell factors and other actual design criteria used;~~
7. ~~The Contractor's share of an approved VECP is 50% of the net savings;~~
8. ~~The Contractor's share of 50% of the net savings shall be full compensation for effecting all changes pursuant to the Change Order resulting from an approved VECP;~~
9. ~~The Department will not pay for the actual costs of implementing an approved VECP if these costs exceed the Contract amount originally committed;~~
10. ~~When the District Engineer determines the actual net savings, the Department will execute a Change Order for a Lump sum of the Contractor's share. The Project Manager may approve a schedule for Progress Payments of the Lump sum; and,~~
11. ~~In preparing a VECP, the Contractor shall perform an independent examination of the affected Work site. The Department will rely exclusively upon the accuracy of the engineering data upon which the VECP is based and will not be required to perform additional~~



~~investigations, crosschecks, or site examinations. The Department will rely exclusively upon the accuracy of the engineering data upon which the VECP is based and will not be required to perform additional investigations, crosschecks, or site examinations. The Department's acceptance or adoption of a VECP shall not be construed to alleviate or reduce the Contractor's full and absolute liability if the implementation of the proposal fails to satisfactorily perform. Except as set forth in Section 100.10, "Project Closure," the Contractor's liability will not extend beyond the Department's final written acceptance.~~

## SECTION 105: CONTROL OF WORK

### 105.1 RESPONSIBILITY AND AUTHORITY OF THE DEPARTMENT

#### 105.1.1 The Department has the authority to:

1. ~~Administer~~ Manage the Contract;
2. Alter the ~~Contract~~ Plans;
3. ~~Modify the Contract by Change Order;~~
4. ~~3. Supervise~~ Enforce and terminate the Contract as expressly provided in other sections of the Standard Specifications; ~~and,~~
5. ~~Wholly or Partially Suspend the Work for cause; and~~
4. ~~Take actions as determined to be in the public's best interest, e.g., weather conditions, discovery of Cultural Resource, and utility conflicts.~~

~~The Project Manager may also wholly or Partially Suspend the Work for reasons beyond the control of the Contractor or not connected to the construction of the Project when the Project Manager deems such a suspension to be in the best interests of the public and the Department. Failure by the Contractor to suspend Work immediately may result in the Contractor being in default of Contract pursuant to Section 108.9, "Default of Contract." The Department will pay for Work caused by such a suspension pursuant to Section 104.2, "Significant Changes in the Character of Work," and will adjust any Contract Time for such a suspension pursuant to Section 108.6, "Determination and Extension of Contract Time."~~

5.       

~~If the Work is suspended by the Project Manager in writing for an unreasonable time (not originally anticipated, customary, or inherent to the construction industry), the Contractor may submit to the Project Manager a Notice of Intent to Claim in accordance with Section 105.19, "Notice of Intent to ~~Potential~~ Claim" which must be accompanied by a proposed revised schedule pursuant to Section 108.3 "Schedule".~~

#### 105.1.2 Contractor Convenience

~~\_\_\_\_\_ The Contractor shall be wholly responsible and liable for any costs or time associated with any requests made for the Contractor's convenience and approved by the Department.~~

#### 105.1.2 ~~Department Authority to Suspend Work~~

~~The Department has the authority to wholly or Partially Suspend the Work and to prepare and post a zero dollar (\$0.00) Progress Payment if the Contractor:~~

1. ~~\_\_\_\_\_ Fails to correct unsafe conditions;~~
2. ~~\_\_\_\_\_ Fails to comply with any term or condition of the Contract;~~
3. ~~\_\_\_\_\_ Fails to observe and comply with any Federal or State law or regulation;~~

4. \_\_\_\_\_ Fails to carry out directions of the Project Manager; or,
5. \_\_\_\_\_ Fails to perform satisfactory Work.

Failure by the Contractor to suspend Work immediately may result in the Contractor being in default of Contract pursuant to Section 108.9 "Default of Contract." The Contractor shall not receive additional compensation or time for these failures.

If, during the course of the Project the Contractor's personnel are not performing satisfactory Work, the Project Manager may order the Contractor to suspend operations until the Contractor corrects the problem, at no cost to the Department.

The Department's ability to withhold Progress Payments in part or in their entirety as part of a suspension as authorized by this Section, supplements the Department's ability, pursuant to Section 109.8, "Progress Payments," until the Contractor complies with the Contract.

#### **105.1.3 Contractor Request for Suspension**

The Contractor may request a suspension of the Work wholly or partially, but the Contractor shall not suspend the Work without written approval from the Project Manager.

### **105.2 PLANS, ~~AND~~ WORKING DRAWINGS**

The Plans may be supplemented by Working Drawings as are necessary for the Work. The Contractor shall have the sole responsibility for verifying pertinent dimensions in the field before submitting such Working Drawings to the Project Manager. Working Drawings shall be submitted by the Contractor and Accepted by the Project Manager before beginning Work covered by the drawings. The Project Manager will review the Working Drawings although the Project Manager's review does not relieve the Contractor of the responsibility for the satisfactory completion of the Work or compliance with the Contract. ~~The Contractor shall have the sole responsibility for verifying pertinent dimensions in the field before submitting such Working Drawings to the Department. The Contractor shall not alter or amend such drawings without the prior written approval of the Project Manager. Contractor shall perform the Work in accordance with the details shown on the Plans prepared by the Department and the approved Working Drawings prepared and submitted by the Contractor. The Contractor shall have the sole responsibility for verifying pertinent dimensions in the field before submitting such Working Drawings to the Department. The furnishing of all Working Drawings is Incidental.~~

The following is a summary of Working Drawings or Contractor submittals:  
Add TABLE FROM COLORADO DOT

The Contractor's Baseline Schedule of Work shall show the submittal of any Working Drawing as a milestone thirty (30) Days before the commencement of Work covered by the drawings. Unless otherwise indicated in the Contract, or approved by the Project Manager in writing, ~~t~~The Project Manager will have no longer than thirty (30) Days for Acceptance of the Working Drawings. If the Working Drawings are not Acceptable, the Working Drawings shall be resubmitted by the Contractor and the timeframe for Acceptance starts over. -All time required for review of Working Drawings and other Contractor submittals shall be Incidental and shall not be the basis for any claim for Contract Time extension or additional compensation.

#### **105.2.1 SUBMITTALS**

Anything that requires approval is considered a submittal by the Department. Any submittal required, other than the Critical Path Method or Bar Graph Schedules, shall be submitted to the Department thirty (30) Days before the Work related to the submittal is performed. The Project Manager will have no longer than thirty (30) Days for Acceptance of the submittal, unless otherwise specified in the Contract.

~~For Working Drawings within railroad ROW, the Contractor shall submit Working Drawings a minimum of ninety (90) Days before commencing Work within railroad ROW.~~

~~The Project Manager will review the Working Drawings although the Project Manager's review does not relieve the Contractor of the responsibility for the satisfactory completion of the Work. The Contractor shall obtain written approval of the Working Drawings from the Project Manager before beginning Work covered by the drawings and shall not alter or amend such drawings without the prior written approval of the Project Manager. The furnishing of all Working Drawings is incidental.~~

### 105.3 COMPLIANCE WITH PLANS AND SPECIFICATIONS

The Contractor shall perform the Work ~~and provide the Materials and provide Materials in substantial-substantial~~ compliance with the lines, grades, cross sections, dimensions, and material requirements as specified by the Contract. ~~The Department's failure to discover or reject Work or Materials not in substantial compliance with the Contract during the Work shall not be considered an Acceptance of the Work or Materials, or a waiver of defects. The Department's failure to properly perform inspections or tests shall not relieve the Contractor from its obligation to perform the Work and provide Materials in substantial compliance with the Contract and shall not be considered the Department's Acceptance of the Work or Materials.~~

~~If Work does not comply with the Contract, the Project Manager may determine if the nonconforming Work is nonetheless Acceptable. If Accepted, the Project Manager will document the basis of Acceptance by Change Order, and provide an adjustment in the Contract price for Work or Materials, as necessary. If the Work or Materials do not comply with the Contract and the Project Manager determines they are unacceptable, the Contractor shall remove, replace, and correct the Work or Materials at no additional cost to the Department.~~

~~The Contractor has an affirmative duty to perform all Work and provide Materials in compliance with the Contract. The Department's failure to discover or reject Materials or Work not in accordance with the Contract during the progress of Work shall not be considered an Acceptance of the Work or Materials, or a waiver of defects. The failure to properly perform inspections, tests or approvals by the Department shall not relieve the Contractor from its obligation to perform the Work and provide Materials in strict conformance with the Contract. If the Project Manager determines that Work or Materials are unacceptable, the Contractor shall remove, replace and correct the Work or Materials at no additional cost to the Department. The Project Manager's determination that the Work or Materials are unacceptable shall not form the basis of a claim for additional Contract Time or additional compensation.~~

~~If Work does not comply or substantially comply with the Contract, the Project Manager may determine the if the nonconforming Work is nonetheless Acceptable. If Accepted, the Project Manager will, by Change Order, document the basis of Acceptance by Change Order, and provide an adjustment in the Contract price for Work or Materials, as necessary.~~

### 105.4 COORDINATION OF CONTRACT DOCUMENTS

~~The following documents are essential parts of the Contract, and in their totality constitute the Contract, and are intended to be complementary. In case of a discrepancy, the Contract documents will govern in the following order of importance:~~

1. Addenda;
2. Required Documents for Bid Submittal;
3. Notices to Contractors;
4. ~~Advertisement~~ Invitation for Bids;
5. Special Provisions;
6. Plans; ~~other than Standard Drawings;~~
7. Supplemental Specifications;
8. Standard Specifications; and,
9. Standard Drawings.

Dimensions given on the Plans or that can be calculated govern over scaled dimensions.

If a Contract ~~or plan~~ discrepancy is discovered after the Award of the Project, the Contractor shall, upon discovery, promptly notify in writing the Project Manager. The Contractor shall take no advantage of any discrepancy or of errors or omissions in the Plans, contradictions within these documents or contradictions between the Contract documents and the worksite. Unless otherwise directed by the Project Manager, the Project Manager will resolve the discrepancy in writing before the Contractor proceeds further with performance of the affected Work.

~~The Project Manager and the Contractor may agree that the Contractor shall obtain drawings, modifications, or other documents necessary to correct the error or omission. The Department will pay for this Work pursuant to Section 104.2, "Significant Changes in the Character of the Work."~~

## **105.5 COOPERATION BY CONTRACTOR RESPONSIBILITIES**

The Contractor shall monitor the Work at all times, select and manage the means and methods for performing the Work. ~~;~~

~~facilitate the timely progress of the Work, and cooperate completely with Department personnel and other Contractors.~~

### **105.5.1 Duties of Superintendent**

~~Regardless of the amount subcontracted, the~~

~~The~~ Contractor shall have on the Project at all times during the course of the Work, a competent and qualified Superintendent who:

- ~~1. Reads and understands the Contract documents; as listed in Section 105.4, "Coordination of Contract Documents;" and~~
- ~~2. Possesses substantial experience in the type of Work being performed;~~
- ~~3. Possesses full authority to execute the orders of the Project Manager without delay and to promptly supply such Materials, Equipment, tools, labor, and Incidentals as may be required by the Work;~~
- ~~4. Can be contacted at an office maintained by the Contractor on the jobsite or at a convenient location nearby; and,~~
- ~~5. Attends the Pre-Construction Conference and other meetings associated with the Project as directed by the Project Manager.~~

~~The Department will provide a Project Manager with an adequate staff and crew to keep pace with the Contractor's progress and will maintain an office at a convenient location.~~

The Contractor and its Superintendent shall communicate with ~~shall recognize~~ the Project Manager as the Department's contact for all matters relating to the Project and promptly submit all documentation or notice required by the Contract to the Project Manager.

## **105.6 COOPERATION WITH UTILITIES**

The Department will notify all utility companies, all pipeline owners, or other parties who may be affected by the proposed construction and will endeavor to have all the necessary adjustments of utility fixtures, pipelines, and other appurtenances within or adjacent to the limits of construction made before the Award of the Contract or as soon as practicable thereafter. The Contractor shall comply with the Notice to Contractors regarding Cooperation with Utilities for relocations, adjustments, and installations of utilities. The Contractor's responsibility is to adequately coordinate, notify, or comply with the Contract and failure to do so shall not form the basis for an extension of Contract Time or additional compensation. will cooperate with all such relocations and adjustments performed by others during the course of the Contract.

The Contractor shall copy the Project Manager on all communications with affected utilities. For telephonic communications a summary of the communication shall be provided to the Project Manager monthly.

~~The Department will notify all utility companies, all pipeline owners, or other parties who may be affected by the proposed construction and will endeavor to have all the necessary adjustments of utility fixtures, pipelines, and other appurtenances within or adjacent to the limits of construction made before the Award of the Contract or as soon as practicable thereafter. The Contractor will cooperate with all such relocations and adjustments performed by others during the course of the Contract.~~

The Contractor shall be responsible for complying with the New Mexico Excavation Law, provisions of NMSA 1978, Section 62-14-1 through -10, et seq., which provides the procedures and requirements related to the performance of Project excavation Work during the performance of the Work. ~~These duties include providing telephonic advance notice of the commencement, extent and duration of the excavation work to the one-call notification system operating in the intended excavation area, notifying appropriate one-call notification center or underground facility owner or operator of planned excavation in order to allow the location and marking of the location of underground facilities, requesting owners or operators of underground facilities to reaffirm line locations every ten (10) Working Days after an initial request to locate, not moving or obliterating utility location markings, and immediately notifying the owner of any underground facilities which may have been damaged or dislocated during the excavation work.~~

~~Upon request, the Department will make available to the Contractor all information received from utility companies, pipeline owners and other parties that the Department has notified concerning the proposed construction. This Department furnished information does not abrogate the Contractor's responsibility for any further verifications and utility inquiries necessary to properly address permanent and temporary utility appurtenances in the performance of the Work.~~

~~The following items which are to be relocated or adjusted will be moved by others at no expense to the Contractor unless otherwise provided for in the Special Provisions or in the Plans:~~

- ~~1. Potable and non-potable waterlines;~~
- ~~2. Sanitary sewer or storm drain lines;~~
- ~~3. Electric or communication lines;~~
- ~~4. Gas or petroleum product lines;~~
- ~~5. Irrigation systems and appurtenances;~~
- ~~6. Pumping, generation, microwave, metering, and substation facilities;~~
- ~~7. Individual property service and metering connections;~~
- ~~8. Utility manholes;~~
- ~~9. Galleries, conduits, and cables;~~
- ~~10. Switching Equipment;~~
- ~~11. Valve boxes;~~
- ~~12. Highway, Street, or Road lighting; and,~~
- ~~13. Traffic Signals.~~

~~Failure by the utility owner to relocate, or adjust, or install the utility in accordance with the Contract may result in the Project Manager issuing and with written direction to from the Project Manager utility the Contractor directing that the Contractor shall relocate, adjust, or install the utility per Section 104.24 "Extra Work". items and the Contract does not impose the responsibility for the relocation or adjustment on the Contractor, the Department may require the Contractor to effect the relocation or adjustment. The relocation or adjustment will be covered by a Change Order, and the Contractor shall perform such Work~~

~~under Force Account basis in accordance with Section 104, "Scope of Work," and Section 109.5, "Payment for Changes, Differing Site Conditions, and Extra Work."~~

~~Subject to compliance with Section 105.19 "Notice of Potential Claim," Section 105.20 "Administrative Remedy," and Section 108.3.2, "Schedule Format," the Contractor may receive additional time under Section 108.6 "Determination and Extension of Contract Time," for delays caused by the failure of a utility owner or others to make a timely relocation or adjustment or for delays caused by utilities not identified by the Contract.~~

~~Subject to compliance with Section 105.19 "Notice of Potential Claim," Section 105.20 "Administrative Remedy," and Section 108.3.2 "Schedule Format," the Contractor may receive compensation under Section 109.11 "Compensation for Claims," for the cost of delays resulting from the failure of a utility owner or others to make a timely relocation or adjustment.~~

~~If public or private utility lines or pipelines or other appurtenances unknown to the Department and the Contractor are encountered during the Work, the Contractor shall immediately suspend construction operations at the site of the utility in question until the Department and the utility owner negotiate and complete the required relocation or adjustment; Work in other areas of the Project shall continue.~~

~~The Contractor shall terminate operations in the immediate area of a utility conflict not identified in the Contract and encountered during the Work. The Contractor shall immediately provide written notice to the Project Manager of the conflict. The Contractor shall continue Work in other areas. The Project Manager shall provide written notification to the Contractor when Work may commence in the area of terminated operations. The Contractor shall make requests for additional Contract Time or compensation per Section 104.3 "Differing Site Condition". Where utility conflicts not identified in the Contract are present, the Contractor shall provide the Project Manager, on a weekly basis, evidence of adequate coordination and cooperation with utilities. Neither additional Contract Time nor compensation will be provided where the Contractor fails to provide the Project Manager, on a weekly basis, evidence including a telephonic log of communications concerning the Contractor's continued cooperation and coordination activities with utilities.~~

~~The Contractor shall be responsible for resolving all problems resulting from the Contractor's failure to make inquiries or notify all known utility companies, pipeline owners or other parties of any Work or conflicts. In this instance the Contractor shall not be allowed adjustments for delays or extra expense.~~

## **105.7 COOPERATION BETWEEN CONTRACTORS**

~~The Department reserves the right at any time to Contract for and have performed other Work on or near the Project. When the Department anticipates multiple Contractors working within the same Project limits, the Bid documents will include sufficient information to allow Bidders to reasonably estimate the impact of the concurrent Work.~~

~~When separate Contracts are let within the limits of any one Project, each Contractor shall conduct the Work without interfering or hindering the progress or completion of the Work being performed by other Contractors. Contractors working on the same Project shall cooperate with each other as directed.~~

~~Each Contractor involved shall assume all liability, financial or otherwise, in connection with the Contract and shall protect and hold harmless the Department for all damages or claims as per Section 107.19 "Responsibility for Third Party Claims and Duty to Defend". save harmless the Department from any and all damages or claims that may arise because of inconvenience, delay, or loss because of the presence and operations of Contractors working within the limits of the same or adjacent Project.~~

~~If the Department employs multiple Contractors and conflicts occur which could not have been reasonably anticipated at the time of the Bid Openings, the Department will allow an adjustment in the Contract Time and price in accordance with Section 108.3 "Schedule" and Section 109.6 "Force Account".~~

The Contractor shall:

- ~~1. Plan, conduct and sequence the Contractor's Work without unnecessarily interfering with or hindering the progress of other Contractors' Work;~~
- ~~2. Cooperate with Contractors working on the same or adjacent Project as directed;~~
- ~~3. Integrate the sequence of the Contractor's Work with the activities of other Contractors;~~
- ~~4. Arrange the Work and place and dispose of the Materials being used so as not to unreasonably interfere with the operation of other Contractors; and,~~
- ~~5. Protect and hold harmless the Department for all damages or claims as per Section 107.19 "Responsibility for Third Party Claims and Duty to Defend."~~

If the Contractor and one (1) or more other Contractors are unable to agree upon the sequence of Work or other matters, the Contractor(s) shall request that~~petition~~ the Project Manager provide a~~in~~ written~~ing for a~~ decision on the issue. The Project Manager will allow a reasonable time for all parties to respond and, after reviewing the information received, will issue a decision binding on all parties within seven (7) Days of receiving such information.

## 105.8 AUTHORITY AND DUTIES OF THE PROJECT MANAGER

### 105.8.1 Project Manager Authority

The Project Manager is a designee of the Cabinet Secretary with authority commensurate with that of the Cabinet Secretary and has the following responsibilities:

1. Interpretation and administration of the Contract;
- ~~4.~~ Immediate charge of the details of the Project;
- ~~2. Administration and satisfactory completion of the Project; and,~~
- ~~3. Authority to reject unaccepted Work and Material; and,~~
4. Authority to wholly or Partially Suspend the Work for reasons beyond the control of the Contractor or not connected to the construction of the Project when the Project Manager deems such a suspension to be in the best interests of the public and the Department; and,;
5. Authority to concur with the Contractor's request to Partially Suspend or wholly suspend the Work.

At no cost to the Department, the Project Manager may also wholly or Partially Suspend the Work for cause, including but not limited to, the Contractor's failure to:

- a. Correct unsafe conditions;
- b. Comply with any term or condition of the Contract;
- c. Observe and comply with any Federal or State law or regulation;
- d. Carry out directions of the Project Manager;
- e. Manage its personnel and Subcontractor and its personnel; or,
- f. Perform satisfactory Work.

~~3.~~

### 105.8.2 Contractor Inquiries to Project Manager

The Contractor shall submit all correspondence to the Project Manager. The Contractor shall submit in writing a request for information for any Project issues, including but not limited to discrepancies in the Contract, to the Project Manager who will resolve the issues.~~all questions regarding:~~

- ~~1. The quality and Acceptance of Materials provided;~~
- ~~2. The quality and Acceptance of Work performed or planned;~~
- ~~3. Rate of progress of the Work;~~
- ~~4. Interpretation of the Contract;~~



5. ~~Acceptable performance of the Contract requirements;~~
6. ~~Administration of payments; and,~~
7. ~~Other Contract inquiries.~~

The ~~dedetermination~~decision of the Project Manager will be in writing and delivered to the Contractor's Superintendent as soon as reasonably practicable.

## 105.9 DUTIES OF THE INSPECTOR

### 105.9.1 Inspector Authority

The Department authorizes its Inspectors to:

1. Inspect the Work;
2. Inspect the preparation, fabrication or manufacture of Materials; and,
3. Notify the Contractor of non-conforming Work, r~~Reject non-conforming Work or Materials, and suspend portions of the Work for safety reasons only. ~~not in conformance with the Contract until any issues can be referred to the Project Manager for a decision.~~~~

The Contractor shall refer questions at issue to the Project Manager for a decision.

### 105.9.2 Inspector Authority Limitations

The Department does not authorize its Inspectors to:

1. Alter or waive any provision of the Contract;
2. Issue instructions contrary to the Contract; or
- 2-3. Provide direction, superintendence or guidance to the Contractor, Subcontractors or Suppliers;
3. ~~Act as the foreman for the Contractor; or,~~
4. ~~Suspend the Work, except for safety reasons.~~

Any action or inaction of the Inspector does not waive the Department's right to pursue any and all legal remedies for defective Work or Work performed by the Contractor in an unworkmanlike manner.

## 105.10 INSPECTION OF WORK

The Contractor shall provide the ~~Project Manager~~Department with 48 hour notice for inspection of the Work. Failure by the Contractor to provide the proper notice may result in the Department directing the Work performed without inspection to be removed at no cost to the Department.

The Contractor shall provide the Department or its representative access to the Work and provide all information, Equipment, and ~~and~~ assistance requested or required to make a complete and detailed inspection of the ~~Materials and~~ Work. All Materials and each part or detail of the Work shall be subject to inspection by the Department. ~~The Department shall be allowed access to all parts of the Work and shall be furnished with such information and assistance by the Contractor as is required by the Department to make a complete and detailed inspection.~~

The Project Manager may direct the Contractor to remove or uncover portions of the finished Work, at any time before final Acceptance of the Work ~~Project~~Work. The Contractor shall restore the portions of the Work to the standard required by the Contract after the Project Manager's examination. If the examined Work is Acceptable, the Department will pay for the removal and restoration as Extra Work under Section 104, "Scope of Work," and Section 109.5, "Payment For Changes, Differing Site Conditions, and Extra Work." However, if the examined

Work is unacceptable, the Contractor shall remove and restore the Work at no additional cost to the Department.

~~Action or inaction by. The absence or presence of~~ a Department Inspector shall not relieve the Contractor from any responsibility under the Contract for Acceptable Work in conformity with the Contract. The failure to properly perform inspections, tests or approvals by the Department shall not relieve the Contractor from its obligation to perform the Work in strict conformance with the Contract.

~~When a unit of government, political subdivision, or a railroad corporation is to pay a portion of the cost of the Work covered by the Contract, its representatives shall have the right to inspect the Work. The Department may allow a unit of government, political subdivision, or a railroad corporation to inspect the Work.~~ This inspection shall not make the unit of government or political subdivision or the railroad corporation a party to the Contract and shall not interfere with the rights of either party.

#### **105.11414 REMOVAL OF UNACCEPTABLE AND UNAUTHORIZED WORK**

Work that does not conform to the requirements of the Contract shall be unacceptable, unless it is determined by the Project Manager to be Acceptable under the provisions of Section 105.3, "Compliance With Plans and Specifications."

~~Should any defective Work or Material be discovered, before Final Acceptance, the Department will issue a non-conformance in accordance with Section 109.8.2 Non-Conformance.~~

~~Prior to Department Acceptance, the Contractor shall replace or repair Materials damaged in transit or during handling at no additional cost to the Department.~~

The Contractor shall remove unacceptable Work resulting from causes existing before the final Acceptance of the Work and replace in an Acceptable manner at no additional cost to the Department. The Project Manager will set the time limit for the replacement Work.

~~The Contractor shall not perform Work before the Department establishes lines and grades.~~ The Department shall not pay for the following under the provisions of the Contract:

1. Work performed contrary to the Project Manager's direction or as provided in the Contract;
2. Work performed beyond the lines and grades on the Plans; or,
3. Work performed without authority.

~~The Department may order the Contractor to remove or replace such Work, at no additional cost to the Department.~~

Upon failure of the Contractor to comply with the removal and replacement of unacceptable or unauthorized Work within the time specified by the Project Manager, the Project Manager shall have authority to cause unacceptable Work to be ~~remedied or~~ removed and replaced. The Project Manager will then deduct from the monies due or that become due to the Contractor the cost of removing or replacing the unacceptable or and unauthorized Work, to be removed by others with the costs to be deducted from monies due or to become due to the Contractor.

#### **105.12 LOAD RESTRICTIONS**

The Contractor shall observe legal load restrictions when hauling Equipment or Material on public Roads outside of the Project or on Roadways within the Project. The Project Manager may approve exceptions, in writing, provided the Contractor has obtained the proper oversize and overweight permits. The Contractor is liable for damage that may result from moving Equipment, even with the issuance of a special permit.

The Contractor shall not use Equipment or haul loads that will cause damage to Structures, Roadway, or any other construction, regardless of legal load allowances.

~~The Contractor may exceed legal loads on treated base under construction with approval from the Project Manager. The Department will not allow loads over PCC construction before the minimum curing period has expired or specified strength is obtained.~~

If the Project Manager determines that anticipated hauling operations may cause damage to existing Roadways or Structures, the Project Manager will issue a written notice to the Contractor. Within seventy two (72) hours of the notice, the Project Manager will elect one (1) or more of the following solutions:

1. Change the haul route; or  
Reduce the allowable load limit.
2. \_\_\_\_\_

~~If the Project Manager determines that hauling operations are causing undue damage to existing Roadways or Structures, the Project Manager will issue a written notice order to stop operations causing the damage. Within seventy two (72) hours of the notice, the Project Manager will issue written direction to the Contractor to repair the damage or The Project Manager will elect one(1) or more of the following solutions:- the Contractor to stop operations causing the damage in accordance with Section 105.17, "Contract Adjustments for Suspension of Work." Within seventy two (72) hours of the notice, the Project Manager will decide on one (1) or more of the following solutions:~~

1. Change the haul route;
2. Reduce the allowable load limit; and,
3. Allow the operations to continue with the requirement that the Contractor repair all damaged areas at ½ Unit Bid prices. In the absence of a Unit Bid price, the current published average unit bid prices shall be used.

#### **405.13 HAUL ROADS**

~~If the Contract establishes Material sources and haul Roads and the Contractor elects to use others, the Department will not pay the Contractor for corrective actions required to repair damage to existing Roadway and Structures resulting from the Contractor's sources and hauling operations.~~

~~If the Contract specifies that the Contractor use established Material sources and haul Roads the Department will determine what preservation or restoration of the existing Roadway or Structures is necessary, payment shall be made pursuant to Section 105.13.1, "Corrective Actions and Methods of Payment."~~

~~If the Contractor's own Material sources are used but transported on some Contract specified haul Roads, and the Department determines that preservation or restoration of the existing Roadway or Structures is necessary, the corrective action and method of payment will be as follows:~~

1. ~~The Contractor shall repair haul Roads not established by the Contract at no additional cost to the Department; and,~~
2. ~~The Department will pay for repairs to Contract established haul Roads in accordance with Section 105.13.1, "Corrective Actions and Methods of Payment."~~

~~The Project Manager will determine the extent of the corrective action.~~

#### **105.123.1 Corrective Actions and Methods of Payment**

#### **105.123.21.4 Change in Haul Route**

If the Project Manager changes the haul route, the Department will modify the Contractor's payment per the following equation:

$$P = R \times t \times (d_1 - d_0) \quad (1)$$

Where,

- $P$  is the payment modification (in dollars)
- $R$  is the rate (in dollars per ton mile determined in accordance with Section 109, "Measurement and Payment.")
- $t$  is the weight of Material hauled from the new stockpile area (in tons)
- $d_0$  is the original haul distance measured from the Roadway access point to the original stockpile area
- $d_1$  is the new haul distance measured from the Roadway access point to the new stockpile area

#### 105.13.1.2 Change in Allowable Load Limit

If the Project Manager reduces the allowable load limit, the Department will pay the Contractor in accordance with the following equation:

$$P = \frac{QF \times R \times d \times (LA - LR)}{LA} \quad (2)$$

Where,

- $P$  is the additional payment (in dollars)
- $R$  is the rate (in dollars per ton mile determined in accordance with Section 109, "Measurement and Payment.")
- $QF$  is the total quantity of Material hauled at the reduced load limit (in tons)
- $LA$  is the allowable load limit (in tons)
- $LR$  is the reduced load limit (in tons)
- $d$  is the haul distance (in miles)

If the Project Manager allows operations to continue or because of damage to an existing Roadways or Structures, the Department will pay the Contractor for the Material used to make the repairs at the 1/2 of the Bid Item Unit Price, or in accordance with Section 109, "Measurement and Payment." If an item is not part of the Contract, the Department will negotiate a new unit price. If a Structure or existing Roadway must be repaired, the Department may pay the Contractor for hauling repair Materials using a rate requested and justified by the Contractor and approved by the Project Manager.

#### 105.13 RESERVED

#### 105.14 RESERVED

#### 105.15 MAINTENANCE DURING CONSTRUCTION

The Contractor shall maintain the Work during construction and until the Department Accepts the Work, except as otherwise provided in Section 104.5, "Maintenance of Traffic," and Section 105.18 "Acceptance"; ~~"Acceptance."~~ This maintenance shall consist of continuous, daily Work with adequate Equipment and forces so that the Roadway and Structures are kept in satisfactory condition. The Contractor shall be responsible for maintaining the Project free and clear of Deleterious Materials including debris, weather related remnants, snow, loose

Materials and trash. The Department ~~will~~ shall be responsible for snow removal operations on travel lanes open and utilized by the public.

~~In the case of a Contract for placing a course on a previously constructed course or Subgrade, the Contractor shall maintain the previous course or Subgrade during all construction operations, including when~~ The Contractor shall maintain the previous course and Subgrade when the Plans require the Contractor to place traffic on the unfinished Roadway.

All maintenance Work during construction and before the Project is Accepted shall be Incidental. The Department shall not pay the Contractor an additional amount for this Work except in accordance with Section 104.5, "Maintenance of Traffic," and Section 105.18, "Acceptance."

#### **105.16 FAILURE TO MAINTAIN ROADWAY OR STRUCTURE**

If the Contractor fails to maintain the Project in accordance with Section 105.15, "Maintenance During Construction," the Project Manager shall notify the Contractor in writing of the failure. ~~If the Contractor does not begin maintenance after such notice, the Project Manager may begin maintenance of the Project. If the Contractor does not take corrective action in timeframe specified by the Project Manager~~ his period, the Project Manager may issue a Non-Conformance or issue written notice per 109.8.2 "Non-Conformance" or notice of the Contractor's apparent default per ~~make corrections or terminate the Contract in accordance with Section 108.9, "Default of Contract."~~ For corrective actions implemented by the Project Manager the Contractor shall reimburse the Department for Department incurred costs of such maintenance plus an additional ten percent (10%) for administrative costs.

If the Contractor does not begin maintenance after such notice from the Project Manager, the Project Manager may begin maintenance of the Project. For corrective actions implemented by the Project Manager the Contractor shall reimburse the Department for Department incurred costs of such maintenance plus an additional ten percent (10%) for administrative costs.

#### **105.17 ~~RESERVED~~ CONTRACT ADJUSTMENT FOR SUSPENSION OF WORK**

~~If the Work is suspended by the Project Manager in writing pursuant to Section 105.1.2, "Department Authority to Suspend Work" for an unreasonable time (not originally anticipated, customary, or inherent to the construction industry), the Contractor may submit to the Project Manager a Notice of Intent to Claim in accordance with Section 105.10, "Notice of Potential Claim" which must be accompanied by a proposed revised schedule pursuant to Section 108.3.2 "Schedule Format."~~

~~Upon receipt, the Project Manager will evaluate the Contractor's request. If the Project Manager agrees that the cost and 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, its Suppliers, or Subcontractors at any approved tier, and not caused by weather conditions, the Project Manager will make an adjustment in accordance with Section 109.11 "Compensation for Claims" and modify the Contract in writing accordingly. The Project Manager will notify the Contractor of the decision.~~

~~The Department will not make a Contract adjustment under this clause if the Contract performance would have been suspended or delayed by any other cause. The Department will not make a Contract adjustment under this clause if a Contract adjustment is provided or excluded under any other term or condition of this Contract.~~

#### **105.18 ACCEPTANCE**

##### **105.18.1 Partial Acceptance**

The Contractor may request in writing that the Project Manager inspect a portion of the Project (e.g., a Structure, a section of Road, etc.) at any time during the Work. If the Project

Manager finds that portion to be in accordance with the Contract, the Project Manager may Accept that portion as complete, and, without waiving the provisions in Section 105.3, "Compliance with Plans and Specifications," Section 107.26 "No Waiver of Legal Rights" and ~~and~~ Section 109.10, "Project Closure" the Contractor may be relieved of further responsibility for that portion unless the Department discovers latent defects before final Acceptance of the Work. Such partial Acceptance does not void or alter the Contract.

The Department will Accept permanent traffic safety and control devices installed in accordance with the Contract (with all ancillary components) and being used by the public upon installation but before ~~c~~Completion of the remaining Work.

Permanently installed items Accepted on this basis are limited to the following:

1. Guardrail;
2. Impact attenuators;
3. Traffic Signals;
4. Signs;
5. Lighting;
6. Raised pavement markers;
7. CWB;
8. Concrete Bridge parapet;
9. Bridge railing;
10. ~~Post and cable barrier~~ Guard-cable;
11. Guardrail anchorages;
12. Permanent pavement markings; and
13. Fence.

All required performance tests and guarantees shall remain applicable.

~~The Department or the Contractor shall will~~ repair or replace any damage, theft, or vandalism to these items after Acceptance in accordance with Section 104.24, "Extra Work." ~~if the damage to an item requires only partial repair or replacement and the Contractor performs the Work, the Department will pay the Contractor in accordance with Section 109.4, "Compensation for Overrun / Underrun Quantities."~~ The Contractor shall repair or replace items damaged due to the Contractor's negligence or as a result of the Contractor's failure to protect the Work per Section 107.20 "Contractor's Responsibility", at no additional cost to the Department.

The Contractor shall erect these items in a logical construction sequence. The Department shall not Accept prematurely constructed items until they may be used for their intended purposes.

#### 105.18.2 Final Contract Acceptance

~~The Department will make the final Contract Acceptance as determined in accordance with 109.10.8 "Physical Completion, Release of Retainage, Final Payment and Final Acceptance".~~

~~when the following occurs:~~

- ~~The Work has been in all things completed to the satisfaction of the Department;~~
- ~~and~~
- ~~All parties have executed the Certificate of Final Acceptance OR that the Contractor has executed the final estimate.~~

~~Final Acceptance will not be granted when the final estimate is a negative final estimate or when there is a unresolved Project Claim.~~

## 105.19 NOTICE OF ~~INTENT TO~~POTENTIAL CLAIM

~~Notice of intent to cClaim shall be given in order that the Department can assess the situation, make an initial determination as to the causes of the intent to cClaim, institute appropriate changes or procedures to resolve the matter, to document issues related to the intent to Claim, to track costs and possible Delay, and facilitate resolution of the intent to Claim. The failure of the Contractor to provide a timely and complete Notice of Intent to Claim form, written notice of intent to make a Claim and a contemporaneous statement of estimated damages or Delay, and to comply with the other requirements of this section shall constitute a waiver or abandonment of the Claim.~~

~~The Contractor waives the right to assert a Claim if the Contractor fails to provide a timely and complete Notice of Intent Claim form. The Contractor's submission of the Notice of Intent to Claim form and the Project Manager's actions related to the Notice of Intent to Claim shall not be construed to prove or validate the Claim or be construed as an admission of liability.~~

- ~~1. Unless otherwise specified by the Contract, t~~The Contractor shall only make Claims in accordance with ~~the Contract pursuant to~~ the exclusive administrative remedy and procedures set forth in this Section and Section 105.20, "Administrative Remedy."
- ~~2. The Contractor shall not submit a Notice of Intent Claim and shall not be entitled to pursue a Claim if the Project Manager determines the Work ordered is Extra Work, in which case payment shall be made in accordance with Section 109.5, "Payment For Changes, Differing Site Conditions, and Extra Work."~~
2. The Contractor shall submit promptly notify to the Project Manager it notice of intent to claim on the Department's current~~the Notice of Intent Claim form, incorporated herein by reference.~~ The Notice of Intent to Claim form and documents or information submitted with the same shall constitute the Contractors — in writing of the intent to make a Claim. The notice of intent to claim ~~and~~ shall provide a contemporaneous statement of estimated damages or delay before beginning the Work on which the Claim is based, but, in no event shall notice be given later than seven (7) Days of the Contractor discovering the condition or issue giving rise to the Claim, or within seven (7) Days of receipt of a notice of a differing site condition from the Project Manager, ~~or in the case of termination of Contract under Section 108.10, "Termination of Contract; No Fault of Contractor" within 30 Days of the effective termination date.~~ A notice of intent to Claim shall include, when relevant to the intended Claim (e.g., when the Contractor intends to seek a Contract adjustment for time, Delay damages, or reduction in Liquidated Damages, etc.), a revised schedule that identifies the impacts pursuant to Section 108.3.2, "Schedule Format"; failure to include a revised schedule shall render the notice of intent to Claim incomplete. This Section and the deadlines stated herein do not modify any of the deadlines for submitting revised schedules as provided in Section 108.3, "Schedule".
3. If the Contractor submits a timely Notice of Intent to Claim Form to notice of potential Claim in accordance with Section 105.19, "Notice of Potential Claim," the Project Manager may, without admitting liability for the Claim, direct the Contractor to keep a complete and accurate account, in detail, of the cost of doing the Work on a Force Account basis per Section 109.6 "Force Account". Failure to maintain records on a Force Account basis when so directed by the Project Manager shall waive any associated Claim by the Contractor.
- ~~4. Such notice of intent to Claim shall be given in order that the Department can assess the situation, make an initial determination as to the causes of the potential Claim, institute appropriate changes or procedures to resolve the matter, to document issues related to the potential Claim, to track costs and possible Delay, and facilitate resolution of the potential Claim. The failure of the Contractor to provide timely written notice of intent to make a Claim and a contemporaneous statement of estimated damages or Delay shall constitute a waiver or abandonment of the Claim. The Contractor waives the right to assert a Claim if the Contractor fails to provide proper and complete notice of intent to Claim.~~
5. The Contractor shall provide the Project Manager proper facilities to keep account of the actual cost associated with the n~~Notice of i~~ntent to ~~of a c~~Claim; the Contractor waives the right to assert a Claim if the Project Manager is not afforded proper

facilities to keep account of actual cost. The Project Manager may, in the Project Manager's discretion, in writing, waive this requirement regarding the furnishing of proper facilities to keep account of actual cost upon a showing of adequate justification by the Contractor.

4. ~~This Section and the deadlines stated herein do not modify any of the deadlines for submitting revised schedules as provided in Section 108.3, "Schedule."~~
5. ~~If the Project Manager finds that the nNotice of iintent to cClaim is justified the Project Manager will process a Supplemental Agreement to resolve the nNotice of iintent to cClaim.~~
6. ~~If the nNotice of iintent to cClaim is unresolved then the Contractor shall comply with Section 105.20, "Administrative Remedy".~~
7. ~~Neither proper Notice by the Contractor nor the Project Manager's accounts of the cost shall be construed to prove or validate the Claim or be construed as an admission of liability.~~

#### 105.20 ADMINISTRATIVE REMEDY

~~This Section governs the administrative remedy procedure to resolve all Claims, unless otherwise specified in the Contract. The administrative remedy procedure is the sole Contractual procedure to resolve claims. No claim shall be accorded any level of review unless the procedure below is and must be followed sequentially. The to resolve Claims. The administrative remedy consists of the following: Once the Contractor has provided timely and proper notice of intent to make a Claim pursuant to Section 105.10, "Notice of Potential Claim" the entire and complete administrative remedy and procedure to resolve all contractual disputes is provided by this Section.~~

~~No Claim shall be accorded any level of review unless the Claim proceeds sequentially. The sequential steps of the process are as follows:~~

~~The complete administrative remedy is sequential in nature, exclusive, and consists of the following steps:~~

- Step I. Notice of Intent to Claim;
- Step II. Submittal of the Claim to the Project Manager;
- Step III. ~~District Engineer-istrict Level~~ review and decision;
- Step IV. Service of Request for Reconsideration of Claim to ~~Cabinet~~ Secretary;
- Step V. ~~Cabinet~~ Secretary's review, which may include referral to Claims Board for an informal hearing, and ~~Cabinet~~ Secretary's decision;
- Step VI. Service of Request for Arbitration or Service of Summons and Complaint in State District Court.

~~No contractual dispute or Claim shall be accorded any level of review unless the dispute No Claim shall be accorded any level of review unless the Claim has been properly submitted, reviewed and decided at the preceding step level. The Contractor shall not proceed to the subsequent step without a written determination from the preceding step. and the Contractor rejects the decision by providing the requisite notices and submittals in writing to the proper Department officials or employees within the time periods proscribed in this Section and Section 105.10, "Notice of Potential Claim."~~

The complete terms of a resolved Claim, regardless of the level of the administrative remedy, shall be documented and memorialized via a Change Order executed by the Contractor and the Department. The executed Change Order shall represent a final agreement to the total ~~additional compensation amount~~ and time due for any and all Work and items pertaining to the Work associated with the Change Order. Unless otherwise provided ~~in the terms of the Change Order, d, in writing, in the executed Change Order,~~ the executed Change Order shall operate as an accord and satisfaction of the Claim and shall operate as a bar to any further Claim by the Contractor. Each party shall bear its own attorneys' fees, costs, and expert fees.



Step I. Notice of Intent to Claim, See 105.19 “

The Department shall dismiss a Contractor's Claim for failure to comply with the time limitations, requirements and procedures set forth in this Section and Section 105.19, “Notice of Intent to ~~Potential~~ Claim.”

~~Each party shall bear its own attorneys' fees, costs, and expert fees.~~

~~Step I. Notice of Intent to Claim, See 105.19 “~~

**105.20.1 Submittal of the Claim to the Project Manager ~~District Level~~**

~~The complete terms of a resolved Claim, regardless of the level of the administrative remedy, shall be documented and memorialized via a Change Order executed by the Contractor and the Department.~~

Step II. Submittal of the Claim to the Project Manager

The Contractor shall submit its Claim on the Department's Claim Form. The Project Manager retains the right to request additional information and documents from the Contractor to support the Claim. The Contractor shall provide the requested ~~such~~ additional information and documents.

~~The Contractor shall submit the Claim in writing to the Project Manager and include justification for the Claim and the total amount requested within 30 Days of the date that the Work associated with the Claim has been completed but, in no event later than within 30 Days of receipt of the Departments proposed final payment statement (estimate) pursuant Section 109.10 “Project Closure”. The Contractor may submit a Claim only once. Once a Claim is submitted to the Project Manager, nothing in this section shall be construed as permitting the Contractor to revive, modify, supplement, enlarge, or amend the Claim other than providing additional documents and information in support of the Claim. The Contractor shall be prohibited from amending either the bases of entitlement or the amount of any compensation or time stated for any and all issues claimed in the Contractor's written Claim submitted hereunder, and all further proceedings shall be limited solely to the bases of entitlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written Claim submitted hereunder. This shall not, however, preclude a Contractor from withdrawing or reducing any of the bases of entitlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written Claim submitted hereunder at any time.~~

1. A Claim shall be rejected and it shall constitute a waiver or abandonment of the Claim and a failure to exhaust its administrative remedy for the Contractor's failure to comply with the following conditions:

- a. The Claim shall be in writing;
- b. The Claim shall be submitted on the Department's Claim Form;
- c. The Claim shall be submitted within 30 Days of the date that the Work associated with the Claim has been completed;
- d. The Claim shall be submitted only once~~has previously been submitted and denied or resolved;~~
- e. The Claim shall include all required supporting documentation and information. ~~If the Claim does not, it shall constitute a waiver or abandonment of the Claim and a failure to exhaust its administrative remedy; and~~  
—A Contractor's, Subcontractor's or Supplier pass-through Claim shall be rejected if it is not certified by the Contractor as the Contractor's Claim on the Department's current approved forms.-

~~4.2.~~ The Contractor has the burden of fully justifying and documenting the Claim and shall provide to the Project Manager the following supporting documentation and information in support of the Claim. The following supporting documentation shall also be that are updated from -or additional to- those documents these submitted with the Notice of Intent to Claim:

- a. Description of the issue upon which the Claim is based;
- b. Location where the issue arose;
- c. The dates impacted including the tTime and date the issue arose;the issue was identified and the dates impacted;
- d. Clear explanation of why the issue requires additional compensation or time or a change to the Contract, including references to the relevant portions of the Contract;
- e. Copies of all written communications including correspondence and emails related to the issue;
- f. A detailed compilation of the amount of additional compensation sought and a breakdown of the amount sought as follows: documented additional job site labor expenses; documented additional cost of Materials and supplies; a list of additional Equipment costs claimed, including each piece of Equipment and the Blue Book rental rate claimed for each; any other additional direct costs or damages and the documents in support thereof; ~~any additional indirect costs or damages and all documentation in support thereof;~~
- g. Where a Claim seeks additional time, time and compensation for Delay, adjustment of Contract Time, or the reduction or elimination of liquidated damages, previously submitted Baseline Schedule and revised schedules that comply with the requirements of Section 108.3, "Schedule";
- h. Invoices identifying the labor, Materials, and Equipment used or proposed to be used;
- i. ~~Project Cost Reports~~Financial Statements. If the amount claimed by the Contractor exceeds \$100,000.00, ~~or if requested by the Project Manager, Project cost reports job cost reports and financial statements~~ for the time periods relevant to the Contract and the performance of the Work. ~~The Contractor shall make the Contractor's documents available for inspection by the Project Manager at the Contractor's project office. The Project Manager may waive this requirement;~~
- j. Bid Documents. If the amount claimed by the Contractor exceeds \$100,000.00, ~~or if required by the Contract if requested by the Project Manager,~~ the Contractor shall make the Contractor's documents available for inspection by the Project Manager at the Contractor's project office. This includes; information and calculations used to prepare and determine its Bbid for the Contract prior to submission of the Bid. - The required bid preparation documents, as maintained by the Contractor, to be produced shall include: clear itemization of the costs for each pay item broken down into components sufficient to allow a detailed cost estimate; the costs allocated to each component broken down into the Contractor's usual estimate categories such as direct labor, Equipment, Materials, and Subcontractor cost; indirect costs, including the indirect cost allocations made to each bid item; quantity takeoffs; the construction and progress schedule and any conceptual schedules upon which the Bid was based; rates of production and progress; marked up plans, sheets and Working Drawings ; calculations, copies and quotes from Subcontractors and Suppliers; memoranda, narratives, and all other information used by the Contractor to arrive at all of the prices contained in the Bid. The Project Manager may waive this requirement;
- k. Total amount of the Claim in terms of time and compensation; and
- k. ~~;~~ ~~and,~~
- l. Certification of Claim. The Contractor shall submit a Certification of Claim form with the Claim.

~~1. The failure of the Contractor to provide the Project Manager all required supporting documentation and information shall constitute a waiver or abandonment of the Claim and a failure to exhaust its administrative remedy. The Project Manager retains the right to request additional information and documents from the Contractor to support the Claim. The Contractor shall provide such additional information and documents.~~

~~Subcontractor Claims shall not be considered, except when timely submitted and certified by the Contractor as the Contractor's Claim.~~

### **105.20.2 District Engineer**

#### ~~2. Step III District Level Review and Decision:~~

The District Engineer or designee has 30 Days from the date the Claim is received by the Project Manager, or additional time if agreed upon by both parties in writing, to review and render a decision. If the District Engineer or designee does not make a written decision within the 30 Days, or the agreed upon additional time, the Claim is deemed denied by the District Engineer. The parties may engage in informal mediation to resolve the Claim at the District level prior to the expiration of the time in which the District Engineer or its designee may render a decision.

~~3. Once a Claim is submitted to the Project Manager, nothing in this section shall be construed as permitting the Contractor to revive, modify, supplement, enlarge, or amend the Claim or the basis of entitlement other than providing additional documents and information in support of the Claim. All further proceedings shall be limited solely to the bases of entitlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written Claim submitted.~~

### **105.20.32 Secretary Level**

#### Step IV: Service of Request for Reconsideration of Claim to the Cabinet Secretary

The Contractor shall within ten (10) Days of the District Engineer's decision, serve a written request to reconsider the Claim. When the Contractor fails to request reconsideration to the Cabinet Secretary within the ten (10) Day timeframe then the District Engineer's decision is deemed accepted by the Contractor. This acceptance shall constitute a complete and final resolution of the Claim and the Department will, within 30 Days of the District Engineer's decision, execute a unilateral Change Order implementing the District Engineer's decision.

~~If the Contractor does not timely serve a written request to reconsider the Claim When the Contractor is willing to arbitrate the Claim it shall submit this intent with the request for reconsideration. The Cabinet Secretary will issue a decision or agree to the request for arbitration. If the Cabinet Secretary does not agree to the request for arbitration or the request to arbitrate is not made by the Contractor, The Department may, within 30 Days of the District Engineer's decision, execute a unilateral Change Order implementing the District Engineer's decision. he Cabinet Secretary will provide a written decision on the request or will refer the Claim to the Department's Claims Board within 21 Days of service of the request for reconsideration; this deadline may be extended in writing by the Cabinet Secretary.~~

A request for reconsideration of the Claim shall be rejected and it shall constitute a waiver or abandonment of the Claim and a failure to exhaust its administrative remedy for the Contractor's failure to comply with the following conditions:

- ~~— The Claim shall be rejected for the Contractor's failure to comply with the following conditions:~~
- ~~— The Claim shall be submitted wWithin ten (10) Days of the District Engineer's or designee's denial of its Claim or a written notice that the attempted mediation of its Claim was unsuccessful~~

~~the Contractor may serve a written request upon the Cabinet Secretary to reconsider the Claim. Service shall not be considered effective unless the request includes all supporting documentation provided at the District Level and, when applicable, a copy of the District Engineer's written denial of the Claim. The Cabinet Secretary will provide a written decision on the request or will refer the Claim to the Department's Claims Board within 21 Days of service of the request for reconsideration; this deadline may be extended in writing by the Cabinet Secretary. Failure to timely serve a written request to reconsider the Claim constitutes acceptance of the District Engineer's decision and a waiver and relinquishment of the Claim. If the Contractor does not timely serve a written request to reconsider the Claim, the Department may, within 30 Days of the District Engineer's decision, execute a unilateral Change Order implementing the District Engineer's decision.~~

~~1. b. Service of Process at the Secretary Level. Failure to timely serve a written request to reconsider the Claim constitutes acceptance of the District Engineer's decision and a waiver and relinquishment of the Claim. Service shall not be considered effective unless the request includes all supporting documentation provided at the District Level and, when applicable, a copy of the District Engineer's written denial of the Claim.~~

Service of all notices and required documentation and information at the Secretary Level shall be made upon the Cabinet Secretary with a copy contemporaneously transmitted to both the District Engineer and the Department's Office of General Counsel. Service upon the Cabinet Secretary shall be made during the Department's regular Business Hours by delivery in person, or by certified mail, postage prepaid, return receipt requested, or by delivery by a nationally recognized overnight or same-day courier service that obtains receipts.— The copy contemporaneously transmitted to the Office of General Counsel may be served by the means for serving the Cabinet Secretary or, with prior written agreement of the Office of General Counsel, by facsimile copy or by email transmission. Service of notice or documents made after the Department's regular Business Hours shall not be effective until the next business Day. Service upon the District Engineer may be made by the means for serving the Cabinet Secretary or by facsimile copy or by email transmission and need not include the documentation previously submitted at the District level.

- ~~1.~~
- ~~2. Certification of Claim. The Contractor shall submit a Certification of Claim with the request for reconsideration on the Department's approved form, available on the Department's webpage.~~

Additional Information. The Secretary retains the right to request additional information from the Contractor to support the Claim, regardless of the Project Manager's previous waiver-of.

~~The written request to reconsider the Claim shall include a notarized statement from an authorized representative or agent of the Contractor certifying: "under penalty of perjury, I have actual knowledge of the truth and accuracy of the Claim and the supporting information and records; the Claim and submittals are true and correct; the Claim made for Work on this Contract is true and is made in good faith to the best of my personal knowledge; and, the Claim and the remedies sought are supported by the terms of the Contract." Where a Claim is a Subcontractor pass-through Claim, the certification shall further include: "the Contractor certifies that the Claim being passed through to the Department is passed through in good faith, has been independently verified by the Contractor, and is accurate and complete to the best of my knowledge and belief."~~

Step V: Cabinet Secretary's Review, Which May Include Referral to Claims Board for an Informal Hearing and Cabinet Secretary Decision

1. The Cabinet Secretary will provide a written decision on the Claim or will refer the Claim to the Department's Claims Board within 21 Days of service of the request for reconsideration. This deadline may be extended in writing by the Cabinet Secretary.
- ~~2.~~
3. 2. Claims Board. If the Claim is referred to a Claims Board, an informal dispute resolution board, by the Cabinet Secretary, the Secretary shall appoint up to three (3) independent panelists with relevant experience in highway and transportation design, construction management, engineering, surveying, construction contract administration, construction oversight work, or law. The Claims Board shall not include any current employees of the Department or the Contractor, but may include individuals contracted to provide services to~~contract employees of the Department.~~ The Claims Board shall apply the Contract to the Claim and shall conduct an informal hearing in order to facilitate the expeditious and informal resolution of the Claim. Attorneys representing the parties are permitted to attend the informal hearing; however, attorneys shall not participate in the informal hearing unless the Claims Board specifically addresses an issue to them or unless agreed to by both parties. Notification shall be provided by both parties a minimum of five (5) Days prior to the hearing if legal representation will be attending the hearing. The Claims Board shall issue a final, written recommendation to the Cabinet Secretary to resolve the Claim.
4. 3. Secretary Decision. If the Claim is referred to the Department's Claims Board, the Cabinet Secretary will provide a written decision within 21 Days of the Secretary's receipt of a final, written recommendation on the Claim from the Claims Board; If the Cabinet Secretary does not provide a written decision within 21 Days, unless extended by the Secretary in writing prior to expiration of time to issue a decision, the Claims Board's recommendations shall be deemed to have been adopted by the Cabinet Secretary and shall operate as the Secretary's decision.
5. 4. Payment. The Contractor is only entitled to payment of its Claim pursuant to the Cabinet Secretary's decision if the Contractor fully accepts the decision and executes an accompanying Change Order. If the Contractor fails to execute a Change Order within 21 Days of the Cabinet Secretary's decision, the Department may process a unilateral Change Order implementing the Cabinet Secretary's decision. The Contractor's proceeding with litigation in State District Court or arbitration shall operate as a waiver by the Contractor to recover or receive payment pursuant to the Cabinet Secretary's decision.
- ~~6. Additional Information. The Secretary retains the right to request additional information from the Contractor to support the Claim including information as is provided by Section 105.20.1, "District Level" (i) and (j), regardless of the Project Manager's previous waiver of those subsections.~~

### 105.20.3 Arbitration

#### Step VI: Service of Request for Arbitration or Service of Summons and Complaint in State District Court

1. The Contractor and Department may agree to arbitrate the Claim instead of proceeding to litigation in State District Court. Arbitration may only be had at the mutual agreement of the Contractor and the Department. Arbitration shall be conducted in accordance with the New Mexico Uniform Arbitration Act (NMSA 1978, § 44-7A-1, et seq.) and this Section.
2. ~~The Contractor may, within ten (10) Days of the issuance of the Cabinet Secretary's decision pursuant to Section 105.20.2, "Secretary Level," serve upon the Department a written request that the Claim be submitted to arbitration. Service of the request to arbitrate the Claim by the Contractor shall only be made in the request for reconsideration. The Cabinet Secretary will issue a decision denying or agreeing to the request for arbitration in writing within ten (10) Days of the receipt of the request to arbitrate. If the Cabinet Secretary does not respond to the request to arbitrate then the request is deemed denied. Service of the request to arbitrate the Claim by the Contractor shall be made pursuant to Section 105.20.2, "Secretary Level." If either the Contractor or the Department fails to provide written notice agreeing to arbitrate the Claim within ten (10) Days of the request, the request shall be deemed denied.~~

~~2.3.~~ By the parties agreeing to electing arbitration, the Contractor waives the right to redress through litigation filed in State District Court. ~~The Contractor's proceeding with arbitration shall operate as a waiver by the Contractor of recovery under any written decision issued by the Cabinet Secretary. Denial of a request, or failure to agree, to arbitrate a Claim by any party does not modify any of the deadlines contained in this Section.~~

~~3.4.~~ If the Contractor and Department agree to arbitrate the Claim the arbitration panel shall consist of three (3) members.

~~4.5.~~ Within 15 Days of the agreement to arbitrate the Claim, the Contractor shall submit the name of a panelist. The Contractor's panelist shall:

- a. Not be an employee of the Contractor;
- b. Have 15 years' experience in Highway construction management, methods, techniques, or law; or have an active professional license with the state of New Mexico as an Engineer, Surveyor or Attorney with ten (10) years' experience in Highway construction management, methods, techniques, or law;
- c. Be either a resident of the state of New Mexico or identify New Mexico as the panelist's principal place of business; and,
- d. Agree to serve on the panel;

~~5.6.~~ Within 15 Days of receiving notice of the Contractor's panelist, the Cabinet Secretary shall submit the name of a panelist. The Cabinet Secretary's panelist shall:

- a. Not be an employee of the Department, but may include individuals contracted to provide services to the Department; be a contract employee of the Department;
- b. Have 15 years' experience in Highway construction management, methods, techniques, or law; or have an active professional license with the state of New Mexico as an Engineer, Surveyor or Attorney with ten (10) years' experience in Highway construction management, methods, techniques, or law;
- c. Be either a resident of the state of New Mexico or identify New Mexico as the panelist's principal place of business; and,
- d. Agree to serve on the panel;

~~6.7.~~ Within 30 Days after the Cabinet Secretary panel appointment, the two (2) panelists will choose a third panelist. The third panelist shall:

- a. Be a professional arbitrator who is a member or diplomat of a nationally recognized professional arbitration organization, such as the National Academy of Arbitrators or the American Arbitration Association; or is a retired federal or New Mexico district or appellate judge; or be a former employee of FHWA;
- b. Not be an employee or a contractor of either the Department or the Contractor; and
- c. Agree to serve on the panel;

~~7.8.~~ If the two (2) panelists are unable to agree, a district judge from the First Judicial District shall choose the third panelist from a list of four (4) prospective panelists who meet the requirements of the preceding paragraph, two (2) each provided by the Department and the Contractor. Application to the court for this appointment shall be made by either or both parties within 15 Days of the impasse; the parties may agree in writing to extend this deadline.

~~8.9.~~ The panel shall hold the arbitration hearing in Santa Fe County, unless otherwise approved by the Department, no later than 90 Days after the panel is selected. If the panel fails to meet this deadline or if the parties agree to extend the deadline, the panel retains jurisdiction to hear and resolve the issues in dispute.

~~9.10.~~ Each party will pay the expenses and fees of its chosen panelist and attorney. Both parties will share equally the expenses and fees of the third panelist. If both parties agree, they will share court reporter costs. If not, the party requesting the transcription will pay the full cost.

~~40-11.~~ The proceedings and the decision of the panel will be in accordance with the New Mexico Uniform Arbitration Act, NMSA 1978, § 44-7A-1 et seq. The decision is final and binding and may be vacated, confirmed, or appealed only in accordance with the New Mexico Uniform Arbitration Act (NMSA 1978, § 44-7A-1 et seq.).

#### 105.20.4 Litigation

If the Contractor does not fully accept the Cabinet Secretary's decision the Contractor shall issue its notice of Public Works Mediation within three (3) Days of the Cabinet Secretary decision. The Contractor shall provide no less than seven (7) Days' notice of the convening of a mediation session. The Public Works Mediation shall be complete within thirty (30) Days of the date of the notice of Public Works Mediation. No extensions of this timeframe will be granted unless approved by the will be granted by the Department. Service of notice of a mediation session shall be made upon both the Cabinet Secretary and the Office of General Counsel and shall otherwise comply with the New Mexico Public Works Mediation Act. The Contractor shall however, exhaust the mandatory mediation procedures of the New Mexico Public Works Mediation Act (NMSA 1978, § 13-4c-1, et seq.) before seeking judicial relief in State District Court. Failure to timely notice and convene a mediation session and to timely file and serve a summons and complaint shall operate as a waiver and abandonment of Contractor's Claim, shall act as an acceptance of the Cabinet Secretary's decision, and shall bar the Contractor from proceeding to litigate the Claim. The Contractor shall provide no less than seven (7) Days notice of the convening of a mediation session. Service of notice of a mediation session shall be made upon both the Cabinet Secretary and the Office of General Counsel and shall otherwise comply with the New Mexico Public Works Mediation Act.

~~and the Contractor and the Department do not agree to arbitrate the Claim. The Contractor may, within 45 Days of the issuance of the Secretary's decision, proceed with litigation in State District Court by filing a summons and complaint. The Contractor shall properly serve the summons and complaint within 30 Days of the filing of the Complaint in State District Court. The Contractor shall, however, exhaust the mandatory mediation procedures of the New Mexico Public Works Mediation Act (NMSA 1978, § 13-4c-1, et seq.) before seeking judicial relief in State District Court. The Contractor shall provide no less than seven (7) Days notice of the convening of a mediation session. Service of notice of a mediation session shall be made upon both the Cabinet Secretary and the Office of General Counsel and shall otherwise comply with the New Mexico Public Works Mediation Act. Failure to timely notice and convene a mediation session and to timely file and serve a summons and complaint shall operate as a waiver and abandonment of Contractor's Claim, shall act as an acceptance of the Cabinet Secretary's decision, and shall bar the Contractor from proceeding to litigate the Claim. Upon expiration of the time in which to mediate and file a summons and complaint, or if a summons and complaint has been filed the expiration of the time in which to properly serve the summons and complaint, the Department may process a unilateral Change Order implementing the Cabinet Secretary's decision based on the Contractor's abandonment or waiver of its Claim.~~

SECTION 106: CONTROL OF MATERIALS

106.1 CONTRACTOR-FURNISHED AGGREGATE AND BORROW SOURCES

~~The Department may reject Material sources, or specific areas within sources as identified in the Bid Package.~~

~~Exploration and development of Material sources by the Contractor including related GRT and Tribal Taxes shall be Incidental.~~

~~The Contractor shall notify the Project Manager in writing of the Materials source prior to delivery of aggregate or borrow Materials to the Project. The Contractor shall provide Acceptable Materials and shall provide the following documentation to notify the Project Manager of the Material source prior to delivery to the Project:~~

- ~~1. Location of source;~~
- ~~4. Copies of lease agreements, purchase orders, or Pit Agreements the Contractor has made with the pit owner or Supplier;~~
- ~~3. Evidence of environmental acceptability, which includes the completed environmental and Cultural Resource requirements of Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals." Such evidence shall, where appropriate include the completed and Department Accepted recommendations for environmental and Cultural Resource management. Evidence of environmental acceptability, which includes completing the environmental and Cultural Resource requirements of Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals." Such evidence shall, where appropriate, also include completing the environmental and Cultural Resource management recommendations;~~
- ~~2. Plans for restoration, including contouring and re-vegetation if necessary; and,~~
- ~~3. Testing results from a Department-approved Laboratory.~~

~~Upon request in writing from the Contractor, the Project Manager may approve Materials at the source prior to delivery. The Project Manager may reject sources, or specific areas within sources, due to failure to provide Acceptable Materials or due to environmental, social, or cultural concerns. If the Project Manager determines that the sources of previously Approved Materials do not produce Acceptable Materials, the Contractor shall provide Acceptable Materials from other sources, or make changes to the existing source to provide Acceptable Materials. No additional compensation or time shall be provided to the Contractor for unacceptable Materials or for developing alternate source locations.~~

~~The Project Manager will notify the Contractor in writing within ten (10) Days of the if when its Material source is Acceptable.~~

~~If the Department does not list rejected sources in the Bid Package and then rejects a source, or an area within a source, on which the Contractor relied to prepare its Bid on the Project, the requirements of Section 104.2, "Significant Changes in the Character of the Work," shall apply.~~

~~Exploration and development of Material sources by the Contractor including related GRT and Tribal Taxes shall be Incidental.~~

~~Requests for approval of sources of Material are subject to environmental acceptability requirements. The Contractor shall submit Environmental Resource studies and Cultural Resource studies to the Project Manager and to the Environmental Program Manager.~~

~~Environmental acceptability requirements do not apply to Commercial Material Sources, but do apply to Materials within a Commercial Material Source that the Contractor obtains with its own forces or forces belonging to its Subcontractor.~~

~~If the Contractor purchases Material from a Material source established for another Project by another Contractor working under Contract to the Department, and if the Material source~~



~~must be expanded beyond the area where environmental and Cultural Resource approvals have previously been obtained pursuant to Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals," then the requirements for environmental acceptability shall apply to the additional area and requirements of Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals" must be completed by the Contractor.~~

~~Prior to delivery of Materials to the Project from an aggregate or borrow source, the Contractor shall provide the following documentation to the Project Manager:~~

- ~~2. Location of source;~~
- ~~3. Copies of lease agreements, purchase orders, or Pit Agreements the Contractor has made with the pit owner or Supplier;~~
- ~~4. Evidence of environmental acceptability, which includes completing the environmental and Cultural Resource requirements of Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals." Such evidence shall, where appropriate, also include completing the environmental and Cultural Resource management recommendations;~~
- ~~5. Plans for restoration, including contouring and re-vegetation if necessary; and,~~
- ~~6. Testing results from a Department approved Laboratory.~~

~~No Material shall be delivered to the Project until the Project Manager notifies the Contractor in writing that the Materials source is Acceptable for use.~~

## 106.2 SUPPLIER PLANT INSPECTION

The Department may inspect Materials at the Supplier's plant. In this event, the Contractor shall:

1. Cooperate and ensure the cooperation of its Materials Supplier;
2. Guarantee unrestricted entry (at reasonable times) to areas where the relevant Material is being manufactured or produced;
3. Arrange for the necessary facilities to be adequately inspected for the production or fabrication of the Material; and,
4. Ensure adequate safety measures are implemented for the inspection.

The Department may retest Materials, before or during use in the Work, and reject Materials that, when retested, do not meet the requirements of the Contract, even if the Materials were tested and Accepted at the plant.

## 106.3 SAMPLES, TESTS, AND CITED SPECIFICATIONS

~~The Contractor shall not incorporate into the Work unacceptable or unapproved Materials. The Project Manager may direct the Contractor to remove unapproved or unacceptable Materials at no additional cost to the Department.~~

The Department will perform tests in accordance with standards, methods, or Specifications, of the Project's Contract, current on the Advertisement date. Unless otherwise specified in the Contract, the Department will take samples and perform tests at its own expense. Unless otherwise specified in the Contract, the Department will provide test results to the Contractor.

## 106.4 CERTIFICATES OF COMPLIANCE

The Contractor shall submit Certificates of Compliance forms to the Project Manager before installing or incorporating Material in the Work, and shall ensure each Certificate of Compliance contains all information in the Department approved current approved Certificate of Compliance form. Additionally, documentation required to verify the information on the Certificate of Compliance form shall be submitted with the completed Certificate of Compliance form, the following information:

1. ~~The Control Number;~~
2. ~~The name of the Contractor;~~
3. ~~The date;~~
4. ~~The specification satisfied;~~
5. ~~An item number (if applicable);~~
6. ~~A description of the item supplied;~~
7. ~~The quantity;~~
8. ~~The shipment number;~~
9. ~~The heat number, lot number, or batch number (depending on the type of Material);~~
10. ~~The seal number (if applicable);~~
11. ~~The manufacturer of Material;~~
12. ~~The printed name, signature, and job title of the company official who certified the document;~~
13. ~~Written verification that the described Material is in accordance with the Contract;~~
14. ~~Written verification that MTRs, manufacturers' Certificates of Compliance, and other relevant documents are available to the Department; and,~~
15. ~~Written verification that manufacturing processes associated with the production of steel and iron Materials are in accordance with Section 106.12, "Preference for Domestic Materials," or special waivers have been granted.~~

~~Materials inspected and stamped during the manufacturing process by a representative of the Department will require the above Certificate of Compliance form noted documents for certification.~~

~~Materials that appear on pre-approved lists maintained by the Department will require the manufacturer's certification, literature, and shop drawings before fabrication and installation.~~

~~The Contractor may provide Material purchased in bulk or left over from previous Projects by submitting Certificates of Compliance forms for those Materials.~~

~~Unless otherwise stated in the Contract, Materials not permanently incorporated into the Work will not require a Certificate of Compliance form, unless otherwise stated in the Contract, but the Contractor shall supply Materials that are in accordance with the Contract.~~

~~Unless requested in writing by the Project Manager, eElectric items meeting UL approval and underground utility Materials meeting ASTM or AWWA Specifications that are so certified or stamped will not require a Certificate of Compliance form will require no further certification.; unless requested in writing by the Project Manager.~~

~~Electric items meeting UL approval and underground utility Materials meeting ASTM or AWWA Specifications that are so certified or stamped will require no further certification, unless requested in writing by the Project Manager.~~

~~Materials inspected and stamped during the manufacturing process by a representative of the Department will require the above noted documents for certification.~~

~~Materials that appear on pre-approved lists maintained by the Department will require the manufacturer's certification, literature, and shop drawings before fabrication and installation.~~

~~Materials not permanently incorporated into the Work will not require a Certificate of Compliance unless otherwise stated in the Contract, but the Contractor shall supply Materials that are in accordance with the Contract.~~

~~The Contractor may provide Material purchased in bulk or left over from previous Projects by submitting Certificates of Compliance for Materials. The Materials shall be in accordance with standards, methods, or Specifications, current on the Advertisement date.~~

~~The Contractor shall replace or repair Materials damaged in transit or during handling at no additional cost to the Department.~~

#### 106.5 FOREIGN MATERIALS

Unless otherwise specified in the Contract, the Contractor shall deliver Materials manufactured outside the United States to approved locations within the state, where they shall remain until sampling and testing are complete.

The Contractor shall arrange for testing that the Department is not able to perform, at no additional cost to the Department, and shall test foreign Materials within the state in the presence of the Department.

The Contractor shall provide a Certificate of Compliance for each lot of foreign Material in accordance with Section 106.4, "Certificates of Compliance;" and, if required, provide with the Certificate of Compliance, certified MTRs for each lot, and clearly identify to which lot they apply.

For structural Material ~~requiring MTRs~~, the Department will only Accept Material from foreign and domestic manufacturers that have established adequate in-plant Quality Control to the satisfaction of the Project Manager. The Department will not Accept structural Materials that do not have Certificates of Compliance and MTRs.

The Project Manager may inspect the plant or require the Contractor to submit detailed written proof of adequate Quality Control.

~~The Department will not Accept structural Materials that do not have Certificates of Compliance and MTRs.~~

#### 106.6 STORAGE OF MATERIALS

The Contractor shall request from the Project Manager written approval to store Equipment or Materials within the ROW for the adequate execution of the Work. The Contractor shall store Equipment and Materials to preserve quality and fitness, ~~for the Work and~~ to protect against vandalism or theft, and to facilitate inspection. The Contractor shall be responsible for the replacement or repair of Materials affected by inadequate protection.

~~Unless otherwise specified in the Contract the Contractor may with the written approval of the Project Manager use the ROW for storage of Material for any duration of the Project.~~

~~The Contractor shall request from the Project Manager written approval to store Equipment within the ROW for the adequate execution of the Work.~~

#### 106.7 HANDLING AND TRANSPORTING MATERIALS

The Contractor shall handle Materials in a manner that preserves the Acceptability for the Work. ~~The Contractor shall transport aggregates from the storage site to the Work site in vehicles constructed and operated to prevent loss or segregation of Materials.~~ The Contractor shall ensure the transportation of Materials is in accordance with state and federal regulations, and prevent leakage of, scattering of, or damage to Materials. Materials damaged or lost in transportation shall be deemed unacceptable and are not subject to payment by the Department.

#### 106.8 DEPARTMENT-PROVIDED MATERIALS

Material provided by the Department will be made available to the Contractor as specified in the Contract.

~~—The Contractor will be held responsible for all Department supplied Material when it takes physical possession of the Materials and until such time that the Materials are until it is incorporated into the Work and Accepted. The Department will list Department provided Materials in the Contract. The Pay Item in which the Contractor uses the Materials includes the cost of hauling, handling and installing the Materials. The Contractor is responsible for loss or damage to Department provided Materials. The Contractor shall replace lost or damaged Materials at no additional cost to the Department.~~

#### **106.9 MATERIALS DESIGNATED BY TRADE NAME**

The Contract may require Materials or Equipment by trade or manufacturers' names. The Department ~~will not may~~ Accept the substitution of Materials or Equipment when the Contract requires Materials or Equipment of specific trade or manufacturers' names, ~~of equal or greater quality provided the proposed substitute is fully documented and submitted to the Project Manager, and prior written approval of the Project Manager is given.~~

~~If allowed the Contractor shall provide information necessary to establish the comparable quality of the proposed substitute Materials or Equipment, at no additional cost to the Department. No additional Contract Time or compensation will be allowed for substitution of Materials.~~

#### **106.10 EQUIPMENT AND MATERIAL GUARANTEES AND WARRANTIES**

Obtain and assign to the Department manufacturer and producer guarantees or warranties for Materials and Equipment. Warrant, for six (6) months after Material or Equipment is installed and operational, that mechanical and electrical Equipment without a manufacturer or producer guarantee are free from defects or imperfections in workmanship and Materials. Repair malfunctions or defects that develop during the six-month period.

Supply manuals for Equipment incorporated in the Work providing the following information:

1. Operational procedures;
2. Complete nomenclature;
3. Wiring diagrams;
4. Schematics showing test voltage and procedural methods;
5. Functional description of circuits;
6. Parts lists;
7. Cross-references to standard part numbers;
8. Names and addresses of sources for testing procedures where appropriate
9. Flow diagrams; and
10. Other relevant data.

#### **106.11 ~~MATERIAL~~ SAFETY DATA SHEETS (MSDS)**

The Contractor shall submit to the Project Manager the most current MSDSs for all Materials that require MSDSs upon delivery of the Materials to the Project. The MSDS shall conform to current Federal requirements in 29 C.F.R. § Section 1910.1200 (g), ~~(YEAR), and contain the following information:~~

1. ~~Product identification:~~
  - a. ~~Name, address, and phone number of chemical manufacturer;~~
  - b. ~~Trade name of the product; and,~~
  - c. ~~Chemical name and formula of the product.~~
2. ~~Hazardous ingredients:~~
  - a. ~~Substances present in the product that are listed as hazardous in the Hazard Communication standard (29 CFR § 1910.1200) (1900 Subpart Z); and,~~

- b. ~~Exposure limits for the hazardous ingredient.~~
- 3. ~~Physical hazard data:~~
  - a. ~~Fire and explosion data; and,~~
  - b. ~~Proper extinguishing Equipment;~~
- 4. ~~Health hazard information:~~
  - a. ~~Estimate of the hazard of the product;~~
  - b. ~~Routes of entry of the product;~~
  - c. ~~Acute and chronic health effects of exposure; and,~~
  - d. ~~Emergency first aid procedures;~~
- 5. ~~Reactivity data;~~
- 6. ~~Spill and leak procedures;~~
- 7. ~~Personal protective Equipment necessary for safe handling of the chemical; and,~~
- 8. ~~Special precautions.~~

**106.12 BUY AMERICA REQUIREMENTS, PREFERENCE FOR DOMESTIC MATERIALS**

The Contractor shall provide Materials in accordance with the Buy America Requirements ~~in~~ (23 C.F.R. § 635.410) on federal-aid Projects.

The Contractor shall bear the burden of proof and the cost to ~~show~~prove the origin and place of manufacture of iron and steel products and Materials.

**SECTION 107: LEGAL RELATIONS, ENVIRONMENTAL REQUIREMENTS, AND RESPONSIBILITY TO THE PUBLIC**

**107.1 LAWS TO BE OBSERVED**

~~Before the start of Work, the Contractor shall be fully informed and make the necessary contacts with municipal and state agencies concerning obligations related to all applicable federal and state laws, all local laws, ordinances and regulations, and all orders and decrees of bodies or tribunals having jurisdiction or authority, including those which in any manner control pollution or impacts to the environment, affect those engaged or employed on the Work, or which in any way affect the conduct of the Work.~~ The Contractor, Subcontractors, and Suppliers shall at all times observe and comply with all such laws, ordinances, regulations, orders, and decrees; and protect and indemnify the State and its officers, employees and agents against all Claims or liability arising from or based on the violation of such laws, ordinances, regulations, orders, or decrees, by the Contractor, ~~or~~ its officers, employees or agents, Subcontractors or Suppliers.

~~The Contractor shall before the start of Work contact the municipal or state agency responsible for air, noise, and water Quality Control regulations to determine the standards that shall be followed during construction.~~

**107.2 PERMITS, LICENSES, AND TAXES**

The Contractor shall procure all permits and licenses; pay charges, fees, royalties, and appropriate taxes; and give notices necessary and incidental to the due and the lawful performance ~~resecution~~ of the Contract~~Work~~.

Prior to beginning Work the Contractor shall furnish to the Department a written list of all permits required for the proper completion of the Contract. The list shall clearly identify the type of permit or permits that must be obtained before Work can be started. Copies of fully executed permits shall be furnished to the Department upon request.

**107.2.1 ~~3~~ COMPLIANCE WITH PAYMENT OF TAXES**

The Contractor shall pay all lawful taxes imposed by the state of New Mexico or other political entities.

The successful Bidder, ~~upon returning the executed Bid Package, and~~ after receiving the Preliminary Award of Contract ~~Notice of Preliminary Award of Contract~~, shall provide to the Department both the Bidder's Taxation and Revenue Department tax identification number and the Bidder's Motor Transportation Division account number. If either of these numbers is unavailable, the Contractor shall submit a letter of explanation. A Notice to Proceed will not be issued until the Contractor submits both numbers or a satisfactory letter of explanation.

**107.2.2 ~~4~~ GROSS RECEIPTS, INDIAN BUSINESS ACTIVITY, AND TRIBAL EMPLOYMENT RIGHTS ORGANIZATION TAXES**

**107.2.3 ~~4.4~~ New Mexico Gross Receipts Tax**

The Department will pay the Contractor for applicable New Mexico GRT and local option tax (including tax increases or decreases effective after the Contract date), and the Contractor shall pay applicable taxes to New Mexico Taxation and Revenue Department. The Contractor shall show the GRT and local option tax as a separate amount added to each request for payment.

The Department shall be promptly reimbursed or repaid for any tax, including GRT, that is refunded to the Contractor, including any refund received by the Contractor after final payment, to the extent such tax was paid by the Department to the Contractor. The Contractor shall keep and maintain all documents, applications for tax refund, and forms filed with, submitted to, received from, or required by the New Mexico Taxation and Revenue Department which relate

to the payment or refunding of any tax paid pursuant to this Section for five (5) years following final payment. All of the above material shall be made available to the Department or FHWA for review, audit, inspection, and copying and shall be produced, upon request, at the Department General Office, the District in which the Work was performed, or an FHWA office, as directed.

#### **107.2.44-2 Tribal Taxes**

All Bids submitted shall exclude any tribal business tax, TERO tax, and other tax imposed by a tribal government. The Department will pay the tax or will exercise its prerogative to challenge the tribal government's authority to impose the tax. If the Department exercises its prerogative to challenge the tribal government's authority to impose the tax, the Department will reimburse the Contractor for such tax only if a court of competent jurisdiction rules the tribe has authority to impose the tax. The Department will reimburse the Contractor only if the final decision of the litigation, or other final disposition of the litigation, results in a determination that the tribe has jurisdiction to impose the tax. The Department will be subrogated to the rights of the Contractor to Claim a refund of, or to contest, any such tax imposed on the Work to the extent any alleged obligation of the Contractor or the Department to pay such tax arises under this section or through the Contractor's performance of this Contract.

The Department will reimburse the Contractor for payment of any Tribal Tax directly related to the performance of the Work within the Project imposed by a tribe upon tribal verification that the tax was paid by the Contractor.

#### **107.5 PATENTED DEVICES, MATERIALS, AND PROCESSES**

The Contractor's Bid Item Unit Price shall include the cost of all royalties and costs from patents, trademarks and copyrights needed to complete the Work.

If the Contractor employs any design, device, Material, or process covered by letters of patent, copyright or trademark, the Contractor shall secure approval for its use from the patentee or owner. The Contractor and the Surety shall indemnify and save harmless the Department from all Claims (including costs, expenses, and damages the Department may be obligated to pay) for infringement by reason of its use. The Contractor and Surety shall also indemnify and save harmless any affected third party and any political subdivision from all claims for infringement by reason of its use.

~~The Contractor shall provide a suitable legal agreement with the patentee or owner to cover the use of any patented or copyrighted designs, devices, Materials, processes, or trademarks. The Contractor shall defend, indemnify and hold harmless the Department, its officers, employees or agents, from any and all Claims (including costs, expenses and damages the Department may be obligated to pay) for Contractor's infringement on such patents, copyrights, and trademarks during prosecution or after completion of the Work.~~

#### **107.6 RESTORATION OF SURFACES OPENED BY PERMIT**

The Department reserves the right to allow utility services with authorized permits by the Department to enter the Project and perform the permitted Work.

When directed by the Department the Contractor shall make all necessary repairs. If directed by the Department, in writing, by the Department the repairs will be subject to the same requirements as the original Work performed. ~~When directed by the Department the Project Manager, the Contractor shall make all necessary repairs, due to such openings in the Highway, Street, or Road. The Department will pay for such repairs in accordance with Section 109.54.42, "Payment for Extra Significant Changes in the Character of Work," and Section 109, "Measurement and Payment."~~

~~The Department reserves the right to construct or reconstruct utility services in the Highway, Street, or Road or to grant permits to municipal or County authorities, corporations, firms, or individuals to perform such Work. The Contractor shall allow parties bearing permits granted by the Department for such Work to make openings in the Highway, Street, or Road.~~

The Department will address time extension requests due to Work by ~~utility services~~ others in accordance with Section 108.6 "Determination and Extension of Contract Time."

~~When directed by the Project Manager, the Contractor shall make all necessary repairs due to such openings in the Highway, Street, or Road. The Department will pay for such repairs in accordance with Section 104.2, "Significant Changes in the Character of Work," and Section 100, "Measurement and Payment."~~

#### **107.7 FEDERAL AID PROVISIONS**

When the FHWA or other federal agency is obligated to reimburse the Department for all or any portion of the cost of a Project, the Contractor shall observe and be subject to federal law applicable to such reimbursement. In such situations, federal requirements supersede conflicting provisions of state and local laws, rules, or regulations. The Work shall be subject to inspection and oversight by the appropriate federal agency. Such inspection or oversight shall not make the U.S. Government a party to this Contract, nor shall the U.S. Government interfere with the rights of the Contract parties.

#### **107.8 SANITARY, HEALTH, AND SAFETY PROVISIONS**

The Contractor shall provide and maintain sanitary accommodations for use by Contractor and Department employees, in accordance with State and local boards of health, or other legal entity with jurisdiction.

~~The Contractor shall comply with federal, State, and local health rules and regulations. The Contractor shall ensure that working conditions are sanitary, non-hazardous, and not dangerous to the health or safety of workers or authorized visitors on the Project.~~ The Contractor shall admit to the Project credentialed Inspectors from OSHA or other agencies responsible for health and safety administration.

##### **107.8.1 STATE AND FEDERAL LAND-MANAGING AGENCIES**

~~While working within or adjacent to State or federal lands and forests, the Contractor shall comply with all regulations of the State or federal authority having jurisdiction governing the protection of these areas, and observe all sanitary laws and regulations. The Contractor shall keep the areas in an orderly condition, dispose of all refuse, and obtain permits for the construction and maintenance of all construction camps, stores, warehouses, residences, latrines, cesspools, septic tanks, and other Structures in accordance with applicable federal or State regulations.~~

#### **107.9 PUBLIC CONVENIENCE AND SAFETY**

The Contractor shall provide for the convenience and safety of the general public, for reasonable access by local residents and businesses, and for the protection of persons and property, in accordance with Section 104.5, "Maintenance of Traffic."

#### **107.10 RAILROADS**

If the Project affects railroad lines, the Contractor shall observe the requirements of the following Sections and the insurance requirements in accordance with Section 107.25, "Insurance Requirements." ~~For the purpose of this Section, the term "Immediate Construction Site" shall mean the area of the Project within railroad Right of Way.~~

~~For the purpose of this Section, the term "agreement" means the contract between the Contractor and railroad that defines the rights and responsibilities of both the Contractor and railroad for the Project. The term "immediate construction site" shall mean the area of the Project defined as having impacts on the railroad in the agreement.~~

##### **107.10.1 Reserved Department/Contractor Financial Responsibilities**



~~The Department may be responsible for the costs of the engineering, inspection, and protection of the railroad Right of Way within the Immediate Construction Site unless otherwise required by the Contract. Work accomplished by the Contractor or its Subcontractors or agents outside the Immediate Construction Site, but within railroad Right of Way, shall be the financial responsibility of the Contractor.~~

#### **107.10.2 Notice to the Railroad**

~~Unless otherwise stated in the Contract, the Contractor shall not begin work in railroad-owned Right of Way before entering into an agreement with the railroad."The Contractor shall not begin Work in the immediate construction site before accomplishing the following before entering into the agreement with the railroad.:~~

- ~~1. Notify the owner of the railroad Right of Way in writing 30 Days prior to the anticipated date to begin Work, the anticipated type of Work, and the anticipated length of time required to complete the Work;~~
- ~~2. Verify that the owner of the railroad Right of Way has arranged at the Contractor's request to provide necessary flaggers or other railroad personnel to protect railroad property at the Immediate Construction Site and minimize interference with the safe and timely operation of railroad Equipment;~~
- ~~3. Receive approval from the owner of the railroad Right of Way and Department for any changes or modifications during construction that affect safety or the railroad's operations;~~
- ~~4. Provide the Department with a copy of written agreements or directives, if any, between the owner of the railroad Right of Way and the Contractor modifying the Work to protect the railroad Right of Way;~~
- ~~5. Take protective measures as necessary to keep railway facilities, including track ballast, free of sand, debris, and other foreign objects and Materials resulting from his operations. Any damage to Railway facilities resulting from the Contractor operations will be repaired or replaced by the owner of the railroad Right of Way and the cost of such repairs or replacement shall be paid for by the Contractor;~~
- ~~6. During demolition, removal and construction of the Work, the Contractor shall not drop or lower Material or debris onto the railroad's property within 50 feet measured from the centerline of an adjacent track or measured from the edge of a railroad maintenance Roadway or measured from any railroad improvement or measured from a railroad Work or staging area; and;~~
- ~~7. Furnish the owner of the railroad Right of Way for approval, five (5) copies of Plans and two (2) sets of calculations for any shoring or cribbing proposed to be used over, under or adjacent to the owner of the railroad Right of Way's tracks. The use of such shoring or cribbing shall conform to the standard side clearances required by New Mexico regulations or rules. In case the use of such shoring will impair said clearance the Contractor shall ensure that application is made to the appropriate state agency, if required, for approval of such impairment during the period of construction of the Project.~~

#### **107.10.3 Cooperation with Owner of Railroad Right of Way**

~~The Contractor shall cooperate with the owner of the railroad Right of Way. Actions by parties beyond the control of the Department, including the actions of owners of railroad Right of Way, and circumstances beyond the control of the Department, such as unforeseen railroad emergencies, that delay completion of the Project shall result in the Department awarding additional Contract Time but not additional compensation to the Contractor. Actions within the control of the Department, which are not the subject of a concurrent delay shall result in the Department awarding both additional Contract Time and additional compensation to the Contractor. A concurrent delay to the completion of the Project by the Department and the Contractor shall result in the Department awarding additional Contract Time but not additional compensation to the Contractor.~~

The Department is not liable for any additional costs or expenses of the Project resulting from the railroad's reallocation of its labor forces assigned to complete railroad Work in the event of an emergency when the owner of the railroad ROW believes such reallocation is necessary to provide for the immediate restoration of the railroad operations or to protect persons or property on or near any other property owned by the railroad.

~~Regardless of the requirements of the Contractor's construction schedule, the owner of the railroad Right of Way reserves the right to reallocate its labor forces assigned to complete railroad Work in the event of an emergency when the owner of the railroad Right of Way believes such reallocation is necessary to provide for the immediate restoration of railroad operations or to protect persons or property on or near any other property owned by the owner of the railroad Right of Way. Neither the Department nor the owner of the railroad Right of Way will be liable for any additional costs or expenses of the Project resulting from any such reallocation of the labor forces by the owner of the railroad Right of Way. The Department reserves the right to amend the Contract with the Contractor as may be necessary, subject to advising and coordinating with the owner of the railroad Right of Way.~~

~~The Contractor shall coordinate the Work each Day with the owner of the railroad Right of Way's operations, prior to commencing any construction activity.~~

~~The Contractor shall provide any notice concerning these requirements in writing. Such notices shall be deemed sufficiently given when sent by electronic means including proof of receipt, or certified mail, return receipt requested to the owner of the railroad Right of Way and the Department.~~

#### **107.10.4 ~~Reserved~~ Storage of Materials or Equipment**

~~The Contractor shall not store Material, park or use Equipment, or interfere with the nearest railroad track or overhead line within the following clearance limits, unless the owner of railroad Right of Way provides written permission:~~

- ~~1. Within ten (10) feet horizontally from the centerline of track, 23 feet three (3) inches vertical above top of rail;~~
- ~~2. Construction or maintenance of electric wires:
  - ~~a. For lines carrying less than 750 V, 27 feet vertically above top of rail;~~
  - ~~b. For lines carrying 750 V, 28 feet vertically above top of rail;~~
  - ~~c. For lines carrying 15 kV to 20 kV, 30 feet vertically above top of rail;~~
  - ~~d. For lines carrying more than 20 kV, 34 feet vertically above top of rail.~~~~

~~When the Contractor must maintain or operate Equipment inside the above tolerances, the Contractor shall notify the owner of the railroad Right of Way of said activities, and allow the owner of railroad Right of Way to provide personnel and devices to protect its property.~~

~~The Contractor shall notify and obtain approval from the owner of railroad Right of Way whenever there is excavation below the elevation of the track, any activity which may result in settlement or movement of railroad property, or whenever the owner of railroad Right of Way believes the railroad facilities may be endangered, so as to allow the owner of railroad Right of Way an opportunity to provide personnel and devices to protect its property.~~

#### **107.10.5 ~~Reserved~~ Movement Across Tracks**

~~If, for the convenience of the Contractor, it becomes necessary to move an oversized load across the railroad tracks, the Contractor shall obtain written permission from the owner of railroad Right of Way, if required by the owner of the railroad Right of Way. The Contractor shall obtain a private crossing agreement if required by the owner of railroad Right of Way. The Contractor shall install all crossings, and provide flagging and protective devices at no additional cost to the Department. The Contractor shall ensure all agreements are in writing; furnish a copy to the Project Manager before beginning any Work under such agreements.~~

#### 107.10.6 ~~Reserved~~Cleanup

~~Before requesting final Acceptance of Work accomplished on railroad property, the Contractor shall remove all tools, implements, and other Materials, and obtain written release from the owner of railroad Right of Way showing that the property is clean, clear, and in a condition acceptable to the owner of railroad Right of Way. If unable to obtain a release from the owner of railroad Right of Way after diligent effort, provide the Project Manager with written evidence of efforts to obtain the release.~~

#### 107.10.7 ~~Reserved~~Post Construction Plans

~~When requested by the owner of the railroad Right of Way, the Contractor shall furnish one (1) set of Post Construction Plans, prepared in U.S. customary units to the owner of the railroad Right of Way. The format of the Post Construction Plans shall be discussed and agreed to at the preconstruction meeting. The Post Construction Plans shall include plan and profile, structural Bridge drawings and Specifications, and drainage Plans. All improvements and facilities shall be shown. All Work associated with this Section shall be incidental.~~

#### 107.11 ENVIRONMENTAL, ~~HAZARDOUS MATERIALS~~ AND CULTURAL RESOURCES APPROVAL, HAZARDOUS MATERIALS

The Department will obtain the environmental, ~~hazardous material~~, and Cultural Resource approvals for the Project before construction. The Department will describe in the Contract any ~~special~~ environmental, ~~hazardous material~~ and Cultural Resource requirements developed to protect resources.

The Department will describe in the Contract any hazardous materials identified and the Contractor shall observe the requirements of sections 107.1, 107.2, 107.8 and the applicable paragraphs of 107.14.

#### 107.12 ENVIRONMENTAL, ~~HAZARDOUS MATERIALS~~ AND CULTURAL RESOURCE AND HAZARDOUS MATERIALS DISCOVERIES

The Contractor shall terminate operations and provide written notification per section 104.2.23 "Differing Site Conditions" when it discovers in the immediate area of environmental, ~~Hazardous Materials~~ or Cultural Resources or Hazardous Materials not identified in the Contract and immediately notify the Project Manager. The Department will coordinate with appropriate regulatory authorities during this time While the Project Manager, Environmental Geology Bureau Manager, Environmental Program Manager, and regulatory authorities complete appropriate mitigation actions, the Contractor shall continue Work in other unaffected areas. The Project Manager shall provide written notification to the Contractor when Work may commence in the area of terminated operations. ~~Any adjustments shall be made in accordance with Section 109.5, "Payment for Changes, Differing Site Conditions and Extra Work,"~~

#### 107.13 CONTRACTOR'S RESPONSIBILITY FOR DAMAGE TO ENVIRONMENTAL AND CULTURAL RESOURCES

The Contractor shall restore or mitigate all damage to environmental or Cultural Resources caused by the Contractor's failure to abide by requirements included in the Contract as well as those areas covered under Section 107.14, "Contractor's Responsibility for Environmental and Cultural Resource Protection" at no additional cost to the Department. The Department, in coordination with regulatory authorities, will determine the extent of restoration or mitigation. The Contractor shall pay any fine imposed on the Department by a regulatory agency for a regulatory violation caused by the Contractor. The Project Manager may suspend the Work in areas where environmental or Cultural Resource violations occur.

#### 107.14 CONTRACTOR'S RESPONSIBILITY FOR ENVIRONMENTAL AND CULTURAL RESOURCE PROTECTION

## 107.14.1 Environmental and Cultural Resource Studies and Approvals

The Contractor shall obtain new certifications for any Contractor located activity outside the project limits or for expansions or additions to existing previously certified areas. If the Contractor purchases Material from a Material source established for another Project by another Contractor working under Contract to the Department, and if the Material source must be expanded beyond the area where environmental and Cultural Resource approvals have previously been obtained pursuant to Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals," then the requirements for environmental acceptability shall apply to the additional area and requirements of Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals" must be completed by the Contractor.

Before beginning soil-disturbing activities (in accordance with Section 106.1, "Contractor-Furnished Aggregate and Borrow Sources"), the Contractor shall notify the Project Manager in writing of the proposed studies to be performed. After Upon the Project Manager's concurrence with the Contractor's studies the Contractor shall obtain the necessary study permits, and employ an Environmental Specialist and a Cultural Resource Professional to conduct environmental and Cultural Resource the approved studies. The Contractor shall ensure that the resource studies meet the standards of the Department, the State historic preservation officer, and any State, tribal, or federal land-managing agency or entity with jurisdiction. The Contractor shall ensure that the resource studies are in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.), the National Historic Preservation Act (16 U.S.C. § 470 et seq.), and the New Mexico Cultural Properties Act (NMSA 1978, § 18-6-1 to 18-6-17), or any other successor statutes. The studies may extend, but are not limited to, the following locations at any disturbed site, including, but not limited to the following:

1. Camp sites;
2. Plant sites;
3. Crusher sites;
4. Stockpile sites;
5. Equipment yards;
6. Borrow Pits;
7. Surfacing Pits; and,
8. Water sources.

The Contractor shall obtain the environmental and Cultural Resource approvals regardless of land ownership. For the environmental approval, the Contractor shall use the Department-furnished checklist Categorical Exclusion form (or equivalent form furnished by the Department), which shall be signed by the Contractor and the Environmental Specialist.

For Cultural Resource reports, use the standard site investigation forms approved by the New Mexico Historic Preservation Division and the New Mexico Cultural Properties Review Committee. ~~The Contractor shall ensure that the resource studies meet the standards of the Department, the State historic preservation officer, and any State, tribal, or federal land-managing agency or entity with jurisdiction. The Contractor shall ensure that the resource studies are in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.), the National Historic Preservation Act (16 U.S.C. § 470 et seq.), and the New Mexico Cultural Properties Act (NMSA 1978, § 18-6-1 to 18-6-17), or any other successor statutes.~~

The Contractor may use previously-completed environmental and Cultural Resource studies, provided all other requirements of this Section are met.

~~The Contractor shall complete other coordination required by environmental regulations.~~

The Contractor shall submit the documentation prepared for the environmental and Cultural Resource approvals to the Project Manager, ~~and the Environmental Program Manager. The Department will then submit the documentation to the appropriate agencies for approval, and~~

~~will notify the Contractor when approvals have been obtained. Approvals may take 45 Days or more after the Contractor delivers the resource studies to the Department. Contractor located activities on state land or privately owned land may take 45 Days or more for approval after the Contractor delivers the resource studies to the Project Manager. Contractor located activities on federal land have no defined period for approval. The NMDOT will not approve requests for additional Contract Time or compensation related to Contractor Located Activities. Adjustments shall only be made in accordance with Section 109.5, "Payment for Changes, Differing Site Conditions and Extra Work," when the time needed to obtain approvals exceeds Federal or State law or regulatory requirements containing time limits.~~

The Contractor shall comply with all conditions and commitments for protection of resources contained in resource agency ~~requirements permits~~ and in the environmental and Cultural Resource approvals. The environmental approval is the FHWA-approved checklist categorical exclusion, or its equivalent. The Cultural Resource approval is the concurrence letter signed by the State historic preservation officer, or its equivalent.

The Contractor shall repair at the Contractor's expense all damage to environmental or Cultural Resources caused by the Contractor's failure to meet the requirements for environmental acceptability or abide by Department directives issued to protect resources identified during the environmental and Cultural Resource evaluation. The nature and extent of such repairs shall be determined after consultations between the Contractor, Department representatives, and the regulatory authorities with management jurisdiction over the subject resources.

#### **107.14.1.14.1 — Commercial Material Sources**

Environmental acceptability requirements do not apply to Commercial Material Sources.

Upon request of the Project Manager, the Contractor shall submit copies of its Commercial Sources Air Quality Permit, Groundwater Permits, and Business License.

#### **107.14.2 Parking and Cleaning of Equipment**

For Projects that have received environmental and Cultural Resource approvals through programmatic categorical exclusions (e.g., pavement preservation and rehabilitation, guardrail replacements, Bridge deck replacements, signalization upgrades, etc.), environmental and Cultural Resource studies will not have been completed outside the existing paved areas by the Department. These Projects will be noted as such in the Contract. For these Projects, the Contractor shall take special care when parking and cleaning Equipment, as outlined in the following requirement.

The intent of the following requirement is to ensure the protection of sensitive environmental and Cultural Resources that may be present within the Right of Way and to encourage the Contractor to avoid damaging these resources when parking and cleaning Equipment. The Contractor shall ensure that parking and cleaning of Equipment within the Right of Way does not damage environmental and Cultural Resources, in one (1) or a combination of the following manners:

1. Park and clean Equipment in previously disturbed areas only;
2. Identify all parking and cleaning locations in previously undisturbed areas, prior to construction, and complete the environmental and Cultural Resource approvals as described in Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals;" or
3. Park and clean Equipment in previously undisturbed areas without completing the environmental and Cultural Resource approvals as described in Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals," and assume all risk and liability for any damage to environmental or Cultural Resources resulting from these actions.

#### **107.14.3 Clean Water Act Aquatic Resources**

The Contractor shall comply with the New Mexico Water Quality Act (NMSA 1978, § 74-6-1 et seq.) and applicable permits and regulations in accordance with the federal Clean Water Act (33 USC § 1251 et seq.).

The Department will apply for and obtain permits and certifications required for construction involving “waters of the United States” as defined by the U.S. Army Corps of Engineers. The Contractor shall comply with the terms of the permit obtained and shall be fully liable for consequences resulting from its failure to comply. The Department will provide a copy of the permits and certifications in the Contract.

~~The Contractor shall minimize vegetation removal, soil disturbance, erosion in the vicinity of live streams, water impoundments, wetlands, or irrigation supplies, and crossing of live streams with heavy Equipment. The Contractor shall not refuel or perform maintenance activities on Equipment near watercourses, nor dump or bury demolition concrete, asphalt, or other Materials near watercourses, but these activities shall be conducted in proper containment areas. The Contractor shall comply with the New Mexico Water Quality Act (NMSA 1978, § 74-6-1 et seq.) and applicable permits and regulations in accordance with the federal Clean Water Act (33 USC § 1251 et seq.).~~

~~The Contractor shall comply with the requirements of Section 603, “Temporary Erosion and Sediment Control,” and the requirements of NPDES, and if performing Work along or adjacent to live streams, it shall do so in accordance with the federal Clean Water Act (33 USC § 1251 et seq.), the regulations and requirements of other authorities with jurisdiction.~~

#### **107.14.4 Minimization of Soil Disturbance**

The Contractor shall minimize damage to or removal of vegetation and trees, except as approved in Section 104.6, “Rights in and Use of Materials Found on the Work.” The Contractor shall not clear, grub, disturb, or excavate land beyond what is authorized by the Contract. The Contractor shall remediate or replace vegetation due to an unnecessary clearing ~~authorized clearing~~ or damage, at no additional cost to the Department.

#### **107.14.5 Air Quality Requirements and Dust Abatement**

The Contractor shall perform dust abatement on the Project and as directed by the Project Manager. The Contractor shall ensure any operations which ~~that burning operations, dust producing activities, and other operations that~~ produce particulate matter comply with State and federal air quality regulations, as administered by the Air Pollution Control Bureau of the NMED, applicable local air quality regulations, and the federal Clean Air Act (42 USC § 7401 et seq.).

#### **107.14.6 Noise Abatement**

~~The if specified in the Contract, the~~ Contractor shall not operate Equipment that emits noise above 70 dbA, measured at a distance of 50 ft, in urban or populated rural areas during ~~the~~ the hours specified in the Contract, and shall comply with County or municipal ordinances if they are more stringent than the requirements in the Contract.

#### **107.14.7 Disposal of Materials ~~Removed Asphalt Pavement Material~~**

Unless otherwise specified in the Contract, the Contractor shall be solely responsible for disposal of ~~The intent of the following requirement is to ensure that removed asphalt pavement~~ Materials. In the disposal of Material the Contractor shall comply with all federal, state and local regulations. The Contractor shall not dispose of Material within the project limits without written approval from the Project Manager, does not contaminate a natural watercourse or Waters of the United States or Surface Waters of the State (pursuant to the federal Clean Water Act, section 307; the federal Clean Water Act, section 404, General Condition 6; the federal Clean Water Act, section 401, Water Quality Certification; the NM Solid Waste Management

~~Regulations, 20 NMAC 9.1; and the NM Water Quality Control Commission Regulations, 20 NMAC 6.2.2201).~~

~~The Contractor shall dispose of removed asphalt pavement Material, not including minor sweepings, belonging to the Department using one (1) or more of the following methods:~~

~~1. Recycling and mixing it into Base Course, Subgrade or HMA of the new Roadway, with approval of the Project Manager; or~~

~~2. The Contractor shall break down asphalt surfacing removed from the Project to a nominal two (2) inch size, or smaller, haul and stockpile the Material at a location approved by the Project Manager or as indicated in the Contract.~~

~~— If the Material is to be permanently placed within the Shoulder or Median, it shall be treated by using one (1) of the following methods:~~

~~a. Machine compacted; or~~

~~b. Sealed with an approved rejuvenating agent.~~

#### **107.14.8 Disposal of Other Materials and Debris**

The Contractor shall move items designated for removal without salvage, unsuitable construction Materials, and debris from clearing and grubbing to an environmentally suitable disposal site secured and coordinated with the appropriate regulatory agencies. The Contractor shall not place any items in wetland areas or areas that may impact endangered species or Cultural Resources. The Contractor shall obtain an environmental and Cultural Resource approval in accordance with Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals."

#### **107.14.9 Prime Coat, Tack Coat, and Soil Sterilants**

The Contractor shall not contaminate soils outside the Roadway Prism when applying prime coat, tack coat and soil sterilants. The Contractor shall not contaminate arroyos, irrigation supplies (acequias and ditches), wetlands, water impoundments, and live streams.

#### **107.14.10 Noxious Weed Prevention**

To avoid the spread of noxious weeds, all prime and subcontractor construction equipment (including but not limited to trucks, excavators, bulldozers, loaders, scrapers, backhoes, trailers, tractors, hydro-seeders, drill-seeders, straw-blasters, compost-spreaders, bobcats, and disks) shall be pressure-washed to remove all visible mud, soil, and debris prior to entering the project limits.

#### **107.15 HAZARDOUS MATERIALS**

The Department will describe in the Contract, all known Hazardous Materials within the project limits.

#### **107.15.1 Hazardous Material Discoveries**

During construction, should Material be encountered which is or the Contractor believes to be hazardous or contaminated, the Contractor shall immediately: terminate operations in the immediate area, notify the Project Manager in writing per Section 104.2.2 "Differing Site Conditions", and the appropriate regulatory authority, and continue Work in other areas. The Project Manager, Environmental Geology Section Manager, and environmental regulatory authorities shall investigate to determine the nature and extent of the Hazardous Material or contamination within the Right of Way. If the Contractor is not qualified, as determined by experience and/or licensure, to undertake a clean-up action, the Contractor shall retain the services of a qualified firm. Any adjustments shall be made in accordance with Section 109.5, "Payment for Changes, Differing Site Conditions and Extra Work".

Should the Contractor fail to notify the Project Manager of Hazardous Material discoveries and/or fail to respond in accordance with all applicable environmental regulations or

any part of these Specifications, the Contractor shall pay, at no cost to the Department, any fine or penalty imposed for regulatory violations.

The Contractor shall terminate operations and provide written notification per section 104.3 "Differing Site Condition" when it discovers Material that is or the Contractor believes to be hazardous or contaminated. The Department will coordinate with the appropriate regulatory authorities. During this time, the Contractor shall continue Work in other unaffected areas. The Project Manager will provide written notification to the Contractor when Work may commence in the area of terminated operations.

The Contractor shall be solely responsible for any fine or penalty imposed for regulatory violations.

#### **407.14.9 — Underground Storage Tanks**

The Contractor shall comply with applicable New Mexico and federal regulations governing the discovery and removal of underground storage tanks (UST). The Contractor shall report the discovery of USTs within the Right of Way (either temporary or permanent), pits, borrow areas, storage or Equipment yards within timelines required by the NMED Petroleum Storage Tank Bureau (PSTB). The Contractor shall remove USTs in accordance with NMED PSTB regulations. Any adjustments shall be made in accordance with Section 109.5, "Payment for Changes, Differing Site Conditions and Extra Work,"

#### **407.14.10 — Hazardous Waste Material, and Reporting and Cleanup of Spills**

The Contractor shall immediately report all spills regardless of cause or association with the Work to the Project Manager if on the Right of Way, or to the property owner if outside of the Right of Way. The Contractor shall clean up and bear all costs of spills associated with the Work including gasoline, diesel fuel, motor oils, solvents, chemicals, toxic and corrosive substances, and other Materials that may threaten public health or the environment. Failure to report a pre-existing spill or spill not associated with the Work shall result in the Contractor bearing the full cost of remediation and cleanup.

#### **407.14.11 — Prime Coat, Tack Coat, and Soil Sterilants**

The Contractor shall not contaminate soils outside the Roadway Prism when applying prime coat, tack coat and soil sterilants. The Contractor shall not contaminate arroyos, irrigation supplies (acequias and ditches), wetlands, water impoundments, and live streams.

#### **407.15 — STATE AND FEDERAL LAND-MANAGING AGENCIES**

While working within or adjacent to State or federal lands and forests, the Contractor shall comply with all regulations of the State or federal authority having jurisdiction governing the protection of these areas, and observe all sanitary laws and regulations. The Contractor shall keep the areas in an orderly condition, dispose of all refuse, and obtain permits for the construction and maintenance of all construction camps, stores, warehouses, residences, latrines, cesspools, septic tanks, and other Structures in accordance with applicable federal or State regulations.

#### **107.16 PREVENTION OF FOREST AND GRASS FIRES**

The Contractor shall prevent forest and grass fires. The Contractor shall notify appropriate officials at the earliest possible moment of the location and extent of any fire. The Contractor shall comply with fire regulations applicable to the area of Work, and furnish and maintain firefighting Equipment and tools required in the Contract. The Contractor shall suspend fire-hazardous operations when necessary at the direction of the Project Manager, and in accordance with Section 105.17, "Contract Adjustments for Suspension of Work."

If performing Work within or adjacent to State or National Forests, the Contractor shall comply with all regulations of the USDA Forest Service, State Forestry Division, New Mexico



Department of Energy, Minerals and Natural Resources, or other authority having jurisdiction, governing the protection of forests and the performance of Work within forests. The Contractor shall keep the areas in an orderly condition, dispose of all refuse, and obtain permits for the construction of field offices and other structures in accordance with the requirements of the Forest Supervisor.

The Contractor shall take all reasonable precautions to prevent and suppress forest fires and shall require employees and Subcontractors to take all reasonable measures within their power to prevent and suppress forest fires. The Contractor shall make every possible effort to notify a Forest official at the earliest possible moment of the location and extent of a fire.

#### **107.17 USE OF EXPLOSIVES**

The Contractor shall exercise extreme care when use of explosives is necessary for the prosecution of the Work. ~~The Contractor shall be responsible for all damage resulting from the use of explosives.~~ The Contractor shall not endanger life or property, including new Work. The Contractor shall use, handle, load, transport, and store explosives and blasting agents in accordance with applicable laws and ordinances, as well as title 29 CFR Part 1926 Safety and Health Regulations for Construction (OSHA) and 30 CFR Part 15.32 whichever is more restrictive. The Contractor shall clearly mark explosives and store them securely. If no local laws or ordinances apply, the Contractor shall store explosives not closer than 600 feet from Roads, buildings, camping areas, or places of human occupancy. Unless otherwise required by an agreement between the Contractor and public utility or owner of railroad ROW, the Contractor shall provide five (5) Day's' sufficient notice to any public utility and owner of railroad ~~ROW~~Right of Way having Structures or facilities near the Project, of the intention to use explosives, so that they may take steps to protect their property before detonation.

#### **107.18 PROTECTION AND RESTORATION OF PUBLIC AND PRIVATE PROPERTY**

The Contractor shall preserve public and private property including land, governmental survey monuments, and property markers from disturbance or damage until the Project Manager has witnessed or otherwise referenced their location, and directed their removal.

The Contractor shall restore public or private property damaged and pay fines directly or indirectly caused by the Contractor through any act, omission, neglect, or misconduct in the execution of the Work, or by defective Work or Materials, or by non-prosecution of the Work. The Contractor shall return such property to a condition equal to that existing before such damage or injury was done, by repairing, rebuilding, or otherwise restoring as directed by the Project Manager. The Contractor shall maintain responsibility for damage until the Work is completed and Accepted. The contractor shall provide the Department with the information to update the control sheet records once a reference mark has been reestablished by the Contractor.

##### **107.18.1 PUBLIC AND PRIVATE REFERENCE MARKS**

Unless otherwise specified in the Plans, the Contractor shall not disturb or damage any public or private reference marks. If the Contractor directly or indirectly by any act, omission, neglect, or misconduct in the execution of the Work disturbs or damages public or private reference marks the Contractor shall be solely responsible for any restoration of the reference marks in accordance with Section 801 "Construction Staking by the Contractor". If the restoration of the public or private reference mark is done improperly then the Contractor shall be solely responsible for a fine of \$2,000.00 per improper reference mark. Delays, costs or impacts associated with the improper restoration of a reference mark shall be the sole responsibility of the Contractor.

~~The Contractor shall preserve public and private property including land, governmental survey monuments, and property markers from disturbance or damage until the Project Manager has witnessed or otherwise referenced their location, and directed their removal.~~

~~The Contractor shall restore public or private property damaged by the Contractor directly or indirectly by any act, omission, neglect, or misconduct in the execution of the Work, or by defective Work or Materials, or by non-prosecution of the Work, at no additional cost to the Department and return such property to a condition equal to that existing before such damage or injury was done, by repairing, rebuilding, or otherwise restoring as directed by the Project Manager.~~

~~The Contractor shall maintain responsibility for damage until the Work is completed and Accepted, or until the Department partially Accepts the affected unit in accordance with Section 105.18.1, "Partial Acceptance," or until the affected unit is opened to traffic in accordance with Section 104.5, "Maintenance of Traffic."~~

#### **107.19 RESPONSIBILITY FOR THIRD PARTY CLAIMS AND DUTY TO DEFEND**

The Contractor shall indemnify and hold harmless the Department and its officers, employees and agents from and against any and all Claims and suits, liability, damages, losses or expenses, including attorney fees and costs, to the extent that they arise out of or are in any way connected with any act or omission of the Contractor, or its officers, employees or agents. The Contractor agrees, at its own expense, and upon written request by the Department, to defend any suit, action or demand brought against the Department on any Claim or demand covered herein.

The Contractor shall establish a local contact number (with area code) for filing Claims, and clearly post the number. In addition, post the name of the Contractor and address, and telephone number at each approach and departure to the Project. The Contractor shall ensure that construction vehicles (Contractor, Subcontractor, and privately owned) working on the Project have clean, unobstructed license plates, and shall mark vehicles legibly with the appropriate company name.

The Contractor shall assign an individual by the date of the preconstruction conference, readily available during normal working hours, to respond to Claims from the public for losses alleged to have occurred within the Project, whether arising from Contractor or Subcontractor action or inaction. The Contractor shall provide claimants with a written outline of the Contractor's Claims procedure, along with a written copy of the Contractor's name, address, and telephone number together with the name and title of the individual assigned to handle Claims from the public and provide a copy of the same to the Project Manager. The Contractor shall maintain a status report of Claims filed, including the name, address, and telephone number of the claimant, the nature of the Claim, pertinent findings regarding the Claim, and a statement regarding the resolution of the Claim. The Contractor shall provide the status report to the Project Manager upon request.

#### **107.20 CONTRACTOR'S RESPONSIBILITY TO PROTECT THE WORK**

Until final Acceptance of the Project by the Project Manager, the Contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof, by the action of the elements or from other causes, whether arising from the execution or from the non-execution of the Work. The Contractor shall rebuild, repair, restore, and make good all injuries or damages to portions of the Work occasioned by the above causes before

final Acceptance and shall bear the expense thereof except as provided in Sections 104.5, "Maintenance of Traffic" and Section 105.18.1, "Partial Acceptance."

Should the Contractor be delayed in the prosecution or completion of the Work by Contractors on contiguous Projects, Acts of God such as fire, flood, earthquake, tornado, or other cataclysmic phenomena of nature, epidemics, quarantine restrictions, strikes, freight embargoes, acts of public enemy, acts of governmental authorities or railroads other than the Department, ~~Acts of God,~~ or documented national unavailability of construction Material, for which the Contractor is in no way responsible, then the Contractor may be entitled to an extension of Contract Time per Section 108.6 "Determination and Extension of Contract Time"; but is not entitled to additional compensation or damages for such delay. For physical damage to the Work resulting from the above unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, the Contractor may be paid pursuant to Section 109, "Measurement and Payment." The Contractor shall not be entitled to non-allowable damages per Section 109.11 "Compensation for Claims".

~~the time herein set for the completion of the Work shall be extended for a period equivalent to the Work time lost by reason of any or all of these causes, but the Contractor shall not be entitled to damages for such delay. The extended time period shall be determined and fixed by the Department, which determination shall be final.~~

In case of suspension of Work ~~from any cause whatever~~ per section 105.8.1 "Project Manager Authority", the Contractor shall be responsible, subject to the provisions of Section 104.5, "Maintenance of Traffic," ~~and Section 105.18.1, "Partial Acceptance,"~~ for the Project and shall take such precautions as may be necessary to prevent damage to the Project, ~~provide for normal drainage, and erect necessary temporary Structures, signs, or other facilities at the Contractor's expense. During such period of suspension of Work, the Contractor shall properly and continuously maintain in a growing condition all living Material in newly established plantings, including seeding and sod, furnished under the Contract, and shall take adequate precautions to protect new tree growth and other important vegetative growth against injury.~~

~~For physical damage to the Work resulting from unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to Acts of God, the public enemy, or governmental authorities, the Contractor will be paid pursuant to Section 109, "Measurement and Payment."~~

#### 107.21 CONTRACTOR'S RESPONSIBILITY FOR UTILITY PROPERTY AND SERVICES

The Contractor shall not begin Work in areas ~~close~~proximate to railroad, telecommunication, or utility company Right of Way or facilities, or other property where damage from the Work might result in expense, loss, or inconvenience to the owner, until arrangements are made with the Project Manager and the owner of the property for the protection of such property or facilities.

~~The Contractor shall cooperate with the owners of underground or overhead utility lines to facilitate their removal or relocation, and conduct operations to avoid duplication of Work and unnecessary interruption of utility services.~~

~~Where utility conflicts are present, the Contractor shall provide the Project Manager, on a weekly basis, evidence of adequate coordination and cooperation with utilities. Neither time or compensation will be provided where the Contractor fails to provide the Project Manager, on a weekly basis, evidence of continued cooperation and coordination activities with utilities.~~

The Contractor shall promptly notify the Project Manager and affected utility or railroad owners authorities of any interruption to water or utility services resulting from exposure, lack of support, or breakage. The Contractor shall provide continuous repair Work to restore water service if interrupted. The Contractor shall not perform Work near fire hydrants until provision for service has been approved by the local fire authority.

~~The Contractor shall contact the owner of the railroad Right of Way and the telecommunications companies to determine whether there is any fiber optic cable systems located within the Project boundaries that could be damaged or their service disrupted due to the construction of the Project. The Contractor shall pothole all lines either shown on the Plans or marked in the field in order to verify their locations. The Contractor shall use all reasonable methods when working with the owner of the railroad Right of Way rail corridor to determine if any other fiber optic lines may exist. Failure by the Contractor to notify, pothole or identify these lines shall be sufficient cause to stop construction at no cost to the State or owner of the railroad Right of Way until these items are completed. The costs for repairs and loss of revenues and profits due to damage to these facilities through negligent acts by the Contractor shall be the sole responsibility of the Contractor. The Contractor shall defend and indemnify and hold the State and owner of the railroad Right of Way harmless against and from all cost, liability and expense arising out of or in any way contributing to these negligent acts of the Contractor.~~

#### **107.22 FURNISHING RIGHT OF WAY**

The Department will secure necessary Right of Way before construction, except as noted in the Contract.

#### **107.23 PERSONAL LIABILITY OF PUBLIC OFFICIALS**

Department employees shall bear no personal liability in carrying out the provisions of the Contract or in exercising powers or authority granted to them by the Contract, it being understood that in such matters they act solely as agents and representatives of the Department.

#### **107.24 NO THIRD-PARTY LIABILITY**

The Department and the Contractor specifically agree that the provisions of this Contract do not make anyone, including any Subcontractor or Materials Supplier, a third-party beneficiary or authorize anyone not a party to this Contract to maintain an action for damages under this Contract.

#### **107.25 INSURANCE REQUIREMENTS**

The Contractor shall procure and maintain at no cost to the Department insurance as detailed below, using an insurance company authorized to do business in New Mexico. Insurance shall cover operations under the Contract, whether performed by the Contractor, the Contractor's agents or employees, or Subcontractors. Contractor shall keep insurance in full force and effect for the entire period of the Work, up to and including final Acceptance, and the removal of Equipment and employees, agents and Subcontractors. All insurance required in this Section shall be procured from insurance or indemnity companies with an A.M. Best Company financial strength rating level of A- or better, Class VII or better, unless otherwise approved in writing by the Department. In no event shall the Department approve the use of an insurance or indemnity company with an A.M. Best Company financial strength rating level of B or worse.

##### **107.25.1 Liability Insurance**

1. The Contractor shall obtain General Liability (Bodily Injury Liability and Property Damage Liability) insurance coverage applicable in full to the subject Project in the following minimum amounts:
  - a. Personal and Bodily Injury Liability: \$1,000,000.00 each person; \$2,000,000.00 each occurrence (annual aggregate); and,
  - b. Property Damage Liability: \$2,000,000.00 each occurrence; (annual aggregate);
2. The insurance coverage shall be documented on a Comprehensive General Liability form or Commercial General Liability form, which must include the following:
  - a. Coverage for liability arising out of the operation of independent Contractors;
  - b. Completed Operations Coverage; and,

- c. Attachment of the Broad Form Comprehensive General Liability Endorsement;
3. If the Work includes the use of explosives, the Contractor's insurance must include coverage for injury to or destruction of property arising out of blasting or explosion;
4. If the Contract includes Work next to an existing building or structure, the Contractor's insurance shall include coverage for injury to or destruction of property arising from the collapse of or structural injury to buildings or Structures due to the following:
  - a. Excavation, including borrowing, filling, or backfilling in connection therewith;
  - b. Tunneling and cofferdam or caisson Work; and,
  - c. Moving, shoring, underpinning, razing, or demolition of buildings or Structures, or removal or rebuilding of structural supports thereof; and,
5. Coverage must include injury to or destruction of property arising out of damage to wires, conduits, pipes, mains, sewers or other similar property or any apparatus in connection therewith below the surface of the ground, if such injury or destruction is caused by or occurs during the use of mechanical Equipment for the purpose of excavating, digging, or drilling.

#### **107.25.2 Automobile Liability Insurance**

The Contractor shall provide or ensure that all vehicles used in performance of the Contract have liability insurance. The Contractor is not responsible for liability insurance for the Department or its agents. The Contractor shall provide limits of liability for automobile liability insurance in the following amounts:

1. Personal and Bodily Injury Liability: \$1,000,000.00 each person; \$2,000,000.00 each occurrence; (annual aggregate); and,
2. Property Damage Liability: \$2,000,000.00 each occurrence; (annual aggregate).

#### **107.25.3 Worker's Compensation Insurance**

The Contractor shall carry worker's compensation insurance and otherwise fully comply with the New Mexico Worker's Compensation Act (NMSA 1978, § 52-1-1 et seq.) and the New Mexico Occupational Disease Disablement Law (NMSA 1978, § 52-3-1 et seq.).

#### **107.25.4 Department as Additional Insured**

The Contractor shall name the Department and any third party so designated in the Contract as an additional named insured on the comprehensive general liability form or commercial general liability form furnished by the Contractor in accordance with Section 107.25.1, "Liability Insurance." The certificate of insurance shall state that the coverage provided under the policy is primary over any other valid and collectible insurance. The additional insured endorsement shall conform to the most current version of the Insurance Services Office's CG 2010 or equivalent, Additional Insured Endorsement Form. The Contractor shall provide to the Department a copy of the Contractor's standard commercial general liability policy showing the Additional Insured Endorsement before the Department issues a Notice to Proceed.

#### **107.25.5 Certificate of Insurance**

The Contractor shall provide evidence of insurance coverage conforming to these Specifications with a certificate of insurance executed on the form provided by the Department, to be made part of the Contract. The certificate shall indicate compliance with these Specifications and shall certify that the coverage shall not be changed, canceled, or allowed to lapse without giving the Department 30 Days written notice. The Contractor shall provide a certificate of insurance to the Department on renewal of a policy or policies as necessary during the term of the Contract. The Department shall not issue a Notice to Proceed until the Contractor meets these requirements.

#### **107.25.6 Umbrella Coverage**

The insurance limits cited in this Section are minimum limits. The Department does not intend that these Specifications define what constitutes adequate insurance coverage for the individual Contractor. The Department will recognize excess coverage (Umbrella) as meeting the insurance requirements of Section 107.25.1, "Liability Insurance," if the limits of the Umbrella coverage meet the individual requirements of this Section.

#### **107.25.7 Optimal Insurance**

If required by the Contract, Contractor shall procure and maintain form and types of bailee theft insurance such as, but not limited to, builder's risk insurance, Contractor's Equipment insurance, and rigger's liability property insurance. If so required, the Contractor shall provide bailee theft insurance in an amount necessary to protect the Department against Claims, losses, and expenses arising from the damage, disappearance, or destruction of property of others in the care, custody, or control of the Contractor, including property of others being worked upon by the Contractor, its agents, employees or Subcontractors.

#### **107.25.8 Railroad Insurance**

If the Work affects railroad property, in addition to the above requirements, unless otherwise specified in the Contract the Contractor shall obtain at its own cost a railroad protective liability policy in the name of the owner of the railroad Right of Way or railroad facilities involved. In addition, on those rails used by the National Railroad Passenger Corporation (NRPC), the Contractor shall obtain a railroad protective liability policy in the name of the NRPC.

Railroad liability insurance shall be in compliance with 23 CFR 646A. These limits of liability apply to the coverage as set forth in AASHTO's Railroad Protective Liability Endorsement form, subject to the terms, conditions, and exclusions found in the form. The policy must afford coverage as provided in the standard Railroad Protective Liability Endorsement.

#### **107.26 NO WAIVER OF LEGAL RIGHTS**

~~Upon completion of the Work the Department will pay the final payment voucher. Payment of the final payment voucher shall not preclude the Department from correcting any measurement, estimate, or certificate made before or after completion of the Contract, nor from recovering from the Contractor or surety or both, overpayments sustained because the Contractor failed to fulfill the obligations under the Contract. A waiver on the part of the Department of any breach of any part of the Contract shall not be held to be a waiver of any other subsequent breach. The Department reserves the right to correct measurements, estimates, certificates, or price adjustments made before or after Physical Completion of the Work, and to recover overpayment from the Contractor or its Surety.~~

~~The Department's waiver of breach of part of the Contract does not constitute a waiver of any other breach. The lack of discovery of a rejector rejection of a defect shall not preclude, nor obligate the Department to accept the rejected defect.~~

The Contractor, without prejudice to the terms of the Contract, shall be liable to the Department for latent defects, fraud, or such gross mistakes as may amount to fraud, and for warranty and guaranty.

#### **107.27 CONTRACTOR'S RESPONSIBILITY ~~TO FOR~~ THE TRAVELING PUBLIC**

The Contractor shall minimize hazards to the traveling public in the Construction Zone from the commencement of the Work until final Acceptance. Minimizing hazards shall include:

1. Keep Equipment, Materials, and workers out of the travel lanes;
2. Remove hazardous construction debris deposited within the Project limits;
3. Inspect and repair the travel lanes (Necessary repairs of damage not caused by the Contractor will be paid for in accordance with Section 109.5, "Payment For Changes, Differing Site Conditions, and Extra Work."); and,

4. Remove obstacles deposited by the public as they transit the Project.

The Contractor shall immediately correct hazards reported by Project inspections, Department employees, or the public. The Contractor shall maintain and publicly post a 24-hour contact number to initiate action quickly.

~~The Contractor shall assign an individual by the date of the preconstruction conference, readily available during normal working hours, to respond to Claims from the public for losses alleged to have occurred within the Project, whether arising from Contractor or Subcontractor action or inaction. The Contractor shall provide claimants with a written outline of the Contractor's Claims procedure, along with a written copy of the Contractor's name, address, and telephone number together with the name and title of the individual assigned to handle Claims from the public. The Contractor shall maintain a status report of Claims filed, including the name, address, and telephone number of the claimant, the nature of the Claim, pertinent findings regarding the Claim, and a statement regarding the resolution of the Claim. The Contractor shall provide the status report to the Project Manager upon request.~~

~~The Contractor shall establish a local contact number (with area code) for filing Claims, and clearly post the number. In addition, post the name of the Contractor, address, and telephone number at each approach to the Project. The Contractor shall ensure that construction vehicles (Contractor, Subcontractor, and privately owned) working on the Project have clean, unobstructed license plates, and shall mark vehicles legibly with the appropriate company name.~~

#### **107.28 CONTRACTOR RECORDS**

The Contractor, Subcontractors and all Suppliers shall keep and maintain all documents in a useable format, including communications, books, papers, records, files, accounts, tax records, cost records, reports, schedules, Bid documents with backup data, including electronic data, and all other material relating to the Contract, Project, Contract compliance, or any Claim for five (5) years following Physical Completion of the Work. Unless otherwise specified in the contract all of the above material shall be made available to the Department for review, audit, inspection and copying and shall be produced, upon request by the Assistant District Engineer – Construction, at the Department General Office, the District in which the Work was performed, or an FHWA office, as directed. The Contractor shall insert the above requirement in each subcontract and shall also include in all subcontracts a clause requiring Subcontractors to include the above requirement in any lower-tier subcontract. The Contractor's failure to maintain and timely provide all requested documents to the Department waives any Claim the basis of which could have, either in whole or in part, been documented or rebutted by such documents.

Resource Loading documents, financial statements provided by the Contractor, and Escrowed Bid Documents which have been visibly marked by the Contractor as "Confidential Trade Secrets" shall be deemed confidential as trade secrets and not subject to inspection pursuant to the Inspection of Public Records Act, NMSA 1978, § 14-2-4. Such information shall not be disclosed by the Department in response to a request made pursuant to the Inspection of Public Records Act without the written permission of the Contractor. Such documents may be disclosed to the Department, including any Inspector, Project Superintendent, Project Manager, Claim consultant, investigator, or testifying or consulting expert, as necessary to perform their duties or as otherwise required by law.

#### **107.29 ASSIGNING OF CONTRACT**

The Contractor may not assign the Contract or assign or delegate any contractual obligation or duty without the prior written consent of the Department and the Surety. Contractor may not make any assignment, in connection with the Contract, including assignment of any payment due Contractor or any Claim, for the benefit of any creditor.

#### **107.30 SEVERABILITY AND CONTRACT INTERPRETATION**

If any provision of this Contract is held to be invalid or unenforceable, the remaining provisions, or the application of such provision to either party, shall remain in full force and effect and, if possible, the rights and obligations of the parties are to be construed and enforced as if the Contract did not contain that term.

If any provision of the Contract is found to be superseded by any applicable state or federal law or regulation or court order, in whole or in part, then both parties shall be relieved of all obligations under that provision only to the extent necessary to comply with the superseding law or ruling, provided however, that the remaining provisions of the Contract, or portions thereof, shall be enforced to the fullest extent permitted by law.

The Contractor agrees that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Contract.

#### **107.31 CHOICE OF LAW**

This Contract is governed by and construed in accordance with the laws of the State of New Mexico.



## SECTION 108: PROSECUTION AND PROGRESS

~~The Contractor is wholly and solely responsible and liable for the performance of all Work or any act by its Subcontractors, Truckers, and Suppliers on the Project.~~

### 108.14 SUBCONTRACTING

Any individual, partnership, firm, corporation, or joint venture performing Work on the Project that is not an employee of the Contractor is a Subcontractor unless otherwise stated in the Contract ~~excepted in this Section.~~

A Supplier or Fabricator is not a Subcontractor unless Work is being performed within the Project limits ~~on the Project. Address issue of temporary employee as subcontractor, and whether the temp agency needs a subcontract or needs to be prequalified.~~

The Contractor shall perform with its own organization at least 40.0% of the Work based on the Total Bid Amount. ~~The phrase, "its own organization" includes only workers employed and paid directly, inclusive of employees who are employed by a lease agreement acceptable to the Department and Equipment owned or rented or without operators and does not include employees or equipment of the Subcontractor, assignee or agent of the Subcontractor. The Contractor is solely responsible and liable for the performance of all Work or any act by its Subcontractors, Truckers, and Suppliers on the Project. Liability of the Contractor and the Contractor's Surety under the Contract and the Contract Bonds shall not be waived or diminished by subcontracting or any other assignment of interest.~~

~~The Contractor's organization shall include workers employed and paid directly and Equipment owned or rented by the Contractor but shall not include employees or Equipment of its Subcontractor, assignee, or agent. The Contractor shall submit to the Project Manager a request to Subcontract for Subcontractor approval on the current Department approved form. The form must be concurred to by the Department before the subcontracted work begins. Unless otherwise approved by the Project Manager, the request to Subcontract shall be submitted no later than two (2) Working Days before the Subcontract Work is scheduled to begin. The Contractor ~~and~~ shall not circumvent this requirement by placing a Subcontractor's employees on its payroll. If the Contractor does not perform at least 40.0% of the Work with its own organization requests for Subcontractor approval will be rejected. The Department will treat a person or group generally operating as an independent Contractor, as independent Contractor for the purposes of this Section. ~~(and how do we treat them?). An independent contractor is a person who is paid for work by the Contractor who is not the Contractor's employee and is not performing work within the project limits such as the Contractor's attorney or accountant.~~~~

~~The Department will provide the required forms for a list of intended Subcontractors and Material Suppliers in the Bid Package. The Contractor shall submit this list at the preconstruction conference and update the list as the Work progresses. The Contractor is responsible for ensuring that its Subcontractors are prequalified by the Department and are also duly licensed for the Work to be performed on the Project, are registered with all of the state agencies as is required to do business in New Mexico and to perform Work on Public Works Projects including the New Mexico Taxation and Revenue Department and the New Mexico Department of Workforce Solutions or successor agencies, and are in compliance with all applicable state and federal laws and regulations including the New Mexico Public Works Minimum Wage Act. The Contractor shall comply with the New Mexico Subcontractor Fair Practices Act to the extent it is applicable to the Project. The Contractor shall update its list of Subcontractors and Suppliers submitted at the Pre-Construction Conference as the Work progresses.~~

A Trucker is not a Subcontractor unless the Contractor is using the Trucker to meet the DBE goal requirement associated with the Project ~~or the Trucker is a DBE.~~ A Trucker is an individual, partnership, firm, corporation, or joint venture that transports Materials to and from the Project and does not perform Work within the Project Limits ~~on the Project site.~~

Transportation of Materials within ~~the Project site (e.g. never leaves the Project Limits)~~ is Work performed by the Contractor or a Subcontractor. ~~Transportation of Materials on or off the Project site (e.g. leaving the Project) does not require a Subcontract.~~

The Contractor shall not construe the Department's concurrence as an endorsement of the subcontract, the Subcontractor, or the Subcontractor's ability to complete the work in a satisfactory manner. Subcontracting creates no Contract between the Department and the Subcontractor. The Subcontractor gains no rights, and the Department accepts no responsibilities by reason of the Subcontractor's contract with the Contractor.

~~Liability of the Contractor and the Contractor's Surety under the Contract and the Contract Bonds shall not be waived or diminished by subcontracting or any other assignment of interest.~~

### **108.1.1 Prompt Payment**

The Contractor shall promptly pay its Subcontractors and Suppliers for satisfactory performance of their contracts no later than ~~thirtyseven (307) Days~~ after receipt of Progress Payment for the Subcontractor's Work or Supplier's Materials by the Department. ~~To show prompt payment to both Subcontractors and Suppliers, the Contractor shall complete and submit the Department approved form to the Project Manager no later than the eighth (8) Day after receipt of the Progress Payment. (Move the changed language into NTC)~~

For purpose of this section, a Subcontractor's and Supplier's portion of the Work is satisfactorily completed when ~~it is Accepted by the Department~~ the Department processes a Progress Payment per Section 109.8 "Progress Payment". In no event shall the Contractor and its Subcontractors fail to promptly pay their Subcontractors and Suppliers the amounts due for undisputed Accepted Work within ~~thirty (30) Days~~ seven (7) Days of the Contractor receiving a Progress Payment from the Department. The payment by the Department to the Contractor is not a condition precedent for payment by the Contractor to any Subcontractor or Supplier. A zero dollar (\$0.00) Progress Payment by the Department does not relieve the Contractor from paying the Subcontractor or Supplier for Accepted Work.

The Contractor's failure to make timely or prompt Subcontractor or Supplier payment may result in the ~~or Supplier payments for undisputed Accepted Work is a Non-Conformance and shall result in the Department withholding 25% of the Progress Payment and may result in the~~ Department rejecting the Contractor's future Bids in accordance with Section 102.5, "Refusal or Rejection of Bids." The Contractor's repeated failure to make timely Subcontractor payment may also lead to Suspension or Debarment in accordance with Section 102.3, "Suspension and Debarment."

## **108.2 NOTICE TO PROCEED AND PRE-CONSTRUCTION CONFERENCE**

### **108.2.1 Notice to Proceed**

The Department ~~may~~ will issue the Notice to Proceed within 30 Days after the Department's Contract execution, unless otherwise agreed to by the parties. The Notice to Proceed will identify the ~~timeframe~~ date ~~the Department expects~~ the Contractor shall ~~to~~ begin Work and when ~~the start of~~ Contract Time shall begin. ~~The Contractor's shall not commencement of the Work without a Notice to Proceed, may be deemed a waiver of this notice and, in the absence of prior written permission from the Project Manager, shall start the Contract Time. In no event shall the Contractor commence Work until after execution of the Contract by all parties.~~

### **108.2.2 Pre-Construction Conference**

After the issuance of the Notice to Proceed, the Project Manager ~~will~~ shall provide written notice to the Contractor of the date, time and location of the Pre-Construction Conference. The Pre-Construction Conference will occur during the timeframe in the Notice to Proceed. If the

Contract has ramp up time, the Pre-Construction Conference shall occur before the ramp up time commences.

The Contractor shall ~~ensure provide an authorized Contract representative and the Project Superintendent at the Pre-Construction Conference or the individual who executed the Contract attends the Pre-Construction Conference. The Contractor's shall not commence commencement of the Work without a Pre-Construction Conference and the items above are Accepted by the Department. Commencing Work without a Pre-Construction Conference may result in a Non-conformance. Contract Time shall commence as indicated in the Notice to Proceed and no additional Contract Time will be granted.~~

The Contractor shall provide the following at a minimum of ten (10) Days before Pre-Construction Conference. The Pre-Construction will not be held until the required items are provided to the Department: ::

1. Letters of assignment (official capacity) for Project;
  - a. Project Superintendent;
  - b. Company and Project Safety Officer;
  - c. Traffic Control Supervisor (include current certifications and copy of wallet card)
2. A list with samples of authorized signatures and assignments for Supplemental Agreements (Change Orders), Progress Payments, payrolls and related items ;
- ~~2-3. Acceptable Baseline Schedule;~~
- ~~3. Letters of assignment (official capacity) for Project;~~
  - ~~a. Project Superintendent;~~
  - ~~b. Company and Project Safety Officer;~~
  - ~~c. Traffic Control Supervisor (include current certifications and copy of wallet card)~~
- ~~4. A list with samples of authorized signatures and assignments for Supplemental Agreements (Change Orders), Progress Payments, Payrolls and related items;~~
- ~~5-4. Additions, revisions deletions to the Traffic Control Plan;~~
  - a. Proposed changes to the project;
  - b. Potential problems with the construction of the project;
- ~~6-5. List of Subcontractors and Material suppliers;~~
- ~~7-6. Lump Sum breakdowns;~~
- ~~8-7. Weighmasters / Deputy Weighmaster certifications (must be maintained throughout the duration of the Project);~~
- ~~9-8. Progress Payment cutoff date;~~
- ~~10-9. Company EEO policy statement;~~
- ~~11-10. Recruitment letters (attachments E-K of the EEO package);~~
- ~~12-11. Superintendent's indoctrination letter (attachment D of EEO package);~~
- ~~13-12. If applicable the on-the-job training letter (Attachment R of the EEO package);~~
  - a. The trainee classification letter must include the number of trainees to be trained, the training program to be used, the classification of each trainee and the approximate start date;
- ~~14-13. The completed Civil Rights / EEO Pre-Construction Report. Complete and sign the portions that are applicable Department Project personnel;~~
14. Pre-Construction safety questionnaire;
15. VECP form; and
16. Other items and any other documents required by the Contract or as directed in the Project Manager's notice of Pre Construction.

~~Failure by the Contractor to provide the above listed items a minimum of ten (10) Days before the Pre-Construction Conference may result in the Contractor being in default of Contract pursuant to Section 108.9 "Default of Contract." The Contractor shall not commence Work until a Pre-Construction Conference is held, and the items above are Accepted by the Department. Contract Time shall commence as indicated in the Notice to Proceed and no additional Contract Time will be granted.~~

~~The Contractor shall not commence Work until the required items are provided to the Project Manager and Accepted.~~

### 108.3 SCHEDULE

#### 108.3.1 Baseline Schedule

The Project shall utilize a CPM format as the Baseline Schedule unless otherwise specified in the Contract.

The Project Manager will notify the Contractor in writing within ten (10) Days of the submittal of a Baseline Schedule if the schedule is "Accepted," "Accepted as noted", or is "rejected." ~~For Baseline Schedules that are "rejected", the Project Manager shall communicate, in writing, to the Contractor all portions of the schedule that are not in compliance with the Contract requirements. The Contractor shall, within seven (7) Days of receipt of the reasons for rejection of the schedule, provide a new Baseline Schedule and all additional information necessary for the Project Manager to "Accept" the Baseline Schedule. The Project Manager will notify the Contractor in writing within seven (7) Days of the submittal of the corrected Baseline Schedule if the schedule is "Accepted," "Accepted as noted", or is "rejected." The Contractor's failure to provide a timely and Acceptable new Baseline Schedule in response to a rejected schedule waives any Claim the basis of which would have been documented by an Acceptable Baseline Schedule.~~

Unless otherwise specified in the Contract, the Contractor is wholly and solely responsible for construction means, methods or techniques, therefore the Project Manager's review of the Baseline Schedule will be for compliance with the Specifications and Contract requirements. Acceptance by the Project Manager shall not relieve the Contractor of any of its responsibilities for the accuracy or feasibility of the schedule. Any Baseline Schedule which ~~exceeds~~ alters the as let Contract Time ~~may be "Accepted as noted" and does not revise the Contract Documents, including Contract Time, unless accompanied by a related Change Order. The Department's Acceptance of a Baseline Schedule that exceeds as let Contract Time shall not operate as a waiver of the Department's right to assess liquidated damages. shall be deemed "rejected." In no event, may approval of a Baseline Schedule revise the Contract Documents, including Contract Time, unless accompanied by a related Change Order. A Baseline Schedule that reflects a completion date before the expiration of Contract Time does not revise the as let Contract Time and will be considered float for the exclusive use and benefit of the Department.~~ The Contractor shall not commence Work until the Project Manager Accepts a Baseline Schedule.

The Department will use the Baseline Schedule to measure Project performance and for evaluation of changes to the Contract. ~~establish major construction operations, to determine Contract Time extensions, and to measure the progress of the Work. The Contractor shall be responsible for assuring all Work, including all Subcontractor Work, is included in the Baseline Schedule. The Contractor shall be responsible for assuring that all Work sequences are logical and that the Baseline Schedule indicates a coordinated plan.~~ Failure by the Contractor to include any element of Work required for performance of the Contract shall not excuse the Contractor from completing all Work within the required time.

~~For Baseline Schedules that are "rejected", the Project Manager shall communicate, in writing, to the Contractor all portions of the schedule that are not in compliance with the Contract requirements. The Contractor shall, within seven (7) Days of receipt of the reasons for rejection of the schedule, provide a new Baseline Schedule and all additional information necessary for~~

~~the Project Manager to "Accept" the Baseline Schedule. The Project Manager will notify the Contractor in writing within seven (7) Days of the submittal of the corrected Baseline Schedule if the schedule is "Accepted," "Accepted as noted", or is "rejected." The Contractor's failure to provide a timely and Acceptable new Baseline Schedule in response to a rejected schedule waives any Claim the basis of which would have been documented by an Acceptable Baseline Schedule.~~

#### 108.3.1.1 CPM Baseline Schedule

Unless otherwise specified in the Contract the Contractor shall provide a CPM Baseline Schedule which clearly describes the following:

- ~~1. A reasonable and workable plan to complete the Work within the Contract Time;~~
- ~~2. The order and relationships of activities and the sequence of the Work;~~
- ~~3. Activities in a format prescribed by the Department so the Department can readily identify the Work and measure the progress of each activity;~~
- ~~4. The Project's critical path;~~
- ~~5. The milestones or other key dates specified in the Contract; and,~~
- ~~6. Logic diagrams.~~

1. Created in the most current version of the scheduling software identified in the Contract: Primavera Suretrack;
2. Identifies the Project's critical path;
3. Includes all activities required to complete the work, including but not limited to, engineering, surveying, permitting, submittals, approvals, procurement, fabrication, deliveries, crushing, utility work and third party work;
4. Includes milestones, interim completion dates, substantial completion date, physical completion date, and other key dates specified in the Contract;
5. Describe activities such that the work is readily and identifiable. The activities shall provide the station or location of the work;
6. Identifies the scheduled early and late start and finish dates for each activity;
7. Limits activity relationships to finish to start, start to finish, and finish to finish relationships. Use of leads and lags must be explained in the narrative. ~~Do not use leads or lags unless otherwise approved by the Project Manager;~~
8. Use only contractual date constraints, unless otherwise approved by the Project Manager;
9. Defines the Work calendar for each activity;
10. Narrative at a minimum including the plan for sequencing the Project;
11. Defines the duration of each activity;
12. Total float and free float for each activity;
13. Workdays each week;
14. Contractor designated holidays;
15. Number of shifts and work hours per Day;
16. Anticipated weather events, based on historical data from the last seven (7) years;
17. Resource loading that shows production rates; and  
Cost loading that shall include the projected Project completion, measured in dollars and time, on a monthly basis or at each Progress Payment cut-off date.

~~The CPM Baseline Schedule shall consist of network diagrams and associated bar graphs and shall include a tabulation of each activity shown on the detailed network diagrams. Provide, at a minimum, the following information on the CPM Baseline Schedule:~~

- ~~1. Activity description;~~
- ~~2. Early start date (each activity);~~
- ~~3. Late start date (each activity);~~
- ~~4. Original duration, in workdays (each activity);~~

- ~~5. Total float and free float (each activity);~~
- ~~6. Sequence and interdependence of activities;~~
- ~~7. Workdays each week;~~
- ~~8. Contractor designated holidays;~~
- ~~9. Number of shifts per Day;~~
- ~~10. Number of hours per shift;~~
- ~~11, 18. Scheduled Completion Date;=~~
- ~~12. Anticipated weather events based on historical data; and~~
- ~~13. Resource Loading.~~

~~The CPM Baseline Schedule shall include a report of projected Project completion, measured in dollars and time, on a monthly basis or at each Progress Payment cut off date. Float contained in the CPM Baseline Schedule is not for the exclusive use or benefit of either the Department or the Contractor.~~

### **108.3.2 Schedule Format**

#### **108.3.2.1 CPM Schedule Format**

The Project shall utilize a CPM format as the Baseline Schedule unless otherwise specified in the Contract.

The Contractor shall prepare and submit one (1) electronic copy and two (2) time-scaled color prints of the CPM Baseline Schedule, updated monthly schedule, and revised schedules using a Project scheduling software as directed by the Department that includes the following features:

1. Ability to display the schedule as a Gantt chart;
2. Ability to clearly display the critical path of scheduled activities apart from the non-critical scheduled activities;
3. Ability to calculate and display total float and free float for each activity;
4. Ability to clearly display the early start, late start, early finish and late finish dates for each activity; and,
5. Ability to easily store and transfer the schedule as a file (or files) from one computer to another.

#### **108.3.2.2 Bar Graph Baseline Schedule**

If required by the Contract the Contractor shall submit the Baseline Schedule in bar graph form. The Baseline Schedule shall list Contract features or Work activities in sufficient detail to show a reasonable and workable plan to complete the Project within the Contract Time. The Contractor shall show the following on the bar graph Baseline Schedule:

1. Each Work activity as a bar;
2. Each activity's planned start and Completion Dates;
3. Each activity's estimated cost and percent of Total Bid Amount;
4. The overall Project cost;
5. The planned Project Completion Date;
6. The monthly projected percent complete in time and dollars;
7. A plot of the monthly projected percent complete (in dollars) superimposed on the bar chart; and,

8. Any approved Project suspensions and time extensions.

### 108.3.3 Monthly and Revised Schedules

For this Section "schedule" refers to CPM or Bar Graph as required by the Contract. The Department considers an updated monthly schedule as an update to the Accepted Baseline Schedule when no changes in activities have occurred except for the progression of planned work. The Department considers a revised schedule as a schedule that modifies the Accepted Baseline Schedule. If Accepted the revised schedule becomes the current Baseline Schedule.

Each activity in a monthly or revised schedule shall contain the same information required for the Baseline Schedule. ~~The Contractor shall include in the schedule a report of projected percent complete, measured in dollars and time. An Acceptable schedule shall conform to Section 108.3.1 "Baseline Schedule." Any updated or revised schedule that exceeds the as let Contract Time may be Accepted as Noted and does not revise In no event may Acceptance of a schedule revise the Contract Documents, including Contract Time, unless accompanied by a related Change Order. The Department's Acceptance of an updated or revised schedule does not operate as a waiver of the Department's right to assess liquidated damages. Any monthly or revised schedule which alters Contract Time shall be deemed "rejected."~~

~~If the Contractor fails to timely submit an updated or revised and Acceptable schedule, the Department shall withhold 25% of the Progress Payment as a Non-Conformance. The contractor shall submit an updated or revised schedule in accordance with 108.3.3.1 "Monthly Schedule Update".~~

~~If the contractor fails to submit an Acceptable schedule, The Department may take action will issue a corrective action report in accordance with in accordance with Section 109.8.2 "Non-Conformance". The Department may suspend the Work pursuant to Section 105.1.2 "Department Authority to Suspend Work" for failure to submit the monthly schedule update or revision. The Contractor's repeated failure to provide timely and Acceptable monthly or revised schedules may lead to Suspension or Debarment in accordance with Section 102.3, "Suspension and Debarment", "or the." Repeated failure to provide timely and Acceptable monthly or revised schedules may result in the Department rejection of the Contractor's future Bids in accordance with Section 102.5, "Refusal or Rejection of Bids." The Contractor's repeated failure to provide timely and Acceptable monthly or revised schedules may lead to Suspension or Debarment in accordance with Section 102.3, "Suspension and Debarment." Failure to timely provide a monthly or revised schedule waives any Claim the basis of which would have been documented by an Acceptable monthly or revised schedule.~~

~~Float contained in the updated or revised Schedule is not for the exclusive use or benefit of either the Department or the Contractor, except as follows: f]float generated on critical path activities due to the acceleration of the Contractor's performance, at the written direction of the Project Manager, shall be for the exclusive use of the Department; and, float generated on critical path activities due to modification, the reduction or elimination of items shall be for the exclusive use of the Department. The float generated by including any time associated with a VECP may shall be split equally for the mutual for the exclusive use of the Department and the Contractor.~~

The Department may grant time extensions only to the extent that the activities on the critical path of the CPM Baseline Schedule in effect at the time of the delay are impacted.

#### 108.3.3.1 Monthly Schedule Update

The Contractor shall submit an updated schedule monthly by the Progress Payment cut-off date.

~~—a minimum of five (5) Days before the Progress Payment date. Failure by the Contractor is a Non-Conformance and 25% of the Progress Payment shall be withheld.~~

~~The Department may suspend the Work pursuant to Section 105.1.2 "Department Authority to Suspend Work" for failure to submit the monthly schedule update or revision.~~

### 108.3.3.2 Contractor's Independent Duty to Provide Schedule Revisions

~~If the Contractor fails to timely submit an updated or revised and Acceptable schedule, the Department shall withhold 25% of the Progress Payment as a Non-Conformance. If it becomes apparent, or should have become apparent to the Contractor that the Contractor cannot complete the Work within the Contract Time, or the critical path changes, the Contractor shall provide a revised schedule and recovery plan to the Project Manager within five (5) Days. When the Critical Path changes, and when applicable, the Contractor shall provide a revised schedule and recovery plan to the Project Manager within five (5) Days, of when it becomes apparent, or should have become apparent, to the Contractor that the Contractor cannot complete the Work within the Contract Time, when a noncritical item has become critical, or cannot meet the schedule due to the following: Section 104.2 "Significant Changes in Character of Work", Section 104.3 "Differing Site Conditions", Section 104.4 "Extra Work", Section 107.12 "Environmental, Hazardous Materials and Cultural Resource Discoveries", or any other cause which may give rise to a Claim.~~

If the Contractor's Work falls behind schedule, the Contractor shall take such steps as may be necessary to mitigate damages and improve its progress including development of a recovery plan. For an Excusable Delay, Noncompensable Delay, Concurrent Delay, as those terms are identified in Section 109.11, "Compensation for Claims," the Contractor shall take all reasonable steps to minimize the impact of the Delay once a Delay causing event is identified. Failure to do so may result in the rejection of all or part of the delay Claim.

~~Nonexcusable Delay, or Inexcusable Delay, as those terms are identified in Section 109.11, "Compensation for Claims," the Contractor shall consider as a minimum the following potential schedule mitigation techniques: increase the number of shifts, begin overtime operations, work extra days including weekends and holidays, or supplement its construction plant and submit, as provided in this Section, a revised schedule with a proposed recovery plan, as may be deemed necessary to demonstrate the manner in which the agreed rate of progress shall be regained, all at no cost to the Department.~~

If the Delay cannot be mitigated, the Contractor shall promptly submit either a written request for an extension of the Contract Time pursuant to Section 105.19, "Notice of Intent/Potential Claim," and Section 105.20, "Administrative Remedy," or request approval of a late completion schedule and shall be liable for liquidated damages.

For an Inexcusable Delay or a Nonexcusable Delay, as those terms are identified in Section 109.11, "Compensation for Claims," the Contractor shall consider as a minimum the following potential schedule mitigation techniques: increase the number of shifts, begin overtime operations, work extra days including weekends and holidays, or supplement its construction plant and submit, as provided in this Section, a revised schedule with a proposed recovery plan, as may be deemed necessary to demonstrate the manner in which the agreed rate of progress shall be regained, all at no cost to the Department.

~~If the Delay cannot be mitigated, the Contractor shall promptly submit either a written request for an extension of the Contract Time pursuant to Section 105.19, "Notice of Potential Claim," and Section 105.20, "Administrative Remedy," or request approval of a late completion schedule and shall be liable for liquidated damages.~~

The revised schedule shall show Contract Time, Project completion date and all additional information necessary for the Project Manager to "Accept" the revised schedule. The Contractor's failure to provide a timely and Acceptable revised schedule waives any Claim the basis of which would have been documented by an Acceptable revised schedule. The Project Manager will provide the Contractor with a decision in writing within ~~ten (10)~~ five (5) Days of receiving the revised schedule. ~~The revised schedule shall become the current Accepted Baseline Schedule.~~

### 108.3.3.3 Schedule Revisions at Request of Department:

~~If it becomes apparent to the Department that the Contractor cannot meet the schedule, or that a noncritical item has become critical,~~ the Project Manager may request a schedule revision



and recovery plan from the Contractor. The Contractor shall, within five (5) Days of receipt of the request, provide a revised schedule. The Project Manager will provide the Contractor with a decision in writing within five (5) Days of receiving the revised schedule. The revised schedule shall become the current Accepted Baseline Schedule, showing Contract Time, Project completion date and all additional information necessary for the Project Manager to "Accept" the revised schedule. The Contractor's failure to provide a timely and Acceptable response waives any Claim the basis of which would have been documented by an Acceptable revised schedule. ~~The Project Manager will provide the Contractor with a decision in writing within ten (10) Days of receiving the revised schedule. The revised schedule shall become the current Accepted Baseline Schedule.~~

#### 108.3.3.4 Schedule Update and Revision Information

The Contractor's updated monthly and revised schedules shall conform to the requirements of Section 108.3.1 "Baseline Schedule" and shall show:

1. Actual start and finish dates of each activity;
2. Remaining duration of activities started but not yet completed;
3. Delays and changes resulting from the addition, deletion or revisions to activities due to the issuance of a Change Order, change to an activity duration, changes to relationship between activities or changes to the planned sequence of work or the method and manner of its performance; and
4. Narrative report describing;
  - a. Processes during the month;
  - b. Shifts in the critical activities from the previous update;
  - c. Sources of delay;
  - d. Weather days;  
~~Certification signed by the Contractor's Superintendent stating that the progress shown on the schedule update accurately represents Work completed through the date indicated;~~
  - e. Traffic switches;
  - f. Allocations of crews;
  - ~~g. Work completed the previous month;~~
  - ~~h. Potential problem areas;~~
  - ~~i. Work planned for the next update period; and~~
  - j. Changes made to the schedule.  
~~The Superintendent shall sign the narrative and provide certification statement stating that the progress shown on the schedule update accurately represents Work completed through the date indicated;~~
  - f.k.

#### 108.4 UNSATISFACTORY PROGRESS OF WORK

The Project Manager shall will issue a notice of unsatisfactory performance to the Contractor, and the Surety. The notice shall be sent by certified mail and identify the unsatisfactory performance.

The progress of the Work is deemed unsatisfactory when:

1. The dollars earned by the Contractor on the Project are 15% less than the estimated dollars earned, as shown on the current Accepted baseline progress schedule;
2. When the start of an activity on the critical path, as shown on the current Accepted progress schedule, has exceeded its late start date by seven (7) Days;
3. When an activity on the critical path, as shown on the current Accepted progress schedule, has exceeded its original duration by ten (10) or more Days; or,
4. When the Project Manager determines that the progress of work is unsatisfactory.

~~The Project Manager shall issue a notice of unsatisfactory performance to the Contractor by certified mail and identify the unsatisfactory performance.~~

When the progress of the Work is deemed unsatisfactory the Project Manager and the Contractor shall meet to address the schedule within five (5) Days. The Contractor shall provide a revised schedule with a narrative addressing Project progress compliance or anticipated liquidated damages. The Department's approval of a late completion schedule will not operate as a waiver of the Department's right to assess liquidated damages. Failure by the contractor to address the unsatisfactory progress ~~if a resolution cannot be determined within five (five (5)5) Days after the meeting, will result in the Project Manager will issuing a Notice of Apparent Default to the Contractor per Section 108.9 "Default of Contract", and Surety of unsatisfactory performance.~~

~~The Contractor shall bring progress into compliance in a time frame determined by the Project Manager, not to exceed 30 Days and at no additional cost to the Department. Failure to return the Project into compliance may result in any or all of the following:~~

- ~~1. Suspend or debar the Contractor in accordance with Section 102.3, "Suspension and Debarment";~~
- ~~2. Withhold Progress Payments in the amount of the projected liquidated damages and withhold 25% of Progress Payments pursuant to Section 109.8, "Progress Payments";~~
- ~~3. The Contractor being declared in default pursuant to Section 108.9, "Default of Contract";~~
- ~~4. Rejection of the Contractor's bids; and,~~
- ~~5. Other administrative actions that the Project Manager deems appropriate and in the best interest of the public and the Department.~~

## 108.5 CHARACTER OF WORKERS, METHODS, AND EQUIPMENT

### 108.5.1 Character of Workers

The Contractor shall provide the resources necessary to complete the Work as specified. The Contractor shall ensure workers have the experience and skills to perform assigned Work.

The Contractor shall remove employee(s) who performs the Work in an unskilled manner, is in eligible eligible to perform the Work, or who is intemperate or disorderly. The Contractor shall ~~allow~~ rehire these employees to return to the Project only with the Project Manager's written permission.

~~If the Contractor or its employee(s) fail to comply with these requirements the Project Manager may suspend the Work at no cost to The Department. Work for failure to remove any employee(s) or to furnish suitable and sufficient personnel necessary to perform the Work.~~

### 108.5.2 Methods and Equipment

~~The Contractor shall use Equipment of the size and mechanical condition to produce the Work. The Contractor shall use methods and equipment capable of performing the work specified in the Contract.~~ The Contractor shall ensure that the Equipment does not damage the Roadway, adjacent property or other Highways, Streets, or Roads.

The Contractor shall request permission of the Project Manager in writing to use methods or Equipment other than those specified in the Contract; The Contractor shall describe the proposed methods and Equipment to be used and the reasons for the change. The Contractor shall perform Work under in accordance with the original Basis of Payment and Contract Time. The Contractor shall discontinue use of alternate methods or Equipment when Work does not meet Contract requirements. The Contractor shall remove and replace unacceptable work or repair deficient Work at Contractor's expense no cost to The Department.

## 108.6 DETERMINATION AND EXTENSION OF CONTRACT TIME

The Department will provide the Contract Time in the Advertisement, in Working Days, Days, or Mandatory Completion date, Invitation for Bids and on the Bid Form. ~~If the Contract contains a Mandatory Completion Date, the Project must be Substantially Complete by that date.~~

~~For Working Day Projects, t~~The Project Manager will provide the Contractor with a weekly statement showing the Contract Time, the number of Working Days used, charged to the Contract for the preceding week, the accumulated Working Days charged, and the number of Working Days remaining to complete the Work. The Contractor shall have ~~three-seven (37)~~ three-seven (37) Days after receipt of the weekly statement to object in writing to the weekly statement, setting forth the specific dates and justifications for the objection. If the Project Manager finds that the Contractor's objection is valid, or if there is an error, then the Project Manager will issue corrected weekly statement(s). If the Project Manager determines that the objection is not valid the Project Manager will notify the Contractor in writing. If the Contractor continues to object to the weekly statement then the Contractor may file a Notice of Intent to ~~Potential Claim, file a written protest of Days charged.~~ Potential Claim. If the Contractor fails to timely object ~~file a written protest,~~ the weekly statement is deemed accepted by the Contractor. ~~,-~~

The Contractor is not entitled to a Partial Suspension, at its own request, n when it meets any of the conditions below apply:

1. ~~for~~ Projects with a Bar Graph Schedule
2. ~~for~~ Project's with a Mandatory Completion Date;
3. Projects that are Calendar Day;
4. ~~When during periods performing work on the Critical Path;~~
5. When the Contractor has not provided without proper justification and approval by the Project Manager has not approved the request;
6. ~~If the Work obstructs the Traveled Way; or~~
7. For issues for which the Contractor is responsible.  
~~of traffic control operations or when working on any critical path activities.~~

Partial suspension shall be lifted if the Contractor works on critical path activities and the Project Manager shall commence the Contract Time count.

~~Day count.~~

~~Quantity overruns in Contract Items that do not significantly change the character of the Work in accordance with Section 104.2 "Significant Changes in the Character of the Work", shall not result in an extension of Contract Time.~~ If completion of the Contract requires Extra Work that impacts the Critical Path, the Contractor shall provide the Department an updated progress schedule and narrative requesting additional Contract Time associated with the Extra Work. Upon adequate justification by the Contractor the Department will determine if any adjustment in Contract Time is warranted.

Any request for additional Contract Time shall be made in writing to the Project Manager. If the Project Manager rejects a time extension request, the Contractor may proceed in accordance with pursuant to Section 105.19 "Notice of Intent to -Potential-Claim."  
Section 105.20, "Administrative Remedy."  
~~pursuant Section 105.19 "Notice of Potential Claim."~~

~~If the Project Manager rejects a time extension request, the Contractor may proceed in accordance with Section 105.20, "Administrative Remedy."~~

~~When the Project Manager completes the final inspection in accordance with Section 109.10 "Project Closure", the daily time charge will stop on the date the Contractor completes all pay items, as determined by the Project Manager, or in accordance with Section 109.10.3 "Termination of Contract Time".~~

## 108.7 Reserved ~~FAILURE TO COMPLETE ON TIME~~

~~Liquidated damages shall be assessed for each Day the Work remains incomplete after Contract Time has expired, including approved time extensions.~~

~~The Department may suspend time charges on the Contract when the Project is Substantially Complete.~~

~~For Work that remains incomplete after the Contract Time expires, the Department shall deduct an amount (in accordance with Section 108.8, "Liquidated Damages") from dollars due the Contractor, not as a penalty but as liquidated damages.~~

~~The Department does not waive its rights under the Contract by allowing the Contractor to finish the Work after the expiration of Contract Time, including approved extensions.~~

### 108.8 LIQUIDATED DAMAGES

The Department is entitled to assess liquidated damages for failure of the Contractor to complete the Work within the Contract Time. A daily charge will be made against the Contractor not as a penalty, but as liquidated damages, for each Day for any Work that remains uncompleted after the lapse of Contract Time.

In suits involving the assessment or recovery of liquidated damages, the reasonableness of daily charges will be presumed and the amount assessed will be in addition to every other remedy enforceable at law, in equity, by statute, or under the Contract.

The Department does not waive its rights to assess liquidated damages under the Contract by allowing the Contractor to finish the Work after the expiration of Contract Time.

~~Time is an essential element of the Contract, and it is important that the Contractor pursue timely completion of the Work. The Contractor shall complete the Work within the Contract Time. The Department's Contract administrative costs, including engineering, inspection, and supervision, will be increased as the time to complete the Work increases. The public is impacted and inconvenienced when a Project is incomplete and not available for use.~~

The Contractor agrees that the following schedule of liquidated damages, unless otherwise specified in the Contract, represents an amount sufficient to cover estimated average daily Departmental costs, ~~the reasonable projected value of inconvenience and monetary damage to the public and the Department~~ if the Contractor does not complete the Project within the Contract Time and does not operate as a penalty to the Contractor:

Schedule of Liquidated Damages	
Total Original Contract Amount (\$)	Charge (\$) per Day
≤100,000	500
>100,000–500,00	1,000
>500,000–1,000,000	1,500
>1,000,000–2,000,000	2,000
>2,000,000–4,000,000	2,500
>4,000,000–7,000,000	3,000
>7,000,000–10,000,000	4,000
>10,000,000	5,000

The Department will deduct liquidated damages from the next Progress Payment due to the Contractor after Contract Time expires and will continue to assess liquidated damages each Progress Payment until the determination of Substantial Completion. If the Department directs Extra Work after Substantial Completion, the Department will rescind the determination of Substantial Completion and then assess Contract Time in accordance with Section 104.2 "Extra Work". ~~shall withhold payment under the Contract and may seek performance from the Contractor's Surety to cover the liquidated damages. The Department shall continue to assess~~

~~liquidated damages until Physical Completion in accordance with Section 109.10 "Project Closure." When the Project Manager issues the notice of completion and final Acceptance, further assessment of liquidated damages will stop. If the amount of Liquidated Damages meets or exceeds the monies due to the Contractor for that Progress Payment then the Department will remaining dollar amount of Work remaining on the Contract seek the Department shall cease Progress Payments. The Contractor remains contractually obligated to complete the Work remaining on the Project. The Contractor shall reimbursement the Department for any Liquidated Damages exceeding the dollar amount withheld from the Contractor, within 30 Days of Physical Completion.~~

~~If the amount of Liquidated Damages meets or exceeds the remaining dollar amount of Work remaining on the Contract the Department shall cease Progress Payments. The Contractor remains contractually obligated to complete the Work remaining on the Project. The Contractor shall reimburse the Department for any Liquidated Damages exceeding the dollar amount withheld from the Contractor within 30 Days of Physical Completion.~~

~~If the Contractor has been granted Substantial Completion, but has not satisfied the requirements of Section 109.10 "Project Closure" tThe Department reserves the right to continue to assess liquidated damages until Physical Completion. Physical Completion in accordance with Section 109.10 "Project Closure." When the Project Manager issues the notice of completion and final Acceptance, Upon the completion of steps I through VII of Project Closure the ADE-Construction shall provide a written determination of Physical Completion to the Contractor which stops further assessment of liquidated damages will stop.~~

### 108.9 DEFAULT OF CONTRACT

The Department may declare the Contractor in default of the Contract if the Contractor:

1. Fails to perform the Work with sufficient resources (supervision, workers, Equipment, or Materials) to assure the completion of the Work;
2. Performs the Work unsuitably, or neglects or refuses to remove Materials or to correct rejected Work;
3. Fails to begin the Work within the time specified in the Notice to Proceed;
4. Discontinues the Work;
5. Fails to resume discontinued Work after the Department issues a request to resume Work;
6. Becomes insolvent or is declared bankrupt, or files for reorganization under the bankruptcy code, or commits any act of bankruptcy or insolvency, either voluntarily or involuntarily;
7. Allows a final judgment, in a suit filed in connection with this Contract, to stand unsatisfied for 30 Days;
8. Makes an assignment, in connection with the Contract, for the benefit of its creditors;
9. Fails to carry on the Work in an Acceptable manner in accordance with the Contract;
10. Fails to comply with Contract requirements or willfully violates any term or condition of the Contract;
11. Fails to perform the Work or maintain the Project in compliance with Federal and New Mexico Occupational Health and Safety laws and regulations;
12. Fails to observe or comply with Federal and New Mexico laws and regulations, local laws and ordinances,
13. Is debarred or suspended in accordance with the Section 102.3, "Suspension and Debarment", or is suspended or debarred by any federal agency;
14. Communicates that the Contractor may not perform under the Contract; ~~or;~~
15. Fails to promptly pay a Subcontractor or Supplier for undisputed Accepted Work in accordance with Section 108.1 "Subcontracting"; ~~or;~~
15. ~~Fails to comply with the direction of the Project Manager.~~

The complete default process is sequential and consists of the following steps:

1. Notice of Apparent Default;
2. Declaration of Default and Demand for Surety to Complete the Work; and,
3. Department Completion of the Work;

#### **108.9.1 Notice of Apparent Default**

The Project Manager will provide written notice to the Contractor and the Contractor's Surety ~~of Contractor's specifying the condition(s) in Section 108.9 "Default of Contract" delay, neglect, apparent default, or anticipatory repudiation. This notice will specify the Contract provisions that the Contractor violated and the corrective measures to be taken by the Contractor. When reasonable grounds for insecurity arise with respect to the performance of the Contract by the Contractor, the Project Manager may, in writing, demand adequate assurance of due performance and until such assurance is received may suspend any Department performance.~~ If the Contractor or Surety does not proceed with the corrective measures within ten (10) Days ~~of the date written notice, or when demanded fails to provide adequate assurance of due performance, after receiving the notice,~~ the Department, upon written notification from the Project Manager, has full power and authority, without violating the Contract, to declare the Contractor in default.

#### **108.9.2 Declaration of Default and Demand for Surety to Complete the Work**

The written declaration of default is separate from the notice of apparent default and will be addressed to both the Contractor and the Surety. The declaration of default is issued after time for the Contract to take corrective measures expires in Section 108.9.1 "Notice of Apparent Default". The declaration of default, to remove ~~se~~ the corrective measures from the Contractor, and will to demand compliance by the Surety of the terms, conditions, and obligations contained in the Performance Bond.

When reasonable grounds for insecurity arise with respect to the performance of the Contract by the Contractor, the Project Manager may, in writing, demand adequate assurance of due performance and until such assurance is received may suspend any Department performance.

If the Department determines that the Contractor is in default the Surety shall complete the Work at its own expense pursuant to the Contract and receive the balance of any funds ~~owed~~ owing to the Contractor.

#### **108.9.3 Department Completion of the Work**

If the Surety fails to complete the Work, the Department will ~~may complete the Project with its forces or may obtain another Contractor to~~ complete the Work. The Department will deduct costs and charges that the Department incurs as a result of the default and the cost of completing the Work from Contract funds due to or which may become due to the defaulting Contractor or Surety. If the total costs for completing the Work exceeds the amount that would have been payable under the Contract, the defaulting Contractor and the Surety shall be jointly and severally liable for the excess costs.

If a default of the Contractor is later determined to be without cause, the default of the Contractor will revert to a Section 108.10 "Termination of Contract; No Fault of Contractor," ~~in the best interest of the public, and the Contractor may not recover and is not entitled to recover damages other than those allowed by that section~~ 108.10 "Termination of Contract; No Fault of Contractor".

When reasonable grounds for insecurity arise with respect to the performance of the Contract by the Contractor, or when demanded fails to provide adequate assurance of due performance the Project Manager may, in writing, demand adequate assurance of due performance and until such assurance is received may suspend any Department performance.

### **108.10 TERMINATION OF CONTRACT; NO FAULT OF CONTRACTOR**

The Department may terminate, by written notice and order, all or part of the Contract, after

determining the following:

1. That the Contractor is prevented from proceeding with or completing the Work as originally contracted for reasons beyond the control of the Contractor; or
2. That termination would be in the public interest.

Reasons for termination may include, but are not limited to, the following:

1. Executive orders of the President of the United States;
- ~~2. Executive orders of the Governor of the State of New Mexico relating to war or national defense;~~
- ~~3. An national~~ emergency that creates a serious shortage of Materials, as deemed by the Secretary;
- ~~4.~~ Orders from duly constituted authorities relating to energy conservation;
- ~~5.~~ Restraining orders or injunctions obtained by third party citizen actions resulting from national or local environmental protection laws or where the issuance of the order or injunction is primarily caused by acts or omissions of persons or agencies other than the Contractor; or,
6. To correct any material errors or omissions in the Plans or to correct any discrepancy or contradictions within the Contract discovered after execution of the Contract by both parties, and which could not have been discovered through the exercise of Pre-Bid Due Diligence, the failure of which to correct is likely to lead to Contractor Delay, a Claim for additional time, or a Claim for compensation which may exceed the costs recoverable under this Section.

#### **108.10.1 Submittals and Procedures**

When the Department issues a notice and order for a Contract termination effective on a certain date the Department will pay:

1. ~~it will pay F~~ for the actual number of units or items of Work completed at the Bid Item Unit Price;
2. ~~or as mutually agreed F~~ for items ~~of of~~ Work started but not partially completed or not started as negotiated and mutually agreed. Negotiated amount shall not exceed the Bid Item Unit Price;  
~~For invoices to restock or for invoices for Material on hand for Work not yet started. Invoices shall be provided by the Contractor documenting both costs and Department will make a determination on how to proceed, including delivery of the Material if needed. For the purposes of this section, materials on hand are M materials that are ordered and have been manufactured before the date notice and order of termination is issued.~~
3. ~~For pay items eliminated by the termination, the Department will pay for items eliminated in their entirety in accordance with Section 109.7, "Eliminated Items."~~

~~The Department may obtain from the Contractor, at a negotiated cost, Acceptable unused Materials obtained by the Contractor for but not incorporated into the Work. The Contractor shall deliver this Material to a prescribed location or dispose of it as mutually agreed.~~

After the Contractor receives the termination ~~a~~ notice and order from the Department, and

~~no agreement or only a partial agreement is reached about the termination costs, then~~ the Contractor shall submit any Claim for ~~additional~~ damages or costs within 30 Days of the date of the notice and order of Contractor's termination or shall waive such Claim. The Contractor shall submit the Claim in accordance with ~~Section 105.19 "Notice of Potential Claim," and Sections 105.19 "Notice of Intent to Claim" and~~ 105.20 "Administrative Remedy." The Claim shall be limited to the following cost items:

1. Actual and direct bidding and Project investigative costs which are separate and excluded from home office overhead costs;
2. Actual and direct mobilization costs, mobilization paid by the Department exceeding actual and direct mobilization costs may be subject to reimbursement by the Contractor;
3. If Work is stopped in advance of the termination date, idle Equipment time using standby-time rental rates at 50% of the Blue Book Equipment rental rate, without the cost of operating personnel;
- ~~4. If Work is stopped in advance of the termination date, idle labor costs; if Work is stopped in advance of termination date;~~
- ~~2. Actual and direct Mobilization costs;~~
- ~~3. Bidding and Project investigative costs;~~
5. Unpaid Supplier costs;
4. Accounting charges involved in Claim preparation;
- ~~5. Unpaid Supplier costs;~~
- ~~6. Idle labor costs if Work is stopped in advance of termination date;~~
7. Written and executed agreements ~~Guaranteed payments~~ for private land usage ~~as part of original Contract~~; and
8. An additional ten percent (10%) of the total of the above items ~~24, 32, 45,~~ and ~~56~~ to cover home office overhead and salaried labor expenses.

The Contractor shall provide those records required by Section 105.20.1, "District Level," to the Department to determine the validity and amount of each Claim item. The Contractor shall not be entitled to recover anticipated loss of profits or any category of damages excluded pursuant to Section 109.11, "Compensation for Claims."

Full or partial Contract termination does not relieve the Contractor of its contractual responsibilities for the completed Work, nor will it relieve the Surety of its obligation for Claims arising out of the completed Work.





## 109.1 MEASUREMENT OF QUANTITY

~~Work performed under the Contract shall be subject to the definitions of quantity in this Section. The Department will measure Pay Items in accordance with the Pay Unit listed in the Contract. Pay Units listed in the respective "Basis of Payment" provisions at the end of each Section within Divisions 200 through 900.~~

**109.1.1 Pay Unit Terminology**

~~The Department cautions the Bidder to carefully read the Bid Package to determine units of measurement deviating from the following standard terms. If the Bid Package has a special reference to terms for measurement, the Bid Package will supersede the following terms and will control.~~ Otherwise, the following terminology controls:

1. The distance between stations is 100 feet, measured longitudinally;
2. Longitudinal measurements are along and parallel to surfaces, not horizontal. For pay items measured by the square yard, the Department will make no deduction for fixtures in the Work with areas less than one (1) square yard;
  - a. Transverse measurements for areas of Base Course and pavements are the neat line dimensions shown on the Plans based on the average width of the installed Material along the centerline of the Roadway;
  - b. Structures are measured according to the neat lines shown on the Plans or as provided by the Department;
  - c. For pay items measured by the foot, measurements are parallel to the base or foundation;
3. The volume of excavation is calculated by using the average end area method at 25 foot intervals, ~~the prism modular method,~~ or other Project Manager approved methods;
4. A ton equals 2,000 lb; ~~a "barrel" equals 376 lb of cement;~~ a "sack" equals 94 lb of cement;
5. Timber and lumber (permanently incorporated in the Project) is measured by the foot, and measured on nominal widths and thickness and the length of each piece. The Department will Accept lumber and timber conforming to the American Lumber Standards for rough and dressed sizes, as specified in the Contract;
6. Standard manufactured items, identified by unit weight or section dimensions, are measured using nominal weights or dimensions. The Department will Accept manufacturing tolerances established by the industries involved, unless otherwise stated in the Contract.
7. Asphalt Materials are measured by the ton or as designated in the Contract. The weight is based on net certified scale weights or weights calculated from certified volumes. The certified weights or volumes are subject to inspection and adjustment at the point of delivery.
- ~~8. Portland cement is measured by the ton, barrel, or sack in accordance with the Bid Package. The Department will use the net certified scale weight of portland cement as the basis of measurement, subject to inspection and adjustment at the point of delivery;~~
- ~~9-8.~~ Materials that are measured by weight shall be measured and proportioned by weight using certified and accurate scales that are within tolerances established by state law;
  - a. The Contractor shall provide scales or use commercial scales;
  - b. Scales shall be certified and sealed at least once every 12 months or each time the scales are relocated, or as directed by the Project Manager;
  - c. Weighmasters (including Deputy Weighmasters), provided by the Contractor and certified by the NMDA, shall operate the scales. The certified weighmasters shall perform their duties in accordance with the regulations of the New Mexico Department of Agriculture statutes and regulations concerning the same.

~~Division of Standards and Consumers Services.—~~The cost of the certified weighmasters, weighmasters' scales, scale tickets, scale house, and verification of the scale's accuracy is Incidental to the weighed Material, included in the Bid Item Price for the weighed Material;

- d. Empty vehicles used to haul Material paid by weight shall be weighed at least twice daily, at a minimum once prior to initial Material delivery and once prior to final Material delivery. The Contractor shall ensure vehicles bear legible identification marks. On a daily basis the Contractor shall provide the Project Manager with a written list of delivery vehicles showing identification marks, number of axles, the distance between extreme axles and daily tare weights. The Contractor shall update this information before delivery of the Material and when the Contractor changes vehicles, combination vehicles, or axle length relationships;
- e. The Department may, may convert weight to volume, or volume to weight, for payment purposes. The Project Manager will determine the factor(s) for conversion using an acceptable method; ~~and obtain the Contractor's agreement before conversion;~~
- f. The operator of each weighed vehicle shall obtain a scale ticket (certificate of correct weight) from the weighmaster and deliver the ticket to the Project Manager or designee at the point of delivery. The following information shall be included on the scale ticket:
  - i. Project number;
  - ii. Date;
  - iii. Ticket number;
  - iv. Truck / Trailer unit number;
  - v. Gross weight;
  - vi. Tare weight;
  - vii. Net weight;
  - viii. Material type;
  - ix. Certified weighmaster's name;
  - x. Signature of weighmaster; and
  - xi. Whether the driver was on or off the scale during weighing.

## 109.2 APPROVED EQUIPMENT RENTAL RATES

~~For machinery or Equipment owned or leased directly by the Contractor or its Subcontractor at any tier, the Contractor will be paid Equipment rental rates shall be paid as designated in the Contract, shown in the Blue Book in effect at Advertisement date. The Department will not compensate the Contractor or its Subcontractors at any tier for owned or leased small tools. Small tools are defined as any tool which would be valued less than \$2000.00 if purchased new.~~

~~The rates in the Rental Rate Blue Book reflect current ownership, overhead and operation costs, based on the average hours of operation per year. The rates do not include operating personnel. The ownership cost represents the total cost of depreciation, interest, insurance, taxes, storage, etc., calculated to an hourly rate. Estimated operating cost per hour includes fuel, lubricants, tires, and other operating expendables, e.g. the percentage of mechanics' wages chargeable to preventive and field maintenance.~~

~~The current Blue Book applies to machinery or special Equipment (other than small tools) and transportation authorized by the Project Manager.~~

~~The Blue Book rates shall be used for the actual time the Equipment is in operation calculated by using the Federal Highway Administration rate. The FHWA rate is equal to the monthly rate divided by 176 (hours/month) plus the hourly operating cost. The FHWA rate must also be adjusted for age and geographic region. Therefore, the "FHWA" rate in the Blue Book~~

represents monthly rate/176 x age adjustments x regional adjustments plus hourly operating cost.—The Department may add a maximum of ~~will add~~ 10~~5~~% only to the Equipment rental rates. The Department will apply Equipment rental rates pursuant to the Blue Book and in accordance with the following criteria:

1. The manufacturer's identification plates on the Equipment will be used to identify the Equipment and its capacities. If the Equipment does not have these plates, the Contractor shall provide written statements certifying the Equipment identification and capacity as shown on the Contractor's Equipment inventory. The Contractor shall submit the type, capacity, and horsepower of each piece of Equipment, to correlate with the Blue Book schedule. The Blue Book reflects the maximum rates for Equipment of modern design and in good-working condition;
2. The Blue Book lists common pieces of Equipment. If the Blue Book does not list a piece of Equipment the use of the Blue Book rental rate for a comparable piece of Equipment shall be used as approved by the Project Manager. If no comparable piece of Equipment is identified in the Blue Book the Project Manager may negotiate a rental rate with the Contractor at a fair market rental rate;
3. If a piece of Equipment, not available on the Project, requires hauling onto the Project, the Contractor shall include the actual transportation cost (in and out). The Department will pay the transportation cost for each piece of Equipment once. Under unusual circumstances the Contractor may provide to the Department written justification for additional transportation costs;
4. The Contractor shall only be paid the operating rate for those hours the Equipment is actually in use. A standby rate for Equipment required to be at the Work site but not operating may be paid by the Department if agreed to in writing in advance by the Project Manager in which case the Department will pay for standby Equipment using standby-time rental rates at 50% of the Blue Book Equipment rental rate, without the cost of operating personnel.
5. The regional difference percentage, as described in the Blue Book does not apply. However, the factors in the Rate Adjustment Tables of the Blue Book do apply;
6. Overtime, as described in Blue Book does not apply. The Department will pay for Equipment used on Extra Work at the regular hourly rate in accordance with the rate provided in the Blue Book.

### 109.3 SCOPE OF PAYMENT

The Contractor shall receive and accept compensation in accordance with the Bid for performing the Work in an Acceptable manner. The compensation associated with the Bid shall include the risks, losses, damages and expenses that, when considering the nature of the Work and having exercised Pre-Bid Due Diligence, should have been reasonably expected by the Contractor in prosecuting the Work.

The Contractor shall receive and accept compensation provided for in the Contract as full payment for furnishing all Materials and for performing all Work under the Contract in a complete and acceptable manner subject to the provisions of Section 107.26 "No Waiver of Legal Rights". The Contractor's Bid Item Unit Price is presumed to be based on its exercise of Pre-Bid Due Diligence and considers all risk, loss, damage, or expense of whatever character arising out of the nature of the Work.

The Department will pay for the approved actual quantities of Material incorporated into the Work unless otherwise provided in the Contract. Method of Measurement.

The Department will only pay for Pay Items listed in the Contract in accordance with the "Basis of Payment" provisions. Items not included in the "Basis of Payment" provisions shall be considered Incidental, unless otherwise indicated in the Contract. The Department will not pay separately for Work Incidental to the completion of a Pay Item, or pay for the Incidental Work under another Pay Item; except as provided in Section 104.6, "Rights in and Use of Materials Found on the Work."

Payment for any Pay Item shall be full compensation for all Work necessary to complete the Pay Item.

When a Contract Item Specification references another Specification(s) to complete the Work, Pay Items referenced in that ~~other~~ Specification, the Pay Items referenced ~~or~~ will not be measured or paid for separately. For example, if the Specification for Contract item "A" refers to Specification "B" the Pay Items in Specification "B" will not be paid for, unless specifically stated in the Contract. The Payment for Contract item "A" will be full compensation for Work as described in the Specification for Contract item "A".

The Contractor shall not receive payment for corrective Work. Corrective work is Work required by the Department to make previously unacceptable Work Acceptable.

The Department may Accept portions of the Work at an adjusted price in accordance with the relevant Pay Adjustment provisions in the Contract. The adjusted price only applies to the specific Accepted portion of Work.

#### **109.4 COMPENSATION FOR OVERRUN / UNDERRUN QUANTITIES**

When the Project Manager determines the Work is Acceptable, t~~he~~ Department will pay the Contractor for the actual quantities of Material in accordance with Basis of Payment s-used in the Work Section or Change Order and Accepted by the Project Manager. If the Accepted quantities of Work vary from the quantities in the Contract, the Contractor shall accept, as payment in full, payment based on the Bid Item Unit Price for the Accepted quantity.

#### **109.5 PAYMENT FOR ~~CHANGES, DIFFERING SITE CONDITIONS, AND~~ EXTRA WORK**

The Department will pay the Contractor for Extra Work ~~and Work~~ resulting from significant changes in the character of the Work, ~~or~~ differing site conditions or Department ordered Work in accordance with Section 104.2, "Significant Changes in the Character of Work," Section 104.3, "Differing Site Conditions," or Section 104.4, "Extra Work," and by Change Order, based on the following order of priority for payment:

1. Bid Item Unit Prices;
2. Negotiated unit prices;
3. Negotiated Lump sum; or
4. Force Account.

For Items of Work performed by the Contractor, the negotiated unit price or negotiated Lump sum price shall include all costs associated with the Work. If Subcontractors perform Work as Extra Work under items 2, 3 or 4, the Department ~~may~~shall only compensate the Contractor up to an additional ten percent (10%) of the total actual cost of the subcontracted Work less than or equal to \$10,000.00 for indirect and administrative costs. If the total cost of the subcontracted Work is greater than \$10,000.00 then the Department shall only compensate the Contractor \$1,000.00 plus 5% of the excess over \$10,000.00.

#### **109.6 FORCE ACCOUNT**

When the order of priority for payment is exhausted and~~if~~ Extra Work must be paid by Force Account, the Department will pay the Contractor in accordance with the following Sections.

If the total cost of the s~~ubcontracted~~ers perform Work by Force Account is less than or equal to \$10,000.00, then the Department shall only compensate the Contractor an additional ten percent (10%) of the total cost of the subcontracted Work for indirect and administrative costs. If the total cost of the subcontracted Work is greater than \$10,000.00 then the Department shall only compensate the Contractor \$1,000.00 plus 5% of the excess over \$10,000.00.

~~If the Contractor submits a timely notice of potential Claim in accordance with Section 105.19, "Notice of Potential Claim," the Project Manager may, without admitting liability for the Claim, direct the Contractor to keep a complete and accurate account, in detail, of the cost of doing the Work on a Force Account basis. Failure to maintain records on a Force Account basis when so directed by the Project Manager shall waive any associated Claim by the Contractor.~~

#### 109.6.1 Labor

The Department will pay ~~the Contractor for labor,~~ the wage rate for Force Account Work actually paid by the Contractor during the pay period ending before ~~the issuance of the Change Order authorizing~~ the Force Account Work commences. Such payment shall include Work by supervisors in direct charge of the Force Account Work. If there is no wage rate for a labor classification needed to perform the type of Work required, the Department and Contractor will negotiate and document a new wage rate before beginning the Force Account Work.

Labor shall also include, and the Department will reimburse for, the following actual reasonable costs paid to (or on behalf of) workers:

1. Subsistence and travel allowances that do not exceed the New Mexico Per Diem and Mileage Act or other Department approved per diem rates;
2. Health and welfare benefits;
3. Retirement~~Pension~~ fund benefits;
- ~~3-4. Vacation benefits; and~~
- ~~4-5.~~ Other benefits required by collective bargaining agreements or other employment Contract, applicable to the class of labor.

The Department will pay an amount equal to 3020 percent of the sum of the direct labor costs and fringe benefits. This payment is in compensation in the following increments: for field office overhead- (105 percent), home office overhead (10 percent), and profit (105 percent), additional 35% of the labor cost for overhead and profit.

#### 109.6.2 Bond, Insurance, and Tax

The Department will pay the Contractor either:

##### Option 1

The actual cost of the following, plus six percent (6%):

1. Property damage, liability, and worker's compensation insurance premiums;
2. Unemployment insurance premiums or contributions;
3. Applicable payroll taxes (not including gross receipts taxes); and
4. Social Security taxes.

To recover actual costs, the Contractor shall provide actual invoice costs ~~satisfactory evidence of the rate(s) of the rate(s)~~ it has paid for bonds, insurance, and taxes.

##### Option 2

In lieu of supplying the above evidence and recovering actual costs:

1. The Contractor shall receive payment at a rate representing 30% of the labor costs for labor burden; and
2. The Contractor shall also receive payment for ~~one percent (1%)~~ the additional costs to of the total Force Account amount for the Contract Bonds supported by invoice(s).

#### 109.6.3 Materials

The Department will pay the Contractor the actual cost of Materials Accepted by the Project Manager and incorporated into the Force Account Work, including transportation charges paid by the Contractor (exclusive of Equipment rentals), plus 15% of the Material cost.

#### 109.6.4 Equipment

For ~~special machinery or special~~ Equipment (other than small tools as defined by the Blue Book), including fuel and lubricants and transportation costs, the Department will pay rental rates as determined in accordance with Section 109.2, "Approved Equipment Rental Rates," unless otherwise agreed in writing.

#### 109.6.5 Miscellaneous

The Department will not pay for other costs not specifically addressed in Section 109.6 "Force Account."

#### 109.6.6 Documentation

The Project Manager will use the Department approved forms to track Force Account costs. The Contractor shall compare and reconcile records with the Project Manager daily, or as otherwise directed by the Project Manager, to determine the amount of Force Account Work completed by the Contractor, ~~as authorized by the Force Account Change Order.~~

#### 109.6.7 Statements

The Department will not ~~pay for Force Account Work until the~~ pay for Force Account Work until the Department verifies that the Force Account Labor, Material and Equipment forms are supported by the documents below. ~~pay for Work performed by Force Account until the~~ Contractor furnishes the Project Manager with itemized statements of the cost of the Force Account Work detailed as follows:

1. Name, classification, date, daily hours, total hours, rate, and extension for each laborer and foreman;
2. Attachments verifying eEquipment brand, year of manufacture, ~~attachments,~~ operating Specifications, dates of use, daily hours, total hours, current Blue Book rental rate, and rate of applicable attachment for each piece of Equipment;
3. Quantities of Materials and prices; and,
4. Transportation of Materials.

Statements shall be supported by receipted invoices for all Materials used and for transportation charges. For in-stock Materials or Materials furnished by the Contractor, the Contractor shall provide an affidavit certifying that such Materials were taken from the Contractor's stock, that the quantity claimed was actually used, and that the price and transportation claimed represent the actual cost to the Contractor. This requirement does not waive the Contractor's responsibility to provide Certificates of Compliance per 106.4 "Certificates of Compliance".

The total payment made as provided above shall constitute full compensation for Force Account Work authorized in writing by the Department.

#### 109.7 ELIMINATED ITEMS

Should Pay Items contained in the Contract become unnecessary for the reasonable completion of the Work, the Project Manager may direct the Contractor, in writing, to eliminate Pay Items from the Contract. This written notification will not invalidate the Contract. The Department will reimburse the Contractor for actual Work completed before the written notification at Bid Item Unit Price.

The total cost of return freight, handling and restocking for Materials associated with that eliminated Work will then be increased by 15%. If Materials cannot be returned, the Department will pay for said Materials at Contractor's actual cost and take ownership.

#### 109.8 PROGRESS PAYMENTS

The Contractor shall not construe any Progress Payment to be an Acceptance of any defective Work or improper Material.

The Acceptance of Work for the purposes of Progress Payments does not constitute Final Acceptance of the Work.

The Department will make Progress Payments ~~at least~~ once each month, ~~as the Work progresses.~~ The Project Manager will prepare and post Progress Payments based on estimates of the value of the Work performed and Materials complete-in-place, and in accordance with Section 109.9, "Stockpile" and minus price reductions within five (5) Days of the estimate cut-off date.

The Department ~~will include in the~~ will include monies associated with an accepted and fully executed change Order when the Work is Accepted with the next Progress Payments, ~~monies associated with accepted fully executed Change Orders, this shall be included within the next regularly scheduled Progress Payment or within 60 Days.~~

The Project Manager shall process a Progress Payment on a monthly basis regardless of the dollar amount, including zero dollar (\$0.00), owed the Contractor. ~~The Department will not make a payment when the total value of the Work completed since the last Progress Payment is less than \$1,000.00 unless the Contractor requests such payment in writing and the Project Manager approves such payment.~~

Whole or Partial Suspension 105:

~~1.2: The Department has the authority 's ability to withhold Progress Payments in part or in their entirety as part of a suspension, suspension as authorized by this Section, supplements the Department's ability, pursuant to Section 109.8, "Progress Payments," until the Contractor complies with the Contract.~~

#### **109.8.1 Retainage**

The Department will make Progress Payments to the Contractor in accordance with Section 109.8 "Progress Payments". The Department will pay 100% of the value of Work performed and Materials complete in place in accordance with Section 109.9, "Stockpile", until the sum of the Progress Payments made equals 95% of the Total Original Contract Amount as amended by Change Order. The Department will continue to make additional Progress Payments in the sum of zero dollars (\$0.00) after the Total Original Contract Amount as amended by Change Order equals 95% and until the Contractor completes the Work in an acceptable manner. The five percent (5%) retained when the Progress Payments equals 95% of the Total Original Contract Amount as amended by Change Order is the amount considered necessary to protect the interests of the public and the Department; those interests include ensuring that the Work is Acceptable, on schedule, in compliance with the Contract, and that the Work reaches Substantial Completion and final Acceptance. Subject to other deductions the amount retained shall be provided to the Contractor in accordance with Section 109.10 "Project Closure."

#### **109.8.2 Non-Conformance**

If the Contractor fails to comply with all material terms and conditions of the Contract the Department ~~may shall~~ withhold an additional 25% as a Non-Conformance from each Progress Payment and subsequent Progress Payments in addition to Retainage until the Contractor fully complies with the Contract. Release of Non-Conformance withholdings shall be processed at the next scheduled Progress Payment after the resolution of the Non-Conformance.

Nothing in this section prevents the Department from withholding application and certification for payment because of the following: unsatisfactory job progress, defective construction not remedied, disputed Work, third party Claims filed or reasonable evidence that a Claim will be filed, failure of the Contractor to make timely or prompt payments for labor, Equipment, and Materials, damage to the Department, reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract, or for Retainage.



The Contractor is not entitled to late payment charges, including late payment charges pursuant to NMSA 1978, § 13-1-158, associated with any payment retained under this Section.

~~The Contractor shall submit an updated schedule monthly by the Progress Payment cut-off date. Failure by the Contractor is a Non-Conformance and 25% of the Progress Payment shall be withheld.~~

#### **109.8.2.1 Automatic Non-Conformance**

~~These items do not follow the Potential Non-Conformance process below. The failure to comply will automatically result in the issuance of a Non-Conformance and withholding of an additional 25% as a Non-Conformance from each Progress Payment. The following items shall be provided in the timeframes in their respective section:~~

- ~~1. The Certificate of Compliance per 106.4 "Certificates of Compliance" for Materials that are required to be Buy America compliant per Section 106.12 "Buy America Requirements" - provide the Certificate of Compliance per 106.4 "Certificates of Compliance";~~
- ~~2. Schedule submittals within the timeframes in Subsection 108.3 "Schedule";  
Pre-Con Submittals within the timeframe in Subsection 108.2.2 "Pre-Construction Conference";~~
- ~~3. Prime Contractor's certified payrolls complete submittal within the timeframe in the "Federal Requirements" Notice to Contractors; and,  
The Contractor's prompt payment to its Subcontractor for undisputed Accepted Work.~~
- ~~4.~~

#### **109.8.2.2 Potential Non-Conformance**

~~For all other terms of the Contract, that the Contractor fails to comply with the Department will issue a Notice of Potential Non-Conformance. The Notice of Potential Non-Conformance will be issued on the current Department form and the Contractor shall have five (5) Days after the Progress Payment cutoff date to resolve the issues listed on the form.~~

~~If the Contractor resolves all issues on the Notice of Potential Non-Conformance within five Days after the Progress Payment cutoff date then no action to withhold the 25% Non-Conformance amount is taken by the Department. If the Contractor does not resolve each issue on the Notice of Potential Non-Conformance within five Days after the Progress Payment cutoff date then the Department will withhold an additional 25% as a Non-Conformance from each Progress Payment and subsequent Progress Payments in addition to Retainage until the Contractor fully complies with the Contract.~~

~~For Safety Items the Department will include a timeframe to resolve the issue in the Notice of Potential Non-Conformance - that may be other than five (5) Days after the Progress Payment cutoff date. If the Contractor fails resolve the safety issue in the Notice of Potential Non-Conformance in timeframe then the Department will withhold an additional 25% as a Non-Conformance from each Progress Payment and subsequent Progress Payments in addition to Retainage until the Contractor fully complies with the Contract.~~

### **109.9 STOCKPILE**

~~Only items identified in the Notice to Contractors titled "Stockpile" are eligible for Stockpile payment.~~

~~Unless otherwise specified in the Contract, it is the policy of the Department and the intent of this Contract to provide payment for Work for Items that have been Accepted and placed on the Project. However, upon adequate written justification provided from the Contractor seeking an exemption to this policy, the Project Manager may approve partial (stockpile) payment for the following Items not yet incorporated and Accepted into the Work and stored in a manner Accepted by the Project Manager.~~

- ~~1. Bid Items Pre-fabricated by a Supplier.~~

~~Unless otherwise specified in the Contract, the Project Manager shall not approve partial (stockpile) payment for the following Items or Materials not yet incorporated and Accepted into the Work:~~

- ~~1. Items Pre-fabricated by the Contractor or Subcontractor unless otherwise specified in the Contract;~~
- ~~2. Items or Materials associated with the typical section e.g. Aggregates, Cement, Asphalt Binder, Lime etc.;~~
- ~~3. Items associated with SWPPP;~~
- ~~4. Items associated with Signs; and,~~
- ~~5. Any Item or Material stored off the Project.~~

#### 109.9.1 Stockpile Payment

After measurement, partial (stockpile) payments to the Contractor may be made for Items on hand not to exceed 50% of the Bid Item price under the following conditions:

1. The Items will be incorporated in the Work;
2. The Items are delivered to the Project or to a storage place approved by the Project Manager;
- ~~3. The delivered Items meet the requirements of the Contract, including Certificates of Compliance per Section 106.4 "Certificates of Compliance"; and,~~
- ~~3. The Items are purchased from a Supplier or Fabricator and are not produced by the Contractor or a Subcontractor unless otherwise specified in the Contract;~~
- ~~4. The Contractor submits paid invoices, certified by the Supplier or Fabricator, to the Project Manager; and~~
- ~~4. Unless otherwise specified in the Contract partial (stockpile) payments for Items on hand shall not exceed 50% the Bid Item price.~~

#### 109.10 PROJECT CLOSURE

- |            |  |
|------------|--|
| Step I.    | Contractor Notice of Projected Substantial Completion Date                                 |
| Step II.   | <del>Department Determination of Substantial Completion</del> <u>Completion Conference</u> |
| Step III.  | Termination of Contract Time   |
| Step IV.   | Project Inspection and Development of Punch List   |
| Step V.    | Notice of Punch List Completion and Request of Final Inspection                            |
| Step VI.   | Final Inspection   |
| Step VII.  | Contractor Submittal of Final Documentation  |
| Step VIII. | Physical Completion and Release of Retainage and Final Payment                             |

##### 109.10.1 Contractor Notice of Projected Substantial Completion Date

The Contractor shall provide written notification to the ADE-Construction of the projected Substantial Completion date. This notice shall be provided a minimum of 30 Days prior to the projected date unless otherwise approved ~~directed~~ by the Project Manager.

##### 109.10.2 ~~Department Determination of Substantial Completion~~ Completion Conference

Prior to the projected Substantial Completion date, the ADE-Construction and the Project Manager shall conduct a completion conference with the Contractor to review the Project and determine conformance with the Contract. The Department and Contractor will address all outstanding Work needed for Substantial Completion. The Department and Contractor will

agree on the schedule for completion of all Work necessary for project closure pursuant to Section 109.10 "Project Closure".

Within five (5) Days of the completion conference or as directed by the Project Manager the Contractor shall submit for approval by the Project Manager the Contractor's proposed updated schedule for project closure.

### **109.10.3 Termination of Contract Time and Determination of Substantial Completion**

After the steps I and II of Project Closure are complete and the Contractor has determined it is ready to request Substantial Completion, the Contractor shall provide to the ADE-Construction a written request to determine Substantial Completion. Within two (2) Days of receipt of the request for Substantial Completion the ADE-Construction will issue a determination of Substantial Completion, Contract Time or, if applicable, Liquidated Damages assessments will cease upon Substantial Completion.

#### **109.10.3.1 Rescinding Substantial Completion**

The Department may rescind Substantial Completion by written notice when any of the conditions for Substantial Completion in the definition of Substantial Completion are no longer met. Substantial Completion may also be rescinded by the Department when Department Ordered Work per Section 104.2.3 "Department Ordered Work" is required.

### **109.10.4 Project Inspection and Development of Punch List**

The Project Manager shall inspect the Project to verify that all Work is complete or develop Punch List items upon the determination of Substantial Completion. The Project Manager shall provide the Contractor written notice that all Work is complete or shall provide a Punch List. Contract Time shall resume if the Contractor fails to provide Acceptable Work associated with the Punch List within the agreed upon schedule ~~that shall not exceed thirty (30) Days and or does not complete all items of Work by the date specified in the updated schedule.~~ Resumed Contract Time shall continue until all Punch List Work is Accepted.

### **109.10.5 Notice of Punch List Completion and Request of Final Inspection**

The Contractor shall provide written notification to the Project Manager that the Punch List is complete and request final inspection.

### **109.10.6 Final Inspection**

The final inspection by the Project Manager and the ADE - Construction will be scheduled and conducted within five (5) Days of the Contractor written request for final inspection. If the inspection reveals unacceptable or unsatisfactory Work, the Project Manager shall give the Contractor written instructions for correction and set the time limit for the Contractor to comply with these instructions. Upon the Contractor's correction of the Work, written notification shall be provided to the Project Manager, the Project Manager shall make an additional inspection and notify the Contractor within four (4) Days of the findings.  
~~as soon as reasonably practicable.~~

If the Project Manager and the ADE - Construction are satisfied that the Work is complete and Acceptable, that inspection shall constitute the final inspection. The Project Manager shall provide written notification of the final inspection ~~is~~ Acceptance to the Contractor within four ~~two~~ (4) Days.

~~If the inspection reveals unacceptable or unsatisfactory Work, the Project Manager shall give the Contractor written instructions for correction and set the time limit for the Contractor to comply with these instructions. Upon the Contractor's correction of the Work, written notification shall be provided to the Project Manager, the Project Manager shall make an additional inspection and notify the Contractor of the findings as soon as reasonably practicable.~~

The Department will Accept the Project as soon as practicable after completion and inspection of the Work. Acceptance is final and conclusive, except for the following situations:

1. Latent defects;
2. Fraud;
3. Gross mistakes that amount to fraud; or
4. The Department's warranty or guaranty rights.

#### 109.10.7 Contractor Submittal of Final Documentation

The Contractor shall submit a schedule for submittal of the following documents required by the Contract including the Final Payment Voucher, Certificate of Payment of Claims, Summary to Contractor, Pit Release Letter, additional named insured Insurance Bonding Release, Affidavit of Wages Paid and Surety Release within five (5) Days of the date of the written notice of final inspection Acceptance. For the Pit Release a Acceptance by the Project Manager of a letter of intent from the landowner for future use may exempt haul Roads or other areas from their re-vegetation requirements.

The Contractor shall furnish a completed Certificate of Payment of Claims from persons or firms, including the Contractor, who have filed Claims for additional compensation, for labor performed, or for Material, supplies, or services furnished to the Contractor or its Subcontractors.

The Department shall withhold final payment and no late payment interest shall be due for the withheld payments until the Contractor furnishes all documents required by the Contract.

#### 109.10.8 Physical Completion, Release of Retainage, Final Payment and Final Acceptance

The Department shall not release retained amounts until Physical Completion and when the Contractor fully complies with all Contract requirements.  
and Release of Retainage and Final Payment

Upon the completion of steps I through VII of Project Closure the ADE-Construction shall provide a written determination of Physical Completion to the Contractor. The Department shall not release retained amounts until Physical Completion and when the Contractor fully complies with all Contract requirements.

Until Physical Completion of the Project final Acceptance of the Project by the Project Manager, the Contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof, by the action of the elements or from other causes, whether arising from the execution or from the non-execution of the Work. The Department shall not release retained amounts until Physical Completion and when the Contractor fully complies with all Contract requirements. Upon Acceptance of Punch List, all Work and receipt of all final documentation the ADE-Construction shall provide a written determination of Physical Completion to the Contractor. Within 60 Days of the written determination of the District Engineer or the designee (ADE-Construction) that the Project has reached Physical Completion, the Department may reduce Retainage if final payment has not been made.

The Department Project Manager shall prepare an estimate summary to contractor which is used for the proposed final payment voucher statement (estimate). The proposed final payment voucher statement (estimate) shall correct all prior Progress Payments and release Retainage. The Department shall withhold from the proposed final payment voucher statement (estimate) any disputed amounts, liquidated Damages and overpayments. Regardless of a disputed or pending Claim, the Contractor will have the right to sign an alternate final payment statement (estimate). The Contractor shall sign, approve and return the Department's final payment voucher. Upon receipt of a signed and approved final payment voucher the Department

shall Accept the Work and pay the balance due on the final payment voucher. The Department paying the balance due on the final payment voucher constitutes final Acceptance.

~~With the Department's approval of the final payment under either the regular form or the alternate form, the Department will pay all remaining undisputed amounts due to the Contractor.~~

~~The Contractor shall approve and return the Department's final payment statement (estimate) or request an alternate final payment statement (estimate) within 30 Days of receipt. Upon receipt of final payment~~

If the Contractor disputes the final payment voucher, then the Contractor shall submit the Notice of Intent to Claim form within seven (7) Days of receipt of the final payment voucher. The Contractor shall not change or modify the final payment voucher. If a clerical error on the final voucher is discovered the Contractor shall notify the Project Manager in writing before the 7 day expiration. If the Project Manger agrees that there is clerical error, the Project Manager will correct the error and reissue the final payment voucher. If the Project Manager does not agree the Project Manager shall notify the Contractor in writing and the Contractor shall have 7 days of receipt to sign the final payment voucher or submit a Notice of Intent to Claim. If the Contractor submits a statement (estimate), Notice of Intent to Claim form from the Contractor or the timeframe to submit the Notice of Intent to Claim form expires expiration of 30 Days, the Department shall Accept the undisputed Work, pay the undisputed balance unilaterally due on the final payment voucher. A Claim is forever barred if the Claim is not timely and properly submitted pursuant to Section 105.19, "Notice of Intent to Claim" within seven (7) Days of receipt of the Department's proposed final payment voucher. The Department paying the balance due on the final payment voucher constitutes final Acceptance.~~statement (estimate) and close the Project.~~

Upon final Acceptance the Department will complete its administrative process to close the Project. Project closure occurs when the State Construction Engineer or designee signs the compass form.

~~A Claim is forever barred if the Claim is not timely and properly submitted pursuant to Section 105.19, "Notice of Potential Claim" and Section 105.20, "Administrative Remedy" within 30 Days of receipt of the Departments proposed final payment statement (estimate). If the Contractor has a disputed Claim and has fully complied with the Administrative Remedy provisions of Section 105.19 "Notice of Potential Claim" and Section 105.20 "Administrative Remedy", the alternate final payment statement (estimate) shall constitute a stipulation by the parties that the acceptance of such payment, the proffering or acceptance of the alternate final payment statement or the making of such refund does not constitute any bar, admission, or estoppel, or waiver of the Claim or any defense thereto, or have any effect as to the pending Claim between the Contractor and the Department.~~

#### **109.10.9 Department Requests for Reimbursement or Refund**

The Contractor shall reimburse or refund the Department for any overpayment in response to a request for refund of overpayment within 30 Days of the Department's ~~request demand~~. Failure by the Contractor to comply may subject the Contractor to default and to rejection of the Contractor's Bids in accordance with Section 102.5, "~~Refusal or~~ Rejection of Bids," until such time that Contractor complies with this Section.

#### **109.11 COMPENSATION FOR CLAIMS**

~~The Contractor is not entitled to payment for Work or that portion of Work that is the subject of a disputed Claim; the Department shall pay undisputed monies due for Accepted Work.~~ The Contractor is not entitled to late payment charges, including late payment charges pursuant to NMSA 1978, § 13-1-158, associated with any Claim or disputed construction services and Materials. The Department will pay the Contractor late payment charges as authorized by NMSA 1978, § 13-1-158 for construction services and Materials not the subject of a disputed Claim or subject to Retainage or withheld Progress Payments and that have been certified by the Department to have been received and Accepted. The Department will pay the Contractor

late payment charges on undisputed, qualified, delayed Progress Payments for certified, approved and Accepted Work in accordance with Section 109.8, "Progress Payments" that are not the subject of a disputed Claim.

The Contractor is barred from seeking a Claim, a remedy, compensation, time, cause of action, or any damages except as provided by Section 105.19, "Notice of ~~Intent to Potential~~ Claim," and Section 105.20 "Administrative Remedy," and this Section.

The Contractor shall not be entitled to any consequential, indirect, punitive, exemplary, special, or incidental damages. ~~When the Department determines entitlement the Contractor shall only receive and shall only be entitled to~~ additional compensation and time as specifically provided by the following Sections of these Specifications: Section 104.2.1, "Significant Change in the Character of the Work"; Section 104.2.2~~3~~, "Differing Site Conditions"; Section 104.2.4, "Extra Work"; Section 107.10.3, "Cooperation with Owner of Railroad Right of Way"; ~~Section 107.20 "Contractor's Responsibility to Protect the Work";~~ Section 108.6, "Determination and Extension of Contract Time"; Section 108.10, "Termination of Contract; No Fault of Contractor"; Section 109, "Measurement and Payment"; and this Section.

Except as otherwise agreed to by the Contractor and the Department in a written Change Order, all Claims and causes of action arising out of the performance and administration of the Contract ~~shall be governed by this Section including; including~~ Claims for Delay, Claims for additional compensation and time, Contract adjustment, Claims seeking extension of Contract Time, Claims seeking Delay damages, pass-through Subcontractor Claims, causes of action for breach of Contract, promissory estoppel, equitable estoppel, waiver, detrimental reliance, bad faith breach of contract, breach of the covenant of good faith and fair dealing, or any other cause of action arising out of the performance of the Work or the Contract ~~shall be governed by this Section.~~ The compensation, time and damages provided for in this Section are exclusive, complete, and apply regardless of whether such Claims are to be resolved pursuant to the procedures set forth in Section 105.20, "Administrative Remedy," or any other legal or administrative procedure, whether or not authorized herein, including arbitration, mediation, or appeal.

#### **109.11.1 Non Critical Disruption**

~~1. Non-critical Disruption is a disruption or interference with Contractor's performance, regardless of cause, that does not negatively impact the Critical Path of the Project and therefore does not meet the definition of a Delay and for which the Contractor will not be entitled to receive delay compensation per 109.11.2.2. nor time. receives neither compensation nor time.~~

#### **109.11.2 Delay**

~~Delay. The term "Delay", in this section, does not include time extensions granted by the Department by Change Order in accordance with Section 108.6, "Determination and Extension of Contract Time" that do not result in any additional compensation.~~

The Contractor's entitlement to compensation and time ~~for with regard to~~ a Delay is defined, limited to, and provided as follows:

~~2.1. Excusable Delay: A Delay which is beyond the Contractor's control that negatively impacts the critical path of the Project and is not caused, in whole or in part, by the Contractor's fault or negligence and for which compensation and/or a time extension may be granted, based upon the following; but not additional compensation, may be granted;~~

~~3. a. Excusable Compensable Delay: An Excusable Delay that negatively impacts the critical path of the Project resulting from the neglect or default of the Department or from a differing Site Conditions per the section for~~

differing site conditions. For such Delays, the Department may grant additional time and compensation. Examples of an excusable Compensable Delay may include but are not limited to Delays attributable to design errors or a differing site condition not readily discovered through Pre-Bid Due Diligence, failure by the Department to acquire Right of Way, and Department-initiated design changes;

4- b. Excusable Noncompensable Delay: An unforeseen and unanticipated Excusable Delay not caused by the fault of either the Contractor or the Department that negatively impacts the critical path of the Project. For such delays, the Contractor may receive an extension of time but not additional compensation. Examples of a Noncompensable Delay may include but are not limited to those events described in Subsection 107.20 "Contractor Responsibility". ~~Delays attributable to utility conflicts, widespread Materials shortages, extreme weather, war, acts of God, and labor strikes.~~

5. ~~Inexcusable Delay or Nonexcusable Delay: -a Delay for which the Contractor is not entitled to compensation and/or time that was caused by: factors within the Contractor's control; the fault or responsibility of the Contractor;- factors that could or should have reasonably been foreseen by the Contractor; Delays caused by an event that the Contractor could have foreseen and prevented but failed to do so; or failure to reasonably mitigate additional Delay after an excusable a-DDelay has been identified. Examples of inexcusable or nonexcusable Delays may include but are not limited to those attributable to reasonably expected seasonal inclement weather events based on historical data, reasonable time periods necessary for reviews of shop drawings by the Department, ~~for changes or additions to the Work that do not negatively impact the critical path of the Project~~, inefficient operation by the Contractor or Subcontractor, inefficient or ineffective construction management by the Contractor or Subcontractor, ~~failure to assign sufficient resources to the Project by the Contractor or its Subcontractor~~, failure by the Contractor to properly perform Pre-Bid Due Diligence, or failure by the Contractor, Subcontractor or Supplier to procure Materials in a timely manner, ~~or failure by the Contractor to assign sufficient resources to the Project.~~~~

~~—Concurrent Critical Delay: Concurrent Delay only occurs when the Project has two separate Critical Paths that have two separate delays which start and end on the same date, delaying the project for the same amount of time. For delays that start on the same date but are resolved at different dates the Contractor is not entitled to any time or additional compensation for the duration when a nonexcusable or inexcusable delay occurs on either of the critical paths. When an excusable compensable delay and excusable noncompensable delay are concurrent as defined above the Contractor shall only be entitled to Contract Time and not any additional compensation.~~

6. ~~Concurrent Delay: A Delay for which the Contractor is not entitled to compensation that occurs when both the Contractor and the Department independently Delay work, or that occurs when the Contractor is responsible for an Excusable or Compensable Delay and also encounters a Differing Site Condition, which negatively impacts critical path activities during approximately the same time period or when separate Delays to the critical path occur at approximately the same time. The Contractor is not entitled to compensation due to or arising from a Concurrent Delay. The Contractor is not entitled to an extension of Contract Time for any period in which a Non excusable Delay is concurrent with an Excusable Delay. When a Noncompensable Delay is concurrent with a Compensable Delay, the Contractor may be entitled to an extension of Contract Time but not entitled to compensation for the period the Noncompensable delay is concurrent with the Compensable Delay.~~

~~7. Inexcusable Delay or Nonexcusable Delay: a Delay for which the Contractor is not entitled to compensation or time that was caused by: factors within the Contractor's control; the fault or responsibility of the Contractor; factors that could or should have reasonably been foreseen by the Contractor; Delays caused by an event that the Contractor could have foreseen and prevented but failed to do so; or failure to reasonably mitigate a Delay. Examples of inexcusable or nonexcusable Delays include those attributable to reasonably expected seasonal inclement weather events, reasonable time periods necessary for reviews of shop drawings by the Department, for changes or additions to the Work that do not negatively impact the critical path of the Project, inefficient operation, inefficient or ineffective construction management, failure by the Contractor to properly perform Pre-Bid Due Diligence, failure by the Contractor to procure Materials in a timely manner, or failure by the Contractor to assign sufficient resources to the Project.~~

~~8. Non-critical Disruption: a disruption or interference with Contractor's performance, regardless of cause, that does not negatively impact the critical path of the Project and therefore does not meet the definition of a Delay and for which the Contractor receives neither compensation nor time.~~

~~2.~~

#### **109.11.2.1 Additional time for Delay.**

The Department may only ~~add~~extend Contract Time for an ~~Excusable Delay~~, Excusable Compensable Delay, or a Excusable Non-compensable Delay. ~~The Department may only grant an extension of Contract Time for an Excusable Delay using the Accepted~~ed~~able~~ updated monthly or revised schedules current and in effect at the time the Delay occurred.

#### **109.11.2.2 Compensation for Delay.**

The Department may only compensate the Contractor for an ~~excusable non-Concurrent~~, Compensable Delay as provided in this Section and in the following order of priority and no other methods of calculating compensation will be accepted. In order to receive compensation for a excusable compensable Delay the Contractor shall document and provide costs resulting from the excusable compensable Delay using actual cost records, shall measure and provide expenses using generally accepted accounting principles, and shall comply with Section 108.3.2, "Schedule Format," and if an agreement about the extension of Contract Time cannot be reached then the Contractor shall comply with Section 108.6 "Determination and Extension of Contract Time" ~~105.20.1, "District Level."~~



~~The Department reserves the right to use innovative bidding approaches, as specified in the Contract, as an alternate means of calculating Delay damages including requiring Bidders to bid a daily overhead rate (cost / Working Day) as a Bid Item Unit Price. For example if the Contract may requires that the Contractor escrow its Bid documents, and the escrow Bid Documents may be considered in resolving Claims.~~

- I.
- II. ~~The compensation which the Contractor may recover for a Delay Claim is limited to:~~
1. Non-salaried labor expenses;
  2. Material costs;
  3. Equipment costs pursuant to Section 109.2 "Approved Equipment Rental Rates";
  4. Costs of extended job site overhead, including bonds; ~~or and of,~~
  5. An additional ten percent (10%) of the total of items 1, 2, 3, and 4 to cover home office overhead, salaried labor expenses, and profit.

~~The Department reserves the right to use innovative bidding approaches, as specified in the Contract, as an alternate means of calculating Delay damages including requiring Bidders to bid a daily overhead rate (cost / Working Day) as a Bid Item Unit Price. If the Contract requires that the Contractor escrow its Bid documents, the escrow Bid Documents may be considered in resolving Claims.~~

- III. ~~If the source of the loss of productivity can be attributed to an and excusable cCompensable Delay and cannot be isolated and priced separately, the method by which the Department shall calculate the extent of an excusable compensableExcusable Delay caused by a production rate inefficiency shall be made in the following order of priority:~~

1. ~~Measured Mile analysis by which the Department shall compare actual efficiency (production rates) in an impacted area to actual efficiency in a comparable non-impacted area; or~~
2. ~~1. Comparison of actual efficiency to actual efficiency on a comparable project; and,~~
3. ~~2. Comparison of actual productivity etual efficiency to planned efficiency production rates in the taking into account the Contractor's Baseline Schedule and timely submitted Acceptable updated monthly or revised schedules or in the escrow bid Documents.~~

### 109.11.2.3 Non-Recoverable Damages

In no event shall the ~~Contractor submit or be entitled to Department make a~~ payment based on ~~any of the following application of the including but not limited to~~ Eichleay formula, the Total Cost Method, ~~original or other formula including original~~ Contract period formula, fixed overhead formula, burden fluctuation method, and comparative absorption rates.

~~Non-Allowable Damages~~—Regardless of the basis or cause of the Claim, the Contractor ~~shall may~~ not recover and is not entitled to recover the following categories of damage:

1. Any compensation except as provided by Section 109.11.2.2 "Compensation for ~~Claims~~ and for Delay";
2. Loss of anticipated profit, incentives or bonuses;
3. Labor inefficiencies at the fault of the Contractor;
4. Home office overhead regardless of whether it is characterized as absorbed, unabsorbed, or extended exceeding that provided in Section 109.11.2.2 "Compensation for ~~Delays~~ Claims";

- ~~5.4.~~ Home office overhead, extended home office overhead, or Delay damages calculated using the Eichleay formula or other formula including original Contract period formula, fixed overhead formula, burden fluctuation method, and comparative absorption rates;
- ~~6.5.~~ Any damages, costs or expenses that are indirect, special, incidental or consequential damages, including, but not limited to, lost or impaired bonding capacity, loss of Bidding and contracting opportunities, loss of credit standing, cost of financing, interest paid, lost Material discounts, economic loss, loss of reputation, loss of other Work, loss of use, loss of business opportunity, loss of product or output, income, loss of profit or revenue, cost of capital, financing, and for loss of management or employee productivity or of the services of such persons, ~~other not Project direct costs~~, and business devastation, bankruptcy, or insolvency. The Department waives any entitlement to consequential damages from the Contractor but not general damages including but not limited to ~~other than~~ liquidated damages as provided in the Contract;
- ~~7.6.~~ Acceleration costs and expenses. The Contractor shall only be entitled to acceleration costs and expenses if e, except where the Department has expressly and specifically directed the Contractor in writing to accelerate the Work at the Department's expense, the Contractor completes the Work within the time directed by the Department, the Contract Time, the Contractor actually incurs acceleration costs and expenses, and the Contractor provides verifiable documentation to support the acceleration costs and expenses;
- ~~8.~~ ~~Indirect costs or expenses;~~
- ~~9.7.~~ Late payment charges, including late payment charges pursuant to NMSA 1978, § 13-1-158, associated with related to any ~~disputed~~ Claim, or disputed construction services or Materials. The Contractor is also not entitled to late payment charges on any judgment or award made to the Contractor. This provision does not affect the Department's payment of late payment charges on undisputed, qualified, delayed Progress Payments for certified, approved and Accepted Work in accordance with Section 109.118, "Compensation for Claims Progress Payments" that are not the subject of a disputed Claim;
- ~~10.8.~~ Prejudgment or post-judgment interest related to or arising from any disputed Claim or on any Award made to the Contractor; or,
- ~~11.9.~~ Attorneys' fees and costs, Claim preparation expenses, and litigation or other costs related to or arising from any disputed Claim, or prosecution thereof.

