

105 – CONTROL OF WORK

SECTION 105

CONTROL OF WORK

105.1 STATE TRANSPORTATION ENGINEER'S AUTHORITY AND DISTRICT ENGINEER'S AUTHORITY

The State Transportation Engineer has final authority over issues concerning materials' inspection, testing and acceptance; quality of the work performed; payment for the work performed; suspension of work; acceleration of work; sequence of work; work progress; contract interpretation; and the Contractor's acceptable fulfillment of the contract. The State Transportation Engineer will use the Contract Documents and best general engineering and construction practices to resolve these issues.

The State Transportation Engineer has the authority over all agency personnel (other than the Secretary of Transportation) and the authority to delegate contract administration and construction matters to agency personnel. In addition to the Secretary, the State Transportation Engineer is the only other individual with the authority to declare a contract in breach according to **subsection 108.9**.

The State Transportation Engineer or District Engineer may order the Contractor to:

- postpone or suspend all or part of the work for any reason;
- accelerate all or part of the work for any reason; or
- change the sequence in which the Contractor plans on prosecuting the work.

105.2 FIELD ENGINEER'S AUTHORITY AND DUTIES

a. The Field Engineer administers the contract and has immediate charge of the engineering details of the contract. The Field Engineer has authority over the Project inspection staff. The Field Engineer has access to all parts of the work and the authority to inspect all work. Submit any required notices to the Field Engineer.

b. The Field Engineer may:

(1) order the Contractor to postpone, shut down, suspend, accelerate, or re-sequence all or part of the work if the Contractor is:

- working in unsafe site conditions;
- using unsafe work practices;
- failing to comply with the Contract Documents;
- producing unacceptable work; or
- performing unauthorized work

(2) reject unacceptable work.

(3) order the Contractor, before final acceptance, to uncover or remove finished work.

(4) order the Contractor to repair or remove and replace unacceptable work.

(5) order the Contractor to repair, restore, remove, or remove and replace unauthorized work. See **subsection 105.5**.

105.3 INSPECTOR'S AUTHORITY AND DUTIES

a. Inspection for KDOT's Benefit. KDOT hires its own employees and consultant employees (Inspectors) to perform inspection work for KDOT's benefit, not to ensure Contractor quality control. Inspection is not a substitute for the Contractor's obligation to deliver acceptable work.

b. Inspector's Authority. Inspectors may examine all work including the preparation, fabrication, and manufacture of all materials provided. Inspectors may test materials. In testing materials, the Inspector will follow the Contract Documents, manufacturer's specifications, or both. Inspectors may reject unacceptable work (including unacceptable materials). Inspectors may suspend all or part of the work if the suspension is necessary because of unsafe site conditions or unsafe work practices.

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c. Limitation on Inspector's Authority. Inspectors are unable to alter or waive contract provisions, issue instructions contrary to the contract, or act as the Contractor's superintendent or foreman. Inspectors are unable to accept from the Contractor any notices required by the Contract Documents to be given by the Contractor to the Engineer. If the Contractor is not complying with the Contract Documents, the Inspector will notify the Field Engineer who has the authority and discretion to shut down the Project.

d. Claim for Excessive or Negligent Inspection. Without delay, notify the Field Engineer if an Inspector exceeds the scope of the Inspector's authority, fails to perform adequately the Inspector's duties, treats the Contractor unfairly, or otherwise acts contrary to the contract. The Contractor shall have no claim for additional time, additional money, or both under **subsections 104.9** and **104.10** if the Contractor fails to notify KDOT of the problem as outlined in **subsection 105.7b.** and within the time frame required in **subsection 104.8a.,** so that KDOT has the opportunity to correct the situation. It shall be no defense under this **subsection 105.3** that the Contractor is afraid the inspection staff will retaliate for the reported violations. If the Contractor encounters retaliation, immediately report the retaliation to the District Engineer.

105.4 INSTRUCTIONS TO THE CONTRACTOR

The Engineer will provide to the Contractor written instructions and other documentation by delivering the instructions personally to the Contractor's designated representative or by mailing, faxing, or e-mailing the instructions to the Contractor's business address.

105.5 CONFORMING WITH PLANS AND SPECIFICATIONS; UNACCEPTABLE WORK; UNAUTHORIZED WORK

a. Contractor's Obligation. Perform work to meet the Contract Documents. Plan dimensions and contract specification values are the benchmarks from which the Engineer will measure deviations.

b. Acceptable Work. Acceptable work is work that meets contract requirements. The Engineer will pay contract prices for acceptable work. Before final acceptance, if the Engineer or Inspector requires the Contractor to uncover completed work and KDOT determines the work is acceptable, the Engineer will pay for uncovering or removing the work and for recovering or replacing the work as extra work under **subsection 104.6.** Exception: if the work meets the contract requirements but is considered unauthorized under **subsection 105.5e.** for failing to give the Engineer advanced notice of the work to allow inspection of the work as required by **subsection 105.7b.,** then the Engineer will not pay for uncovering or removing the work or for recovering or replacing the work as extra work under **subsection 104.6.**

c. Reasonably Acceptable Work. Reasonably acceptable work is work that does not meet Contract Document requirements but that the Engineer determines is adequate to serve the design purpose and meet the public's needs. The Engineer may pay reduced contract prices for reasonably acceptable work. The Engineer will determine the price reduction by using pay adjustment factors included in the Contract Documents. If the Contract Documents do not contain pay adjustment factors, the Engineer and Contractor will negotiate the price reduction. If the Engineer and Contractor are unable to agree upon the price reduction, the price reduction will be treated as a claim and the subject of deductive change order.

d. Unacceptable Work. Unacceptable work is work that does not meet contract requirements and that the Engineer determines is inadequate to serve the design purpose or to meet the public's needs. Propose a remedy (repair, restore, remove, or remove and replace) for the unacceptable work and then implement the remedy the Engineer chooses at the Contractor's expense. The Engineer, not the Contractor, decides whether the Contractor shall repair the unacceptable work or remove and replace the unacceptable work. Before final acceptance, if the Engineer requires the Contractor to uncover completed work and KDOT determines the work is unacceptable, the Contractor shall pay for uncovering or removing the work as well as for recovering, repairing, or removing and replacing the work.

e. Unauthorized Work. Unauthorized work is work performed without the Field Engineer's approval, work performed outside the Project limits, work performed contrary to the Field Engineer's instructions, work performed without inspection, or work performed without a superintendent on the Project. Propose a remedy

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(repair, restore, remove, or remove and replace) for the unauthorized work and then implement the remedy the Engineer chooses at the Contractor's expense. The Engineer, not the Contractor, decides whether the Contractor shall repair, restore, remove, or remove and replace the unauthorized work.

f. Remedying Unacceptable or Unauthorized Work.

(1) For either unacceptable work or unauthorized work, the Field Engineer will give the Contractor:

- written notice of the remedy KDOT has selected (repair, restore, remove, or remove and replace); and
- A date for beginning and a date for completing this remedial work.

(2) If the Contractor fails to begin or prosecute the remedial work timely, the Field Engineer will inform the Bureau Chief of Construction and Materials who will inform the Secretary. The Secretary will notify the Contractor and Surety that the Contractor has failed to begin or prosecute the work timely and:

(a) declare the Contractor in breach of contract under **subsection 108.9**;

(b) provide the Contractor a final opportunity to cure by completing the remedial work within a specified time; and

(c) if the Contractor fails to cure:

- remove the Contractor from the Project and exercise the Secretary's remedies for breach under **subsection 108.9**; or
- hire a third party or use KDOT's maintenance forces to perform the remedial work rather than removing the Contractor from the Project.

(3) If KDOT hires a third party or uses its maintenance forces to perform the remedial work without removing the Contractor from the Project, the Field Engineer will deduct from future progress payment(s) the estimated costs of the remedial work. After determining the final costs for this work, the Field Engineer will adjust the next progress payment to reflect the actual remedial work costs. If contract funds are insufficient, the Engineer will bill the Contractor for the excess remedial costs. If the Contractor fails to pay these costs within 7 business days after billing, KDOT may notify the Surety of this default and seek payment from the Surety for remedial work costs not recovered from the Contractor without declaring the Contractor in breach of the entire contract under **subsection 108.9**.

(4) The Contractor shall have no claim or escape from liability under this **subsection 105.5**, because:

- the Engineer required one remedy rather than another;
- the Engineer/Inspector knew or should have known the Contractor was performing unacceptable work or unauthorized work;
- the Engineer/Inspector overlooked or failed to discover the unacceptable work or unauthorized work until final inspection; or
- the Secretary failed to provide adequate cure time under **subsection 105.5f.(2)**, it being understood that the amount of cure time specified depends on the nature of the remedial work and public's best interests.

105.6 COORDINATING CONTRACT DOCUMENTS

a. The exploratory work documents, standard specifications, plans, special provisions, project special provisions, and all other Contract Documents are essential parts of the contract. A requirement occurring in one document is as binding as though occurring in all documents. The Contract Documents describe and provide for a complete Project. Keep a copy of the Contract Documents on the Project site.

b. Discrepancies, Errors, Omissions, or Ambiguities in Contract Documents.

(1) Do not take advantage of any Contract Document discrepancies, errors, omissions, or ambiguities.

(2) If there is a discrepancy between or among the following Contract Documents, the governing ranking or order of precedence is:

Dimensions

1. Plan
2. Calculated
3. Scaled

Information

1. Information received at mandatory pre-bid
2. Project Special Provisions
3. Special Provisions
4. Plans
5. Standard Specifications

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(3) If there is a discrepancy between the exploratory work documents and other Contract Documents, notify the Bureau of Construction and Materials upon discovering the discrepancy. Do not assume the Contract Documents listed above control over the exploratory work documents.

(4) If a Bidder discovers a discrepancy, error, omission, or ambiguity in any Contract Document before the Letting, notify the Bureau of Construction and Materials upon discovering the discrepancy, error, omission, or ambiguity. The Bureau will issue an addendum to all Bidders that obtained a Bidding Proposal Form from KDOT.

(5) If the Contractor discovers a discrepancy, error, omission, or ambiguity in any Contract Document after the Letting, notify the Field Engineer. The Field Engineer will issue a clarification. The Field Engineer will make a contract adjustment for resulting extra work if the Engineer determines that:

- a reasonable contractor would have failed to discover the discrepancy, error, omission, or ambiguity before the Letting;
- the Contractor has met the requirements of **subsection 104.6**; and
- in case of a discrepancy, the Engineer's clarification is inconsistent with the order of precedence, **subsection 105.6b.(2)**.

105.7 CONTRACTOR COOPERATION WITH ENGINEER AND INSPECTORS

a. Before beginning construction activities, discuss with the Engineer the Contractor's schedule to coordinate construction sequencing and traffic control sequencing. If **subsection 108.3** requires a written schedule, review with the Engineer the Progress Schedule/Network Schedule.

b. Cooperate with the Field Engineer and Inspectors to complete the Project timely and effectively. Provide advanced notice of Project work to be performed so the Engineer may coordinate the Inspectors' activities with the Contractor's work. Provide any required information and accommodations for KDOT and any LPA to make a complete and detailed inspection. Notify the Field Engineer of disputes with Inspectors verbally without delay, so the Field Engineer has the opportunity to resolve the situation with the least delay and cost impact to all parties. Disputes include an Inspector exceeding the scope of the Inspector's authority, failing to perform adequately the Inspector's duties, treating the Contractor unfairly, or otherwise acting contrary to the contract.

If the dispute involves the Field Engineer or if the Field Engineer takes no action to resolve the dispute between the Contractor and Inspectors, notify the District Engineer.

If the dispute involves the District Engineer or if the District Engineer takes no action to resolve the dispute between the Contractor and Inspectors, notify the Bureau Chief of Construction and Materials.

Make no claim for contract adjustment if notice was not given as provided above.

c. Allow any unit of government, railroad, or utility company having jurisdiction over, funding of, or another interest in part or the entire Project to inspect the work relevant to that entity's role or interest. Such inspection does not make these entities a party to the contract.

d. Employ a competent superintendent.

(1) The superintendent shall:

- be present on the Project site when work is being performed;
- have experience in the work being performed;
- have the skill, education, and experience to understand the Contract Documents;
- receive, respond to, and execute the Engineer's and Inspectors' instructions; and
- coordinate all of the Contractor's, subcontractors', and suppliers' activities.

(2) If the Contractor elects not to have its own superintendent, appoint a superintendent who is employed by an approved subcontractor to fulfill the requirements of **subsection 105.7d. (1)**.

(3) The superintendent shall not act as both a superintendent and a foreman or laborer without the Field Engineer's approval. In determining whether to allow a working superintendent, the Field Engineer will consider the nature and scope of the Project, the number of operations occurring, the number of people working on the Project, and the working superintendent's ability to fulfill the requirements of **subsection 105.7d.(1)**.

(4) The Field Engineer may suspend work if the Contractor fails to have a competent superintendent on the Project when work is being performed.

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If the Contractor continues to fail to provide a competent superintendent on the Project when work is being performed, the Secretary or State Transportation Engineer may declare the Contractor in breach of contract under **subsection 108.9**.

105.8 CHARACTER OF WORKERS; METHODS, OPERATIONS, AND EQUIPMENT

a. Personnel.

(1) Employ/use the number and quality of workers needed to complete the Project in the Contract Time.
(2) Employ/use the number and quality of supervisory personnel required to manage the Project effectively.
(3) At the Engineer's request, remove disorderly, intemperate, or unqualified personnel, whether employed by the Contractor, subcontractors, or suppliers. Do not employ/use such persons on other KDOT projects without the Engineer's written approval.

b. Equipment.

(1) Use the amount, type, and quality of equipment needed to complete the Project in the Contract Time.
(2) Do not use equipment or operate equipment in a manner that damages the roadway, adjacent property, or other highways.

c. Method of Operations. Unless the contract specifies otherwise, select the method of operations needed to complete the Project in the Contract Time.

d. Changes in Equipment or Methods of Operations.

(1) If the contract specifies the method of operations or equipment, obtain the Engineer's approval to alter the method of operations, equipment, or both. If the Engineer decides the altered method of operations or alternative equipment does not meet contract requirements, the Engineer will order the Contractor to discontinue the altered method of operations or to stop using the alternative equipment.
(2) The Engineer will not increase the contract price or Contract Time based on a change in the method of operations or equipment, unless the change qualifies as extra work under **subsection 104.6**.

105.9 SUBLETTING CONTRACT

a. Do not sublet, sell, transfer, assign, or dispose of part of the contract work without the Engineer's written consent. Submit to the Engineer subcontractor approval forms to obtain approval for subletting part of the contract including lower-tier subletting. Assume responsibility for sublet work, at any tier, as if the Contractor were performing that work. The Secretary's approval of subcontractors is for KDOT's benefit and KDOT's need to be aware of the persons and entities operating within the Project limits. This approval is not a guaranty of the subcontractors' capabilities or a representation concerning the subcontractors' skills, abilities, and integrity to perform the work.

b. Do not subcontract with or hire a consultant to perform contractor construction staking, process control testing, or any other work that is the Contractor's responsibility on a Project, if KDOT or a LPA has already engaged that consultant to perform design engineering, construction engineering, or inspection services on the same Project.

c. With the Contractor's own organization, perform physical construction that equals at least 30% of the contract amount. For state-tied projects, the contract amount is the sum of the contract amounts for all tied projects.

d. The Engineer's consent under this **subsection 105.9** does not release the Contractor from liability for completing the contract and does not release the Contractor, the Surety, or both from their bond obligations. Exception: The Secretary may release the Contractor from liability under the contract and the bond if the Secretary, Contractor, and Surety execute a separate written agreement that allows the Contractor to assign the contract to a third party who has obtained bonding as described in **subsection 103.6**. Do not sell, transfer, assign or dispose of all of the contract work without the Secretary's written consent to the assignment of contract as provided in **subsection 103.6**.

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105.10 PLANS AND WORKING DRAWINGS

a. Plans. The Secretary may provide plans showing lines, grades, roadway typical cross-sections, all structures, and a summary of contract pay items. Steel bridge plans show only general features. Keep one set of plans on the Project site.

b. Working Drawings. Submit an electronic copy of working drawings in Adobe PDF (Portable Document Format) file format, with a maximum internal page size of 17 inches by 11 inches. For each deliverable (falsework plans for a structure, shop drawings for structural elements which will be fabricated, etc.), submit the copy in one transmission, with the sheets consecutively numbered, and with no duplications of sheets.

c. Timely Submittal. Provide all working drawings to the Field Engineer or designated KDOT office at the time the Progress Schedule/Network Schedule identifies or at a date that allows the reviewing Engineers at least 15 business days to review the drawings. If the Contractor desires the drawings be reviewed in less than 15 business days, notify the Field Engineer or designated KDOT office that the time for review and approval is critical. While KDOT will attempt to accommodate the Contractor's time frame, KDOT makes no guarantee that KDOT will complete the review process in less than 15 business days.

d. Timely Review. Within 15 business days after the Contractor has provided initial or revised working drawings to the Field Engineer or designated KDOT office, the Field Engineer or designated KDOT office will review and either approve or reject the drawings. If rejected, correct and resubmit revised working drawings for the Engineer's approval. Allow the Field Engineer and other reviewing Engineers a reasonable time for subsequent review and approval. The Contractor assumes all risk of delay incurred for revisions and the Engineer's review of these revisions. If KDOT fails to accept or reject initial or revised drawings within 15 business days, the Contractor may seek compensation under **subsection 104.6** for additional time or acceleration costs.

e. Responsibility for Working Drawings. The Contractor has sole responsibility for the adequacy and accuracy of the working drawings. The Engineer's approval of the working drawings is for KDOT's benefit, not to ensure Contractor quality control. The Engineer's review and/or approval are not intended as an undertaking of the Contractor's duty to provide adequate and accurate working drawings.

105.11 CONTRACTOR'S RESPONSIBILITY FOR UTILITY PROPERTY AND SERVICES AND COOPERATION WITH UTILITIES

a. General.

(1) The Contract Documents will identify the location of existing utility fixtures and appurtenances (utilities) that will be in place before construction begins and that will remain in place during construction. Anticipate minor deviations from plan locations.

(2) The Contract Documents will designate the utilities to be adjusted or relocated by utility owners, other third parties, or the Contractor during the construction.

(3) Notify Kansas One Call and arrange for utility locates in the anticipated work area before beginning excavation. Save utility locate markers as long as possible.

(4) Coordinate, schedule, and perform work to minimize interference with others who are adjusting or relocating the utilities. KDOT will not compensate for modifications to the Contractor's schedule to accommodate utility adjustments or utility relocations the Contract Documents identify for relocation during construction.

(5) Include in the Contractor's bid all costs (money and time) associated with the presence of identified utilities.

b. Contractor's Responsibility for Utility Property and Services.

(1) Use work procedures that do not damage utilities, utility property, or both within and adjacent to the Project limits.

(2) Coordinate and perform work to avoid interrupting utility service.

(3) Notify the utility owner of damage to or exposure of its utility or other property. Do not hinder the utility owner from restoring utility service.

(4) Work around fire hydrants only after the local fire authority approves this work and the Contractor has made provisions for continued service.

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(5) Assume responsibility for damages to utilities arising from the Contractor's negligent acts or omissions if the utilities were designated in the Contract Documents and correctly located/relocated (having no or only minor deviations from the plan location/relocation). The utility owner will decide whether the Contractor shall pay the utility owner to repair the damage or whether the Contractor shall repair the damage. Repair the damaged utilities by restoring them to the condition existing before the damage occurred.

c. Contractor's Responsibility for Unidentified Utilities or Incorrectly-Relocated Utilities Found During Construction.

(1) Except as provided in **subsection 105.11c.(2)**:

(a) the Contractor assumes no responsibility for damages to or delays caused by utilities discovered at the site but unidentified in the Contract Documents (unidentified).

(b) the Contractor assumes no responsibility for damages to or delays caused by utilities identified in the Contract Documents but discovered in a location different than that identified and outside the industry-accepted tolerances (incorrectly relocated).

(c) the Contractor may be entitled to a contract adjustment (time, money, or both) under **subsection 104.5** for delay associated with unidentified or improperly-relocated utilities. See **subsection 104.8** for contract adjustment notification.

(2) Despite a utility being unidentified or incorrectly relocated, the Secretary will not pay for damages to the utility or compensate the Contractor for delays caused by the utility if:

(a) the Contractor failed to notify Kansas One Call and obtain field locates before excavating;

(b) the Contractor knew or should have known that the utility was in the location discovered; or

(c) the Contractor's negligent or intentional act or omission contributed to the physical damage or delay but only to the extent the damage or delay was caused by the Contractor's act or omission.

(3) The Engineer and utility will decide whether to adjust or relocate unidentified and incorrectly relocated utilities.

d. Contractor's Responsibility for Utility's Negligent Field Locates. The Contractor shall notify Kansas One Call and obtain utility field locates before excavating. The Contractor assumes responsibility for increased construction costs or delay damages caused by improperly-marked field locates. The Secretary may give the Contractor an extension of time under this **subsection 105.11d.** if the improperly-marked field locates increase the Contractor's time for performance.

e. Nothing in **subsections 105.11c.** or **d.** is intended to make the Contractor liable to any utility for physical damage to the utility beyond that allowed by an agreement between the Contractor and utility, the Kansas Underground Utility Damage Prevention Act, or any other law. Nothing in **subsections 105.11c.** or **d.** is intended to prevent the Contractor from seeking recovery or asserting defenses against the utility to the extent allowed by an agreement between the Contractor and utility, the Kansas Underground Utility Damage Prevention Act, or any other law.

105.12 COOPERATION AND CLAIMS BETWEEN CONTRACTORS

a. General.

(1) The Secretary may let several contracts under one Project. The Secretary may let contracts for multiple projects within the same physical Project limits, adjacent limits, or same vicinity. For purposes of this provision, the term "contractor" means an entity having an agreement with the Secretary, on KDOT's behalf or on behalf of a LPA, for improvement, construction, reconstruction, or maintenance of roads and/or bridges within the state of Kansas and that includes the Standard Specifications.

(2) Cooperate with other contractors in the same physical Project limits, adjacent limits, or same vicinity to avoid delaying these other contractors.

(3) Coordinate work sequencing with other contractors in the same physical Project limits, adjacent limits, or same vicinity to both anticipate and minimize delay to each other.

(4) Notify the Field Engineer if another contractor fails to cooperate or coordinate work sequencing.

(5) Include in the Contractor's bid all costs (money and time) associated with expected delays resulting from another contractor working in the same Project limits, adjacent limits, or the same vicinity.

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b. Suits Between Contractors. Under KDOT-let contracts, the Contractor and other contractors working within the same Project limits or adjacent limits have the contractual right to sue each other for delay damages. These Contractors are considered third party beneficiaries of the contract between the Secretary and the Contractor allegedly causing the delay.

c. Suits Against the Secretary.

(1) Contractors working within the same Project limits or adjacent limits have no right to sue the Secretary for delay damages another contractor caused. If the facts causing the aggrieved contractor's damages are based upon another contractor's actions, this **subsection 105.12** applies regardless of the theory of liability the aggrieved contractor asserts against the Secretary.

(2) The aggrieved contractor agrees to seek relief first from the contractor causing the delay.

(3) If the aggrieved contractor sues the Secretary, the contractor causing the delay shall defend the suit and hold harmless the Secretary from such suit.

(4) If the aggrieved contractor is unable to collect an award or judgment from the contractor causing the delay after taking legal action to recover such judgment in a Kansas court, the Secretary will pay the judgment. The Secretary will proceed against the Surety to recover any monies the Secretary pays under this **subsection 105.12**.

(5) Because this **subsection 105.12** does not prevent an aggrieved contractor from recovering damages, this **subsection 105.12** is not a "no damages for delay" provision.

d. Claims Related to Contract Time.

(1) The Secretary may give the aggrieved contractor an extension of time for delays another contractor causes. This extension of time does not prevent the Secretary from recovering liquidated damages or other costs the Secretary incurs because of the contractor causing the delay. This extension of time may not relieve the contractor causing the delay from paying delay damages to the aggrieved contractor.

(2) If the Project is time critical and the Secretary is unable to extend Contract Time, the Secretary may pay the aggrieved contractor to accelerate the work and overcome the delay. If the Secretary makes such payment, the contractor causing the delay shall be responsible to the Secretary for such payment. The contractor causing the delay shall indemnify the Secretary for damages the Secretary incurs under this **subsection 105.12**. The Secretary will proceed against the contractor and the Surety to recover any monies the Secretary pays under this **subsection 105.12**.

e. Burden of Proof. Nothing in this **subsection 105.12** modifies the parties' obligations to prove their claims and defenses.

105.13 CLAIMS PROCEDURE

a. Claim. A claim is a written notice for more money, time, or both because of an act or omission of a KDOT representative, design consultant, inspection consultant, or other government entity that the Contractor believes violates the contract. A claim includes a contract adjustment request unresolved between the Contractor and KDOT at any level of review.

b. Levels of Review.

(1) Field Engineer. Submit a claim to the Field Engineer. The Field Engineer will issue a written decision within 21 calendar days, accepting or denying the claim, in whole or in part.

(2) District Engineer. If dissatisfied with the Field Engineer's decision, appeal the decision in writing to the District Engineer within 15 calendar days after receiving the Field Engineer's written decision. The District Engineer will issue a written decision within 30 calendar days after holding an informal settlement hearing with all parties.

(3) Bureau Chief of Construction and Materials. If dissatisfied with the District Engineer's decision, appeal the decision in writing to the Bureau Chief of Construction and Materials within 15 calendar days after receiving the District Engineer's decision. The Bureau Chief of Construction and Materials will issue a written decision within 45 calendar days after holding an informal settlement hearing with all parties.

(4) State Transportation Engineer. If dissatisfied with the Bureau Chief of Construction and Materials' decision, appeal the decision in writing to the State Transportation Engineer within 15 calendar days after receiving the Bureau Chief of Construction and Materials' decision.

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(a) The State Transportation Engineer will hold a formal final administrative hearing or will appoint another hearing officer or a hearing panel to hold a formal final administrative hearing.

- The State Transportation Engineer has sole discretion to conduct the final administrative hearing or appoint another hearing officer or a panel for this purpose. Any hearing officer may be a KDOT employee or a non-KDOT employee. Any panel may consist of KDOT employees, non-KDOT employees, or a combination thereof.
- If the Contractor requests a non-KDOT hearing officer or panel and the State Transportation Engineer grants this request, both parties will share equally the expense of the outside hearing officer or panel.

(b) Final Agency Decision. The State Transportation Engineer will issue a final agency decision whether the State Transportation Engineer conducts the hearing or appoints a hearing officer or panel to conduct the final administrative hearing. If a hearing officer or a panel conducted the final administrative hearing, the State Transportation Engineer will issue the Agency's final decision after:

- reviewing the hearing officer's or panel's decision; and
- concurring in the decision or modifying the decision as the State Transportation Engineer deems best.

(c) The State Transportation Engineer's decision under **subsection 105.13b.(4)(b)** represents KDOT final agency action under the Kansas Judicial Review Act (KJRA) K.S.A. 77-601 et seq.

c. Hearing Procedures.

(1) Informal, settlement hearing. For purposes of **subsection 105.13b.**, the District Engineer or Bureau Chief of Construction and Materials may hold an informal hearing by document submission, by phone, or by meeting with all parties in person. These informal hearings are considered settlement negotiations. Documents submitted at these meetings and the KDOT representative's decision are part of the agency record; however, the discussions at these meetings are confidential. Parties may have Legal Counsel present. No formal rules of evidence apply.

(2) Final administrative hearing. The final administrative hearing will take the following form unless the parties agree otherwise in writing.

- Before the hearing, submit a written statement identifying the issues in dispute (questions of law and questions of fact);
- A court reporting service will record the hearing. A party may request a written transcript of the proceeding at that party's expense;
- All witnesses will testify under oath;
- A party may have Legal Counsel present. Counsel has the right to examine all witnesses;
- Formal rules of evidence do not apply. While hearsay is admissible generally, the hearing officer may require further substantiation or authentication of hearsay evidence;
- Legal Counsel may present a party's arguments; however, these arguments are not evidence. Thus, for the hearing officer to consider these arguments, Counsel's arguments must be supported by witness testimony, documentation provided to the hearing officer, or both; and
- The agency record will consist of the hearing transcript, all documentation submitted to the hearing officer or panel at the hearing, and all documentation the hearing officer or panel and State Transportation Engineer considered in reaching a decision.

(3) Supporting Documentation. Provide all documentation KDOT, the LPA, or both request to support a Claim. This documentation may include, without limitation, bid records; job cost reports; payment records for material, labor, and subcontract work; financial statements; records used in preparing the claim such as schedule analysis and production analysis; company records showing overhead and profit; records of subcontractors; and records of suppliers, among others. The Contractor shall identify and segregate those documents the Contractor claims are confidential or proprietary. KDOT, the LPA, or both will endeavor to protect such records from disclosure to third parties under the exemptions to the Kansas Open Records Act.

(4) Interest on Claims. Demonstrate entitlement to interest under Kansas law. If interest on a claim is due under Kansas law, the Secretary will pay an annual rate of interest that is equal to the judgment rate published by the Kansas Secretary of State (on his/her official website) for the applicable years in which interest is owed.

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d. Time Period for Filing Appeals; Waiver. Except for appeals from the State Transportation Engineer's decision which are governed by the KJRA, K.S.A. 77-601 et seq., file all appeals within 15 calendar days or obtain the reviewing Engineer's approval to file the appeal outside the 15 calendar day period. If the Contractor fails to file the appeal within the required 15 calendar days or fails to obtain a time extension, the Contractor waives the right to appeal the claim and accepts the decision of the last reviewing Engineer.

e. Time period for KDOT Decisions; Delay. If the KDOT Field Engineer, District Engineer, or Bureau Chief of Construction and Materials fail to issue a decision within the calendar days permitted under **subsection 105.13b.** or within any additional time the Contractor and KDOT agree upon, the Contractor may treat the claim as denied and appeal to the next level of review.

f. LPA Projects. On projects funded with LPA and Federal-aid monies, the LPA may conduct its own claim resolution process or may require the Contractor to follow the claims procedure of **subsection 105.13b.** as modified in this **subsection 105.13f.** If the LPA requires the Contractor to follow **subsection 105.13b.,** submit a claim in the same manner as KDOT projects. The reviewing KDOT Engineers will involve the LPA representatives in the informal hearings. If the Area Engineer, District Engineer, or Bureau Chief of Construction and Materials are unable to resolve the claim, the claims procedure ends and the Contractor may seek other remedies. KDOT will not conduct a final administrative hearing or issue a final agency decision on LPA/Federal-aid funded projects. The Project agreement between the LPA and KDOT, as the administrator of federal funds, may identify whether the LPA is using KDOT's claims procedure. If the agreement between the LPA and KDOT does not identify a claims procedure, the Contractor and LPA may agree to a use KDOT's claims procedure or an alternate claims procedure. In the event of their failure to reach an agreement, then the Contractor may seek whatever remedies against the LPA that the law permits.

105.14 CONSTRUCTION STAKES, LINES AND GRADES

a. Contractor Construction Staking. Use construction stakes and benchmarks to establish the controls necessary to perform work. Comply with the Contractor Construction Staking requirements under **SECTION 802.** Preserve all stakes and benchmarks. Replace missing, damaged, or incorrectly-set stakes and benchmarks. Bear the cost of replacement unless KDOT disturbed or destroyed the stakes/benchmarks or Contract Document errors resulted in the incorrectly-set stakes/benchmarks.

b. KDOT Construction Staking. If KDOT provides the construction staking, KDOT will comply with the Contractor Construction Staking requirements under **SECTION 802.** Preserve all stakes and benchmarks. If the Contractor disturbs or destroys stakes or benchmarks requiring KDOT to re-stake, the Contractor shall be responsible for the cost to replace stakes and benchmarks. Notify the Field Engineer at least 10 business days before beginning work that requires staking. The Secretary will not be responsible for staking delays that occur because the Contractor failed to give KDOT this notice.

105.15 VALUE ENGINEERING OR COST REDUCTION PROPOSAL (Proposal)

a. If the Contractor wishes to modify the Contract Documents to reduce Project construction costs, the Contractor may submit to the Field Engineer a written value engineering proposal detailing such modification and the anticipated cost reduction.

- Value Engineering is a new method or product not previously used on KDOT projects. The proposed method or product must be equal to or greater than the quality specified in the Contract Documents.

b. If the Contractor wishes to modify the Contract Documents to reduce Project construction costs, submit to the Field Engineer a written cost reduction proposal detailing such modification and the anticipated cost reduction.

- Cost Reduction is applying previously proven methods or materials to reduce the Project cost. The proposed method or product must be equal to or greater than the quality specified in the Contract Documents.

c. Include the following items in the Proposal:

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- Existing contract requirements and discussion of the advantages and disadvantages of these requirements;
- Proposed modifications (changes, additions, and deletions) to existing contract requirements and discussion of the advantages and disadvantages of these modifications;
- A complete set of proposed plans and specifications that show the modifications, including quantity variations in contract pay items among other things;
- Detailed cost estimate of the Proposal;
- Time frame within which the Engineer must make a decision on the Proposal; and
- Anticipated time impact (delay, acceleration, or none) on Project completion.

d. Acceptance/Rejection. The Field Engineer will transmit the Proposal to the District Engineer and the Bureau Chief of Construction and Materials.

(1) The Bureau Chief of Construction and Materials may accept all or part of the Contractor's Proposal if the Bureau Chief of Construction and Materials, exercising sole discretion, determines the proposal:

- contains the information required in **subsection 105.15c.**;
- generates a net savings in construction costs according to **subsection 105.15e.**; and
- is in the State of Kansas's best interests.

(2) The Bureau Chief of Construction and Materials, exercising sole discretion, will reject all or part of the Contractor's Proposal if the Proposal:

- impairs essential characteristics of the Project such as service life, economy of operation, ease of maintenance, desired appearance, design ability, design policies, and safety, among other things;
- requires excessive review, evaluation, investigation, or a combination of these items; or
- changes the basic bridge design, pavement thickness, pavement type, or a combination of these items.

e. Net Savings. To determine the net savings, the Bureau Chief of Construction and Materials will subtract the revised contract price from the original contract price and then deduct expenses KDOT will incur for reviewing and implementing the Proposal. For original contract costs, the Bureau Chief of Construction and Materials may disregard contract bid prices that do not reflect actual costs.

f. Change Order and Payment. If the Bureau Chief of Construction and Materials accepts all or part of the Contractor's Proposal, the parties will execute a change order. The change order will specify the net savings with both the Secretary and Contractor receiving 50% of the net savings. If payment is made through unit prices, KDOT will pay the Contractor its 50% share of the net savings on intermediate estimates as the units of work are completed. If payment is made on a lump sum basis, KDOT will pay the Contractor its 50% share of the net savings after KDOT has accepted the accepted Proposal work. KDOT will not pay the Contractor's expenses in developing, designing, and submitting the Proposal.

g. KDOT's Future Use of Value Engineering/Cost Reduction Proposal. If accepted, KDOT may adopt the Proposal for general use on other projects without further reimbursement to the Contractor. If KDOT does not adopt the Proposal for general use, KDOT will pay for the use of the Proposal on other projects for which the Contractor makes the Proposal and the Bureau Chief of Construction and Materials accepts the Proposal.

105.16 NOTICE OF ACCEPTANCE

a. Notice of Acceptance of a Portion of Contract (Partial Acceptance). The Contractor may request the Engineer to make final inspection of a completed unit or portion of the Project such as a structure, a roadway, or an interchange. If the Engineer determines the unit or portion of the Project complies with the Contract Documents and it is in the State's best interest to accept this work, the Engineer may issue a partial acceptance of this work.

(1) The Engineer may issue a partial acceptance for the following:

- Sections of pavement, bridges, and interchanges that are opened to traffic if traffic is in its final traffic configuration; or
- Portions of the Project completed and awaiting action by another Contractor under a separate contract such as grading the roadway surface for a separately-let surfacing project.

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(2) The Engineer will not issue a partial acceptance for the following:

- Individual RCP's, RCB's, or span bridges;
- Grading balances;
- Portions of completed pavement not open to traffic or not in its final traffic configuration;
- Sign structures; or
- Completed, small parts of the Project.

The partial acceptance relieves the Contractor of further responsibilities for the accepted unit or portion of the Project except as noted in **subsection 108.12**.

b. Notice of Acceptance of Contract. After the Contractor notifies the Engineer that all work is complete, the Engineer will inspect the Project. If the Engineer determines work is incomplete or needs corrective action, the Engineer will provide the Contractor a punch list. After the Contractor completes the punch list and final cleanup (**subsection 104.21**), the Engineer will again inspect the Project. Upon finding the Contractor has completed all work, the Engineer will issue a Notice of Acceptance of Contract.

(1) The Notice of Acceptance of Contract prevents the Contractor from making further requests for additional time, additional money, or both except for the following:

- Contract Changes under **SECTION 104** that arise within 10 business days before Notice of Acceptance. (See **subsection 104.8d**. for waiver of claims filed after Notice of Acceptance).
- Adjustments to prior and pending change orders for correction of quantities, measurements, or certifications allowed under **subsection 108.12**).

(2) The Notice of Acceptance of Contract relieves the Contractor of the responsibility to:

- perform physical construction on the Project except construction arising out of any breach of warranty, breach of guaranty, latent defects, fraud, or misrepresentation discovered after acceptance (see **subsection 108.12**).
- repair damage to the Project caused by Acts of God or third parties.
- maintain the Project.

(3) The Notice of Acceptance of Contract begins the statutory time for subcontractors and suppliers to file payment claims against the Contract Bond as permitted in K.S.A. 68-410.