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SECTION 108

PROSECUTION AND PROGRESS

108.1 NOTICE TO PROCEED

a. General. For each Project, the Engineer will issue to the Contractor a Notice to Proceed, a written notice to the Contractor to begin the contract work including, when applicable, the date from which the Engineer will start charging Contract Time. The Notice to Proceed will be issued and the Contract Time will begin within the earliest and latest starting dates established for the Project. (see **subsection 102.6**). Without the District Engineer's permission and for good cause only, the Engineer cannot give a Notice to Proceed date earlier than the earliest starting date or later than the latest starting date established for the Project. To move the earliest and latest start date by more than 30 calendar days, the District Engineer will obtain the approval of the Bureau Chief of Construction and Materials. Perform no work on the Project site until the Engineer issues the Notice to Proceed. Begin work on the Project site on or shortly after the Engineer issues the Notice to Proceed. If, for any reason, the Contractor has not received the Notice to Proceed on or before the latest starting date, the Contractor shall notify the Engineer of the omission.

b. Railroad Protective Liability Policy. Typically, the Engineer will not issue the Notice to Proceed without an approved, railroad protective liability policy. If the Engineer agrees to issue the Notice to Proceed before the Contractor has obtained an approved, railroad protective liability insurance policy, do not perform work within the railroad right-of-way until the railroad has approved this policy.

c. Restricted Site Access. The Engineer may issue the Notice to Proceed even if the Contractor has restricted site access. Include in the Contractor's bid all costs (money and time) associated with restricted site access identified in the Contract Documents or observed by site examination.

108.2 PRE-CONSTRUCTION CONFERENCE AND PROJECT PROGRESS MEETINGS

a. Pre-Construction Conference. KDOT will hold a pre-construction conference for the Project. If held at a facility, attend and bring to the pre-construction conference all documentation the Engineer requires. If conducted by phone, submit the required documentation to the Field Engineer.

b. Project Progress Meeting. At least once a month, hold a Project progress meeting with the Engineer, Inspectors, and any other government owners involved in the Project. Invite subcontractor personnel as well as other third parties which may affect the Contractor's progress. If necessary, hold Project progress meetings weekly or bi-weekly. These meetings allow the parties to discuss upcoming work, discuss anticipated problems, determine inspection requirements, review schedules, and review punch list items (see **subsection 104.21**) among other things. Notify the District Engineer if KDOT personnel are not attending Project progress meetings.

108.3 PROGRESS SCHEDULE OR NETWORK SCHEDULE (SCHEDULE)

a. Definitions.

(1) Progress Schedule: A chronologically-sequenced bar chart identifying the following:

- activities, sequence of activities, and duration of activities; and
- dates for drawing submittals and desired approval.

(2) Network Schedule: A chronologically-sequenced bar chart and associated reports sorted by activity and earliest/latest start dates. The bar chart shall identify the following:

- activities, sequence of activities, duration of activities, and resources (Major Equipment, Materials, Labor) expected to be devoted to the work at the various stages;
- dates for drawing submittals and desired approval; and
- interdependence of all activities.

b. Schedule.

(1) Unless the Project has less than 30 working days, submit either an accurate Progress Schedule or a Network Schedule. Submit the Schedule either at the pre-construction conference or within 10 business days before the anticipated beginning of work on the Project.

(2) It is the Contractor's responsibility to determine the most feasible order of work consistent with the contract requirements. Plan and organize work to produce the least interference with traffic, businesses, and home owners and to minimize the use of planned detours. Plan and organize work to meet the Contract Time and any interim Contract Times. If the Schedule reflects completion of parts or all of the work earlier than the Contract Time (early completion), the Secretary shall not be liable for additional costs the Contractor incurs to achieve early completion or liable for delays that prevent the Contractor from achieving early completion.

(3) Provide enough detail so the Schedule reflects the Controlling Item of Work (CIOW) and other activities that affect the Contract Time.

(4) The Engineer will request the Contractor to submit a revised Schedule if the Engineer believes the Schedule is unworkable.

c. Controlling Item of Work (CIOW). The Engineer will use the Schedule to identify the Controlling Item of Work and all activities that extend the Contract Time. If the Engineer is unable to identify the CIOW from the Schedule, the Engineer will request a revised Schedule that shows the CIOW and all activities that extend the Contract Time. If the Contractor fails to provide a revised Schedule or if the Contractor's revised Schedule fails to show the CIOW, the Engineer will determine the CIOW.

d. Notification. Notify the Engineer of Schedule changes, delays, or both regardless of whether the Contractor is seeking additional time or money. The Engineer may notify the Contractor that the contract is behind schedule. This notice is not an order to accelerate the project.

e. Updated Schedule. (For projects requiring a Schedule).

(1) Update Schedules when a Contract Change or other act or omission:

- alters the sequence of activities;
- changes the time for performing an activity; or
- requires the Contractor to increase or decrease major equipment, material, or labor to meet the Schedule.

(2) Submit an updated Schedule to the Engineer within 5 business days after one of the following events occur:

- a Contract Change that affects the Schedule by 10 working days;
- a contract delay that affects the Schedule by 10 working days;
- work falls behind the latest Schedule by 10 working days (Working Day Projects); or
- work falls behind the latest Schedule by 14 calendar days (Calendar Completion Date or Calendar Day Projects).

(3) Update schedules accurately by adjusting the Schedule to reflect the resources the Contractor plans to devote to the work. If using a Network Schedule, identify the resources in the updated Schedule.

(4) Identify any planned acceleration or planned sequencing change required to complete the work within the Contract Time.

f. Payment for Schedules. Include in the Contractor's bid the cost of preparing and submitting the original Schedule and anticipated updates. The cost for the Schedule is subsidiary to other work.

g. Use of Network Schedules. Provide a Network Schedule instead of a Progress Schedule when:

(1) the Contract Documents requires a Network Schedule;

(2) the Engineer requires a Network Schedule because:

- the Engineer is unable to determine from the Progress Schedule the CIOW;
- the Engineer is unable to determine from the Progress Schedule the activities that extend the Contract Time;
- the Contractor has not submitted updated progress schedules; or

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- the Contractor's other acts or omissions cause a need for a Network Schedule to monitor the Project.

108.4 CONTRACT TIME-GENERAL

a. Contract Time. The Contract Time is the time set forth in the Contract Documents for completion of the work on the Project. Timely performance is an essential part of the contract. Complete all of the work within the Contract Time. For the Contract Time, the Secretary may establish:

- (1) working days, calendar days, or a calendar completion date to complete all work; or
- (2) A combination of working days, calendar days, or calendar completion dates, to perform all work necessary to open the Project to unrestricted traffic (Project Open Time) and then to complete all remaining work for Project construction completion (Cleanup Time).

b. Project Open Time. During the Project Open Time, the Contractor shall perform all work necessary to open the Project to unrestricted traffic and may perform any other work necessary to complete physical construction or reconstruction of the Project. "Unrestricted traffic" means that all roadways (lanes, turn lanes, ramps, side roads, medians, shoulders etc.) within the Project limits are open to unobstructed continuous traffic flow with temporary or permanent striping, temporary or permanent signing, and required safety features such as guardrail and traffic control devices in place and operational. "Unobstructed continuous traffic flow" means traffic is following the final lane configurations required by the plans and there are no lane closures. The Engineer, not the Contractor determines when the Contractor may open the Project to unrestricted traffic.

c. Cleanup Time. The Cleanup Time is the number of working days, calendar days, or calendar completion date available to the Contractor after the Project Open Time expires for the Contractor to complete remaining, unfinished contract pay items, subsidiary items, incidental work, final cleanup, and final punch list.

- (1) Determine the number of cleanup days on working day contracts according to **TABLE 108-A**.

TABLE 108-A: DETERMINING CLEANUP DAYS ON A WORKING DAY PROJECT

Project Open Time in Working Days-Range	Number of Cleanup Working Days
1 to 50	10
51 to 100	20
101 to 200	30
200+	40

(2) If the Engineer adjusts the Project Open Time from one range to another because of a Contract Change, the Engineer will apply the cleanup working days corresponding to the new range in **TABLE 108-A**.

(3) On calendar day or calendar completion date contracts, the Secretary will identify the number of cleanup working days, cleanup calendar days, or the cleanup calendar completion date in a project special provision.

- (4) Project Open Time and Cleanup Time are separate periods of time.
 - Even if the Project is not open to unrestricted traffic, the Engineer will begin charging Cleanup Time the day after the Project Open Time expires.
 - If the Project is open to unrestricted traffic but the Project Open Time has not expired, the Engineer will not begin charging Cleanup Time until the Project Open Time has expired.
 - Once begun, the Engineer will continue charging Cleanup Time until all work is complete and the charging of Cleanup Time will not be suspended on days in which the Contractor is being assessed liquidated damages, a disincentive assessment, or both for restricting traffic.

d. Provide the Engineer at least 24-hour notice when the Contractor or subcontractors intend to work on Saturday. Obtain the District Engineer's approval to work on Sundays, Kansas Civil Service holidays, Governor-proclaimed holidays, Saturdays following a Friday holiday, and Saturdays preceding a Monday holiday.

- e. Resume work promptly after temporary suspensions and winter shutdown.**

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f. Interim Contract Times. The Secretary may set Interim Contract Times in which the Contractor shall complete certain parts of the Project. Interim Contract Times may be stated in working days, calendar days, calendar completion dates, or a combination thereof.

108.5 WORKING DAY CONTRACTS (Also, see **subsection 108.4.**)

a. Complete all work necessary to open the Project to unrestricted traffic within the original contract working days and any additional working days allotted to the contract (Project Open Time). Complete all remaining unfinished contract pay items, subsidiary items, incidental work, extra work, final cleanup, and final punch list within the working days remaining in the Project Open Time, if any, and the Cleanup Time permitted under **subsection 108.4c.**

b. The Engineer will begin charging working days on the date of the Notice to Proceed.

c. The Engineer will assess a working day or cleanup working day for:

(1) Every weekday on which weather does not prevent the Contractor or a subcontractor from performing the Controlling Item of Work (CIOW) for at least 50% of the Contractor's normal workday (regardless of whether the Contractor or subcontractor performs work).

(2) Every Saturday on which the Contractor or a subcontractor chooses to work and is able to work on the CIOW (regardless of whether the Contractor or subcontractors perform work on the CIOW).

(3) Every Sunday or legal holiday on which the District Engineer allows the Contractor or a subcontractor to perform work requiring inspection (regardless of the type of work or the time spent working).

(4) Every weekday the Contractor or a subcontractor is unable to perform the CIOW because of an act or omission for which the Contractor, subcontractor, or supplier is responsible under the contract.

(5) Every weekday the Contractor or a subcontractor is unable to perform the CIOW because of plant failures, equipment failures, delivery delays, inefficient operations, personnel problems, material shortages (other than national shortages meeting **subsection 108.5d.(5)**), financial difficulties, and work on another project(s). The Contractor assumes the risk of delay associated with these matters, even though these matters may not be foreseeable. The Contractor assumes the risk of delay associated with these matters, even though these matters may be outside the Contractor's control or outside the control of the subcontractor's or suppliers at any tier.

(6) Exception: If weather prevents the Engineer from assessing a working day or cleanup working day under **subsection 108.5c.(1)**, the Engineer will not assess a working day or cleanup working day for a reason listed in **subsections 108.5c.(2) through (5)**.

d. The Engineer will not assess a working day or cleanup working day for the following:

(1) Recovery Days. Recovery days are days the Contractor needs to restore the site to the approximate condition that existed before weather prevented the Contractor from performing the CIOW.

(2) States Delay Days. States delay days are days in which the Contractor or subcontractors cannot work on the CIOW because of a Contract Change or other act or omission for which KDOT, any LPA, or another government entity is responsible. State's delay days include days on which the Contractor is awaiting a final punch list under **subsection 104.21** when the final punch list is the CIOW and the 5 business days allowed to prepare the final punch list has expired.

(3) Piling Delivery. The Engineer will not charge working days on days the Contractor or subcontractor awaits the arrival of permanent piling if:

- the contract requires test piles;
- the bridge Contractor or subcontractor ordered the permanent piling immediately after driving the test piles; or
- piling installation is the CIOW.

(4) Winter Holiday Period. The Engineer will not charge working days or cleanup working days during the Winter Holiday Period regardless of whether the Contractor or subcontractors perform work. The Winter Holiday Period begins December 23 and ends January 3.

(5) National Material Shortages. The Engineer will not charge working days under **subsection 108.5c.(5)** if there is a national material shortage unless:

- the national material shortage was foreseeable at the time of bid; or
- the national material shortage does not prevent the Contractor from performing the CIOW.

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(6) Winter Shutdown Period. The Engineer will not charge working days or cleanup working days during a Winter Shutdown Period identified in or added to the Contract Documents. KDOT may add a Winter Shutdown Period to the contract when the District Engineer and Contractor agree to suspend the Project because winter conditions prevent the Contractor from making progress on the CIOW for at least 50% of the Contractor's normal work week or winter conditions make it commercially impractical for the Contractor to make progress on the CIOW.

e. **Concurrent Delay.** The Engineer will not assess a working day or cleanup working day under subsection 108.5c. if subsection 108.5d. prevents the Engineer from assessing a working day or cleanup working day on that same day.

f. **Notification of Working Day Charges.** Weekly, the Engineer will provide the Contractor a Notification of Working Day Charges, identifying the working days, cleanup working days, or both that were charged during the previous week.

g. **Disputing Working Day Charges.**

(1) Notify the Engineer, in writing, of any contested working days or cleanup working days charged within 10 business days after receiving the Notification of Working Day Charges. In the written notice, provide the reasons for contesting the days charged. If the Contractor fails to give this notice in writing or fails to give this notice within 10 business days, the Contractor waives the right to dispute the working days or cleanup working days charged in that Notification of Working Day Charges. Notice to the Inspector is not sufficient under this subsection 108.5g.

(2) If the Contractor disputes the working days or cleanup working days charged because of a Contract Change, comply with subsections 104.8 and 104.10 and identify in the contract adjustment request which working days or cleanup working days the Contract Change has affected. The 10 day notice period in subsection 108.5g.(1) does not apply to working days or cleanup working days disputed because of a Contract Change.

h. **Additional Working Days.** Working days will be added to a contract only when SECTION 104 allows additional time and when a written contract adjustment (Change Order) has received final approval.

108.6 CALENDAR DAY AND CALENDAR COMPLETION DATE CONTRACTS (Also, see subsection 108.4.)

a. The Engineer will issue a Notice to Proceed on the date the Contractor begins work or the date the Contract Documents specify.

b. Complete all work necessary to open the Project to unrestricted traffic within the calendar days allotted in the Contract Documents or before the calendar completion date expires, including authorized time extensions (if any). Complete all remaining, unfinished contract pay items, subsidiary items, incidental work, extra work, final cleanup, and final punch list within the calendar days remaining (if any), within the days remaining before the calendar completion date expires (if any), and within the Cleanup Time set by the project special provision.

c. The Secretary will increase the number of calendar days, extend the calendar completion date, or pay the Contractor to accelerate the Project if the Contractor proves one of the following:

(1) The Contractor is entitled to a contract adjustment under SECTION 104 and complies with subsection 104.10b.

(2) Unusually severe weather delayed the Project completion as provided in this subsection 108.6.c(2). Unusually severe weather is adverse weather that at the time of year in which it occurred is abnormal for the place in which it occurred. For unusually severe weather to delay Project completion and warrant additional time under subsection 108.6.c(2), the Contractor must have a schedule showing the CIOW and delay to the CIOW at the time of the unusually severe weather. In addition, the Contractor must show unusually favorable weather at other times of the year failed to diminish, mitigate, or overcome the delay caused by the unusually severe weather.

(3) An Act of God delayed the Project completion.

d. The State Transportation Engineer has sole discretion to determine whether to give a time extension or pay acceleration costs under subsection 108.6c.

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e. Interim Contract Times. The project special provision may require the Contractor to perform specified work within Interim Contract Times (working days, calendar days, or calendar completion dates) designated in the Project Special Provision.

108.7 COMPLETING WORK EARLY-INCENTIVE AWARD

a. The Secretary may offer the Contractor an incentive award for completing some or all of the work before the specified hourly periods, working days, calendar days, or calendar completion date expires (incentive award).

b. Seek no additional money for completing a Project before the Contract Time unless the parties have agreed, in writing, to an incentive award under this **subsection 108.7**. Seek no additional money for completing parts of a Project before interim Contract Times, unless the parties have agreed, in writing, to an incentive award under this **subsection 108.7**.

c. The Contractor may request the Secretary to add an incentive award to a contract. It is in the Secretary's sole discretion to include or add an incentive award to a contract.

d. The Secretary will pay the incentive award only if the Contractor completes the work early, according to the Contract Documents.

108.8 FAILURE TO COMPLETE WORK TIMELY-LIQUIDATED DAMAGES AND DISINCENTIVE ASSESSMENTS

a. If the Contractor fails to complete the work within the Contract Time and within Interim Contract Times, if any, the Secretary may charge:

- (1) liquidated damages under this **subsection 108.8**;
- (2) liquidated damages under a Project Special Provision;
- (3) a disincentive assessment(s) under a Project Special Provision; or
- (4) any combination of the foregoing.

b. Excluding Sundays and legal holidays, the Engineer will charge liquidated damages, a disincentive assessment, or both for each calendar day, or part thereof, that:

- (1) The Project remains incomplete after the Contract Time has expired.
- (2) The Project is not open to unrestricted traffic after the Project Open Time has expired.
- (3) The Contractor obstructs the unrestricted traffic flow to perform work after the Project was opened to unrestricted traffic and the Project Open Time has expired.
- (4) Specified work is not complete after Interim Contract Time(s) expire.
- (5) The Project remains incomplete after Cleanup Time expires.

If the District Engineer permits the Contractor to work on Sundays or legal holidays during liquidated damages or disincentive assessment periods, the Engineer will charge liquidated damages, disincentive assessments, or both for all Sundays and legal holidays worked, including the Winter Holiday period. The Engineer will not stop charging liquidated damages, disincentive assessments, or both until the Contractor completes the required work unless the Engineer suspends damages under **subsection 108.8c**.

c. Exceptions warranting suspension of damages and resumption of damages.

(1) Extra Work. The Engineer will suspend liquidated damages, disincentive assessments, or both if the Engineer orders extra work after the Contract Time has expired and this work becomes the CIOW, affects the CIOW, or otherwise extends the Project completion time. The Engineer will resume charging and deducting liquidated damages, disincentive assessments, or both when the extra work ceases to be the CIOW, stops affecting the CIOW, or no longer extends the Project completion time.

(2) Final Punch List. The Engineer will suspend liquidated damages, disincentive assessments, or both on days the Contractor is awaiting a final punch list under **subsection 104.21** when the final punch list is the CIOW and the 10 business days allowed to prepare the final punch list has expired.

The Engineer will resume charging and deducting liquidated damages, disincentive assessments, or both on one of the following days, whichever occurs first:

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- The day the Contractor resumes the final punch list work.
- The 1st working day after the Contractor receives the final punch list.
- The 5th calendar day after the Contractor receives the final punch list if the Contractor had demobilized from the Project.

(3) Specified Winter Conditions.

(a) Suspension of Damages. On working day, calendar day, or calendar completion date projects, if the roadway is open to traffic and in its final traffic configuration for winter, the Engineer will suspend liquidated damages, disincentive assessments, or both:

- during a Winter Shutdown Period identified in the Contract Documents;
- during a Winter Shutdown Period the parties negotiate;
- once seasonal limitations prevent the Contractor from performing the CIOW on pay items restricted by these limitations such as permanent pavement markings and seeding; or
- when winter conditions prevent the Contractor from making progress on the CIOW for at least 50% of the Contractor's normal work week or winter conditions make it commercially impractical for the Contractor to make progress on the CIOW.

(b) Resuming Damages after Suspension for Weather Conditions. On working day, calendar day, or calendar completion date projects that have been suspended for weather conditions under **subsection 108.8c.3(a)**, the Engineer will resume charging and deducting liquidated damages, disincentive assessments, or both on whichever of the following days occurs first:

- the day after the winter shutdown period expires.
- the day the Contractor resumes work on its own.
- May 31st of the year following the suspension for weather conditions.

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d. Amount of damages.

(1) On working day contracts, the Secretary will determine the amount of liquidated damages using **TABLE 108-1**.

Original Contract Amount Range		Amounts of Liquidated Damages to be Deducted for Each Day Over Contract Time, Project Open Time or Cleanup Time	
		Condition at End of Working Days, Calendar Days, Calendar Completion Date, Cleanup Time	
(A)	(B)	Project Not Complete after Contract Time Expires under 108.4a.(1) or Project Not Open to Unrestricted Traffic after Project Open Time Expires under 108.4a.(2)*	Project Open to Unrestricted Traffic, but not Completed after Cleanup Time Expires under 108.4a.(2)
\$0.00	\$500,000.00	\$800.00	\$400.00
\$500,000.01	\$1,000,000.00	\$1,000.00	\$500.00
\$1,000,000.01	\$2,500,000.00	\$1,200.00	\$600.00
\$2,500,000.01	\$5,000,000.00	\$1,500.00	\$750.00
\$5,000,000.01	\$10,000,000.00	\$2,000.00	\$1,000.00
\$10,000,000.01	\$25,000,000.00	\$2,500.00	\$1,250.00
Over \$25,000,000.01		\$3,000.00	\$1,500.00

*Or Not Available to the Next Contractor, when applicable.

Application of TABLE 108-1 when Contract Time includes Project Open Time and Cleanup Time:

- Multiply the number of days (under **subsection 108.8b.**) that the Project was not open to unrestricted traffic after the Project Open Time expired by the amount in (A) to obtain an amount of Liquidated Damages.
- Multiply the number of days (under **subsection 108.8b.**) that the Project was open to unrestricted traffic but not complete after the Cleanup Time expired by the amount in (B) to obtain an amount of Liquidated Damages.
- Combine these 2 liquidated damage amounts to obtain a Total Liquidated Damages amount.

(2) On calendar day projects, calendar completion date projects, or projects with an Interim Contract Time(s), the Secretary will designate in a Project Special Provision the amount of liquidated damages, disincentive assessment, or both. If a Project Special Provision does not address the amount of liquidated damages, disincentive, or both, apply **TABLE 108-1**.

(3) If the Contractor placed temporary rather than permanent striping, the Project will no longer be considered open to “unrestricted traffic” on days the Contractor replaces the temporary striping with permanent striping. If the Contractor placed temporary rather than permanent signing, the Project will no longer be considered open to “unrestricted traffic” on days the Contractor replaces the temporary signing with permanent signing, if the replacement obstructs continuous traffic flow. In either situation, the Engineer will calculate the liquidated damages on these days using the amount in column A of **TABLE 108-1**.

e. The Secretary assesses liquidated damages to recover the Secretary’s additional engineering costs, administration costs, supervision cost, and inspection costs for the Contractor’s failure to complete the work within the Contract Time or Interim Contract Times. The Secretary assesses disincentive assessments to recover some of the public’s user costs or other public expenditures that are unique to the Project and caused by the Contractor’s failure to complete the work within the Contract Time or Interim Contract Times. The Secretary may combine the liquidated damages and disincentive costs into one amount and label the amount as liquidated damages. These

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damages are not considered a penalty but rather as an agreed upon alternative to calculating the actual damages incurred by the Secretary and users for Project delay.

f. Liquidated damages and disincentive assessments assessed under this **subsection 108.8** do not relieve the Contractor from liability for any damages or costs resulting from: claims between Contractors under **subsection 105.12**, third party claims, and deducts for construction work that failed to meet contract requirements such as asphalt smoothness and erosion control violations, among others.

g. Permitting the Contractor to continue working after the Contract Time or Interim Contract Times expire does not constitute a contract time extension or prevent the Secretary from declaring a breach of contract under **subsection 108.9** for the Contractor's failure to complete work timely.

h. Nothing in this **subsection 108.8** or any Project Special Provision providing for liquidated damages, disincentive assessments, or both prevents the Secretary from declaring a breach of contract under **subsection 108.9** for the Contractor's failure to complete work timely.

i. The Contractor, not the Secretary, shall pay for traffic control during liquidated damages periods, disincentive assessment periods, or both incurred for the Contractor's failure to meet the Contract Time. This provision shall not apply to damages incurred for failing to meet Interim Contract Times.

j. Administering Damages. For purposes of this **subsection 108.8**, the term "damages" means liquidated damages, disincentive assessments, or both.

The Engineer will deduct the damages from contract funds owed to the Contractor. If damages exceed contract funds, pay KDOT for remaining damages owed. Issue this payment within 10 business days after receiving notice to pay.

If the Contractor fails to pay, the Secretary may collect the amount owed from the Surety after declaring a breach of contract under **subsection 108.9**.

The Engineer will continue to assess damages even after the Secretary or Surety takes over the contract after the Contractor's breach. Both the Contractor and Surety are liable for the damages assessed.

Only the Secretary or State Transportation Engineer may waive all or part of the damages. As each situation and project is different, no damage waiver in one instance dictates a future waiver of damages on the same or another project.

108.9 CONTRACTOR'S BREACH OF CONTRACT

a. Causes for Breach. The Secretary (or State Transportation Engineer) may declare the Contractor has breached the contract if the Contractor:

- fails to comply with the contract;
- fails to pay legal judgments within 30 days after the judgment becomes final;
- assigns contract proceeds to creditors without the Secretary or Surety's consent;
- becomes insolvent or is declared bankrupt; or
- commits a fraudulent act on this Project or another project.

b. Notice and Opportunity to Cure. If the Secretary declares a breach of contract for failing to comply with the contract, the Secretary will notify the Contractor and Surety, in writing, of the breach, specifying the particular cause. Except as provided in this **subsection 108.9**, the Secretary will give the Contractor and Surety 10 business days to cure the breach by complying with the contract. If the Secretary determines it is commercially or physically impossible for the Contractor or Surety to cure the breach within the 10 business days allowed, the Secretary will determine whether it is in the State's best interest to extend the cure time or to follow through with the breach of contract. The Secretary has sole discretion to extend the cure time. The Secretary's failure to extend the cure time will not give rise to a breach of contract claim, lack of good faith claim, or other claim. The Secretary may give the Contractor and Surety less than 10 business days to cure the failure to perform remedial work timely (see **subsection 105.5f.**).

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c. Determination of and Remedies for Breach.

(1) If the Contractor or Surety does not cure the breach within the 10 business days or any allowed extension, or if the Contractor or Surety has not been allowed to cure the breach, the Secretary will declare the Contractor in breach and remove the contract from the Contractor. After removing the contract from the Contractor and determining which action is in KDOT's best interests, the Secretary may:

- Hire another Contractor to complete the contract work;
- Require the Surety to complete the contract according to the original contract terms;
- Use KDOT forces to complete the contract work; or
- Employ a combination of the above or other methods to complete the contract work.

(2) The Secretary, Surety, or third party completing the contract or contract work may appropriate and use all materials on the Project site and all materials paid for and stored off site.

(3) If the Secretary hires a third party or uses the Secretary's own forces to complete the contract work, the Contractor and Surety are liable to the Secretary for extra costs the Secretary incurs to complete the contract work. These costs include construction costs that exceed the original contract price and administrative costs that rise from the Contractor's breach. The Secretary will deduct these costs from the contract funds. If the costs exceed the amount of contract funds, the Contractor and Surety shall pay the Secretary the deficit. If the costs are less than the contract funds remaining, the Secretary will pay the Contractor or Surety the balance.

d. Set-off. Nothing in subsection 108.9 prevents the Secretary from exercising the Secretary's set-off rights under K.S.A. 75-6201 et seq.

108.10 OWNER'S BREACH OF CONTRACT

a. Causes for Breach. The Contractor may assert the Secretary has breached the contract if a Contract Change, act, omission, or combination thereof, for which the Secretary is responsible under the contract, fundamentally changes the scope of the original contract.

b. Notice. If the Contractor believes the Secretary has breached the contract, give the Secretary notice, in writing, of the breach, specifying the particular Contract Change, act, or omission. Provide this notice within 10 business days after the Contract Change, act, or omission.

This notice is necessary so the Secretary may determine whether to modify, defer, or cancel the contract. If the Contractor fails to give the Engineer this notice, the Contractor waives the right to seek damages, a time extension, or both outside the contract terms and may seek only a contract adjustment under the contract.

108.11 DEFERRING OR CANCELLING A CONTRACT

a. Reasons for Deferring or Cancelling Contract. The Secretary may defer a contract or cancel a contract for one or more of the following events:

- Executive orders of the President of the United States of America or Governor of Kansas;
- National emergencies;
- Injunctions (temporary restraining orders, preliminary injunctions, permanent injunctions);
- Other court orders;
- Major design changes;
- Site changes;
- Insufficient appropriations to continue the Contract or make payments for charges under the Contract; Other conditions making deferment or cancellation in the State's best interests.

The Secretary's discretion to defer or cancel a contract exists even if the Contractor has partially or substantially performed the work.

b. Notice. The Secretary will provide the Contractor a written Notice of Deferment or Notice of Cancellation.

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c. Deferment. The Secretary and Contractor will enter into a written agreement stating the terms and conditions of deferment. If the parties cannot agree on these terms, the Secretary either will cancel the contract or will keep the original contract in force.

d. Cancellation.

(1) When the Secretary cancels a contract or the remainder of a contract and the Contractor, its subcontractors, or its suppliers did not cause the cancellation, the Secretary will pay the following costs:

- contract prices for work completed;
- idle equipment time if the Engineer stops work before the cancellation date;
- mobilization and demobilization not already included;
- bidding and Project investigative costs relative to amount of work completed;
- material costs for materials the Contractor obtained but were not yet incorporated in the work and that the Contractor is unable to sell or return;
- overhead expenses attributable to the cancelled Project;
- legal and accounting charges for claim preparation associated with cancellation;
- idle labor cost if the Engineer stops work before the cancellation date;
- guaranteed payments for private land usage associated with the Project; and
- other reasonable costs the Contractor incurs because of cancellation, but excluding loss of anticipated profits.

(2) Cancellation does not modify or eliminate the Contractor's or Surety's responsibility for the work performed.

e. Eliminated Items. This **subsection 108.11** does not apply to eliminated items which are covered by **subsection 104.4** even though the eliminated item(s) causes the Contractor to cancel a subcontract or supply contract.

108.12 TERMINATION OF CONTRACTOR'S LIABILITY AFTER NOTICE OF ACCEPTANCE AND EXCEPTIONS

a. Liability to Secretary.

(1) The Notice of Acceptance of Contract under **subsection 105.16** releases the Contractor and Surety from further liability to the Secretary for:

- physical construction on the Project (except construction arising out of any breach of warranty, breach of guaranty, latent defects, fraud, or misrepresentation discovered after Notice of Acceptance);
- physical damage to the Project caused by Acts of God and third parties after Notice of Acceptance (except for physical damage caused by the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, or a combination thereof); or
- Maintenance of the Project.

(2) The Notice of Acceptance of Contract under **subsection 105.16** does not release the Contractor and Surety from the obligation to complete final paperwork or to accept cost adjustments for the work performed. Release of these obligations (with exceptions) occurs after Final Payment as provided in **subsection 109.9**.

b. Liability to Third Parties.

(1) The Notice of Acceptance of Contract under **subsection 105.16** does not release the Contractor from liability to third parties for personal injury (including bodily injury and death) and property damage claims associated with the contract and arising out of the negligent acts or omissions of the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, or a combination thereof. Nothing in this **subsection 108.12** extends the Contractor's liability for these claims beyond that established by law.

(2) The Notice of Acceptance of Contract under **subsection 105.16** does not release the Contractor and Surety from liability to subcontractors and suppliers for work performed or materials supplied on the Project. Nothing in this **subsection 108.12** extends the Contractor's liability for these claims beyond that established in the contract between the Contractor and subcontractor or supplier or beyond that established by law. Nothing in this **subsection 108.12** extends the Surety's liability for these claims beyond that established in the Contract Bond and by law.