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101- DEFINITIONS AND TERMS

SECTION 101

DEFINITIONS AND TERMS

101.1 RULES OF INTERPRETATION

Use of Imperative Mood. KDOT has generally written the standard specifications in the imperative mood, so the subject and helping verb are implied. Example: "Provide supervision" rather than "The Contractor shall provide supervision".

The word "will" generally pertains to the Kansas Department of Transportation's decisions or actions.

When used before a list, the word "include", "includes", or "including" means "including but not limited to" the items in the list.

Although the Contractor is the most-often implied subject, the subject may also include a subcontractor at any tier, supplier at any tier, vendor, fabricator, manufacturer, or other entity the Contractor engages to perform work (including the supply of materials, products, or equipment for use on the Project).

101.2 ABBREVIATIONS

Wherever the following abbreviations are used in these specifications or in other Contract Documents, they are intended to represent the following organizations, agencies, and/or their respective publications, standards, etc.:
AASHTO - American Association of State Highway and Transportation Officials.

ASTM - American Society for Testing and Materials.

AWS - American Welding Society.

CFR - Code of Federal Regulations.

DME - Designated Materials Engineer.

DWR - Division of Water Resources.

EEO - Equal Employment Opportunity.

FHWA - Federal Highway Administration-U. S. Department of Transportation.

GSA - General Services Administration.

KDOT - Kansas Department of Transportation.

LPA - Local Public Authority

MRC - Materials and Research Center

MUTCD - Manual on Uniform Traffic Control Devices.

OSHA - Occupational Safety and Health Administration.

101.3 DEFINITIONS

A + B BIDDING - A bidding method shown in the Contract Documents in which the bidder bids both the work and the working days or calendar days. KDOT assigns a set dollar value for each working day or calendar day the Contractor bids based upon some or all of the daily road user costs. The Secretary will total the amount bid for the work and the product of the working days or calendar days and the set daily dollar value. The contract is awarded to the lowest responsible and responsive bidder using the combination of the work and time. The contract price is the amount bid for the work. The contract time is the number of working days or calendar days the Contractor bid.

101- DEFINITIONS AND TERMS

ACTS OF GOD - A natural event, not preventable by a human agency, such as flood, tornado, or lightning. Forces of nature such as rain, wind, hail, and snow if these forces produce unusually severe weather. 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.

ADVERTISEMENT - The public announcement inviting bids for specified work.

AWARD - The State Transportation Engineer's acceptance of a Proposal and a prerequisite to executing a construction contract.

BID BOND - The approved security, on KDOT's form, the bidder and the bidder's surety or sureties execute, guaranteeing the execution of a satisfactory contract and the filing of an acceptable contract bond if the State Transportation Engineer accepts the bidder's proposal.

BIDDER - An individual, partnership, corporation, other legal entity, or any acceptable combination thereof (joint venture) submitting a proposal.

BID PRICE AND CONTRACT PRICE OR AMOUNT - The sum of the products of the quantities of work the Engineer estimates for the Project and the bidder's respective unit prices, lump sum prices, or both as set forth in the Proposal.

BRIDGE - A single or multiple span structure, including supports, erected over a depression or an obstruction, such as water, a highway, or railway, and having a track or passageway for carrying traffic or other moving loads and having an opening measured along the center of the roadway of more than 20 feet between under-copings of abutments or spring lines of arches or extreme ends of openings of multiple boxes. If there are no abutment copings or fillets, the 20 foot measurement shall be between points 6 inches below the bridge seats or, in the case of frame structures, immediately under the top slab. All measurements shall include the width of intervening piers or division walls.

Bridge Length. The greater dimension of a structure measured along the center of the roadway between backs of abutment backwalls or between ends of the bridge floor.

Bridge Roadway Width. The clear width of structure measured at right angles to the center of the roadway between the bottom of curbs or, if curbs are not used, between the inner faces of parapet or railing.

BUSINESS DAY - Any day excluding Saturday, Sunday, federal legal holidays, and state legal holidays.

CALENDAR COMPLETION DATE - A specified date by which the Contractor shall complete Project construction.

CALENDAR DAY - Every day shown on the calendar, beginning at 12:01 a.m. and ending at midnight.

CATALOG CUTS - Manufacturers' technical literature that the Contractor is required to submit to the Engineer for approval. On projects where Buy America requirements apply, note on shop drawing and catalog cuts that steel and iron used meets Buy America, unless otherwise specified.

CENTER LINE OF HIGHWAY - A line equidistant from the edges of the median separating the main traveled ways on a divided highway or the center line of the main traveled way on a non-divided highway.

CHANGE ORDER - A written order the Engineer issues to the Contractor and both parties sign, which sets forth any contract change(s). Once both parties execute it, the change order becomes a part of the contract.

CLEANUP TIME (CLEANUP WORKING DAYS) - 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.

101- DEFINITIONS AND TERMS

COMPENSATE (COMPENSATION) - Depending on the context, compensate or compensation refers to time, money, or both money and time.

CONSTRUCTION LIMITS - The limits defined by the contract that actual construction work is to occur within.

CONTRACT - The written agreement between the Secretary and the Contractor setting forth the parties' obligations to perform and pay for the work.

The contract includes the following Contract Documents, all of which constitute one instrument and are incorporated by reference into the contract: the Proposal, exploratory work documents, addenda, amendments, contract form, contract bond, standard specifications, special provisions, project special provisions, general plans, detailed plans, the notice to proceed, material test methods, material test reports, material certifications, Part V of the KDOT Construction Manual, change orders, payment vouchers, guarantees, warranties, and other agreements, if any, that are required to complete the construction of the work timely and in an acceptable manner.

CONTRACT ADJUSTMENT - A contract change order for time, money or both time and money that compensates the Contractor for Contract Changes. A contract change order for time that compensates the Contractor for Acts of God.

CONTRACT BOND - The approved security, on KDOT's form, that the Contractor and the Contractor's surety or sureties execute, guaranteeing completion of the contract (performance of work and payment of all legal debts for the work).

CONTRACT CHANGE - A Contract Change is any event by which the Secretary, the Secretary's authorized representative, or the Secretary's authorized agents modify the contract whether at KDOT's or the Contractor's request. On City-owned or County-owned projects, a Contract Change also includes any event by which Local Public Authority (LPA), the LPA's representative, or the LPA's authorized agents modify the contract whether the LPA, KDOT, or the Contractor initiate the modification. Changes to the contract caused by Acts of God are not Contract Changes.

CONTRACT DOCUMENTS - An all-encompassing term for all documents relating to the contract. The Contract Documents include the Proposal, exploratory work documents, addenda, amendments, contract form, contract bond, standard specifications, special provisions, project special provisions, general plans, detailed plans, the notice to proceed, material test methods, material test reports, materials certifications, Part V of the KDOT Construction Manual, change orders, payment vouchers, guarantees, warranties, and other agreements, if any, that are required to complete the construction of the work timely and in an acceptable manner, all of which are incorporated by reference into the contract.

CONTRACT ITEM (PAY ITEM or BID ITEM) - Specific work item for which the contract provides a unit price or lump sum price.

CONTRACT TIME - The time set forth in the Contract Documents (including authorized extensions) for completing all work on the Project, expressed as working days, calendar days, specific calendar completion dates, or a combination thereof. See also Interim Contract Time.

CONTRACTOR - The individual partnership, corporation, other legal entity, or any acceptable combination thereof (joint venture) contracting with the Secretary to complete the contract. (The second party to the contract.)

CONTROLLED ACCESS FACILITY - A highway, road, or street designed to expedite and control through and local traffic and to give owners or occupants of abutting property restricted rights of access, light, air, or view over, from or to such highway, road, or street.

CONTROLLING ITEM(S) OF WORK. (CIOW) - Those work item(s) that are directly interrelated such that each has a definite influence on progress of the overall work.

CULVERT - Any structure providing an opening under the roadway that does not meet the classification of a bridge.

101- DEFINITIONS AND TERMS

DAMAGES - Depending on the context in the specifications, a broad term that includes injury to persons, injury to property, destruction of property, economic loss, and monetary expenses.

DAYLIGHT HOURS - The period ½ hour after sunrise to ½ hour before sunset.

DELAY - When used as a noun, Delay means an event(s) that increases, disrupts, hinders, or interferes with the duration of the Contractor's work. When used as a verb, Delay means the action of increasing, disrupting, hindering, or interfering with the duration of the Contractor's work. The Contractor cannot avoid application of specifications using the term "Delay" by characterizing an event as a disruption, hindrance, or interference with the work.

DETOUR - A designated, temporary traffic route the Secretary has approved around a closed road.

DISTRICT MATERIALS ENGINEER (DME) - Each District has a designated District Materials Engineer. The specifications use the abbreviation DME to refer to these individuals.

EMBANKMENT - That portion of the work that is constructed from natural material, such as soil, shale, rock, or a combination thereof either as a fill section.

ENGINEER - The State Transportation Engineer acting directly or through duly authorized representative(s) for engineering and administrative supervision of the contract. Authorized representatives for engineering and administrative supervision of the contract include the KDOT Director of Operations, Bureau Chief of Construction and Materials, Bureau Chief of Research, District Engineer, District Construction Engineer, Metro Engineer, Field Engineering Administrator, Area Engineer, Area Construction Engineer, and Construction Managers.

ENGINEER OF TESTS - The Engineer of the Materials Test Unit of the Bureau of Construction and Materials. The Engineer of Tests is located at the Kansas Department of Transportation, Materials and Research Center, 2300 Van Buren, Topeka, Kansas 66611.

EQUIPMENT - All machinery, tools, and apparatus necessary to complete the contract, including fuels, lubricants, and other parts required to use, operate, and maintain such machinery, tools, and apparatus.

EQUIPMENT SPREAD - Machinery necessary to excavate move, spread, and compact rock or common material.

EXPLORATORY WORK DOCUMENTS - Documents KDOT, local government owners, or Engineering Design Consultants develop to determine the Project's engineering requirements. These may include geotechnical foundation investigation reports; soils reports; geology reports; hydraulic investigations; hydrological investigations; bridge reports; earth work computations; boring logs; surveys; rock investigations; soils investigations; environmental investigations; building investigations; bridge investigations; and other geological, geotechnical, or design information for the Project. Exploratory work documents are Contract Documents.

EXTRA WORK - See subsection 104.6.

FIELD ENGINEER - The KDOT employees directly in charge of administering contracts for KDOT. This term includes the KDOT Metro Engineer, Field Engineering Administrator, Area Engineer, Area Construction Engineer, or Construction Manager.

FREEWAY - A controlled-access highway with access to interchanges.

FRONTAGE ROAD - A highway, road or street which is auxiliary to and located on the side of another highway, road or street for service to abutting property.

GENDER REFERENCES - No particular gender is intended by the use of the words "he," "she," "him," or "her" in these specifications or other Contract Documents.

HIGHWAY - The whole right-of-way used in constructing a facility for the purpose of vehicular travel as part of the State Highway System and under the Secretary's jurisdiction.

101- DEFINITIONS AND TERMS

HIGHWAY DISTRICTS - There are 6 Highway Districts each headed by a District Engineer. Each District has from 16 to 19 Counties which represent the boundaries of the District. Obtain details of the District boundaries from the KDOT District Offices in Topeka, Salina, Norton, Chanute, Hutchinson, Garden City, or KDOT's Bureau of Construction and Materials.

INSPECTOR - The Engineer's authorized representative assigned to both observe and check contract performance at Project sites, field laboratories, manufacturers' establishments, fabricators' facilities, Contractors' home offices, or other work locations.

INTERIM CALENDAR COMPLETION DATE - A specified date by which the Contractor shall complete construction of certain parts of the Project.

INTERIM CONTRACT TIME - The time allowed (including authorized extensions) for completing certain parts of the Project, expressed as hourly periods, working days, calendar days, a calendar completion date, or a combination thereof.

INTERSTATE HIGHWAY - Any highway the Secretary officially designates and the Federal government approves as a part of the National System of Interstate and Defense Highways.

KANSAS DEPARTMENT OF TRANSPORTATION (KDOT) - Kansas Department of Transportation as constituted under the laws of Kansas headed by the Secretary of Transportation and created to administer various transportation activities for roads and bridges throughout the state of Kansas. Contract Documents may use the term "Department" or "Agency" as well as "KDOT".

KANSAS TEST METHOD (KT-*) - Testing methods found in Part V of the KDOT Construction Manual. The (*) refers to the actual test number. Those test methods identified in the Contract Documents are the acceptable method of testing materials.

LEGAL HOLIDAYS - Legal holidays are defined as State Civil Service holidays, including New Year's Day, Martin Luther King Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, Christmas Day and any other day proclaimed by the Governor of the State of Kansas, Saturdays following a Friday holiday, and Saturdays preceding a Monday holiday. When the Contract Documents use the term "Business Days", the list will also include Columbus Day, Presidents Day, and any other federal holiday not recognized by the state of Kansas.

LETTING - An event conducted at a specific time and location at which bidders proposals are read by KDOT in public.

LIQUIDATED DAMAGES - Predetermined amounts owed (subtracted or withheld from the contract price if possible) for each day work remains uncompleted beyond specific Interim Contract Times or Contract Times.

LOCAL PUBLIC AUTHORITY (LPA) - A division of government at the County, City, or Township level responsible for a system of roads, streets, and bridges under that entity's jurisdiction. Generally, KDOT acts as the agent for the Local Public Authority when the Local Public Authority is the owner of the Project but the Project is financed by federal or state funds in whole or in part.

MAJOR AND MINOR CONTRACT ITEMS - A major contract item is any contract item, excluding mobilization, having an original contract value of 5% or more of the original contract amount. Any other contract item shall be considered a minor contract item.

MATERIALS - Substances specified for use in constructing the Project and its appurtenances.

MATERIALS AND RESEARCH CENTER (MRC) - The Materials and Research Center located at 2300 Van Buren, Topeka, KS 66611.

101- DEFINITIONS AND TERMS

MEDIAN - The portion of a divided highway or street separating the traveled ways for traffic moving in opposite directions.

NOTICE TO PROCEED - Written notice to the Contractor to begin the contract work including, when applicable, the date from which the Engineer will start charging Contract Time.

PAVEMENT STRUCTURE - The combination of subbase, base course, and surface course placed on a prepared or treated sub-grade to support the traffic load and distribute the load to the underlying materials.

- Subgrade: The top surface of an embankment or finished cut upon which the pavement structure, shoulders, and curbs are constructed.
- Subgrade Treatment: Stabilization of underlying earthen material or roadbed material.
- Subbase: The layer or layers of specified material of designed thickness placed on a subgrade to support a base course.
- Base Course: The layer or layers of specified material of designated thickness placed on a subbase or a subgrade to support a surface course.
- Surface Course: The layer or layers of pavement structure designed to accommodate the traffic load. The top layer resists skidding, traffic abrasion, and the disintegrating effects of climate and may be identified as the “Wearing Course”.

PART V - Part V of the KDOT Construction Manual which primarily refers to materials and tests for materials used in the Project. Part V is a Contract Document.

PLANS - The KDOT-prepared, LPA-prepared, or Consultant-prepared and owner approved plan profiles, typical cross sections, and other detail sheets showing the location, character, dimensions, and details of the work.

PRIME CONTRACTOR - See CONTRACTOR.

PROFILE GRADE - The trace of a vertical plane intersecting the top surface of the proposed wearing surface, usually along the longitudinal centerline of the traveled way. Profile grade means either elevation or gradient of such trace according to the context.

PROJECT - The specified location on which construction is to be performed together with all improvements to be constructed under the contract.

PROJECT LIMITS - The limits of all work that is associated with the Project, including traffic control and detours.

PROJECT OPEN TIME - The time allowed (including authorized extensions) for completing work on the Project necessary to open the Project to unrestricted traffic, expressed as working days, calendar days, a specific calendar completion date, or a combination thereof.

PROPOSAL (BID) - A bidder's offer, on the prescribed form to perform the work at the prices quoted.

PROPOSAL FORM - The prescribed form that the Secretary provides and that the Secretary requires a bidder to use in preparing its offer or Proposal.

QUALIFICATION STATEMENT AND EXPERIENCE QUESTIONNAIRE - The specified form, filed annually, on which the Contractor shall provide the required information as to the Contractor's ability to perform and finance the work.

RIGHT-OF-WAY - Land, property, or an interest therein the Secretary acquires for transportation or transportation-related purposes.

ROAD - A public way for purposes of vehicular travel, including the entire area within the right-of-way.

101- DEFINITIONS AND TERMS

ROADSIDE - The land area adjoining the outer edge of roadway. The land area as well as the median, if any, between the roadways of a divided highway.

ROADWAY - The portion of a highway from outside edge of shoulder to outside edge of shoulder including the traveled way.

SECRETARY - The Secretary of Transportation, Kansas Department of Transportation, appointed by the Governor. The Chief Executive Officer of the Kansas Department of Transportation.

SHOP DRAWINGS - See WORKING DRAWINGS.

SHOULDER - The portion of the roadway contiguous with the traveled way that contributes to the lateral support of the base and surface courses and that is used by stopped vehicles in emergency situations.

SIDEWALK - That portion of the right-of-way primarily constructed for the use of pedestrians.

SPECIAL PROVISIONS AND PROJECT SPECIAL PROVISIONS -

a. SPECIAL PROVISIONS. Approved additions or revisions to the standard specifications.

b. PROJECT SPECIAL PROVISIONS. Approved additions or revisions to the standard specifications that address conditions particular to an individual Project.

STABILIZATION - Modification of soils or aggregates by incorporating materials that will increase load bearing capacity, firmness, and resistance to weathering or displacement.

STANDARD SPECIFICATIONS - The current edition of the Kansas Department of Transportation's Standard Specifications for State Road and Bridge Construction.

STATE - The State of Kansas acting through its authorized representative, the Secretary of Transportation.

STATES DELAY OR OWNERS DELAY - An event(s) that increases, disrupts, hinders, or interferes with the duration of the Contractor's work (Delay) caused by actions of KDOT or a LPA (including authorized representatives and agents).

STATE TRANSPORTATION ENGINEER - The Deputy Secretary & State Transportation Engineer reporting to the Secretary of Transportation and having authority over all engineering and construction functions of KDOT (See subsection 105.1).

STREET - A public way for vehicular travel, including the entire area within the right-of-way, that is generally located within cities and developed areas.

STRUCTURES - Bridges, culverts, catch basins, drop inlets, retaining walls, manholes, headwalls, buildings, sewers, service pipes, underdrains, foundation drains and other features encountered in the work.

SUBCONTRACTOR - An individual, partnership, corporation, other legal entity, or any combination thereof (joint venture) to which the Contractor sublets part of the contract. Subcontractors are not a party to the contract between the Secretary and Contractor. However, the Contractor assumes liability for the subcontractors as if the Contractor were performing the sublet work with its own forces. Thus, when the specifications refer to the word "Contractor" but subcontractors are performing the work, the word "Contractor" includes the subcontractors.

SUBGRADE - The top surface of an embankment or finished cut upon which the pavement structure, shoulders, and curbs, if any, are constructed.

SUBSIDIARY - Materials, labor, or other elements that because of their nature or quantity have not been identified as a separate contract item and are included within the contract item on which they necessarily depend.

101- DEFINITIONS AND TERMS

SUBSTRUCTURE - All of that part of a structure below the bearing of simple and continuous spans, skewbacks of arches or top of footings of rigid frames, together with backwalls, wingwalls and wing protection railings.

SUPERINTENDENT - The Contractor's representative that has authority to communicate with the KDOT Field Engineer and Inspectors and to coordinate the Contractor's, subcontractors', and suppliers' activities. See subsection 105.7d.

SUPERSTRUCTURE - All of that part of a structure above and including the bearing of simple and continuous spans, skewbacks of arches or top of footings of rigid frames, excluding backwalls, wingwalls, and wing protection railings.

SUPPLIERS - An individual, partnership, corporation, other legal entity, or any combination thereof (joint venture) from which the Contractor obtains commodities needed to fulfill the contract. Suppliers are not a party to the contract between the Secretary and Contractor. However, the Contractor assumes liability for the suppliers as if the Contractor were providing the commodities with its own forces. Thus, when the specifications refer to the word "Contractor" but suppliers are providing the commodities the word "Contractor" includes the suppliers.

SURETY - An individual, partnership, corporation, or other legal entity (not the Contractor) executing a bond provided by the Contractor. The Surety shall be licensed by the State of Kansas to do business in the State.

TRAFFIC CONTROL DEVICES - All items used to control the movement of traffic through work zones, including safety barrels, barricades, fences, traffic signs, warning signs, striping, traffic lights, and traffic signals.

TRAVELED WAY - The portion of the roadway for the movement of vehicles, exclusive of shoulders and auxiliary lanes. This may be 1 or multiple driving lanes in each direction.

UNRESTRICTED TRAFFIC - 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 device 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.

UTILITY or **UTILITY OWNER** - Electric, telephone, cable, water, gas, pipeline, or sewer service owned and operated by a corporation or an LPA.

WORK - The providing of all labor, materials, equipment, and other incidentals necessary to complete the contract, regardless of whether the Contractor, subcontractors at any tier, suppliers at any tier, or a combination thereof carry out the contract obligations. In context, the term "work" may also refer to providing labor, materials, equipment, and other incidentals necessary to complete physical construction of the Project or a specific portion of the Project or contract.

WORKING DAY - A working day shall be any day the Contractor is not restricted from prosecuting the CIOW because of KDOT, LPAs, or weather as further provided in subsection 108.5.

WORKING DRAWINGS - Stress sheets, shop drawings, erection plans, falsework plans, framework plans, cofferdam plans, bending diagrams for reinforcing steel, other supplementary plans, or similar information that the Contractor is required to submit to the Engineer for approval. On projects where Buy America requirements apply, note on shop drawing and catalog cuts that steel and iron used meets Buy America, unless otherwise specified.

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SECTION 102

BIDDING REQUIREMENTS AND CONDITIONS

102.1 NOTICE TO CONTRACTORS (ADVERTISEMENT)

The Secretary will publish a “Notice to Contractors” in the official “Kansas Register” website at http://www.kssos.org/pubs/pubs_kansas_register.asp. The Notice will notify prospective Contractors of a Letting. The Notice describes the contemplated work, informs the prospective Contractor to obtain Bidding Proposal Forms from KDOT's website, identifies the location of plans and specifications, identifies the time and place for the public opening and reading of proposals and reserves the Secretary's right to reject bids.

102.2 PREQUALIFYING CONTRACTORS

a. Prequalification Requirements. Before submitting a Proposal, be prequalified to bid as a Contractor upon one or more classifications of work.

To prequalify, submit to the KDOT Director of Operations in Topeka, Kansas, a completed Qualification Statement and Experience Questionnaire (Questionnaire) DOT Form No. 208 at least 10 business days before the Letting at which the Contractor plans to bid. KDOT does not prequalify subcontractors but approves subcontractors under **subsection 105.9**.

b. Classifications of Work.

- A. All Earthwork.
- B. Earthwork-Minor: Less than 10,000 CUYD.
- C. Stabilized Subgrades and Base Courses: Subgrade Modification, Lime Treated Subgrade, Cement or Fly Ash Treated Subgrade, Crushed Stone Subgrade, Aggregate Base, Cement Treated Base, Granular Base.
- D. All Structures.
- E. Bridge Repair: Bridge Repair, Area Prepared for Patching, Multi-Layer Polymer Overlay, Slurry Polymer Concrete Overlay, Polymer Overlay Repair, Expansion Devices.
- F. Reinforced Concrete Box Structures.
- G. Retaining Wall Systems: Retaining Walls, Landscape Retaining Walls and MSE Fills.
- H. Retaining Walls-Cast-in-place.
- I. Misc. Concrete: Curb and Gutter, Sidewalk, Concrete Ditching Lining, Concrete Riprap, Flumes, Inlets.
- J. Pipe: Entrance, Cross Road, Erosion and Liner Pipe, Storm and Sanitary Sewer, Underdrains, Edge Drains.
- K. All Portland Cement Concrete Pavement.
- L. Portland Cement Concrete Pavement-Minor: Less than 10,000 SQYD, Pavement Patching (excluding Asphalt Patching).
- M. All Hot Mix Asphalt.
- N. Hot Mix Asphalt-Minor: Less than 2000 tons.
- O. Asphalt Treatments: Cold Recycled Asphalt Construction, Surface Recycled Asphalt Construction, Microsurfacing, Asphalt Prime Coat, Asphalt Sealing, Asphalt Surface Treatments, Ultrathin Bonded Asphalt Surface, Crack Seals, Crack Repairs.
- P. Aggregate Drainage Improvements.
- Q. Painting Structural Steel.
- R. Guardrail and Fencing.
- S. Pavement Marking.
- T. Signing and delineation: Structural signs.
- U. Signing-Minor: Post mounted signs, excluding structural signs.
- V. Electric Lighting and Traffic Signals.
- W. Rest Area Structures and Buildings.
- X. Planting and Seeding: Temporary Erosion and Pollution Control, Seeding, Mulching, Topsoil, Trees, Shrubs and other Plants.
- Y. Miscellaneous: Construction not otherwise classified.

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c. Qualification Rating. The KDOT Prequalification Committee (Committee) will assign a qualification rating after reviewing the prospective Contractor's Questionnaire and, if available, the Contractor's performance record. The Questionnaire solicits the prospective Contractor's financial worth, equipment, and experience.

The Questionnaire requires the Contractor to submit a financial statement showing the Contractor's net worth (see **subsection 102.2h.**). If a Certified Public Accountant (CPA) meeting the requirements below audits the financial statement, the Contractor's qualification rating and qualification amount will be determined using the Contractor's audited net worth and the Contractor's equipment, experience, and performance record. If the Contractor submits an unaudited financial statement, the Contractor's qualification amount will be a maximum of \$3,000,000.00 for all projects. To meet the requirements of this **subsection 102.2**, a CPA shall be duly licensed at the time the CPA audits the financial statement.

The performance record should describe classification of work performed, work quality, work timeliness, payment of accounts, cooperation with owners and the public, public safety, work site safety, and contract compliance. Additionally, the Committee may consider whether the Contractor is in good standing with other state and federal agencies and the Contractor's compliance with legal obligations. The Committee will consider both owned and leased equipment when determining which classifications of work the Contractor may perform.

The Committee will notify the prospective Contractor of its qualification rating. This qualification rating includes the dollar value and classifications of work the prospective Contractor may have under contract at a given time. KDOT will protect from disclosure the assigned qualification rating and confidential information contained in the Questionnaire. The financial information contained in the Questionnaire is confidential and is not required to be disclosed under the Kansas Open Records Act, See K.S.A. 45-221(a)(33). The qualification rating will remain effective for 1 year unless the Committee revises the rating under **subsection 102.2d**.

d. Revised Qualification Rating. At annual renewal, at the Contractor's request, or at any other time the Committee deems appropriate, the Committee may revise the Contractor's qualification rating based on the Contractor's updated, performance record, or changes in financial conditions, ownership, or organizational structure.

e. Remaining Qualified. Once qualified, a Contractor's eligibility to bid is valid for 1 year from the date of qualification. To remain qualified, submit a completed Questionnaire annually, at other times the Committee requests, and within 30 calendar days after a change in business ownership. The Committee will not issue a proposal form to a Contractor who has failed to renew the Contractor's qualification status. The Contractor's prequalification under this **subsection 102.2** does not limit the Secretary's authority to determine the Contractor is non-responsible under **subsection 102.18**.

f. Committee's Reconsideration of Qualification Rating and Secretary's Review. If dissatisfied with an initial or revised qualification rating, submit to the Committee a written request for reconsideration within 10 calendar days after receiving notice of the initial or revised qualification rating. Explain why the Committee should reconsider the assigned rating. The Committee will hold a hearing and provide the Committee's final decision within 30 calendar days after receiving the request for reconsideration. If still dissatisfied, submit a written appeal to the Secretary within 10 calendar days after receiving the Committee's final decision. Explain why the Secretary should overturn the assigned rating. The Secretary, or the Secretary's designee, will hold a final hearing. The Secretary, or the Secretary's designee, will provide KDOT's final decision within 15 calendar days after the final hearing. The Contractor may have legal representation at both the Committee's hearing and the Secretary's hearing. See K.A.R. 36-30-3(b). The decision of the Secretary, or the Secretary's designee, under this **subsection 102.2f.** is considered final agency action under the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.*

g. Qualification Rating for Joint Ventures. For a joint venture's qualification rating, the Committee will adjust the Contractor's combined qualification on each Contractor's individual experience in the classifications of work being considered. This rating will not exceed the sum of the Contractor's separate qualification ratings.

h. Financial Statements (Audited or Unaudited).

(1) The financial statements shall present the net worth of the enterprise as of a date not more than 1 year prior to the date that the Questionnaire is submitted.

(2) The name of the enterprise identified in the financial statements (except as noted in **subsection 102.2h.(3)** below) shall be the same name used for prequalification, bidding and contracting with KDOT.

(3) If a Contractor desires to be prequalified as a separate entity of the enterprise, then the requirements are as follows:

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- Submit the audited financial statements of the consolidated entity with unmodified opinion of an independent Certified Public Accountant; or
- Submit audited financial statements of the separate entity with an independent Certified Public Accountant report with a modified opinion that, if qualified, is only qualified due to the lack of consolidation because of a Variable Interest Entity; or
- Submit consolidated audited financial statements and the schedule for consolidation that separates all entities including the separate entity that is desired to be prequalified; then
- The financial information for the separate entity will be considered in the prequalification process.

102.3 PROPOSAL FORM, PROPOSAL, AND CONTRACT

a. Proposal Forms. Acquire the Proposal Form from KDOT's website at (<http://www.ksdot.org>) by choosing the following selections: "Doing Business", "Bidding & Letting" and "Proposal Information" and then using the links provided in the Project information for the particular Project of interest. The Proposal Form consists of the following documents:

- (1) The Project electronic bidding system file (EBS file) on the Bid Express website that contains:
 - (a) DOT Form No. 202 with a description of the location and type of construction; the time for performance, and the date, time, and place for opening proposals.
 - (b) The Unit Prices List which consists of price sheets that list the Project's bid items and estimated quantities for each bid item and spaces for the contractor to insert its unit price and total price for each bid item.
 - (c) Required contract provisions that require information from the Bidder and apply to the Project as identified on the Special Provision List.
 - (d) Amendments that KDOT makes after KDOT first placed the Bidding Proposal Form on KDOT's website. (See **subsection 102.4.c.**).
- (2) The Special Provision List, if any, in effect at the time of the Letting. The Special Provision List identifies all required contract provisions, project special provisions, and special provisions that apply to the Project. The EBS file may not contain all required contract provisions. The EBS file may contain provisions that do not apply to the Project. The Bidder is responsible for consulting the Special Provision List to identify which provisions are included in the Proposal Form.
- (3) The required contract provisions, project special provisions and special provisions identified in the Special Provision List, if any.
- (4) Bid Bond that complies with **subsection 102.11**.
- (5) The Standard Specifications.
- (6) The Project plans, if any.
- (7) The exploratory work documents, if any.
- (8) All remaining, attached and unattached documents relating to the Project, including but not limited to addenda and amendments, if any.

b. Proposal. The Proposal Form becomes the Bidder's Proposal after the Bidder completes the EBS file (which includes DOT Form No. 202, the Unit Prices List, and applicable required contract provisions), electronically signs the Proposal where required on DOT Form No. 202, and delivers the completed EBS file documents, the EBS data file, and bid bond to KDOT using Bid Express. The Special Provision List, required contract provisions not requiring information from the Bidder, project special provisions, special provisions, Standard Specifications, plans, exploratory work documents, any additional contract information, and any addenda are incorporated by reference into the Bidder's Proposal.

c. Contract. After the parties have executed a Contract, the Proposal becomes the Contract.

102.4 ISSUING PROPOSAL FORM

a. The Secretary will provide Proposal Forms in electronic format on KDOT's website at <http://www.ksdot.org> which can be viewed by choosing the following selections: "Doing Business", "Bidding & Letting" and "Proposal Information", and using the links provided in the Project information for the particular Project of interest. The current version of the Standard Specifications For State Road and Bridge Construction may be printed from KDOT's website at <http://www.ksdot.org> by choosing the following selections: "Doing Business",

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“Bidding & Letting” and “Specifications”. Paper copies of the current Standard Specifications may be requested of the Bureau of Construction and Materials and will be billed at the current fee.

b. Prime Contractor Bid Holders. Bidders wanting to bid as a prime Contractor shall identify themselves on the website in **subsection 102.4a.** as a Bid Holder no later than the close of business on the Monday preceding the scheduled Letting Date. A Bidder shall furnish this notice by marking the “Bid Holders List” box contained in the Proposal Information for each Project on which the Bidder intends to bid. This notice is necessary for KDOT to determine a Bidder’s eligibility and approval to bid as a prime Contractor on the Project. A Bidder shall not be eligible to bid as a prime Contractor if, at the close of business on the Monday preceding the scheduled Letting Date, the Bidder:

- is not prequalified or qualified under **subsection 102.2;**
- does not have available bidding capacity, because the Engineer’s estimate for the Project alone or when combined with the Bidder’s outstanding contract work and subcontract work exceeds the Bidder’s qualification amount;
- is deemed unable to perform at least 30% of the contract amount, because the estimated dollar value of the classifications of work for which the Bidder is qualified do not equal at least 30% of the estimated dollar value of the Project, using the Engineer’s estimate. The Bidder shall not be allowed to manipulate this requirement by submitting mathematically unbalanced unit prices for mobilization and other contract items;
- did not attend a mandatory pre-bid conference for the Project;
- is prohibited from rebidding on a Project, because the Bidder withdrew from a previous award of contract for the Project without forfeiting its bid bond;
- is prohibited from rebidding on a Project, because the Bidder failed to enter into a Contract after award to that Bidder in the first Letting; or
- is currently suspended or debarred from bidding or under a notice of suspension or proposed debarment by KDOT, another Kansas state agency, other state government agency, FHWA, or other federal agency.

c. Addenda and Amendments. Proposal Forms include contract addendum and amendments. Addenda identify changes to the Proposal Form that KDOT makes after initial advertising on KDOT’s website. Amendments are addenda that change the documents contained in the EBS file (DOT Form No. 202’s time for performance and the Unit Prices List). An addendum will be sent by email to all Bid Holders and the Bid Holders shall acknowledge receipt of the addendum by either return email or facsimile. The addendum will also be included on the KDOT website above. Addenda (other than amendments) are incorporated by reference into the Proposal. Amendments are included in the Proposal’s EBS file by Bid Express or the Bidder. The Bidder is responsible for ensuring the EBS file that the Bidder uses to prepare its Proposal and submits to KDOT contains any amendments. The Bidder may accomplish the change by either loading the amendment into the Bidder’s saved EBS file or downloading an updated EBS file that contains the amendment. See InfoTech’s website (www.bidx.com) for further instructions on accomplishing these changes. The Secretary may reject Proposals that fail to include amendments. (See **subsection 102.17**).

d. Non-bid Holders. Subcontractors, suppliers, and other interested entities may identify themselves as a Non-bid Holder in the space provided on KDOT’s website to inform Bidders of their interest in the Project. Subcontractors, suppliers, and other interested entities not needing Proposal Forms may use the Non-Bidding EBS file link provided in the Project Information on KDOT’s website to view a pdf copy of the Project EBS file rather than downloading the EBS file that Bidders use to prepare their proposal.

e. Errors in Issuing Proposal Form. A Bidder’s obtaining of a Proposal Form by mistake of Bid Express or KDOT shall not be construed as a waiver of the contract requirements for qualification, eligibility, and responsibility as provided in **subsections 102.2, 102.4, and 102.18**, and the Bidder shall have no claim against KDOT for the mistaken issuance of a Proposal Form and corresponding rejection of the Bidder’s Proposal.

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102.5 COMBINATION BIDS, TIES, RIDERS AND ALTERNATE BIDS

a. Combination Bids. A combination bid is the act of joining two or more projects by tying the projects or by taking a dollar deduction on a project(s) if awarded more than one project.

(1) Only the Secretary may combine projects located in different Highway Districts, regardless of the funding source.

(2) The Secretary will accept combination bids for:

- (a) Projects the Secretary requires the Bidder to tie, including projects located in different Highway Districts.
- (b) Federal-Aid funded state projects in the same Highway District.
- (c) Kansas-funded state projects in the same Highway District.
- (d) County-funded projects in the same county.
- (e) City-funded projects in the same city.
- (f) Kansas-funded state projects "tied to" Federal-Aid funded state projects.
- (g) Projects containing the same classification of work and not violating **subsections 102.5a.(2)(a)** through (f).
- (h) Projects containing Classification D, E and F work and not violating **subsections 102.5a.(2)(a)** through (f).
- (i) Projects containing Classification M, N, and O work and not violating **subsections 102.5a.(2)(a)** through (f).
- (j) Projects containing Classification S, T and U work and not violating **subsections 102.5a.(2)(a)** through (f).
- (k) Projects containing Classification G and H work and not violating **subsections 102.5a.(2)(a)** through (f).
- (l) Projects containing Classification I, J and P work and not violating **subsections 102.5a.(2)(a)** through (f).

(3) Designate combined bids in the space provided on the first page of the Proposal (DOT Form No. 202). The Secretary will accept only combined bids the Bidder identifies in the space provided on DOT Form No. 202.

b. Ties.

(1) Unless the Bidding Proposal Form prohibits tied bids or unless the tie would result in an unacceptable combination bid, the Secretary will accept the following ties:

- Project A and Project B "are tied" - Two-way tie. Neither A nor B can be awarded without the other.
- Project A "tied with" Project B - Two-way tie. Neither A nor B can be awarded without the other.
- Project A "tied to" Project B – One-way tie. Project B can be awarded without awarding Project A (but Project A cannot be awarded without also awarding Project B).

(2) Only the Secretary may tie projects located in different Highway Districts.

(3) Designate ties in the space provided on the first page of the Proposal (DOT Form No. 202). The Secretary will accept only ties that are identified in the space provided on DOT Form No. 202.

c. Riders.

(1) The Secretary will accept the following riders when the Bidder bids on more than one project:

- (a) A maximum dollar amount of work the Bidder will undertake in a specific Letting.
- (b) A maximum number of projects the Bidder will undertake in a specific Letting.
- (c) Deductions from Projects in Same Funding Source. A monetary deduction to a unit price on one or more items of work for projects in the same funding source when the following requirements are met:
 - The projects are located in the same Highway District;
 - The projects contain the same classifications of work or like classifications of work as permitted in **subsections 102.5a.(2)(g)** through (j); and
 - The Bidder includes in the space provided for riders on DOT Form No. 202 the following language "Deduct (Amount of dollars from line item #) from Project B if awarded Project A." These are combination bids. See **subsection 103.1b.(4)** for the Secretary's method of calculating the lowest dollar cost.

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(d) Deductions from Projects in Different Funding Sources. A monetary deduction to a unit price on one or more items of work for projects with different funding sources when the following requirements are met:

- The projects are located in the same Highway District;
- The projects contain the same classifications of work or like classifications of work as permitted in **subsections 102.5a.(2)(g)** through (j);
- The Bidder includes in the space provided for riders on DOT Form No. 202 the following language: "Deduct (Amount of dollars from line item #) from Project B if awarded Project A.;" and
- The Bidder making the deduct shall be determined the lowest responsible and responsive bidder on Project A, the primary project, standing alone and regardless of the deduct on Project B. Deducts from projects in different funding sources are not combination bids as the Secretary does not join the bids in calculating the lowest dollar cost. See **subsection 103.1b.(4)** for the Secretary's method of calculating the lowest dollar cost.

(2) Do not make monetary deductions across Highway Districts, regardless of the funding source.

(3) Designate riders in the space provided on the first page of the Proposal (DOT Form No. 202). The Secretary will accept only riders that are identified in the space provided on DOT Form No. 202.

d. Alternate Bids.

(1) The Secretary will accept alternate bids when the Bidding Proposal Form allows or requires the Bidder to price alternates for materials, methods of operation, contract items, work schedules, or other items.

(2) **Alternate Work Schedules.** The Secretary may offer a non-accelerated and an accelerated time for completion. Bid the non-accelerated time for completion, placing a unit price in each unit price column, and summing the products of the unit prices and estimated quantities (Base Bid). Bid the accelerated time for completion in the Line Item, "Accelerated Work Schedule". Include in the lump sum price for "Accelerated Work Schedule" all mobilization, overhead, traffic control, and other costs necessary to meet the accelerated schedule. Complete the Special Bid Summary on the Unit Price List sheets, identifying the Base Bid and the Accelerated Bid total (obtained by combining the Base Bid and the Accelerated Work Schedule bid item).

(3) The Secretary, not the Bidder, has discretion to determine which alternate to accept.

102.6 START DATE

Before the Letting, obtain the earliest and latest starting dates for a Project from the KDOT website <http://www.ksdot.org> by choosing the following selections: "Doing Business", "Bidding & Letting" and "Proposal Information". The Notice to Proceed will be issued and the Contract Time will start within the earliest and latest starting dates (see **subsection 108.1**). The Engineer will not modify these dates except as allowed in **subsection 108.1**.

The earliest and latest starting dates for the twelve (12) months prior to the current Letting may be found on KDOT's website <http://www.ksdot.org> by choosing the following selections: "Doing Business", "Bidding & Letting" and "Earliest/Latest Start Date Archive".

102.7 ESTIMATED AND UNDETERMINED QUANTITIES

The quantities in the Unit Prices List sheets are estimates. The Secretary may increase, decrease, or eliminate these quantities. If the Secretary finds it impossible or impractical to estimate the quantity of an item, the Secretary may set a unit price for this item. The set price will become the unit price.

102.8 EXAMINING PROPOSAL FORM AND PROJECT SITE, INCLUDING EXPLORATORY WORK DOCUMENTS

a. Except when the contract requires the Bidder to provide plans or working drawings, the Secretary, a LPA, or both will prepare plans and specifications that enable a Bidder to construct the Project.

b. Examine the Bidding Proposal Form before submitting a bid. Notify the Construction Letting Engineer in the Bureau of Construction and Materials of errors, omissions, or ambiguities in the Bidding Proposal Form

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before the Letting. The Secretary will pay no claims for obvious errors, omissions, or ambiguities in the Bidding Proposal Form.

c. Examine the Project site before submitting a bid. Refer questions to the Construction Letting Engineer in the Bureau of Construction and Materials regarding the scope of work and Project site conditions. Review and analyze exploratory work documents in conjunction with visiting the Project site.

(1) The Bidding Proposal Form includes exploratory work KDOT, a LPA, or both prepared or had prepared for the Project. This exploratory work may include geotechnical foundation investigation reports; soils reports; geology reports; hydraulic investigations; hydrological investigations; bridge reports; earthwork computations; boring logs; surveys; rock investigations; soils investigations; environmental investigations; building investigations; bridge investigations; and other geological, geotechnical, or design information for the Project.

(2) The Bidders may obtain exploratory work documents from the KDOT website at <http://www.ksdot.org> by choosing the following selections: "Doing Business", "Bidding & Letting" and "Proposal Information", using the "Exploratory and Project Reports" link provided in the Project information for the particular Project of interest or from the Bureau of Construction and Materials.

(3) The Bidder shall be responsible for utilizing the most recent exploratory work documents in preparing its Proposal. KDOT will not notify Bidders of a change in the exploratory work documents made after KDOT has placed these documents on the website.

d. KDOT and LPAs assume no responsibility to a Bidder for the conclusions or interpretations the Bidder forms based upon information KDOT, LPAs, or both make available to the Bidder. The Bidder understands that persons performing exploratory work and persons preparing geotechnical, geological, or design information are exercising their own independent professional judgment.

e. KDOT and LPAs assume no responsibility to a Bidder for any understanding reached outside the Proposal Form between the Bidder and employees or agents of KDOT, LPAs, or both unless that understanding is put in writing and added to the Proposal Form before the Letting.

f. KDOT and LPAs assume no responsibility to a Bidder for any representation made outside the Proposal Form by employees or agents of KDOT, LPAs, or both unless that representation is put in writing and added to the Proposal Form before the Letting. Oral representations concerning the site conditions do not bind the Secretary, LPA, or both.

g. Do not use the information KDOT, LPAs, or both make available as a substitute for the exercise of the Bidder's or its agents' independent professional judgment. Do not use the information KDOT, LPAs, or both make available to excuse the Bidder's obligation to determine the means and methods of constructing the Project. The existence of exploratory work documents does not excuse the Bidder from performing a Project site examination and using the Bidder's own interpretation and judgment concerning the site. The Secretary will pay no site condition claims for conditions the Bidder discovered or should have discovered in a Project site examination.

h. Before the Letting, notify the Construction Letting Engineer in the Bureau of Construction and Materials of any discovered errors, omissions, or ambiguities in the geotechnical, geological, or design information KDOT, a LPA, or both provide.

i. Before the Letting, notify the Construction Letting Engineer in the Bureau of Construction and Materials of any perceived inadequacies in the geotechnical, geological, or design information KDOT, a LPA, or both provide.

j. Obtain the exploratory work documents from the Bureau of Construction and Materials if unable to retrieve some or all of the exploratory work on the KDOT website. The Bidder's inability to obtain exploratory work documents on the internet does not excuse the obligation to review all exploratory work documents before submitting a bid for the Project.

102.9 FAMILIARITY WITH LAWS AND ORDINANCES

Examine Federal, State, County, and Municipal laws, regulations, rules, and ordinances that apply to the Project before submitting a bid. Include in the bid, costs to comply with such laws.

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102.10 PREPARING PROPOSALS

a. Rules for All Proposals.

(1) Access Bidding Proposal Forms on KDOT's website. See **subsection 102.3a**.
(2) Use the AASHTOWare Project software version of Expedite (most current version) and Bid Express to prepare and submit a Proposal.

- (a) Bid Express is a subscription-based Web Site service developed by Info Tech.
- (b) To establish an account with Bid Express, contact Bid Express at www.bidx.com.
- (c) Obtain a digital I.D. (key) from Info Tech that enables the Bidder to submit an electronic internet bid. (It takes Info Tech approximately 3 to 5 business days to issue this key.)
- (d) KDOT is not a party to the agreement between the Bidder and Bid Express. KDOT does not warrant that the Bid Express internet services will be uninterrupted, error free, or completely secure. KDOT assumes no liability for damages to the Bidder or third parties arising out of the Bidder's use of Bid Express or inability to use Bid Express.

(3) To prepare a Proposal, download the electronic bidding system file [EBS file] for the Project, insert on the Unit Prices List in the EBS file the unit price for each bid item in the blank spaces after each item (showing the sum of money for which the Bidder shall perform the work), complete the required contract provisions contained in the EBS file, and electronically sign DOT Form No. 202 by using an electronic identification on the blank space provided on DOT Form No. 202. If the Proposal is made by a partnership or corporation, include the name and address of the partnership or corporation and title of person signing for the partnership or corporation. The one signature binds the Bidder to the Proposal and all attached certifications.

(4) Provide all information the Bidding Proposal Form requests or requires. Include costs for subsidiary and incidental work in the contract unit prices or lump sum prices.

(5) Assume responsibility for the accuracy of the electronic forms and include all amendments that KDOT makes before the Letting. (See **subsection 102.4.c**). Upon being notified of a contract amendment, download from the Bid Express website a new EBS file that contains the amendment or load the amendment from the Bid Express website onto the Bidder's existing EBS file and submit the revised Proposal using Bid Express.

(6) Do not alter the Bidding Proposal Form except to comply with contract addenda or amendments as provided in **subsection 102.4.c**.

(7) Assume all risk for the timely delivery to KDOT of the Bidder's bid submitted through Bid Express.

(8) Joint Ventures.

- (a) Indicate which company is the lead on the joint venture to receive the necessary documents and identify the individuals that are authorized to digitally sign the electronic internet bid for the joint venture.
- (b) Obtain KDOT's approval to bid as a joint venture and a new contractor number for the joint venture.
- (c) Obtain a new digital I.D. (key) from Info Tech for the joint venture. KDOT must approve the joint venture before Info Tech will issue the Bidder a new key.

102.11 BID BONDS

Submit an electronic Bid Bond that complies with the requirements of this **subsection 102.11**, with the Proposal. Contact a company that has an agreement with Bid Express to submit bid bonds electronically and include the required bid bond information on the Bidder's Proposal before submitting the Proposal.

The Surety executing the Bid Bond shall be authorized to transact business as a Surety in Kansas. Guaranty the Secretary that within 10 business days after notice of the award of the contract, the Bidder shall sign the contract and provide the required Contract Bond and insurance coverages. The penal sum of the Bid Bond is 5% of the amount bid. The Bidder forfeits to the Secretary the penal sum of the bond as liquidated damages if the Bidder fails to sign the contract or provide the required documents for reasons other than a nonjudgmental bid error. See **subsection 102.16**. The two lowest Bidders' Bid Bonds shall remain effective until the Secretary executes a contract or the Bidder forfeits the penal sum of the bond.

102.12 SUBMITTING PROPOSALS

a. Deliver a Proposal to KDOT by transmitting the Proposal through Bid Express using the Bid Express website (www.bidx.com) before the time set for receiving proposals expires. Assume all risk for the timely delivery to KDOT of the Proposal, transmitted through Bid Express.

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b. Bid Express includes in the Proposal the Project's completed EBS data file saved in .ebs format which contains DOT Form No. 202, the Unit Prices List, and required contract provisions. Submit the Bid Bond with the Proposal as stated in **subsection 102.11**.

c. Allowing the Bidder to submit some rather than all Proposal documents is for the Bidder's convenience and expense. The Bidder is bound to all provisions in the Proposal whether incorporated physically or by reference into the Bidder's Proposal.

102.13 WITHDRAWING PROPOSALS BEFORE THE LETTING

Before the time for receiving proposals expires, a Bidder may withdraw a Proposal in writing or by email directed to the Chief of the Bureau of Construction and Materials, without Bid Bond forfeiture.

102.14 REVISING PROPOSALS

a. Before the time for receiving proposals expires, a Bidder may revise its Proposal by making changes on its EBS file and resubmitting the Proposal to KDOT through Bid Express.

b. The Secretary's representatives will not revise Bidders' proposals and have no access to proposals before the Letting.

c. A Bidder shall not revise its Proposal after the Letting and the Secretary's representatives have no authority to revise proposals after the Letting.

102.15 PUBLIC OPENING OF PROPOSALS

KDOT will open and read in public at the time and place indicated in the Bidding Proposal Form, all proposals received unless KDOT has to delay the opening to accommodate internet or other technical difficulties in downloading proposals. KDOT invites all Bidders, their authorized agents and other interested parties to be present. If KDOT incurs a delay in downloading the proposals, KDOT will delay the public reading until KDOT has been able to download all proposals from the Internet. If KDOT incurs technical difficulties that prevent KDOT from reading some or all proposals on the Letting date, KDOT will postpone the reading of proposals to another day or change the Letting date. KDOT will notify Bidders of KDOT's planned action on KDOT's website and on the Bid Express website. KDOT also will notify Bidders directly by e-mail.

Following the public reading, KDOT will take the proposals to the Bureau of Construction and Materials. At this time, the Bureau of Construction and Materials will check the proposals for compliance with the Contract Documents (responsiveness), will verify the Bidders are prequalified in the appropriate classifications and dollar value of work, and will determine the Bidders are otherwise responsible. The Bureau of Construction and Materials will notify a Bidder by email or other writing if the Secretary rejects the Bidder's Proposal.

102.16 WITHDRAWING PROPOSALS FOR BID MISTAKES AFTER THE LETTING

a. A Bidder shall not revise its Proposal after the Letting.

b. A Bidder may withdraw its Proposal after the Letting for a nonjudgmental error (See **subsection 102.16e.** for definition) without forfeiting its bid bond if:

(1) The nonjudgmental error is evident on the face of the Proposal or established by clear and convincing evidence; and

(2) The Bidder notifies KDOT of the nonjudgmental error within 2 business days after the Letting.

c. A Bidder may withdraw its Proposal after the Letting but will forfeit its bid bond as liquidated damages if:

(1) The error is a judgmental error (See **subsection 102.16f.** for definition); or

(2) The error is a nonjudgmental error, but the Bidder notifies KDOT of the nonjudgmental error more than 2 business days after the Letting.

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d. If the Bidder withdraws its Proposal without bid bond forfeiture as permitted in **subsection 102.16b.**, the Bidder shall not perform subcontract work on the Project and shall not re-bid if the Secretary re-lets the Project.

e. A nonjudgmental error is a mathematical error, a clerical error, or an error not involving the use of judgment or reason.

f. A judgmental error is an error resulting from incorrect or flawed reasoning, assessments of facts, or assumptions on how to satisfy contract requirements.

g. K.S.A. 75-6901 *et seq.* governs this **subsection 102.16**.

102.17 REJECTION OF PROPOSALS; NON-RESPONSIVENESS

a. Before the award of contract and without liability, the Secretary has full authority to reject all proposals and either re-let or cancel the Project.

b. Before the award of contract and without liability, the Secretary has full authority to waive technicalities and irregularities (non-conformities) in individual proposals except for those identified in **subsection 102.17f.** and **g.**

c. Before the award of contract and without liability, the Secretary may reject an individual proposal as non-responsive for failing to comply with a contract requirement or for changing a contract requirement. The Secretary's authority to reject a Proposal as non-responsive under this **subsection 102.17c.** is not limited to the non-conformities identified in **subsections 102.17d., e., f. and g.**

d. The Secretary may reject a proposal as non-responsive if the Bidder submitted an(a):

- (1) Altered form.
- (2) Unapproved form.
- (3) Unauthorized conditional bid.
- (4) Unacceptable combination.
- (5) Unauthorized alternate bid.

(6) Mathematically unbalanced unit price(s). A Proposal is mathematically unbalanced when the Proposal contains lump sum or unit prices that do not reflect the reasonable actual costs (plus reasonable profit, overhead costs, and other indirect costs) to construct the item. See **subsection 103.1b.(7).**

(7) Materially unbalanced bid. A materially unbalanced bid is a bid that generates reasonable doubt that award to that bidder would result in the lowest ultimate cost to KDOT, a LPA, or both. See **subsection 103.1b.(7).**

(8) A bid amount in the Proposal which, when added to the unearned amounts of the Bidder's other outstanding contract obligations, exceeds the total dollar amount of the Bidder's qualification. The outstanding contract amount includes all contract and subcontract work that the Bidder performs with its own forces. (See **subsection 102.2**).

e. The Secretary may reject a Proposal as non-responsive if the Bidder failed to:

(1) Identify itself as a Bid Holder and obtain KDOT's approval to bid (see **subsection 102.4b.**) even though the Bidder is prequalified.

- (2) Follow instructions on a KDOT addendum.

f. The Secretary will reject a Proposal as non-responsive if the Bidder added language, giving the Bidder a right to reject or accept an award of contract.

g. The Secretary will reject a Proposal as non-responsive if the Bidder failed to:

- (1) Include a unit price in the Unit Bid column for each line item of work listed in the Unit Prices List.
- (2) Insert a principal's electronic signature on an electronic internet Proposal. (DOT Form No. 202).
- (3) Submit a completed electronic internet bid bond as **subsection 102.12** requires.
- (4) Complete Required Contract Provision dated 08-10-66 (latest revision), Certification-Noncollusion and History of Debarment.
- (5) Complete Required Contract Provision dated 04-30-82 (latest revision), Certification-Prequalified Financial Amount.

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(6) Complete Required Contract Provision dated 07-19-80 (latest revision), DBE Contract Goals, for all Federal Aid Projects.

(7) Submit only KDOT-certified DBE's on Required Contract Provision dated 07-19-80 (latest revision), DBE Contract Goals, for all Federal Aid Projects, unless the total value of KDOT-certified DBE's on this provision equals or exceeds the DBE Contract Goal.

(8) Include in the Proposal acceptable ties, riders, combinations, or alternates, if any, that comply with **subsection 102.5**.

(9) Use Expedite software to prepare the Bidder's Proposal.

(10) Include in the Proposal amendments, if any, as **subsection 102.4** requires.

(11) Have a current Tax Clearance Certificate at the time of award of contract.

h. The Bureau of Construction and Materials will notify a Bidder, by email or other writing, that the Secretary rejects the Bidder's Proposal.

102.18 REJECTION OF PROPOSALS; NON-RESPONSIBLE CONTRACTOR

a. Even though a Bidder is prequalified under **subsection 102.2**, the Prequalification Committee may determine a Bidder is otherwise non-responsible as lacking the skills, abilities, or integrity to perform the work.

b. Before the award of contract and without liability, the Prequalification Committee has full authority to determine a Bidder is non-responsible. The Prequalification Committee may determine a Bidder is non-responsible for reasons other than those identified in this **subsection 102.18**.

c. The Prequalification Committee may determine a Bidder is non-responsible and reject the Bidder's Proposal if the Bidder:

(1) Made false, deceptive or fraudulent statements in the "Contractor's Qualification Statement and Experience Questionnaire" or in a qualification hearing.

(2) Owes outstanding labor and materials bills on a current contract without a good cause exception for non-payment as permitted in **subsection 109.6d**.

(3) Owes the Secretary monies on a current contract and has no good cause for failing to reimburse the Secretary for the monies owed.

(4) Performed unacceptable work on a current or recent project(s), calling into question the Bidder's ability to perform future, quality work.

(5) Performed work unsatisfactorily on a current contract regarding the timeliness of work and the award of additional work could affect timely completion of the current contract work.

(6) Lacks financial resources, equipment, experience, or supervision to perform classifications of work.

(7) Has been suspended or debarred from bidding or been given a notice of suspension or proposed debarment from bidding by KDOT, another Kansas state agency, other state government agency, FHWA, or other federal government agency.

d. Before an award of contract occurs, the Prequalification Committee will provide the Bidder an initial written notice of non-responsibility, specifying the reasons the Committee has determined the Bidder is non-responsible. The Bidder may object to the Committee's determination in writing or by requesting an informal hearing. The Bidder shall identify the reasons for the Bidder's disagreement with the Committee's initial determination of non-responsibility. After receiving the Bidder's written arguments or holding an informal hearing, the Prequalification Committee will issue either a final notice of responsibility or a final notice of non-responsibility. If issuing a final notice of non-responsibility, the Committee will specify the reasons the Committee has determined the Bidder is non-responsible.

e. The Prequalification Committee's final notice of non-responsibility under **subsection 102.18d**. is considered final KDOT agency action under the KJRA, K.S.A. 77-601 *et seq.*

f. If a Bidder's conduct represents such serious acts, omissions, or misconduct, calling into question the Bidder's ability to perform future work, the Prequalification Committee may decline to renew the Contractor's qualification and/or initiate suspension or debarment under **subsection 102.19** rather than repeatedly finding a Contractor is non-responsible under this **subsection 102.18**.

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g. The Secretary will reject a Proposal from a Bidder that is not properly prequalified or qualified under **subsection 102.2** or is not otherwise eligible to bid as a prime Contractor under subsection **102.4** even though the electronic bidding system or a KDOT representative may have allowed the Bidder to obtain a Proposal Form and submit a Proposal.

102.19 SUSPENSION OR DEBARMENT

a. Definitions.

(1) Debarment. An exclusion or bar from contracting with or bidding on contracts let by the Secretary for a specified period.

(2) Suspension. An exclusion or bar from contracting with or bidding on contracts let by the Secretary for a temporary period of time, pending the completion of legal or debarment proceedings.

b. The Secretary may impose debarment on a Contractor if the Contractor:

(1) Makes false, deceptive, or fraudulent statements in the "Contractor's Qualification Statement and Experience Questionnaire" or in a qualification hearing.

(2) Lacks financial resources, equipment, experience, or supervision to perform classifications of work.

(3) Fails to pay the Secretary monies owed on previous contracts.

(4) Is suspended or debarred in Kansas or in a different state by a Kansas state agency, another state government agency, the FHWA, or another federal government agency.

(5) Submits more than one Proposal for the same Project under the same or different names.

(6) Commits fraud, anti-trust violations, theft, labor violations, wage law violations, illegal discrimination, or other actions indicating a lack of business integrity or business honesty. The Secretary may rely upon a criminal conviction, an adverse civil judgment, the Contractor's admission, or other evidence as proof of the offense.

(7) Violates a contract the Secretary let or violates an associated subcontract by:

(a) Willfully failing to comply with the Contract Documents.

(b) Failing to perform one or more contracts within a reasonable time preceding the decision to suspend or debar and the Contractor's actions or actions within the Contractor's control substantially caused this failure to perform.

(c) Unsatisfactorily performing work (quality or timeliness) on one or more contracts within a reasonable time preceding the decision to suspend or debar and the Contractor's actions or actions within the Contractor's control substantially caused this unsatisfactory performance.

(d) Failing to pay labor or material bills on one or more contracts.

(e) Performing any other act or omission that affects the Contractor's responsibility as a Contractor or subcontractor.

c. The Secretary may suspend a Contractor from bidding if the Secretary has evidence that raises a reasonable suspicion that the Contractor has committed any of the acts set forth in **subsection 102.19b.** and if the Secretary determines that the suspension is in the best interests of the state of Kansas. The Secretary may impose suspension instead of or prior to debarment.

d. Before suspending or debarring a Contractor, the Secretary will give the Contractor notice of suspension or debarment and hold hearings as K.A.R. 36-31-2 and K.A.R. 36-31-3 require.

e. Nothing in this **subsection 102.19** limits the Secretary's authority to determine the Bidder is non-responsible under **subsection 102.18.**

f. The Secretary will reject a Proposal from a Bidder suspended or debarred at the time of Letting even though the electronic bidding system or a KDOT representative may have allowed the suspended or debarred Bidder to obtain a Bidding Proposal Form and submit a Proposal.

SECTION 103

AWARD AND EXECUTION OF CONTRACT

103.1 AWARD OF CONTRACT

a. Lowest Responsible and Responsive Bidder.

(1) If awarded, the Secretary will award the contract to the lowest, responsible, and responsive Bidder. The lowest bidder is the Bidder who offers to complete the Project at the lowest dollar cost as determined in **subsection 103.1b.**

A responsible Bidder is a Bidder who is prequalified before the Letting date and who has the skills, abilities, and integrity to perform the work at the time the Secretary awards the contract. See **subsection 102.2** for prequalification. See **subsection 102.18** for determinations of non-responsibility.

A responsive Bidder is a Bidder who has complied with all Bidding Proposal Form requirements. See **subsection 102.17** for determinations of non-responsiveness.

(2) The Secretary may award a contract to a responsible and responsive lone Bidder.

b. Calculating Lowest Dollar Cost.

(1) Base Bid. To determine the lowest dollar cost, the Secretary will sum the products of the estimated quantities by the unit bid prices (base bid).

(2) Combination Bids. For allowed combination bids, the Secretary will determine the base bid for each project and compare each project's base bid with the sum of the projects' base bids. The Secretary will award the contract based on whichever base bid or combination results in the lowest overall cost to KDOT or the LPA.

(3) Tied Bids. For allowed tied bids, the Secretary will determine the base bid for each project and compare each project's base bid with the sum of the projects' base bid. The Secretary will award the contract based on whichever base bid or tie results in the lowest overall cost to KDOT or the LPA.

(4) Bids involving Riders. For allowed deducts under **subsection 102.5c.(1)(c)**, the Secretary will determine the base bid for each project and compare each project's base bid with the sum of the projects' base bids as adjusted by the deduct(s). The Secretary will award the contract based on whichever base bids or combination results in the lowest overall cost to KDOT or the LPA.

For allowed deducts under **subsection 102.5c.(1)(d)**, the Secretary will not combine the projects' base bids to determine the lowest overall cost to KDOT or the LPA. Rather, the Secretary will determine the lowest responsible bidder on the project for which an award was mandatory (the primary project or Project A) using the base bids on Project A. If the lowest bidder on Project A is the bidder offering the deduct, the Secretary will apply the deduct to Project B and then determine the lowest bidder on Project B. If the lowest bidder on Project A is not the bidder offering the deduct, the Secretary will ignore the deduction offered on Project B and determine the lowest bidder using the base bids on Project B with no deducts. KDOT reserves the right to ignore deducts in situations in which KDOT is unable to administer application of the deducts equitably. For instance, one bidder's Project A may be another bidder's Project B and produce a conflict among the primary projects.

(5) Bids with Time Costs. If the Bidding Proposal Form requests or requires A+B bidding or lane-rental bidding, the Secretary will add to the base bid the product of the time for performance by the daily road user cost or lane rental cost. The Secretary will use this total to determine the lowest bid but will not use this total to determine the contract amount. Instead, the contract amount is the base bid and the Contract Time is the number of days the Bidder bid.

(6) Alternate Bids. If the Bidding Proposal Form requests or requires an alternate bid, the Secretary may award the contract based upon the lowest cost of whichever alternate the Secretary determines is in the best interests of the state of Kansas. For example, with an accelerated work schedule alternate bid, the Secretary may award the contract either to the lowest, responsible and responsive base Bidder or to the lowest, responsible and responsive accelerated Bidder.

(7) Unbalanced Bids. See **subsections 102.17d.(6)** and **(7)**.

(a) The Secretary may determine that a mathematically unbalanced price(s) or a materially unbalanced bid does not reflect the lowest dollar cost to KDOT and reject a Proposal containing such unbalancing.

(b) Mathematically unbalanced price(s). A Proposal is mathematically unbalanced when the Proposal contains lump sum prices or unit prices that do not reflect the reasonable, actual cost (plus reasonable profit, overhead costs, and other indirect costs) to construct the item.

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- (c) Materially unbalanced bid. A materially unbalanced bid is a bid that generates reasonable doubt that award to that bidder would result in the lowest ultimate cost to KDOT, an LPA, or both.
- (d) If KDOT suspects the bidder has submitted mathematically unbalanced price(s) or a materially unbalanced bid, the Bureau Chief of Construction and Materials will request that the bidder submit an explanation and documentation that demonstrates why the prices or bid are not unbalanced.
- (e) If the bidder is unable to demonstrate that the prices or bid are not unbalanced, the Bureau Chief of Construction and Materials will notify the Secretary who has complete discretion to accept or reject the bidder's Proposal.
- (f) If the Secretary accepts a Proposal that, in the Secretary's judgment, contains a mathematically unbalanced price(s), the Bidder waives the right to seek compensation beyond the contract unit price or lump sum price for the work if such item overruns or underruns. Thus, **subsections 104.2** and **104.3** shall not apply to a mathematically unbalanced item(s).

c. Notice of Award. The Secretary will provide the successful Bidder notice of award of contract within 45 calendar days after the Letting. The Secretary may extend the time within which the award is made if the apparent lowest, responsible and responsive Bidder agrees to such extension. A Bidder other than the apparent lowest, responsible and responsive Bidder may agree to a time extension for award or may withdraw a bid without forfeiting its bond.

103.2 CANCELLATION OF AWARD

Before the Secretary signs the contract, the Secretary may cancel the award of contract with no liability. Assume the risk for costs incurred, materials ordered, or work started before the Secretary signs the contract.

103.3 CONTRACT BOND REQUIREMENTS

a. Provide a contract bond on D.O.T. Form 282, for contract performance and payment of labor, materials, supplies, and other items as specified in D.O.T. Form 282. Secure a penal sum that equals the contract amount. Obtain the contract bond from an insurer or Surety the Kansas Commissioner of Insurance has authorized to do business in Kansas and the Secretary approves. Within 5 business days after the insurer or Surety fails or becomes financially insolvent, file a new contract bond executed by an approved insurer or Surety.

b. Payment Bond Claims. Subcontractors and suppliers may file a claim on the contract bond before the Project is completed and a maximum of 6 months after the Project is completed. For purposes of this provision and K.S.A. 68-410, the Project is completed on the date the Engineer issues the Notice of Acceptance of Contract under **subsection 105.16**. This Notice of Acceptance date may follow an observation or establishment period.

103.4 EXECUTING THE CONTRACT

a. Within 10 business days after notice of the award of contract or within any time extension the Bureau Chief of Construction and Materials has granted:

(1) Provide to the Secretary the contract bond, certificate(s) of insurance, authorization to do business in Kansas, and other documents the Proposal Form requires. To obtain authorization to do business in Kansas, register with the appropriate state agencies. If the Bidder is not domiciled in Kansas then appoint an individual or organization, other than a government employee, as the Bidder's resident agent in Kansas for service of process.

See **subsection 107.10** for liability insurance requirements that must be in place before the parties execute the contract.

See **subsection 107.11** for railroad protective liability insurance requirements. Though not a prerequisite to contract execution, the railroad protective liability policy must be in place and approved before the Contractor begins work at railroad crossings, work adjacent to railroad right-of-way, or work within 50 feet of the centerline of a railroad track; and

(2) Sign and return to KDOT the contract and contract bond. Persons with the Contractor's Power of Attorney may sign the contract, contract bond, or both in lieu of an authorized Contractor representative. Persons with the Surety's Power of Attorney may sign the contract bond in lieu of an authorized Surety's representative. Submit the required Powers of Attorney with the contract and contract bond. Select one of the following methods

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and advise the Contract and Proposal Coordinator in the KDOT Bureau of Construction and Materials of the method the Bidder has selected.

- Sign the contract and contract bond at the Office of the Bureau of Construction and Materials.
- Request that KDOT electronically transmit the contract and contract bond to an e-mail address the Bidder has designated. Print the contract and contract bond. Sign and return by mail the contract and contract bond to the Contract and Proposal Coordinator in the Bureau of Construction and Materials.

b. The Secretary will not sign the contract until the Bidder has provided the documents required under **subsection 103.4a**. The date the Secretary signs the contract becomes the effective contract date.

103.5 FAILING TO EXECUTE THE CONTRACT

If the Bidder fails to provide required documentation or fails to sign the contract according to **subsection 103.4**, the Secretary will cancel the award of contract to that Bidder and either re-award the contract to the next lowest, responsible, and responsive Bidder or re-let the Project. The Bidder shall forfeit its Bid Bond as liquidated damages for the delay, re-letting expenses or both. The Bidder shall not perform subcontract work on the Project and shall not re-bid if the Secretary re-lets the Project.

103.6 ASSIGNMENT OF CONTRACT

a. General. A Contractor may assign the entire contract to another prequalified Contractor if the following conditions are met:

- (1) The Secretary finds the Assignment has a valid business purpose and is in the best interests of the State of Kansas; and
- (2) Either the existing Surety agrees to continued liability on the contract bond or a new Surety executes a contract bond assuming all contract obligations as of the contract execution date. The Secretary will not recognize any Assignment until the Secretary and Surety or Sureties have consented in writing to the Assignment.

b. Reorganization of Contractor's Business Organization. A partnership change or a Contractor's reorganization as an individual proprietorship, partnership, or corporation shall not prevent the reorganized partnership, or company from completing pending contracts with the Secretary if the following conditions are met:

- (1) The Surety on the contract bond executes a supplemental agreement, endorsement, or rider assuming liability for the reorganized partnership or company; and
- (2) The original partners or original organization remains liable on the contract and contract bond, and the new partners and new organization assume liability for future contract performance; or
- (3) The new partners and new organization assume liability for past contract performance and future contract performance.

c. Death. If the Secretary and Surety on the contract bond approve, the heirs, executor or administrator of a sole proprietorship's estate may complete the deceased Contractor's contract.

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SECTION 104

SCOPE OF WORK

104.1 INTENT OF CONTRACT AND SCOPE OF CONTRACT

a. Perform all work necessary to construct or reconstruct the Project. Use the best general engineering and construction practices.

b. Assume responsibility for the following:

- all work necessary to construct or reconstruct the Project;
- sublet work at any tier as if the Contractor were performing that work (**subsection 105.9**);
- materials supplied at any tier as if the Contractor were supplying the materials directly (**SECTION 106**);
- unacceptable work and unauthorized work (**subsection 105.5**);
- damage to Project work (**subsection 104.20**); and
- damage to persons and property (**subsection 107.10**).

c. Accept Contract Changes such as differing site conditions, quantity changes, eliminated items, extra work, and temporary suspensions of work, among others. Contract Changes do not release the Contractor or Surety from liability for completing the contract. The Engineer will prepare a change order for Contract Changes.

d. If the Contractor believes that a Contract Change or any other acts or omissions fundamentally change the scope of the original contract and thus represent a breach of contract, notify the Engineer in writing. See **subsection 108.10b**.

e. Changes caused by Acts of God are not Contract Changes.

104.2 SIGNIFICANT CHANGE IN MAJOR CONTRACT ITEM QUANTITIES

a. A major contract item is any contract item, excluding mobilization, having an original contract value of 5% or more of the original contract amount.

b. A significant change in contract quantities is an increase or decrease to a major contract item of work by more than 25% of the original contract quantity. For decreases of 100%, see **subsection 104.4** for eliminated items.

c. The Engineer will make a contract adjustment for a significant change in contract quantities if the Contractor proves:

(1) the changed quantities reasonably increase or decrease the Contractor's time for performance (CIOW or Project critical path), price for performance, or both;

(2) the Contractor, its suppliers at any tier, or its subcontractors at any tier did not cause or contribute to the changed quantities; and

(3) the Contractor has provided the required notice under **subsection 104.8**.

d. Limits on Compensation. A price adjustment will apply only to that quantity above 125% or below 75% of the original contract quantity. The Secretary will not compensate the Contractor for expenses not recovered because of the way the Contractor allocated overhead, profit, or other expenses among the various bid items.

104.3 CHANGES IN MINOR CONTRACT ITEM QUANTITIES

a. Any item not considered a major contract item is considered a minor contract item.

b. The Engineer will not provide monetary compensation for changes in quantities of minor contract items.

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c. The Engineer may grant a time extension if the Contractor proves:

- (1) the quantity change in minor contract items increases the time for performance (CIOW or Project critical path);
- (2) the Contractor, its suppliers at any tier, or its subcontractors at any tier did not cause or contribute to the changed quantities; and
- (3) the Contractor has provided the required notice under **subsection 104.8**.

104.4 ELIMINATED ITEMS

a. The Engineer may eliminate items from the contract regardless of whether the eliminated item(s) represents an entire subcontract.

b. Determining the Contract Adjustment (Price and Time).

(1) Money allowed. The Secretary will pay for work actually performed and materials purchased (but non-returnable) before KDOT gave the Contractor notice of eliminating the item from the contract. Deliver to KDOT, materials the Secretary purchased under this **subsection 104.4**. Such materials become KDOT's property. The cost of materials purchased but non-returnable shall include the invoice price of the materials and shipping/delivery charges that represent the most economical movement of the materials to the Contractor's office and/or to the Project site or other location KDOT designates.

(2) Prohibited Costs. The Secretary will not pay for bidding costs, overhead, anticipated profit, interest, or other indirect costs associated with the eliminated item.

(3) Subcontracts. If the eliminated item is a subcontracted item, neither the Contractor nor the pass-through subcontractor is entitled to recovery beyond reimbursement for actual work performed and materials purchased. The Secretary will not pay for the pass-through subcontractor's bidding costs, overhead, anticipated profit, interest, or other indirect costs associated with the eliminated item even if the eliminated item results in canceling the subcontract.

(4) Time. The Secretary will not increase or decrease the Contract Time for eliminated items.

c. Subsections 104.8 through 104.10 do not apply to eliminated items.

104.5 DIFFERING SITE CONDITIONS

a. Differing site conditions are:

(1) Type I. Type I site conditions are subsurface or latent physical conditions encountered at the site differing materially from those affirmatively indicated in the Contract Documents.

(2) Type II. Type II site conditions are unknown and unusual physical conditions differing materially from those ordinarily encountered and generally recognized as inherent in the contract work.

b. Unless **subsection 104.5c.** applies, the Engineer will make a contract adjustment for a differing site condition if the Contractor proves:

(1) the differing site condition reasonably increases or decreases the Contractor's time for performance, price for performance, or both;

(2) the Contractor, its suppliers at any tier, or its subcontractors at any approved tier did not cause or contribute to the differing site condition; and

(3) the Contractor has provided the required notice under **subsection 104.8**.

c. The Engineer will not make a contract adjustment for a differing site condition if:

(1) the Contract Documents address the Type I conditions encountered.

(2) the Contract Documents address the Type I or Type II nature of the work.

(3) a provision in the Contract Documents shifts to the Contractor the responsibility for the Type I or Type II conditions encountered or nature of the work.

(4) the average Contractor should have been able to discover the differing Type I or Type II site condition from reviewing the Contract Documents or from investigating the site.

(5) the Contractor knew or should have known of the Type I or Type II conditions encountered or nature of the work.

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d. Contract Changes or claims associated with unidentified and improperly relocated utilities under **subsection 105.11** shall be treated as differing site conditions and evaluated under **subsections 105.11 and 104.5**.

104.6 EXTRA WORK

a. Extra Work is:

(1) work not foreseen or included in the original contract.

(2) work that differs materially in kind or nature from that involved or included in the original proposed construction.

(3) work caused by, delay to work caused by, or acceleration of work caused by:

(a) written changes that KDOT, a LPA, or both make to the Contract Documents or the Contractor's work.

(b) verbal changes that KDOT, a LPA, or both make to the Contract Documents or the Contractor's work.

(c) other acts or omissions that change the contract terms.

b. The Engineer will make a contract adjustment for extra work if the Contractor proves:

(1) the Engineer and Contractor agreed that the written or verbal Contract Change is extra work and reached this agreement before the Contractor began the extra work;

(2) the Contractor, its subcontractors, or its suppliers did not voluntarily perform or provide the extra work;

(3) the extra work was necessary to complete the Project;

(4) the extra work reasonably increases or decreases the Contractor's time for performance (CIOW or Project critical path), price for performance, or both;

(5) the act or omission of the Contractor, its suppliers at any tier, or its subcontractors at any tier did not cause or contribute to the extra work;

(6) another Contractor on this Project or an adjacent project did not cause or contribute to the extra work (refer to **subsection 105.12** for claims between Contractors); and

(7) the Contractor has provided the required notice under **subsection 104.8**.

c. Examples of extra work include work caused by, delay to work caused by, or acceleration of work caused by:

- changes KDOT, a LPA, or both make that affect the Contractor's method of operations.
- changes KDOT, a LPA, or both make that affect the Contractor's manner of performing the work.
- changes KDOT, a LPA, or both make that affect the Contractor's schedule.
- changes KDOT, a LPA, or both make to the Contract Documents because of an error or omission in the Contract Documents.
- changes in government-provided facilities, equipment or materials.
- changes in federal, state, or municipal law enacted after the Letting.

d. For purposes of **subsection 104.6**, KDOT includes KDOT employees and KDOT hired third party consultants operating within their authority and duties (see **subsection 105.2** and **105.3**). For purposes of **subsection 104.6**, LPA includes LPA employees and LPA hired third party consultants operating within their authority and duties (see **subsection 105.2** and **105.3**).

e. Contract Changes or claims for negligent inspection, excessive inspection, or both shall be treated as extra work and evaluated under **subsection 105.7 and 104.6**; however, the Contractor's failure to provide timely notice as required by **subsection 104.8a**. will result in the denial of the claim and waiver of the claim under **subsection 104.8c.(3)**. Allowances made for lack of timely notice in **subsection 104.8c.(1)** and **104.8c.(2)** do not apply to claims for negligent inspection or claims for excessive inspection.

104.7 TEMPORARY SUSPENSION OF WORK

a. A temporary suspension of work occurs when:

(1) The Engineer orders the Contractor to suspend all or part of the work. The Engineer will follow a verbal suspension with written notice to the Contractor.

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(2) The Engineer's acts or omissions result in a suspension of all or part of the work. Verbally, without delay, notify the Engineer if such acts or omissions result in a suspension. Follow the verbal notice with a written notice to the Engineer. The Engineer may not know the acts or omissions caused the suspension.

b. Unless **subsection 104.7c.** applies, the Engineer will compensate for a temporary suspension of part or all of the work if the Contractor proves:

(1) the temporary suspension reasonably increases or decreases the Contractor's time for performance, price for performance, or both;

(2) the Contractor, its suppliers at any tier, or its subcontractors at any approved tier, did not cause or contribute to the suspension;

(3) the Contractor submits its request for a contract adjustment within 7 calendar days after the suspension or within any additional time the Engineer grants in writing;

(4) no other provision in the contract permits or denies a contract adjustment for the acts or omissions causing the temporary suspension; and

(5) the suspension:

- was not originally anticipated or should not have been anticipated in the original contract;
- is not a suspension customary in, ordinarily encountered in, or inherent to the construction industry; or
- is for a period longer than anticipated.

c. Compensation Denied for Certain Suspensions.

(1) The Engineer will not compensate for a temporary suspension if the suspension was caused by:

- unsafe conditions.
- violation of laws.
- requirements of KDHE, Corp of Engineers, or other governmental entities.

(2) The Engineer will not grant monetary compensation but will suspend working day charges or grant a time extension, whichever applies, under **SECTION 108** if the suspension was caused by:

- an Act of God as provided in **subsection 108.6c.(3)** (calendar day contracts).
- weather/recovery days as provided in **subsections 108.5c.(1)** and **108.5d.(1)** (working day contracts).
- unusually severe weather as provided in **subsection 108.6c.(2)** (calendar day contracts).
- an agreement to suspend the Project for a winter shutdown period as provided in **subsection 108.5d.(6)**.

d. Determining the Contract Adjustment (Price and Time).

(1) Money. The Secretary will pay the Contractor using the Force Account provision of **subsection 109.3**.

The Contractor is responsible for keeping track of and submitting all costs. The Secretary will not pay suspension costs not documented with Force Account records. The Secretary will not pay suspension costs if the Contractor would have incurred these costs notwithstanding KDOT's temporary suspension of work. Exception: if the Contractor can segregate suspension costs from other costs that would have been incurred, the Engineer will include the segregated costs in the contract adjustment.

(2) Time or Acceleration Costs. The Secretary will increase the Contractor's time for performance by the amount of time KDOT's temporary suspension delayed the Project's critical path. Alternatively, the Secretary will pay acceleration costs if the Engineer requires or permits the Contractor to accelerate the work at KDOT's expense rather than increasing the time for performance.

(3) Waiver. If the Contractor fails to submit its request for a contract adjustment within 7 calendar days after the suspension is lifted or the additional time the Engineer grants as provided in **subsection 104.7b.(3)**, the Contractor waives the right to a contract adjustment.

(4) **Subsections 104.8 through 104.10** do not apply to temporary suspensions.

104.8 NOTICE OF CONTRACT CHANGE AND REQUEST FOR CONTRACT ADJUSTMENT

a. Notice. After encountering a Contract Change, notify the Field Engineer of the Contract Change verbally without delay and in writing within 10 business days. In the written notice, describe the Contract Change and, if applicable, any potential claim for contract adjustment (additional time, money, or both). Explain how the

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Contractor anticipates the Contract Change will impact the Contractor's operations, delay the Contractor's schedule, or otherwise increase the Contractor's costs.

(1) Such written notice of a Contract Change is necessary so the Field Engineer may record the costs the Contractor is incurring.

(2) Provide the written notice even if the Engineer orders the Contract Change. The Engineer may know the Contractor is performing the work but not that the Contractor expects a contract adjustment for the work.

(3) Never assume the Engineer knows the Contractor is performing a Contract Change for which the Contractor will be claiming a contract adjustment. The Engineer and Contractor may disagree that the work is a Contract Change.

(4) For differing site conditions, provide the written notice to the Field Engineer before beginning the work caused by the differing site conditions. Obtain the Engineer's approval of a preliminary or final contract adjustment before beginning the work caused by the differing site condition unless the Engineer allows otherwise in writing.

(5) For extra work, provide the written notice to the Field Engineer before beginning the extra work. Obtain the Engineer's approval of a preliminary or final contract adjustment before beginning the extra work unless the Engineer allows otherwise in writing.

(6) Notice to an Inspector does not meet the requirements of this provision.

b. Contract Adjustment Request. After providing the Engineer written notice of a Contract Change under **subsection 104.8a.**, submit a written request for any contract adjustment desired (time, money or both) without unreasonable delay but no later than 30 calendar days following the written notice of Contract Change.

(1) If the Contractor desires more than 30 calendar days to submit the request, obtain the Engineer's approval to submit the request for contract adjustment outside the 30 calendar day period provided.

(2) If the request involves a differing site condition or extra work, the Contractor must obtain the Engineer's approval of a contract adjustment before beginning the differing site condition work or extra work unless the Engineer allows otherwise in writing. If the Contractor needs to begin the work before the Contractor is able to submit a final contract adjustment request, obtain the Engineer's approval to submit a preliminary contract adjustment with an estimate of the requested time, money, or both. Then, submit the final request for contract adjustment within the 30 calendar day period provided or within any additional time the Engineer approves.

c. Failure to Provide Notice or Failure to Submit Request. If the Contractor does not provide notice of the Contract Change timely under **subsection 104.8a.**, or if the Contractor does not submit the contract adjustment request timely and in sufficient detail under **subsections 104.8b., 104.9 and 104.10**, the Engineer may:

(1) reduce the Contractor's request for contract adjustment by the amount of time, money, or both time and money the Secretary may have been able to save if the Contractor would have given more timely notice or a more timely contract adjustment request; and

(2) reduce the Contractor's request by amounts the Engineer was unable to substantiate with KDOT records; or

(3) deny the claim and consider the lack of timely notice as the Contractor's waiver of the claim.

d. Waiver of Contract Adjustment Request. Notwithstanding **subsection 104.8c.**, the Engineer will deny the claim and consider the lack of timely notice as the Contractor's waiver of the claim if the Contractor fails to provide notice of the Contract Change before the Engineer issues Notice of Acceptance of Contract under **subsection 105.16b.**

e. Certification of Contract Adjustment Request. The Contractor's authorized representative shall certify the contract adjustment request with one of the following statements, whichever applies to the specific contract adjustment request:

(1) The undersigned hereby certifies, under the penalty of law for perjury or falsification, that I am authorized to submit this contract adjustment request on behalf of the Contractor and to bind the Contractor, that the contract adjustment request is made in good faith and, to the best of the Contractor's knowledge and belief, is a true and complete statement of the estimated costs and time sought for the Contract Change and is authorized by the Contract. I further certify that no additional claims will be submitted related to this contract adjustment request, and the Contractor will maintain documentation that supports the contract adjustment request.

(2) The undersigned hereby certifies, under the penalty of law for perjury or falsification, that I am authorized to submit this contract adjustment request on behalf of the Contractor and to bind the Contractor, the contract adjustment request is made in good faith and, to the best of the Contractor's knowledge and belief, is a true

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and complete statement of the actual costs and time incurred for the Contract Change and is authorized by the Contract. I further certify that no additional claims will be submitted related to this contract adjustment request, and the Contractor has documentation that supports the contract adjustment request.

f. Subcontractor/Supplier Pass Through Claims. Contract adjustment requests shall include pass-through claims of subcontractors and suppliers, if any, associated with Contract Changes. KDOT's consideration of these claims does not create privity of contract between KDOT and the subcontractors or suppliers or between the LPA and the subcontractors or suppliers. If the contract adjustment request includes the pass-through claim of subcontractors and suppliers, the Certification required under **subsection 104.8e.** shall include the following language for each subcontractor and supplier seeking a pass-through claim: "The claim being passed through to KDOT, the LPA, or both is passed through in good faith and is, to the best of the Contractor's knowledge and belief, a true and complete statement of the estimated or actual costs and time incurred by the named subcontractor/supplier for the Contract Change and is authorized by the Contract. I further certify that no additional related claims will be submitted on that subcontractor's/supplier's behalf, and the Contractor has or will have documentation that supports the pass-through claim." The Subcontractor's or Supplier's authorized representative shall certify the contract adjustment request with one of the statements provided in **subsection 104.8e.**, whichever applies to the specific contract adjustment request, except that the word "Contractor" shall be replaced with the word "subcontractor" or "supplier".

104.9 PRICING THE CONTRACT ADJUSTMENT REQUEST

a. Costs Included. Include in the contract adjustment request, submitted under **subsection 104.8**, all direct and indirect costs associated with the Contract Change including labor, materials, equipment, overhead, profit, impact costs, and other costs for which the Contractor claims compensation is owed. When applicable, provide reduction in costs attributable to the Contract Change. Do not include prohibited costs listed in **subsection 104.9c.**

(1) For Contractor-owned equipment charges, use the Rental Rate Blue Book for Construction Equipment (Blue Book) rates as calculated under **subsection 109.3d.** for both operating equipment (**subsection 109.3d.(1)**) and idle equipment (**subsection 109.3d.(3)**). Exception: if the contract adjustment request is for an amount equal to or greater than Two hundred fifty thousand dollars (\$250,000.00), the Secretary's representative at any level of review may require the Contractor to provide actual equipment rates from the Contractor's cost accounting records rather than allowing the Contractor to use Blue Book rates. The lesser of Blue Book or actual equipment rates will be used for the contract adjustment request. When actual equipment rates are required instead of Blue Book rates, standby rates will be determined in accordance with **subsection 109.3d.(3)** except the calculation shall use the hourly ownership rate determined from the Contractor's cost accounting records in lieu of the hourly rental rate.

(2) For rented equipment, use the actual rental cost from invoice.

b. Acceleration Costs. On calendar day or calendar completion date projects, also include in the contract adjustment request all direct and indirect costs associated with required acceleration. Identify these costs separately from the other direct and indirect costs. If the Contractor determines circumstances make it impracticable or impossible to accelerate the work, notify the Engineer in the contract adjustment request.

c. Prohibited Costs. Do not include claim preparation costs, attorney's fees, loss of anticipated profit, and interest during the period in which the Contractor prepared the claim. Do not include loss of bonding capacity, loss of credit, loss of business, and similar items of consequential damages not specifically allowed in **subsection 104.9a.** These charges are not payable under the contract.

d. Impact Costs. If the Contractor is uncertain as to the amount of impact costs, write in the contract adjustment request the anticipated impact cost amount and specify that this is an anticipated amount which will be justified in detail upon completion. The Contractor waives the right to seek impact costs if the Contractor fails to include actual or anticipated cost in the contract adjustment request. In evaluating compensation for impact costs, the Engineer may take into account changes in schedule float that occur between the date of the Contract Change and the date the Contractor furnishes its actual or anticipated claimed impact costs.

e. Force Account Records. The Field Engineer may require the Contractor to keep force account records under **subsection 109.3.**

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f. Omitted Contract Changes. Subsection 104.9 does not apply to changes in minor contract items quantities, eliminated items, or temporary suspensions; instead, see subsections 104.3, 104.4 and 104.7.

104.10 TIME EXTENSIONS IN THE CONTRACT ADJUSTMENT REQUEST

a. Working Day Contracts. On working day contracts, include in the contract adjustment request, submitted under subsection 104.8, all additional days caused by a Contract Change and all working days disputed because of a Contract Change. Submit a detailed narrative describing the delay in operations and an updated progress schedule to support the claimed time extension.

b. Calendar Day or Calendar Completion Date Projects. On calendar day or calendar completion date projects, identify the additional time associated with a Contract Change. Submit a detailed narrative describing the delay in operations and describing the acceleration efforts necessary to overcome the delay. Submit an updated progress schedule that supports the claimed delay and that demonstrates acceleration. Anticipate receiving acceleration costs under subsection 104.9b. rather than a time extension. If the Contractor feels circumstances make it impossible or impractical to accelerate the work, notify the Engineer in the contract adjustment request. The Secretary may grant a time extension if KDOT finds it is impossible or impractical for the Contractor to meet the calendar completion date by acceleration or if KDOT determines acceleration costs are excessive.

c. Acts of God on Calendar Day or Calendar Completion Date Projects. Subsection 108.6 rather than SECTION 104 governs time extensions for Acts of God and other unusually severe weather events unrelated to Contract Changes.

d. Proof of Delay. The Engineer will consider additional days and extensions under subsections 104.10a. and 104.10b. only if the Contractor shows the Contract Change required additional days, shows delay to the CIOW, shows that the delay extends the Project Open Time, Cleanup Time, or other Contract Time, or a combination thereof.

e. Omitted Contract Changes. Subsection 104.9 does not apply to eliminated items or temporary suspensions; instead, see subsections 104.4, and 104.7.

104.11 MAINTAINING AND PROTECTING THE WORK AND INFRASTRUCTURE

a. General. Maintain and protect from damage the work being constructed and all roads, detour routes, intersections, ramps, entrances, temporary approaches, crossings, and structures (infrastructure) within the Project limits. If traffic is being carried through construction, maintain all access routes. If performing work at night or during evening hours, provide lighting equipment so conditions compare favorably with daylight hours. Observe curing periods and legal load restrictions.

b. Detours. Unless shown otherwise in the Contract Documents, all detour routes except those over or through construction will be maintained by the Secretary.

If the detour is marked by the Contractor, the Contractor shall be responsible for maintaining such markings.

c. Maintain and protect the work and infrastructure within the Project limits until partial or final acceptance. Maintaining infrastructure includes temporary surfacing and repairs to pavement and other infrastructure necessary to safely move traffic through the Project.

d. During all temporary suspensions and winter shutdown periods, perform the following operations:

- store all materials so they do not impede or obstruct traffic or traffic safety;
- provide and maintain normal and adequate drainage;
- continue implementation of the SWPPP in accordance with DIVISION 900;
- erect and maintain temporary structures, signs, or other facilities;
- maintain newly established planting, seeding, and sod;
- protect new trees or other vegetative growth; and

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- protect the work from damage and deterioration.

e. Snow Removal Responsibilities.

- Conduct snow and ice removal on closed roads to maintain access on all closed roads through the winter.
- The Secretary will conduct snow and ice removal on official detour routes and State highways opened to through traffic (including associated intersections and ramps) within the Project limits.
- For City and County Projects, the LPA will conduct snow and ice removal on official detour routes opened to through traffic (including associated intersections and ramps) within the Project limits.

104.12 REMOVING AND DISPOSING OF STRUCTURES AND OBSTRUCTIONS

Remove from the Project all:

- structures and obstructions that are going to be replaced under the contract;
- structures and obstructions unnecessary for constructing the Project;
- structures and obstructions useless to the completed Project; and
- trash.

If a new structure is replacing an existing bridge at the same location, remove the existing bridge.

The Secretary may remove or contract with third parties to remove from the highway right-of-way buildings and other improvements that need to be replaced or relocated. Private or public utilities will remove their utilities from the highway right-of-way or relocate within the highway right-of-way, unless the Contract Documents require the Contractor to do the relocation. The Contract Documents will specify which structures or obstructions third parties will be removing.

The costs of removing structures and obstructions is subsidiary to other work unless the contract has a separate bid item for removal of existing structures or unless the material falls within the limits of structure excavation.

104.13 LOAD RESTRICTIONS

a. Observe legal load restrictions when operating equipment, hauling equipment, or hauling materials on public roads; newly constructed/reconstructed base, pavement, and structures; and any existing base, pavement or structures that will remain in place. Assume responsibility for changes in legal load restrictions that occur after the Project was let. Obtain the District Engineer's written approval and a special permit to exceed legal load restrictions on the State highway system and on newly constructed/reconstructed portions of the Project.

b. Protect roadways and structures within Project limits from damage. Observe curing periods before operating equipment or hauling loads on newly constructed pavement, reconstructed pavement, or structures. Do not haul loads of any size on pavement base, except when operations require equipment on pavement base to place material. Assume responsibility for damages to roadways and structures the Contractor causes when operating equipment or hauling loads.

104.14 OPENINGS IN HIGHWAY OR RIGHT-OF-WAY FOR THIRD PARTIES

Make no openings, entrances, or other access points in the highway or right-of-way for third parties unless shown in the Contract Documents or unless the third party has obtained a permit from KDOT. Construct all openings, entrances, and other access points according to KDOT's standards. Maintain and repair all openings, entrances, and other access points until final acceptance.

104.15 THIRD PARTY PERMITS AND RESTORING WORK AREAS DAMAGED BY THIRD-PARTY PERMITS

a. The Secretary may issue to individuals or organizations permits for making an opening in the highway or using highway right-of-way.

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b. The Secretary or other government authorities may issue to individuals or organizations permits for constructing or reconstructing utilities.

c. From the time the Notice to Proceed is issued until Final Acceptance, coordinate and accommodate third parties authorized to work within the Project limits. Do not allow individuals or organizations to perform work within the Project limits without a permit from KDOT or other government authorities.

- If the Engineer orders the Contractor to repair or restore work within the Project limits that these individuals or organizations damaged, the Engineer will pay for these repairs or restoration as extra work; and
- If these individuals delay the Contractor's operations, the Engineer will consider whether the delay entitles the Contractor to a contract adjustment as a differing site condition or extra work, whichever applies.

104.16 HANDLING TRAFFIC THROUGH CONSTRUCTION

Safely move traffic throughout the Project. Provide temporary surfacing, when required. Repair potholes and other pavement deficiencies. The Engineer's approval of the Contractor's method of operations does not lessen the Contractor's responsibility for the traveling public's safety.

Sequence work to provide 2-way travel of traffic whenever practicable.

Do not detour traffic if the Contract Documents state that traffic will be carried through construction.

Erect signs and traffic control devices as shown in the Contract Documents or traffic control plan, unless the Engineer directs otherwise. The Engineer will establish work zone speed limits. Confine restricted speed zones to the immediate vicinity of the work, and maintain speed zones over the minimum length of the Project. When the vicinity of the work changes, move the restricted work zone devices to the new area. Remove or cover signs that are unnecessary when no work is in progress.

Provide flaggers and equip flaggers to comply with **SECTION 805**.

The Engineer may shut down all or part of the work (temporary suspension) to handle traffic safely during periods of inclement weather or heavy traffic. The Contractor is not entitled to additional monetary compensation for these temporary suspensions except as provided in this **subsection 104.16**. The Contractor is entitled to working day relief under **subsections 108.5c. and d.** or a time extension under **subsection 108.6c.** if the Contractor proves the suspension for inclement weather or heavy traffic meets the conditions stated in these subsections. Exception: The Contractor may be entitled to additional monetary compensation under **subsection 104.7b.** if KDOT, any LPA, or both knew or should have known of the traffic restriction before the Letting.

Include in the Contractor's bid all costs associated with traffic restrictions identified in the Contract Documents. The Contractor is not entitled to additional time, money, or both for these traffic restrictions.

104.17 TRAFFIC CONTROL DEVICES

The Contractor's obligation to provide, erect, and maintain all traffic control devices is extremely important. The Engineer's failure to enforce the Contractor's duty to provide, erect, and maintain all traffic control devices does not lessen the Contractor's responsibility or liability to KDOT, any LPA, the public and workers for failing to provide, erect, or maintain these devices.

The Contractor's subletting of traffic control devices does not lessen the Contractor's responsibility or liability to the public and workers for failing to provide, erect, or maintain these devices. A subcontractor's delay in providing acceptable traffic control devices or a subcontractor's delay in repairing or replacing unacceptable traffic control devices does not excuse the Contractor's obligation to perform this work timely.

Obtain the Engineer's approval before erecting traffic control devices, changing traffic control devices, or removing traffic control devices except if an emergency situation requires immediate action. Comply with the Engineer's orders to change or remove traffic control devices.

Provide, erect, and maintain all traffic control devices necessary to protect the public and workers on the Project. Make sure that the quality, quantity, and placement of traffic control devices meet the most recent edition of the Manual on Uniform Traffic Control Devices (MUTCD) adopted by the Secretary, ATSSA standards, and **SECTION 805**. Traffic control devices that do not meet the MUTCD, ATSSA standards, or **SECTION 805** are unacceptable.

Inspect traffic control devices at least daily during the day, and when needed, at night. Immediately upon discovering or receiving notification of unacceptable traffic control devices, either repair or remove and replace the

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unacceptable traffic control devices. Record unacceptable traffic control devices and record when the condition has been corrected.

Provide, erect and maintain all traffic control devices until written, final acceptance of the Project including all temporary suspensions of work.

104.18 OPENING SECTIONS TO TRAFFIC AND MAINTAINING ROADWAYS AFTER OPENING SECTIONS TO TRAFFIC

a. The contract may require the Contractor to open to traffic designated sections of the Project before the Contractor has completed all work. Open to traffic and maintain these sections until partial or final acceptance. Include in the Contractor's bid the costs for maintaining these sections of traffic before partial or final acceptance.

b. During the Project, the Engineer may order the Contractor to open to traffic sections of the Project before the Contractor has completed all work or before the Contract Time expires. Open such sections to traffic. The Engineer will issue a partial acceptance of this section. The Secretary will maintain or pay the Contractor to maintain partially accepted sections open to traffic. Exception: the Secretary does not assume liability for damage the Contractor causes to partially accepted work.

104.19 RAILROAD PROVISIONS

a. Notice of Work. Notify the Railroad Company's Division Superintendent/Division Engineer/General Manager, in writing, of the date the Contractor anticipates beginning work on Railroad Company property. If there is no Contractor's Right of Entry or other document in the Contract Documents specifying the notice requirements, provide this initial notice a minimum of 10 business days before starting the work. If the work requires railroad protective services, provide an additional notice a minimum of 24 hours before starting the work.

b. Communication with Railroad. Maintain contact and liaison with the Railroad Company's Division Superintendent/Division Engineer/General Manager or that person's authorized representative. Obtain the Division Superintendent/Division Engineer/General Manager's approval of the time and manner of doing the work.

c. Allowed Clearances. The Contract Documents will show clearance distance from the nearest rail of any railroad track. Allow no structure, material, equipment, or other obstructions within this clearance distance except for permitted falsework.

d. Falsework on Grade Separation Structures. The Contract Documents will show falsework clearance for grade separation structures. Allow no obstructions within the clearance lines shown. After placing falsework, expedite work over the tracks to minimize the falsework duration. Construct falsework to protect the Railroad Company's tracks. Construct falsework to protect the railroad facilities and provide safe train operation. Once no longer necessary, remove falsework, protecting the Railroad Company's tracks and safe train operation. If, in the Railroad Company Chief Engineer's opinion, the Contractor fails to construct, maintain, or remove the falsework safely, thereby endangering the safety of railroad traffic, the Railroad Company may take over the falsework operations and bill the Contractor for expenses the Railroad Company incurs in assuming these obligations.

e. Working Around Railroad Tracks. At all times keep workers, materials, equipment, and machinery a minimum of 12 feet from the centerline of the Railroad Company's main track.

f. Crossings. Cross the Railroad Company's tracks only at existing, open public crossings or temporary crossings the Contractor has constructed with the Railroad Company's written approval (permit).

g. Prosecution of Work. Once begun, consistently pursue work near the railroad tracks, delaying completion only if conditions outside the Contractor's control prevent continued work.

h. Restoring Railroad Property. Upon completing construction, restore the Railroad Company's right-of-way and property to a condition substantially similar to the condition that existed before the Contractor began construction. Include in the Contractor's bid the anticipated costs for such restoration.

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i. Obtaining Railroad Protective Services. Obtain from the Railroad Company the services of railroad flaggers, switch-tenders, pilots, and similar protective services required because of the Contractor's operations on the contract.

j. Payment for Railroad Costs.

- (1) Using Railroad Property. Costs for using railroad property are subsidiary to other bid items.
- (2) Restoring Railroad Property. Costs of restoring railroad property are subsidiary to other bid items.
- (3) Obtaining Railroad Protective Services. Costs for obtaining railroad protective services are subsidiary to other bid items.
 - (a) Pay the Railroad Company directly for railroad protective services.
 - (b) The cost of railroad protective services includes labor, transportation, and travel expenses.
 - (c) Exception: The Secretary will reimburse the Railroad Company directly for railroad protective services required under force account work.
 - (d) Exception: If not included in the Contract Documents the Secretary will reimburse the Railroad Company directly for excess costs of railroad protective services required at detours and temporary crossings if:
 - the detour or temporary crossing the Contractor constructed replaced an existing crossing for which the Railroad Company had maintained protective services; and
 - the protective services required at the detour or temporary crossing are greater than the services that were required at the existing crossing. Only the excess costs are reimbursable.

(4) Adjusting Railroad Property. Costs necessary to adjust Railroad property for the Contractor's convenience (other than that shown on the Contract Documents) are subsidiary to other bid items.

k. Contractor's Right of Entry. If the Railroad requires the Contractor to execute a right of entry or other agreement directly with the Railroad as a condition to being on railroad right-of-way, KDOT will include a copy of that agreement in the Contract Documents through a Railroad Special Provision. The Contractor is responsible for knowing the requirements of the Railroad Special Provision and should be aware that the Railroad Special Provision may modify the requirements of **subsection 104.19**. If there is a conflict between the Railroad Special Provision and **subsection 104.19**, the Special Provision shall control.

104.20 LIABILITY FOR DAMAGE TO WORK/PROJECT

a. Work. For purposes of this **subsection 104.20**, the term "work" refers to the improvements to be constructed under the contract.

b. Damage Caused by Acts of God and Third Parties. Until Notice of Acceptance of Contract under **subsection 105.16**, protect the work from and assume liability for damages to the work caused by Acts of God, vandalism, malicious mischief, falling objects, explosions, and other acts of third parties except acts of the public enemy (**subsection 104.20d.**) and certain acts of the traveling public (**subsection 104.20h.**). Once damaged, the work is considered unacceptable work under **subsection 105.5**.

c. Damage caused by the Contractor and the Contractor's agents. Protect the work from and assume liability for damages to the work caused by faulty workmanship. Protect the work from and assume damages for the work caused by events within the control of the Contractor, Contractor's agents, subcontractors at any tier, suppliers at any tier, or any combination thereof. Once damaged, the work is considered unacceptable work under **subsection 105.5**.

d. Damage caused by Acts of Governmental Authorities or Acts of the Public Enemy. The Secretary assumes liability for damages to the work caused by acts of governmental authorities or acts of the public enemy. The Secretary also assumes liability for damages to the work that occur during unanticipated winter shutdown when acts of governmental authorities or the public enemy extend the Contractor's operations into the winter shutdown condition. If the Secretary requires the Contractor to restore, repair, remove, or remove and replace work damaged in this manner, the Engineer will pay for the work as extra work under **subsection 104.6**.

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e. Damage to work that has been partially accepted. The Secretary assumes liability for damages to the work that occur after the Engineer has issued a partial acceptance of the work under **subsection 105.16a**. The Secretary assumes liability for damages to work that is complete and awaiting partial acceptance under **subsection 105.16a**. The Contractor has the burden to prove that the work is complete. Exception: The Secretary does not assume liability for such damages if the Contractor, the Contractor's agents, subcontractors at any tier, or suppliers at any tier caused the damage.

f. Damage to work during contract winter shutdown periods. Protect the work from and assume liability for damages to the work during contract winter shutdown periods except as provided in **subsection 104.20h**. Once damaged, the work is considered unacceptable work under **subsection 105.5**. Include in the Contractor's bid anticipated costs necessary to conduct repairs or replacement.

g. Damage to work during temporary suspensions of entire Project.

(1) Protect and assume liability for damages to the work that occur during temporary suspensions of the entire Project for which the Contractor is not entitled to a contract adjustment under **subsection 104.7**. Once damaged, the work is considered unacceptable work under **subsection 105.5**.

(2) The Secretary assumes liability for damage to the work that occurs during temporary suspensions of the entire Project if:

- the Contractor is entitled to a contract adjustment under **subsection 104.7** and the Contractor would have been completed with physical construction of the Project at the time the damage occurred had the Project not been temporarily suspended;
- acts of governmental authorities or acts of the public enemy caused the damage; or
- acts of the traveling public caused the damage as provided in **subsection 104.20h**.

If the Secretary requires the Contractor to restore, repair, remove, or remove and replace work damaged in this manner, the Engineer will pay for the work as extra work under **subsection 104.6**.

h. Damage to work caused by the traveling public. The Secretary assumes liability for damages to the work caused by the traveling public if:

- (1) the roadway is open to travel by the traveling public (restricted or unrestricted traffic);
- (2) the damage was caused by a vehicular accident;
- (3) no negligent act or omission of the Contractor, the Contractor's agents, subcontractors at any tier, or suppliers at any tier caused or contributed to the vehicular accident; and
- (4) the work damaged was in a finished condition, meeting plans and specifications, whether it qualifies for partial acceptance under **subsection 105.16a**.

104.21 PUNCH LIST AND FINAL CLEANUP

a. Punch List. A punch list is a list of incomplete work items or items needing corrective action to fulfill the contract requirements.

b. Final Cleanup. Final cleanup includes completing all work necessary to construct or reconstruct the Project and cleaning up the Project site, adjacent property the Contractor occupied, borrow sites, plant sites, and local material sources of all trash, weeds, brush, materials, temporary structures, and equipment.

c. Preparation of Punch List.

(1) Monthly Punch List. At each monthly progress meeting, the Field Engineer will provide the Contractor a punch list. KDOT's failure to include an item on a monthly punch list (as distinguished from the final punch list) does not relieve the Contractor's responsibility to complete or correct the item before acceptance of contract.

(2) Final Punch List. Within the Cleanup Time established in **subsection 108.4c**. or by special provision or within a different Contract Time established by special provision when the contract does not have separate Cleanup Time, request in writing for the Engineer to provide a final punch list for the Project. Include a summary of all known incomplete items to be finished for acceptance of contract. If not yet completed, include in the final punch list as-built construction plans as defined in and required by **subsection 802.3g**.

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Identify the date the Engineer should provide the final punch list, allowing at least 5 business days for the Field Engineer to develop the final punch list, and allowing time for the Contractor to complete the punch list within the Cleanup Time or other Contract Time permitted.

Within the 5 business days allowed for KDOT to prepare the final punch list, the Contractor's superintendent shall meet with the Field Engineer, a KDOT Maintenance Representative, District Representative and an LPA, if any, to review, inspect the work, and develop the final punch list.

After the final punch list is developed and submitted to the Contractor, KDOT and any LPA representative waive the right to add items to the final punch list without paying for the added items as extra work under **subsection 104.6**. See **subsection 104.21d.(1)(c)**.

(3) Notice of Acceptance of Contract. After the Contractor has completed the final punch list and the final cleanup, the Field Engineer will issue Notice of Acceptance of Contract under **subsection 105.16b**. KDOT's failure to include an item on the final punch list constitutes a waiver of the Contractor's responsibility for that item except as provided in **subsection 108.12** (pertaining to breach of warranty, breach of guaranty, latent defects, fraud, or misrepresentation discovered after Notice of Acceptance).

d. Timely Completion.

(1) Complete the final punch list and final cleanup within the Cleanup Time permitted in **subsection 108.4c**, or by special provision or within the other Contract Time established by special provision.

(a) If the Engineer fails to provide the final punch list within the required 5 business days and the Contractor is performing no physical construction on the Project because the Project is in a state of completion:

- the Engineer will not charge time until the Engineer provides the final punch list.
- the Engineer will suspend charging time damages under **subsection 108.8** if the Project is in liquidated damages, disincentive assessments, or both until the Engineer provides the final punch list.

(b) The Engineer will resume charging time or associated damages, if any, on one of the following days, whichever occurs first:

- The day the Contractor resumes the 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.

(c) If KDOT and any LPA representative, or both add items (except As Built construction plans, required by **subsection 802.3g**) after the final punch list has been given to the Contractor and before Notice of Acceptance:

- the Engineer will pay for these items as extra work under **subsection 104.6** but the requirements of **subsection 104.6b.(1)** concerning a written agreement and **subsection 104.6b.(7)** concerning notice will not apply.
- the Engineer will not charge time while the Contractor is performing the extra work.
- the Engineer will suspend charging damages under **subsection 108.8** if the Project is in liquidated damages, disincentive assessments, or both until the Contractor completes the extra work.

(2) If the Contractor fails to complete the final punch list and final cleanup within the Cleanup Time or other Contract Time including adjustments in **subsection 104.21d.(1)**, the Secretary may do either or both of the following:

(a) Charge the Contractor liquidated damages per **TABLE 108-1** or as specified in a special provision.

(b) Declare the Contractor in breach of contract and exercise the Secretary's remedies for breach if the Contractor fails to cure as provided in **subsection 108.9**. These remedies include hiring a third party or using KDOT's maintenance forces to perform the final punch list or final cleanup after removing the Contractor from the Project, recovering damages charged to the Contractor, and recovering expenses the Secretary incurred because of the breach. Neither the Contractor nor

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Surety can avoid liability under **subsections 104.21** and **108.9** by characterizing the failure to perform the final punch list or final cleanup as an immaterial breach of contract.

- e. The Engineer will not issue Notice of Acceptance of Contract under **subsection 105.16b.** until the final punch list and final cleanup has been completed. Exception: if the remaining final cleanup involves a third party landowner, the Engineer will issue Notice of Acceptance if the Contractor/landowner agreement provides for cleanup at a future date.

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.

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. Remediying 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**.

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 **subsection 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.

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.

SECTION 106

CONTROL OF MATERIALS

106.1 SOURCE OF SUPPLY AND QUALITY REQUIREMENTS

a. Sources of Supply.

(1) Use sources of supply that will generate materials that meet quality requirements. Sources of supply include quarries, pits, borrow areas, fabrication plants, right-of-way, and other sources from which the Contractor may obtain material.

(2) Notify the Engineer, in writing, of proposed sources of supply or changes in existing sources of supply unless the Contract Documents designate the source of supply. Provide this notice at least 10 business days before either producing material from that source or delivering material to the Project. When applicable, include the land ties of the sources. Assume all costs of acquiring sources of supply, including any exploration and development costs.

(3) The Engineer or Inspector will inspect, test, and then approve or reject Contractor-furnished sources of supply that KDOT has not previously approved. Do not use a Contractor-furnished source of supply without the Engineer's written approval.

(4) If an approved source of supply fails to yield acceptable material:

- (a) stop producing material from that source until the Engineer approves the source again;
- (b) provide material from another approved source; or
- (c) perform a combination of **subsection 106.1a.(4)(a)** and **(b)**

(5) If an approved source of supply that KDOT required in the Contract Documents fails to yield acceptable material, the Engineer will compensate the Contractor for extra work under **subsection 104.6**.

(6) Inspection, testing, and approval of Contractor-furnished sources of supply are for KDOT's benefit, not to ensure Contractor quality control (QC) results. This inspection, testing, and approval is not a substitute for the Contractor's obligation to provide acceptable sources of supply.

b. Quality Materials.

(1) Use only materials that meet the Contract Documents' requirements. Unless specified otherwise, use new materials.

(2) The Engineer or Inspector will inspect materials. The Engineer, Inspector, or Contractor will test the materials. See **subsection 106.3**.

- After inspection and testing, the Engineer or Inspector will approve or reject the materials at the source of supply, at the Project site, or both;
- The Engineer or Inspector may reject materials at the Project site even if the Engineer or Inspector previously approved the materials at the source of supply;
- The Engineer or Inspector may reject the materials if, at any time, the Engineer determines the materials do not meet the Contract Documents; and
- The Engineer or Inspector may reject materials during or after incorporation into the work if the material does not meet the Contract Documents requirements.

(3) If material that has not been inspected, tested, and accepted is used, the Engineer may decide the work is unacceptable, reasonably acceptable, or unauthorized and require the removal and replacement of the material, or accept a price reduction for the material. See **subsection 105.5**.

(4) Inspection, testing, and approval of Contractor-furnished materials are for KDOT's benefit, not to ensure Contractor QC results. This inspection, testing, and approval is not a substitute for the Contractor's obligation to provide acceptable material.

c. "Buy America" Materials.

(1) Current federal regulations require the use of domestic iron and steel on federal-aid projects with limited exceptions. On federal-aid projects, use only iron and steel that have been manufactured, produced and processed in the United States. This includes any federally non-participating items.

If an iron or steel product meets at least one of the following conditions:

- It is specifically listed below

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- It is used in pavements, bridges, tunnels or other structures
- It is at least 90% steel or iron by weight
- It is not identified as a miscellaneous component or subcomponent

then the product is subject to Buy America.

A list of products that are subject to Buy America coverage (regardless of % steel or iron content) include, but are not limited to, the following:

- Steel or iron products used in pavements, bridges, tunnels or other structures, which include, but are not limited to, the following: fabricated structural steel, reinforcing steel, piling, high strength bolts, anchor bolts, dowel bars, permanently incorporated sheet piling, bridge bearings, cable wire/strand, prestressing/post-tensioning wire, motor/machinery brakes and other equipment for moveable structures;
- Guardrail, guardrail posts, end sections, terminals, cable guardrail;
- Steel fencing material, fence posts;
- Steel or iron pipe, conduit, grates, manhole covers, risers;
- Mast arms, poles, standards, trusses, or supporting structural members for signs, luminaires, or traffic control systems; and
- Steel or iron components of precast concrete products, such as reinforcing steel, wire mesh and pre-stressing or post-tensioning strands or cables.

The miscellaneous steel or iron components, subcomponents and hardware necessary to encase, assemble and construct manufactured products are not subject to Buy America coverage. These include, but are not limited to, cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts, nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges, etc.

(2) On all federal-aid projects, all iron or steel shall have been manufactured, produced, and processed in the United States. Manufacturing processes include any process which modifies the chemical content, the physical size or shape, or the final finish of the iron or steel. These processes include initial melting, mixing, rolling, machining, extruding, bending, grinding, drilling, and coatings applied to iron or steel (including epoxy coatings, galvanizing, painting, and any other coating that protects or enhances the value of the iron or steel used).

(3) Obtain the Engineer's written approval before using any iron or steel that has not been manufactured, produced, and processed in the United States as permitted in this **subsection 106.1c.(3)**. With the Engineer's written permission, foreign iron and steel may be used if:

- (a)The combined total cost of all the foreign iron used, steel used, or the cost of both iron and steel used when both are required does not exceed 0.1% of the total cost of the Project or \$2,500.00 dollars, whichever is greater. The cost of the foreign iron used, steel used, or both includes material costs, manufacturing costs, assembly costs, transporting costs, and testing costs associated with the foreign iron, steel, or both.
- (b) The Federal Highway Administration has waived specific products or processes according to 23 CFR 635.410, for the duration of that waiver.

The Contractor:

- Assumes the risk of including any foreign iron or steel in the Contractor's bid.
- Incurs any costs needed to remove and replace with domestic iron and steel the amount of foreign iron, steel, or both that exceeds 0.1% of the total Project costs or \$2,500.00, whichever is greater.
- Has the obligation to remove and replace foreign iron and steel that exceeds 0.1% of the total Project costs or \$2,500.00 whichever is greater. The obligation is regulatory and is not excused by:
 - Errors the Contractor, subcontractors, suppliers, fabricators, or other third parties make in determining the costs of foreign iron and steel as defined above.
 - The Engineer's approval under **subsection 106.1c.(3)**. The Contractor shall make no claim for contract adjustment (additional time, money, or both) because of the use of foreign iron or steel.

(4) Companies providing iron or steel or performing any manufacturing processes on the iron or steel shall include a "Buy America" statement on test reports and material certifications submitted to KDOT, the Contractor, or both. The "Buy America" statement shall identify the source of the iron or steel and the location(s) of the

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manufacturing processes. The statement shall certify that the company issuing the test report or material certification complies with all provisions of the Buy America Act.

(5) This **subsection 106.1c. and "Buy America"** requirements do not apply to temporary items (Example: temporary sheet piling, steel scaffolding, and falsework) on the contract, even if these items are left in place with the Engineer's approval.

(6) After work is completed on the Project, submit to the Engineer a certification stating the dollar amount of foreign iron used, steel used, or both. Include material costs, manufacturing costs, assembly costs, transporting costs, and testing costs in the dollar amount. Identify a zero dollar amount if no foreign iron or steel was used on the Project.

(7) This **subsection 106.1c.** and Buy America requirements do not apply to 100% state funded projects.

106.2 MATERIAL SOURCES

a. **Contractor-Furnished Materials.** Provide all materials and acquire all sources of supply required to complete the contract except for those materials and sources of supply that KDOT provides under the Contract Documents (or by contract adjustment). Provide test reports or product certifications for all Contractor-furnished materials. Obtain the Engineer's written approval to use all Contractor-furnished proposed sources of supply such as borrow sites and aggregate sources among others.

b. **KDOT-Furnished Materials.** At its own expense, KDOT may provide materials, sources of supply, or both for the Contractor's use in performing the work. In the Contract Documents, KDOT may designate materials, sources of supply, or both that the Contractor may use in performing the work. When designated, these materials and sources are acceptable for the Contractor's use. KDOT assumes responsibility for the quality of these materials and sources of supply unless the Contractor's acts or omissions affect the quality or source of supply. These materials become the Contractor's property once the Contractor takes control. From a designated source of supply, determine the amount of equipment and work required to produce a material that meets the contract requirements. Expect variations in material quality and do not assume the entire deposit is acceptable. The Engineer may order procurement of material from any portion of a deposit. The Engineer may reject portions of the deposit as unacceptable.

c. **Site Selection and Restoration.** Obtain the Engineer's approval to use KDOT designated sources of supply for plant sites, stockpiles, and haul roads. Obtain the Engineer's approval to use the Project right-of-way, other KDOT right-of-way, or other KDOT property (mixing strips) for plant sites, stockpiles, and haul roads.

Where practical, do not store equipment or materials (including soil stockpiles) within 50 feet of rivers, streams or other surface waters. Where such storage is necessary, obtain the Engineer's written approval and include in the Project SWPPP appropriate best management practices for the storage area.

Locate borrow areas, gravel pits, and quarry sites so they are not visible from the highway, unless the Engineer approves otherwise.

Before using private property to obtain material, store material, operate a plant site, or perform other construction activity, enter into a written agreement with the landowner. When using private property for borrow, obtain all permits and clearances required for compliance as shown in **subsection 107.2**, (which most commonly includes wildlife and archaeological clearances).

When requested, provide a copy of the Contractor's agreement with the landowner. Submit a reclamation plan to the Engineer for the Engineer's approval. After ceasing to use private property, reclaim the site(s) according to the approved reclamation plan(s). Leave sites in a neat condition. Provide a copy of the landowner's release of the Contractor from further obligation.

d. **Rights In and Use of Materials Found on the Work.** When approved by the Engineer, the Contractor may use on the Project such stone, gravel, sand or other material determined suitable by the Engineer which may be found in the excavation. The Engineer will pay for both the excavation of such materials at the corresponding contract unit price and for the contract pay item for which the excavated material is used.

No charge for the materials used shall be made against the Contractor.

Do not excavate or remove any material from within the highway location which is not within the grading limits, as indicated in the Contract Documents without written approval from the Engineer.

Replace any excavated material removed for use in embankments, backfills, approaches, etc. with acceptable material at own expense.

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106.3 SAMPLING, TESTING, AND CITED SPECIFICATIONS

The Engineer, Inspector, or both may inspect, test, and approve or reject all materials before, during, and after incorporation into the work.

The Engineer or Inspector will take or direct the Contractor to take all samples, except the Contractor's process control and QC samples. Sample and test the process control and QC samples. Upon request, KDOT will provide copies of test results KDOT performed. When the Contract Documents refer to an undated specification, standard, or test method that AASHTO, ASTM, GSA, or another recognized national technical association has adopted, the reference means the most recent published (including interim or tentative) specification, standard, or test method in effect on the Letting date.

The Secretary will pay the cost of all inspection and testing the Engineer or Inspectors undertake.

The Contractor shall:

- pay the cost of all materials that KDOT or the Contractor uses for sample testing;
- pay the cost of all testing the Contractor performs on quality control/quality assurance (QC/QA) projects;
- include such costs in the QC/QA bid item; and
- pay the costs of testing KDOT performs on materials that exceed contract quantities and testing that is requested but the Engineer or Inspector deems unnecessary.

If the Contract Documents specify one manufacturer's product, the Contractor may request the use of a product of another manufacturer unless the Contract Documents prohibit substitution. Submit the request to the Engineer and include:

- a complete description of the item;
- an explanation of how the alternate product meets the same standards as the product the Contract Documents specify;
- copies of shop drawings, catalog cuts, or both; and
- test reports or other descriptive literature, completely illustrating such items.

The Engineer alone determines whether the alternate product is acceptable.

Provide the Engineer required test reports or certifications for all materials incorporated into the work.

The Engineer may waive the testing requirements of small quantities of materials if the material is incidental to the work, a recognized commercial brand, or obtained from sources having a history of adequate QC.

On projects where Buy America requirements apply, note on shop drawings and catalog cuts that steel and iron used meets Buy America, unless otherwise specified.

106.4 CONTRACTOR QUALITY CONTROL REQUIREMENTS FOR QUALITY CONTROL/QUALITY ASSURANCE (QC/QA) PROJECTS

This **subsection 106.4** outlines general requirements for all types of QC/QA projects. Consult the particular section or subsection to obtain detailed process and QC requirements for a particular type of construction.

a. General.

- (1) Provide personnel and equipment that meet Part V QC testing procedures.
- (2) Provide the Engineer all reports, records, and diaries developed during construction activities. These documents are KDOT's property.

b. Quality Control Plan.

(1) At the pre-construction conference, submit in writing a Quality Control Plan (QC Plan) that meets Part V testing procedures (partially detailed below) for the Engineer's review and approval.

(a) List the names and phone numbers of all individuals and alternates responsible for QC administration and inspection. For each particular type of construction, supply one or more individuals who have complied with the technical certification requirements detailed in "KDOT Policy and Procedure Manual for The Certified Inspection and Testing Training (CIT) Program Manual". Only certified technicians may perform testing used for materials acceptance.

- The certification requirement applies whether the personnel belong to the Contractor's QC organization or private testing firms.

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- Obtain the "KDOT Certified Technician Manual" from the KDOT Bureau of Materials and Research.

(b) On the organizational chart, show the specified lines of authority for both mix design and QC operations during production.

(2) The Engineer's review and approval of the Contractor's QC Plan are for KDOT's benefit, not to ensure QC results. This review and approval is not a substitute for the Contractor's obligation to control quality.

c. Testing Facilities.

(1) Locate the QC testing facility either at the plant site or adjacent to the Project site and in a place that is readily accessible to the Project. Before beginning mixture production, obtain the Engineer's approval of the testing facility, including the facility's location and the testing equipment. Obtain the District Materials Engineer's approval to put the testing facility in a location other than the plant site or adjacent to the Project site. Provide the QC personnel the space and testing equipment needed to meet Part V.

(2) Calibrate and correlate the testing equipment with prescribed procedures and conduct tests according to Part V testing procedures.

(3) To facilitate communication between the Contractor and the Engineer, equip the QC testing facility with the following:

- (a) A telephone with a private line for the QC personnel's exclusive use.
- (b) A copying machine for the Contractor's, Engineer's, and Inspector's use.

(4) In the testing facility, post a copy of the organizational chart from the QC Plan.

(5) Allow the Engineer access to the testing facility to observe testing procedures, calculations, test documentation, and plotting of test results among other items.

(6) If the Contract Documents require one, locate the Field Office and Laboratory (Lab) near the Contractor's testing facility. See **SECTION 803**.

d. Testing, Recording, and Data Presentation Requirements.

(1) Take all test samples at random locations, at the frequencies designated in the approved QC Plan, and at the rates specified in the KDOT Sampling and Testing Frequency Chart, Part V. Provide the Inspector with the random locations or frequencies before going to the job site to sample or test. The Engineer reserves the right to generate the random locations, frequencies, or both. If KDOT generates the random locations or frequencies, KDOT will provide notification prior to the sampling time.

(2) Record all original documentation in a bound field book or other KDOT approved bound record and turn over to KDOT at the end of the Project. Record and document all test results and calculations on data sheets KDOT has approved. Record specific test results on a daily summary sheet KDOT has approved. Base moving averages on 4 consecutive test results. Include in the Daily Quality Control Summary Sheet a description of quality control actions taken. Post and keep current QC charts showing both individual test results and moving average values. As a minimum, plot the single test values and the 4-test moving average values, as applicable, on KDOT-approved control charts. Keep control charts current on an ongoing basis. Plot results and limits as follows:

- individual test results for each test point in black. Connect those points with a solid black line;
- moving average for each test variable in red. Starting with the fourth test, connect those points with a dashed red line;
- KDOT verification test results with green asterisks; and
- specification working range limits for single test results with a green ink dotted line and for the 4-point moving average results with a green ink solid line.

(3) Store and retain all QC and verification samples for 7 business days.

(4) Provide test data as specified in the appropriate QC/QA construction specification.

e. Inspection by KDOT.

(1) The Engineer and Inspector reserve the right to run any test at any time to determine contract compliance.

(2) The Engineer or Inspector will inspect aggregates at the point of production for approved deposits, ledges, and beds. Do not produce aggregates from non-approved deposits, ledges, or beds. Immediately remove from the stockpile aggregates obtained from non-approved deposits, ledges, or beds.

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(3) The Engineer or Inspector may test aggregates for acceptance at the point of usage. Remove and replace, repair, or otherwise correct, at the Contractor's expense, work incorporating aggregates from non-approved sources.

106.5 CONTRACTOR'S PROCESS CONTROL FOR NON-QC/QA PROJECTS

a. General.

- (1) Provide and maintain an adequate process control system.
 - Perform all inspections and tests necessary to meet the Contract Documents; and
 - Provide materials and formulate design mixes that meet the Contract Documents.

(2) Assume responsibility for the process control of all aggregate and aggregate combinations during production, handling, stockpiling, blending, mixing, and placing operations.

(3) Perform all tests by personnel certified under the Certified Inspection and Testing Training (CIT₂) Program. Personnel may be certified by another program with approval of the Engineering Technician Training Coordinator.

b. Process Control Plan.

(1) Before beginning material production, submit in writing a Process Control Plan for the Engineer's review and approval. In the Process Control Plan, include the following:

- Sampling and testing frequencies, sampling locations, sampling and testing methods, and other inspections required to maintain the Process Control Plan. Upon request, KDOT will provide a recommended process control sampling and testing frequencies chart;
- Procedures to determine gradation, plasticity index, and deleterious substance content of all aggregates the Contractor may use;
- Procedures for inspecting stockpiles for separation, contamination, or segregation;
- For cold feed bins, include calibration procedures for setting cold feeds including observation of cold feed operation for uniformity;
- For hot bins, include procedures to determine the gradation of aggregate in each bin. Determine the theoretical combined grading and calibrate the hot feed settings to provide the required material;
- For batch plants, determine the percent or weight to be used from each bin to assure compliance with the Approved HMA Mix Design or Approved Concrete Mix Design; and
- For continuous flow plants, establish a gate calibration chart for each bin. Determine gate settings for each bin to assure compliance with the Approved HMA Mix Design or Approved Concrete Mix Design.

(2) KDOT considers the guidelines set forth in **subsection 106.5b.(1)** as customary activities necessary to control the production of materials or mixes at an acceptable quality level. The activity KDOT requires depends on the type of process or materials the Contractor is producing. The frequency of these activities also varies with the process and the materials.

(3) The Engineer's review and approval of the Contractor's Process Control Plan are for KDOT's benefit, not to ensure Contractor quality processes. This review and approval is not a substitute for the Contractor's obligation to control processes.

c. Sampling and Testing. Use the same process control sampling, testing methods, and procedures that KDOT uses. Consult Part V for the Kansas Test (KT) Methods and for a Sampling and Testing Frequency Chart that the Contractor or producer may use as a material acceptance guide when developing the Process Control Plan. Advise producers supplying material for non-QC/QA projects to find the minimum required sampling and testing frequencies in Part V.

d. Test Reports. Maintain a file of all process control tests and provide this file to the Engineer at the Engineer's request.

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e. Inspection by KDOT.

(1) The Engineer and Inspector reserve the right to run any test at any time to determine contract compliance.

(2) The Engineer or Inspector will inspect aggregates at the point of production for approved deposits, ledges, and beds. Do not produce aggregates from non-approved deposits, ledges, or beds. Immediately remove from the stockpile aggregates obtained from non-approved deposits, ledges, or beds.

(3) The Engineer or Inspector will test aggregates for acceptance at the point of usage. Remove and replace, repair, or otherwise correct, at the Contractor's expense, work incorporating aggregates from non-approved sources.

106.6 PLANT INSPECTION

a. When materials are inspected at the point of manufacture, the following apply:

(1) Cooperate with and assist the Engineer or Inspector and make sure the material producer cooperates with and assists the Engineer or Inspector.

(2) The Engineer or Inspector has full right of entry at all times to areas of the plant concerning the manufacture or production of the materials being provided;

(3) Provide and maintain adequate safety measures; and

(4) KDOT may retest materials delivered to the plant that were tested and approved at the source of supply. KDOT may reject materials that do not meet the Contract Documents requirements upon re-testing.

b. The Engineer may accept non-complying, plant-inspected material if all of the following conditions are met:

(1) The Engineer has satisfactory test results of both prior and subsequent material tests using the same source or sources as the non-complying material.

(2) The Engineer finds the incidence and degree of nonconformance with the specification requirements are within reasonable and practical limits.

(3) Demonstrates diligent, exercised material controls consistent with standard industry practices.

(4) The Engineer determines the non-complying material will not adversely affect the value or serviceability of the completed work.

106.7 STORAGE OF MATERIALS

Provide all space required to store stockpiled materials. Locate stored materials to facilitate prompt inspection. Do not use private property to store materials without the owner's or lessee's written approval. Provide copies of such written approval at the Engineer's request. The Engineer may approve portions of the right-of-way for storing materials. Restore all storage sites to their original condition at the Contractor's expense.

Store materials to preserve the materials' quality. The Engineer or Inspector may re-inspect and reject stored materials, even if the Engineer or Inspector previously approved the materials before storage.

106.8 APPROVED MATERIAL SIGNS

a. Provide, install, and maintain "Approved Material" signs at each major material stockpile site that contains both non-KDOT tested and KDOT-approved materials. Sites include the Contractor's or commercial batching areas, plant sites, and major stockpile sites.

b. Install and construct the signs using the material specified below and conforming reasonably to the details shown in **FIGURE 106-1**. Keep the signs clean and in good condition at all times.

(1) Sign Face Details.

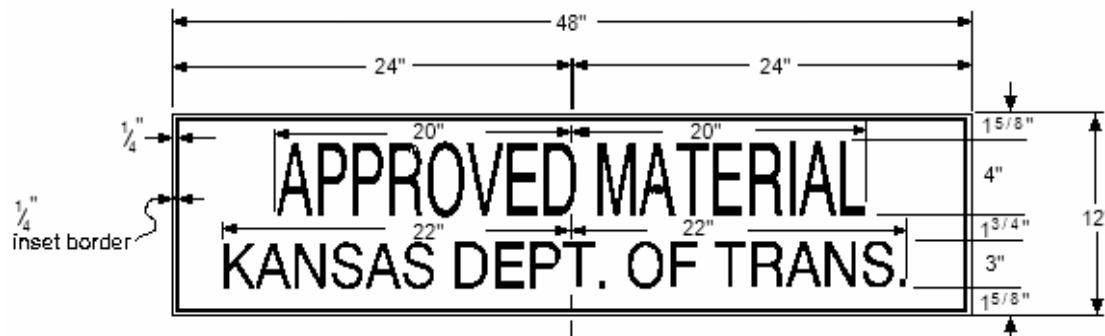
- Top Line 4-inch Standard Alphabet Series "B" Legend;
- Second Line 3-inch Standard Alphabet Series "B" Legend;
- I.D. Signs 2-inch Standard Alphabet Series "B" Legend; and
- Plain painted white background with black legend direct applied copy with ¼ inch inset border.

(2) Materials. Manufacture the signs from backing material composed of either metal (14 gauge steel or 0.100 inch thick flat sheet aluminum) or ¾ inch thick exterior type fir plywood and mounted on a suitable post.

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(3) Sign Locations. Install the signs at stockpile locations the Engineer approves. Erect signs approximately 5 feet high measured from the bottom of the sign and visible to anyone observing the stockpile from a normal working area.

FIGURE 106-1: Details for Approved Material Signs.



c. If the Engineer requires, install identification signs for individual aggregate types and mixes (example SSG-1 for SM-12.5A) in locations where similar stockpile materials are being stored. Make these signs using "I.D. Signs 2 inch Standard Alphabet Series "B" Legend." Attach these signs to the "Approved Material" sign post.

d. Include in the Contractor's bid the cost of providing, erecting, and maintaining required materials signs.

106.9 HANDLING MATERIALS

Handle all materials to preserve their quality. Transport aggregates from the storage site to the work in tight vehicles, constructed to prevent loss, degradation, or segregation of materials during all operations.

106.10 DISPOSITION OF UNACCEPTABLE MATERIALS

Remove from the work site all unacceptable and rejected materials, unless the Engineer allows the Contractor to make the materials acceptable. Do not incorporate into the work previously rejected materials, until corrected and until the Engineer approves their incorporation into the work.

106.11 MATERIAL PROVIDED BY KDOT

When KDOT provides material, KDOT will deliver the material or make the material available at locations the Contract Documents specify. Coordinate delivery with KDOT. Pay any demurrage charges associated with the delivery of KDOT provided materials.

After KDOT delivers the material or the Contractor obtains the material, the Contractor assumes responsibility for the material as if the Contractor had provided the material. KDOT assumes responsibility for the quality of these materials unless the Contractor's, independent Contractor's, or subcontractor's acts or omissions affect the quality of the material.

107 - LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC

SECTION 107

LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC

107.1 LAWS TO BE OBSERVED

a. Observe and comply with all laws. Laws include Federal law, State law, Municipal law, Federal regulations, State regulations, Municipal ordinances, codes, and orders and decrees of courts, boards, or other tribunals having authority over the subject matter involved.

b. Protect KDOT and any LPAs from liability and indemnify these entities for damages caused by or fines levied for the Contractor's, subcontractors', or suppliers' violation of the law.

c. Immediately notify the Engineer of inconsistencies (ambiguities) between a law and the contract.

107.2 PERMITS, LICENSES, AND TAXES

a. Obtain all permits and licenses necessary to perform the work unless the Contract Documents state KDOT will obtain the permit or license.

(1) Contact KDOT's Bureau of Design, Environmental Services Section, for information regarding necessary environmental permits.

(2) Sources of permits include the U.S. Army Corps of Engineers (Corps), Kansas Department of Health and Environment (KDHE), Kansas State Board of Agriculture Division of Water Resources (DWR), Kansas Department of Wildlife and Parks (KDWP), Kansas State Historical Society (KSHS) and other governing authorities.

(3) Comply with all permit conditions and restrictions imposed by governing authorities.

b. Permits for Work in Waterways. If the Contractor's method of operation requires placing material in a waterway, obtain both a Corps' Section 404 permit and a KDHE 401 Certification (applicable when water flow exceeds 5 cubic feet/second).

c. Railroad Permits. Secure from the Railroad Company any permit, license, right-of-way easement, or right-of-access the Railroad Company requires for:

- constructing temporary crossings upon or over railroad right-of-way, tracks, or property; or
- using or traveling across railroad right-of-way, tracks, or property.

d. KDOT Obtained Permits. KDOT will obtain the U.S. Army Corps of Engineers' permit for design activity. Review any permit KDOT obtains at the District Office in which the Project is located or at the Bureau of Construction and Materials.

e. KDOT Provided Permits. Obtain a permit from the District Engineer if the Contractor needs an opening in the highway or right-of-way. See **subsection 104.14** for further obligations involving Third Party permits.

f. Notice and Timeliness. Request permits and licenses in a manner that prevents Project completion delays. Assume responsibility for delays of 30 calendar days or less in obtaining a permit or license. The 30 calendar day period begins on the date the Contractor submits an accurate, completed permit/license application or the date the Contractor submits a written request if a permit/license application is not required. Assume responsibility for delays in obtaining permits and licenses outside the 30 calendar day period specified if the additional delay was caused by the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, or a combination thereof.

g. Expenses. Pay all permit fees, license fees, charges, and taxes necessary to perform the work.

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107.3 PATENTED DEVICES, MATERIALS, AND PROCESSES

Enter into all legal agreements necessary to use patented or copyrighted designs, devices, materials, processes, or trademarks. Protect KDOT, political subdivisions, and third parties from liability and indemnify KDOT, political subdivisions, and third parties for expenses these entities incur, damages these entities pay, or both for patent or copyright infringements. Assume this liability and pay these expenses and damages whether sought during construction or after Project completion. Make sure subcontractors at any tier and suppliers at any tier comply with the same requirements.

107.4 FEDERAL AID PROVISIONS

If a Project contains Federal aid funds, comply with all Federal laws, regulations, policies, and federally required contract provisions that are necessary for KDOT, LPAs, or both to receive Federal funding. These Federal laws, regulations, policies, and required contract provisions generally control over State laws, State regulations, Local ordinances, and codes.

The FHWA or other appropriate Federal agency may inspect and approve the work. This authority does not make the U.S. Government a party to the contract.

107.5 PROVIDING RIGHT-OF-WAY

The Secretary will secure all necessary rights-of-way before construction begins unless the Contract Documents identify a delay in obtaining the rights-of-way.

107.6 EMPLOYEE SAFETY

Make sure no Contractor employees or subcontractor employees are working in unsanitary, unsafe, or hazardous conditions. Provide all safety equipment and materials and take all other action the law, the contract, and the Engineer require to provide a sanitary, safe, and non-hazardous work environment. Admit to the work site and comply with the directions of OSHA inspectors, KDHE inspectors, or other regulatory agency inspectors involved with the Project. Nothing in this provision forces the Contractor to waive the right to demand that regulatory agency inspectors have an appropriate warrant if State or Federal law permits or requires a warrant. Admit to the work site KDOT safety personnel and KDOT environmental personnel, who will make any recommendations through the Field Engineer.

107.7 PUBLIC SAFETY

Public safety is critical. Move traffic safely through construction. Move traffic with the least, minimal traffic obstructions. Provide safe ingress and egress for residents living within the Project limits. Provide temporary surfacing, when required. Repair potholes and other pavement deficiencies. Maintain roadways according to the Contract Documents. See **subsections 104.11 and 104.16**.

Where practical, store vehicles, construction equipment, materials, tools, and debris either off the right-of-way or a minimum of 30 feet from the traveled way. If the Engineer approves storage of an item(s) within 30 feet of the traveled way, place appropriate signs, safety barriers, barricades, or a combination thereof around the item(s). Assume the costs of such devices.

107.8 STORING AND USING EXPLOSIVES

a. General. Store and use explosives safely, protecting against damage to life, property, and the Project. Assume liability for bodily injury, death, damage, and third party property damage caused by negligently storing or using explosives. Assume liability for Contractor's property damage and damage to the Project caused by storing or using explosives.

b. Storage. Store explosives a minimum of 1,000 feet from the traveled way, 1,000 feet from a place of human occupancy, or 1,000 feet from both unless the law requires a greater restriction. Follow the requirements of OSHA and other authorized, regulatory agencies, if any, in securing and marking stored explosives.

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c. Use. Notify property owners and utility owners of intended explosives use in their property's vicinity. Notify railroads of intended explosives use if such use is within 200 feet of railroad tracks, railroad structures, or both. Provide this notice in advance of blasting, allowing these owners a reasonable time to monitor and protect their property. Include in the notice the date, time, and approximate duration of blasting operations.

107.9 PROTECTING PROPERTY, LANDSCAPE, AND THE ENVIRONMENT

a. Protect public and private property from damage until final acceptance. Install temporary fence if the Contractor's operations require temporary fence to protect adjacent property, animals, or both.

b. Disturb no land monuments or property marks before the Engineer or Contractor (whichever is responsible) verifies the location of these markers.

c. Cease construction operations upon encountering historical or archaeological artifacts. The Engineer will determine whether to suspend operations until third parties are able to extract the artifacts or the Contractor has approval to excavate the site. The Engineer may allow work to continue in other Project locations.

d. Prevent and avoid pollution and wildlife interference.

(1) Locate and protect all temporary storage facilities for petroleum products, other fuels, and chemicals to prevent accidental spills from entering streams, lakes, ponds, rivers, and reservoirs (water body) within the Project area. In 24 hours, clean up all such spills located within 1,500 feet of any water body.

(2) Do not dispose of the following on any land within the Project limits, in any water body, in any wetlands, or in any location in which runoff, flood, wind, or other natural forces could result in environmental pollution: cement sweepings, concrete washings, concrete wash water from concrete trucks and other concrete mixing equipment, treatment chemicals, grouting and other bonding materials, construction debris, or other waste materials.

(3) Protect wetlands in the Project vicinity from all activities that may result in draining or filling in wetlands.

(4) Use clean uncontaminated materials for fill to minimize excessive turbidity by leaching of fines and to preclude the entrance of deleterious and toxic materials into any water body by natural runoff or by leaching.

(5) Outside the immediate area of operation, excavate, dredge and fill in the water course to minimize increases in suspended solids and turbidity.

(6) During every phase of the Project, immediately remove and properly dispose of all debris to prevent the accumulation of unsightly, harmful, and toxic materials in or near any water body.

e. Erosion Control. Prevent erosion on the Project and Project related borrow areas according to **SECTION 901**. Use KDOT's Temporary Erosion Control Manual as a guide for the design, installation, and maintenance of temporary erosion control measures.

107.10 LIABILITY FOR BODILY INJURY AND PROPERTY DAMAGE CLAIMS; INSURANCE REQUIREMENTS

a. Bodily Injury Claims. Assume liability for bodily injury (including death) arising out of negligent acts or omissions that are:

- associated with contract performance; and
- caused by the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, or a combination thereof.

b. Property Damage Claims (other than damage to the Project/work itself). Assume liability for property damages (including loss of use resulting from property damage) arising out of negligent acts or omissions that are associated with contract performance and caused by the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, or a combination thereof. Restore damaged property to a condition similar or equal to that condition existing before the damage, pay to restore the damaged property to that condition, or pay to replace the damaged property.

(1) If government property, the Engineer will determine whether the Contractor's restoration sufficiently corrected the damage.

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(2) If private property, the property owner will determine whether the Contractor's restoration sufficiently corrected the damage. After restoring damaged property or paying for damaged property as required, obtain a release from the property owner and submit the release to the Engineer. The Engineer will not issue final acceptance until the Contractor has obtained and submitted the required release unless the property owner acts unreasonably in refusing to issue a release.

(3) See **subsection 104.20** for the Contractor's liability for damage to the work/Project. Although the property damage claims and related insurance requirements of **subsection 107.10** do not encompass damage to the Project, the Contractor is responsible for Project damage under **subsection 104.20**.

c. Required Insurance Coverage and Limits.

(1) "Commercial General Liability" insurance in an amount a minimum of \$1,000,000 each occurrence, \$2,000,000 aggregate for bodily injury and property damage combined, and \$2,000,000 aggregate for products and completed operations. The Secretary may increase these limits or require an umbrella policy on specific projects. As a minimum, the Commercial General Liability Policy shall contain the following coverages:

- Premises and Operations;
- XCU (explosion, collapse, and underground hazards);
- Products and Completed Operations;
- Contractual Liability (for the Contractor's indemnification obligations); and
- Contractual Liability--Railroads (through endorsement or otherwise) to provide coverage for Contractor's operations on Railroad right-of-way if Project involves work on Railroad right-of-way. This coverage is required in addition to Railroad Protective Liability insurance under **subsection 107.11**.

(2) "Automobile Liability" insurance in an amount a minimum of \$1,000,000 each occurrence for bodily injury and property damage combined and that covers Owned, Hired, and Non-Owned vehicles.

(3) "Worker's Compensation" and "Employer's Liability" insurance that complies with K.S.A. 44-532, related statutes, and amendments thereto.

d. General Insurance Requirements.

(1) Certificates of Insurance. Before signing the contract, provide to the Secretary Certificates of Insurance showing the Contractor carries insurance in the amounts and type this **subsection 107.10** requires and showing the effective and expiration dates of such insurance. Such certificates shall identify any and all endorsements to the policy. Such certificates shall provide the insurance company endeavor to give KDOT, any LPA, or both, thirty days' notice of policy cancellation, policy non-renewal, or a material change in the policy. At the Engineer's request, submit copies of the Contractor's insurance policies. For projects involving work on Railroad right-of-way, the Certificates of Insurance shall show Railroad property as part of the designated job site.

(2) Authorized Insurers and Approved Forms. Obtain insurance only from insurers authorized to transact insurance business in Kansas as an authorized insurer (admitted insurers). For general liability, see K.S.A. 40-214. For automobile liability insurance, see K.S.A. 40-3103. For worker compensation insurance, see K.S.A. 44-532. If unable to obtain an admitted insurer under K.S.A. 40-214, request the Secretary's permission to use a non-admitted insurer authorized to write excess surplus lines coverage under K.S.A. 40-246e. Be prepared to demonstrate to the Secretary and Kansas Insurance Commission why the Contractor was unable to use an admitted carrier as required by State statute. Use only forms that the Kansas Insurance Commission has approved unless the Secretary has given permission to use a non-admitted insurer under K.S.A. 40-246e. Include any endorsements the Kansas Insurance Commission requires.

(3) Duration. Obtain and maintain all insurances this **subsection 107.10** requires until KDOT issues Notice of Acceptance of Contract under **subsection 105.16b**. Make sure Commercial General Liability Insurance coverage extends to claims made after Notice of Acceptance and before any applicable statute of limitations expires.

(4) Additional Insureds. If applicable and if the contract requires, make LPAs and Railroads additional insureds on the Commercial General Liability policy and Automobile Liability policy.

e. Subcontractors and Independent Contractors. Make sure subcontractors at any tier (including construction surveyors, materials testing services, or other service type providers) and independent contractors obtain and maintain the insurance this **subsection 107.10** requires. At the Engineer's request, submit copies of such subcontractors' and independent contractors' certificates of insurance or insurance policies.

107.11 LIABILITY FOR RAILROAD CLAIMS; RAILROAD INSURANCE REQUIREMENTS

a. Protect the Railroad from and assume liability for bodily injury (including death) to railroad workers and railroad passengers arising out of negligent acts or omissions that are associated with contract performance and caused by the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, railroad workers assigned to the Project, or a combination thereof.

b. Protect the Railroad from and assume liability for damage to railroad property and railroad right-of-way (including loss of use resulting from property damage) arising out of negligent acts or omissions that are associated with contract performance and caused by the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, railroad workers assigned to the Project, or a combination thereof.

c. Obtain a Railroad Protective Liability Insurance Policy (RPL) for the Railroad as the named insured for damages described in **subsection 107.11a.** and **107.11b.** on projects involving work at railroad crossings, work adjacent to railroad right-of-way that could damage railroad right-of-way, or work within 50 feet of the centerline of a railroad track. Comply with the following requirements and any additional requirements and modifications to the following requirements contained in a project special provision:

(1) RPL Limits. For each annual period, an amount of \$2,000,000 each occurrence and \$6,000,000 aggregate for bodily injury (including death), property damage, and physical damage to property combined.

(2) RPL Coverage. Contact the Railroad for those forms, endorsements, and exclusions the Railroad requires. If unable to comply with the Railroad's requirements, notify the Assistant Bureau Chief of Construction and Materials, Kansas Department of Transportation, Topeka, Kansas.

(3) Authorized insurers and Approved Forms. Obtain the RPL only from insurers authorized to transact insurance business in Kansas as an authorized insurer under K.S.A. 40-214. If unable to obtain an authorized, general liability insurer under K.S.A. 40-214, request the Secretary's permission to use a non-admitted insurer authorized to write excess lines coverage under K.S.A. 40-246e. Use only forms that the Kansas Insurance Commission has approved unless the Secretary has given approval to use a non-admitted insurer under K.S.A. 40-246e. Include any endorsements the Kansas Insurance Commission requires.

(4) Duration. Maintain the RPL **subsection 107.11** requires until KDOT issues final acceptance under **subsection 105.16b.** unless the Railroad and Secretary approve cancellation of the Policy before final acceptance.

(5) Subcontractors. If any work is sublet, make sure subcontractors at any tier provide the same insurance for the Railroad Company to cover the subcontractor's operations.

d. RPL Submittal and Approval.

- Provide the Bureau Chief of Construction and Materials, Kansas Department of Transportation, Topeka, Kansas, the original and 1 copy (Original for Carrier, copy for KDOT) of the RPL on the Railroad Company's behalf;
- Submit the RPL within 15 calendar days after receiving notice of award of the contract. Obtain Railroad approval of the RPL before beginning construction on or near the railroad or railroad right-of-way. The Railroad Company approves the RPL, including coverage provided and the underwriter. (The Railroad typically requires 30 business days to issue its RPL approval.);
- The Engineer may delay issuing the Notice to Proceed until the Contractor has obtained the railroad's approval of the RPL. Alternatively, if the Contractor has submitted the RPL to KDOT, the Engineer may issue the Notice to Proceed, restricting the Contractor's operations to locations outside the railroad right-of-way until the railroad has approved the RPL; and
- Assume the risk of delays in submitting the RPL Policy. Assume responsibility for delays of 45 calendar days or less in obtaining the Railroad's approval. The 45 calendar day period begins on the date the Contractor submits the RPL to KDOT. Assume responsibility for delays in obtaining the Railroad's approval outside the 45 calendar day period specified if the additional delay was caused by the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, or a combination thereof. NOTE: Railroad permits are subject to **subsection 107.2c.**

e. Sample Form. If desired, request from the Assistant Bureau Chief of Construction and Materials, Kansas Department of Transportation, Topeka, Kansas, a sample Standard Form Railroad Protective Liability Policy.

107.12 INDEMNIFICATION

a. Defend KDOT and any LPA and hold KDOT and any LPA harmless from bodily injury claims, (including death), intellectual property claims, other personal injury claims, property damage claims (other than damage to the project-work itself), and associated expenses (including attorney's fees and defense costs) that are associated with contract performance and that are caused by 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. If KDOT, the LPA, or both defend against a bodily injury claim, intellectual property claim, other personal injury claim, or property damage claim (other than damage to the Project-work itself), indemnify KDOT, the LPA, or both for expenses they incurred (including attorney's fees and defense costs), amounts they paid (including interest), or both but only if the claim was associated with contract performance and only to the extent caused by 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. The fact that KDOT, any LPA, or both share liability with the Contractor does not release the Contractor's obligations to defend, hold harmless, and indemnify KDOT, any LPA, or both; however, the Contractor's obligation to indemnify does not include that part of the claim (including that share of expenses) caused by the negligent acts or omissions of KDOT, the LPA, or both.

b. If the Project requires work on Railroad right-of-way, defend the Railroad and hold the Railroad harmless from bodily injury claims (including death), personal injury claims, property damage claims, and associated expenses (including attorney's fees and defense costs) that are associated with contract performance and that are caused by the negligent acts or omissions of the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, railroad workers assigned to the Project, or a combination thereof. If the Railroad defends against a bodily injury claim, personal injury claim, or property damage claim, indemnify the Railroad for expenses the Railroad incurred (including attorney's fees and defense costs), amounts the Railroad paid (including interest), or both but only if the claim was associated with contract performance and only to the extent caused by the negligent acts or omissions of the Contractor, the Contractor's agents, independent contractors, subcontractors at any tier, suppliers at any tier, railroad workers assigned to the Project, or a combination thereof. The fact that the Railroad shares liability with the Contractor does not release the Contractor's obligations to defend, hold harmless, and indemnify the Railroad; however, the Contractor's obligation to indemnify does not include that part of the claim (including that share of expenses) caused by the negligent acts or omissions of Railroad employees not assigned to the Project and Railroad contractors, agents, independent contractors, subcontractors at any tier, and suppliers at any tier.

c. The indemnification obligations in **subsections 107.12a.** and **b.** do not affect other indemnification rights or obligations that may exist as to a party or person described in **subsection 107.12.**

107.13 UNKNOWN HAZARDOUS MATERIALS

Upon encountering unknown hazardous materials or unknown potentially hazardous materials, immediately:

- stop work within the contaminated or potentially contaminated area;
- remove workers from the contaminated or potentially contaminated area;
- exercise extreme caution at all times;
- notify the Engineer; and
- continue working on other unaffected areas unless the Engineer prohibits such work.

With KDHE and possibly other environmental agencies, the Secretary and any LPA will identify the hazardous materials and form a cleanup plan for the hazardous materials. The Secretary and any LPA will arrange for a third party to perform the cleanup. The Secretary will treat the discovery and cleanup of unknown hazardous materials as a differing site condition under **subsection 104.5.**

Nothing in **subsection 107.13** limits the Contractor's responsibility for cleaning up, at the Contractor's expense, known hazardous or potentially hazardous materials, including those materials identified in the Contract Documents and those materials the Contractor brings to the Project.

107 - LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC

107.14 LIABILITY OF PUBLIC OFFICIALS

a. The Secretary's authorized representatives assume no personal or other liability in exercising their contractual authority. They act only as the Secretary's employees or agents.

b. The LPAs authorized representatives assume no personal or other liability in exercising their contractual authority. They act only as the LPAs employees or agents.

107.15 LPAs AND OTHER THIRD PARTY OWNERS

The Secretary is the principal contracting party on construction contracts for the State highway system as defined by K.S.A. 68-406.

The Secretary is the agent on construction contracts entered into on behalf of disclosed principals such as counties, cities, political subdivisions, or other authorized persons, firms, or corporations.

These LPAs and other third parties have the right to:

- enter the property;
- inspect and approve work;
- be protected by and receive the benefits of bonding, and insurance; and
- along with KDOT, enforce construction contract terms and accept the Project.

The agreement(s) made between the Secretary and a disclosed principal(s) on a Project is incorporated by reference into the construction contract for the Project. The Secretary will provide a copy of any agreement upon request.

107.16 THIRD PARTY BENEFICIARY

Except as provided in **subsection 105.12** and **subsection 107.12**, the parties do not intend to confer third party beneficiary rights on any person or entity that is not a party to this contract.

Respecting third parties, the parties to this contract have only the duties, obligations, and responsibilities the law imposes.

108 – PROSECUTION AND PROGRESS

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.

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SECTION 109

MEASUREMENT AND PAYMENT

109.1 MEASUREMENT OF QUANTITIES

a. General.

- Measure all work using the United States Standard Measure or using the International System of Units (SI), whichever the Contract Documents specify;
- Use generally recognized methods of measurement and computations conforming to good engineering practices; and
- Measure structures according to neat lines shown on the plans or that the Engineer alters.

b. Temperature Corrections.

- (1) Correct all measurements to 60°F, unless the Contract Documents show otherwise.
- (2) For asphalt materials:
 - Correct asphalt volume to 60°F using ASTM D1250 or using tables the Asphalt Institute publishes for emulsified asphalt temperature-volume corrections; and
 - Measure tar according to ASTM D 633.

c. Measurement by Length.

- Measure items such as pipe culverts, guardrail, underdrains, and similar items by the linear foot parallel to the base or foundation; and
- Measure Stations horizontality by the 100 linear feet.

d. Measurement by Area or Volume.

- Make longitudinal measurements for area computations horizontally;
- Do not deduct for fixtures having an area less than 9 square feet; and
- Make transverse measurements for area computations using neat dimensions shown on the plans, unless the Contract Documents show otherwise.

e. Measurement by Weight.

(1) Equipment. Provide and maintain weighing devices according to **SECTION 152**.

(2) Weight.

- Measure ton as short ton consisting of 2,000 pounds avoirdupois;
- Measure aggregate weight in the saturated surface dry condition;
- For asphalt materials, accept certified scale weights as adjusted for loss from the car or waste;
- Adjust asphalt material weight for loss from foaming; and
- Accept asphalt material weight shipped directly from the refinery if measured with temperature compensating meters.

(3) Weighing Procedures.

- Weigh on accurate and approved scales (see **subsection 152.2**);
- Zero balance scales every day before beginning weighing operations. Make a minimum of 2 random zero balances during the day and record the results;
- Check scales and record results a minimum of 2 times per week. In checking scales, use a roller, motorgrader, or loaded truck and weigh on 2 different scales in the same vicinity. The difference in the 2 scales must not exceed 0.25%. If the difference exceeds 0.25%, recertify the scales according to **subsection 152.2**;
- Make sure the scale operator obtains and records in bound field book a minimum of 2 tare weights each day. (Exception: This is not required if scale operator uses an electronic scale system with an automatic print-out to weigh materials);
- Use either KDOT Form No 251A or Contractor-furnished materials receipts (including print-outs) in quadruplicate including the following required information:
 - Type of material;

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- KDOT Project Number;
 - Date;
 - Truck Number;
 - Gross Weight;
 - Tare Weight;
 - Net Weight;
 - Deductions for Moisture (M), Soft friable material (SFM), Wash (W) graduation under 4.00, if applicable;
 - Pay Quantity;
 - % Total Moisture;
 - Location for initials of Scale Inspector; and
 - Location for initials of Road Inspector; and
- Complete and sign the KDOT Form No 251A or Contractor-furnished materials receipts.
 - Give original and first copy to the truck driver. Make sure truck driver gives both the original and copy to the designated Inspector. The Inspector will document receiving the tickets by initialing both receipts, retaining the original, and returning the copy to the truck driver;
 - Retain one copy for the Contractor; and
 - Leave the third copy with the scale documentation.

(4) Scale Operators. Do not change scale operators except in circumstances beyond the Contractor's control and after the Engineer approves the change.

f. Other Weight Conditions.

- The Engineer will use weight tickets to initially accept and pay for stored materials shipped by rail or truck. (Final payment will be based on actual weight measured on the Project.); and
- The Engineer will not use truck or rail car weights for materials passed through mixing plants.

g. Materials Measured by Volume.

- Measure volume at point of acceptance;
- Use any size vehicle within the legal weight constraints if volume can be readily determined;
- Load vehicles to their water level capacity;
- At the point of delivery, the Engineer may require the load to be leveled in the vehicle before acceptance; and
- Before the Contractor begins delivering a volume pay item, the Engineer may convert the volume of materials to weight of materials. The Engineer and Contractor shall determine and agree to the weight to volume conversion factors. Use KT methods, when applicable.

h. Miscellaneous Materials Measurements.

- Wire Gage or Gage means the wire size number specified in AASHTO-M32;
- Measure timber by the thousand foot board measure (M.F.B.M.) incorporated into the structure based on nominal width and thickness and the extreme length of each piece; and
- Unless the Contract Documents specify otherwise, the Engineer will accept manufacturer's measurements for standard manufactured items such as fence, wire plates, rolled shapes, and pipe conduit that are identified by gage, unit weight, or section dimensions.

i. Computed Quantities.

- (1) Use the following methods to compute volumes of excavation:
 - average end area method;
 - photogrammetric measurements and computer calculations with the Engineer's approval; or
 - other methods the Bureau of Construction and Materials accepts to compute volumes of excavation.
- (2) Use standard engineering calculations to compute areas and volumes from measured dimensions.

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109.2 SCOPE OF PAYMENT

a. Pay Items. The Secretary will pay unit prices or lump sum prices (contract prices) for the various contract pay items as designated in the Contract Documents.

b. Original Contract Work. Accept payment of the contract prices in the "Schedule of Prices" as full compensation for performing all work necessary to construct or reconstruct the Project and for accepting all risk, loss, damage, and expense for which the Contractor is responsible under the contract.

c. Subsidiary and Incidental Work. The Secretary will not consider subsidiary and incidental items for separate payment. Include costs for subsidiary and incidental work in the contract unit prices or lump sum prices.

d. Price/Pay Adjustment Factors, Damages, and Bonuses. Accept adjustments to contract prices and accept contract deducts, damages, bonuses, incentives, or any combination of these items the Contract Documents specify.

e. Contract Changes. Accept payment for Contract Changes under **SECTION 104**.

109.3 FORCE ACCOUNT PAYMENT

If the parties are unable to agree upon the amount of compensation for extra work, the Secretary may require the Contractor to perform specific work on a force account basis. Compute force account costs as follows:

a. Labor.

(1) Wages.

(a) The wage rate agreed upon in writing before beginning the force account work for the number of hours all workers and foremen are actually engaged in such work.

(b) Contractor's overhead and profit: The sum of 20% plus the percentage for bond, insurance, and taxes calculated under **subsection 109.3b.** multiplied by the sum of the wages calculated under **subsection 109.3a.(1)(a).**

(2) Fringe Benefits.

(a) Costs paid for, health and welfare benefits, pension fund benefits, or other such benefits but only if the law, collective bargaining agreement, written employment contract, or Contractor's written company policy requires payment for such costs.

(b) Contractor's overhead and profit: 15% of the sum of the allowances in **subsections 109.3a.(2)(a).**

(3) Subsistence and Travel Allowances.

(a) The actual daily cost per worker paid for subsistence and travel allowances (allowances) agreed upon in writing before beginning the force account work for the days all workers and foremen are actually engaged in such work. If a worker performs the force account work for more than 60% of the worker's day, KDOT will pay 100% the worker's daily allowance. If a worker performs the force account work for 60% or less of the worker's day, KDOT will pay 50% of the worker's daily allowance.

(b) Subsistence and travel allowances costs are only paid if the law, collective bargaining agreement, written employment contract, or Contractor's written company policy requires payment for such costs.

(c) Contractor's overhead and profit: 15% of the sum of the allowances in **subsections 109.3a.(2)(a) and (b).**

b. Bond, Insurance, and Taxes. The rate (shown as a percentage) the Secretary establishes and adjusts periodically for bond costs, unemployment insurance contributions, social security taxes, medicare and insurance premiums (property damage, comprehensive liability, automobile liability, and worker's compensation) that the force account work causes.

c. Materials.

(1) The actual costs of materials the Engineer approves and the Contractor uses or consumes in the force account work.

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(2) Contractor's overhead and profit: 15% of the sum of the material costs calculated under **subsection 109.3c.(1)**.

d. Equipment.

(1) Before beginning the force account work, provide equipment information so that equipment may be identified in the Rental Rate Blue Book for Construction Equipment (Blue Book). The rate to be paid will be the monthly rate set forth in the Blue Book. The Blue Book rate is calculated by dividing the monthly rate for the equipment by 176 and adjusting that rate by Blue Book age and regional adjustment factors before adding in the Blue Book estimated hourly operating cost. The hourly operating cost includes costs for repairs, fuel, and lubricants used or consumed in the force account work.

(2) Transportation costs to and from the site of the work if:

- the equipment is obtained from the nearest approved source;
- the return charges do not exceed the delivery charges;
- haul rates do not exceed the established rates of licensed haulers; and
- the equipment is not already available on the Project.

(3) Standby rates for idle equipment (hourly rental rate minus the hourly operating cost) times 0.5 for equipment not operating during normal working hours if:

- the equipment is used in the force account work; and
- the Engineer orders the Contractor to keep the equipment on the Project.

(4) Contractor's overhead and profit: No allowance will be made for overhead and profit on the items in **subsections 109.3d.(1), (2) and (3)**.

e. Limitation on Compensation. The Secretary will not pay superintendents, the use of small tools, or other costs for which no specific allowance is provided in this **subsection 109.3**.

f. Required Verification and Documentation.

(1) Daily, the Contractor's representative and the Engineer shall compare and agree upon the records of labor, equipment, and materials used for the force account work.

(2) To receive payment, provide itemized statements of the costs of such force account work detailed as follows:

- name, classification, date, daily hours, total hours, wage rate, and extensions thereof for each worker and foreman;
- quantities of materials, prices, and extensions thereof and transportation costs for materials. Attach invoices for all materials used or consumed. If the Contractor takes the materials from its own inventory, provide an affidavit certifying that:
 - the material was taken from inventory;
 - the quantity claimed was actually used; and
 - the price and transportation costs claimed represent the Contractor's actual costs; and
- designations, dates, daily hours, total hours, rental rates, and extensions thereof for each unit of equipment and transportation costs for equipment.

(3) If the Engineer cannot verify the itemized statement from KDOT's Project records, KDOT may conduct a complete audit of the Contractor's force account records.

g. Payment of Force Account Work or Negotiated Work Performed by Subcontractors, Leased Trucking, or other Trucking.

(1) The term "work" in this **subsection 109.3g.** means either force account work or work performed on a negotiated price basis, whichever applies.

(2) When all or a portion of the "work" is sublet to a highway industry subcontractor or the Contractor hires subcontractors, leased trucking, or other trucking, the Contractor shall receive overhead in the amount shown in **TABLE 109-1**. The "Dollar Amount of Work" shall be the total amount determined for the subcontractor or leased trucking using the requirements shown in **subsections 109.3a.** through **109.3f.** or the subcontractor's or leased trucking's negotiated price.

TABLE 109-1: ADD ON FOR CONTRACTOR'S OVERHEAD FOR FORCE ACCOUNT WORK OR NEGOTIATED WORK USING HIGHWAY SUBCONTRACTORS, LEASED TRUCKING AND OTHER TRUCKING	
Dollar Amount of Work	Add on for Overhead to compensate Contractor for administrative expenses incurred in additional subcontract work and additional trucking
\$0 to \$50,000	5%
\$50,000 to \$100,000	\$2500 plus 3% for any amount over \$50,000
Over \$100,000	\$4000 plus 1.5% for any amount over \$100,000

109.4 STORED MATERIALS PAYMENTS

a. Request payment for properly stored nonperishable materials when the value of the stored material is a minimum of \$5,000.00 for each individual item of material, unless otherwise approved by the Engineer. Only include the actual material and shipment costs in the request. Do not include any testing fees, stockpiling costs, sales tax, etc.

- When requesting payment for stored materials, verify the quantity of materials stored and the value of the material. Identify the contract line item numbers (bid items) representing the stored materials and the quantities of stored materials assigned to each designated contract line item number. Provide required certification for all stored materials according to the Contract Documents;
- As the materials are incorporated into the work, the Engineer will measure actual quantities and adjust the stored materials payment by the actual quantities incorporated. Upon receiving each payment voucher (progress payment), verify the accuracy of the stored materials paid for to date and advise the Engineer of any discrepancy; and
- After receiving payment for the stored materials, pay subcontractors and suppliers according to **subsection 109.6**.

b. The Engineer will pay stored materials for nonperishable material the Contractor manufactures using its own forces. Before payment, the Contractor and Engineer shall agree upon and verify the delivery amount and storage location. The Engineer may pay for materials stored properly at a fabricator's or manufacturer's facility if the material is specifically identified for a KDOT Project.

c. The value of stored materials shall not exceed 90% of the contract price for the item of work in which these materials will be incorporated.

d. Assume liability for stored materials lost by deterioration, waste, theft, or other natural or man-made actions.

e. Stored materials payment requests will not be accepted if the material is scheduled for use within 30 days of the request.

109.5 PROGRESS PAYMENTS

a. **Work Accomplished.** The Engineer will make an approximate estimate of the work accomplished (considering price and pay adjustment factors) and pay for this work (progress payment) at intervals not to exceed one calendar month. Request progress payments at more frequent intervals, if desired. The Engineer may withhold from progress payments liquidated damages, reimbursement for remedial work under **subsection 105.5f**, excess costs for breach of contract, final cleanup work expenses, and other deducts the Contract Documents specify.

b. **Contract Proceeds.** Obtain the Engineer's and Surety's written consent to assign contract proceeds to creditors.

c. **Payment for Contract Bond.** If requested and upon receiving an invoice, KDOT will make payment for the premium amount of the Contract Bond. The payment will be made with the following conditions:

- The premium shall be greater than \$5,000.00;

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- The invoice shall list the premium for each Project when the invoice includes multiple projects;
- Payment will be shown as "Contract Bond" on intermediate payments; and
- When the Contractor has earned 50% of the "Original Contract Amount", the Engineer will remove the payment for "Contract Bond" from future progress payments.

Note: The Percent of Original Contract Amount = the amount earned by the Contractor* divided by the total dollar value of the original contract (all bid items).

*Do not include monies earned for "Contract Bond", "Mobilization", "Traffic Control (Lump Sum)", "Contractor Construction Staking" and "Stored Materials".

109.6 PAYMENTS TO SUBCONTRACTORS & SUPPLIERS

a. Definitions. For purposes of **subsections 109.6 and 109.7**, use the following definitions:

- "subcontract" means a contract for supplies, materials, services, or a combination thereof between a Contractor and a subcontractor; and
- "subcontractor" means an entity that provides the Contractor supplies, materials, services, or a combination thereof to complete the contract.

b. Progress Payments.

(1) Prior to the first progress payment, submit to the Engineer bid item price sheets for 1st tier subcontractors providing services and a copy of materials purchase orders for 1st tier subcontractors providing materials. This information is needed for the Engineer to verify proper payment.

(2) Within 10 calendar days after receiving payment from the Secretary for approved, subcontract work, pay subcontractors for their work.

(3) Within 15 calendar days after receiving payment from the Secretary, submit to the Engineer a "Certificate for Subcontract Work and Payment", KDOT Form No. 1010, containing the following representations:

"I certify that the Contractor received payment from the Secretary on (date) and, within 10 calendar days after this date, paid the subcontractors named below for the work those subcontractors completed on or before the payment voucher's "Paid To Date". [Signed by Contractor's representative].

Note: More than 1 subcontractor may be shown on KDOT Form No. 1010.

c. Retainage.

(1) Bonded Subcontractors. Withhold no retainage from bonded subcontractors.

(2) Unbonded Subcontractors. Withhold from unbonded subcontractors the percentage of retainage, if any, the Contractor feels is necessary to protect itself. Withhold this retainage until the unbonded subcontractor has completed all its subcontract work and has provided an affidavit that the subcontractor has paid all indebtedness for supplies, materials, and labor used in performing its subcontract work. The unbonded subcontract work is considered completed when KDOT pays the Contractor 100% of the items subcontracted. After the unbonded subcontractor has provided this affidavit, pay all retainage owed within the next 5 business days.

(3) No subcontract provision shall permit the Contractor to delay subcontractors' retainage payments until the Project's final acceptance or final payment.

d. Good Cause Exception. If the Contractor has "good cause" to withhold a subcontractor's progress payment (bonded or unbonded subcontractors) or retainage (unbonded subcontractors), identify the cause for withheld payment, the payment amount, and the anticipated payment date, writing this information on the "Certificate for Subcontract Work and Payment", KDOT Form No. 1010. If the Engineer determines the Contractor has "good cause" for a withheld payment, the Engineer will not impose sanctions on the Contractor. A Contractor's lack of funds to pay is not "good cause" for withheld payment.

109.7 SANCTIONS FOR FAILURE TO PAY PROMPTLY

a. If a Contractor fails to comply with the payment requirements of **subsection 109.6** without good cause, pay an interest penalty to the affected subcontractor. Compute the interest penalty at the rate of 1.5% per month on the amount of money owed the subcontractor. The interest assessment will begin on the day after payment is due

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under **subsection 109.6** and will continue until the Contractor has paid the amount of money owed the subcontractor.

b. If a Contractor fails to comply with the certification requirements of **subsection 109.6**, the Secretary may impose liquidated damages of \$50.00 per calendar day per subcontractor for each day certification is late.

c. If a Contractor submits a certification stating payment has been made but knowing payment has not been made as **subsection 109.6** requires (false certification), the Secretary may impose liquidated damages of \$50.00 per calendar day per subcontractor for each day the certification remains false.

d. If a Contractor fails to comply with the payment requirements without good cause, submits a false certification, or repeatedly fails to comply with the certification requirements of **subsection 109.6b.**, the Secretary may adjust a Contractor's qualification rating, declare the Contractor is not a responsible Contractor, suspend a Contractor from bidding, or debar a Contractor from bidding.

e. For each violation of **subsection 109.6**, a Contractor may receive one or more of the sanctions provided.

109.8 PROVISION FOR LOWER-TIER SUBCONTRACTORS

a. Definitions.

- Lower-tier subcontract means a contract for supplies, materials, service, or a combination thereof between a subcontractor and a party other than the Contractor; and
- Lower-tier subcontractor means an entity that provides a subcontractor supplies, materials, services, or a combination thereof to complete a subcontract.

b. Progress Payments. Include in all subcontracts a provision that requires the subcontractor to pay all lower-tier subcontractors within 10 calendar days after the subcontractor receives payment from the Contractor. Include a good cause exception clause to such prompt payment similar to the one contained in **subsection 109.6d.**

c. Retainage. Include in all subcontracts a provision similar to **subsection 109.6c.** that prohibits the subcontractor from withholding retainage from bonded lower-tier subcontractors and requires the subcontractor to release retainage to all unbonded lower-tier subcontractors.

d. Administration. The Contractor is responsible for administering this provision. KDOT will not monitor prompt payments to lower-tier subcontractors. KDOT may investigate payment complaints lower-tier subcontractors make to KDOT.

109.9 FINAL PAYMENT AND CORRECTIONS AFTER FINAL PAYMENT

a. Final Payment. Final payment will reflect the contract amount adjusted by approved contract adjustments (Change Orders) minus all previous payments and deductions. The Secretary will issue final payment after the following events occur:

- the Engineer issues Notice of Acceptance of Contract under **subsection 105.16b.**;
- the Engineer prepares a final estimate of the value of all work;
- the Contractor signs the final estimate;
- the Contractor submits an Affidavit of Contractor, swearing that the Contractor has paid all debt the contract requires;
- the Surety executes a Release of Final Estimate; and
- the Bureau of Construction and Materials reviews the final paperwork, including the signed final estimate.

b. Release of Secretary. By accepting the final payment, the Contractor releases the Secretary from all claims arising out of the work except for claims caused by correction of errors in quantities, measurements, or certifications (payment corrections) discovered after final payment. The Secretary is not released from liability for payment corrections until 3 years from the date of final payment. Nothing in **subsection 109.9** permits the

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Contractor to file claims under **SECTION 104** for additional time, additional money, or both after final payment rather than at Notice of Acceptance as provided in **subsection 105.16b**.

c. Release of Contractor and Surety. By issuing final payment, the Secretary releases the Contractor and Surety from further costs necessary to construct the Project except for costs incurred due to latent defects; costs incurred because of the Contractor's breach of warranty, breach of guaranty, fraud, or misrepresentation; and costs resulting from correction of errors in quantities, measurements, or certifications (payment corrections) discovered within 3 years from the date of final payment. See **subsection 108.12** for the Contractor's and Surety's release of liability from further construction obligations after Notice of Acceptance of Contract.

d. Field Audit Corrections. The Contractor and Surety understand that the KDOT Bureau of Fiscal Services audits the Project after final payment rather than before final payment. Despite final payment, the Secretary will correct quantity, measurement, or certification errors discovered during a final audit. If the correction is favorable to the Contractor, the Secretary will pay the Contractor the amount owed. If the correction shows KDOT overpaid the Contractor, pay the Secretary the amount owed. If the Contractor fails to pay the amount owed, the Surety shall pay the amount owed. Neither party nor the Surety has obligations under this **subsection 109.9** after 3 years from the date of final payment. The Surety shall have no claim or defense that KDOT's alleged negligence in computing quantities, computing measurements, or reviewing quantities, measurements, or certifications during construction and before final payment prejudiced the Surety's rights or voided the Surety's obligations under this **subsection 109.9**.

109.10 RESPONSIBILITY FOR PAYMENT

The Secretary will pay for work with warrants as state law allows.

