



**Department of  
Transportation**

# **STANDARD SPECIFICATIONS**

(US CUSTOMARY UNITS)

## **VOLUME 1 SECTION 100**

**CONSTRUCTION  
AND  
MATERIALS**

**September 1, 2025**

50 Wolf Road  
Albany, New York 12232

[www.dot.ny.gov](http://www.dot.ny.gov)

## **INTRODUCTION**

This publication has been prepared to provide a compilation of standard requirements, called Specifications, used by the New York State Department of Transportation for construction contracts. These specifications are written to the Contractor. They define the Contractor's responsibility in meeting each specification, enumerate the Department's expectations and how they are going to measure and pay, and explain what the Contractor is expected to provide.

When this publication, entitled Standard Specifications (USC) and dated as shown on the Title Page, is incorporated by reference into the Department's construction contracts, it is made a part of that contract. The requirements stated herein may be revised or amended from time to time by notes or special specifications or documents of any description that would be furnished as part of a construction contract.

# STATE OF NEW YORK

## DEPARTMENT OF TRANSPORTATION

### ENGINEERING DIVISION

Contained herein are:

General Provisions of Contract;  
Contract forms of Proposal, Agreement and Bonds;  
General Construction Specifications;  
Materials of Construction;  
Payment Items

Adopted  
by

The Commissioner of Transportation  
and Short Titled

### **"STANDARD SPECIFICATIONS" (USC)**

*Note: While these specifications may be used for general construction work, they have been compiled in US customary units with particular emphasis placed upon their use for highways, parkways, bridges and similar work. Necessary modifications of the contents hereof will be incorporated in the "Contract Documents" covering dissimilar work.*

# TABLE OF CONTENTS

## Contents

<b>Section 100 .....</b>	<b>4</b>
<b>GENERAL PROVISIONS .....</b>	<b>4</b>
<b>SECTION 101 - ABBREVIATIONS AND DEFINITIONS OF TERMS.....</b>	<b>4</b>
101-01 ABBREVIATIONS OF TERMS.....	4
101-02 DEFINITIONS OF TERMS .....	7
<b>SECTION 102 - BIDDING REQUIREMENTS AND CONDITIONS.....</b>	<b>17</b>
102-01 LOCATION OF REGIONAL OFFICES.....	17
102-02 EXAMINING THE CONTRACT DOCUMENTS AND THE WORK SITE. ....	18
102-03 OTHER CONTRACTS. ....	19
102-04 PROPOSAL CONTENT. ....	20
102-05 PROPOSAL SUBMISSION.....	21
102-06 BID DEPOSIT. ....	22
102-07 MODIFICATION OR WITHDRAWAL OF PROPOSAL. ....	22
102-08 SAMPLE APPENDIX A - STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS.....	22
102-09 VACANT.....	29
102-10 LABOR AND EMPLOYMENT.....	29
102-11 EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENTS.....	32
102-12 DBE/MBE/WBE/SDVOB PARTICIPATION.....	38
102-13 STATE AND LOCAL SALES TAX EXEMPTION.....	50
102-14 FORM OF CONTRACT AND BID BOND.....	50
102-15 SAMPLE FORM OF BID BOND. ....	51
102-16 SAMPLE CONTRACT PAY ITEM FORMAT.....	53
102-17 SAMPLE FORM OF JURAT.....	54
<b>SECTION 103 CONTRACT AWARD AND EXECUTION .....</b>	<b>63</b>
103-01 CONTRACT AWARD.....	63
103-02 EXECUTION OF CONTRACT.....	64
103-03 CONTRACT BONDS.....	64
103-04 CANCELING AWARD.....	64
103-05 PARTNERING.....	64
103-06 SAMPLE FORM OF CONTRACT AGREEMENT.....	65
103-07 SAMPLE FORM OF FAITHFUL PERFORMANCE BOND.....	77
103-08 SAMPLE FORM OF LABOR AND MATERIAL BOND.....	81
<b>SECTION 104 - SCOPE OF WORK.....</b>	<b>84</b>
104-01 WORK REQUIRED.....	84
104-02 CHANGES, CONTINGENCIES, EXTRA WORK AND DEDUCTIONS.....	84
104-03 DIFFERING SITE CONDITIONS.....	84
104-04 SIGNIFICANT CHANGES IN THE CHARACTER OF WORK.....	85
104-05 SUSPENSIONS OF WORK DIRECTED BY THE ENGINEER.....	87
104-06 NOTICE AND RECORDKEEPING.....	88
104-07 SITE HOUSEKEEPING.....	90
104-08 MAINTAINING TRAFFIC.....	90
104-09 CONTRACTOR'S RETENTION OF RECORDS.....	91
104-10 VALUE ENGINEERING CHANGE PROPOSAL (VECP).....	91
<b>SECTION 105 - CONTROL OF WORK.....</b>	<b>98</b>
105-01 ENGINEER'S AUTHORITY.....	98
105-02 CHARACTER OF WORKERS.....	99

# TABLE OF CONTENTS

105-03 METHODS AND EQUIPMENT.....	99
105-04 CONTRACT DOCUMENTS.....	101
105-05 VENDOR RESPONSIBILITY.....	102
105-06 COOPERATION WITH UTILITIES AND OTHER CONTRACTORS.....	102
105-07 TERMINATION.....	102
105-08 REMOVAL OF UNACCEPTABLE AND UNAUTHORIZED WORK.....	103
105-09 WORK AFFECTING RAILROADS.....	104
105-10 SURVEY AND STAKEOUT.....	104
105-11 INSPECTION.....	109
105-12 LOAD RESTRICTIONS.....	109
105-13 WORK ZONE TRAFFIC CONTROL FOR MOBILE OPERATIONS.....	110
105-14 DISPUTED WORK AND DISPUTE RESOLUTION.....	110
105-15 FURNISHING RIGHT OF WAY.....	116
105-16 SHOP DRAWING ACCEPTANCE.....	116
105-17 CONTRACT RECORDS.....	117
105-18 MANUFACTURER WARRANTIES AND GUARANTEES.....	117
105-19 CONTRACTOR WARRANTIES.....	117
105-20 OPENING HIGHWAY TO TRAFFIC PRIOR TO CONTRACT FINAL ACCEPTANCE.....	117
105-21 CIVIL RIGHTS MONITORING AND REPORTING.....	118
<b>SECTION 106 - CONTROL OF MATERIAL.....</b>	<b>126</b>
106-01 SOURCES OF SUPPLY.....	126
106-02 QUALITY REQUIREMENTS.....	126
106-03 PLANT INSPECTED MATERIALS.....	127
106-04 MATERIAL ACCEPTANCE RECORDS.....	128
106-05 RECYCLED MATERIALS.....	129
106-06 STORAGE AND HANDLING OF MATERIALS.....	130
106-07 BASIS FOR MEASUREMENT.....	130
106-08 REJECTED MATERIALS.....	130
106-09 EQUIVALENTS.....	130
106-10 QUALITY ASSURANCE.....	130
106-11 BUY AMERICA.....	131
<b>SECTION 107 - LEGAL RELATIONS AND RESPONSIBILITY TO PUBLIC .....</b>	<b>134</b>
107-01 LAWS, RULES, REGULATIONS AND PERMITS.....	134
107-02 PATENTED DEVICES, MATERIALS AND PROCESSES.....	136
107-03 FEDERAL AID PARTICIPATION.....	136
107-04 PUBLIC NOTICES.....	136
107-05 SAFETY AND HEALTH REQUIREMENTS.....	136
107-06 INSURANCE.....	149
107-07 PROTECTION OF UNDERGROUND FACILITIES.....	158
107-08 PROTECTION AND RESTORATION OF PROPERTY AND LANDSCAPE.....	160
107-09 DAMAGE.....	161
107-10 MANAGING SURPLUS MATERIAL AND WASTE.....	163
107-11 AIR QUALITY PROTECTION.....	167
107-12 WATER QUALITY PROTECTION.....	169
107-13 POLLUTION PREVENTION AND SPILL RESPONSE.....	171
107-14 VACANT.....	171
107-15 USE OF UNITED STATES-FLAG VESSELS.....	171
107-16 ENSURING PAY EQUITY BY STATE CONTRACTORS.....	172
<b>SECTION 108 - PROSECUTION AND PROGRESS .....</b>	<b>172</b>

# TABLE OF CONTENTS

108-01	PROGRESS SCHEDULE.....	172
108-02	COMPLETION DATE. ....	175
108-03	FAILURE TO COMPLETE WORK ON TIME.....	175
108-04	DELAY PROVISIONS. ....	178
108-05	SUBLETTING OR ASSIGNING THE CONTRACT.....	179
108-06	COMMENCEMENT OF ACTIONS ON STATE PUBLIC WORKS CONTRACTS. ....	184
108-07	SEASONAL SHUT-DOWN. ....	184
<b>SECTION 109 - MEASUREMENT AND PAYMENT .....</b>		<b>185</b>
109-01	MEASURING QUANTITIES. ....	185
109-02	COMPENSATION FOR ALTERED QUANTITIES.....	185
109-03	SCOPE OF PAYMENT.....	185
109-04	PARTIAL PAYMENTS .....	186
109-05	EXTRA WORK AND TIME RELATED COMPENSATION. ....	187
109-06	CONTRACT PAYMENTS. ....	196
109-07	PROMPT PAYMENTS BY THE CONTRACTOR.....	197
109-08	ELIMINATED MATERIALS. ....	198
109-09	FINAL ACCEPTANCE AND FINAL AGREEMENT.....	198
109-10	UNCOMPLETED WORK AGREEMENTS.....	200

# Section 100

## GENERAL PROVISIONS

### SECTION 101 - ABBREVIATIONS AND DEFINITIONS OF TERMS

(Last Revised September, 2025)

Wherever in these specifications or in other contract documents the following terms or pronouns in place of them are used, the intent and meaning shall be interpreted as follows:

#### 101-01 ABBREVIATIONS OF TERMS.

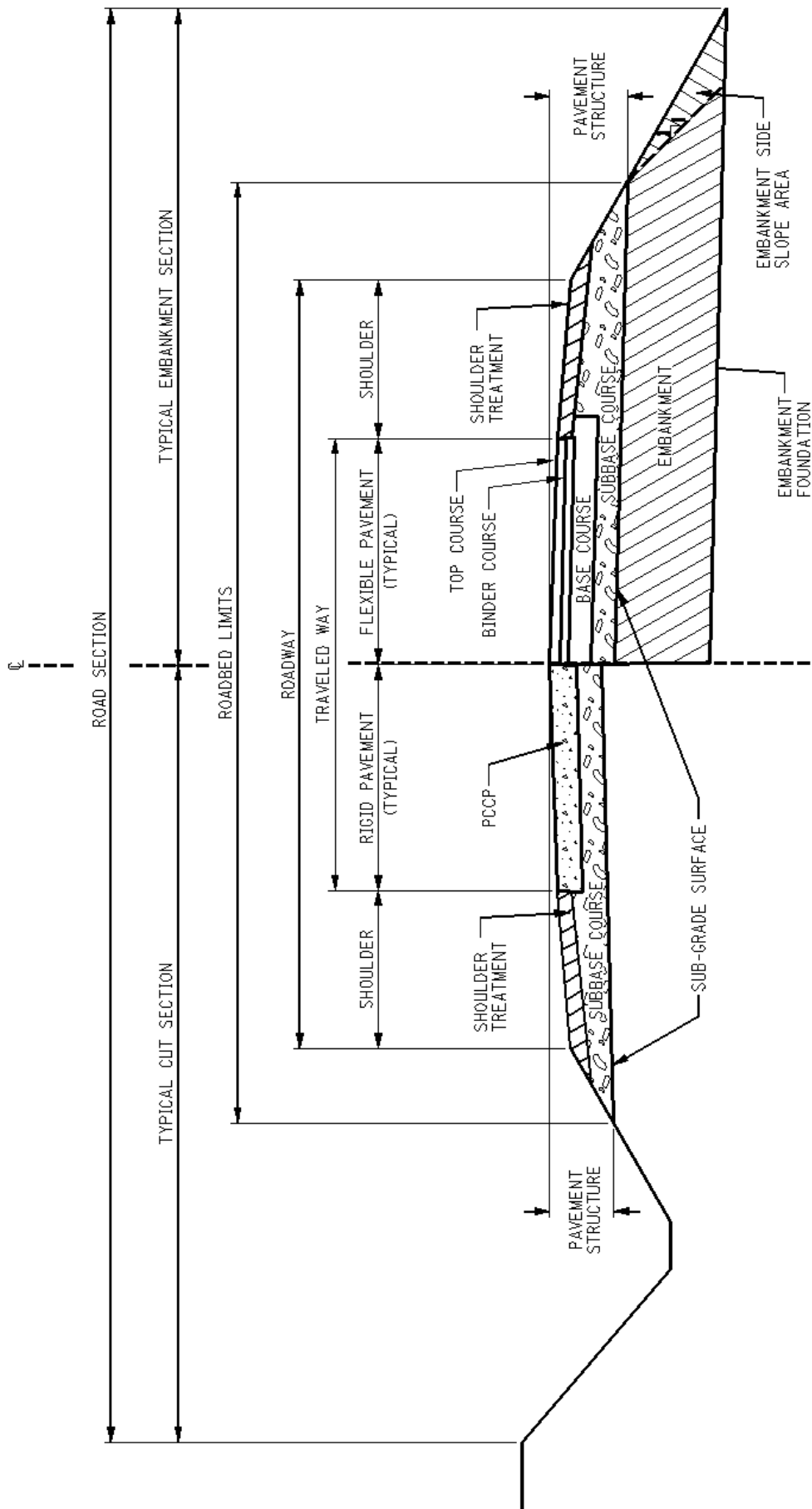
Wherever the following abbreviations are used in these specifications or on the plans, they are to be construed the same as the respective expressions represented. Some of these abbreviations may be acronyms and some may appear with periods.

AASHTO	- American Association of State Highway and Transportation Officials
AISI	- American Iron and Steel Institute
AMPP	- Association for Materials Protection and Performance
ANSI	- American National Standards Institute, Inc
AREA	- American Railway Engineering and Maintenance-of-Way Association
ASME	- American Society of Mechanical Engineers
ASTM	- American Society for Testing and Materials
AWPA	- American Wood-Preservers Association
AWWA	- American Water Works Association
CADD	- Computer Aided Design and Drafting
CPM	- Critical Path Method
CFR	- Code of Federal Regulations
CRU	- Contract Review Unit
DCEC	- Deputy Chief Engineer for Construction
DCED	- Deputy Chief Engineer for Design
DCES	- Deputy Chief Engineer for Structures Design and Construction
DCETS	- Deputy Chief Engineer for Technical Services
EPA	- U.S. Environmental Protection Agency
FHWA	- Federal Highway Administration
HMA	- Hot Mix Asphalt
MASH	- Manual for Assessing Safety Hardware
MM	- Materials Method
MP	- Materials Procedure
MURK	- Manual for Uniform Record Keeping
MUTCD	- Manual of Uniform Traffic Control Devices
NACE	- National Association of Corrosion Engineers
NEC	- National Electric Code
NEMA	- National Electrical Manufacturers Association
NYCRR	- Official Compilation of Codes, Rules and Regulations of the State of New York
NYSDEC	- New York State Department of Environmental Conservation
NYSDOL	- New York State Department of Labor
NYSTA	- New York State Thruway Authority
OSHA	- Occupational Safety and Health Administration, US Department of Labor
PCC	- Portland Cement Concrete

## 101-01 ABBREVIATIONS OF TERMS.

PCCM	- NYSDOT Precast/Prestressed Concrete Construction Manual
PCCP	- Painting Contractor Certification Program
RME	- Regional Materials Engineer
SCM	- New York State Steel Construction Manual
SDS	- Safety Data Sheet
SSPC	- Society for Protective Coatings
USACE	- U.S. Army Corps of Engineers
USC	- United States Code
USCG	- United States Coast Guard
UL	- Underwriters' Laboratories
VECP	- Value Engineering Change Proposal
WMA	- Warm Mix Asphalt





### 101-02 DEFINITIONS OF TERMS.

Wherever the following terms are used in these specifications or on the plans, they are to be construed the same as the respective definitions represented.

**A+B Bidding.** A time-related form of bidding used by the Department for contracts that are time sensitive, either in overall contract duration, or the duration of a task or tasks. The total contract bid price consists of the amount bid that will be paid for the work (the “A portion”), plus the number of days for completion of the specified work multiplied by the user cost specified in the contract documents, (the “B portion”).

**Addenda.** Separate publication(s) containing supplemental additions, deletions, and modifications to the provisions of the Standard Specifications which are in effect on the date of advertisement for receipt of bids.

**Advertisement.** The public announcement, as required by law, inviting bids for work to be performed or materials to be furnished.

**Amendment.** A formal alteration by addition, deletion or modification of a proposed contract, issued prior to the opening of bids.

**Approved List.** List of materials, equipment, Manufacturers, Fabricators or Material Suppliers approved by the Materials Bureau under a particular specification. The Approved Lists are published periodically and are available from the Materials Bureau or on the Department web site.

**Association for Materials Protection and Performance (AMPP).** A global community of professionals dedicated to materials protection through the advancement of corrosion control and protective coatings. AMPP was created when the SSPC standards program merged with the NACE International standards program.

**Award.** The decision of the Department to accept the proposal of the lowest responsible bidder for the work, subject to the execution and approval of a satisfactory contract therefore and bond to secure the performance thereof and to such other conditions as may be specified or otherwise required by law.

**Base Line Data.** The relevant contract specific information and engineering data used to develop the contract plans and proposal. The relevant information and data will be listed as available on Form CONR-9 *Supplemental Information Available to Bidders* included in the contract proposal.

**Bid Deposit.** The security furnished by the bidder with their proposal for a contract, as guarantee the bidder will enter into a contract for the work if their proposal is accepted.

**Bidder.** An individual, firm or corporation formally submitting a proposal for the work contemplated acting directly or through a duly authorized representative.

**Bridge.** The term “bridge” shall apply to any structure whether single or multiple span construction with a clear span in excess of 20 feet when measurement is made horizontally along the center line of roadway from face to face of abutments or sidewalls immediately below the copings or fillets; or, if there are no copings or fillets, at 6 inches below the bridge seats or immediately under the top slab, in the case of frame structures. In the case of arches, the span shall be measured from spring line to spring line. All measurements shall include the widths of intervening piers or division walls, as well as the width of copings or fillets.

**Broker.** A firm that arranges or expedites transactions for materials.

**Calendar Day.** Every day shown on the calendar. The calendar day begins at 12:00AM (Midnight).

**CFR.** Code of Federal Regulations annual edition is the codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government, written TT CFR PPP.SS. TT refers to the Title, PPP refers to the Part and SS refers to the Section. For example: 29 CFR 1926.1 refers to Title 29, Code of Federal Regulations, Part 1926, Section 1. Code of Federal Regulations are available on the internet at <https://gov.ecfr.io/cgi-bin/ECFR> .

**Change Order.** Written order issued by the Department covering contingencies, extra work, deductions, increases or decreases and additions, alterations or omissions to the plans or specifications. A Change Order is referred to as an Order on Contract in State Highway Law.

**Chief Engineer.** The Chief Engineer of the New York State Department of Transportation.

**Closed Drainage System.** A collection system of enclosed channels for storm water runoff which carries water to a discharge point. Typically has drainage structures for inlet(s) and may include intermediate drainage structures at junction points.

**Commissioner.** The Commissioner of the New York State Department of Transportation.

**Comptroller.** The head of the New York State Office of the State Comptroller.

**Contemporaneous Period Analysis Method.** A technique for evaluating schedule delays or time savings. The analysis period for the purpose of these provisions shall be the period covered in each regular progress schedule submission, as they coincide with contract payments to the Contractor.

**Contract.** The executed contract agreement. The contract includes, but is not limited to, an executed contract agreement, a set of contract documents and contract bonds.

**Contract Agreement.** The agreement covering the performance of the work and furnishing of labor and materials in the construction of the work in conformance with the requirements of the contract documents. A sample of the standard agreement is shown in §103-06 *Sample Form of Contract Agreement*.

**Contract Bond.** The approved form of security, executed by the Contractor and its Surety or Sureties, guaranteeing complete execution of the contract and all supplemental agreements pertaining thereto and the payment of all legal debts pertaining to the construction of the contract.

**Contract Documents.** The contract documents shall include the advertisement for proposals; the contract proposal; the proposal submitted by the Contractor; the Equal Employment Opportunity (EEO) utilization goals; the Disadvantaged Business Enterprise/Minority Business Enterprise/Women's Business Enterprise/Service-Disabled Veteran-Owned Business (DBE/MBE/WBE/SDVOB) participation goals; Appendix A *Standard Clauses for New York State Contracts*; the Base Line Data; Standard Specifications, including all addenda thereto identified in the contract proposal; the Standard Sheets; the contract plans; any amendments to the contract proposal or the contract plans issued prior to the date of letting; and all provisions required by law to be inserted in the contract whether actually inserted or not.

Whenever separate publications other than Standard Sheets and Standard Specifications are referenced in the Contract Documents it shall mean those, as amended, which are current on the date of letting.

**Contract Limits.** The limits shown in the contract documents, in which all work occurs, including advanced signing and detours covered under an individual contract. The Contractor shall be responsible for the highway within the contract limits. For contracts with multiple sites, this may be defined as a single larger limit if the sites are in close proximity, or as multiple sets of contract limits if the sites are widely separated. On-site contract work cannot be conducted outside the contract limits. If the contract limits are not specified in the contract documents, the contract limits shall be the limits within which all work is performed, including advanced signing and detours included in the contract documents.

**Contract Pay Item.** A specifically described unit of work for which a price is provided in the contract. The basic format of a standard specification contract pay item number is a three-digit root number, a decimal point, and then either a two, four, or six-digit extension number (XXX.XX, XXX.XXXX, or XXX.XXXXXX). The three-digit root number denotes the standard specifications section to which the contract pay item relates (i.e. 564 – Structural Steel).

The format of a special specification contract pay item is the same as the standard specification contract pay item number, but a two-digit origin code number (that was previously shown as a prefix) is added as a suffix. The special specifications will be contained in the contract proposal. The origin code number (RR) denotes the NYSDOT Region, Office, or Group that originated the special specification. Regardless of the length of the extension number, the suffix is always in the seventh and eighth decimal place after decimal point. For special specification contract pay item numbers with only a two or four digit extension number, blank spaces, hyphens or lowercase “b”s are used to bridge the space between the end of the extension number and the origin code number (XXX.XX---RR or XXX.XXXX--RR or XXX.XXXXXXRR or XXX.XXbbbbRR or XXX.XXXXbbRR or XXX.XX RR or XXX.XXXX RR).

**Contract Payments.** Payments to the Contractor for work satisfactorily performed, in accordance with §109-06 *Contract Payments*.

**Contract Plans.** The official contract drawings which show the location, character, dimensions, and details of the work to be performed.

**Contract Proposal.** Part of the contract documents which includes the information for bidders, Contractor’s bid package, Special Notes, Project Details, Standard Specification revisions, and Special Specifications contained therein.

**Contractor.** The individual, firm, or corporation undertaking the execution of the work under the terms of the contract and acting directly or through their or its agents or employees.

**Contractor Work Day.** A calendar day scheduled for active prosecution of the work.

**Critical Path.** In the Progress Schedule the critical activities shall be those activities being on the longest path. In a project network diagram, the series of activities which determines the earliest completion of the project.

**Critical Path Method (CPM).** A network analysis technique used to predict project duration by analyzing which sequence of activities (which path) has the least amount of scheduling flexibility (the least amount of float). A scheduling technique utilizing activities, durations, and interrelationships/dependencies (logic), such that all activities are interrelated with logic ties from the beginning of the project to the completion of the project. Early dates are calculated by means of a forward pass using a specified start date. Late dates are calculated by means of a backward pass starting from a specified completion date (usually the early finish date calculated by the forward pass).

**Culvert.** An enclosed channel open at both ends carrying water from a stream or water course through an artificial barrier such as a roadway embankment. The term “culvert” shall apply to any structure whether of single or multiple span construction with an interior width of 20 feet or less when measurement is made horizontally along the center line of roadway from face to face of abutments or sidewalls immediately below the copings or fillets, or, if there are no copings or fillets, at points 6 inches below the bridge seats or immediately under the top slab in the case of frame structures. In the case of arches, the span shall be measured from spring line to spring line. All measurements shall include the widths of intervening piers or division walls, as well as the widths of copings or fillets.

**Day.** A calendar day unless otherwise defined or modified.

**Department.** The New York State Department of Transportation, including staff and managers who have been delegated certain contractual and technical authority by the Commissioner. The Department maintains a web site at *www.dot.state.ny.us*.

**Departmental Geotechnical Engineer.** The Regional Geotechnical Engineer or his/her authorized representative, or a Geotechnical Engineer of the Geotechnical Engineering Bureau acting at the request of the Regional Geotechnical Engineer.

**Departmental Engineering Geologist.** An Engineering Geologist of the Geotechnical Engineering Bureau authorized by the Director of Geotechnical Engineering Bureau to perform the duties required under these specifications.

**Design Bid Build.** A construction project that is designed by the Department, competitively procured, and constructed by the Contractor.

**Design Build.** A construction project that is designed and constructed by the Design-Builder as a result of competitive procurement.

**Device Day (DVDY).** The sum of the number of devices used each day. For example, three Device Days could be three devices used for one day, one device used for three days, or one device used for two days plus another device used for one of those days or for a different day.

**Drainage Structure.** A structure that collects and/or redirects storm water runoff, including catch basins, manholes, leaching basins and similar structures, but not structures for sanitary sewers.

**Employee.** Any person working on the project mentioned in the contract documents, and who is under the direction or control, or receives compensation from the Contractor or Subcontractor.

**Engineer OR Engineer-In-Charge.** The Engineer representing the Department of Transportation having direct supervision of the execution of the contract under the direction of the Regional Director.

**Equipment.** All machinery and equipment, together with the necessary supplies for upkeep and maintenance, and tools and apparatus necessary for the proper construction and acceptable completion of the work.

**Erosion and Sediment Control.** Any action taken or item used as part of a contract or as a separate action to minimize the destructive effects of wind and water on surface soil. The use and placement of berms and dams, rolled erosion control products, grasses, sod, mulches, slope drains, sediment basins and drainage systems may be temporary and used throughout construction, or permanent and installed for the anticipated life of the facility.

**Extra Work.** Work not provided for in the contract as awarded but found essential to the satisfactory completion of the contract within its intended scope.

**Fabricator.** A firm that assembles, constructs or otherwise substantially alters materials or supplies into assemblies, components or finished items for inclusion into the work prior to resale.

**Federal-Aid.** Joint cooperative construction or reconstruction of State highways and bridges or grade crossing elimination work with monies contributed to the State by the Federal Government under Title 23, United States Code, Highways, and amendments thereto.

**Federal-Aid Project.** An identification applied to federally aided work for the purpose of the records of the FHWA. Federal-Aid contracts are denoted "F.A. Project" on the proposal cover and on the title page.

**Field Change Payment (FCP).** A contract contingency that allows for the timely payment of authorized extra work that is necessary to fulfill the intent of the plans and specifications without the preparation of a change order during construction. An FCP change order is processed only to the Regional Construction Engineer level for approval, and payments are made under the contract pay item for the quantity completed at the appropriate unit price.

**Final Acceptance.** Acceptance of the completed work by the Commissioner upon the recommendation of the Regional Director. Prior to the final acceptance the contract work may be inspected, accepted and approved by other agencies and/or municipalities who will have jurisdiction of the work after contract completion.

**Final Agreement.** Agreement between the New York State Department of Transportation and the Contractor, stating the net increase or decrease of the cost of work completed from the total cost of work originally authorized under the contract. All contract payments will be made prior to the issuance of the Final Agreement.

**Final Inspection.** An independent final review of the work set forth in the contract to ensure the work is completed in accordance with the contract documents.

**Geotechnical Engineering Bureau.** The Department's Geotechnical Engineering Bureau has the responsibility for providing all Geotechnical Engineering Services including laboratory testing of earthwork materials.

**Highway.** The whole strip of land bounded by the right of way lines.

**Incentive/Disincentive (I/D).** Predetermined adjustment to the total contract amount for each day or portion thereof that the work is completed ahead of or behind a specific milestone, phase or contract completion date.

**Inspector.** The Department of Transportation representative assigned to inspect methods and materials relating to work both on and off the site of the contract.

**Land Surveyor.** A Land Surveyor licensed or otherwise authorized to practice surveying under Article 145 and registered or otherwise authorized under Article 130 of the New York State Education Law.

**Landscape Development.** Landscape development is any development or item used as part of a

project or as a separate action through the use, placement and management of land and elements for aesthetic enhancement, such as decorative surfaces and wall faces, benches, waste receptacles, tables, etc., and plant materials consistent with a specific landscape architectural design plan.

**Landscaping.** Landscaping is the use and placement of plant materials (trees, shrubs, vines and certain ground covers) consistent with a landscape architectural design plan. Planting vegetation for screening and erosion control purposes does not constitute landscaping.

**Lane Rental.** An amount identified as the value of a lane or lanes to be occupied by the Contractor in performance of the contract. The total amount bid for lane rental is the total value that can be used by the Contractor in performance of the contract. If additional value is used by the Contractor, that amount will be deducted from the payments to be made to the Contractor.

**Laying Length of Pipe.** Feet (laying length) of pipe shall be measured by multiplying the number of whole units by the nominal length of each unit and adding thereto the length of any fractional units incorporated in the work. The nominal length of a unit or fractional unit shall be the inside measured length from butt end to butt end and exclusive of the bell or groove on the female end.

**Letting.** The date and time the Contractor's completed bid proposals are due to the Department. For Design Bid Build Low Bid Contracts, the letting is also the process by which bids are opened and publicly read, and the apparent low bidders are announced for each contract. Design Bid Build Best Value bids are not publicly opened or read.

**Major Item.** Any contract pay item for which the original unit bid price multiplied by the original item quantity exceeds the following minimum major item value based on total contract bid price.

Total Contract Bid Price	Major Item Value
≤ \$1,333,333	\$20,000
> \$1,333,333 - \$66,500,000	1.5% of the total contract bid price
> \$66,500,000	\$1,000,000

NOTE: The total contract bid price shall not include the value of any Field Change Payment item. For contracts subject to A+B Bidding, the total contract bid price will include only the "A" portion of the bid. For contracts containing Incentive/Disincentive provisions, Lane Rental provisions, or any similar provisions, the total contract bid price will exclude any incentive/disincentive, lane rental, or similar items.

**Manual for Uniform Record Keeping on Construction Contracts (MURK).** Manual(s) containing uniform contract record keeping forms and procedures to be followed by the Engineer, current on the date of contract award. MURK Part 1A is the Contract Administration Manual (CAM), Part 1B is the Construction Inspection Manual (CIM), Part 1C is the Safety and Health Program Manual, and Part 2A is the Materials Inspection Manual (MIM). The MURK manuals are guidance documents, and are not a part of the contract documents.

**Manual for Assessing Safety Hardware (MASH).** Manual issued by the American Association of State Highway and Transportation Officials which presents uniform guidelines for crash testing permanent and temporary highway safety features and recommends evaluation criteria to assess test results.

**Manual of Uniform Traffic Control Devices (MUTCD).** Consists of the *Manual on Uniform Traffic Control Devices for Streets and Highways* approved by the FHWA and 17 NYCRR Chapter V, the *New York State Supplement to the National Manual on Uniform Traffic Control Devices for Streets and Highways*.

**Manufacturer.** A firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described by the specifications.

**Material.** Any approved material acceptable to the Commissioner and conforming to the requirements of the specifications.

**Material Supplier.** A firm, also known as a regular dealer, that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described in the specification required for the performance of the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. A Material Supplier is an established, regular business that engages in, as its principal business, and under its own name, the purchase and sale or lease of the products in question. Packagers, brokers, manufacturer's representatives or other persons who arrange or expedite transactions are not Material Suppliers. If the Material Supplier involves trades/occupations where prevailing wages are required to be paid, submittal of payrolls is required.

**Materials Bureau.** The Department's Materials Bureau has a responsibility in the quality assurance program for materials to be used on the contract and maintains a testing facility in Albany, New York.

**Materials Details.** That information, unique to a particular product, that is necessary to adequately identify it or to describe the proper handling, installation, or use of that product.

**Minor Item.** Any contract pay item that does not meet the definition of a Major Item.

**NCHRP 350.** National Cooperative Highway Research Program Report 350 *Recommended Procedures for the Safety Performance Evaluation of Highway Features*. NCHRP 350 presents procedures for the evaluation of roadside safety features and appurtenances, by vehicle crash testing or in-service evaluation.

**Near.** When used in reference to an underground facility, within 15 feet of the outside perimeter or diameter of an underground facility or its encasement.

**NYCRR.** Official Compilation of Codes, Rules and Regulations of the State of New York, written TT NYCRR PPP. TT refers to the Title, and PPP refers to the Part of the official compilation.

**Office.** Any of the Offices of the New York State Department of Transportation. Current Offices within the Engineering Division are Construction, Design, Environment, Project Management, Structures and Technical Services.

**One-Call Notification System.** Organization(s) whose purpose is to establish and carry out procedures to protect underground facilities from damage due to excavation and demolition, including receiving notices of intent to perform excavation and/or demolition and transmit the notices to the operators of underground facilities in the specified area.

**Order on Contract.** Written order issued by the Commissioner covering contingencies, extra work, deductions, increases or decreases and additions, alterations or omissions to the plans or specifications. An order-on-contract is referred to as a change order in these specifications.

**Owner/Operator.** A single individual who owns and operates a vehicle or other piece of equipment as an independent contractor and does not have any employees. An individual who rents or leases a vehicle



or other piece of equipment without a property interest is not an Owner/Operator. The Owner/Operator is responsible for all costs incurred in the ownership and operation of the vehicle/equipment including, but not limited to: licensing/registration, insurance, taxes, permits, repairs and fuel. Payments to the Owner/Operator are for both the vehicle/equipment and an operator, and may be made on a time, distance, load or other basis.

**Partial Payments.** Payments made to the Contractor in accordance with §109-04 *Partial Payments*, upon application, for materials provided prior to installation of such material in the permanent work.

**Payment Limit.** Defines the boundary beyond which no quantities will be measured for payment. Whenever payment limits are indicated, only the work which is actually directed and completed within these limits will be measured for payment.

**Payment Line.** Defines the line from which the work quantity will be measured. Whenever payment lines are indicated, quantities representing work completed will be measured from these lines only. No other lines or locations will be used to measure quantities.

**Plans.** The official contract drawings and applicable standard sheets, which show the location, character, dimensions and details of the work to be performed.

**Precast/Prestressed Concrete Construction Manual (PCCM).** The Precast/Prestressed Concrete Construction Manual published by the Office of Structures. The Precast/Prestressed Concrete Construction Manual is a mandatory supplement to the contract documents for contracts which include a wide variety of precast and prestressed concrete units.

**Professional Engineer.** A Professional Engineer licensed or otherwise authorized to practice engineering under Article 145 and registered or otherwise authorized under Article 130 of the New York State Education Law.

**Professional Service.** Specialized technical work provided to the Contractor for a fee or other basis not generally accounted for through labor, materials and equipment billing. Professional Services primarily provide technical expertise and produce deliverables such as reports, test results, evaluations, recommendations, data or information. If the Professional Service involves trades/occupations where prevailing wages are required to be paid, submittal of certified payrolls is required. Professional Services include, but are not limited to, professional engineering, professional surveying, construction inspection, environmental services, CPM scheduling, public outreach, digital photography and laboratory testing.

**Project.** The construction work to be performed under one or more construction contracts to complete an undertaking.

**Project Limits.** The limits in which the improvements associated with a specific project have been designed.

**Proposal.** The offer of the bidder for the work, when executed and submitted on the prescribed form.

**Proposal Form.** The approved form on which the Department requires formal bids to be prepared and submitted for the work.

**Reasonable Close Conformity.** Compliance with reasonable and customary manufacturing and construction tolerances where working tolerances are not specified. Where working tolerances are specified, reasonably close conformity means compliance with such tolerances. Without detracting from

the complete and absolute discretion of the Engineer to insist upon such tolerances, the Engineer may accept variations beyond such tolerances as reasonable close conformity where they will not materially affect the value or utility of the work and the interests of the State.

**Region.** One of eleven geographical subdivisions of the State used to designate or identify the location of the proposed work.

**Regional Director.** The Director, acting through the Commissioner, who is delegated the authority and responsibility to execute the total Department prescribed work plans for his/her respective region.

**Response Contract.** A contract with a significant amount of work for which the specific work and location is undefined or partially defined at time of letting. Response Contracts include Job Order Contracts, Requirements Contracts, Standby Where and When Contracts, and Statewide Emergency Bridge Contracts as identified in the Contract Proposal.

**Right of way or R.O.W.** A general term denoting land, property or interest therein, usually in a strip, acquired for or devoted to a highway.

**Roadbed.** The graded portions of a highway within top and side slopes, prepared as a foundation for the pavement structure and shoulders.

**Roadside.** A general term including: the area between the outside edge of shoulder and the right of way boundary; the median area between inside shoulders of divided highways; and areas within interchanges.

**Roadway.** The portion of a highway included between the outside edges of the shoulders.

**Road Section.** That portion of a highway included between the top of the slope in cut and the bottom of slope in fill.

**Safety Data Sheet.** A detailed informational document prepared by the manufacturer or importer of a hazardous chemical. The Safety Data Sheet follows a standard specification with a 16-section format as described in the Globally Harmonized System (GHS) of the Classification & labeling of Chemicals which established guidelines for ensuring the safe production, transport, use, & disposal of hazardous materials.

**Samples.** Physical examples of materials, equipment or workmanship submitted to the Engineer by the Contractor, or taken by the Engineer, in order to establish a standard which the Contractor is required to meet.

**Service.** A firm that provides an economic activity, such as professional, technical, consultant, or managerial service, or provides bonds or insurance specifically required for the performance of the contract.

**Shop Drawings.** Drawings, diagrams, illustrations, test data, performance charts, catalog cuts, brochures and other data prepared by the Contractor, Subcontractor, Manufacturer, Fabricator or Material Supplier for submission to the Department as an illustration of a portion of the work.

**Shoulder.** The portion of the roadway contiguous with the traveled way for accommodation of stopped vehicles, for emergency use, and for lateral support of base and surface courses.

**Site.** The specific area adjacent to and including the area upon which construction work is to be performed. Generally, such area may be considered as defined by the right of way or property made

available to the Contractor for construction operations.

**Special Notes.** Special directions, provisions, or requirements peculiar to the contract under consideration.

**Specifications.** The body of directions, requirements, etc., contained in this present volume, together with all special specifications and documents of any description and agreements made (or to be made), pertaining to the methods (or manner) of performing the work or to the quantities and quality as shown by the test records of accepted materials to be furnished under a contract. Within these specifications there are two formats for numbering. One is used for the specification sections and subsections portion and the other for contract pay items. (See definition - Contract Pay Item.) A specification section is written using the word Section xxx *Section Title* (e.g., Section 564 *Structural Steel*) and subsections are written with a subsection symbol, the core section number, a dash, another and may include a decimal (e.g., §107-05 *Safety and Health Requirements* or §608-3.03E.2.).

**Standard Sheets.** The standard drawings, issued by the Department, approved for repetitive use, showing details to be used where appropriate. The entire set of Standard Sheets is referenced and is part of the Contract Documents. The applicable version of the Standard Sheet set will be as shown in the Contract Proposal. Standard Sheets are available on the NYSDOT web site in Adobe Acrobat (pdf) format.

**State.** When used, means the State of New York, represented by the Department of Transportation through the Commissioner of Transportation.

**Steel Construction Manual (SCM).** The Steel Construction Manual published by the Office of Structures. The Steel Construction Manual is a mandatory supplement to the contract documents for contracts which include contract pay items which require the Contractor to furnish or rehabilitate structural metals.

**Structures.** Bridges, culverts, retaining walls, cribbing, manholes, drainage structures, end walls, buildings, sewers, service pipes, underdrains, foundation drains and other features which may be encountered in the work and not otherwise classed herein.

**Subcontractor.** Any individual, firm or corporation to whom the Contractor, with the written consent of the Department, sublets any part of the contract. A Subcontractor is approved by the Department in accordance with §108-05 *Subletting or Assigning the Contract* to perform on-site work specifically required for the performance of the contract. (Note: Other agencies may have a different definition.)

**Superintendent.** The Contractor's authorized English speaking representative responsible for and in charge of the Work. The Superintendent shall be authorized to receive all communications from the Engineer.

**Surety.** The corporate body bound with and for the Contractor, guaranteeing the full and complete performance of the contract, and for the payment of all debts pertaining to the work.

**Test.** Methods adopted by the Commissioner to ascertain the quality, character and acceptability of materials and processes utilized in performing the contract.

**Tolerance Zone.** When used in reference to an underground utility, the tolerance zone shall be a distance of 2 feet on either side of the designated centerline, plus one-half of the utility diameter, if the utility diameter is known.

## 102-01 LOCATION OF REGIONAL OFFICES.

**Traveled Way.** Portion of the roadway for the movement of vehicles, exclusive of the shoulders. Through traveled way is the portion of the roadway for the movement of vehicles, exclusive of shoulders and auxiliary lanes.

**Utility.** Person, corporation, municipality or public authority engaged in the distribution of electricity, gases, petroleum products, water, steam, the collection of wastewater, the operation of traffic control systems, or the provision of telecommunication service. For the purposes of these Specifications, the term Utility will apply to organizations that operate utilities owned by others.

**Work.** The furnishing of all labor, materials, equipment, and other incidentals necessary or convenient to the successful completion of the contract and the carrying out of all the duties and obligations imposed by the contract.

**Work Day.** A calendar day on which State offices are open to the public for business. State recognized public holidays are not Work Days.

Work  the describes execution Contract.	New York State Public Holidays		Order. A formal document created by Department that and approves work for on a Response
Work work, less than item,  other through	New Year's Day	January 1	Service. Specialized usually consisting of an entire contract pay provided to the Contractor for a fee or basis not accounted for labor, materials and equipment billing. If
	Martin Luther King, Jr. Day	3rd Monday in January	
	President's Day	3rd Monday in February	
	Memorial Day	Last Monday in May	
	Juneteenth	June 19	
	Independence Day	July 4	
	Labor Day	1st Monday in September	
	Columbus Day	2nd Monday in October	
	Veteran's Day	November 11	
	Thanksgiving Day	4th Thursday in November	
	Christmas Day	December 25	

the Work Service involves trades/occupations where prevailing wages are required to be paid, submittal of certified payrolls is required. A Work Service may include, but is not limited to: concrete pumping, vehicle towing, pest control, security, cleaning services, garbage removal, and crane lifting operations.

## SECTION 102 - BIDDING REQUIREMENTS AND CONDITIONS

(Last Revised May, 2025)

### 102-01 LOCATION OF REGIONAL OFFICES.

The Regional Offices and counties covered are located as follows:

Region Number	Including Counties:			Regional Office Address
1	Albany	Essex	Greene	50 Wolf Road
	Rensselaer	Saratoga	Schenectady	Albany, N.Y. 12232
	Warren	Washington		(518) 457-3522
2				207 Genesee Street
	Fulton	Hamilton	Herkimer	Utica, N.Y. 13501
	Madison	Montgomery	Oneida	(315) 793-2447

## 102-02 EXAMINING THE CONTRACT DOCUMENTS AND THE WORK SITE.

3	Cayuga Oswego	Cortland Seneca	Onondaga Tompkins	333 E. Washington St. Syracuse, N.Y. 13202 (315) 428-4351
4	Genesee Ontario Wayne	Livingston Orleans	Monroe Wyoming	1530 Jefferson Road Rochester, N.Y. 14623 (585) 272-3310
5	Cattaraugus Niagara	Chautauqua	Erie	100 Seneca Street Buffalo, N.Y. 14203 (716) 847-3238
6	Allegany Steuben	Chemung Yates	Schuyler	107 Broadway Street Hornell, N.Y. 14843 (607) 324-8404
7	Clinton Lewis	Franklin St. Lawrence	Jefferson	317 Washington Street Watertown, N.Y. 13601 (315) 785-2333
8	Columbia Putnam Westchester	Dutchess Rockland	Orange Ulster	4 Burnett Boulevard Poughkeepsie, N.Y. 12603 (845) 431-5750
9	Broome Otsego Tioga	Chenango Schoharie	Delaware Sullivan	44 Hawley Street Binghamton, N.Y. 13901 (607) 721-8116
10	Nassau	Suffolk		250 Veterans Memorial Highway Hauppauge, N.Y. 11788 (631) 952-6632
11	Bronx Richmond	Kings Queens	New York	1 Hunters Point Plaza 47-40 21st Street Long Island City, N.Y. 11101 (718) 482-4526

### 102-02 EXAMINING THE CONTRACT DOCUMENTS AND THE WORK SITE.

Information on construction contracting opportunities, including letting schedules, contract documents, detailed plans of the work, contract proposals, supplemental information available to bidders, amendments, and other information are available on the Construction Opportunities > Contract Documents page of the Department's Business Center web site at: [www.dot.ny.gov/business](http://www.dot.ny.gov/business) for free download. Standard sheets are available on the Engineering > CADD Info > Drawings page of the Department's Business Center web site at: [www.dot.ny.gov/business](http://www.dot.ny.gov/business) for free download.

The attention of persons intending to make proposals is specifically called to Article 3 *Examination of Documents and Site* of the contract agreement wherein the bidder agrees that it has examined the contract documents and the site of the work and has fully informed itself from personal examination of the same regarding the quantities, character, location and other conditions affecting the work to be performed including the existence of poles, wires, pipes, ducts, conduits, and other facilities and structures of municipal and other public service corporations on, over or under the site. Particular attention is called to contract plans and the contract proposal, which contains special notes and special specifications, which may contain contract requirements at variance with standard specifications and standard sheets and may include information concerning the existence of poles, wires, pipes, ducts, conduits, and other facilities and structures of municipal and other Utilities on, over or under the site.

## 102-03 OTHER CONTRACTS.

All inquiries prior to the receipt of bids regarding any discrepancy, error, or omission; or regarding the intent or meaning of the contract documents; shall be directed only through the website at: [www.dot.ny.gov/business](http://www.dot.ny.gov/business). Responses will be provided to Bidders through the website.

The Bidder agrees that its proposed contract prices include all costs arising from existing conditions shown, or specified in the contract documents including the Base Line Data, and/or readily observable from a site inspection during the bidding period available under this contract, and/or generally recognized as inherent in the nature of the work. The Bidder shall take no advantage of any apparent error or omission in the contract documents.

**A. Base Line Data.** The Department will make available relevant project specific information and engineering data that were used to develop the contract documents. The material will be listed as available on a form in the contract proposal entitled "Supplemental Information Available to Bidders". The supplemental information could include, for example, earthwork cross section sheets, various subsurface information, record plans, special reports and other pertinent project data. The information or data listed as available on the form can be accessed by the Contractor for inspection or reproduction at the Regional Office where the work is located. This material will be the Base Line Data and together with other contract documents will be used to determine changes to the work. Base Line Data will be consistently provided in all Department projects.

**B. Contract Document Components.** The following components of the contract documents, as amended, complement one another in the declining order of precedence listed below. The intent of the contract documents is to include all items/aspects of the work that are necessary for the proper initiation, execution, and completion of the work.

1. Contract Plans (or Project Details located in the Contract Proposal, if provided);
2. Contract Proposal - Special Notes;
3. Contract Proposal - Special Specifications;
4. Standard Specifications including all revisions thereto, identified in the Contract Proposal;
5. Standard Sheets;
6. Base Line Data;
7. Any portion of the Contract Proposal not addressed in this order of precedence;
8. The proposal submitted by the Contractor.

**C. Subsurface Information.** Boring logs and other subsurface information made available for the inspection of bidders were obtained with reasonable care and recorded in good faith by the Department. The subsurface information shown was obtained for State design and estimate purposes. It is made available to bidders so that they may have access to the same information available to the State. It is presented in good faith, but as with all subsurface information it represents only a small fraction of the total volume of material at the site.

The soil and rock descriptions shown are as determined by a visual inspection of the samples from the various explorations unless otherwise noted. The observed water levels and/or water conditions indicated thereon are as recorded at the time of the exploration. These levels and/or conditions may vary considerably, with time, according to the prevailing climate, rainfall and other factors. Interpolation between data points may not be indicative of the actual material to be encountered.

The locations of utilities or other underground man-made features were ascertained with reasonable care and recorded in good faith from various sources, including the records of municipal and other public service corporations, and therefore the location of known utilities may only be approximate. Subsurface utility quality level designations shown in the contract documents are defined in accordance with §107-07E. *Quality Level Designations*.

## 102-03 OTHER CONTRACTS.

The Department reserves the right to let other contracts in connection with this work. The Contractor

acknowledges that, from the contract documents, it has been informed of such other contracts in the work area, it has carefully reviewed the contract documents and all other pertinent information made available by the Department that relate to the nature and scheduling of these other contracts and will submit a progress schedule that takes into account the need to coordinate its work with other contractors. There may be other Utilities, contractors, or employees of the Department and its authorized representatives working at, or adjacent to, the work site during the term of the contract.

The Contractor may not have exclusive access to or occupancy of the territory within the contract limits. To the extent indicated in the contract documents, the Department may also require that certain facilities and areas be used concurrently by the Contractor and others. The Contractor shall anticipate that its work may be interrupted or delayed from time to time due to the concurrent activities of others.

#### **102-04 PROPOSAL CONTENT.**

Each proposal shall specify the correct gross sum, in the manner hereafter described for which the work will be performed according to the plans and specifications and any amendment to the specifications if the same are issued prior to the date of receipt of the proposal, together with a unit price for each of the specified separate items. The Bidder's attention is directed to the fact that it cannot exceed three (3) decimal positions in the cents column under unit bid price. No zero-dollar bids for any item will be allowed.

**A. Fixed Price Items.** Some of the contract pay items may be designated as Fixed Price Items, for which the unit prices are fixed, and published in the proposal. These contract pay items can be identified in the Itemized Proposal by the words, "Fixed Price: See Specification and §102-04" appearing beneath the description of the item, and preprinted entries in the "Unit Price" and "Bid Amount" columns. The bidder shall not change these entries. Should the amount shown be altered, the altered figures will be disregarded and the preprinted price and amount will be used to determine the total amount bid for the contract.

Fixed Price Items generally indicate the price that will be paid for certain work. These have been prepared taking into account the cost of all labor, materials, and equipment necessary to complete the work including an allowance for overhead and profit. Actual payments made under Fixed Price Items will be in accordance with the provisions of the specification for that item.

**B. Dollars-Cents Items.** Some of the contract pay items may be designated as Dollars-Cents Items, for which the unit prices are fixed at \$1.00. These contract pay items have preprinted entries in the "Est of Quantities", "Unit Price" and "Bid Amount" columns. The bidder shall not change these entries. Should the amount shown be altered, the altered figures will be disregarded and the preprinted price and amount will be used to determine the total amount bid for the contract.

Dollars-Cents Items generally indicate an estimate of payments, with actual payments to be based on actual costs. Actual payments made under Dollars-Cents Items will be based on the provisions of the specification for that item.

**C. Minimum/Maximum Bid Items.** Some of the contract pay items may be designated as Minimum Price Items or Maximum Price Items. These contract pay items can be identified in the Itemized Proposal by the words "Minimum Bid\_\_\_\_" or "Maximum Bid\_\_\_\_" appearing beneath the description of the item. The price bid for Minimum Price Items shall not be less than the minimum price published in the Itemized Proposal, but it may exceed that price. The price bid for Maximum Price Items shall be less than, or equal to, the maximum price published in the Itemized Proposal. If a bid is less than the Minimum Price, or more than the Maximum Price, published in the Itemized Proposal, the Department will substitute the appropriate minimum (or maximum) price and make the necessary adjustments to determine the total amount bid.

**D. A+B Bidding.** Some contracts may use A+B bidding. The contract proposal specifies the maximum number of consecutive calendar days for each stage or phase of work subject to A+B Bidding, referred to as B-portion work, in the Special Note entitled *Description of B-Portion Work*. The Bidder shall enter the number of consecutive calendar days bid for each phase or stage of work subject to A+B bidding individually in the space provided in the Itemized Proposal. If a Bid shows time for completion of B-portion work in excess of the maximum number of consecutive calendar days allowed, the Department will substitute the maximum time allowed and make the necessary adjustments to determine the total amount bid.

**E. Percentage Bid Items.** Some of the contract pay items may be designated as Percentage Items. These contract pay items will contain a number in the "Approximate Quantity and Units" column of the Itemized Proposal. This number represents the number of dollars correlating to a percentage bid of 100%. The "Bid Amount" will be determined by the product of the percentage bid under the "Unit Price", expressed as a decimal, multiplied by the quantity of dollars shown in the "Approximate Quantities and Units" column.

The Bidder shall enter a percentage bid in decimal form under the "Unit Price." For example, a bid of 10.5 percent would be entered under the "Unit Price" as 0.105. A bid of one hundred percent would be entered as 1.000. Percentage bid items may be bid only as whole percentages and tenths of percentages.

If a bid is expressed to hundredths of a percent (e.g., 10.65%), the Department will disregard the hundredths portion (i.e., the 0.05) and make the necessary adjustments to determine the total amount bid based on the expressed whole plus tenths percentage (e.g., 10.6% or 0.106).

## 102-05 PROPOSAL SUBMISSION.

The deadline for submitting a proposal is found in the published notice calling for proposals. Any proposal received after the time specified in the published notice, as modified by any Amendment, will not be accepted. Any proposal which does not contain prices opposite each of the items for which there is a quantity exhibited in the itemized proposal, or which shall in any manner fail to conform to the conditions of the published notice inviting proposals, may be deemed informal. All blank spaces in the proposal form shall be filled in as noted, and no change shall be made in the wording of the proposal or in the items mentioned therein. If the proposal is made by an individual, the individual's address shall be given. If the proposal is made by a corporation, the names and addresses of the president, secretary and treasurer shall be given. If the proposal is made by a partnership, the names and addresses of the partners shall be given.

Amendments will be provided via electronic means on the Department website. Persons or firms that obtain contract documents from sources other than the Department bear the sole responsibility for obtaining any Amendments issued by the Department.

Hard copy proposals submitted by the Bidder shall be prepared on the proposal form prepared by the Department for that individual contract, including all updates issued via amendment. Bidders shall use dark permanent ink in completing hard copies of the proposal form, and ensure the form is clear and legible. Proposals that are illegible or that contain any omission, erasures, non-permanent ink, alterations, additions, or items not called for in the itemized proposal or that contain irregularities of any kind, may be rejected as informal. The Bidder is encouraged to submit an electronic bid file with their paper bid, however, electronic bid files on disk will not be accepted without a paper bid. If there is any discrepancy between the paper bid and the electronic file, the paper bid will prevail. The Bidder shall sign in the space provided in the proposal form, with its signature. An officer of a corporation or a member of a partnership signing for the bidder shall place his or her signature and title after the word "By" under the name of the Contractor. The same procedure shall apply to the proposal of a joint venture by two or more bidders with each party of the joint venture submitting a separate signature page. If the signature is by an agent or attorney-in-fact for the joint venturers, then the proposal shall be accompanied by an authenticated copy of the evidence of its authority to act on behalf of all of the joint venturers.



## 102-06 BID DEPOSIT.

Proposals submitted via the Internet by the Bidder using Bid Express shall be prepared using the electronic file(s) prepared by the Department for that individual contract, including all updates issued via amendment. The Bidder shall submit and digitally sign the electronic bid. For joint ventures submitted electronically, an authenticated copy of the evidence of the authority of the agent or attorney-in-fact for the joint venturers to act on behalf of all of the joint venturers must be submitted to the Contract Management Bureau prior to the Letting.

If a Bidder submits both a electronic bid via the Internet using Bid Express and a paper bid, the Bid Express bid will rule, and the paper bid will be regarded as informal.

### **102-06 BID DEPOSIT.**

THE BIDDER MUST SUBMIT A BID SECURITY WITH EACH BID. Every proposal shall be accompanied by (1) a bid bond or (2) a certified check payable to the New York State Department of Transportation or (3) a bank cashier's check payable to the New York State Department of Transportation. If the Bidder elects to submit a bid bond, it shall be on the Department's Bid Bond Form (CONR 391, a sample of which is included in §102-15, *Sample Form of Bid Bond*) that already contains language representing 5% of the total bid. If the Bidder elects to submit a certified check or bank cashier's check for a bid deposit, it shall be 5% of the total bid. The retention and disposition of such bid bond or certified check or bank cashier's check by the Department shall be pursuant to and in conformity with §38(2) of the Highway Law, as amended.

### **102-07 MODIFICATION OR WITHDRAWAL OF PROPOSAL.**

Permission will not be given to modify or explain by e-mail, telephone, letter or otherwise, any proposal after it has been deposited with the Department.

Paper proposals may be withdrawn before the time designated for opening by submitting a request to the Director, Contract Management Bureau, on company letterhead and signed by an officer of the company who possesses appropriate binding contracting authority for such company. The Contractor shall be responsible to confirm such requests are received by the Department. Email requests for withdrawal of paper proposals must be followed up with the submission of the original document.

Electronic proposals may be withdrawn in their entirety before the time designated for opening via the Tools function in AASHTOWare Project Bids. No notification to the Department is necessary. No proposal shall be withdrawn after the time designated for opening such proposals publicly, except to exercise the option as provided herein. The Department will open and read proposals in the order determined by the Department and not in the order in which the projects are advertised. Any bidder or its duly authorized agent who is physically present at the letting and who has submitted proposals on more than one project of any one letting may, at its option and upon written request to an authorized Department representative at the letting, withdraw any or all of its additional proposals after the person who opens and reads the proposal has announced that such bidder has submitted the lowest proposal on a project for which proposals have last been read. When this option is exercised, the requested proposals to be withdrawn will be returned to the bidder unopened or, if the proposal was submitted electronically, the Department will delete the proposal(s) and the proposal will not be made public. No returned proposals can be resubmitted after the bidder has exercised its privilege to withdraw the same. Any bidder exercising the privilege of so withdrawing its proposal(s) waives all claims that may arise should it be found that its opened proposal is informal or for any other reason is unacceptable to the Department.

### **102-08 SAMPLE APPENDIX A - STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS.**

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licensor, licensee, lessor, lessee or any other party):

**1. EXECUTORY CLAUSE.** In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

**2. NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

**3. COMPTROLLER'S APPROVAL.** In accordance with Section 112 of the State Finance Law, if this contract exceeds \$50,000 (or \$75,000 for State University of New York or City University of New York contracts for goods, services, construction and printing, and \$150,000 for State University Health Care Facilities) or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$25,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services, either for itself or its customer agencies by the Office of General Services Business Services Center, is required when such contracts exceed \$85,000. Comptroller's approval of contracts established as centralized contracts through the Office of General Services is required when such contracts exceed \$125,000, and when a purchase order or other procurement transaction issued under such centralized contract exceeds \$200,000.

**4. WORKERS' COMPENSATION BENEFITS.** In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

**5. NON-DISCRIMINATION REQUIREMENTS.** To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment, nor subject any individual to harassment, because of age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status or because the individual has opposed any practices forbidden under the Human Rights Law or has filed a complaint, testified, or assisted in any proceeding under the Human Rights Law. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as

defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

**6. WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

**7. NON-COLLUSIVE BIDDING CERTIFICATION.** In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

**8. INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the Federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2 NYCRR 105.4).

**9. SET-OFF RIGHTS.** The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

**10. RECORDS.** The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

**11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.**

(a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

**12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.** In accordance with Section 312 of the Executive Law and 5 NYCRR 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following

shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) At the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) The Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State shall consider compliance by a Contractor or subcontractor with the requirements of any Federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such Federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

**13. CONFLICTING TERMS.** In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

**14. GOVERNING LAW.** This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

**15. LATE PAYMENT.** Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

**16. NO ARBITRATION.** Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

**17. SERVICE OF PROCESS.** In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

**18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS.** The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

**19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES (APPLICABLE ONLY IN NON-FEDERAL AID NEW YORK STATE CONTRACTS).** In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

**20. OMNIBUS PROCUREMENT ACT OF 1992 (APPLICABLE ONLY IN NON-FEDERAL AID NEW YORK STATE CONTRACTS).** It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority- and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development  
Division for Small Business and Technology Development  
625 Broadway  
Albany, New York 12245  
Telephone: 518-292-5100

A directory of certified minority- and women-owned business enterprises is available from:

NYS Department of Economic Development  
Division of Minority and Women's Business Development  
633 Third Avenue 33<sup>rd</sup> Floor  
New York, NY 10017  
646-846-7364

e-mail: [mwbebusinessdev@esd.ny.gov](mailto:mwbebusinessdev@esd.ny.gov)  
<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.aspsearchcertifiedhttps://ny.newnycontracts.com>

The Omnibus Procurement Act of 1992 (Chapter 844 of the Laws of 1992, codified in State Finance Law § 139-i and Public Authorities Law § 2879(3)(n)–(p)) requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than \$1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority- and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

**21. RECIPROCITY AND SANCTIONS PROVISIONS** Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively, codified in State Finance Law § 165(6) and Public Authorities Law § 2879(5)) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 2023, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii.

**22. COMPLIANCE WITH BREACH NOTIFICATION AND DATA SECURITY LAWS.** Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law §§899-aa and 899-bb and State Technology Law §208).

**23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW.** If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

**24. PROCUREMENT LOBBYING.** To the extent this agreement is a "procurement contract" as defined by State Finance Law §§139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law §§139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the

State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

**25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.**

To the extent this agreement is a contract as defined by Tax Law §5-a, if the contractor fails to make the certification required by Tax Law §5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law §5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

**26. IRAN DIVESTMENT ACT.** By entering into this Agreement, Contractor certifies in accordance with State Finance Law §165-a that it is not on the “Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012” (“Prohibited Entities List”) posted at: <https://ogs.ny.gov/list-entities-determined-be-non-responsive-biddersofferers-pursuant-nys-iran-divestment-act-2012><https://ogs.ny.gov/iran-divestment-act-2012>

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification at the time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the State.

During the term of the Contract, should the state agency receive information that a person (as defined in State Finance Law §165-a) is in violation of the above-referenced certifications, the state agency will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the state agency shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the Prohibited Entities list after contract award.

**27. ADMISSIBILITY OF REPRODUCTION OF CONTRACT.** Notwithstanding the best evidence rule or any other legal principle or rule of evidence to the contrary, the Contractor acknowledges and agrees that it waives any and all objections to the admissibility into evidence at any court proceeding or to the use at any examination before trial of an electronic reproduction of this contract, in the form approved by the State Comptroller, if such approval was required, regardless of whether the original of said contract is in existence.

**102-09 VACANT.**

**102-10 LABOR AND EMPLOYMENT.**

The provisions of NYS Labor Law, as amended, and referred to in §102-08 *Standard Clauses for New York State Contracts* shall be applicable. On Federal-Aid contracts, any provisions of NYS Labor



Law that are more restrictive than the mandatory Federal-Aid construction contract compliance requirements, including the Davis-Bacon Act, shall apply.

The Contractor shall directly employ those members of its own organization. Employee leasing and other similar arrangements under which workers are employed by another organization are not permitted.

No procedures or requirement shall be imposed by any state which will operate to discriminate against the employment of labor from any other state, possession or territory of the United States, in the construction of a Federal-Aid project. The selection of labor to be employed by the Contractor on any Federal-Aid project shall be of its choosing.

The Contractor shall not use convict labor unless performed by convicts who are on parole, supervised release, or probation for construction, maintenance or any other purpose at the site or within the contract limits from the time of contract award until contract final acceptance by the Department.

**A. Wages.** The Department will identify in the contract proposal whether the NYS Department of Labor (NYSDOL) has determined the work under the contract to be prevailing wage eligible, and if so, the Department will provide the Prevailing Rate Case (PRC) number. The PRC number is found on NYSDOL Form PW-200. The Contractor shall ensure that workers are paid the appropriate wages and supplemental (fringe) benefits. If the contract is prevailing wage eligible, all on-site work shall be paid prevailing wages. When both State and Federal prevailing wages apply, the Contractor shall pay the higher of the combination of the wages and supplemental (fringe) benefits.

The Contractor shall obtain periodic wage rate schedule updates from the NYSDOL. Wage rate amendments and supplements are available on the NYSDOL web site at <https://www.labor.ny.gov/workerprotection/publicwork/PWContents.shtm>. All changes or clarification of labor classification(s) and applicability of prevailing wage rates shall be obtained in writing from the Office of the Director, NYSDOL Bureau of Public Work. The Contractor shall include the cost of changes in prevailing wages and supplemental (fringe) benefits, over the contract duration, in the contract bid prices.

**B. Overtime Dispensation.** All bidders, in submitting their bids, should base their bids and work progression on the assumption that Overtime Dispensation pursuant to Article 8 of the New York State Labor Law, for any workers, laborers, and mechanics to work more than 8 hours in any one calendar day or more than 5 days in any one week will not be granted for any operation for the contract duration. Regardless of approval or disapproval of overtime by the NYSDOL, no adjustment will be made in any bid prices.

Subsequent to award, where the contract proposal has imposed specific scheduling and/or phasing requirements or where it is determined by the Department to be in the best interest of the public, the Department may process, for approval by the NYSDOL, requests for overtime dispensation on certain specific operations.

The Contractor shall submit requests for overtime dispensation to the Department on Form PW-30, Application for Dispensation for Hours, which will be provided by the Engineer upon request. The Department will review applications for overtime dispensation submitted by the Contractor associated with contracts subject to (A+B) Bidding, Incentive/Disincentive (I/D) or Lane Rental work favorably, but the application should not request more than 60 hours per week. The 60 hours per week may be either 6 - 10 hour days or 5 - 12 hour days. Overtime dispensations will be supported by the Department to advance Department goals and priorities, subject to specific circumstances and conditions associated with each contract.

The Department cannot guarantee that the NYSDOL will grant dispensation from restrictions pursuant to the provisions of Article 8 of the State Labor Law, however with the Department's certification, it is anticipated that they will act favorably, provided that the Contractor is in compliance with Labor Law requirements at the time of application.

**C. Payrolls.** The Contractor shall provide the Engineer with weekly certified payrolls from each firm engaged in work during the preceding weekly payroll period performed by prevailing wage eligible workers.

Certified payrolls shall contain for each employee, name, race, gender, home address, an individually identifying number (e.g. the last 4 digits of the employee's social security number), work class, hours worked, wage rate, supplemental (fringe) benefits paid or provided, payroll taxes, withholdings and actual wages paid. Certified payrolls shall not include full social security numbers of employees. Certified payrolls shall be submitted on Form HC-231-1 for all contracts. At the Contractor's option, other payroll formats which supply the required data and certifications may be used. Each certified payroll submitted shall be accompanied by a Statement of Compliance signed by the Contractor. If the firm does not maintain a place of business in New York State and the amount of the contract exceeds \$25,000, payroll records and certifications shall be kept on the worksite.

Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to NYSDOL or USDOL for purposes of an investigation or audit of compliance with prevailing wage requirements. Contractors may require subcontractors to provide addresses and social security numbers to the Contractor for its own records, without weekly submission to the Department.

**D. Training.** An apprentice is defined as an individual who is enrolled in an apprenticeship training program that is registered with the NYS Department of Labor. A list of approved programs is available from the NYS Department of Labor at

<https://www.labor.ny.gov/apprenticeship/appindex.shtm>

A trainee is defined as an individual who is enrolled in an On-the-Job Training (OJT) program that is approved by the Federal Highway Administration (FHWA).

A number of sources to obtain training for apprentices/trainees are available. These include:

- A NYSDOL approved apprenticeship program sponsored by a union or a temporary project level agreement with a union which has a NYSDOL approved apprenticeship program.
- A NYSDOL approved apprenticeship program sponsored by a contractor.
- A NYSDOL approved apprenticeship program sponsored by a contractor signatory with an apprenticeship sponsor consortium for certain services.
- An FHWA approved OJT program (where applicable).

Approved OJT Programs are currently limited to apprenticeable occupations as determined by NYSDOL or USDOL.

Training under Training Special Provisions, if required, will be shown in the contract documents. In order to fulfill training requirements required under Training Special Provisions and/or §102-11 *Equal Employment Opportunity Requirements*, training should begin as early as possible during a construction contract. The Department recommends that all bidders have an approved apprenticeship or OJT program prior to bidding.

The Contractor shall furnish the apprentice/trainee a copy of the program to be followed in providing the training. The Contractor shall provide each apprentice/trainee with a certification showing the type and length of training satisfactorily completed.

When training is required under Training Special Provisions and/or §102-11 *Equal Employment Opportunity Requirements*, the Contractor shall designate to the Engineer, at the preconstruction meeting, a person (or persons) from its existing workforce as the Trainer and Training Coordinator for any apprentice(s)/ trainee(s).

The Trainer shall:

1. Be located on the contract site generally on a daily basis; and
2. Be responsible for the day-to-day supervision and training of persons on the contract; and

## 102-11 EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENTS.

3. Be responsible for the preparation and submission of a monthly training progress report, after consultation with designated apprentices/trainees.

The Training Coordinator shall:

1. Be knowledgeable about the contract and the Apprenticeship/OJT programs to be used; and
2. Be responsible for ensuring on-the-job orientation of apprentice/trainees; and
3. Be responsible for ensuring meaningful and effective training for the duration of training.

### **102-11 EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENTS.**

The Department seeks to ensure nondiscrimination in employment under all Department contracts. The Contractor shall comply with the following Equal Employment Opportunity (EEO) requirements. *Goals for Equal Opportunity Employment Participation* are listed in the required contract provisions section of the contract proposal.

For Federal-Aid contracts, Equal Employment Opportunity provisions are also found on Form FHWA 1273 *Required Contract Provisions Federal-Aid Construction Contracts*, or Form FHWA 1316 *Required Contract Provisions Appalachian Development Highway System and Local Access Roads Construction Contracts*, one of which is incorporated in the required contract provisions section of the contract proposal.

Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

**A. Statutory Authority.** The Federal statutory authority for Equal Employment Opportunity provisions is contained in 23 U.S.C. 140, Title VII of the Civil Rights Act of 1964, Federal Aid Highway Act of 1968 and Executive Order 11246. State statutory authority is contained in Section 85 of the Highway Law, Section 428 of the Transportation Law, and NYS Executive Law Articles 15 and 15-A. Regulations have been promulgated under 23 CFR 200, 23 CFR 230, 41 CFR 60, 49 CFR 21, and 5 NYCRR 140-145.

#### **B. Definitions.**

**1.** For Federal-Aid contracts, a minority group member is defined under this subsection as someone who is, and can demonstrate membership in, one of the following groups:

- a. Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);
- b. Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);
- c. Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and
- d. American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

**2.** For non Federal-Aid contracts, a minority group member is defined under this subsection as a United States citizen or permanent resident alien who is, and can demonstrate membership in, one of the following groups:

## 102-11 EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENTS.

- a. Black persons having origins in any of the Black African racial groups;
- b. Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent of either Indian or Hispanic origin, regardless of race;
- c. Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent, or the Pacific Islands;
- d. Native American or Alaskan native persons having origins in any of the original peoples of North America.

**C. *Equal Opportunity Clause.*** The Contractor shall develop and implement an EEO policy in accordance with Form FHWA 1273 *Required Contract Provisions Federal-Aid Construction Contracts* for Federal-Aid contracts and in accordance with §102-08 *Standard Clauses for All New York State Contracts* for non Federal-Aid contracts.

**1. *Non-Discrimination.*** The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability. The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.

To the extent required by Article 15 of the Executive Law and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor shall not discriminate against any employee or applicant for employment because of military status, predisposing genetic characteristics, marital status, familial status, or domestic violence victim status; and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

Such actions shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Department setting forth the provisions of this non-discrimination clause.

**2. *Solicitations.*** The Contractor shall state in all solicitations or advertisements for employees placed by or on behalf of the Contractor, that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, military status, disability, predisposing genetic characteristics, marital status, or domestic violence victim status.

**3. *Compensation Information.*** The Contractor shall not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the Contractor's legal duty to furnish information.

**4. *Collective Bargaining Agreements.*** The Contractor shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representative of the Contractor's commitments to equal employment opportunities, under the Equal Opportunity Clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

**5. *Executive Order 11246.*** The Contractor shall comply with all provisions of Federal Executive Order 11246, and of the rules, regulations, and relevant orders of the U.S. Secretary of Labor.

**6. *Furnishing Information.*** The Contractor shall furnish all information and reports required by Executive Order 11246 and by rules, regulations, and orders of the U.S. Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the Department and the U.S. Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

**7. *Non-Compliance.*** In the event of the Contractor's non-compliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246, or by rule, regulation, or order of the U.S. Secretary of Labor, or as otherwise provided by law.

**8. *Subcontracts/Purchase Orders.*** The Contractor shall include the provisions of §102-11C *Equal Opportunity Clause* in every subcontract or purchase order, unless exempted by rules, regulations, or orders of the U.S. Secretary of Labor issued pursuant to section 204 of Executive Order 11246, so that such provisions will be binding upon each subcontractor or vendor. The Contractor shall take such action with respect to any subcontract or purchase order as may be directed by the U.S. Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: provided, however, that in the event a Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

**D. *Employment Goals.*** An employment goal(s) for minorities and a separate goal for women are presented in the contract documents. The Contractor shall provide equal employment opportunity and shall take affirmative action for all minority groups, both male and female; and women, both minority and non-minority. The covered area is the county or counties in which the work is located. The Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

The Contractor shall not use the goals or affirmative action standards to discriminate against any person because of race, color, religion, sex, sexual orientation, gender identity, national origin, age, military status, disability, predisposing genetic characteristics, marital status, or domestic violence victim status.

If the Contractor performs work outside of the covered area, it shall apply the goals established for the county where the work is actually performed. The Department will monitor the Contractor's attainments towards EEO goals in accordance with §105-21 *Civil Rights Monitoring and Reporting*.

The goals set for the contract are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each

construction trade in which it has employees in the covered area. The Contractor is expected to make substantially uniform progress in meeting its goals in each trade.

The hours of minority and female employment and training shall be substantially uniform throughout the length of the contract, and in each trade, and the Contractor shall make a good faith effort to employ minorities and women evenly on each of its contracts. The transfer of minority or female employees, apprentices, or trainees from contractor to contractor or from contract to contract for the sole purpose of meeting the Contractor's goals is a violation of the contract, the Executive Order and the regulations in 41 CFR 60-4. Compliance with the goals will be measured against the total work hours performed. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations.

The Contractor shall not enter into any subcontract with any person or firm debarred from government contracts pursuant to Executive Order 11246.

The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Contractor records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, classification (e.g., supervisor, journeyworker, apprentice, or trainee), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

The Contractor's compliance with the Executive Order and 41 CFR 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by these specifications and its efforts to meet the goals.

***E. Affirmative Action Steps.*** The Contractor shall take specific affirmative actions to promote equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its efforts to ensure equal employment opportunity. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

- 1.*** Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, shall assign two or more women to each construction contract. The Contractor shall specifically ensure that all forepersons, superintendents, and other onsite supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.
- 2.*** Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.
- 3.*** Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented

in the file with the reason therefore, along with whatever additional actions the Contractor may have taken.

**4.** Provide immediate written notification to the Department when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

**5.** Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by either the NYS Department of Labor or the US Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under E.2. above.

**6.** Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

**7.** Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as superintendents, forepersons, etc., prior to the initiation of construction work at any contract site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

**8.** Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other contractors and Subcontractors with whom the Contractor does or anticipates doing business.

**9.** Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

**10.** Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of the Contractor's work force.

**11.** Validate all tests and other selection requirements in accordance with state and Federal laws, rules and regulations.

**12.** Conduct, at least annually, an inventory and evaluation of all minority and female personnel for promotional opportunities. Encourage these employees to seek or to prepare for promotional opportunities through appropriate training, etc.

**13.** Ensure that seniority practices, labor classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

**14.** Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

**15.** Document and maintain a record of all solicitations of offers for Subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

**16.** Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

**F. Complaints of Alleged Discrimination.** The Contractor shall promptly investigate all complaints of alleged discrimination made to the Contractor in connection with its obligations under this contract, shall attempt to resolve such complaints, and shall take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, corrective action shall include such other persons. Upon completion of each investigation, the Contractor shall inform every complainant of all available avenues of appeal.

**G. Associations.** Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations. The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the Contractor is a member and participant, may be asserted as fulfilling one or more of its obligations, provided that the Contractor actively participates in the group, makes every effort to ensure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

**H. Hometown Plans (Federal-Aid Contracts Only).** If a Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the USDOL in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors participating in Hometown Plans shall be able to demonstrate their participation and document their compliance with the provision of the Hometown Plan. Each Contractor participating in an approved plan is individually required to comply with its obligation under the EEO clause and to make a good faith effort to achieve each goal under the plan in each trade in which it has employees. The overall good faith performance by other Contractors toward a goal in an approved plan does not excuse any covered Contractor's failure to take good faith efforts to achieve the Plan goals and timetables.



**102-12 DBE/MBE/WBE/SDVOB PARTICIPATION.**

DBE/MBE/WBE/SDVOB is a general term that refers to a Disadvantaged Business Enterprise (DBE), a Minority Business Enterprise (MBE), a Women's Business Enterprise (WBE), or a Service-Disabled Veteran-Owned Business (SDVOB). The DBE program applies to Federal-Aid contracts and the MBE/WBE (M/WBE) and SDVOB programs apply to Non-Federal-Aid contracts. The Department seeks to:

- Ensure nondiscrimination in award and administration of Department contracts;
- Create a level playing field on which DBE/MBE/WBE/SDVOBs can fairly compete for Department contracts;
- Ensure that the Department's DBE/MBE/WBE/SDVOB Program is narrowly tailored in accordance with applicable laws;
- Ensure that only firms that fully meet DBE/MBE/WBE/SDVOB eligibility standards are permitted to participate as DBE/MBE/WBE/SDVOBs;
- Help remove barriers to the participation of DBE/MBE/WBE/SDVOBs in the performance of Department contracts; and
- Assist in the development of firms that can compete successfully in the marketplace outside the DBE/MBE/WBE/SDVOB programs.

The parties to this contract shall take all necessary and reasonable steps in accordance with the laws, rules and regulations cited in this subsection to promote the objectives outlined above. The Contractor shall comply with the applicable laws, rules and regulations and the DBE/MBE/WBE/SDVOB Program Assurances stated below.

**DBE/MBE/WBE/SDVOB Program Assurances.**

The Contractor or Subcontractor shall not discriminate on the basis of race, color, national origin, sex, sexual orientation, or gender identity in the award and performance of Department contracts. The Contractor shall carry out the applicable requirements of 49 CFR 26 in the award and administration of Federal-Aid contracts. The Contractor shall carry out the applicable requirements of Article 15-A of the New York State Executive Law, Article 3 of the Veteran Services Law, and the regulations promulgated under 5 NYCRR 140-145 and 9 NYCRR 252.2 in the award and administration of Non-Federal-Aid contracts. Failure by the Contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Department deems appropriate, which may include, but is not limited to: (1) withholding contract payments; (2) assessing sanctions; (3) liquidated damages; and/or (4) finding the Contractor a non-responsible bidder. The Contractor shall not use the requirements of these specifications to discriminate against any qualified company or group of companies. These requirements shall be made a part of all subcontracts and agreements entered into as a result of this contract.

**A. Statutory Authority.**

**1. Disadvantaged Business Enterprise (DBE) Program.** The Federal statutory authority for the DBE Program is contained in the Intermodal Surface Transportation Efficiency Act of 1991 (Public Law 102-240); the Transportation Equity Act of the 21st Century (TEA-21), (Public Law 105-178); the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), (Public Law 109-59); the Moving Ahead for Progress in the 21st Century Act (MAP-21), (Public Law 112-141); and the Fixing America's Surface Transportation (FAST) Act (Public Law 114-94). New York State has enacted Section 85 of the Highway Law and Section 428 of the Transportation Law. Regulations have been promulgated under 49 CFR 21, 49 CFR 26 and 17 NYCRR §35.

**2. *Minority/Women's Business Enterprise (M/WBE) Program.*** The State's statutory authority to effectuate the M/WBE requirements are set forth in Section 428 of the Transportation Law and Executive Law Article 15-A and regulations promulgated at 5 NYCRR §140-145.

**3. *Service-Disabled Veteran-Owned Business (SDVOB) Program.*** The State's statutory authority to effectuate the SDVOB requirements are set forth in Article 3 of the Veteran Services Law and regulations promulgated at 9 NYCRR §252.2.

**B. *DBE/MBE/WBE/SDVOB Goal(s).*** Federal-aid contracts have a single DBE goal. Non-Federal-Aid contracts have three separate and distinct goals, one for MBEs, one for WBEs, and one for SDVOBs which cannot be combined. The Department will monitor the Contractor's commitments towards DBE/MBE/WBE/SDVOB goals and attainments in accordance with §105-21 *Civil Rights Monitoring and Reporting*.

**1. *Established Goal(s).*** Contract participation goal(s) for DBE/MBE/WBE/SDVOBs are expressed as a percentage of the total contract bid price. The goal(s) are stated in the Contract Proposal and remain in effect throughout the life of the contract. In executing the contract or bid documents the Bidder declares that it subscribes to the participation goal(s) and shall meet the goal(s) or demonstrate that it could not meet them despite its best efforts. Failure to provide commitments to meet the established goal(s) for the contract or failure to meet the good faith efforts may be grounds for rejection of the bid as non-responsive.

**2. *Zero Percent Goal(s).*** If a zero goal for participation by DBE/MBE/WBE/SDVOBs is established, the Contractor shall promote the objectives of the DBE/MBE/WBE/SDVOB Programs by providing opportunities for DBE/MBE/WBE/SDVOBs to participate in these areas, with such participation to be credited towards the race-neutral component of the Department's DBE/MBE/WBE/SDVOB Programs.

**C. *Eligibility.*** DBEs are eligible to be used to meet the goal on Federal-Aid contracts. MBEs, WBEs, and SDVOBs are eligible to be used to meet the goal on Non-Federal-Aid contracts. The programs are separate, and eligibility in one program does not provide eligibility in the other.

**1. *DBE Eligibility.*** Only those DBE firms that are certified under the New York State Unified Certification Program are eligible under the DBE Program. Only the work, services or products provided by DBE Firms under NAICS code(s) which the DBE is certified for, at the time the DBE enters into a contract with the Contractor, can be credited towards the contract goal. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. DBE certification is not an endorsement of the quality or performance of the business but simply an acknowledgment of the firm's status as a DBE. A directory of certified firms is available on the NYS Unified Certification Program website at <https://nysucp.newnycontracts.com>.

**2. *M/WBE Eligibility.*** Only those M/WBE firms that are certified by the NYS Department of Economic Development are eligible under the M/WBE Program. Only the work, services or products provided by M/WBE firms under code(s) which the M/WBE is certified for, at the time the M/WBE enters into a contract with the Contractor, can be credited towards the contract goal. M/WBE certification is not an endorsement of the quality or performance of the business but simply an acknowledgment of the firm's status as an M/WBE. A directory of certified firms is available on the Empire State Development website at <https://ny.newnycontracts.com/FrontEnd/ VendorSearchPublic.asp> and <https://ny.newnycontracts.com/FrontEnd/searchcertifieddirectory.asp>.

**3. SDVOB Eligibility.** Only those SDVOB firms that are certified by the NYS Office of General Services' Division of Service-Disabled Veteran's Business Development are eligible under the SDVOB Program. Only the work, services or products provided by SDVOB Firms under the directory code(s) which the SDVOB is certified for, at the time the SDVOB enters into a contract with the Contractor, can be credited towards the contract goal. SDVOB certification is not an endorsement of the quality or performance of the business but simply an acknowledgment of the firm's status as an SDVOB. A directory of certified firms is available on the NYS Office of General Services website at <https://ogs.ny.gov/veterans/> <https://sdves.ogs.ny.gov/business-search>.

**D. Counting DBE/MBE/WBE/SDVOB Participation Towards the DBE/MBE/WBE/SDVOB Goal(s).** The value of the work performed by a DBE/MBE/WBE/SDVOB, including that of a DBE/MBE/WBE/SDVOB Prime Contractor, with its own equipment, with its own forces, and under its own supervision will be counted toward the goal(s), provided the participation is a commercially useful function. A DBE/MBE/WBE/SDVOB Prime Contractor shall still provide opportunities for participation by other DBE/MBE/WBE/SDVOBs in all types of contracts and procurement activities. Work performed by DBE/MBE/WBE/SDVOBs on the contract will be counted as set forth below. If the Department determines that some or all of a DBE/MBE/WBE/SDVOB's work does not constitute a commercially useful function in accordance with §102-12E. *Commercially Useful Function*, only the portion of the work considered to be a commercially useful function will be credited toward the goal(s).

The participation of a firm that is certified as an MBE cannot be counted toward a WBE goal, and the participation of a firm that is certified as a WBE cannot be counted toward an MBE goal. The participation of a firm that is certified as both an MBE and a WBE will only be counted toward one goal for each contract pay item performed by the firm in its entirety and cannot be divided between the two goals. The participation of a firm that maintains more than one certification may only be counted toward one goal (i.e., MBE, WBE, or SDVOB) for each contract pay item in the contract. A joint venture between a DBE/MBE/WBE/SDVOB and a non-DBE/MBE/WBE/SDVOB is allowed however only work performed independently by the DBE/MBE/WBE/SDVOB, not the Joint Venture, will be counted toward the DBE/MBE/WBE/SDVOB goal(s) based on the total dollar value of the clearly defined portion of the work that the DBE/MBE/WBE/SDVOB performs with its own forces. The joint venture agreement is subject to approval by the Department, a copy of which is to be furnished by the Contractor before execution of the contract. For purposes of Commercially Useful Function (CUF) review, the DBE/MBE/WBE/SDVOB must comply with the provisions of §102-12E. *Commercially Useful Function*.

The Bidder is responsible to verify the information provided by the DBE/MBE/WBE/SDVOB and ensure that the counting of the DBE/MBE/WBE/SDVOB's participation is accurate. Any shortfall caused by errors in counting are the responsibility of the Bidder.

**1. Subcontractors.** A Subcontractor is any individual, firm, or corporation to whom the Contractor, with written consent of the Department, sublets any part of the contract. A Subcontractor is approved by the Department in accordance with §108-05 *Subletting or Assigning the Contract* to perform on-site work specifically required for the performance of the contract.

100% of the value of the work performed by a DBE/MBE/WBE/SDVOB Subcontractor will be counted toward the DBE/MBE/WBE/SDVOB goal(s), including the cost of materials and supplies purchased by the DBE/MBE/WBE/SDVOB, except the cost of supplies or equipment rented or leased from the Contractor or its affiliates will not be counted.

If a DBE/MBE/WBE/SDVOB Subcontractor is part of a joint venture, their participation will be counted as indicated above in §102-12D. *Counting DBE/MBE/WBE/SDVOB Participation Towards the DBE/MBE/WBE/SDVOB Goal(s)*.

**2. *Manufacturers/Fabricators.*** A Manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described by the specifications. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications.

A Fabricator is a firm that assembles, constructs or otherwise substantially alters materials or supplies into assemblies, components, or finished items for inclusion into the work prior to resale.

100% of the cost of the materials or supplies from a DBE/MBE/WBE/SDVOB Manufacturer or Fabricator will be counted toward the DBE/MBE/WBE/SDVOB goal(s). Manufacturers or Fabricators may provide materials to the Contractor or a Subcontractor working on the contract for installation. When a DBE/MBE/WBE/SDVOB makes minor modifications to the materials, supplies, articles, or equipment, the DBE/MBE/WBE/SDVOB is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.

**3. *Material Suppliers.*** A Material Supplier, also known as a regular dealer, is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described in the specifications required for the performance of the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. A Material Supplier is an established, regular business that engages in, as its principal business, and under its own name, the purchase and sale or lease of the products in question.

A DBE supplier performs a commercially useful function as a regular dealer and receives credit for 60 percent of the cost of materials or supplies (including transportation cost) when all, or at least 51 percent of, the items under a purchase order or subcontract are provided from the DBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE's inventory.

60% of the cost of the materials or supplies from a M/WBE Material Supplier will be counted toward the M/WBE goal(s). 100% of the cost of the materials or supplies from an SDVOB Material Supplier will be counted toward the SDVOB goal. Equipment rental or equipment leasing is considered to be a type of material supply activity and is credited at 60% for DBE/MBE/WBEs and 100% for SDVOBs. Material Suppliers may provide materials to the Contractor or a Subcontractor working on the contract for installation. Credit determination awarded to a firm for the provision of materials and supplies (i.e., whether the firm is acting as a material supplier or broker) will be determined on a contract-by-contract basis. If it is determined that the material supplier is acting as a broker, the participation will be credited accordingly.

A Material Supplier who deals in bulk items such as petroleum products, steel, cement, gravel, stone, or asphalt, and items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or items ordered to specification), need not own, operate nor maintain a store, warehouse, or other establishment, if it owns and operates distribution equipment for the products. This can be accomplished by either maintaining stock of the product or through delivery of the materials, to the job site or Contractor's designated location, by using the Material Supplier's own trucks. Any supplementing of Material Suppliers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. To be considered valid, the long-term lease shall include the lessor's name, list of trucks to be leased by vehicle identification number (VIN), and the agreed upon amount of the cost and method of payment. Third party haulers do not qualify as a long-term lease. The operator shall be an employee of the DBE/MBE/WBE/SDVOB. It shall be the responsibility of the DBE/MBE/WBE/SDVOB to provide the operator's fuel, maintenance and insurance for all leased trucks.

Some bulk items may be drop-shipped due to the specific needs in a contract and the MBE/WBE/SDVOB must take legal possession of the items in the chain of distribution at all times after acceptance of the item. However, the MBE/WBE/SDVOB will receive credit as a Broker not as a Material Supplier (See §102-12D.4 *Brokers/Manufacturer's Representatives*).

**4. Distributor (Federal-Aid Contracts Only).** A DBE Distributer is an established business that engages in the regular sale or lease of the items specified by the contract. A DBE Distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g., a Manufacturer's facility), making it liable for loss or damage not covered by the carrier's insurance.

If the materials or supplies are purchased from a DBE Distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, 40% of the cost of materials or supplies (including transportation costs) will be credited.

A DBE Distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE Distributor. Where a Distributor "drop ships" materials without assuming risk or does not operate in accordance with its distributorship agreement, credit is limited to fees or commissions.

**5. Brokers/Manufacturer's Representatives.** A Broker / Manufacturer's Representative is a firm that arranges or expedites transactions for materials.

100% of the expenditures for fees or commissions charged for assistance in the procurement of, or fees for transportation charges for the delivery of, materials or supplies provided by a DBE/MBE/WBE/SDVOB Broker/Manufacturer's Representative will be counted toward the DBE/MBE/WBE/SDVOB goal(s), provided they are determined by the Department to be reasonable and not excessive as compared with fees customarily allowed for similar services. The cost of the materials and supplies themselves will not be counted. A Broker / Manufacturer's Representative may arrange or expedite transactions for materials to the Contractor or Subcontractor working on the contract.

**6. Services.** A Service is a firm that provides an economic benefit, such as professional, technical, consultant, or managerial service, or provides bonds or insurance specifically required for the performance of the contract.

100% of the expenditure for fees charged by a DBE/MBE/WBE/SDVOB Service will be counted toward the DBE/MBE/WBE/SDVOB goal(s), provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

**7. Trucking Firms.** A DBE/MBE/WBE/SDVOB trucking firm shall own and operate at least one fully licensed, insured, and operational truck used on the contract and shall be responsible for the management and supervision of the trucking operation, and the arrangement cannot be contrived solely for the purpose of meeting the DBE/MBE/WBE/SDVOB goal(s). The DBE/MBE/WBE/SDVOB trucking firm shall control the day-to-day DBE/MBE/WBE/SDVOB trucking operations and shall be responsible for: (1) Negotiating and executing rental/leasing agreements; (2) Controlling the work force; (3) Coordinating the daily trucking needs with the Contractor or Subcontractor; and (4) Scheduling and dispatching trucks.

100% of the value of the trucking operations the DBE/MBE/WBE/SDVOB provides on the contract using trucks it owns or leases on a long-term basis that are registered, insured, and operated by the DBE/MBE/WBE/SDVOB using drivers it employs, will be counted toward the DBE/MBE/WBE/SDVOB goal(s). A lease shall indicate that the DBE/MBE/WBE/SDVOB has exclusive use of and control over the truck. This does not preclude the leased truck from working

for others during the term of the lease with the consent of the DBE/MBE/WBE/SDVOB, so long as the lease gives the DBE/MBE/WBE/SDVOB absolute priority for use of the leased truck. Leased trucks shall display the name and identification number of the DBE/MBE/WBE/SDVOB.

**E. Commercially Useful Function.** A DBE/MBE/WBE/SDVOB's participation will only be counted toward meeting the DBE/MBE/WBE/SDVOB contract goal(s), when it performs a commercially useful function. In order to be considered as performing a commercially useful function, a DBE/MBE/WBE/SDVOB shall be responsible for the execution of a distinct element of work on the contract and carry out its responsibilities by actually performing, managing, and supervising the work involved in accordance with normal industry practice. This applies to all work performed by a DBE/MBE/WBE/SDVOB including Subcontractors, Manufacturers/Fabricators, Material Suppliers, DBE Distributors, Brokers/Manufacturer's Representatives, Services and Trucking Firms regardless of whether the DBE/MBE/WBE/SDVOB's participation is intended to count towards the goals(s). With respect to supplying materials to be used on the contract, the DBE/MBE/WBE/SDVOB shall assume the responsibility for negotiating price, determining quality and quantity, ordering the material, and paying for the materials.

Regardless of whether an arrangement between the Contractor and the DBE/MBE/WBE/SDVOB represent standard industry practice, if the arrangement erodes the ownership, control or independence of the DBE/MBE/WBE/SDVOB or in any other way does not meet the commercially useful function requirement, the Contractor will receive no credit toward the goal(s). If the reduction in credit results in the DBE/MBE/WBE/SDVOB participation to fall below the Contractor's commitment, the Contractor shall make every effort to find another DBE/MBE/WBE/SDVOB to make up the shortfall to meet their commitments, in accordance with §102-12H. *Good Faith Efforts.*

A DBE/MBE/WBE/SDVOB does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction or contract through which funds are passed in order to obtain the appearance of DBE/MBE/WBE/SDVOB participation. The arrangement cannot be contrived solely for the purpose of meeting the DBE/MBE/WBE/SDVOB goal(s). The Contractor shall not seek credit toward the goal(s) through any arrangements or actions of others where the Contractor knows, or should have known, based upon the evidence and circumstances present, that a DBE/MBE/WBE/SDVOB is not performing a commercially useful function.

**1. Work Force.** The DBE/MBE/WBE/SDVOB shall employ its own work force, (including administrative and clerical) separate and apart from that employed by the Contractor, other Subcontractors on the contract, or their affiliates. The DBE/MBE/WBE/SDVOB must use its workforce to perform or exercise responsibility for its portion of the contract. This does not preclude the employment by the DBE/MBE/WBE/SDVOB of an individual that has been previously employed by another firm involved in the contract, provided that the DBE/MBE/WBE/SDVOB can demonstrate it maintains an employer-employee relationship with the employee by being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employee. The routine transfer of work crews from another employer to the DBE/MBE/WBE/SDVOB will not be allowed.

**2. Supervision.** All work performed by the DBE/MBE/WBE/SDVOB shall be controlled and supervised by the DBE/MBE/WBE/SDVOB without duplication of supervisory personnel from the Contractor, other Subcontractors on the contract, or their affiliates. This does not preclude routine communication between the supervisory personnel of the DBE/MBE/WBE/SDVOB and other supervisors necessary to coordinate the contract work.

**3. *Materials.*** DBE/MBE/WBE/SDVOBs shall negotiate price, determine quality and quantity, order, install (where applicable) and pay for the material(s) required to perform the work when material supply is included in their scope of work.

**4. *Equipment.*** DBE/MBE/WBE/SDVOBs may supplement their equipment by renting or leasing additional equipment in accordance with customary industry practice, provided the equipment is not rented/leased from the Prime Contractor or its affiliate, except as noted below. Before supplementing their equipment, the DBE/MBE/WBE/SDVOB must first own and operate at least one operational business-critical piece of equipment capable of independently providing a service under the contract. There may be rare instances in which a DBE/MBE/WBE/SDVOB may use a Prime Contractor's equipment, supplies, etc. to a limited degree (e.g., the DBE/MBE/WBE/SDVOBs backhoe breaks down and the DBE/MBE/WBE/SDVOB uses the Prime Contractor's backhoe for the rest of the day; use of a crane; etc.). Such limited use must be approved by the Department. Consequently, if a charge for the use of a Prime Contractor's equipment (distinct from the DBE/MBE/WBE/SDVOB's labor in operating the equipment) is part of the cost of the DBE/MBE/WBE/SDVOB's contract, it would be subtracted from the DBE/MBE/WBE/SDVOB credit allowed for the contract. Should back charges result in DBE/MBE/WBE/SDVOB participation falling below the goal(s), the Contractor shall be required to backfill.

**F. *Submission of Proposals.*** (Applicable only to Federal-Aid contracts). In submitting a proposal, a Bidder declares that it shall make commitments to those qualified DBEs whose participation the Bidder submits to meet the contract goal(s).

All Bidders shall submit a complete DBE Participation Package with their bid proposal. The DBE Participation Package shall include a summary of the confirmed DBE commitments (i.e., electronic entry in Project Bids or AAP 14 for paper bids); DBE confirmation on Department provided forms (i.e., AAP 20, AAP 22, and AAP23) for each DBE firm for the type and amount of work shown in the summary of commitments; and sufficient good faith effort documentation (if required). Confirmed DBE commitments are commitments where the proposed DBE participation is firm, the work is clearly defined, the correct NAICS codes have been identified, the DBE firm is certified to perform the work, and the proposed commitments have been verified by the DBE firm. The Bidder's summary of commitments shall include DBE name, DBE address, work category, and commitment amount.

In addition, per 49 CFR 26.11, all Bidders shall submit with their bid proposal a Bidder's List (i.e., CONR 80 Bidder's List) which contains information for all Subcontractors, both DBEs and non-DBEs, who provided quotes on the contract. The Bidder's List shall include the Subcontractor's name and work code applicable to each scope of work the Subcontractor sought to perform in its quote. Failure to submit the required Bidders List information may result in rejection of the bid.

**G. *DBE/MBE/WBE/SDVOB Participation Package.***

**1. *DBE Participation Package.*** For Federal-Aid contracts, all Bidders shall submit a complete DBE Participation Package to the Department with their proposal. The DBE Participation Package shall include confirmed DBE commitments; DBE confirmation, on Department provided forms (i.e., AAP 20, AAP 22, and AAP23), for each DBE firm for the kind and amount of work shown in the Bidder's commitments; and good faith effort documentation (if required). No additions, substitutions or deductions to the DBE commitments identified at time of letting will be considered as part of the DBE Participation Package.

A commitment to a DBE is expressed as a dollar amount agreed to by both the Bidder and the DBE for the performance of identified work, services or products. Commitments are for quantities of contract pay items, or associated to contract pay items for work, services or products

that are not measured in the same manner as the contract pay item. Commitments for less than the full scope of the contract pay item shall be indicated as such in the DBE Participation Package.

For each DBE Subcontractor, the Bidder shall indicate, in the DBE confirmation form (i.e., AAP 20 *DBE Subcontractor / Work Service / Professional Service Commitments / Confirmation*), the contract pay item number(s) of the work to be performed.

For each DBE Manufacturer, Fabricator, Material Supplier (including equipment rental without operator), Distributor, or Broker, the Bidder shall be responsible for the collection, review and submission of a fully executed DBE confirmation form (i.e., AAP 22 *DBE/MBE/WBE/SDVOB Material Commitments / Confirmation*) affirming that the responses received in the questionnaire, by its proposed DBE, indicate the performance of a commercially useful function, will be consistent with the preliminary counting of such participation toward the contract goal. A separate AAP 22 must be submitted for each separate and distinct contract pay item number(s) of the materials, supplies, articles, or equipment to be manufactured, fabricated, supplied, or otherwise provided. If the material, supplies, articles, equipment or service does not correspond to a specific contract pay item, the Bidder shall use a contract pay item(s) to which the activity relates.

For each DBE Service, the Bidder shall indicate, in the DBE confirmation form (i.e., AAP 20 *DBE Subcontractor / Work Service / Professional Service Commitments / Confirmation*), the contract pay item number(s) of the service to be provided. If the Service does not correspond to a specific Department contract pay item, the Bidder shall use a contract pay item(s) to which the activity relates.

For each DBE Trucking Firm, the Bidder shall indicate, in the DBE confirmation form (i.e., AAP 23 *DBE/MBE/WBE/SDVOB Trucking Commitments / Confirmation*), the contract pay item number(s) for which the trucking operations are to be performed. If the trucking operation does not correspond to a specific contract pay item, the Bidder shall use a contract pay item(s) to which the activity relates. The Bidder shall indicate the type of trucking operation to be performed, the number of trucks owned/leased, the number of trucks working on-site or off-site, rate per hour/ton/load/etc., duration or amount, and total dollar value of the proposed DBE commitment. The Bidder shall provide copies of all lease agreements utilized by the DBE Trucking Firm.

If the Bidder meets or exceeds the established DBE goal(s) for the contract with commitments to certified DBEs, it is not necessary for the Bidder to submit documentation of good faith efforts. However, if after review by the Department, a Bidder's commitments fall below goal, no additional time will be given to submit good faith efforts.

If the contract goal(s) is not met in full, then the Bidder shall provide documentation of its good faith efforts with their proposal, in accordance with §102-12H. *Good Faith Efforts* that demonstrate that the Bidder attempted but could not meet the goal(s).

If the Low Bidder fails to submit a complete DBE Participation Package (i.e., DBE commitments, DBE confirmation, and/or GFE) at time of letting they may be deemed non-responsive by the Department.

For tracking and oversight purposes, after the Low Bidder's commitments and/or good faith efforts have been accepted by the Department, the Low Bidder will be notified by email to input their DBE Participation Package, as submitted with their proposal, in EBO within 5 calendar days. On Design Bid Build Best Value contracts, notification will be sent upon designation. For those items of work where a DBE Subcontractor is performing less than 100% of a contract pay item, the Bidder shall explain, in writing, the scope of work to be performed by the DBE and shall indicate those items as such in EBO (i.e., split item).

Once the Low Bidder has completed all entries in EBO, they shall notify the Construction Pre-Award Unit at [construction.civilrights@dot.ny.gov](mailto:construction.civilrights@dot.ny.gov). Once the Low Bidder has received notification by the Department that their entries have been accepted, each DBE shall acknowledge the commitment in EBO within 10 calendar days.



The Contractor shall execute subcontracts, agreements, or purchase orders, as appropriate, with each DBE for the type and amount of work identified in the approved AAP19 *DBE/MBE/WBE/SDVOB Schedule of Participation*, no later than 10 days after contract award.

**2. MBE/WBE/SDVOB Participation Package.** For Non-Federal-Aid contracts, within 10 calendar days, the Low Bidder shall submit a complete MBE/WBE/SDVOB Participation Package, as outlined below, to the Office of Construction using the Department approved civil rights reporting software, Equitable Business Opportunity Solution (EBO). The time period is measured starting the day after the Letting for Design Bid Build Low Bid contracts and the day after designation for Design Bid Build Best Value contracts. If the last day is a Saturday, Sunday, State holiday or Federal holiday, the period is extended to the next day that State offices are open.

A commitment to a MBE/WBE/SDVOB is expressed as a dollar amount agreed to by both the Bidder and the MBE/WBE/SDVOB for the performance of identified work, services or products. Commitments are for quantities of contract pay items, or associated to contract pay items for work, services or products that are not measured in the same manner as the contract pay item. Commitments for less than the full scope of the contract pay item shall be indicated as such in EBO (i.e., split item).

For each MBE/WBE/SDVOB Subcontractor, the Low Bidder shall indicate the contract pay item number(s) of the work to be performed in EBO. For those items of work where the MBE/WBE/SDVOB Subcontractor is performing less than 100% of a contract pay item, the Low Bidder shall explain, in writing, the scope of work to be performed by the MBE/WBE/SDVOB.

For each MBE/WBE/SDVOB Manufacturer, Fabricator, Material Supplier (including equipment rental without operator), or Broker, the Low Bidder shall indicate the contract pay item number(s) of the service to be provided in EBO. In addition, the Low Bidder shall be responsible for the collection, review and submission of a fully executed MBE/WBE/SDVOB confirmation form (i.e., AAP 22 *DBE/MBE/WBE/SDVOB Material Commitments / Confirmation*) affirming that the responses received in the questionnaire, by its proposed MBE/WBE/SDVOB, indicate the performance of a commercially useful function, will be consistent with the preliminary counting of such participation toward the contract goal. A separate AAP 22 must be submitted for each separate and distinct contract pay item number(s) of the materials, supplies, articles, or equipment to be manufactured, fabricated, supplied, or otherwise provided. If the material, supplies, articles, equipment or service does not correspond to a specific contract pay item, the Low Bidder shall use a contract pay item(s) to which the activity relates.

For each MBE/WBE/SDVOB Service, the Low Bidder shall indicate the contract pay item number(s) of the service to be provided in EBO. If the service does not correspond to a specific Department contract pay item, the Low Bidder shall use a contract pay item(s) to which the activity relates.

For each MBE/WBE/SDVOB Trucking Firm, the Low Bidder shall indicate, in EBO, the contract pay item number(s) for which the trucking operations are to be performed. If the trucking operation does not correspond to a specific contract pay item, the Low Bidder shall use a contract pay item(s) to which the activity relates. For each MBE/WBE/SDVOB Trucking Firm, the Low Bidder shall indicate, in the MBE/WBE/SDVOB confirmation form (i.e., AAP 23 *DBE/MBE/WBE/SDVOB Trucking Commitments / Confirmation*), the type of trucking operation to be performed, the number of trucks owned/leased, the number of trucks working on-site or off-site, rate per hour/ton/load/etc., duration or amount, and total dollar value of the proposed MBE/WBE/SDVOB commitment. The Low Bidder shall provide copies of all lease agreements utilized by the MBE/WBE/SDVOB Trucking Firm.

Once the Low Bidder has completed all entries in EBO, they shall notify the Construction Pre-Award Unit at [construction.civilrights@dot.ny.gov](mailto:construction.civilrights@dot.ny.gov). Once the Low Bidder has received notification by the Department that their entries have been accepted, each DBE shall acknowledge the commitment in EBO within 10 calendar days.

If the Low Bidder meets or exceeds the established MBE/WBE/SDVOB goal(s) for the contract with commitments to certified MBE/WBE/SDVOBs, it is not necessary for the Low Bidder to submit documentation of good faith efforts.

If the contract goal(s) is not met in full, then the Bidder shall provide documentation of its good faith efforts within the 10 calendar days in accordance with §102-12H. *Good Faith Efforts* that demonstrate that the Bidder attempted but could not meet the goal(s).

The Contractor shall execute subcontracts, agreements, or purchase orders, as appropriate, with each MBE/WBE/SDVOB for the type and amount of work identified in the approved AAP19 *DBE/MBE/WBE/SDVOB Schedule of Participation*, no later than 10 days after contract award.

**H. Good Faith Efforts.** If the Low Bidder fails to meet the DBE/MBE/WBE/SDVOB contract goal(s), the Department will evaluate the good faith efforts the Bidder made to obtain DBE/MBE/WBE/SDVOB participation to determine if the efforts are sufficient to recommend award of the contract. Efforts to obtain DBE/MBE/WBE/SDVOB participation that are merely pro forma are not good faith efforts, nor are efforts that, even if they are sincerely motivated, given all relevant circumstances, they could not reasonably be expected to produce a level of DBE/MBE/WBE/SDVOB participation sufficient to meet the goal(s).

If the Bidder has not met the DBE/MBE/WBE/SDVOB goal(s), it shall submit sufficient documentation that substantiates good faith efforts. Such documentation shall include, at a minimum, the AAP10 *DBE/MBE/WBE/SDVOB Solicitation Log*, all forms of solicitation inquiries that were returned as undeliverable, quotations submitted by DBE/MBE/WBE/SDVOBs that were not selected for participation, quotations submitted by non-DBE/MBE/WBE/SDVOBs that were selected for comparison, and an explanation for the Bidder's action in each case.

In order to evaluate the Bidder's good faith efforts, the Department will consider the quality, quantity, and intensity of the different kinds of efforts that the Bidder has made.

Below is a list of the types of actions which the Department will consider as part of the Bidder's good faith efforts to obtain DBE/MBE/WBE/SDVOB participation. It is not intended to be a mandatory checklist, nor is it intended to be exhaustive or exclusive. Other factors or types of efforts may be relevant in appropriate cases.

1. Securing participation by certified DBE/MBE/WBE/SDVOB firms for work that they are listed to perform that is in the contract. Only DBEs certified by the NYS Unified Certification Program (NYSUCP) shall be used to fulfill the established goal on Federal-Aid contracts. Only M/WBEs certified by the NYS Department of Economic Development and SDVOBs certified by the NYS Office of General Services' Division of Service-Disabled Veteran's Business Development shall be used to fulfill the established goal(s) on Non-Federal-Aid contracts.
2. For all work, soliciting, at a minimum, certified DBE/MBE/WBE/SDVOBs within 100 miles of the contract location. i
3. The Bidder shall conduct market research to identify small business contractors and suppliers and solicit, through all reasonable and available means, the interest of all certified DBE/MBE/WBE/SDVOBs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events; advertising and/or written notices; posting of notices of sources sought and/or requests for proposals, written notices or emails to all certified DBE/MBE/WBE/SDVOBs listed in the appropriate directory of certified firms that specialize in the areas of work desired and which are located in the area or surrounding area.

The Bidder shall solicit this interest as early in the bidding process as practicable, to allow the DBE/MBE/WBE/SDVOBs to respond to the solicitation and submit a timely offer. The Bidder shall determine with certainty if the DBE/MBE/WBE/SDVOBs are interested by taking

appropriate steps, including following up the initial solicitation with at least one additional solicitation via a different media. The Bidder shall keep records of efforts to solicit and negotiate with DBE/MBE/WBE/SDVOBs as evidence of good faith efforts, using the Solicitation Log as a continuing record.

4. Selecting portions of the work to be performed by DBE/MBE/WBE/SDVOBs in order to increase the likelihood that the DBE/MBE/WBE/SDVOB goal(s) will be achieved. This includes, where appropriate, either breaking down operations or combining like or related operations into logistically and economically feasible units to facilitate DBE/MBE/WBE/SDVOB participation, even when the Contractor might prefer to perform these work items with its own forces. This may include, where possible, establishing flexible time frames for performance and delivery schedules in a manner that encourages and facilitates DBE/MBE/WBE/SDVOB participation.

5. Providing interested DBE/MBE/WBE/SDVOBs with adequate information on where and how to obtain the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their timely offer.

6. a. *Negotiating in good faith with interested DBE/MBE/WBE/SDVOBs.* It is the Bidder's responsibility to make a portion of the work available to DBE/MBE/WBE/SDVOB firms and to select those portions of the work or material needs consistent with the available DBE/MBE/WBE/SDVOB firms, so as to facilitate DBE/MBE/WBE/SDVOB participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBE/MBE/WBE/SDVOBs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBE/MBE/WBE/SDVOBs to perform the work.

b. *Additional Costs.* The fact that there may be some additional costs involved in finding and using DBE/MBE/WBE/SDVOBs is not in itself sufficient reason for a Bidder's failure to meet the contract DBE/MBE/WBE/SDVOB goal(s), as long as such costs are reasonable. The ability or desire of a Bidder to perform the work of a contract with its own organization does not relieve the Bidder of the responsibility to make good faith efforts. Bidders are not, however, required to accept higher quotes from DBE/MBE/WBE/SDVOBs if the Department determines the price difference to be excessive or unreasonable.

7. a. *Not rejecting DBE/MBE/WBE/SDVOBs as unqualified.* The Bidder shall not reject DBE/MBE/WBE/SDVOBs as unqualified without sound reasons based on a thorough investigation of their capabilities. The Bidder's standing within its industry, membership in specific groups, organizations or associations, and political or social affiliations (for example union vs. non-union status) are not legitimate causes for rejection or non-solicitation of proposals in the Bidder's efforts to meet the contract goal. Rejection of the DBE/MBE/WBE/SDVOB because its quotation for the work was not the lowest received is not considered good faith effort. Nothing in this paragraph shall be construed to require the Bidder to accept unreasonable quotes in order to satisfy contract goals.

b. *Replacement Prices.* A prime contractor's inability to find a replacement DBE/MBE/WBE/SDVOB at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE/MBE/WBE/SDVOB. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a

replacement DBE/MBE/WBE/SDVOB, and it is not a sound basis for rejecting a prospective replacement DBE/MBE/WBE/SDVOB's reasonable quote.

8. Making efforts to assist interested DBE/MBE/WBE/SDVOBs in obtaining bonding, lines of credit or insurance as required by the Department or the Bidder.

9. Making efforts to assist interested DBE/MBE/WBE/SDVOBs in obtaining necessary equipment, supplies, materials, or related assistance.

10. Where available, effectively using the services of available minority/women focused media, trade associations, and contractor groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBE/MBE/WBE/SDVOBs.

11. Stating future commitments to use the DBE/MBE/WBE/SDVOBs after contract award is not considered to be responsive to the contract solicitation requirements or to constitute good faith efforts.

A Bidder shall also submit a detailed explanation identifying any circumstances unique to the contract that were deterrents to meeting the goal(s) (e.g., night work, small quantities over multiple locations, specialized work, etc.); detailed rationale as to why a specific scope of work is not considered to be a subcontract item and therefore was not solicited; and a detailed explanation for any scope of work deemed "self-performing" without the intent to split the work.

**I. Pre-Award Approval.** In order to award a contract to a Bidder that has failed to meet the DBE/MBE/WBE/SDVOB contract goal(s), the Department must determine that the Bidder's good faith efforts were those that a Bidder actively and aggressively seeking to meet the goal(s) would make given all relevant circumstances.

If the Department determines that the Low Bidder has failed to meet the goal(s) and good faith effort requirements, the Department may issue a finding of non-responsiveness. Before awarding the contract to a subsequent bidder, the Department will provide the Low Bidder an opportunity for administrative reconsideration by an official who did not take part in the original determination.

**J. Administrative Reconsideration.** If the Low Bidder is deemed non-responsive due to failure to meet the civil rights requirements, and believes they have good cause, they shall have 5 calendar days from notification to request an Administrative Reconsideration. The Low Bidder will have the opportunity to provide argument and written documentation of good faith efforts made prior to letting, and to meet in person with the Department's reconsideration official upon notification concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The Department will send the Low Bidder a written decision on reconsideration, explaining the basis for finding that the Low Bidder did or did not meet the goal or make adequate good faith efforts to do so.

**K. Notice of Deficiency.** (Applicable only to Non-Federal-Aid contracts) The Department will review the submitted MBE/WBE/SDVOB Participation Plan and advise the Low Bidder of Department acceptance or issue a notice of deficiency within 20 business days of receipt.

If a notice of deficiency is issued, the Bidder shall respond to the notice of deficiency, within 7 business days of receipt, by submitting to the Department a written remedy in response to the notice of deficiency. If the written remedy is not timely or is found by the Department to be inadequate, the Department will notify the Bidder and direct them to submit, within 5 business days of notification by the Department, a request for a partial or total waiver of M/WBE and/or SDVOB participation goals

## 102-12 DBE/MBE/WBE/SDVOB PARTICIPATION.

on the Department's waiver form. Failure to file the waiver in a timely manner may be grounds for disqualification of the proposal.

The Department may deem a Bidder's proposal non-responsive if the Bidder fails to submit an MBE/WBE/SDVOB Participation Plan; fails to submit a written remedy to a notice of deficiency; fails to submit a request for waiver; or if the Department determines that the Bidder failed to document sufficient good faith efforts.

**L. Pre-Award Waivers.** (Applicable only to Non-Federal-Aid contracts) Prior to submission of a request for a partial or total waiver, the Low Bidder shall contact the Department by email at *construction.civilrights@dot.ny.gov*.

In accordance with 5 NYCRR 140-145 and 9 NYCRR 252.2, a Bidder that is able to document good faith efforts to meet the M/WBE and SDVOB goal requirements, respectively, may submit a request for a partial or total waiver on the Department's waiver form, accompanied by supporting documentation. A Bidder may submit a request for waiver at the same time they submit their MBE/WBE/SDVOB Participation Plan. If a request for waiver is submitted with the MBE/WBE/SDVOB Participation Plan and is not accepted by the Department at that time, the provisions of §102-12K *Notice of Deficiency* will apply. For M/WBE participation, if a Contractor is found non-responsive or non-responsible by the Department, the request for a waiver shall be deemed moot. For SDVOB participation, if the documentation included with the Bidder's waiver request is complete, the Department will evaluate the request and issue a written notice of acceptance or denial within 20 business days of receipt.

**M. Bidder's Compliance with DBE Program Requirements.** (Applicable only to Federal-Aid contracts.) The Department's acceptance of the Low Bidder's proposal is conditioned upon the Low Bidder's fulfillment of the DBE participation requirements. Failure by the Low Bidder to submit a complete DBE participation package or to provide commitments to meet the established goal without adequate good faith efforts may be grounds for rejection of the proposal as non-responsive and the bid deposit may be subject to forfeiture pursuant to §103-02 *Execution of Contract*.

**N. Bidder's Compliance with M/WBE and SDVOB Program Requirements.** (Applicable only to Non-Federal-Aid contracts.) The Department's acceptance of the Low Bidder's proposal is conditioned upon the Low Bidder's fulfillment of the M/WBE and SDVOB participation requirements. Failure by the Low Bidder to submit a complete MBE/WBE/SDVOB participation package within 10 calendar days after letting for Design Bid Build Low Bid contracts or within 10 calendar days after designation for Design Bid Build Best Value contracts, or failure to provide commitments to meet the established goal prior to award, without adequate good faith efforts sufficient to support a goal waiver request, may be grounds for rejection of the proposal as non-responsive and the bid deposit may be subject to forfeiture pursuant to §103-02 *Execution of Contract*.

## 102-13 STATE AND LOCAL SALES TAX EXEMPTION.

In accordance with Section 1115 of the Tax Law, in connection with capital improvement contracts all tangible personal property which will become an integral component of a structure, building or real property of the State, or any of its political subdivisions, is exempt from State and local retail sales tax and compensating use tax.

## 102-14 FORM OF CONTRACT AND BID BOND.

The form of contract and bid bond, if given, shall be that provided by the Department.

All of the following sections which have the word "Sample" in the title are samples of the contract documents executed by the Contractor as a part of the bidding and/or award process. The executed bid documents control and have precedence over the samples presented herein.

**102-15 SAMPLE FORM OF BID BOND.**

**KNOW ALL PERSONS BY THESE PRESENTS**, that \_\_\_\_\_  
 (Name of Contractor / Proposer)

\_\_\_\_\_  
 (Contractor / Proposer Address)  
 (hereinafter called the "Principal") and the \_\_\_\_\_  
 a corporation created and existing under the laws of the State of \_\_\_\_\_, having its principal office  
 in the City of \_\_\_\_\_ and authorized as a surety in the State of New York (such surety or Co-  
 sureties are hereinafter called the "Surety"), are held and firmly bound unto The People of the State of  
 New York (hereinafter called the "State"), in the full just sum of [*Five Percent (5%) of Attached Bid*  
*/Price Proposal*], good and lawful money of the United States of America, for the payment of which said  
 sum of money, well and truly to be made and done, the said Principal binds themselves (himself/herself,  
 itself), their (his/her, its) heirs, executors and administrators, successors and assigns, and the said Surety  
 binds itself, its successors and assigns jointly and severally, firmly by these presents:

WHEREAS, the said Principal has submitted to the Commissioner of Transportation of the State  
 of New York, a proposal for \_\_\_\_\_

(Project Description), and

WHEREAS, under the terms of the Laws of the State of New York as above indicated, the said  
 Principal has filed or intends to file this bond to guarantee that the Principal will execute all required  
 contract proposal documents and furnish such faithful performance or other bonds as may be required by  
 law in accordance with the terms of the Principal's said proposal.

NOW, THEREFORE, the condition of the foregoing obligation is such, that if the said Principal  
 shall promptly execute and submit, and the Commissioner of Transportation shall accept, all required  
 contract proposal documents including such faithful performance bond or other bonds as may be required  
 by law in accordance with the terms of the Principal's said proposal, then this obligation shall be null and  
 void, otherwise to remain in full force and virtue.

In case of multiple or co-sureties, the Co-Sureties agree to empower a single representative with  
 authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Department will  
 have no obligation to deal with multiple sureties hereunder. All correspondence from the Department to  
 the Co-Sureties and all claims under this Bond shall be sent to such designated representative, and all  
 correspondence so sent shall be deemed to have been sent to all Co-Sureties. The Co-Sureties also agree  
 to designate a single agent for service of process with respect to any actions on this Bond, which agent  
 shall either be a natural person or a corporation qualified to act as an agent for service of process under  
 the laws of the State of New York. The designated representative and agent for service of process may be  
 changed only by delivery of written notice (by personal delivery or by certified mail, return receipt  
 requested) to the Department designating a single new representative and/or agent, signed by all of the  
 Co-Sureties. The initial representative shall be:

\_\_\_\_\_  
 (Name of Representative)

\_\_\_\_\_  
 (Address)

\_\_\_\_\_  
 (City, State, Zip)

and the initial agent for service of process shall be:

\_\_\_\_\_

(Name of Initial Agent)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State, Zip)

IN TESTIMONY WHEREOF, the said Principal has hereunto set his/her (their, its) hand and the said Surety has caused this instrument to be signed by its authorized officer.

Signed and delivered this \_\_\_\_ day of \_\_\_\_\_ 20\_\_ in the presence of:

\_\_\_\_\_  
(Company)  
By \_\_\_\_\_ ) Principal  
(Signature)  
\_\_\_\_\_  
(Title of Authorized Officer)

\_\_\_\_\_  
(Company)  
By \_\_\_\_\_ ) Surety (or Co-Surety)  
(Signature)  
\_\_\_\_\_  
(Title of Authorized Officer)

\_\_\_\_\_  
(Company)  
By \_\_\_\_\_ ) Co-Surety  
(Signature)  
\_\_\_\_\_  
(Title of Authorized Officer)

\_\_\_\_\_  
(Company)  
By \_\_\_\_\_ ) Co-Surety  
(Signature)  
\_\_\_\_\_  
(Title of Authorized Officer)

(The Surety Company shall append a single copy of a statement of its financial condition and a copy of the resolution authorizing the execution of Bonds by officers of the Company to the bond(s).)

**(Acknowledgment of principal, unless it be a corporation)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person described in and who executed the foregoing instrument

102-16 SAMPLE CONTRACT PAY ITEM FORMAT.

and acknowledged that he/she executed the same.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of principal, if a corporation)**

STATE OF NEW YORK ss.:

COUNTY \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_ to me known and known to me to be the person, who being by me duly sworn, did depose and say that he/she resides in \_\_\_\_\_ that he/she is the \_\_\_\_\_ of \_\_\_\_\_ the corporation described in and which executed the foregoing instrument; and that he/she signed his/her name thereto by order of the Board of Directors of said Corporation.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Contractor, if a limited liability company)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_ to me known, and known to me to be the person who being duly sworn, did depose and say that he/she resides in \_\_\_\_\_; that he/she is the duly authorized member of the limited liability company described in and which executed the foregoing instrument; and that he/she executed the foregoing instrument on behalf of the limited liability company for the purposes set forth therein as the act and deed of said limited liability company.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Surety Company)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_ to me known and known to me to be the person, who being by me duly sworn, did depose and say that he/she resides in \_\_\_\_\_. that he/she is the \_\_\_\_\_ of \_\_\_\_\_ the corporation described in the foregoing instrument; and that he/she signed his/her name thereto by order of the Board of Directors of said Corporation.

\_\_\_\_\_  
Notary Public

**102-16 SAMPLE CONTRACT PAY ITEM FORMAT.**



# 102-17 SAMPLE FORM OF JURAT.

LN #	ITEM DESCRIPTION	EST OF QUANTITIES AND UNITS	UNIT PRICE DOLLARS CENTS	BID AMOUNT DOLLARS CENTS
0002 ITEM: 201.06	NEC			
	LUMP SUM CLEARING AND GRUBBING	LUMP SUM		
0012 ITEM: 203.03	14521.00			
	CUBIC YARDS EMBANKMENT IN PLACE	PER CUBIC YARD		
0064 ITEM: 402.195911	123.00	55.000	6765.00	
	QUALITY UNITS PLANT PRODUCTION QUALITY			
	ADJUSTMENT TO 402.195901			
	FIXED PRICE: SEE SPECIFICATION AND SUBSECTION 102-03.	PER QUALITY UNIT		
0248 ITEM: 637.2101 10	NEC	7200.000	7200.00	
	LUMP SUM PORTABLE CELLULAR DIGITAL TELEPHONE (HANDS FREE)/(RADIO EQUIPMENT)(FIXED PRICE)			
	FIXED PRICE: SEE SPECIFICATION AND SUBSECTION 102-03.	LUMP SUM		
0406 ITEM: 697.0201	510000.00	1.000	510000.00	
	DOLLARS AND CENTS FIELD			
	CHANGE PAYMENT (FCP)			
	FIXED PRICE: SEE SPECIFICATION AND SUBSECTION 102-03.	PER DOLLARS AND CENTS		
0414 ITEM: 699.040001	NEC			
	MOBILIZATION			
	MUST NOT EXCEED 4% OF SUBTOTAL SHOWN ABOVE. SEE SPECIFICATION FOR THIS ITEM.	LUMP SUM		
PLEASE BE SURE A BID IS ENTERED FOR EACH ITEM, EXCEPT AS DIRECTED FOR OPTIONAL ITEMS.				
				\$ _____

## 102-17 SAMPLE FORM OF JURAT.

### 1. Itemized Proposal

In submitting this bid, the undersigned declares that it is made without any connection with any person making another bid for the same contract; that the bid is in all respects fair and without collusion, fraud or mental reservation; and that no official of the State, or any person in the employ of the State is

directly or indirectly interested in said bid or in the supplies or work to which it relates, or in any portion of the profits thereof.

The undersigned also hereby declares to have carefully examined the plans, specifications and form of contract, and to have personally inspected the actual location of the work together with the local sources of supply, to be satisfied as to all the quantities and conditions, and understands that in signing this proposal waives all right to plead any misunderstanding regarding the same.

The undersigned further understands and agrees to furnish and provide for the respective item price bid all the necessary material, machinery, implements, tools, labor services and other items of whatever nature, and to do and perform all the work necessary under the aforesaid conditions, to complete the improvement of the aforementioned project in accordance with the plans and specifications for said improvement, which plans and specifications it is agreed are a part of this proposal, and to accept in full compensation therefore the amount of the summation of the products of the approximate quantities multiplied by the unit prices bid. This summation will hereinafter be referred to as the gross sum bid.

For Design Bid Build projects, the undersigned further agrees to accept the aforesaid unit bid prices as compensation for any additions or deductions caused by variation in quantities due to more accurate measurement, and for use in the computation of the value of the work performed for monthly estimates, unless otherwise specifically provided for in the Standard Specifications.

The undersigned further agrees that should the bidder challenge any administrative action of the Department regarding the award of the Contract, such special proceeding shall be brought in Supreme Court, Albany County, and in no other location.

The undersigned further agrees that at any time during the progress of work the State adds, alters or omits portions of the work it shall so perform such work and accept compensation in accordance with the Standard Specifications.

The undersigned further understands and agrees not to start any work until the contract agreement is signed by the Commissioner or the Commissioner's duly authorized representative. In no event shall the undersigned start any contract work which involves a disturbance within the State right of way prior to award of the contract by the Comptroller.

## **2. Bid Deposit**

Accompanying this proposal is a bid bond, certified check or bank cashier's check for the specified amount of deposit required. In the event this proposal is accepted by the Department of Transportation and the undersigned shall fail to execute the contract and in all respects comply with the provisions of Section 38 of the Highway Law, as amended, the moneys represented by such bid bond, certified check or bank cashier's check shall be regarded as liquidated damages and shall be forfeited and become the property of the State of New York; otherwise to be returned to the depositor in accordance with the provisions of said Section 38 of the Highway Law, as amended.

On acceptance of this proposal for said work the undersigned does or do hereby bind herself/himself or itself/themselves to enter into written contract, within ten days of date of notice of award, with the said Department of Transportation, and to comply in all respects with §38(6) of the Highway Law, as amended, in relation to security for the faithful performance of the terms of said contract.

## **3. Certifications**

### **A. Non-Collusive Bidding Certifications (NYS Finance Law §139-D)**

1. Every bid hereafter made to the state or any public department, agency or official thereof, where competitive bidding is required by statute, rule or regulation, for work or services performed or to be performed or goods sold or to be sold, shall contain the following statement subscribed by the bidder and affirmed by such bidder as true under the penalties of perjury:

a. By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of his knowledge and belief:

- (1) The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;
- (2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and
- (3) No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.

b. A bid shall not be considered for award nor shall any award be made where a. (1)(2) and (3) above have not been complied with; provided however, that if in any case the bidder cannot make the foregoing certification, the bidder shall so state and shall furnish with the bid a signed statement which sets forth in detail the reasons therefore. Where a. (1)(2) and (3) above have not been complied with, the bid shall not be considered for award nor shall any award be made unless the head of the purchasing unit of the state, public department or agency to which the bid is made, or his designee, determines that such disclosure was not made for the purpose of restricting competition.

The fact that a bidder: (a) has published price lists, rates, or tariffs covering items being procured, (b) has informed prospective customers of proposed or pending publication of new or revised price lists for such items or (c) has sold the same items to other customers at the same prices being bid, does not constitute, without more, a disclosure within the meaning of subparagraph 1. a.

2. Any bid hereafter made to the state or any public department, agency or official thereof by a corporate bidder for work or services performed or to be performed or goods sold or to be sold, where competitive bidding is required by statute, rule or regulation, and where such bid contains the certification referred to in subdivision one of this section, shall be deemed to have been authorized by the board of directors of the bidder and such authorization shall be deemed to include the signing and submission of the bid and the inclusion therein of the certificate as to non-collusion as the act and deed of the corporation.

#### **B. Non-Collusive Bidding Certification (49 CFR 20)**

The Contractor to whom the above identified contract is to be awarded does hereby tender to the New York State Department of Transportation this sworn statement pursuant to Section 112(c) of Title 23 U.S. Code *Highways* and does hereby certify, in conformance with said 23 USC 112(c) that the said Contractor has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with the above identified contract.

The signatory to this proposal, being duly sworn, certifies that, EXCEPT AS NOTED BELOW, its company and any person associated therewith in the capacity of owner, partner, director, officer, or major stockholder (five percent or more ownership):

1. is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency;
2. has not been suspended, debarred, voluntarily excluded or determined ineligible by any federal agency within the past three years;
3. does not have a proposed debarment pending; and
4. has not been indicted, convicted, or had a civil judgment rendered against it by a court of competent Jurisdiction in any matter involving fraud or official misconduct within the past three years.

EXCEPTIONS - List any relevant information, attaching additional sheets if necessary. (Exceptions will not necessarily result in disapproval, but will be considered in determining responsibility. For any exception noted, indicate below to whom it applies, the initiating agency, and dates of action. Providing false information may result in criminal prosecution or administrative sanctions.)

**4. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion. (FHWA Section 1273 X.) [For Federal-Aid Contracts Only]**

A. The Bidder certifies to the best of its knowledge and belief, that it and its Principals:

1. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency;
2. Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
3. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (a)(2) of this certification; and
4. Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

B. Where the Bidder is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

**5. Certification Regarding Use of Contract Funds for Lobbying (FHWA 1273 Section XI.) [For Federal-Aid Contracts Only]**

A. The Bidder certifies, by signing and submitting this bid or proposal, to the best of his/her/their knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure of Lobbying Activities," in accordance with its instructions.

B. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S. Code §1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

C. The Bidder also agrees by submitting its bid or proposal that the Bidder shall require that the language of this certification be included in all lower tier subcontracts which exceed \$100,000, and that all such subrecipients shall certify and disclose accordingly.

**6. Bidder Assurance of No Conflict of Interest or Detrimental Effect.**

The firm offering to provide services pursuant to this Contract, as a Contractor or joint venture Contractor, attests that its performance of the services outlined in this proposal does not and will not create a conflict of interest with nor position the firm to breach any other contract currently in force with the State of New York.

Furthermore, the firm attests that it will not act in any manner that is detrimental to any State project on which the firm is rendering services. Specifically, the firm attests that:

- a. The fulfillment of obligations by the firm, as proposed in the response, does not violate any existing contracts or agreements between the firm and the State;
- b. The fulfillment of obligations by the firm, as proposed in the response, does not and will not create any conflict of interest, or perception thereof, with any current role or responsibility that the firm has with regard to any existing contracts or agreements between the firm and the State;
- c. The fulfillment of obligations by the firm, as proposed in the response, does not and will not compromise the firm's ability to carry out its obligations under any existing contracts between the firm and the State;
- d. The fulfillment of any other contractual obligations that the firm has with the State will not affect or influence its ability to perform under any contract with the State resulting from this proposal;
- e. During the negotiation and execution of any contract resulting from this proposal, the firm will not knowingly take any action or make any decision which creates a potential for conflict of interest or might cause a detrimental impact to the State as a whole including, but not limited to, any action or decision to divert resources from one State project to another;
- f. In fulfilling obligations under each of its State contracts, including any contract which results from this proposal, the firm will act in accordance with the terms of each of its State contracts and will not knowingly take any action or make any decision which might cause a detrimental impact to the State as a whole including, but not limited to, any action or decision to divert resources from one State project to another;
- g. No former officer or employee of the State who is now employed by the firm, nor any former officer or employee of the firm who is now employed by the State, has played a role with regard to the administration of this contract procurement in a manner that may violate section 73(8)(a) of the State Ethics Law; and
- h. The firm has not and shall not offer to any employee, member or director of the State any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence said employee, member or director, or could reasonably be expected to influence said employee, member or director, in the performance of the official duty of said employee, member or director or was intended as a reward for any official action on the part of said employee, member or director.

Firms responding to this proposal should note that the State recognizes that conflicts may occur in the future because a firm may have existing or new relationships. The State will review the nature of any such new relationship and reserves the right to terminate the contract for cause if, in its judgment, a real or potential conflict of interest cannot be cured.

**7. False Claims Certification (31 USC §3729, NYS Finance Law Article 13)**

Under the Federal False Claims Act, 31 U.S. Code §3729, any person or entity who knowingly presents, or causes to be presented to the Federal Government, a false or fraudulent claim for payment or approval is liable to the United State Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three times the amount of damages the Government sustains.

Under the New York State False Claims Act, NYS Finance Law Article 13, any person or entity who knowingly presents or causes to be presented to the State of New York or Local Governments within the

State of New York, a false or fraudulent claim for payment or approval is liable to the Government for a civil penalty of not less than \$6,000 and not more than \$12,000, plus three times the amount of damages the Government sustains.

“Knowingly” is defined as: (1) actual knowledge; (2) acting in deliberate ignorance of the truth or falsity of information; or (3) acting in reckless disregard of the truth or falsity of information; no proof of specific intent to defraud is required.

The Contractor to whom the above-identified contract is to be awarded does hereby certify to New York State Department of Transportation that it understands the prohibitions under the Federal and New York State False Claims Acts, and that it has not and will not submit or cause to be submitted any fraudulent claims in the submission of this bid or in connection with the above identified contract. The Contractor further certifies that it understands retaliatory actions, against employees and officers who initiate a *Qui Tam* (public) action on behalf of the government or cooperate in the investigation of a false claim, are prohibited and are subject to an assessment of damages and penalties, under the provisions of the Federal and New York State False Claims Acts.

## **8. Executive Order 177 Certification**

The New York State Human Rights Law, Article 15 of the Executive Law, prohibits discrimination and harassment based on age, race, creed, color, national origin, sex, pregnancy or pregnancy-related conditions, sexual orientation, gender identity, disability, marital status, familial status, domestic violence victim status, prior arrest or conviction record, military status or predisposing genetic characteristics.

The Human Rights Law may also require reasonable accommodation for persons with disabilities and pregnancy-related conditions. A reasonable accommodation is an adjustment to a job or work environment that enables a person with a disability to perform the essential functions of a job in a reasonable manner. The Human Rights Law may also require reasonable accommodation in employment on the basis of Sabbath observance or religious practices.

Generally, The Human Rights Law applies to:

- a. All employers of four or more people, employment agencies, labor organizations and apprenticeship training programs in all instances of discrimination or harassment;
- b. Employers with fewer than four employees in all cases involving sexual harassment; and
- c. Any employer of domestic workers in cases involving sexual harassment or harassment based on gender, race, religion or national origin.

In accordance with Executive Order No. 177, the Proposer / Bidder hereby certifies that it does not have institutional policies or practices that fail to address the harassment and discrimination of individuals on the basis of their age, race, creed, color, national origin, sex, sexual orientation, gender identity, disability, marital status, military status, or other protected status under the Human Rights Law.

Executive Order No. 177 and this certification do not affect institutional policies or practices that are protected by existing law, including but not limited to the First Amendment of the United States Constitution, Article 1, Section 3 of the New York State Constitution, and Section 296(11) of the New York State Human Rights Law.

## **9. US Department of Transportation Office of Inspector General – Fraud, Waste, & Abuse Hotline**

The U.S. Department of Transportation (USDOT) Office of Inspector General (OIG) maintains a Hotline for receiving allegations of fraud, waste, abuse, or mismanagement in USDOT programs or operations. Persons with knowledge of bid collusion (i.e., contractors, suppliers, work persons, etc.), or other questionable contract related practices (inadequate materials, poor workmanship, theft of materials, etc.), are encouraged to report such activities by calling the Hotline at 1-800-424-9071, emailing [hotline@oig.dot.gov](mailto:hotline@oig.dot.gov), or writing to the USDOT Inspector General, 1200 New Jersey Ave SE, West Bldg. 7th Floor, Washington, DC 20590. Allegations may be reported 24 hours a day, seven days a week by DOT employees, contractors, or the general public.

# **10. New York State Office of the Inspector General Hotline**

The New York State Office of the Inspector General maintains a Hotline for receiving allegations of governmental misconduct. Reports of New York State governmental misconduct may be made in strict confidence to the Toll Free 24-hour Statewide HOTLINE at 1-800-DO RIGHT (1-800-367-4448), the on-line complaint form at [www.ig.ny.gov](http://www.ig.ny.gov) or in writing to the New York State Office of the Inspector General, Empire State Plaza, Agency Building 2 - 16th Floor, Albany, New York 12223.

## **11. Offerer Disclosure of Prior Non-Responsibility Determinations – Contractor must complete the form below:**

1. Has any Governmental Entity made a finding of non-responsibility regarding the individual or entity seeking to enter into the Procurement Contract in the previous four years? (Please circle):

No      Yes

If yes, please answer questions 2-4. If no, skip to question 5.

2. Was the basis for the finding of non-responsibility due to a violation of State Finance Law §139-j? (Please circle):

No      Yes

3. Was the basis for the finding of non-responsibility due to the intentional provision of false or incomplete information to a Governmental Entity? (Please circle):

No      Yes

4. If you answered yes to any of the above questions, please provide details regarding the finding of non-responsibility below.

Governmental Entity: \_\_\_\_\_

Date of Finding of Non-responsibility: \_\_\_\_\_

Basis of Finding of Non-Responsibility: \_\_\_\_\_

\_\_\_\_\_

(Add additional pages as necessary)

5. Has any Governmental Entity or other governmental agency terminated or withheld a Procurement Contract with the individual or entity seeking to enter into the Procurement Contract due to the intentional provision of false or incomplete information? (Please circle):

No      Yes

6. If yes, please provide details below.

Governmental Entity: \_\_\_\_\_

Date of Termination or Withholding of Contract: \_\_\_\_\_

Basis of Termination or Withholding: \_\_\_\_\_

\_\_\_\_\_

(Add additional pages as necessary)

## **BY EXECUTING THIS PROPOSAL, THE CONTRACTOR AGREES TO:**

1. Perform all work listed in accordance with the Contract Documents including all amendments, (found at <https://www.dot.ny.gov/doing-business/opportunities/const-notice> or

<https://www.dot.ny.gov/main/business-center/designbuild>) at the prices bid; subject to the Changed Conditions provisions if applicable;

2. Accompany this proposal with a bid bond, certified check or bank cashier's check for the specified amount of deposit required;
3. All the terms and conditions of the non-collusive bidding certifications required by §139-d of the State Finance Law and 49 CFR Part 20;
4. For Federal-Aid contracts only, certify, under penalty of perjury, as to the current history regarding suspensions, debarments, voluntary exclusions, determinations of ineligibility, indictments, convictions or civil judgments required by *FHWA Form 1273 Required Contract Provisions Federal-Aid Construction Contracts- Section X "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion"*;
5. For Federal-Aid contracts only, certify that no Federal appropriated funds have been paid or will be paid, to any person for lobbying a Federal official or employee, or disclosure was made in accordance with 31 USC 1352 required by *FHWA Form 1273 Required Contract Provisions Federal-Aid Construction Contracts- Section XI "Certification Regarding Use of Contract Funds for Lobbying"*;
6. Attest that its performance of the services outlined in this proposal does not and will not create a conflict of interest with nor position the firm to breach any other contract currently in force with the State of New York;
7. Certify that it understands the prohibitions under the Federal False Claims Act (31 USC §3729) and the New York State False Claims Act (NYS Finance Law Article 13);
8. Certify that all information provided to the Department with respect to the requirements contained in the Procurement Lobbying Law (State Finance Laws §139j and §139k) is complete, true and accurate;
9. Affirm, under penalty of perjury, that all the responses provided to the Department with respect to its submitted Form CCA-2 *New York State Vendor Responsibility Questionnaire For-Profit Construction*, are complete, true, and accurate, and further affirms and acknowledges that it must remain a responsible Contractor throughout the duration of the contract, in accordance with §105-05 *Vendor Responsibility*;
10. Provide commitments to meet the established DBE/MBE/WBE/SDVOB participation goal(s) or to demonstrate sufficient good faith efforts to do so;
11. By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that the bidder has and has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all of its employees. Such policy shall, at a minimum, meet the requirements of Section 201-G of the New York State Labor Law.
12. Certify to all other clauses required by this proposal and contained herein.

Dated \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
Legal Name of person, firm or corporation

By \_\_\_\_\_

Signature (Title)

**(Acknowledgment of individual Contractor)**

STATE OF NEW YORK

County of \_\_\_\_\_ ss.:

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person described in and who executed the foregoing instrument,  
and acknowledged that he/she/they executed the same.

\_\_\_\_\_  
Notary Public



**(Acknowledgment of co-partnership Contractor)**

STATE OF NEW YORK

County of \_\_\_\_\_ ss.:

On this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, before me personally came \_\_\_\_\_ to me known and known to me to be the person who executed the foregoing instrument, who being by me duly sworn, did for himself/herself/themself depose and say that he/she/they is a member of the partnership of \_\_\_\_\_, consisting of himself/herself/themself and \_\_\_\_\_, and that he/she/they executed the foregoing instrument in the firm name of \_\_\_\_\_, and that he/she/they had authority to sign same, and did duly acknowledge to me that he/she/they executed the same as the act and deed of said firm for the uses and purposes mentioned therein.

\_\_\_\_\_  
Notary Public**(Acknowledgment of Contractor, if a corporation)**

STATE OF NEW YORK

County of \_\_\_\_\_ ss.:

On this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, before me personally came \_\_\_\_\_ to me known and known to me to be the person, who being duly sworn, did depose and say that he/she/they resides in \_\_\_\_\_, that he/she/they is the \_\_\_\_\_, of the \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; and that he/she/they signed her/his/their name thereto by order of the Board of Directors of said Corporation.

\_\_\_\_\_  
Notary Public**(Acknowledgment of Contractor, if a Joint Venture)**

A bidder that is a Joint Venture shall include a separate, signed and notarized copy of the acknowledgment page for each party in the joint venture.

**Please Complete Information Requested Below:**

The address of the bidder is:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
City, State and Zip Code

Federal Identification No \_\_\_\_\_

Contact Person \_\_\_\_\_

Phone No. ( ) \_\_\_\_\_

E-mail \_\_\_\_\_

**If a Partnership**

Name

Address

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_**If a Corporation**

Name

Address

\_\_\_\_\_, President  
\_\_\_\_\_, Secretary\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_, Treasurer

**SECTION 103 CONTRACT AWARD AND EXECUTION**

(Last Revised January, 2025)

**103-01 CONTRACT AWARD.**

The contract award will be made only to the lowest responsible bidder as will best promote the public interest as provided by Section 38 of the Highway Law. The lowest bid will be determined by the Commissioner on the basis of gross sum for which the entire work will be performed, arrived at by a correct computation of all contract pay items specified in the proposal, at the unit prices stated in the proposal. If there is any discrepancy between the hard copy and electronic format of itemized proposals published by the Department, in either the contract pay items or quantities, the Department will evaluate the bids based only on that portion that is common to all formats.

The Department reserves the right to reject any or all bids in the best interest of the State pursuant to Section 38 (4) of the Highway Law. The Department reserves the right to reject any proposal from any entity that is a parent, affiliate, or subsidiary, or that is under common ownership, control, or management with any other entity submitting a bid on the same contract. The Department reserves the right to reject any proposal deemed non-responsive, or any contractor deemed non-responsible, and then, pursuant to Section 38 of the Highway Law, award to other than the low bidder, or waive minor informalities if, in its opinion, the best interest of the State will thereby be promoted.

The Commissioner reserves the right to reject any proposal in which any of the bid prices are unbalanced to the potential detriment of the Department. An unbalanced bid is considered to be one containing lump sum or unit bid prices which do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs which are anticipated for the performance of the work in question.

In accordance with Section 140 of the State Finance Law, whenever a bid deposit is required, a bidder may withdraw its bid if no award of the contract is made within 45 days after the receipt of the bids, and upon such withdrawal, its deposit will be returned. The notice of withdrawal shall be made in writing and addressed to the Contract Management Bureau.

As a condition of award, the Contractor shall submit a completed Form CCA-2, *New York State Vendor Responsibility Questionnaire - For Profit Construction* to the Contract Management Bureau. If requested by the Department, the bidder shall present additional evidence of ownership, corporate structure, ability and financial standing, as well as a statement as to equipment. Contracting corporations which are chartered in states other than New York, as well as individuals or firms doing business under fictitious names, shall register with the NYS Department of State, authorizing them to conduct business in New York State prior to contract award.

Contract award of a joint venture proposal will place upon the joint venture participants complete liability, jointly and individually, for contract performance.

**A. A+B Bidding.** For contracts subject to A+B Bidding, the lowest bid will be determined by the Commissioner on the basis of the gross sum, which will be arrived at by a correct computation of all contract pay items specified in the proposal at the unit prices stated in the proposal (A portion), plus the total number of calendar days proposed by the bidder to complete the portion of work to which the incentive/disincentive is applicable, times the unit cost (B portion).

**B. Structural Painting.** For contracts containing structural paint removal and painting work in accordance with §105-03C. *Structural Painting*, as a condition of award, if the Apparent Low Bidder is not AMPP certified or currently approved by the Department in lieu of AMPP certification, the Apparent Low Bidder shall submit a written notice to the Office of Contract Management, within 7 calendar days after bid letting, identifying the certified or approved firm that will perform structural

## 103-02 EXECUTION OF CONTRACT.

paint removal operations and painting work. This shall not relieve the Contractor from complying with the requirements of §108-05 *Subletting or Assigning the Contract* regarding limitations on subcontracting.

### 103-02 EXECUTION OF CONTRACT.

The person or persons whose proposal is accepted shall execute the contract and comply in all respects with the statutory provisions relating to the contract within ten days of the date of the delivery of the contract form. A sample of the standard contract agreement is shown in §103-06 *Sample Form of Contract Agreement*. In case of failure or refusal on the part of the bidder to deliver the duly executed contract to the Department within the ten day period herein mentioned, the amount of the deposit made may be forfeited and paid to the New York State Department of Transportation.

All of the following sections which have the word "Sample" in the title are samples of the contract documents executed by the Contractor as a part of contract award. The executed contract documents control and have precedence over the samples presented herein.

### 103-03 CONTRACT BONDS.

The Contractor shall provide the State with a Faithful Performance Bond and a Labor and Material Bond from sufficient sureties listed on the US Department of the Treasury listing of Approved Sureties (Treasury Department Circular 570) and licensed to do business in New York State, and with a minimum rating by A.M. Best of (A-) in the "Best's Key Rating Guide." Treasury Department Circular 570 can be found on the US Department of the Treasury website at <https://fiscal.treasury.gov/surety-bonds/circular-570.html>. The Contractor shall procure and deliver bonds to the State and maintain them at its own expense and without expense to the State. The Surety or Sureties shall append a statement of its financial condition and a copy of the resolution authorizing the execution of Bonds by officers of the Company to the bond(s).

**A. Faithful Performance Bond.** The Contractor shall provide a bond in the form prescribed by the Commissioner, shown in §103-07 *Sample Form of Faithful Performance Bond*, with sufficient sureties, approved by said Commissioner, guaranteeing that the Contractor will perform the work in accordance with the terms of the contract documents, and that it will commence and complete the work within the time prescribed in the contract, and that it will provide against direct or indirect damages that shall be suffered or claimed on account of such construction or improvement, during the time thereof, until the final agreement is signed by the Contractor. The amount of the Faithful Performance Bond shall be 100% of the amount of the total contract bid price.

**B. Labor And Material Bond.** The Contractor shall provide a bond in the form prescribed by the Commissioner, shown in §103-08 *Sample Form of Labor and Material Bond*, with sufficient sureties, approved by said Commissioner, guaranteeing prompt payment of monies due all persons supplying the Contractor or Subcontractor with labor and materials employed and used in carrying out the contract, which bond shall inure to the benefit of the persons supplying such labor and materials, until the final agreement is signed by the Contractor. The amount of the Labor and Material Bond shall be 100% of the amount of the total contract bid price.

### 103-04 CANCELING AWARD.

The Department reserves the right to reject all proposals and advertise for new proposals, or proceed to do the work otherwise, if, in its opinion, the best interest of the State will thereby be promoted.

### 103-05 PARTNERING.

It is the Department's policy to use the principles of partnering to guide the management of construction contracts and the construction program, within the parameters covered by the laws, regulations and other policies that govern work in the public sector.

The partnering principles are intended to promote quality through continuous improvement at all stages of construction. The goal of the Department is to complete each contract in the most efficient, timely, safe, and cost effective manner, to the mutual benefit of the Contractor and the Department, meaning a quality contract delivered on time, within budget, and without significant disputes.

Partnering is defined as those actions taken to include all parties with an appropriate and vested interest in the management of a transportation project such that it is completed in the most efficient, timely, safe, and cost effective manner for the mutual benefit of all concerned. Those actions include, but are not limited to, communication, organization, establishing goals, continuous improvement, problem identification, conflict resolution, and managing change. Interested parties may include, but are not limited to, the Department, the Contractor, Subcontractors, Fabricators, Material Suppliers, the community within which the project is constructed, the community served by the project, Federal, State and local government or other public agencies, and utilities.

None of the actions identified as part of, or taken in the course of partnering shall be construed to alter, modify, delete or waive any of the provisions or requirements of the Department's Specifications or any applicable laws or regulations.

The Department with the Contractor will manage each contract in a cooperative manner utilizing the following principles of partnering:

- establish communications with all involved parties early in the partnering process;
- establish a relationship of shared trust, equity, and commitment;
- develop strategies for identifying mutual goals;
- develop strategies for timely communications and decision making;
- establish process for timely response to changes or variations in field conditions;
- solve potential problems, at the lowest level, before they create a negative impact;
- encourage the use of products, technology and processes that provide a demonstrated level of improved quality; and
- develop a plan for periodic joint evaluation based on mutually agreed goals.

The specifications are to be implemented in an equitable fashion that recognizes the problems that are inherent in construction, addresses the different-than-expected field conditions, resolves disputes in open communications manner, and makes contract adjustments in a timely, and fair manner consistent with the terms of the contract. These specifications are intended to fairly allocate risk, resulting in a balanced contractual approach to risk-sharing. The Department will provide information relevant to preparation of a bid for the contract, and in connection with submission of its bid, the Contractor has the right to rely on information provided by the Department in the contract documents.

**A. Formal Partnering.** Generally, an item for formal partnering will be included in the contract proposal for large, more complex contracts. In addition, the Department will accept requests by successful low bidders to incorporate formal partnering on any contract that requires coordination and cooperation with third parties such as Subcontractors, suppliers, utility companies and railroads, or as otherwise desired by the Contractor.

**B. Informal Partnering.** The Department is willing to informally partner with the Contractor on all other contracts. Informal partnering is defined as the application of partnering principles to the management of the contract by the mutual agreement of the interested parties. Although the principles of partnering are to be applied, there is no fixed organization or structure adopted for that purpose.

## DESIGN BID BUILD CONTRACT AGREEMENT

Contract  
County(ies):

THIS AGREEMENT, made by and between THE PEOPLE OF THE STATE OF NEW YORK, hereinafter referred to as 'State', acting by and through the Department of Transportation, pursuant to the Highway Law, and

- ☐ an individual conducting business as: \_\_\_\_\_
- ☐ a partnership, consisting of: \_\_\_\_\_
- ☐ a corporation organized and existing under the laws of the State of: \_\_\_\_\_
- ☐ a limited liability company (LLC), organized under the laws of the State of: \_\_\_\_\_
- ☐ a joint venture, consisting of: \_\_\_\_\_

the location of whose principal office is: \_\_\_\_\_  
hereinafter called the "Contractor".

WITNESSETH: That the State and the Contractor, for the consideration hereinafter named agree as follows:

**ARTICLE 1. WORK TO BE DONE.** The Contractor shall furnish all the materials, appliances, tools and labor of every kind required, and construct and complete in the most substantial and skillful manner, the construction, improvement or reconstruction of the project on or before the completion date(s) as described in Article 4, in accordance with this Contract Agreement and any Contract Documents specific to the following project:

[Contract Description]  
F.A. Project Number:  
in the County(ies) listed above which constitutes contract D \_\_\_\_\_.

The Contractor further agrees that their proposal, as defined by the Standard Specifications, is not based upon the assumption that any specifications, traffic restrictions, scheduling or phasing/staging requirements will be waived; an extension of Contract Completion Date will be granted; a labor dispensation will be granted; substitution of non-approved products, alternatives or claimed functional equivalents for specified construction materials and methods will be allowed; or any Value Engineering Change Proposals will be approved.

In accordance with Section 41 of the New York State Finance Law, this Contract shall be deemed executory only to the extent of money available to the State for the performance of the terms hereof and no liability on account thereof shall be incurred by the State beyond moneys available for the purpose thereof.

**ARTICLE 2. COMPONENTS OF THE CONTRACT.** This Contract shall incorporate and consist of: (a) this Agreement, which includes Appendix A *Standard Clauses for New York State Contracts*, (b) contract bonds, and (c) Contract Documents.

Contract Documents shall be deemed to include the following, specific to the above-referenced project: the Contract Proposal, as defined in the Standard Specifications §101-02 *Definitions of Terms*; the Proposal submitted by the Contractor; the Equal Employment Opportunity (EEO) participation goals; the Disadvantaged/Minority/Women's Business Enterprise (D/M/WBE) and Service-Disabled Veteran-Owned Business (SDVOB) participation goals; the Base Line Data; the "Standard Specifications" of the New York State Department of Transportation (also referred to as "Std. Spec."), including all addenda, as identified in the Contract Proposal; the Standard Sheets; the Contract Plans; any amendments to the Contract Proposal

or the Contract Plans issued prior to the date of letting ; and all provisions required by law to be inserted in the Contract, whether actually inserted or not. Whenever separate publications, other than Standard Sheets and Standard Specifications, are referenced in the Contract Documents, it shall mean those, as amended, which are current on the date of letting. Those components referenced above, but not attached to this Agreement, shall be deemed incorporated by reference.

The components of the Contract are intended to be complementary and to describe and provide for a complete Project. The following components of the Contract complement one another in the following declining order of precedence:

- A) Appendix A *Standard Clauses for New York State Contracts*;
- B) FHWA Form 1273, if applicable; FHWA Form 1316, if applicable; Federal Prevailing Wage Rate, if applicable; any other federal provisions set forth in the Contract Proposal;
- C) State Prevailing Wage Rates, if applicable; Goals for Equal Employment Opportunity (EEO) Participation; DBE/MBE/WBE/SDVOB Participation Goals;
- D) Design Bid Build Contract Agreement (other than Appendix A *Standard Clauses for New York State Contracts*);
- E) Contract Documents, as amended, in the following order:
  - 1. Contract Plans (or Project Details located in the Contract Proposal, if provided);
  - 2. Contract Proposal - Special Notes;
  - 3. Contract Proposal – Special Specifications;
  - 4. The Standard Specifications of the New York State Department of Transportation including all addenda identified in the Contract Proposal;
  - 5. Standard Sheets;
  - 6. Base Line Data;
  - 7. Any portion of the Contract Proposal not addressed in this order of precedence;
  - 8. The Proposal submitted by the Contractor.

**ARTICLE 3. EXAMINATION OF DOCUMENTS AND SITE.** The Contractor agrees that before submitting a proposal the Contractor carefully examined the Contract Documents, together with the site of the proposed Work, as well as the surrounding territory of the site, and the Contractor is informed regarding all of the conditions affecting the Work to be done and labor and materials to be furnished for the completion of this contract, including the existence of poles, wires, pipes and other facilities and structures of municipal and other public service corporations on, over or under the site, except latent conditions that meet the requirements of Std. Spec. §104-03 *Differing Site Conditions*, and that the Contractor's information was secured by personal and other investigation and research.

**ARTICLE 4. DATE OF COMPLETION.** The Contractor further agrees that it will begin the Work herein embraced within ten days of the effective date hereof, unless the consent of the State, in writing, is given to begin at a later date, and that it will prosecute the same so that it shall be entirely completed and performed on or before the completion date of \_\_\_\_\_, 20\_\_.

No extension beyond the Contract Completion Date fixed by the terms of this Contract shall be effective unless in writing signed by the State. Any extension shall be for such time and upon such terms and conditions as shall be fixed by the State, which may include the assessment of liquidated damages and a charge for engineering, inspection, or other expenses actually incurred.

Notice of application for such extension shall be filed with the Engineer at least fifteen days prior to the date of completion fixed by the terms of this Agreement.

**ARTICLE 5. ALTERATIONS AND OMISSIONS.** The said Work shall be performed in accordance with the true intent and meaning of the Contract Documents without any further expense of any nature

whatsoever to the State other than the consideration named in this Agreement.

The State reserves the right, at any time during the progress of the Work, to alter the scope of the Work or omit any portion of the Work as it may deem reasonably necessary for the public interest, making allowances for additions and deductions with compensation made in accordance with the Contract, without constituting grounds for any claim by the Contractor for damages or for loss of profits, whether actual or anticipated, or for any variations between the approximate quantities and the quantities of the Work as done.

**ARTICLE 6. NO COLLUSION OR FRAUD.** The Contractor hereby agrees that the only person or persons interested as Principal or Principals in the bid or proposal submitted by the Contractor for this contract are named therein, and that no person other than those mentioned therein has any interest in the above mentioned proposal or in securing of the award, and that this contract has been secured without any connection with any person or persons other than those named, and that the proposal is in all respects fair and was prepared and the contract was secured without collusion or fraud and that neither any officer nor employee of the New York State Department of Transportation has or shall have a financial interest in the performance of the contract or in the supplies, Work or business to which it relates, or in any portion of the profits thereof. Legal requirements to which the Contractor must adhere are set forth in State Finance Law §139-a and §139-b.

**ARTICLE 7. CONTRACT PAYMENTS.** As the Work progresses in accordance with the contract and in a manner that is satisfactory to the State, the State hereby agrees to make payments to the Contractor therefore, based upon the proposal attached hereto and made a part hereof, as follows: The State shall once in each month and on such days as it may fix, determine the quantity of Work completed and of material which has actually been put in place in accordance with the terms and conditions of the contract, during the preceding month, and compute the value thereof and pay to the Contractor the monies due as provided in §38(7) of the Highway Law. No monthly payment shall be rendered unless the value of the Work completed equals 5% of the contract amount or \$1,000, whichever is the lesser. Semi-monthly payments may be rendered provided (a) the value of the Work performed in two successive weeks is more than \$50,000 or (b) the Commissioner of Transportation deems it to be in the best interests of the State to do so. The Contractor shall not hold any retainage from any Subcontractor.

**ARTICLE 8. NO PAYMENT DUE TO CONTRACTOR'S NON-COMPLIANCE.** It is further agreed that so long as any lawful or proper direction concerning the Work or material given by the Commissioner of Transportation, or his/her/their representative, shall remain uncomplied with, the Contractor shall not be entitled to have said contract payment processed, nor shall any contract payment(s) be processed for Work performed or material furnished until such lawful or proper direction aforesaid has been fully and satisfactorily complied with.

**ARTICLE 9. FINAL ACCEPTANCE OF WORK.** When in the opinion of the Regional Director a Contractor has fully performed the Work under the contract, the Regional Director shall recommend to the Commissioner of Transportation the acceptance of the Work so completed. If the Commissioner accepts the recommendation of the Regional Director, he/she/they shall thereupon by letter notify the Contractor, with copies to other interested parties, of such acceptance. Prior to the Final Acceptance of the Work by the Commissioner or his/her/their designee, the contract Work may be inspected, accepted and approved by other agencies and/or municipalities who will have jurisdiction of the Work after Final Acceptance.

Final Acceptance shall be final and conclusive except for defects not readily ascertainable by the Department, actual or constructive, fraud, gross mistakes amounting to fraud or other errors which the Contractor knew or should have known about as well as the Department's rights under any warranty or guarantee. Final Acceptance may be revoked by the Department at any time prior to the Office of the State

Comptroller's approval of the Final Agreement (CONR 46) in instances when the Department discovers such defects, mistakes, fraud, or errors in the Work.

**ARTICLE 10. FINAL AGREEMENT.** After the Final Acceptance of the Work, the Engineer shall prepare a Final Agreement of the Work performed and the materials placed and shall determine the value of such Work and materials under and according to the terms of the contract. This Final Agreement shall be certified, as to its correctness, by the Engineer. Upon approval of such Final Agreement by the Regional Director, it shall be submitted to the Commissioner for final approval. The right, however, is hereby reserved to the Commissioner to reject the whole or any portion of the Final Agreement, should the said certificate of the Engineer be found or known to be inconsistent with the terms of the agreement or otherwise improperly given. All certificates upon which partial payments may have been made shall be subject to correction in the final certificate or Final Agreement.

**ARTICLE 11. RIGHT TO SUSPEND WORK AND CANCEL CONTRACT.** It is further mutually agreed that if at any time during the prosecution of the Work the Commissioner of Transportation shall determine that the Work upon the contract is not being performed according to the contract or for the best interest of the State, the execution of the Work by the Contractor may be temporarily suspended by the Commissioner of Transportation, who may then proceed with the Work under his/her/their own direction in such manner as will accord with the contract specifications and be for the best interests of the State; or he/she/they may terminate the Contractor's employment under the contract while it is in progress, and thereupon proceed with the Work, in affirmance of the contract, by contract negotiated or publicly let, by the use of his/her/their own forces, by calling upon the surety to complete the Work in accordance with the plans and specifications or by a combination of any such methods; or he/she/they may cancel the contract and either re-advertise or re-let as provided in Section 38 of the Highway Law, or complete the Work under its own direction in such a manner as will accord with the contract specifications and be for the interests of the State; Any excess in the cost of completing the contract beyond the price for which it was originally awarded shall be charged to and paid by the Contractor failing to perform the Work or its surety; all in pursuance of the provisions of Section 40 of the Highway Law.

Whenever the State determines to suspend or stop Work under the contract, a written notice sent by mail to the Contractor at its address and to the sureties at their respective addresses, shall be sufficient notice of its action in the premises.

**ARTICLE 12. DETERMINATION AS TO VARIANCES.** In any case of any ambiguity in the Contract Documents or between any parts of the Contract Documents, the matter must be immediately submitted to the Commissioner, who shall adjust the same, and his/her/their decision in relation thereto shall be final and conclusive upon the parties.

**ARTICLE 13. SUCCESSORS AND ASSIGNS.** This Agreement shall bind the successors, assigns and representatives of the parties hereto.

**ARTICLE 14. INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with §139-h of State Finance Law, the Contractor hereby promises, asserts and represents that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating or shall participate in an international boycott in violation of the provisions of the United States Export Administration Act of 1969, as amended, or the United States Export Administration Act of 1979, or the effective Regulations of the United States Department of Commerce promulgated under either act.

It is understood further that the State in awarding a contract does so in material reliance upon the promise and representation made by the Contractor in the forgoing paragraph and that such contract shall be rendered



forfeit and void by the State Comptroller if subsequent to the bid execution date, the Contractor or such owned or affiliated person, firm, partnership or corporation has been convicted of a violation of the aforesaid Acts or Regulations or has been found upon final determination of the United States Commerce Department or any other appropriate agency of the United States to have violated such Acts or Regulations.

The Contractor agrees to and shall notify the Commissioner of Transportation, the Director of the Contract Management Bureau and State Expenditures in the Office of the State Comptroller of any such conviction or final determination of violation within five (5) days thereof.

#### **ARTICLE 15. WRITTEN NOTICES.**

1. All notices permitted or required hereunder shall be in writing and shall be transmitted either:

- a. via certified or registered United States mail, return receipt requested;
- b. by facsimile transmission;
- c. by personal delivery;
- d. by expedited delivery service; or
- e. by e-mail.

Such notices shall be addressed to the individuals or titles named in the Contract Documents, or which are designated by the Contractor or the State at the pre-construction meeting, or which are designated by the State or the Contractor from time to time during the course of the Contract pursuant to Paragraph 3 herein.

2. Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt.

3. The parties may, from time to time, specify any new or different address in the United States as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

4. The following information is the contact information for the Department's Regional Construction Engineer. The Regional Construction Engineer will serve as the main point of contact for the Contractor. All notices should be sent to the Department's Regional Construction Engineer at the following address:

*Name:* \_\_\_\_\_

*Address:* \_\_\_\_\_

*Telephone number:* \_\_\_\_\_

*Email:* \_\_\_\_\_

5. The following information is the contact information for the Contractor's Project Manager. The Contractor's Project Manager will serve as the main point of contact for the State. All notices should be sent to the Contractor's Project Manager at the following address:

*Name:* \_\_\_\_\_

*Address:* \_\_\_\_\_

*Telephone number:* \_\_\_\_\_

*Email:* \_\_\_\_\_

**ARTICLE 16. CONTRACTOR RECEIPT OF PAYMENT.** The Contractor shall provide complete

and accurate information and supporting documentation required by the Contract, the Agency and the Office of the State Comptroller (OSC). Payment will only be rendered electronically, unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payment will be made in accordance with ordinary State procedures and practices from the Statewide Financial System (SFS). The Contractor shall comply with OSC procedures to authorize electronic payments. A Contractor, who has not previously performed Work for New York State, shall complete a Substitute Form W9 for processing by the Department in order to obtain an SFS Vendor ID. After obtaining an SFS Vendor ID, the Contractor will receive an email from SFS with information which includes a link to the payment portal to track and manage payments. For questions regarding electronic payments, the Contractor should contact SFS at (518) 457-7717 or (855) 233-8363. The Contractor will not receive payment under this Contract if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

**ARTICLE 17. SUPPLEMENTAL TITLE VI PROVISIONS (CIVIL RIGHTS ACT).** During the performance of this contract, the Contractor, for itself, its assignees, and successors in interest (herein after referred to as the "Contractor") agree as follows:

- (1) **Compliance with Regulations.** The Contractor shall comply with the Regulation relative to nondiscrimination in federally assisted programs of the Department of Transportation of the United States 49 Code of Federal Regulations, Part 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this Contract.
- (2) **Nondiscrimination.** The Contractor, with regard to the Work performed by it during the Contract, shall not discriminate on the grounds of race, color, national origin, sex, sexual orientation, gender identity, age, and disability/handicap, or income status in the selection and retention of Subcontractors, including procurements of materials and leases of equipment. The Contractor shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices when the Contract covers a program set forth in 49 CFR 21, Appendix B.
- (3) **Solicitations for Subcontractors, Including Procurements of Materials and Equipment.** In all solicitations either by competitive bidding or negotiation made by the Contractor for Work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential Subcontractor or supplier shall be notified by the Contractor of the Contractor's obligations under this contract and 49 CFR 21 relative to nondiscrimination on the grounds of race, color, or national origin, sex, sexual orientation, gender identity, age, and disability/handicap.
- (4) **Information and Reports.** The Contractor shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by NYSDOT or the FHWA to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a Contractor is in the exclusive possession of another who fails or refuses to furnish this information the Contractor shall so certify to NYSDOT, or the FHWA as appropriate, and shall set forth what efforts it has made to obtain the information.
- (5) **Sanctions for Noncompliance.** In the event of the Contractor's noncompliance with the nondiscrimination provisions of this Contract, NYSDOT shall impose such contract sanctions as it or the FHWA may determine to be appropriate, including, but not limited to: (a.) withholding of payments to the Contractor under the Contract until the Contractor complies, and/or (b.) cancellation, termination or suspension of the Contract, in whole or in part.
- (6) **Incorporation of Provisions:** The Contractor shall include the provisions of paragraphs (1) through

(6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto.

The Contractor shall take such action with respect to any subcontract or procurement as NYSDOT or the FHWA may direct as a means of enforcing such provisions, including sanctions for noncompliance, provided, however, that in the event a Contractor becomes involved in, or is threatened with, litigation by a subcontractor or supplier as a result of such direction, the Contractor may request NYSDOT to enter into such litigation to protect the interests of NYSDOT; and, in addition, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

**ARTICLE 18. CONFLICTS OF INTEREST.** Included in paragraph 6 of the JURAT submitted with the bid, the Contractor has provided a *Bidder Assurance of No Conflict of Interest or Detrimental Effect*, signed by an authorized executive or legal representative attesting that the Contractor's performance of the services does not and will not create a conflict of interest with, nor position the Contractor to breach any other contract currently in force with the State of New York, that the Contractor will not act in any manner that is detrimental to any State project on which the Contractor is rendering services.

The Contractor hereby reaffirms the attestations made in its proposal and covenants and represents that there is and shall be no actual or potential conflict of interest that could prevent the Contractor's satisfactory or ethical performance of duties required to be performed pursuant to the terms of this Agreement. The Contractor shall have a duty to notify the Department immediately of any actual or potential conflicts of interest.

In conjunction with any subcontract under this Agreement, the Contractor shall obtain and deliver to the Department, prior to entering into a subcontract, a *Bidder Assurance of No Conflict of Interest or Detrimental Effect* form, signed by an authorized executive or legal representative of the subcontractor. The Contractor shall also require in any subcontracting agreement that the subcontractor, in conjunction with any further subcontracting agreement, obtain and deliver to the Department a signed and completed Vendor Assurance of No Conflict of Interest or Detrimental Effect form for each of its subcontractors prior to entering into a subcontract.

The Department and the Contractor recognize that conflicts may occur in the future because the Contractor may have existing, or establish new, relationships. The Department will review the nature of any relationships and reserves the right to terminate this Agreement for any reason, or for cause, if, in the judgment of the Department, a real or potential conflict of interest cannot be cured.

As further specified in 23 CFR 1.33, the Contractor hereby agrees that this Contract has been secured without any apparent or real conflict of interest that would (1) compromise the integrity and fairness of the procurement process, or (2) create circumstances where the Contractor obtained or appeared to obtain an unfair competitive advantage, or (3) compromise the interests of the Department and the People of the State of New York.

The Contractor further agrees that the Contract was secured without collusion or fraud and that neither any officer nor employee of the Department of Transportation has or shall have a financial interest in the performance of the Contract or in the supplies, Work or business to which it relates, or in any portion of the profits thereof. Legal requirements to which the Contractor must adhere are set forth in State Finance Law §139-a and §139-b.

**ARTICLE 19. ETHICS REQUIREMENTS.** The Contractor and its Subcontractors shall not engage any person who is, or has been at any time, in the employ of the State to perform services in violation of the provisions of the New York Public Officers Law, other laws applicable to the service of State employees, and the rules, regulations, opinions, guidelines or policies promulgated or issued by the New York State Joint Commission on Public Ethics, or its predecessors (collectively, the "Ethics Requirements"). The Contractor certifies that all of its employees and those of its Subcontractors who are former employees of

the State and who are assigned to perform services under this Contract shall be assigned in accordance with all Ethics Requirements. During the Term, no person who is employed by the Contractor or its Subcontractors and who is disqualified from providing services under this Contract pursuant to any Ethics Requirements may share in any net revenues of the Contractor or its Subcontractors derived from this Contract. The Contractor shall identify and provide the State with notice of those employees of the Contractor and its Subcontractors who are former employees of the State that will be assigned to perform services under this Contract, and make sure that such employees comply with all applicable laws and prohibitions. The State may request that the Contractor provide it with whatever information the State deems appropriate about each such person's engagement, work cooperatively with the State to solicit advice from the New York State Joint Commission on Public Ethics, and, if deemed appropriate by the State, instruct any such person to seek the opinion of the New York State Joint Commission on Public Ethics. The State shall have the right to withdraw or withhold approval of any Subcontractor if utilizing such Subcontractor for any Work performed hereunder would be in conflict with any of the Ethics Requirements. The State shall have the right to terminate this Contract at any time if any Work performed hereunder is in conflict with any of the Ethics Requirements.

The Contractor shall establish a practice of obtaining a list of all staff proposed by vendors and reviewing it to identify any former State employees. If a former State employee is identified, the Contractor shall review their employment history to ensure their participation is appropriate and allowable under the Public Officers Law.

The Contractor shall disclose any existing or contemplated relationship with any other person or entity, including relationships with any member, shareholders of 5% or more, parent, subsidiary, or affiliated firm, which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers of the Respondent or former officers and employees of the Agencies and their Affiliates, in connection with your rendering services enumerated in this solicitation. If a conflict does or might exist, please describe how your firm would eliminate or prevent it. Indicate what procedures will be followed to detect, notify the Agencies of, and resolve any such conflicts.

The Contractor shall disclose whether it, or any of its members, shareholders of 5% or more, parents, affiliates, or subsidiaries, have been the subject of any investigation or disciplinary action by the New York State Commission on Public Integrity or its predecessor State entities (collectively, "Commission"), and if so, a brief description must be included indicating how any matter before the Commission was resolved or whether it remains unresolved.

**ARTICLE 20. LICENSING.** In addition to any required licensure or permit specified in the Contract Documents, any professional services regulated by Articles 145, 147, and 148 of the New York State Education Law performed in furtherance of this Contract shall be performed by a licensed professional in accordance with such laws.

**ARTICLE 21. DBE/MBE/WBE/SDVOB GOALS.** DBE/MBE/WBE/SDVOB refers to a Disadvantaged Business Enterprise (DBE), Minority Business Enterprise (MBE), Women's Business Enterprise (WBE), or Service-Disabled Veteran-Owned Business (SDVOB). The DBE Program applies to Federal-Aid contracts, and the MBE Program, WBE Program, and SDVOB Program applies to Non-Federal-Aid contracts. The DBE/MBE/WBE/SDVOB goal(s) for this Contract is shown in the Contract Proposal. The Contractor must make a good faith effort to meet the goal(s). See Std. Spec. §102-12 *DBE/MBE/WBE/SDVOB Participation*.

**ARTICLE 22. INDEMNIFICATION.** The Contractor shall be responsible for all damage to life and property due to negligent or otherwise tortious acts, errors, or omissions of the Contractor in connection with its services under the Contract Documents. To the fullest extent permitted by law: (a) the Contractor shall indemnify, hold harmless, and release the Department and/or the State of New York, any municipality

in which the Work is being performed; and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the Work from suits, claims, actions, damages, and costs of every name and description resulting from the Work under this Contract and until the Final Acceptance thereof; (b) with respect to personal injury or property damage occurring after Final Acceptance and not covered by the indemnity in clause Article 22 (a), the Contractor shall indemnify, hold harmless, and release the Department and/or the State of New York, any municipality in which the Work is being performed; and/or any public benefit corporation, railroad or public utility from suits, claims, actions, damages, and costs of every name and description resulting from negligent or otherwise tortious acts, errors, or omissions of the Contractor in connection with its services under the Contract Documents; and (c) the Contractor shall indemnify, hold harmless, and release the Department's Inspector from suits, claims, actions, damages, and costs involving personal injury and property damage resulting from the Contractor's Work under the Contract during its prosecution and until the Final Acceptance thereof. The Department may retain such monies from the amount due to the Contractor as may be necessary to satisfy any claim for damages recovered against the Department, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, or the Department's Inspectors. The Contractor's obligation under this paragraph shall not be deemed waived by the failure of the Department to retain the whole or any part of such monies due the Contractor, or where such suit, action, damages, and/or costs have not been resolved or determined prior to release of any monies to the Contractor under the Contract. Such obligation shall not be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages imposed by law upon the Contractor, Subcontractors, the Department, the State, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, or any Department consultants or Contractors working relative to the Project.

The Contractor has the obligation, at its own expense, for the defense of any action or proceeding which may be brought against the parties specified in this Article. This obligation shall include the cost of attorney fees, disbursements, costs, and other expenses incurred in connection with such action or proceeding. The provisions of this Article shall survive the expiration or termination of the Contract.

Without limiting the generality of the foregoing, Contractor's obligation to indemnify, save harmless and release the Persons identified in this article specifically includes any suits, claims, actions, damages, and costs of every name and description resulting from any spill or release or threatened spill or release of a Hazardous Material (i) attributable to the negligence, willful misconduct or breach of contract by Contractor, its Subcontractors or agents, or (ii) which was brought onto the Site by Contractor or any of its Subcontractors or agents.

Notwithstanding the foregoing, the Department reserves the right to join such action, at its sole expense, when it determines there is an issue involving a significant public interest.

Such obligation does not extend to those suits, actions, damages, and costs of every name which arise out of the sole negligence of the Department, the State of New York, any municipality in which the Work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work of the Project, or any Department consultants or Contractors working relative to the Project, their agents, or their employees.

**ARTICLE 23. LIQUIDATED DAMAGES.** Time is an essential element of the Contract, and the Work shall be pursued vigorously to completion. The public is subject to detriment and inconvenience when full use of infrastructure cannot be made because of an incomplete Project. The Contractor agrees to the liquidated damages provisions as provided in Std. Spec. §108-03 *Failure to Complete Work on Time*.

**ARTICLE 24. INDEPENDENT CONTRACTOR.** The Contractor agrees to the terms as an Independent Contractor described in Std. Spec. §107-01 *Laws, Rules, Regulations and Permits*.

**ARTICLE 25. VENDOR RESPONSIBILITY.**

The Contractor shall comply with Vendor Responsibility requirements as set forth in Std. Spec. §105-05 *Vendor Responsibility*.

**ARTICLE 26. INSURANCE.**

The Contractor shall comply with the insurance requirements set forth in Std. Spec. §107-06 *Insurance* or otherwise modified by the Contract Proposal.

**IN WITNESS WHEREOF**, this Agreement has been executed by the State, acting by and through the Commissioner of Transportation, and the Contractor or his appointed representative, who has executed this Agreement on the day and year written below.

[ Contractor Firm Name]

\_\_\_\_\_  
(Printed Name, Title)

\_\_\_\_\_  
Signature

Agency Certification(s)

The New York State Department of Transportation has undertaken an affirmative review of the proposed Contractor's responsibility in accordance with the standards outlined in the Office of the State Comptroller's *Guide to Financial Operations*, Chapter XI.16, and based upon such review, has reasonable assurance that the proposed Contractor is responsible.

All information provided with respect to the requirements contained in state Finance Laws 139J and 139K is complete, true and accurate. All requirements for state Finance Laws 139J and 139K have been met and the appropriate documentation is attached.

In addition to the acceptance of this contract, I also certify that original copies of this signature page will be attached to all other exact copies of this contract.

**Department of Transportation**

Recommended by:

Approved by:

\_\_\_\_\_  
Date

-----  
**ATTORNEY GENERAL:**

-----  
**FOR STATE COMPTROLLER:**

Approved \_\_\_\_\_

Approved \_\_\_\_\_  
-----

THIS CONTRACT IS NOT TO BE EXECUTED OR BECOME EFFECTIVE UNTIL IT SHALL FIRST BE APPROVED BY THE STATE COMPTROLLER AND FILED IN HIS OFFICE. (Section 112, State Finance Law.)

**(Acknowledgment of Contractor, if a Joint Venture)**

A Joint Venture shall include a separate, signed and notarized copy of the acknowledgment page for each party in the joint venture.

**(Acknowledgment of individual Contractor)**

STATE OF NEW YORK ss.:  
COUNTY OF

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person described in and who executed the foregoing instrument  
and acknowledged that he/she/they executed the same.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of co-partnership Contractor)**

STATE OF NEW YORK ss.:  
COUNTY OF

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person who executed the foregoing instrument, who, being duly  
sworn by me, did for himself/herself/themself depose and say that he/she/they is a member of the firm of  
\_\_\_\_\_, consisting of himself/herself/themself and  
\_\_\_\_\_ and that he/she/they executed the foregoing instrument and that  
he/she/they had authority to sign same, and he/she/they did duly acknowledge to me that he/she/they  
executed the same as the act and deed of said firm for the uses and purposes mentioned therein.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Contractor, if a corporation)**

STATE OF NEW YORK ss.:  
COUNTY OF

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known, and known to me to be the person who being duly sworn, did depose and say that  
he/she/they resides in \_\_\_\_\_; that he/she/they is the  
\_\_\_\_\_ of \_\_\_\_\_ the corporation described in and  
which executed the foregoing instrument; and that he/she/they signed his/her/their name thereto by order  
of the Board of Directors of said Corporation.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Contractor, if a limited liability company)**

STATE OF NEW YORK ss.:  
COUNTY OF

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known, and known to me to be the person who being duly sworn, did depose and say that

103-07 SAMPLE FORM OF FAITHFUL PERFORMANCE BOND.

he/she/they resides in \_\_\_\_\_; that he/she/they is the duly authorized member of the limited liability company described in and which executed the foregoing instrument; and that he/she/they executed the foregoing instrument on behalf of the limited liability company for the purposes set forth therein as the act and deed of said limited liability company.

\_\_\_\_\_  
Notary Public

[Appendix A, Standard Clauses for All NYS Contracts inserted here]

**103-07 SAMPLE FORM OF FAITHFUL PERFORMANCE BOND.**

**KNOW ALL PERSONS BY THESE PRESENTS**, that \_\_\_\_\_  
(Name of Contractor / Design-Builder)

\_\_\_\_\_  
(Contractor / Design-Builder Address)  
(hereinafter called the "Principal") and \_\_\_\_\_  
a corporation created and existing under the laws of the State of \_\_\_\_\_ having its principal office in the City of \_\_\_\_\_ and authorized as a surety in the State of New York (such surety or Co-sureties are hereinafter called the "Surety") are held and firmly bound unto the People of the State of New York (hereinafter called the "State"), by and through its Department of Transportation (hereinafter called the "Department"), in the full and just sum of [*Total Contract Bid / Proposal Price or the "A Portion" of Total Contract Bid Price (\$.....)*] good and lawful money of the United States of America, to the payment of which said sum of money, well and truly to be made and done the said Principal binds itself, its heirs, executors, administrators or assignees and the said Surety binds itself, its successors or assigns, jointly and severally, firmly by these presents:

**WHEREAS**, said Principal has entered into a certain written contract with the Department of Transportation, 50 Wolf Road, Albany, New York 12232.

(Project Description)

FA Project Number \_\_\_\_\_

In the county(ies) listed above, which constitutes Contract D \_\_\_\_\_

**NOW, THEREFORE**, the condition of this obligation is such that if the said Principal shall well, truly and faithfully perform the work in accordance with the terms of the contract and as said contract may be modified or amended, and will commence and complete the work within the time prescribed in the contract, and shall protect the said State against, and pay any excess of cost as provided in said contract, and all amounts, damages, costs and judgments which may be recovered against said State or its officers or agents of which the said State may be called upon to pay to any person or corporation by reason of any damages, direct or indirect, arising or growing out of the doing of said work, or the repair or maintenance thereof, or suffered or claimed on account of said public works contract during the time thereof or the manner of doing the same, or the neglect of the said Principal, or its agents, or servants, or the improper performance of the said work by the said Principal, or its agents, or servants, or from any other cause, then this obligation shall be null and void, otherwise to remain in full force and virtue.

In the event of a failure of performance of the contract by the Principal, which shall include, but not be limited to, any breach or default of the contract by the Principal, or in case said contract is forfeited by the Principal in the manner provided for in the contract and the said Surety, for value received, hereby stipulates and agrees, if requested to do so by the State, has the option to either remedy the default, or breach or forfeiture of the Principal or take charge and fully perform and complete the work, mentioned



and described in said contract and specifications, pursuant to the terms, conditions and covenants thereof and as may be amended, at its own expense. The procedure by which the Surety undertakes to discharge its obligations under the bond shall be subject to the advance written approval of the Department. If the Surety completes the contract, it shall be paid for the actual items of work performed in accordance with the Principal's contract terms and prices. In this event the Surety assumes the rights and obligations of the Principal.

It shall be the duty of the Surety to give unequivocal notice in writing to the Department, within forty-five (45) days after receipt of written notice from the Department to the Surety, of the Surety's election to remedy default(s) or breach(es) or forfeiture(s) promptly or to perform and fully complete the contract promptly as provided herein, time being of the essence of this bond. In said notice of election, the Surety shall state the date on which the remedy or performance shall commence. During the period between the Department's notice and Surety's performance of the contract or remedy of the default, breach or forfeiture, the Surety shall be liable for and agrees to pay any and all reasonable and necessary costs as determined by the Department to maintain the contract site safe and convenient to the public.

It shall also be the duty of the Surety to give prompt notice in writing to the Department upon the completion of the remedy and/or correction of each breach or default or completion of the contract. The Surety shall not assert solvency of its Principal or its Principals denial of default as justification for its failure to give notice of election or for its failure to promptly remedy the breach or default or to complete the contract.

In the event the Surety shall fail to exercise either option or to act promptly then the Department shall give ten (10) days' notice of such failure, both to Principal and Surety, and after the expiration of the 10 days the Department may cause the work to be completed pursuant to Section 40 of the Highway Law, and the Surety and the Principal shall be jointly and severally liable for the amount of excess cost of completing the contract work beyond the amounts remaining for this contract adjusted for the work actually performed. When the cost of completion of performance by the Obligee is estimated, the Principal and Surety shall pay, free from all liens and encumbrances, the State determined estimated - completion costs above the funds remaining for this contract, to the Department within 30 days of receipt of the estimate. Adjustment of the Department's estimated completion cost will be made upon the Department's final acceptance of the work and appropriate refunds, if any, will be promptly made to the Surety. Any actual costs in excess of the estimated price shall be paid to the Department promptly on demand. Additionally, Principal and Surety shall be liable for any applicable liquidated and/or engineering costs or damages.

In addition, the said Principal and Surety further agree, as part of this obligation, to pay all damages of any kind to person or property that may result from a failure in any respect to perform and complete said contract including, but not limited to costs necessary to protect the traveling public or to avoid inconvenience to the traveling public, (liquidated damages as provided above) all repair and replacement costs necessary to rectify construction errors, architectural and engineering costs and fees, all consultant fees, all testing and laboratory fees, and all interest, legal fees and litigation costs incurred by the Department.

And the said Surety thereby stipulates and agrees that no change, extension, alteration, deduction or addition in or to the terms of the said contract or the plans or specifications accompanying the same, shall in any way affect the obligations of said Surety of its bond.

In case of multiple or co-sureties, the Co-Sureties agree to empower a single representative with authority to act on behalf of all the Co-Sureties with respect to this Bond, so that the Department will have no obligation to deal with multiple sureties hereunder. All correspondence from the Department to the Co-Sureties and all claims under this Bond shall be sent to such designated representative, and all correspondence so sent shall be deemed to have been sent to all Co-Sureties. The Co-Sureties also agree to designate a single agent for service of process with respect to any actions on this Bond, which agent shall either be a natural person or a corporation qualified to act as an agent for service of process under the laws of the State of New York. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt

requested) to the Department designating a single new representative and/or agent, signed by all the Co-Sureties. The initial representative shall be:

\_\_\_\_\_  
(Name of Representative)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State, Zip)

and the initial agent for service of process shall be:

\_\_\_\_\_  
(Name of Initial Agent)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State, Zip)

**IN TESTIMONY WHEREOF**, the said Principal has hereunto set his/her (their/its) hand and the said Surety has caused this instrument to be signed by its authorized officer, the day and year above written.

Signed and delivered this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, in the presence of:

Contractor / Design Builder

\_\_\_\_\_  
(Company)

\_\_\_\_\_  
(Printed Name, Title of Authorized Officer)

By: \_\_\_\_\_  
(Signature)

Surety (or Co-Surety)

\_\_\_\_\_  
(Company)

\_\_\_\_\_  
(Printed Name, Title of Authorized Officer)

By: \_\_\_\_\_  
(Signature)

Co-Surety

\_\_\_\_\_  
(Company)

\_\_\_\_\_  
(Printed Name, Title of Authorized Officer)

By: \_\_\_\_\_  
(Signature)

Co-Surety

\_\_\_\_\_  
(Company)

\_\_\_\_\_  
(Printed Name, Title of Authorized Officer)

By: \_\_\_\_\_  
(Signature)

(The Surety Company shall append a single copy of a statement of its financial condition and a copy of the resolution authorizing the execution of Bonds by officers of the Company to the bond(s).)

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**State Of New York Office of the Attorney General**

I hereby approve the foregoing contract and bond as to form and manner of execution.

\_\_\_\_\_  
Attorney General

\_\_\_\_\_  
Date

**(Acknowledgment of Principal, unless it be a corporation)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person described in and who executed the foregoing instrument  
and acknowledged that he/she executed the same.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Principal, if a corporation)**

STATE OF NEW YORK ss.:

COUNTY \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person, who being by me duly sworn, did depose and say that  
he/she resides in \_\_\_\_\_ that he/she is the \_\_\_\_\_ of  
\_\_\_\_\_ the corporation described in and which executed the foregoing  
instrument; and that he/she signed his/her name thereto by order of the Board of Directors of said  
Corporation.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Contractor, if a limited liability company)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known, and known to me to be the person who being duly sworn, did depose and say that he/she  
resides in \_\_\_\_\_; that he/she is the duly authorized member of the limited  
liability company described in and which executed the foregoing instrument; and that he/she executed the  
foregoing instrument on behalf of the limited liability company for the purposes set forth therein as the  
act and deed of said limited liability company.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Surety Company)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

103-08 SAMPLE FORM OF LABOR AND MATERIAL BOND.

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person, who being by me duly sworn, did depose and say that  
he/she resides in \_\_\_\_\_, that he/she is the \_\_\_\_\_ of the  
\_\_\_\_\_ the corporation described in the foregoing instrument; and that  
he/she signed his/her name thereto by order of the Board of Directors of said corporation.

\_\_\_\_\_  
Notary Public

**103-08 SAMPLE FORM OF LABOR AND MATERIAL BOND.**

**KNOW ALL PERSONS BY THESE PRESENTS**, that \_\_\_\_\_  
(Name of Contractor / Design-Builder)

\_\_\_\_\_  
(Contractor / Design-Builder Address)  
(hereinafter called the "Principal") and the \_\_\_\_\_  
a corporation created and existing under the laws of the State of \_\_\_\_\_ having its principal office  
in the City of \_\_\_\_\_ and authorized as a surety in the State of New York (such surety  
or Co-sureties are hereinafter called the "Surety"), are held and firmly bound unto the People of the State  
of New York (hereinafter called the "State") by and through its Department of Transportation (hereinafter  
called the "Department"), in the full and just sum of [*Total Contract Bid / Proposal Price or the "A  
Portion" of Total Contract Bid Price (\$.....)*] good and lawful money of the United States of  
America, for payment of which said sum of money, well and truly to be made and done, the said Principal  
binds itself, its heirs, executors and administrators, successors and assigns, and the said Surety binds  
itself, its successors and assigns jointly and severally, firmly by these presents:

**WHEREAS**, said Principal has entered into a certain written contract with the Department of  
Transportation, 50 Wolf Road, Albany, New York 12232.  
(Project Description)

FA Project Number \_\_\_\_\_  
In the county(ies) listed above which constitutes Contract \_\_\_\_\_

**NOW, THEREFORE**, the condition of this obligation is such, that if the said Principal shall  
promptly pay all monies due to all persons furnishing labor or materials to it or its Subcontractors in the  
prosecution of the work provided for in said contract, then this obligation shall be void, otherwise to  
remain in full force and effect;

Provided, however, that the Comptroller of the State of New York having required the said Principal  
to furnish this bond in order to comply with the provisions of Section 137 of the State Finance Law, all  
rights and remedies on this bond shall inure solely to such persons and shall be determined in accordance  
with the provisions, conditions and limitations of said Section to the same extent as if they were copied at  
length herein; and

Further, provided, that the place of trial of any action on this bond shall be in the county in which the  
said contract was to be performed, or if said contract was to be performed in more than one county then in  
any such county, and not elsewhere.

In case of multiple or Co-sureties, the Co-Sureties agree to empower a single representative with  
authority to act on behalf of all the Co-Sureties with respect to this Bond, so that the Department will  
have no obligation to deal with multiple sureties hereunder. All correspondence from the Department to  
the Co-Sureties and all claims under this Bond shall be sent to such designated representative, and all  
correspondence so sent shall be deemed to have been sent to all Co-Sureties. The Co-Sureties also agree  
to designate a single agent for service of process with respect to any actions on this Bond, which agent

shall either be a natural person or a corporation qualified to act as an agent for service of process under the laws of the State of New York. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Department designating a single new representative and/or agent, signed by all the Co-Sureties. The initial representative shall be:

\_\_\_\_\_  
(Name of Representative)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State, Zip)

and the initial agent for service of process shall be:

\_\_\_\_\_  
(Name of Initial Agent)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State, Zip)

**IN TESTIMONY WHEREOF**, the said Principal has hereunto set his/her (their, its) hand and the said Surety has caused this instrument to be signed by its authorized officer, the day and year above written.

Signed and delivered \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_ in the presence of

Contractor / Design Builder

\_\_\_\_\_  
(Printed Name, Title of Authorized Officer)

\_\_\_\_\_  
(Company)  
By: \_\_\_\_\_  
(Signature)

Surety (or Co-Surety)

\_\_\_\_\_  
(Printed Name, Title of Authorized Officer)

\_\_\_\_\_  
(Company)  
By: \_\_\_\_\_  
(Signature)

Co-Surety

\_\_\_\_\_  
(Printed Name, Title of Authorized Officer)

\_\_\_\_\_  
(Company)  
By: \_\_\_\_\_  
(Signature)

Co-Surety

\_\_\_\_\_  
(Printed Name, Title of Authorized Officer)

\_\_\_\_\_  
(Company)  
By: \_\_\_\_\_  
(Signature)

(The Surety Company shall append a single copy of a statement of its financial condition and a copy of the resolution authorizing the execution of Bonds by officers of the Company to the bond(s).)

-----

**(Acknowledgment of Principal, unless it be a corporation)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person described in and who executed the foregoing instrument  
and acknowledged that he/she executed the same.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Principal, if a corporation)**

STATE OF NEW YORK ss.:

COUNTY \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person, who being by me duly sworn, did depose and say that  
he/she resides in \_\_\_\_\_ that he/she is the \_\_\_\_\_ of  
\_\_\_\_\_ the corporation described in and which executed the foregoing  
instrument; and that he/she signed his/her name thereto by order of the Board of Directors of said  
Corporation.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Contractor, if a limited liability company)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known, and known to me to be the person who being duly sworn, did depose and say that he/she  
resides in \_\_\_\_\_; that he/she is the duly authorized member of the limited  
liability company described in and which executed the foregoing instrument; and that he/she executed the  
foregoing instrument on behalf of the limited liability company for the purposes set forth therein as the  
act and deed of said limited liability company.

\_\_\_\_\_  
Notary Public

**(Acknowledgment of Surety Company)**

STATE OF NEW YORK ss.:

COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_, before me personally came \_\_\_\_\_  
to me known and known to me to be the person, who being by me duly sworn, did depose and say that  
he/she resides in \_\_\_\_\_. that he/she is the \_\_\_\_\_ of the  
\_\_\_\_\_ the corporation described in the foregoing instrument; and that  
he/she signed his/her name thereto by order of the Board of Directors of said Corporation.

\_\_\_\_\_  
Notary Public

**SECTION 104 - SCOPE OF WORK**

(Last Revised January, 2025)

**104-01 WORK REQUIRED.**

The Contractor shall begin work within ten days of the date of the contract award notification by the Department, unless written consent of the Department is given to begin at a later date. Contract awards are posted by the Office of the State Comptroller on [www.openbooknewyork.com](http://www.openbooknewyork.com). The Contractor shall perform all work enumerated under the terms of the contract and shall protect all adjoining properties, utility facilities and existing highway facilities within the right of way. The Contractor shall repair and/or replace any property, utility facility or highway facility damaged or destroyed by it or its employees through construction operations, within and adjacent to the right of way.

As soon as possible after the contract has been awarded, the Contractor shall contact the Regional Construction Engineer to schedule a preconstruction meeting. A preconstruction meeting is held with the Contractor and interested parties involved in the contract to discuss the contract scope, work plan and schedule and review administrative procedures necessary to begin work. A Contractor Principal, the Superintendent, Safety Officer, and others as appropriate typically attend. A separate Civil Rights meeting is frequently scheduled and conducted by the Regional Compliance Specialist (RCS) with the Contractor's Civil Rights representatives and others as required. The Regional Construction Engineer may waive a part of a preconstruction meeting for a Contractor with multiple contract awards.

The Contractor shall coordinate the work of its Subcontractors, Manufacturers, Fabricators and Material Suppliers. Their operations shall be arranged and conducted so that delays will be avoided. Where the work of the Contractor, or Subcontractors, overlaps or dovetails with that of other Contractors, materials shall be delivered and operations shall be conducted so as to carry on the work continuously in an efficient and workmanlike manner.

During the life of this contract, Utilities may make changes in their facilities. These changes may be made by the Utility employees or by contract within the limits of or adjacent to this contract and may be temporary and/or permanent.

Delays or oversights on the part of the Contractor, Subcontractors or Utilities in properly completing any work, thereby requiring the removal and replacement of work already in place, will not be the basis for a claim of extra compensation. Such work will be performed at the cost and expense of the responsible Contractor, Subcontractor or Utility. Reference is made to General Obligations Law §11-102 which concerns the interference and/or delay of the Contractor's progress of work by Utilities.

**104-02 CHANGES, CONTINGENCIES, EXTRA WORK AND DEDUCTIONS.**

The provisions of Article 5, *Alterations and Omissions* of the contract agreement shall apply. Whenever the Department determines that from any unforeseen cause the terms of any contract should be altered to provide for changes, contingencies, extra work, or the deletion of work, a change order may be issued to the Contractor. Upon direction by the Department, the Contractor shall then promptly proceed with the Work in accordance with the pertinent specifications. Such changes in quantities and alterations shall not invalidate the contract nor release the Surety, and the Contractor shall perform the Work as altered.

No instructions, either written or verbal from any Department employee or agent shall be construed as an order for changes until receipt by the Contractor of written notification that a change order has been approved by the Department and filed by the Office of the State Comptroller (OSC), or written notification from the Engineer that changes in the work are eligible and authorized for payment in accord with Section 697 *Field Change Payment*. The Contractor may proceed with the work in advance of the approved change order if the Contractor has received an approved *Authorization of Extra Work*.

**104-03 DIFFERING SITE CONDITIONS.**

In accordance with 23 CFR 635.109(a)(1):

#### 104-04 SIGNIFICANT CHANGES IN THE CHARACTER OF WORK.

*During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party of the specific differing site conditions before the site is further disturbed and before the affected work is performed.*

*Upon written notification, the Engineer will investigate the site conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding anticipated profits, will be made and the contract modified in writing accordingly. The Engineer will notify the Contractor, of the determination whether or not an adjustment to the contract is warranted.*

*No contract adjustment which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.*

The Department will administer the above Federal regulations as follows:

During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, the party discovering such conditions shall promptly notify the other party of the specific differing site conditions before the site is further disturbed and before the affected work is performed, with subsequent written notice to be provided later. The Contractor shall comply with the notice and recordkeeping provisions of §104-06 *Notice and Recordkeeping*.

The Contractor or the State, as the case may be, must make written notice to the other party of the existence of apparent subsurface or latent physical conditions if that party wishes to adjust the contract price or time of performance, including direct costs and/or time related compensation, if applicable. Such notice shall be given within 15 calendar days of the time at which the party had knowledge, or should have had knowledge of the differing site condition. The Department will have no liability and no adjustment will be made for any damages which accrued more than 15 calendar days prior to the filing of such a notice with the Engineer.

Upon written notice, the Engineer will investigate the site conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of the work, an adjustment, excluding anticipated profits, will be made to the contract. The Engineer will make an initial response in writing to the Contractor, within 21 calendar days, with a determination whether or not an adjustment to the contract is warranted. Situations requiring examination of the site or input from other Department personnel may require additional time to resolve. No contract adjustment will be allowed unless the Contractor has provided the required written notice, or written notice was provided to the Contractor by the State.

If an agreement on an adjusted price has not been reached before the work begins, the Contractor shall keep daily records and make reports of all labor, material and equipment used in connection with such work and the cost thereof as specified in §109-05C. *Force Account Reports*. Compensation for increased costs of the work resulting from the differing site conditions will be made in accordance with §109-05 *Extra Work and Time Related Compensation*. Compensation for time related costs, if any, will be made in accordance with §109-05D. *Time Related Compensation*.

#### 104-04 SIGNIFICANT CHANGES IN THE CHARACTER OF WORK.

In accordance with 23 CFR 635.109(a)(3):

*The Engineer reserves the right to make, in writing, at any time during the work, such **changes in quantities and such alterations in the work** as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the contract nor release the Surety, and the Contractor agrees to perform the work as altered.*

*If the alterations or changes in quantities significantly change the character of work under the contract, **whether such alterations or changes are in themselves significant changes in the character of***



*work, or by affecting other work cause such other work to become significantly different in character, an adjustment, excluding anticipated profits, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made by the Department, either for or against the Contractor, in such amount as determined to be fair and equitable.*

*If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.*

*The term "significant change" shall be construed to apply only to the following circumstances: when the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or when a Major Item of work, as defined elsewhere in the contract, is increased in excess of 125 percent, or decreased below 75 percent of the original contract quantity. Any allowance for a change in unit price shall apply only to that portion of work in excess of 125 percent of the original contract item quantity, or in the case of a decrease below 75 percent, to the actual amount of work performed.*

The Department will administer the above Federal regulations as follows:

The Department may make, in writing, at any time during the work, any necessary changes in quantities and alterations to the work in order to satisfactorily complete the project. If the Contractor or the Department discovers a change that constitutes a significant change in the character of work as defined below, the party discovering the change shall promptly provide the other party written notice of the significant change in the character of work before additional work is performed. The Contractor shall comply with notice and recordkeeping provisions of §104-06 *Notice and Recordkeeping*.

The Contractor or the State, as the case may be, must make written notice to the other party of the existence of an apparent significant change in the character of work if that party wishes to adjust the contract price or time of performance, including direct costs and/or time related compensation, if applicable. Such notice shall be given within 15 calendar days of the time at which the party had knowledge, or should have had knowledge of an event, matter or occasion which results in a significant change in the character of work. The Department will have no liability and no adjustment will be made for any damages which accrued more than 15 calendar days prior to the filing of such a notice with the Engineer.

Upon written notice, the Engineer will investigate the changes and if it is determined that the alterations or changes in quantities significantly change the character of work, whether such alterations or changes are in themselves significant changes in the character of work, or by affecting other work, cause such other work to become significantly different in character, an adjustment, excluding anticipated profits, will be made to the contract. The Engineer will make an initial response in writing to the Contractor, within 21 calendar days, with a determination whether or not an adjustment to the contract is warranted. Situations requiring examination of the site or input from other Department personnel may require additional time to resolve. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made by the Department, either for or against the Contractor, in such amount as determined to be fair and equitable. No contract adjustment will be allowed unless the Contractor has provided the required written notice, or written notice was provided to the Contractor by the State.

If an agreement on an adjusted price has not been reached before the work begins, the Contractor shall keep daily records and make reports of all labor, material and equipment used in connection with such work and the cost thereof as specified in §109-05C. *Force Account Reports*.

Compensation for increased costs of the work resulting from significant changes in the character of work will be made in accordance with §109-05 *Extra Work and Time Related Compensation*. Compensation for time related costs, if any, will be made in accordance with §109-05D. *Time Related Compensation*.

## 104-05 SUSPENSIONS OF WORK DIRECTED BY THE ENGINEER.

- A. *Character of Work.*** The term "significant change" shall be construed to apply only when the character of the work differs materially in kind or nature from that involved or included in the original proposed construction.
- B. *Major Items.*** The term "significant change" shall be construed to apply to Major Items (as defined in §101-02 *Definitions of Terms*) only when the quantity of a Major Item is more than 125% or is less than 75% of the original contract quantity. Any allowance for a change in the unit price shall apply only to that portion of work in excess of 125% of the original contract item quantity, or to the actual amount of work performed if the quantity decreases below 75% of the original contract item quantity. The Contractor or the State, as the case may be, must make written notice to the other party of the "significant change" in the quantity of a major item if that party wishes to adjust the contract price or time of performance. Knowledge of a "significant change" in quantity could result from receipt of a change order (approved or unapproved), a letter directing a change in the contract work, review of plan details and estimates, review of work completed or progress payment quantities, or a combination of the above. Payment for major items will be limited in accordance with §109-02 *Payment for Altered Quantities*.
- C. *Minor Items.*** The term 'significant change' shall be construed to apply to Minor Items (as defined in §101-02 *Definitions of Terms*) only when extra work both (1) increases the quantity of a Minor Item to more than 200% of the original contract quantity and (2) results in an increase of more than \$5,000 from the original contract amount. Any allowance for a change in the unit price shall apply only to that portion of work both in excess of 200% of the original contract item quantity, and in excess of \$5,000 greater than the original contract amount.
- D. *Composite Items.*** Composite items, for the purposes of this subsection, consist of rock and non-rock components and are limited to unclassified excavation and trench and culvert excavation identified on the Earthwork Summary Sheets. The term "significant change" shall be construed to apply to a composite item when the character of the work differs materially in kind or nature from the original proposed construction or when the composite item is a Major Item, any individual component of the composite is less than 75% or more than 125% of the quantity stated in the Earthwork Summary Sheet used by the Department in preparing the contract, and the reasonable costs of the composite item either increases or decreases as a result of the change. Any allowance for a change in the unit price shall be governed by the appropriate subsection within §104-04 *Significant Change in the Character of the Work*. At the Engineer's request, the Contractor shall submit its price breakdown of the bid price for the individual components of any composite item.
- E. *Fixed Quantity Items.*** Certain items of work may be "fixed quantity" items and payment will be restricted to the quantity stated in the Estimate of Quantities. The term "significant change" shall be construed to apply to fixed quantity items only if, during the progress of the work, the quantity of work is found to be less than 75% or more than 125% of the quantity stated in the Estimate of Quantities.
- F. *Lump Sum Items.*** Certain items of work may be Lump Sum items wherein a single bid amount is intended to provide payment for all necessary work during the execution of the contract. The term "significant change" shall be construed to apply to Lump Sum items when either changes in other contract work items or alterations in the work result in a significant change in the character of work required to complete-"Lump Sum" items of work.

## 104-05 SUSPENSIONS OF WORK DIRECTED BY THE ENGINEER.

In accordance with 23 CFR 635.109(a)(2):

*If the performance of all or any portion of the work is suspended or delayed by the Engineer in writing for an unreasonable period of time (not originally anticipated, not customary, or not inherent to the construction industry) and the Contractor believes that it is due additional compensation and/or contract time is due as a result of such suspension or delay, the Contractor shall submit to the Engineer in writing a request for adjustment within 7 calendar days of receipt of the notice to resume work. The request shall set forth the reasons and support for such adjustment.*

*Upon receipt, the Engineer will evaluate the Contractor's request. If the Engineer agrees that the cost and/or time required for the performance of the contract has increased as a result of such suspension and the suspension was caused by circumstances beyond the control of and not the fault of the Contractor, its Suppliers or subcontractors at any approved tier, and not caused by weather, the Engineer will make an adjustment (excluding profit) and modify the contract in writing accordingly. The Contractor will be notified of the Engineer's determination whether or not an adjustment to the contract is warranted. No contract adjustment will be allowed under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided or excluded under any other term or condition of this contract. No contract adjustment will be allowed unless the Contractor has provided the required written request for adjustment within the time prescribed.*

The Department will administer the above Federal regulations as follows:

During the progress of the work, the Engineer may direct the Contractor in writing to suspend work due to circumstances beyond the Contractor's control. If the performance of all or any portion of the work is suspended or delayed by the Engineer for an unreasonable period of time (not originally anticipated, not customary, or not inherent to the construction industry) and the Contractor believes that it is due additional compensation and/or additional time to perform the work as a result of such suspension or delay, the Contractor shall keep daily records of all labor, material and equipment idled or used in connection with such work and the cost thereof in accordance with the recordkeeping provisions of §104--06 *Notice and Recordkeeping*.

The Contractor shall submit a request for contract adjustment within seven (7) calendar days of receipt of the notice from the Engineer to resume work. This request shall set forth the reasons and support for such adjustment. Upon receipt, the Engineer will evaluate the Contractor's request for contract adjustment, and if it is determined that the cost and/or time required for the performance of the contract has increased as a result of a suspension of work directed by the Engineer and the suspension was caused by circumstances beyond the control of and not the fault of the Contractor, its Subcontractors, Manufacturers, Fabricators or Material Suppliers and not caused by weather, an adjustment, excluding profits, will be made to the contract. The Engineer will notify the Contractor of the determination whether or not an adjustment to the contract is warranted. No contract adjustment will be made to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided for or excluded under any other term or condition of this contract. No contract adjustment will be allowed unless the Contractor has provided the required written notice, or written notice was provided to the Contractor by the State.

Compensation for increased costs of the work resulting from a Suspension of Work Directed by the Engineer will be made in accordance with §109-05 *Extra Work and Time Related Compensation*. Compensation for time related costs, if any, will be made in accordance with §109-05D. *Time Related Compensation*.

#### **104-06 NOTICE AND RECORDKEEPING.**

The Contractor shall provide the Engineer written notice of its contentions regarding Differing Site Conditions, Significant Changes in the Character of Work, Suspensions of Work Directed by the Engineer, disputed work, time related disputes or any other dispute. The notification and recordkeeping provisions in this Contract shall be strictly complied with for disputes of any nature and are a condition precedent to any recovery. Timely notice and recordkeeping affords the Department the opportunity to

initiate measures that will mitigate damages to all parties and/or to agree to terms and conditions for timely payment for any eligible added costs.

**A. *Written Notice Requirements.***

**1. *Differing Site Conditions.*** The Contractor shall provide written notice of its contentions to the Engineer, or the Engineer will provide written notice of the Department's contentions to the Contractor, within 15 calendar days after the appropriate party knew or should have known of any dispute regarding Differing Site Conditions.

**2. *Significant Changes in the Character of Work.*** The Contractor shall provide written notice of its contentions to the Engineer, or the Engineer will provide written notice of the Department's contentions to the Contractor, within 15 calendar days after the appropriate party knew or should have known of any dispute regarding Significant Changes in the Character of Work.

**3. *Suspensions of Work Directed By The Engineer.*** The Contractor shall provide written notice of its contentions to the Engineer within 7 calendar days of receipt of a notice to resume work.

**4. *Disputed Work.*** The Contractor shall provide written notice of its contentions to the Engineer within 15 calendar days of receipt of a direction to complete work that the Contractor believes is not contract work, any direction of the Engineer that the Contractor believes exceeds the requirements of the provisions of the contract.

**5. *Time Related Compensation.*** The Contractor shall provide written notice of its contentions to the Engineer within 15 calendar days of the occurrence of any event which affects the scheduled time of performance, if the Contractor believes that it is or will be entitled to additional compensation for time related damages, whether due to delay, extra work, disputed work, breach of contract or other causes.

After submitting the required notice, the Contractor shall follow the dispute process set forth in §105-14, Disputed Work and Dispute Resolution.

**B. *Recordkeeping Requirements.*** If an agreement on an adjusted price has not been reached before the work begins, the Contractor shall keep and submit records for each operation and location sufficient to support any additional costs, in accordance with §109-05C. *Force Account Report.*

**1. *Differing Site Conditions.*** If an agreement on an adjusted price has not been reached before the work begins, the Contractor shall keep and submit daily records to document all labor, material and equipment used for disputed work in accordance with §109-05C.1. *Daily Summary.*

**2. *Significant Changes in the Character of Work.*** If an agreement on an adjusted price has not been reached before the work begins, the Contractor shall keep and submit daily records to document all labor, material and equipment used for disputed work in accordance with §109-05C.1. *Daily Summary.*

**3. *Suspensions of Work Directed By The Engineer.*** The Contractor shall keep and submit daily records to document all labor, material and equipment used in accordance with §109-05C.1. *Daily Summary*, beginning upon receipt of a notice of Suspension of Work from the Department.

**4. *Disputed Work.*** During the progress of any disputed work for which an agreement on an adjusted price has not been reached, the Contractor shall keep and submit daily records of all

## 104-07 SITE HOUSEKEEPING.

labor, material and equipment used for disputed work in accordance with §109-05C.1. *Daily Summary*.

**5. Time Related Compensation.** If the Contractor is claiming time related compensation, the Contractor shall keep and submit daily records of all labor, material and equipment for each operation and location affected by the delay in accordance with §109-05C.1. *Daily Summary*. Other records shall, as far as practicable, be sufficient to support any costs claimed under §109-05D.1. *Time Related Compensation*.

For the duration of the time related compensation period, the Contractor shall prepare and submit weekly reports to the Engineer setting forth the following:

- a. Potential effect on the Contractor's schedule.
- b. Identification of all operations that have been, are, or may be delayed.
- c. Explanation of how the Department's acts or omissions are affecting or delaying operations.

**C. Failure to Comply.** Failure of the Contractor to provide such written notice in a timely fashion will be grounds for denial of the dispute and the Department does not have to show prejudice to its interest before such denial is made. In the event the Contractor fails to provide the required written notice within the required time limits, or fails to maintain and submit the records specified above, any claim for compensation shall be deemed waived, notwithstanding the fact that the Department may have had actual notice of the facts and circumstances comprising such dispute and is not prejudiced by such failure of notice or recordkeeping.

## 104-07 SITE HOUSEKEEPING.

The contract site shall be cleaned up at the close of each work day, and be left in an orderly condition. Waste and debris shall be removed from the work site and surrounding areas cleaned of debris or waste generated from the work site. Containers shall be provided for the collection and separation of waste, and garbage and other waste shall be disposed of at frequent and regular intervals. Any salvaged material not specified to be disposed of otherwise, shall become the property of the Contractor and shall be removed from the site.

## 104-08 MAINTAINING TRAFFIC.

The Contractor shall maintain and protect traffic in accordance with the requirements of the MUTCD and the contract documents.

**A. Closing of Highway.** The legal closing of a highway to public travel in the manner provided by Section 104 of the Highway Law will be done by the Commissioner or by the County Superintendent of Highways when requested by the Department. Not all highways are legally closed during highway construction operations.

When a highway is legally closed and public travel diverted therefrom, adequate warning, danger and direction signs and lights shall be erected and maintained by the Contractor to properly protect and direct public travel by day and by night. Suitable barricades shall also be erected at the ends of such closed sections of highways and large signs displayed indicating such closure. All signs, barricades and other traffic control devices used shall conform to the MUTCD.

**B. Use of Restricted Highway.** With the award of a contract the Commissioner will, unless otherwise specified, designate the section of highway under contract a "Restricted Highway" pursuant to Section 104A of the Highway Law and Section 1625 of the Vehicle and Traffic Law. Pursuant to these legal sections, the Commissioner has the authority to (1) establish maximum and minimum speed limits at which vehicles may proceed along any such Restricted Highway; (2) establish weight and dimension limits of vehicles; (3) regulate the use of such Restricted Highway by pedestrians,

## 104-09 CONTRACTOR'S RETENTION OF RECORDS.

equestrians, and animals; (4) regulate parking, standing, stopping, and backing of vehicles; (5) control persons and equipment engaged in work on such highway. When used on such Restricted Highways, all traffic control devices shall be considered as official traffic control devices and shall conform to the MUTCD.

The Commissioner will therefore cause signs indicating such restrictions to be placed at such points as deemed necessary for the safe use of the Restricted Highway. The traveling public and Contractor must observe and comply with these restrictions, as posted, except that the Contractor may be allowed greater latitude with respect to size and weight of construction equipment.

Construction Equipment or vehicles shall be operated on the Restricted Highway as provided under §105-12 *Load Restrictions*.

### 104-09 CONTRACTOR'S RETENTION OF RECORDS.

The Contractor shall retain all records for six years following the date of approval of the contract final agreement by the Office of the State Comptroller. Required records shall include all payrolls, accounts, details that comprise its total cost pursuant to any of the provisions under §104-02 *Changes, Contingencies, Extra Work and Deductions*, records maintained pursuant to §105-14 *Disputed Work and Dispute Resolution* and §109-05 *Extra Work and Time Related Compensation*, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by the Contractor in connection with the contract. Legible copies, including microfilm copies, are acceptable, provided they are so arranged, identified, and indexed that any individual document, or component of the records, can be located with reasonable facility.

The Contractor shall make such records available to the Department for review and audit upon request, if deemed necessary by the Department. In case all or a part of such records are not made so available, the Contractor understands and agrees that any items not supported by reason of such unavailability of the records shall be disallowed, or if payment therefore has already been made, the Contractor shall, upon demand in writing by the Commissioner, refund to the Department the amount so disallowed.

### 104-10 VALUE ENGINEERING CHANGE PROPOSAL (VECP).

**A. Purpose and Scope.** The purpose of a Value Engineering Change Proposal (VECP) is to encourage the use of the Contractor's ingenuity and experience in arriving at alternative construction designs, methods, and procedures that result in a lower direct cost to accomplish a contract requirement. It is the intent of this provision to share with the Contractor any substantial direct cost savings which may be generated as a result of a VECP offered by the Contractor and approved by the Department. A VECP is a Contractor-initiated change request. If approved, the changes and payments will be authorized through the change order process. Before a VECP can be implemented, it must pass through three approval processes: conceptual approval, formal approval, and change order approval. To expedite the review process, the Contractor has the option of jointly submitting the conceptual VECP and the formal VECP for simultaneous review. If the VECP receives formal approval, as part of the change order process the Contractor may request that the Department consider granting advanced authorization of extra work.

The VECP should produce direct cost savings to the Department and the public without, in the sole judgment of the Department, impairing essential functions and characteristics of the facility including but not limited to service life, economy of operation, ease of maintenance, desired appearance, and safety. The Contractor, when developing a VECP, shall address the designer's objectives, environmental permit requirements and regulations, commitments made to the public to mitigate the impact of construction, and other such concerns.

The "direct cost savings" is the difference of the "construction savings" generated by implementing the VECP minus reasonable "design costs" associated with the VECP. The "construction savings" is the difference between what it would cost to complete all the contract work without implementing the VECP and the cost to complete all the contract work if the VECP is

implemented. This includes any changes to quantities or unit prices across the entire contract if affected by the VECP. If the estimated cost to complete all the contract work without implementing the VECP differs from the contract bid amount for the work, supporting documentation to explain the variance shall be provided. Reimbursable "design costs" are specific to engineering changes (examples: design changes, plan sheet revisions, and quantity estimating). Expenditures toward proposal preparation (examples: scheduling, documentation, cost analysis, material research, etc.) are not reimbursable.

Indirect cost savings (time, user delay, railroad force account costs, inspection costs, etc.), although considered when reviewing the merits of the VECP, are not reimbursed. A VECP may alter the progress schedule and milestone dates, which in turn could affect time-related contract provisions.

Proposals that reduce the time to complete the contract, and only result in indirect cost savings, may be accepted based on the mutual benefit derived. These proposals will be evaluated in accordance with §104-10F. *Time Savings*.

**B. Submittal of Conceptual VECP.** A conceptual proposal is required for all VECP. It should outline the general technical concepts associated with the VECP and the estimated direct cost savings which may result. Upon review by the Department, one of the following actions will be taken:

- Conceptual approval and a request for the Contractor to submit a formal VECP.
- Request for additional information
- Rejection of the VECP

The Contractor shall submit an original and three copies of the conceptual VECP to the Engineer along with any additional information requested by the Department. The conceptual VECP should contain sufficient information for concept review and evaluation, including the following as a minimum:

**1. Conceptual VECP Summary.** A summary of the VECP identified as "Conceptual VECP" which includes:

- a. Short title (description) of the VECP (10 or less words).
- b. Contract information (Contract D number, PIN, contract description, contractor, federal aid number if applicable, letting date, Region, and county).
- c. Original total contract bid price.
- d. Estimated contract cost. This may be different from the original total contract bid price due to addition or alteration of work (i.e., the estimated cost to complete the work if the VECP is not implemented). The Engineer must concur with the estimated contract cost.
- e. Estimated contract cost if the VECP is implemented (excludes VECP design cost and any VECP construction savings reimbursement).
- f. Estimated VECP construction savings (Item d. minus Item e.).
- g. Estimated VECP design cost (Not all VECP will have design cost).
- h. Estimated direct cost savings due to the VECP (Item f. minus Item g.).
- i. Fifty percent of the estimated direct cost savings (This should equal the overall savings to the State).
- j. Estimated total adjusted contract cost if VECP is implemented (includes VECP savings and design cost reimbursements).
- k. The type of VECP (either "Cost Savings" or "Time Savings Only").
- l. Date by which the authorization of extra work (change order) must be granted. (If time sensitive, requests for advance authorization of extra work per §104-02 *Changes, Contingencies, Extra Work and Deductions* will be considered.)
- m. Identification of any new or existing contract pay items requiring agreed prices.
- n. Identification of any materials with long lead times (to order, fabricate, deliver, etc.) that may require purchase authorization from the Engineer prior to formal approval/disapproval of

the VECP, or may delay the implementation of the VECP. Identify any date by which authorization to order these materials must be received without affecting the progress schedule.

- o.* A basic description of the VECP and associated benefits and impacts (progress schedule, environmental, maintenance & protection of traffic, quality, etc.).

**2. Conceptual Plans.** Conceptual plan drawings.

**3. Design Criteria.** If the VECP proposes design changes, supporting technical design criteria shall be provided.

**4. Schedules.**

- a.* The most recently approved baseline progress schedule.
- b.* The most recently approved construction progress schedule update.
- c.* A draft, proposed, revised progress schedule illustrating the impacts of the VECP. The schedule shall identify: (1) the time required to develop a formal VECP; (2) the time required to order, fabricate, and deliver materials with long lead times; (3) the time required to obtain any environmental permits or other required approvals; (4) any anticipated progress schedule changes (contract completion date, milestone dates, task durations, etc.); (5) the latest date by which authorization of the VECP extra work must be granted without affecting the schedule. The draft progress schedule should provide a sufficient level of detail upon which the reasonableness of the VECP can be determined.

Should the Department find that insufficient time is available for review and processing, it may reject the VECP solely on such basis. If the Department fails to respond to the VECP by the date specified, the Contractor will consider the VECP rejected and will have no basis for a dispute against the State as a result thereof. The Department may accept a VECP that requires a contract time extension if sufficient cost savings are anticipated.

**5. Estimate of costs.** The conceptual VECP estimate of costs should include sufficient information to determine the reasonableness of the VECP. If the proposal requires the ordering of materials, the Contractor needs to provide documentation from the suppliers to justify the cost of the materials.

**6. Previous Use or Testing.** A description of any previous use or testing of the VECP on another Department contract or elsewhere, the conditions and results therewith. The Contractor shall submit the technical aspects of the VECP in sufficient detail so the Department can determine the suitability of the VECP from an engineering perspective. If the technology is new, test information shall be provided to the Department's satisfaction. If a similar VECP was previously submitted on another Department contract, indicate the date, contract number, and the action taken by the Department.

**C. Submittal of Formal VECP.** Upon notification by the Engineer that the conceptual VECP is approved and a formal VECP is necessary, the Contractor will submit to the Engineer an original and three copies of the following materials and information for each formal VECP along with any additional information requested by the Department:

- 1. Formal VECP Summary.** A summary of the VECP, identified as "Formal VECP", which follows the conceptual VECP summary format and information requirements (Information and estimates may have changed since the conceptual VECP).



**2. Complete Plans and Specifications.** Complete plans and specifications, which meet Department standards, showing the proposed changes relative to the original contract features and requirements. The Department requires a Professional Engineer's stamp and signature on any significant engineering changes.

**3. Field Change Sheets.** Field change sheets and/or shop drawings. If the VECP results in a field change, and those items affected require the submission of shop drawings, the shop drawings will not be accepted unless accompanied by corresponding field change sheets. Documents shall be developed in compliance with Department requirements. The Department requires a Professional Engineer's stamp and signature on any significant engineering changes.

**4. Schedules.** The same information requirements as for the conceptual VECP apply, except that a formal, proposed, revised progress schedule in accordance with §108-01 *Progress Schedule* is required.

**5. Cost Analysis.** A complete cost analysis indicating quantity changes, unit price changes, and new contract pay items. As a minimum it shall include:

- a. An itemized comparison of estimated costs to complete all the contract work with implementing the VECP and without implementing the VECP.
- b. Proposed unit prices for any new contract pay items introduced by the VECP and appropriate documentation for review under the Agreed Price process.
- c. Proposed unit prices for any existing contract pay items for which agreed prices are sought due to a significant change in character of work (quantity or complexity), see §104-04 *Significant Changes in the Character of Work*. Appropriate documentation for review under the Agreed Price process is required.
- d. The cost of any items with long lead times (e.g., materials ordered) required after conceptual approval and before final approval shall be identified.

**6. Differences.** Full descriptions of the difference between the existing contract requirements and the proposed changes, and the comparative advantages and disadvantages of each, including considerations of service life, economy of operation, ease of maintenance, traffic flow, safety, desired appearance, progress schedule, and any increase/reduction of environmental impacts.

**7. Technical Presentation.** The Contractor may be required to conduct a technical presentation as part of the review process.

**8. Cost Documentation.** All formal VECP costs submitted shall be supported by documentation as required by §109-05 *Extra Work and Time Related Compensation*.

The Department will not formally approve any VECP until all required VECP documentation has been submitted and is acceptable to the Department.

A formal VECP may be submitted concurrently with the conceptual VECP, however, the Contractor assumes any costs associated with the formal VECP at its own risk. Reimbursable costs will be considered only if the conceptual VECP is approved. Clearly identify whether a VECP is being submitted for conceptual approval, formal approval, or both.

Once a formal VECP has been approved, the VECP will then be submitted as an order-on-contract and processed accordingly. If time sensitive, requests for advanced authorization of extra work per §104-02 *Changes, Contingencies, Extra Work and Deductions* will be considered, but only after formal VECP approval. The Contractor is responsible for submitting all appropriate information to the Engineer in a timely manner.

**D. Conditions.** The Contractor shall not base any bid prices on the anticipated approval of a VECP and should recognize that any VECP may be rejected. The following terms and conditions apply to VECP:

1. A VECP will only be considered after the contract is awarded.
2. A VECP applies only to the contract for which it was submitted. One VECP shall not be submitted for multiple contracts. Approval or disapproval of a VECP on one contract does not guarantee approval or disapproval on another contract.
3. The VECP becomes the property of the Department and will contain no restrictions imposed by the Contractor on its use or disclosure. The Department will have the right to use, duplicate, and disclose in whole or in part any data necessary for the utilization of the VECP. The Department retains the right to utilize any accepted or rejected VECP or part thereof on any other project without any obligation to the Contractor.
4. Approval of the conceptual VECP in no way obligates the Department to approve the formal VECP. The Contractor will have no claim against the Department as a result of the rejection of any such conceptual or formal VECP except as otherwise provided in §104-10E.4.
5. When the Department is in the process of making design and specification revisions and a Contractor submits a VECP with similar revisions, the Department will reject the VECP and proceed without any obligation to the Contractor.
6. A VECP will be considered only if reasonable, cost-effective options are not provided in the contract documents.
7. The Department will be the sole judge as to whether a VECP qualifies for consideration and evaluation. It may reject any VECP that requires excessive time or costs for design review, evaluation, and/or investigations. The Department will be the sole judge in determining if the proposed VECP will result in a sufficient amount of direct or indirect cost savings to offset the Department's effort to review the VECP.
8. A VECP shall be consistent with the Department's design policies and basic design criteria, provide the same service life or more, facilitate economy of operations, ease of maintenance, and achieve the desired appearance and safety.
9. A VECP will not be allowed that changes the type and/or thickness of the pavement structure and material, or solely substitutes one material for another. Examples of materials that may fall into this inappropriate substitution situation are drainage pipes, bridge coatings, pavement markings, etc. The simple elimination of work does not necessarily constitute a VECP, however, a VECP which introduces a simple material substitution, or elimination of work, may be considered if it is accompanied by a design change or change in the construction method. A simple material substitution which introduces a new material to the Department may be also considered.
10. The VECP will not be experimental in nature, but will have been proven to the Department's satisfaction under similar or acceptable conditions on another Department contract or at another location acceptable to the Department.
11. If the Department requires any additional information to evaluate the VECP, this information shall be provided in a timely manner. Unless otherwise mutually agreed upon, failure to do so

will result in the rejection of the VECP. An incomplete or a poor quality VECP which hinders the Department's review may also result in the rejection of the VECP.

**12.** The Contractor shall encourage submissions of VECP from an approved subcontractor, provided that reimbursement is made by the Department to the Contractor and that the terms of payment to the Subcontractor are satisfactorily negotiated and accepted before the VECP is submitted to the Department. Subcontractors may not submit a VECP except through the Contractor.

**13.** A VECP approved by the Department is considered to be a revision to the contract documents and progress schedule. Consequently, if unsatisfactory results are being achieved or adjustments are necessary during implementation of a VECP, the rejection of work, removal of work, addition of work, or revision of work shall be evaluated in accordance with the Standard Specifications.

**14.** All contract pay items and quantities referenced in the VECP construction savings analysis shall be Department-approved contract provisions. Any extra work, inclusion of an omission of work, or other field changes shall be authorized prior to use in VECP savings calculations.

**15.** No work related to a VECP will be performed under force account. Agreed prices must be reached for any contract pay items related to the VECP before the VECP is approved. If the Contractor is deemed to have taken reasonable diligence in determining the work involved but if during the construction of VECP work a significant change in the character of work occurs, the Department may consider new agreed prices.

**16.** The Contractor will receive written notification from the Department when the VECP is approved. Material orders placed prior to VECP approval shall be submitted at the Contractor's risk.

**17.** Once a VECP has been approved, the VECP will then be submitted as a change order and processed accordingly. If time sensitive, requests for advanced authorization of extra work in accordance with §104-02 *Changes, Contingencies, Extra Work and Deductions* will be considered, but only after formal VECP approval. The Contractor is responsible for submitting all appropriate information to the Engineer in a timely manner.

**E. Payment.** If the VECP is accepted by the Department, the changes and payments will be authorized through a change order. Reimbursement to the Contractor will be made as follows:

**1.** A VECP introduces two individual payments, one for VECP construction savings, and one for VECP design cost. The contract pay item changes along with the VECP construction savings and design cost reimbursements to the Contractor should be submitted in one change order.

**2.** The Department will pay to the Contractor 50% of the VECP construction savings. The VECP construction savings is the difference between the actual contract costs with the VECP implemented and a detailed estimate of what it would have cost to complete the contract work without implementing the VECP, based on final construction. If final construction savings differs from the amount estimated in the formal VECP, an adjustment may be made and included in another change order. The VECP construction savings reimbursement to the Contractor will not be paid until the VECP work has been completed (progress payments on the completed VECP work are allowed). The Department may withhold all or a portion of the payment for the Contractor's share of the VECP construction savings until the final contract accounting. In the event that at final contract accountings the implementation of VECP actually results in no

construction savings, then the Contractor will receive no VECP construction savings payment. The Department is the sole judge in deciding the construction savings due to the implementation of the VECP. The Department will withhold VECP construction savings reimbursement until the Contractor supplies all required VECP documents.

3. If a design cost is submitted for a VECP, the Department will pay to the Contractor a 50% share of the Contractor's reasonable cost for design incurred after conceptual VECP approval. If the design cost submitted for Department approval is deemed unreasonable, only 50% of the design cost deemed to be reasonable will be reimbursed. Not every VECP will have a design cost associated with it. The Department is the sole judge in determining the reasonableness of the design cost. Reimbursable design costs are for engineering changes. Preparation and submission of the proposal (e.g., savings analysis, progress scheduling, etc.) are not considered design costs and are not reimbursable. Reimbursable VECP design may be performed by a consultant or directly by the Contractor. The Contractor shall not be charged for, nor can the Contractor claim, any VECP design performed by the Department.

The design cost shall be submitted as a lump sum item with supporting documentation. The supporting documentation shall include itemized direct salary costs (rates & hours), overhead (only for consultant design), and direct non-salary costs. Payment for direct salary costs and overhead will be limited to the current Department reimbursement policies for Consultant Engineering agreements.

For consultant design, reasonable overhead on the direct technical salaries will be reimbursed. For Contractor design, overhead is not reimbursable for direct salary costs. Overhead shall not be charged for direct non-salary costs whether incurred by the Contractor or by a consultant. Payment for direct non-salary costs will be made at actual cost paid. Although for certain direct non-salary costs (lodging, meals, mileage) there are prevailing maximum rates established by the State Comptroller which the reimbursement rates shall not exceed.

The subtotal of direct salary costs, overhead, and direct non-salary costs shall be considered a "professional service fee" and reimbursed in accordance with §109-05B.3. *Service Charges*. A maximum 5% for the Contractor's contract supervision and overhead is allowed, in addition to any overhead submitted for consultant direct salary costs. All design costs are subject to audit. Additional supporting documentation (receipts, time sheets, etc.) shall be supplied in a timely manner if requested by the Department.

In the case of a formal VECP being jointly submitted with the conceptual VECP, the Department will pay to the Contractor a 50% share of the Contractor's reasonable cost for design specific to the development of the formal VECP (nothing toward the conceptual VECP) if the conceptual VECP is approved.

4. In the event of the Department's conceptual approval of a direct cost savings VECP, and the Contractor is directed to proceed with the VECP implementation steps and final approval is not reached, regardless of whether due to the actions of the Department or the Contractor, 50% of the total reasonable design costs will still be reimbursed to the Contractor. If "advance" written approval was given to proceed with the work, procure materials, and begin fabrication; and rejection occurs, the work and fabrication costs will be reimbursed in accordance with §109-05 *Extra Work and Time Related Compensation*. Only those materials not incorporated and unique to the contract (i.e., not restockable) will be evaluated for payment.

5. There will be no reimbursement for any costs incurred for the conceptual VECP or prior preparations.

6. If more than one VECP is approved for a contract, construction savings and design costs shall be tracked separately for each VECP.

7. When multiple submittals of information for a VECP are required to satisfy the information needs of the conceptual or formal VECP procedure, and contract timing will be negatively impacted before review and subsequent approval can be given by the Department, then the VECP may be rejected. In such cases, there will be no claim by the Contractor for design costs or loss of anticipated savings and/or profits.

8. VECP payments only involve direct savings or costs. Indirect savings or costs (time, user delay, contract delay, etc.) are not included in VECP payment calculations. The calculations of VECP payments are independent from the payments or penalties for contract time related issues. If a VECP revises the progress schedule, the contract milestones upon which time related provisions are based may be affected. Time savings resulting from a VECP may be realized in a time related contract provision. Conversely, if a VECP negatively affects a progress schedule, time related contract provisions may be negatively affected.

**F. Time Savings.** The Department will consider proposals that result in time savings and at the same time may increase the cost of the contract. The Department will be the sole judge as to whether the benefits of completing the contract or a phase before the scheduled completion date or milestone offsets any increase in cost. These submittals, while not constituting a Value Engineering Change Proposal, will be reviewed using the VECP approval process. In addition to information required in §104-10 B. *Submittal of Conceptual VECP* and §104-10 C. *Submittal of Formal VECP*, the Contractor shall provide the Department the anticipated amount of time to be saved and sufficient information to enable the Department to calculate and evaluate the cost benefit of the savings in user delay. Time savings generated by the VECP may be claimed under an existing time related contract provision. If the time savings VECP increases the cost of the contract, the additional cost shall not be subtracted from any time related contract provision payments.

**G. Significant Changes.** The description of what will be considered a "significant change" associated with a VECP are identified in §104-04 *Significant Changes in the Character of Work*. Once a VECP is approved, any future significant change is no longer based on the original contract bid conditions (quantity, nature or kind of a material involved), but rather on the conditions as adjusted by the VECP (adjusted quantities, anticipated site conditions and materials, etc.). Any item that was identified as a Major Item in the original contract documents is still considered a Major Item, regardless of the change in quantity or price due to the VECP.

All significant changes shall be agreed upon prior to formal VECP approval. If after formal VECP approval, an unforeseen change in the VECP work causes a significant change in the character of work, quantities and prices may be adjusted and the VECP savings shall be adjusted accordingly.

## SECTION 105 - CONTROL OF WORK

(Last Revised September, 2025)

### 105-01 ENGINEER'S AUTHORITY.

The Engineer will make all decisions for the Department regarding the quality and acceptability of materials furnished, work performed, work progress, and contract interpretation. All communications by the Contractor with the Department, written or verbal, shall be in English. All references to costs, charges, prices, etc. shall be in United States dollars. Unless directed otherwise, the Contractor shall direct all communications with the Department through the Engineer. When communications are directed to persons or units other than the Engineer, a clear copy, including all attachments, shall be sent to the Engineer.

The Engineer may stop by written order any work or any part of the work under the contract if the methods or conditions are such that 1) unsatisfactory work might result; or 2) if improper material(s) or

## 105-02 CHARACTER OF WORKERS.

procedure(s) are being used; or 3) if the Contractor fails to comply with any requirement or provision of the contract documents or with any State or Federal law or regulation; or 4) conditions are considered to be sufficiently deficient as to seriously affect the safety of the public or the workers employed; or 5) non-conformance with the work zone traffic control provisions is causing serious disruptions to traffic operations. The Contractor will not be entitled to any additional monetary compensation for such a work stoppage. Any work completed in violation of a written stop order will not be paid for even if subsequently determined to be acceptable.

### **105-02 CHARACTER OF WORKERS.**

The Contractor shall give its constant attention to the work while it is in progress, or it shall place it in charge of a competent and reliable English-speaking Superintendent or Foreman, who shall have authority to act for the Contractor and who shall be acceptable to the Engineer.

The Contractor shall always employ sufficient workers to progress the work to completion in the manner and time specified. All workers shall have sufficient skill and experience to properly perform the work assigned them. All workers engaged in special or skilled work shall have had sufficient experience in such work to perform it and operate the equipment involved properly, safely, and satisfactorily. Any person employed by the Contractor whom the Engineer may deem unruly, disorderly, incompetent, uncooperative, unsafe, unfit to perform the work, or otherwise engaged in illegal conduct on the project site, may be at once suspended from the project and immediately referred to the Deputy Chief Engineer of Construction (DCEC). The DCEC, then can decide if further action is warranted. If so, the DCEC can ban the worker, as shown below, according to the severity of the situation:

- 1.) From the project work site for the duration of the contract;
- 2.) A period of one (1) year from all Department projects; or
- 3.) An indefinite ban from all the Department projects.

Any Contractor employee banned under numbers two (2) or three (3) above may submit a written request for reconsideration of the aforementioned ban to the DCEC.

No Contractor employee may use, distribute, dispense, possess or manufacture any alcoholic beverages, illegal drugs or any other intoxicating substance on a contract site. The Contractor's written policy shall require that employees be subject to reasonable suspicion drug and alcohol testing, not report to work under the influence of drugs or alcohol, nor be impaired or unable to function at the workplace as a result of consuming alcohol or other intoxicants. While prescription drugs are not prohibited, they should not render an employee unfit to complete their job duties. Contractor employees that are suspected of using drugs or alcohol, or who are suspected to be under the influence of such substances, shall be reported to the Engineer. Contractor employees who are under the influence of drugs or alcohol may deemed incompetent are subject to the above procedure.

Furthermore, firearms of any kind will not be permitted on Department contract worksites. They cannot be on the person of Contractor employees or in their vehicle parked at the contract worksite. See NY CLS Penal Law § 265.01-e.

### **105-03 METHODS AND EQUIPMENT.**

Where particular methods or equipment are specifically required, the Contractor may apply in writing to the Regional Director to use alternate methods and equipment to provide the same results. Such alternates may be used only after favorable recommendation by the Regional Director and the written approval of the Deputy Chief Engineer, Construction (DCEC). When, in the opinion of the Regional Director, satisfactory results are not being obtained using the Contractor's alternate methods and equipment, the methods and/or equipment shall be immediately modified to produce satisfactory results.

The Contractor may use the most efficient equipment that is consistent with conditions at the time of use. It is anticipated that seasonal or weather conditions combined with the nature of the terrain will often require the use of lighter and smaller equipment than might be used under optimum conditions.

**A. Equipment.** Contractors must comply with Environmental Conservation Law (ECL) 19-0323 and NYSDEC Regulation 6 NYCRR Part 248 *Use of Ultra Low Sulfur Diesel (ULSD) Fuel and Best Available Retrofit Technology (BART) for Heavy Duty Vehicles*. In order to reduce diesel emissions, the Contractor and all Subcontractors shall use Ultra Low Sulfur Diesel (ULSD) fuel to operate all diesel engines used to complete the work on the contract site. Materials delivery vehicles not owned by the Contractor or a Subcontractor are exempt from this requirement, but should minimize idling time at contract sites whenever possible.

ULSD fuel requirements shall apply to all diesel engines/equipment, including stationary and mobile equipment, whether owned, leased or rented. The hours the piece of equipment is used to complete the work is defined as the actual time the engine is running. The time periods may be continuous or discontinuous, and include warm-up, idling, in traffic, and in production.

Contractors shall make determinations of regulatory applicability for vehicles in inventory used on active Department contracts beginning October 1. The determinations shall be based on the definition of Heavy Duty Vehicle (HDV), including on and off-road diesel-powered vehicles, with a GVWR of more than 8,500 pounds. Contractors shall also quantify project ULSD fuel used by HDVs beginning with active contract work on October 1.

The annual reporting period for 6 NYCRR Part 248 is from October 1 (previous year) to September 30 (current year). Contractors shall report all of their diesel-powered Heavy Duty Vehicles (HDVs) operated on Department contracts during the subject reporting period. Contractors shall submit the following required information electronically to the Department at *mo-construction@dot.ny.gov* by October 15 of the reporting year:

1. Inclusion of "DERA" and calendar year being reported in the subject line of the email.
2. Contact information including firm name, contact person, phone number, and email.
3. Estimated annual total quantity of ULSD fuel used by covered vehicles on NYSDOT contracts.
4. Required Fleet information for HDVs (including HDVs exempt from BART requirements).

The Contractor will be notified when any diesel powered construction equipment is in non-compliance. The Contractor shall correct non-compliance within a 24-hour period.

**B. Earthwork.** Construction operations requiring soil compaction shall not be performed from November 1<sup>st</sup> thru April 1<sup>st</sup> except with an approved Winter Earthwork submittal in accordance with §203-3.01 A. *Winter Earthwork Submittal*. In all work incorporated into the final product, the Contractor shall not place material that is frozen, or place fill material on frozen ground regardless of the date.

**C. Structural Painting.** Structural paint removal operations and painting work shall include work primarily shown in Section 570 *Paint Removal Operations*, Section 573 *Structural Steel Painting: Field Applied – Total Removal*, and overcoating work under Section 574 *Structural Steel Painting: Overcoating and Localized*, but not including localized painting. Structural paint removal operations and painting work shall not include: bridge superstructure removal and other structural demolition work under Section 202 *Removal of Structures and Obstructions*; paint removal that is incidental to the main work under an item; localized paint removal from structural steel necessary for safe progress of other work on the structural steel; and containment for localized steel repair and painting.

Contractors and/or Subcontractors performing structural paint removal operations and painting work shall be certified in accordance with the following requirements of the Quality Procedures (QP) Programs, of the Association for Materials Protection and Performance (AMPP):

## 105-04 CONTRACT DOCUMENTS.

- AMPP SSPC QP-1 Accreditation: Field Application to Complex Industrial and Marine Structures;
- AMPP SSPC QP-2 Accreditation: Field Removal of Hazardous Coatings.

In lieu of AMPP certification, the Contractor shall submit documentation to the Office of Technical Services that demonstrates that it has established equivalent processes and procedures conforming to the standards set forth in the procedures for AMPP SSPC QP1 and QP-2, including an internal audit at least annually. The documentation shall be reviewed, evaluated, and approved by a Professional Engineer experienced in structural painting operations selected by the Contractor and approved by the Department. The cost for the review and approval shall be paid by the Contractor. The review and approval process will take a minimum of 90 days.

The completed evaluation shall include an opportunity for Department comments on prior performance, a maximum qualification period of 2 years, a process for appeal by the applicant, evaluation criteria which would lead to suspension or revocation, a process for recordkeeping by the reviewing Professional Engineer, and a process for requalification.

### 105-04 CONTRACT DOCUMENTS.

**A. Interpretation Of Contract Documents.** In case of any difference in the interpretation of the plans, special provisions, specifications, special specifications, standard sheets, or between them, the Contractor shall immediately submit the matter to the Engineer. The Engineer will consult with other Department personnel, as necessary, and provide the Contractor with an interpretation in a timely manner.

The detail plans and specifications for the contract have been prepared with care and are intended to show as clearly as is practicable the work required to be done. The Contractor shall realize, however, that construction details can not always be accurately anticipated and that in executing the work, field conditions may require reasonable modifications in the details of plans and quantities of work involved. Contract work shall be carried out to meet these field conditions to the satisfaction of the Engineer and in accordance with his/her instructions and the contract documents.

In the event the Contractor discovers an error or omission in the contract documents, it shall immediately notify the Engineer. The Engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the contract documents.

**B. Reasonable Close Conformity With Contract Documents.** All work performed and all materials furnished shall be in reasonable close conformity with the lines, grades, cross sections, dimensions and materials requirements, including tolerances, shown in the contract documents.

Plan dimensions and contract specification values are to be considered as the target value to be strived for and complied with as the design value from which any deviations are allowed. It is the intent of the specifications that the materials and work quality shall be uniform in character and shall conform as nearly as realistically possible to the prescribed target value or to the middle portion of the tolerance range. The purpose of the tolerance range is to accommodate occasional minor variations from the median zone that are unavoidable for practical reasons. When a maximum or minimum value is specified, the production and processing of the material and the performance of the work shall be so controlled that material or work will not be preponderantly of borderline quality or dimension.

In the event the Engineer finds the materials or the finished product in which the materials are used not within reasonable close conformity with the plans and specifications, but that reasonably acceptable work has been produced, the Engineer shall then make a determination if the work shall be accepted and remain in place. In this event, the Engineer will document the basis of acceptance by contract modification which will provide for an appropriate adjustment in the contract price for such



## 105-05 VENDOR RESPONSIBILITY.

work or materials as he/she deems necessary to conform to his/her determination based on engineering judgment.

In the event the Engineer finds the materials or the finished product in which the materials are used or the work performed are not in reasonable close conformity with the plans and specifications, and have resulted in an inferior or unsatisfactory product, the work or materials shall be removed and replaced or otherwise corrected by and at the expense of the Contractor.

### **105-05 VENDOR RESPONSIBILITY.**

The Contractor shall at all times during the contract term remain responsible. The Contractor agrees, if requested by the Commissioner of Transportation or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.

In addition to any and all other suspension rights provided elsewhere in this Contract, the Commissioner of Transportation or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, the Contractor will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the Commissioner of Transportation or his or her designee issues a written notice authorizing a resumption of performance under the Contract.

In addition to any and all other termination rights provided elsewhere in this Contract, upon written notice to the Contractor and a reasonable opportunity to be heard with appropriate Department officials or staff, the Contract may be terminated by the Commissioner of Transportation or his or her designee at the Contractor's expense where the Contractor is determined by the Commissioner of Transportation or his or her designee to be non-responsible. In such event, the Commissioner of Transportation or his or her designee may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.

### **105-06 COOPERATION WITH UTILITIES AND OTHER CONTRACTORS.**

The Contractor shall cooperate with Utilities and other contractors and arrange or adjust its progress schedule to coordinate with the other parties as indicated in the contract documents.

Consistent with that indicated in the Base Line Data and contract documents, the Department will advise the Contractor of the schedules of others. If utility facility adjustments are to be made by a Utility's forces in connection with the contract during the contract term, the Contractor shall cooperate with the Utility.

In case of interference between the operations of the Utilities and contractors, the Department will adjust as necessary the schedule of each contractor and the sequence of work necessary to expedite the completion of the work. Coordination and access issues will be resolved by the Department, if necessary. Delays and interferences to the Contractor's performance caused by activities of other contractors, which could not have reasonably been anticipated from the contract documents, may entitle the Contractor to an extension of time and/or time related damages.

If any part of the Contractor's work depends on the work of any other contractor and/or the Department for proper execution and/or results, that would render its work unsuitable for proper execution and/or results, the Contractor shall promptly notify the Department of any discrepancies and/or defects in said other work prior to proceeding with its own work.

### **105-07 TERMINATION.**

The provisions of Article 11 *Right to Suspend Work and Cancel Contract* of the contract agreement and Section 40 of the Highway Law shall apply.

**A. Termination for Cause.** If the Commissioner of Transportation shall determine that the work upon the Contract is not being performed according to the Contract, he/she may terminate the Contractor's employment under the Contract and proceed with the contract work by contract negotiated or publicly let, or by the use of the Department's own forces, or by calling upon the Surety to complete the work in accordance with the plans and specifications, or by a combination of any such methods; or, he/she may cancel the contract and either re-advertise and re-let as provided in Section 38 of the Highway Law, or complete the work under his/her own direction in such manner as will accord with the contract specifications and be for the best interests of the State. Any excess in the cost of completing the Contract beyond the price for which it was originally awarded shall be charged to and paid by the Contractor failing to perform the work or by the Contractor's Surety, pursuant to the terms and conditions of the Faithful Performance Bond.

**B. Termination for Convenience.** The Commissioner may, by written notice, terminate the contract or any portion thereof if he or she determines that termination would be in the best interests of the Department or of the State of New York. Reasons for termination may include, but are not limited to executive orders of the President relating to the prosecution of war or national defense, national emergency which creates a serious shortage of materials, orders from duly constituted authorities relating to energy conservation, and restraining orders or injunctions obtained by third-party citizen action resulting from national or local laws or regulations, or where the issuance of such order or injunction is primarily caused by acts or omissions of persons or agencies other than the Contractor, or where the orderly progression of a project is interfered with or delayed by acts or omissions of persons or agencies other than the Contractor. The Contractor specifically understands that the issuance of such notice by the Commissioner shall be conclusive as to its necessity.

When the contract, or any portion thereof is terminated, for any of the above mentioned reasons, before completion of all items of work in the contract, payment will be made for the actual numbers of units or items of work completed at the contract unit price, or as mutually agreed for items of work partially completed, but no claim for loss of anticipated profits on uncompleted work shall be made by the Contractor nor shall the State of New York be liable for the loss of anticipated profits for such uncompleted work.

In such cases of termination, reimbursement for organization of the work (when not otherwise included in the contract) and moving equipment to and from the contract site will be considered where the volume of work completed is too small to compensate the Contractor for these expenses under the contract unit prices, the intent being that an equitable settlement will be made with the Contractor.

Acceptable materials, obtained by the Contractor for the work, that have been inspected, tested and accepted by the Engineer, and that are not incorporated in the work, shall be returned to the Manufacturer, Fabricator, or Material Supplier whenever it is possible to do so at nominal or no cost. Where the Contractor returns such materials to its Manufacturer, Fabricator, or Material Supplier, the State will pay the Contractor the actual documented costs connected with returning such materials to the extent such costs are reasonable as determined by the Department. In the event the Contractor is unable to return such material at reasonable or no cost, and provides documentation satisfactory to the Department that such material can not be economically returned, the State will be responsible for all such material and will either direct the manner of disposition or purchase such material from the Contractor at actual cost as shown by receipted bills and actual cost records to the extent such costs are reasonable as determined by the Department, at such points of delivery as may be designated by the Engineer.

Termination of a contract or a portion thereof for the convenience of the State shall not relieve the Contractor of its responsibilities for the completed work, nor shall it relieve its surety of its obligation for and concerning any just claims arising out of the work performed.

## 105-08 REMOVAL OF UNACCEPTABLE AND UNAUTHORIZED WORK.

## 105-09 WORK AFFECTING RAILROADS.

All work which does not conform to the requirements of the contract shall be considered unacceptable unless otherwise determined acceptable under the provisions in §105-04B *Reasonable Close Conformity with Contract Documents*.

The Department may direct the Contractor to remove any portion of the work performed under this contract for inspection or for any other purpose. If such inspection shows that the work was constructed in accordance with the terms of the contract, payment shall be made to the Contractor for such removal and subsequent replacement at a fair and reasonable price for the work performed. No payment will be made for such removal or for replacement of the work to satisfactory condition if such inspection shows that the work was not constructed in accordance with the contract requirements. No payment will be made for the removal or replacement of any work which may itself be satisfactory, but the removal of which is necessary for the replacement of unsatisfactory work. No payment shall be made in such removal and replacement situations if work was done or materials furnished without inspection by an authorized Department representative.

The above paragraph shall not apply to concrete foundation for pavement or portland cement concrete pavement rejected as a result of core tests. Work so rejected shall be removed and replaced at no additional cost to the State.

All work shall be in satisfactory condition at the time of contract acceptance. Any work done or materials used without inspection by an authorized Department representative may be ordered removed and replaced at the Contractor's expense.

Unacceptable work, whether caused by poor work, defective materials, damage through carelessness or any other cause found to exist prior to the final acceptance of the work, shall be removed immediately and replaced in an acceptable manner irrespective of the presence of, or lack of, a Department Inspector or representative. This clause shall have full effect regardless of the fact that the defective work may have been done or the defective materials used with the full knowledge of the Inspector. The fact that the Inspector or Engineer may have previously overlooked such defective work shall not constitute an acceptance of any part of it.

### 105-09 WORK AFFECTING RAILROADS.

Requirements and procedures for operations on or adjacent to railway facilities can be found in Special Notes in the Contract Proposal. Additional information, if supplied by the railroad, may also be found in the Supplemental Information.

**A. *Railroad Workplace Safety.*** All work within the railroad right of way shall be conducted in accordance with 49 CFR Part 214 Railroad Workplace Safety and the railroad's safety rules. Procedures for compliance with 49 CFR Part 214 shall be addressed within the Project Safety and Health Plan.

**B. *Railroad Clearances.*** No temporary bridge, falsework, staging or obstructions shall be erected over track, tracks or railroad property where the vertical under clearance is less than 22 feet over top of rail until the existing bridge warnings have been relocated or new or temporary bridge warnings are installed by the railroad company or companies affected and are in service. Railroads may impose additional or more restrictive clearance and/or permit or entry requirements. Additional clearance information may be available in the contract documents.

A track, catenary, electrical wire or electrical facility, or other railroad facility, or railroad property is considered fouled when any object is brought closer than the clearances set forth by the railroad company. Vehicles or construction equipment shall be considered fouling when located in such a position that failure of same with or without load brings the equipment within the fouling limit. The Contractor shall conduct its work and handle its equipment such that no part of any material or equipment shall foul a track, catenary, electrical wire or electrical facility, or other railroad facility, or railroad property without written permission from the railroad company or companies affected.

**C. *Supervision and Railroad Approval.*** All work on any contract affecting a railroad company's property, right of way facilities, including temporary track detour, shall be carried out under the joint supervision of the Department and the railroad company or companies in a manner satisfactory to both agencies.

Information on required railroad notice and approvals may be found in the contract documents or in the supplemental information. If notice and approval provisions are not provided in the contract documents, the Contractor shall provide written notice to the railroad facility owner a minimum of 30 days prior to the requested start of work. The Contractor shall obtain prior approval from the railroad company to use railroad property to access a site and shall be responsible for any associated permit application, agreement, insurances, and fees.

The Contractor shall obtain the written approval from the railroad company or companies affected in respect to the details and methods to be employed in constructing any structures, track detours, falsework, removal of structures, allowable track clearances, and any or all other details that may in any manner affect the operation or maintenance of any or all railroad facilities, as determined by the railroad. The requirement that written approval shall be obtained from the railroad company shall be complied with before the Contractor starts work. The Contractor shall include in its unit prices bid for this work all the costs of these requirements including any expense occasioned by delay or interruption of its work by reason of the operation or maintenance of the railroad facilities. Approval by the railroad company or companies affected does not absolve the Contractor from any liability resulting from its contractual operations.

**D. *Coordination of Work.*** The Contractor shall coordinate with the railroad company or railroad companies in carrying out railroad force account work. When the work of the Contractor or Subcontractor dovetails with the railroad force account work, the materials shall be delivered and the operations conducted so as to carry on the work continuously in an efficient and skillful order. Delays or oversight on the part of the Contractor or Subcontractors in getting any or all of their work done in the proper manner, thereby requiring removal and replacement of work already in place, will not be the basis for a claim for extra compensation. Such work shall be done at the cost and expense of the responsible Contractor or Subcontractor.

**E. *Railroad Employees.*** When, in the opinion of the railroad company or companies, the Contractor's normal operations in progressing its contract are such that a track is or might be fouled or railroad traffic or property endangered, the railroad company or companies will employ protective labor, when found necessary for railroad operations. Unless an item for railroad cost reimbursement is included in the contract and directed to be used by the Engineer, payment for the services described above shall be made to the railroad company directly by the State pursuant to the terms of a State-Railroad agreement negotiated for the contract. When an item for railroad cost reimbursement is included in the contract and directed to be used by the Engineer, the Contractor shall pay for such services.

All services for protective labor and similar protective services occasioned by the operation of the Contractor, except as noted in the preceding paragraph shall be at the sole expense of the Contractor and the Contractor shall include all such costs in its unit bid prices for such protection.

The Contractor shall, at its own expense, carry compensation and other insurance required by the railroad company or companies.

It is agreed that the furnishing of any protective labor shall not relieve the Contractor from any liability of payment for any damage caused by its operations.

**F. *Protection of Railroad Service and Facilities.*** The Contractor shall take special care and vigilance to avoid damage to the trains, tracks, facilities and property of the railroad company and shall conduct its work so as not to interfere with the movement of trains or other operations of the railroad company. Whenever work may affect the safety or movement of trains or railroad property,

as determined by the railroad, the method of doing the work shall be submitted to the railroad company affected for approval. This work shall not be commenced or prosecuted until written approval from the railroad company is received. The approval of the railroad will not release the Contractor from any responsibility for any damages to the railroad company caused by the acts of the Contractor or its employees and Subcontractors. If, during the carrying out of the contract work, the trains, tracks, or other facilities or property of the railroad company are endangered, the Contractor shall immediately do such work as directed by the Engineer to restore safe conditions and, upon failure of the Contractor to carry out such orders immediately, the railroad company may, with the approval of the Engineer, take whatever steps are necessary to restore safe conditions. The cost and expense to the railroad company of restoring safe conditions or of repairing any damage to the railroad company's trains, tracks, facilities or property caused by the Contractor's operations shall, when approved by the Engineer, be considered a charge against the Contractor and shall be paid for by it, or upon its failure or refusal to pay such charge within a reasonable time after the railroad company submits the bill to it, the amount thereof may be deducted from any monies due or that may become due to it under its contract, and any such sum so deducted may be paid to the railroad company after an audit by the State of the items of such cost and expense.

In performing construction operations both on and off railroad right of way areas, the Contractor shall prevent the fouling of railroad track ballast with earth, mud, silt, or other foreign matter. To prevent fouling of the ballast, it may be necessary for the Contractor to construct temporary erosion control measures or sheeting or provide other precautionary measures that are required by the railroad.

Where, in the opinion of the railroad company, demolition work, concreting or hauling along or across tracks will result in ballast becoming fouled, the Contractor shall take preventive measures required by the railroad to protect the entire ballast section. The protective material shall remain in place until the railroad determines there is no further possibility of fouling the ballast and then shall be removed by the Contractor.

The work required to protect the railroad track ballast shall be performed by and at the expense of the Contractor and under the supervision of and to the satisfaction of the railroad company or its authorized representative. The railroad company will assume no responsibility for the adequacy of the work.

In the event that the railroad track ballast does become fouled after the aforementioned protective measures are taken, the railroad company, with its own forces, may elect to remove and replace the fouled ballast with clean ballast. The charges for this work will be billed by the railroad company against the Contractor.

**G. *Lifting.*** All lifting operations shall be conducted in accordance with §107-05(P) Lifting. In addition, equipment used for the erection or removal of structures over railroad facilities shall have a minimum lifting capacity of 150% of the lift weight (operational capacity limited to  $66\frac{2}{3}\%$  of the tipping load) or that which is required by the railroad, whichever is greater.

**H. *Use of Explosives.*** Blasting shall be conducted in such a manner as not to endanger facilities or operation of the railroad, as determined by the State or the railroad. The Contractor shall furnish, while blasting, at its own cost and expense, watch persons and other protection necessary to protect the public and railroad. The Contractor's attention is directed to §107-05 Safety and Health Requirements, with regard to blasting.

**I. *Foundations.*** Foundations may be extended or lowered if deemed necessary by the DCES and the railroad company or companies affected, only if such change is ordered by the DCES.

**J. *Communications and Signals.*** The cost of all changes to railroad communication and signal facilities made for the convenience of the Contractor shall be paid for by the Contractor.

**K. *Contractor's Private Grade Crossing.*** If the Contractor elects, and the railroad company or companies approve, to have a private grade crossing at the site of the work installed for its own use, it shall make a formal request to the railroad company or companies for such a crossing. A regulatory hearing is required for crossings of railroad lines carrying passenger service. The Contractor may have to enter into an agreement with the railroad company or companies pertaining to the size, type, and use of the crossing. The payment for installing and removing the crossing, obtaining necessary insurance for the protection of the railroad company or companies, obtaining agreements or permits, and required railroad protective services associated with using the crossing will be the responsibility of the Contractor. The railroad company or companies may elect to install and/or remove the temporary crossing at the sole expense of the Contractor. Any delays caused by the Contractor's election to pursue a grade crossing with the railroad(s) shall be the sole responsibility of the Contractor.

**L. *Sidetrack Facilities.*** When the Contract requires sidetrack facilities, the cost shall be borne by the State as set forth elsewhere in the Contract Agreement. When sidetrack facilities are required by the Contractor, it shall at its sole cost and expense, make the necessary arrangements for the use of existing sidings, tracks not in service or the construction of new sidings. The Contractor shall restore any and all existing sidings and tracks used for sidetrack facilities to the condition existing prior to use by the Contractor. The construction location and use of all sidetrack facilities are to be subject to the approval of the railroad company affected. The railroad may elect to perform the work on sidetrack facilities; costs incurred by the railroad for this work shall be the Contractor's responsibility.

The railroad company may move the Contractor's cars, placed on existing sidings, at any time, to permit the placing of cars for said railroad company's business.

When any turnouts from the main tracks are approved by the railroad company, such turnouts will be furnished, installed, and removed by the railroad company at the expense of the Contractor unless otherwise noted on the contract plans. Similarly, any signal work and derails necessary for sidetrack facilities will be furnished, installed, and removed by the railroad company at the Contractor's expense unless otherwise noted on the contract plans.

**M. *Railroad Use of Completed Work.*** The railroad company or companies affected may, prior to the completion of the work to be performed under contract and the acceptance thereof, enter upon and use any portion of said work without any compensation whatsoever to the Contractor for such use, and without any compensation or payment whatsoever to the Contractor for any delay in the work caused by such use. The taking possession and use shall not be deemed an acceptance of the work so taken and used or any part thereof.

**N. *Work Trains and Railroad Equipment.*** If the Contractor elects to use work trains or any railroad equipment which operate on the tracks of the railroad company, the operation of such trains and equipment is subject to any requirements determined by the railroad company or companies affected. The cost of the services of any railroad employees required by the railroad company to operate such trains or equipment shall be paid by the Contractor, including the cost of necessary protective services from the railroad.

**O. *Operation of Railroad.*** The Contractor shall reduce to a minimum the length of time that the railroad company will have to operate over any track detour. The Contractor shall continue full operation throughout the winter months, if directed by the Engineer on all work necessary to restore the tracks to their permanent location. The Contractor shall conduct its work so that the scheduled speed can be maintained by the railroad at all times.

**105-10 SURVEY AND STAKEOUT.**

Prior to the start of construction work, all right of way markers, property line markers and survey control markers located in or adjacent to areas which may be disturbed during construction shall be properly protected and tied to fixed reference points or located from established contract control. Upon completion of the work, all right of way or property line markers or survey markers that have been disturbed by the Contractor, shall be reset under the direction of a Land Surveyor. Field location notes shall be recorded and made available to the Engineer upon request at no additional cost to the State.

All survey control and boundary location work shall be performed in accordance with the Department's *Land Surveying Standards and Procedures Manual* under the direction of a Land Surveyor.

All survey work performed for quality control by the Contractor and for quality assurance by the Department should both utilize: (1) similar levels of measurement precision and methods to perform positional measurements, (2) the same control network from which measurements are made, and (3) the same survey measurement procedures to ensure consistency of results.

Terrain features are measured and positioned by various methods relative to the contract control network established for each contract. The precision with which an instrument or equipment positions a point is related to the quality of the method by which measurements are made, and the ability to duplicate the same measurement. The local accuracy of a located point is the closeness of the measured or computed value to a standard or accepted value (actual spatial position on the earth). Positional tolerance is the allowable spatial difference between making measurements by two different methods or by the same method at separate times, all of which have the same level of precision.

Horizontal coordinates and vertical elevations of existing features provided as part of the contract are located in the field based on accuracies achievable for each positional point relative to the contract control. Positional accuracies are directly related to the strength of the contract control network, the methods used to make the measurements, the precision of the instruments used to measure to the feature, and how definable the feature is which is being located. Point feature locations represent a single position (for example: property line marker, sign post, utility pole, or fire hydrant) and can be re-identified or verified in the field to within a small variation (high confidence level) from where they were initially positioned. Linear feature locations define the alignment of that feature. That alignment can be verified to within a specific tolerance depending on the spacing or frequency at which the points were originally measured to define that alignment. Straight or uniformly curved linear features (for example: curbline, edge of roadway, or edge of sidewalk) which can be easily defined in the field should have a relatively small positional variation from their designed location when compared to a verified field location. Irregular shaped or not as clearly defined linear features (for example: break lines, ditchlines, treelines, or environmental area perimeters) which are sometimes difficult to define or delineate precisely in the field, could have a larger variation from where they were initially positioned when compared to a field-verified location.

Digital terrain model (DTM) surfaces, when provided by the Department, are made up of a combination of point and linear features. The precision of a data collection instrument does not necessarily indicate what positional tolerance should be expected of any feature verified from an existing DTM. The location or elevation of a feature selected from a DTM surface can, at best, be determined by interpolating the horizontal position or elevation between previously located points. The verification of any specific elevation on the DTM surface is directly related to: (1) the spacing of collected data or breaklines used to produce that surface; (2) the uniformity of the surface being measured; (3) the steepness of the slope of that surface; and (4) how obscured the surface is from the measuring technique used to originally locate the surface. Standardized procedures for determining the spacing/frequency of point and linear features (including break lines), are critical to providing consistent results. Department standardized procedures for determining feature locations are described in both the *Land Surveying Standards and Procedures Manual* and the *Specifications for Photogrammetric Stereocompilation*.

Verification of the positional tolerance of the DTM surface elevation requires a comparison of the original collected point data with recollected point data measured at the same horizontal locations. Field comparisons to interpolated DTM surfaces or recreated surface information (from other information

sources) shall not be used for verification of the positional tolerance of a feature. Comparisons of re-measured point data can only be made with the original collected point data, not to interpolated positions. Measurements for verification of DTM point data shall also be made from the same contract control network, and by instruments capable of an equal or greater precision.

### **105-11 INSPECTION.**

Department Inspectors are authorized to inspect all work done and materials furnished, including all or any part of the work and the preparation, fabrication or manufacture of the materials to be used. Department Inspectors may be Department employees, or agents acting for the Department. Department Inspectors are not authorized to either alter or waive the provisions of these specifications or the contract, or to issue instructions contrary to the plans and specifications, without written approval of the Engineer, or act as a foreperson for the Contractor. Department Inspectors have the authority to reject unacceptable work or materials.

The Department inspections and tests are for the sole benefit of the Department and do not (1) relieve the Contractor of the responsibility for providing adequate quality control measures; (2) relieve the Contractor of responsibility for damage to or loss of the material before acceptance; (3) constitute or imply acceptance; or (4) affect the continuing rights of the Department after acceptance of the completed work under Article 9 *Final Acceptance of Work* of the contract agreement.

The Engineer and the Inspector shall be allowed full work access and shall be furnished with necessary information and assistance by the Contractor to make a complete and detailed inspection. The Contractor shall carry out the provisions of the contract at all times, regardless of whether an authorized inspector is present or not. Any work or item that is, at any time, found to be out of specification or not in compliance with the plans shall remain the responsibility of the Contractor and shall be subject to such corrective measures that are approved in writing by the Engineer.

The Contractor shall transmit a copy of any audit or inspection report conducted by SSPC, OSHA, or EPA of the contract site to the Engineer within seven days of receiving such a report. If the Contractor has been disciplined by SSPC or placed on warning, probation, suspended or revoked status from the Painting Contractor Certification Program (PCCP) during the past 24 months, the Contractor shall provide a written explanation of the cause for such action, the corrective measures enacted, and the Contractor's current PCCP status.

### **105-12 LOAD RESTRICTIONS.**

Construction equipment or vehicles delivering materials or traveling to a site from outside the contract limits shall have all required permits issued through the established Department vehicle permit system in accordance with Section 385 of the Vehicle and Traffic Law (or 23 USC, Section 127 for Federal Aid Projects on the Interstate System). The permit will indicate the limits within which such equipment with over-legal gross weights or axle loadings may operate, the frequency of such passages and all other limiting factors.

Construction equipment or vehicles operating within the contract limits having gross weights or axle loadings within the legal limits Section 385 of the Vehicle and Traffic Law (or 23 USC, Section 127 for Federal Aid Projects on the Interstate System) may operate without specific approval.

Prior to the use of construction equipment or vehicles with over-legal gross weights or axle loadings on any structure, on any new pavement or on any resurfaced pavement within the contract limits, the Contractor shall submit a written request to the Engineer. This request shall be accompanied, upon request, by an appropriate analysis performed by a Professional Engineer, including the pertinent equipment data, and shall demonstrate that the operations will not result in detrimental effects on the highway or structure.

Use of over-weight construction equipment or vehicles within the contract limits other than listed above shall be subject to the approval of the Engineer. If it is determined that the use of construction equipment or vehicles is having a detrimental effect or will result in detrimental effects on the finished work, the Engineer will so notify the Contractor to modify or cease the operations.



**105-13 WORK ZONE TRAFFIC CONTROL FOR MOBILE OPERATIONS.**

For contracts that involve mobile operations, but do not include separate contract pay items for work zone traffic control, a work zone traffic control sequence shall be provided by the Contractor in accordance with the MUTCD. When last following vehicle and/or trailing vehicles are required by these provisions, they shall meet the requirements of Section 619 *Work Zone Traffic Control* for Shadow Vehicles. No separate payment will be made for this work, the cost shall be included in prices bid for the various contract items.

**105-14 DISPUTED WORK AND DISPUTE RESOLUTION.**

The term "dispute" shall mean a disagreement between the Contractor and the Department concerning a matter of contract performance or contract compensation. Dispute resolution may involve adjustments in compensation, adjustment of contract pay items, the addition of new contract pay items to the contract, and/or extension of time for performance. The Contractor shall continue the work during the pendency of the dispute.

It is the goal of the Department to resolve disputes that may arise under the contract in a timely, just and fair manner consistent with the terms of the contract. The dispute resolution process may be undertaken at any time from the contract award to the issuance of the final payment by the Office of the State Comptroller. The dispute resolution process recognizes and will take into consideration the risks and controls inherent in construction which the Contractor or the Department have agreed to assume pursuant to the terms of the contract. The Contractor is encouraged, when initiating a dispute, to provide information concerning measures that may be taken to mitigate the damages.

Disputes of any nature shall be made in strict accordance with the contract provisions, including the notice and recordkeeping provisions of §104-06 *Notice and Recordkeeping*. The Department reserves the right to modify specifications or delete portions of the work being disputed in order to mitigate damages.

**A. *Disputed Work.*** If the Contractor is of the opinion that any work directed by the Engineer to be completed as contract work is extra work and not contract work, or that any order of the Engineer exceeds the requirements of the provisions of the contract, the Contractor shall provide the Department written notice and maintain records in accordance with §104-06 *Notice and Recordkeeping*. After submitting the required notice, the Contractor shall complete its dispute submission in accordance with §105-14F. *Required Content of Dispute Submission*.

**1. *Determined to Be Contract Work.*** If the Department determines that the disputed work is contract work and not extra work, or that the direction given to the Contractor and protested was proper, the Department will direct the Contractor to continue the disputed work and the Contractor shall promptly comply. The Contractor's right to further pursue a dispute for extra compensation or damages will not be affected in any way by the Contractor complying with the directions of the Department to proceed with the work, provided the Contractor continues to keep and submit daily records to document all labor, material and equipment used for disputed work in accordance with §109-05C.1. *Daily Summary* to the Engineer.

**2. *Determined to Be Extra Work.*** If the Department, determines that the disputed work is extra work and not contract work, or that a direction given to the Contractor and protested was not proper, then a contract adjustment will be made. Compensation will be made for such work in accordance with §109-05 *Extra Work and Time Related Compensation*. The Contractor shall continue to maintain force account records until receipt of the change order approved by the Office of the State Comptroller. Documented, additional, actual and reasonable costs incurred by the Contractor pursuant to following a written order to perform work (that was subsequently

contained in a change order which was disapproved) will be considered reimbursable. Eligibility for additional compensation shall cease upon notification of the disapproval of a change order.

**B. Time Related Disputes.** The term "time related dispute" shall mean any dispute arising from any event which affects the scheduled time of performance. This paragraph is intended to cover all such events which include major deductions or increases to quantities of work, suspension of work and cancellation of contract, and termination, as well as actions, forces or factors, such as "delay", "disruption", or "interference."

If the Contractor believes that it is or will be entitled to additional compensation for time related disputes, whether due to delay, extra work, disputed work, breach of contract, or other causes, the Contractor shall comply with the notice and recordkeeping provisions of §104-06 *Notice and Recordkeeping*. The Department will have no liability and no adjustment will be made for any damages which accrued more than 15 calendar days prior to the filing of written notice with the Engineer. The primary tool used to evaluate the time of performance is the Contractor's progress schedule. Department approval of a schedule or a revised schedule does not entitle the Contractor to a time extension or any time related damages. Compensation will be made for such work in accordance with §109-05D. *Time Related Dispute Compensation*.

**C. Acceleration Disputes.** The Contractor may not dispute costs associated with acceleration of the work unless the Department has given prior express written direction to the Contractor to accelerate its effort. The Contractor shall always have the basic obligation to complete the work in the time frames set forth in the contract. Lack of express written direction on the part of the Department shall never be construed as approval.

If the Contractor does accelerate its work efforts pursuant to written direction from the Department, compensation will be made in accordance with §109-05E. *Acceleration Compensation*. The Department, in determining whether or not any compensation is warranted, will evaluate the facts and circumstances which led to the acceleration to determine whether they were in the Contractor's control.

**D. Non-Compliance Disputes.** The term "non-compliance dispute" shall mean any dispute arising from any event which affects the Contractor's ability to comply with the general provisions of the contract. This includes, but is not limited to, liquidated damages associated with the Contractor's failure to comply with the civil rights requirements including Commercially Useful Function; Good Faith Efforts; Substitutions and Terminations.

If the Contractor is of the opinion that any order or action of the Engineer exceeds the requirements of the provisions of the contract, the Contractor shall provide the Department written notice and maintain records in accordance with §104-06 *Notice and Recordkeeping*. If the Department determines that remedies imposed on the Contractor for non-compliance were not proper, then a contract adjustment will be made.

**E. Review Time Periods for Disputes.** After providing written notice, the Contractor shall, as soon as the information is available or ascertainable, provide the Engineer with a summary of its dispute contentions in accordance with §105-14F. *Required Content of Dispute Submission*, in sufficient detail so that the Engineer may make a determination. The Engineer will make an initial response, in writing, within 21 calendar days after the Contractor provides the dispute submission.

If a dispute is not resolved by the Engineer to the satisfaction of the Contractor, within 10 work days of receipt of the Engineer's written decision or the Engineer fails to reply within 21 calendar days, the Contractor shall notify the Regional Director, in writing, with a copy to the Engineer, of its contentions relative to the dispute.

If the dispute is not resolved by the Regional Director to the satisfaction of the Contractor, within 15 calendar days of receipt of the Regional Director's written decision or the Regional Director fails to reply within 30 calendar days, the Contractor shall notify the Commissioner, in writing, with copies to the Engineer and the Regional Director, of its contentions relative to the dispute, indicating the substance of previous communication on the issue with the Engineer and the Regional Director and its rebuttal of their previous findings.

**1. *Disputes to the Commissioner Up to \$50,000.*** For all disputes to the Commissioner of \$50,000 or less, the Department will respond in writing within 45 calendar days of receipt of the dispute. If any additional documentation supporting the dispute, or relating to the subject matter of the dispute is required, the Contractor shall provide such information within 30 calendar days of the request unless another time period is agreed to. The Department's written response to the additionally documented dispute will be submitted to the Contractor within 15 calendar days after receipt of said additional documentation or within a period of time no greater than that taken by the Contractor in producing said additional documentation, whichever is greater. If the Contractor disputes the Department's written response, or the Department fails to respond within the time prescribed, the Contractor may so notify the Department in writing within 15 calendar days of receipt of the Department's response, or within 15 calendar days of the Department's failure to respond. Upon the Contractor's request, the Department will schedule a meeting or conference. By agreement between the Department and the Contractor, such time periods may be modified.

**2. *Disputes to the Commissioner Over \$50,000 to \$250,000.*** For all disputes to the Commissioner over \$50,000 and less than or equal to \$250,000, the Department will respond in writing within 60 calendar days of receipt of the dispute. If any additional documentation supporting the dispute, or relating to the subject matter of the dispute is required, the Contractor shall provide such information within 30 calendar days of the request unless another time period is agreed to. The Department's written response to the additionally documented dispute will be submitted to the Contractor within 30 calendar days after receipt of said additional documentation, or within a period of time no greater than that taken by the Contractor in producing said additional documentation, whichever is greater. If the Contractor disputes the Department's written response, or the Department fails to respond within the time prescribed, the Contractor may so notify the Department in writing within 15 calendar days of receipt of the Department's response, or within 15 calendar days of the Department's failure to respond. Upon the Contractor's request, the Department will schedule a meeting or conference and notify the Contractor within 30 calendar days of the scheduled date. By agreement between the Department and the Contractor, such time periods may be modified.

**3. *Disputes to the Commissioner over \$250,000 or of Undetermined Value.*** For disputes to the Commissioner over \$250,000 or that have an undetermined value, the Department will respond in writing within 90 calendar days of receipt of the dispute. If any additional documentation supporting the dispute, or relating to the subject matter of the dispute, is required, the Contractor shall provide such information within 30 calendar days unless another time period is agreed to. The Department's written response to the additionally documented dispute will be submitted to the Contractor within 60 calendar days after receipt of the said additional documentation, or within a period of time no greater than that taken by the Contractor in producing said additional documentation, whichever is greater. If the Contractor disputes the Department's written response, or the Department fails to respond within the time prescribed, the Contractor may so notify the Department in writing within 30 calendar days after the receipt of the Department's response, or within 30 calendar days of the Department's failure to respond. Upon the Contractor's request, the Department will schedule a meeting or conference and notify the

Contractor within 30 calendar days of the scheduled date. By agreement between the Department and the Contractor, such times periods may be modified.

***F. Required Content of Dispute Submission.*** All disputes shall be submitted in writing to the Engineer, and shall be in sufficient detail to enable the Engineer to ascertain the basis and the amount of each dispute. If requested and as a minimum, the following information shall be provided when such information is ascertainable by the Contractor:

***1. General.***

- a. The date on which actions resulting in the dispute occurred or conditions resulting in the dispute became evident.
- b. A copy of the notice of dispute for the specific dispute by the Contractor.
- c. To the extent known, the name, function, and activity of each Department official, or employee or agent, involved in, or knowledgeable about facts that gave rise to such dispute.
- d. The name, function, and activity of each Contractor or Subcontractor official, or employee, involved in, or knowledgeable about facts that gave rise to such dispute.
- e. The identification of any pertinent documents, and the substance of any material communication relating to such dispute.
- f. A statement as to whether the additional compensation or extension of time if requested is based on the provisions of the contract or is an alleged breach of contract.
- g. If an extension of time is also requested, the specific days for which it is sought and the basis for such request as determined by an analysis of the construction progress schedule.

***2. Time Related Dispute Submissions.***

- a. A description of the operations that were delayed, the reasons for the delay, how they were delayed, including the report of all scheduling experts or other consultants, if any.
- b. The documented process of establishing, maintaining and updating the progress schedule, showing when the delay occurred and how it affected the schedule, in accordance with §108-01 *Progress Schedule* or a CPM specification, if applicable.
- c. The amount of additional compensation sought in accordance with §109-05D. *Time Related Compensation.*

***3. Acceleration Dispute and Disputed Work Submissions.***

- a. A detailed factual statement of the dispute providing all necessary dates, locations and items of work affected by the dispute.
- b. The specific provisions of the contract which support the dispute and a statement of the reasons why such provisions support the dispute.
- c. The amount of additional compensation sought and a breakdown of that amount shall conform to the requirements of §109-05B. *Force Account Work* except for acceleration disputes which shall conform to the requirements and categories specified in §109-05D. *Time Related Compensation.*

***G. Required Certification of Disputes Over \$50,000.***

When submitting any dispute over \$50,000, the Contractor shall certify in writing, under oath and in accordance with the formalities required by the contract, as to the following:

1. That supporting data is accurate and complete to the Contractor's best knowledge and belief;
2. That the amount of the dispute is based on sound engineering principles, is supported by sound mathematical and cost accounting principles and the dispute itself is in accordance with the terms

of the contract, and accurately reflects what the Contractor in good faith believes to be the Department's liability;

3. That the dispute and the amount of the dispute is in full compliance with the Federal False Claims Act, 31 U.S. Code Section 3729, and New York State False Claims Act, NYS Finance Law Article XIII; and that the Contractor acknowledges that if determined to be in violation of these acts by a court of proper competent jurisdiction, such violating Contractor shall be subject to liability for a civil penalty, plus up to three times the damage the State sustains by such violation.

4. The certification shall be executed by:

- a. The Contractor, if the Contractor is an individual.
- b. A senior company official in charge at the Contractor's plant or location involved or an officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs, if the Contractor is not an individual.

**H. Auditing of Records.** A Contractor who has filed a dispute, or Subcontractor, Manufacturer, Fabricator or Material Supplier on whose behalf a dispute has been filed, shall have the following records available for audit at any time following the filing of such dispute, and shall cooperate with the auditors, whether or not such dispute is part of a suit pending in the courts of this State. The audit may be performed by employees of the Department or by an independent auditor appointed by the Department, and may begin on 15 days notice to the Contractor, Subcontractor, Manufacturer, Fabricator or Material Supplier as is appropriate. The Contractor, Subcontractor, Manufacturer, Fabricator or Material Supplier shall cooperate with the auditors. The Department will maintain the audit, its backup, reports, schedules and conclusions as confidential material. Failure to maintain and retain sufficient records shall constitute a waiver of that portion of such dispute that cannot be verified and shall bar recovery there under. In the event the Contractor fails to substantially furnish the required reports and accounting records, such failure shall constitute a waiver of the dispute for payment other than for payment at contract unit prices for the work performed. The Contractor will be allowed to review the audit findings and will be allowed 30 calendar days to respond to any items disallowed by the audit.

Without limiting the generality of the foregoing, the auditors shall have available to them and the Contractor agrees to provide access to and true copies of the original, in whatever format the records are created/maintained, of the following documents:

1. All documents related to the preparation of the Contractor's bid including the final calculations on which the bid was based.
2. All documents which relate to each and every dispute together with all documents which support the amount of damages as to each dispute.
3. Daily time sheets, superintendent diaries or log sheets and foreperson's daily reports.
4. Union agreements and reports, if any.
5. Insurance policies, welfare and benefits records or plans for union and non-union personnel.
6. Payroll register, Individual employee earnings records and Payroll tax returns.
7. Material invoices, purchase orders, and all material and supply acquisition contracts.
8. Material cost distribution work sheet.
9. Equipment records (list of company equipment, rates, depreciation schedules, daily equipment reports or logs, fueling logs or records, equipment lease purchase agreements, and equipment purchase invoices).
10. Depreciation records on all company equipment whether such records are maintained by the company involved, its accountant, or others.

11. If a source other than depreciation records is used to develop costs for the Contractor's internal purposes in establishing the actual cost of owning and operating equipment, all such other source documents.
12. Vendor rental agreements, subcontractor invoices, agreements and back charge records.
13. Subcontractor payment certificates.
14. Canceled checks (payroll and vendors).
15. Job cost ledger or report and Job payroll ledger.
16. General ledger, general journal (if used), and all subsidiary ledgers and journals together with all supporting documentation pertinent to entries made in these ledgers and journals.
17. Cash receipts, cash disbursements journal, purchase journal, petty cash journal and supporting vouchers.
18. Audited and unaudited financial statements for all years during operations on this contract.
19. Documents which reflect the Contractor's actual overhead during the years contract work was performed.
20. Work sheets used to prepare the dispute establishing the cost components for items of the dispute including, but not limited to, labor, benefits and insurance, materials, equipment, subcontractors, and all documents which establish the time periods, individuals involved, the hours and the rates for the individuals.

**I. Contract Closeout Process.** A dispute, or a portion thereof, that has been previously submitted to the Department which remains unresolved to the satisfaction of the Contractor, may be submitted for Department review in connection with the closeout process. The records made, and recommendations or actions of a facilitator, a Dispute Review Board, or any other dispute resolution method, shall be off the record, non-binding, confidential, and may not be used in any future litigation.

**1. Contract Closeout Meeting.** If requested by the Contractor, the Department will schedule a contract closeout meeting with the Office of Construction in Albany. The contract closeout meeting process involves meeting(s) with the Contractor and its representatives and Department personnel to amicably resolve all remaining disputes of the Contract. In lieu of pursuing the closeout meeting process, the Contractor may elect to utilize the Gatekeeper process.

**2. Gatekeeper.** The Chief Engineer of the Department of Transportation is the Gatekeeper. The Contractor may submit a single request per contract to the Department to have the Gatekeeper identify an alternate dispute resolution process to be used for unresolved dispute(s) in the contract closeout process. The Contractor shall provide to the Gatekeeper a brief description of the contract work and identify the Contractor's preferred method of dispute resolution. The Contractor shall document to the Gatekeeper that (a) the unresolved dispute involves unique, unusual or complex construction, engineering or legal issues; (b) the unresolved dispute has a monetary value in excess of \$50,000 and (c) the Contractor has demonstrated a clear commitment to active participation in partnering during the conduct of this contract.

Upon conclusion of the review, the Gatekeeper will advise the Contractor how it should proceed with processing such dispute(s) in an attempt to resolve the matter. The Gatekeeper will advise the Contractor to proceed to one of the following: (1) a contract closeout meeting with the Office of Construction, (2) a facilitated contract closeout meeting with the Office of Construction or to (3) a Dispute Review Board (DRB). The decision of the Gatekeeper shall be final and shall not be subject to review under Article 78 of the New York Civil Practice Law and Rules. The expenses of the facilitator, a DRB, or any other method shall be equally shared by the Department and the Contractor.

*a. Facilitated Closeout Meeting.* A facilitator may be used to assist in resolving disputes arising out of the performance of the contract. The facilitator shall consist of one person,

## 105-15 FURNISHING RIGHT OF WAY.

agreed to by the Department and the Contractor, who is knowledgeable in public works construction matters and who shall try to bring the parties to a mutually agreeable resolution of the disputes.

*b. Dispute Review Board.* A Dispute Review Board (DRB) may be established to assist in resolving disputes arising out of the performance of the contract. The DRB shall consist of one or three persons, agreed to by the Department and the Contractor, who are knowledgeable in public works construction matters. For a one person DRB, the person must be mutually acceptable to the Department and the Contractor. For a DRB of three persons, one will be selected by the Department, one will be selected by the Contractor and one will be mutually selected by the Department and the Contractor. The DRB will make a recommendation as to the resolution of the disputes.

**3. Claims.** If any dispute, or portion thereof, remains unresolved following the meeting(s) or conference(s) and the receipt of the final agreement, the Contractor may file a claim in the New York State Court of Claims in accordance with law and the provisions of the Contract.

## 105-15 FURNISHING RIGHT OF WAY.

The Department will secure all rights of way in advance of construction. Any exception will be indicated prior to the award of the contract. The Contractor shall not enter upon any parcel until the proper rights of entry have been obtained.

The Contractor's attention is directed to the fact that Permanent Easements (P.E.), Temporary Easements (T.E.) and Temporary Occupancies (T.O.) are obtained by the Department for specific construction purposes. Contractors should not anticipate unlimited usage of such areas and shall confine construction activities to such purposes as are specifically described in the ROW appropriation maps and/or as shown on the plans unless separate agreements are made between the Contractor and the landowner permitting other usage of such areas. Such limitations and related costs shall be reflected in the bid prices.

Releases may be used for contract work outside of the existing right of way that minimizes the construction impacts on a property owner and is not essential for construction. A release is not used for property rights acquired by the Contractor, including rental of property for equipment staging, office space or material storage. Work performed under a release may include: plantings; unsound and hazardous tree removal; minor grading; and reconnection or minor work on private driveways, walkways and utilities as a result of work within the right of way.

The Department will secure all releases prior to the Contractor performing contract work on private parcels. The Contractor may not secure releases for contract work. If a release cannot be obtained, the work will be removed from the contract.

The Engineer will coordinate with the property owner to determine the disposition of any surplus material or waste in accordance with §107-10 *Managing Surplus Material and Waste*.

## 105-16 SHOP DRAWING ACCEPTANCE.

A shop drawing is a drawing, diagram, illustration, test data, performance chart, catalog cut, brochure and other data prepared by the Contractor, Subcontractor, Manufacturer, Fabricator or Material Supplier for submission to the Department as an illustration of a portion of the work. The Department's acceptance of shop drawings does not relieve the Contractor of the responsibility to satisfactorily complete the work in accordance with the contract documents.

Unless otherwise stated in the contract documents, no portion of the work requiring shop drawings or a sample of the work shall be commenced until the submission has been formally accepted by the Department. The Contractor will not be entitled to reimbursement for changes made to the contract documents unless such changes occur after submission of the shop drawings.

## 105-17 CONTRACT RECORDS.

Review of shop drawings will begin only after the submission of a complete set of information required to complete a discrete item of work. If the shop drawing requires a signature and seal by a Professional Engineer, a copy of an insurance certificate or *CONR2 Prime Contractor's Certification*, in accordance with §107-06 *Insurance*, for Professional Liability shall accompany the submittal package. Unless stated elsewhere in the Standard Specifications, the review process will allow two work days per drawing submitted or a minimum of 10 days per submittal. Unless otherwise stated in the Steel Construction Manual or the Prestressed Concrete Construction Manual, a drawing shall be defined as a sheet of similar layout as the plan sheets in the contract documents. Submission of materials directly to a reviewing unit shall be done only with the approval of the Engineer. Complete copies of all submissions shall be provided to the Engineer.

### **105-17 CONTRACT RECORDS.**

The Engineer will keep contract records in accordance with the Manual for Uniform Record Keeping (MURK). Changes that are made in subsequent revisions of the Manual will be incorporated in the contract procedures and records unless authorized to the contrary in writing by the Deputy Chief Engineer, Construction (DCEC). The Contractor is invited to review the contract records with the Engineer if desired. The Contractor may request occasional or incidental copies of contract records in support of on-going construction activities, subject to the availability of staff to fulfill the Contractor's request. If the Contractor desires significant or large numbers of copies of records, the Contractor shall file a Freedom of Information Law (FOIL) request with the Regional Director. In several instances, (such as Force Account work, application for approval of Subcontractors, etc.) the Contractor shall furnish such data and information on forms as established in MURK and furnished by the Department.

### **105-18 MANUFACTURER WARRANTIES AND GUARANTEES.**

The Contractor shall provide to the Department or the authority having jurisdiction of the facility any manufacturer's warranties and guarantees normally given as customary trade practice. For contracts involving the furnishing and/or installing of electrical and mechanical equipment, the Contractor shall guarantee the satisfactory in-service operation of mechanical and electrical equipment and related components for a period of 6 months following contract acceptance, at no cost to the State for either parts or labor. This requirement does not apply to mechanical and electrical equipment furnished by the State.

### **105-19 CONTRACTOR WARRANTIES.**

The Department may make available, subject to express agreement in writing between the Department and the Contractor, with approval from the FHWA when required, warranties associated with the contract for limited circumstances. A prototype warranty specification is available from the Department for the purpose of the Contractor's providing a warranty for a particular item, as opposed to providing a warranty for an entire contract. The product warranty will be developed between the Department and the Contractor with input from appropriate technical experts and the Office of Legal Affairs in conjunction with the Office of Construction, and incorporated into the contract via change order. The warranty may be used in situations including, but not limited to, work performed not in full compliance with the contract documents, where initial testing does not indicate any deficiency in the end product.

### **105-20 OPENING HIGHWAY TO TRAFFIC PRIOR TO CONTRACT FINAL ACCEPTANCE.**

When directed, in writing by the Regional Construction Engineer, the Contractor shall open to traffic any portion of new pavement and/or structures before contract final acceptance. Traffic on these portions of highway so opened to travel by the Regional Construction Engineer, shall be maintained and protected in accordance with the provisions of the contract.

Should the Contractor be dilatory in completing the work on the portion of the highway directed to be opened, the Regional Construction Engineer may order all or a portion of the said highway open to traffic;



## 105-21 CIVIL RIGHTS MONITORING AND REPORTING.

and in this event the Contractor shall not be relieved of its liability and responsibility during the period the work is so opened prior to contract final acceptance.

These provisions apply not only to the reconstruction of existing highways, but also to work on new locations where traffic is not maintained during construction.

### 105-21 CIVIL RIGHTS MONITORING AND REPORTING.

The Department approved civil rights reporting software is Equitable Business Opportunity Solution (EBO). The EBO software is a web-based system owned and maintained by the Department and provided to the Contractor at no cost. The Contractor shall use the Department approved civil rights reporting software on all contracts. The Contractor shall enter into EBO complete and accurate electronic data to the Department for each month, not later than the 15th of the following month. Data shall be current through the end of the last full payroll week for that month, or as otherwise approved by the Engineer to coordinate with contract payment submittals.

**A. *Civil Rights Officer(s).*** The Contractor shall designate a Corporate Civil Rights Officer, a Corporate DBE/MBE/WBE/SDVOB Representative, and a contract site Equal Employment Opportunity (EEO) Representative; and each Subcontractor shall designate a Corporate Civil Rights Officer, and a contract site Equal Employment Opportunity (EEO) Representative in the Department approved civil rights reporting software to generate the Form AAP15 *Designation of Affirmative Action Representatives by Contractors/Subcontractors*. The designated individuals shall have the responsibility to and shall be capable of effectively administering and promoting an active program of equal employment opportunity and who shall be assigned adequate authority and responsibility to do so. A single individual may fulfill multiple roles. The Contractor shall update the Department approved civil rights reporting software within 10 calendar days of any changes in these roles.

**B. *Workforce Participation Plan.*** At the Pre-Construction Meeting, the Contractor shall submit a *Workforce Participation Plan* covering the Contractor's workforce and the workforce of its Subcontractors with subcontracts over \$10,000, together and coordinated with the contract progress schedule, that addresses the Equal Employment Opportunity goals. The Contractor shall not start work until the Department has reviewed and accepted the *Workforce Participation Plan*. The Contractor shall submit a revised plan when a significant work force build-up or reduction will substantially affect goal attainment, or when a revised schedule is requested by the Department. Such revised *Workforce Participation Plan* must be agreed upon by the Department or the original will remain in effect.

**C. *Equal Employment Opportunity (EEO) Monitoring and Reporting.*** The Contractor's compliance with the EEO Requirements will be based on its Employment Utilization, affirmative action steps and its good faith efforts to meet the goals. The Department, in evaluating the Contractor's good faith efforts to meet the EEO goal(s), will first analyze the Contractor's goal attainment on an individual contract. If the Contractor is not meeting the goal(s) for a single trade or contract, the Department will analyze, progressively, the Contractor's goal attainment on all contracts held by the Contractor within the county, the Region, and/or the State. This method of analysis shall be applied primarily but not solely to contracts with small population numbers. Other factors to be considered include but are not limited to: the location of the contracts, the relative proximity of the contracts to each other, and the nature of the work.

**1. *Employee Utilization Data.*** The Contractor shall input employee utilization data into the Department approved civil rights reporting software for its workforce and for each Subcontractor with a subcontract exceeding \$10,000 to the Department on a monthly basis, not later than the 15th of the following month. Data shall be submitted showing the total hours for each payroll

week, separately through the end of the last full payroll week for that month. Payroll data is captured using the last date of the payroll. Therefore, a payroll week only partially in a month shall be submitted for the next month. Payroll weeks are determined based on the firm's established payroll end date. Data shall include gender, ethnicity, and hours worked by trade(s) and classification. Employment utilization percentages are determined using data from the start of work up to and including the month being reported. For the purpose of determining utilization percentages, the hours of female and minority employment are tabulated separately and attainment percentages are calculated separately.

**2. *Federal-Aid Highway Construction Contractors Annual EEO Report.*** The Contractor shall submit all required employee utilization data into the Department approved civil rights reporting software to produce a Form FHWA 1391 *Federal-Aid Highway Construction Contractors Annual EEO Report* to the Department annually not later than August 15th, reflecting the work force during all or any part of the last full payroll period worked in July, for all ongoing Federal-Aid contracts. The data shall indicate the number of minority men, minority women, non-minority men, and non-minority women employees currently engaged in each trade.

**3. *Monthly Training Progress Report.*** When training is required under §102-11 *Equal Employment Opportunity Requirements* and/or Training Special Provisions, the Contractor shall submit a monthly training progress report to the Engineer not later than the 15th of each month. In addition to each Monthly Training Progress Report, the Contractor shall provide the Engineer a summary of hours required to complete the various work elements of the training program, hours completed this period, and hours completed to date. This summary shall be provided in sufficient detail to allow the Engineer to determine whether the hours in the previous period are qualified hours under this pay item.

**4. *Contractor Compliance with EEO Requirements.*** If the Contractor fails to meet the EEO goals for minorities or women, or demonstrate good faith efforts, the Department may require training of minorities and women to satisfy the employment goals. If the Contractor fails to meet the EEO goals, to demonstrate good faith efforts, or is in noncompliance with the nondiscrimination clauses, the Department may suspend additional contract payments in accordance with Article 8 *No Payment on Contractor's Non-Compliance* of the contract agreement, the Contractor may be directed to attend a hearing before the Contract Review Unit, or the Department may follow any other lawful procedure upon due notice in writing to the Contractor, including cancellation, termination, or suspension in whole or in part in accordance with Article 11 *Right to Suspend Work and Cancel Contract* of the contract agreement.

The Contractor may also be referred to the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), which has the sole authority to determine compliance with Executive Order 11246 and its implementing regulations. OFCCP may declare the Contractor ineligible for further Federal-Aid contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246, or by rule, regulation, or order of the U.S. Secretary of Labor, or as otherwise provided by law.

**D. *DBE/MBE/WBE/SDVOB Monitoring and Reporting.*** The Contractor shall utilize the DBE/MBE/WBE/SDVOBs committed to at pre-award to perform the work or supply materials for which each is listed. The Engineer will monitor the work to ensure that the identified DBE/MBE/WBE/SDVOBs perform the work as identified in the Contractor's commitments. Attainments will be measured based on payments made to DBE/MBE/WBE/SDVOBs.

If the Contractor has not executed a subcontract with a DBE/MBE/WBE/SDVOB before the DBE/MBE/WBE/SDVOB is notified of removal of its eligibility by the certifying agency, the

Contractor may not make commitments to use the firm on the contract as a DBE/MBE/WBE/SDVOB, and attainments will not be credited toward the contract goal. The Contractor shall replace the DBE/MBE/WBE/SDVOB with another DBE/MBE/WBE/SDVOB or provide sufficient Good Faith Effort documentation.

If the Contractor has executed a subcontract with a DBE/MBE/WBE/SDVOB before the DBE/MBE/WBE/SDVOB is notified of removal of its eligibility by the certifying agency, the Contractor may continue to use the DBE/MBE/WBE/SDVOB on the contract in accordance with the executed subcontract, and attainments will be credited toward the contract goal. Any new or extra work performed by the ineligible DBE/MBE/WBE/SDVOB not covered under the scope of the original executed subcontract will not be credited toward the contract goal. However, if the DBE/MBE/WBE/SDVOB is decertified because they were acquired by or merged with another firm that is not certified (i.e., Non-DBE/MBE/WBE/SDVOB), the portion of work that was performed after the firm was decertified will not count towards the goal, even if the Contractor has executed a subcontract with the decertified firm. If the loss of credit towards the goal affects the Prime Contractor's ability to meet the overall contract goal, the Contractor shall make up for the shortfall or provide sufficient Good Faith Effort documentation. When a contract is awarded with DBE/MBE/WBE/SDVOB commitment(s) that is less than the contract goal(s), the Contractor shall continue good faith efforts. The Contractor shall periodically review items that are available for DBE/MBE/WBE/SDVOB participation, typically before the beginning of a new construction season and when significant new items of work are added to the contract, and conduct additional DBE/MBE/WBE/SDVOB solicitation.

If a Contractor, in order to meet the DBE contract goal or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, a DBE that does meet the eligibility criteria of 49 CFR Subpart D, the U.S. Department of Transportation may initiate suspension or debarment proceedings against that firm under 2 CFR Parts 180 and 1200.

**1. *Report of Payments to Subcontractors and DBE/MBE/WBE/SDVOBs.*** The Contractor shall enter payment data into EBO for all Subcontractors and for all DBE/MBE/WBE/SDVOBs that are due a payment or have received a payment, within 14 days of receipt of payment from the Department, in order to measure DBE/MBE/WBE/SDVOB goal attainment and to monitor Contractor compliance with the requirements of §109-07 *Prompt Payments by the Contractor*.

The Subcontractor or DBE/MBE/WBE/SDVOB shall acknowledge receipt of payment not later than 7 calendar days after receipt. The date of receipt is: (1) the date the payment was made by electronic transfer to an account identified and agreed to by both parties; (2) the date the envelope containing the payment was date stamped by the U.S. Postal Service; or (3) the date the payment was physically provided to a previously authorized representative of the Subcontractor or DBE/MBE/WBE/SDVOB, either by the Contractor or by a delivery service.

The Contractor shall enter the final payment to each Subcontractor or DBE/MBE/WBE/SDVOB and designate it as such when the final payment is made, or as a separate \$0.00 entry indicating final payment has been made, prior to contract final acceptance, excepting those payments due from work contained in a change order(s) that have not been approved. The Subcontractor or DBE/MBE/WBE/SDVOB shall acknowledge receipt of final payment not later than 7 calendar days after receipt or by notification by the Contractor that a separate \$0.00 entry indicating final payment was entered in the civil rights reporting software.

**2. *Monitoring Commercially Useful Function (CUF) by DBE/MBE/WBE/SDVOBs.*** The Contractor shall monitor the work of the DBE/MBE/WBE/SDVOBs to ensure each performs a Commercially Useful Function (CUF) and can be properly counted towards the Contractor's DBE/MBE/WBE/SDVOB commitments. Upon request, the Contractor shall provide the Engineer one week notification for work to be performed by a DBE/MBE/WBE/SDVOB.

The Department will review the work, services or products provided by each DBE/MBE/WBE/SDVOB to verify the performance of a CUF in accordance with §102-12E *Commercially Useful Function*. To determine whether a DBE/MBE/WBE/SDVOB has performed a CUF, the Department may also examine similar transactions, particularly those in which DBE/MBE/WBE/SDVOBs do not participate.

If the Department determines that some or all of a DBE/MBE/WBE/SDVOBs work does not constitute a CUF in accordance with §102-12E. *Commercially Useful Function*, only the portion of the work considered to be a CUF will be credited toward the goal(s).

Upon request, each DBE/MBE/WBE/SDVOB Subcontractor shall provide additional documentation to the Engineer for the purposes of monitoring CUF. Such documentation may include, but not be limited to: confirmation that the workforce provided meets the requirements of §102-12E.1. *Work Force*; a copy of purchase order(s) for all material incorporated into the work in order to confirm that the DBE/MBE/WBE/SDVOB has met the requirements of §102-12E.3. *Materials*; and a copy of a rental agreement for all non-owned equipment used to perform the work to the Engineer in order to confirm that the DBE/MBE/WBE/SDVOB has met the requirements of §102-12E.4. *Equipment*.

Upon request, the Contractor shall provide a copy of a purchase order(s) for all material, supplies, articles, or equipment provided by a DBE/MBE/WBE/SDVOB Manufacturer, Fabricator, or Material Supplier and a copy of a scope of services that details the work product(s) provided from each DBE/MBE/WBE/SDVOB Professional Service and Work Service to the Engineer.

A DBE/MBE/WBE/SDVOB may present evidence to rebut a determination by the Department that the DBE/MBE/WBE/SDVOB is not performing a CUF. For DBEs, CUF determinations by the Department are subject to review by the Federal Highway Administration (FHWA) but the determination may not be administratively appealed to USDOT. An M/WBE may rebut a determination by the Department that the M/WBE is not performing a CUF to the NYS Department of Economic Development. An SDVOB may rebut a determination by the Department that the SDVOB is not performing a CUF to the NYS Office of General Services' Division of Service-Disabled Veteran's Business Development.

**3. Revisions to DBE/MBE/WBE/SDVOB Participation.** The Contractor shall obtain Department approval for substantial revisions, as defined below, in DBE/MBE/WBE/SDVOB participation prior to implementing any proposed change through submission of Form AAP16 *Request to Modify DBE/MBE/WBE/SDVOB Participation*. Once approval is granted by the Department, the Contractor shall submit a revised AAP19 *DBE/MBE/WBE/SDVOB Schedule of Participation* using the Department approved civil rights reporting software. Unless approval for the revision is granted, the Contractor will not be entitled to any payment for work or material committed to a DBE/MBE/WBE/SDVOB unless it is performed or supplied by the approved DBE/MBE/WBE/SDVOB.

If the reduction of the DBE/MBE/WBE/SDVOB's work or the removal of the DBE/MBE/WBE/SDVOB causes the DBE/MBE/WBE/SDVOB participation to fall below the goal(s), the Contractor shall make good faith efforts in accordance with §102-12H *Good Faith Efforts* to find another DBE/MBE/WBE/SDVOB to substitute for the original DBE/MBE/WBE/SDVOB to perform at least the remaining sum of work as the DBE/MBE/WBE/SDVOB that was terminated, to the extent needed to meet the contract goal(s). This includes when the DBE/MBE/WBE/SDVOB fails to complete its work on the contract for any reason, including when work committed to a DBE/MBE/WBE/SDVOB cannot be credited toward goal attainment, reduced due to overestimations made prior to award, or due to commercially useful function violations.

Upon request, the Contractor shall provide documentation of good faith efforts within 7 days which may be extended for an additional 7 days if necessary at the request of the Contractor. The

Department will provide a written determination to the Contractor stating whether or not good faith efforts have been demonstrated.

A DBE/MBE/WBE/SDVOB may be substituted if the work committed to the DBE/MBE/WBE/SDVOB is deleted or reduced by the Department and enough work remains to substitute an equal commitment amount to the affected DBE/MBE/WBE/SDVOB. If not enough work remains, the Department may relieve the Contractor from attaining that portion of the commitments.

The following modifications will be considered a substantial revision in DBE/MBE/WBE/SDVOB participation:

- Removing or substituting a DBE/MBE/WBE/SDVOB.
- Adding new item(s) of work to a DBE/MBE/WBE/SDVOB within a core (3 digit) contract pay item number (i.e., 606 – Guide Railing).
- Reducing the dollar value of or eliminating the DBE/MBE/WBE/SDVOB's item(s) of work or a portion of the work.
- Changes in participation due to major differences between estimated quantities and actual work performed.

The following modifications will not be considered a substantial revision in DBE/MBE/WBE/SDVOB participation:

- Adding a DBE/MBE/WBE/SDVOB to perform work and/or provide materials on the contract, where such addition is not intended to remove or substitute for other DBE/MBE/WBE/SDVOB work.
- Increasing the dollar value of an item(s) of work or adding new item(s) of work within the same core (3 digit) contract pay item number (i.e., 606 – Guide Railing) to a DBE/MBE/WBE/SDVOB.
- Substituting similar dollar values of work within a currently approved core (3 digit) contract pay item number (i.e., 606 – Guide Railing).
- Changes in participation due to minor differences between estimated quantities and actual work performed.

The Contractor shall not terminate a DBE/MBE/WBE/SDVOB listed on the approved DBE/MBE/WBE/SDVOB Participation Plan without the prior written consent of the Department. This includes, but is not limited to, instances in which a Contractor seeks to perform work originally designated for a DBE/MBE/WBE/SDVOB subcontractor with its own forces or those of an affiliate, a non-DBE/MBE/WBE/SDVOB firm, or with another DBE/MBE/WBE/SDVOB firm.

The Department will consent only if the Prime Contractor has good cause to terminate the DBE/MBE/WBE/SDVOB firm. Good cause includes, at a minimum, one the following circumstances:

- The listed DBE/MBE/WBE/SDVOB fails or refuses to execute a written contract;
- The listed DBE/MBE/WBE/SDVOB fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the Contractor;
- The listed DBE/MBE/WBE/SDVOB fails or refuses to meet the Contractor's reasonable, nondiscriminatory bond requirements.
- The listed DBE/MBE/WBE/SDVOB becomes bankrupt, insolvent, or exhibits credit unworthiness;
- The listed DBE/MBE/WBE/SDVOB is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1200 or applicable state law;

- The Department has determined that the listed DBE/MBE/WBE/SDVOB is not a responsible Contractor;
- The listed DBE/MBE/WBE/SDVOB voluntarily withdraws from the project and provides to the Department written notice of its withdrawal;
- The listed DBE/MBE/WBE/SDVOB is ineligible to receive credit for the type of work required;
- A DBE/MBE/WBE/SDVOB owner dies or becomes disabled with the result that the firm is unable to complete its work on the contract;
- Other documented good cause that the Department determines compels the termination of the DBE/MBE/WBE/SDVOB. Provided, that good cause does not exist if the Contractor seeks to terminate a DBE/MBE/WBE/SDVOB it relied upon to obtain the contract so that the Contractor can self-perform the work for which the DBE/MBE/WBE/SDVOB was engaged or so that the Contractor can substitute another DBE/MBE/WBE/SDVOB or non-DBE/MBE/WBE/SDVOB contractor after contract award.

Before submitting its request to terminate and/or substitute a DBE/MBE/WBE/SDVOB to the Department, the Contractor shall give notice in writing to the DBE/MBE/WBE/SDVOB subcontractor, with a copy to the Engineer, of its intent to request to terminate and/or substitute, and the reason for the request.

The Contractor shall give the DBE/MBE/WBE/SDVOB five days to respond to the notice and advise the Department and the Contractor of the reasons, if any, why the DBE/MBE/WBE/SDVOB objects to the proposed termination of its subcontract and why the Department should not approve the Contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), the Department may approve a response period shorter than five days.

Failure of a Contractor to obtain Department approval prior to reduction, termination or substitution of a DBE/MBE/WBE/SDVOB may be deemed a breach of contract subject to appropriate actions such as, but not limited to, a responsibility review, withholding contract payments, and/or loss of credit towards the DBE/MBE/WBE/SDVOB goals.

**4. Contractor's Compliance with DBE Program Requirements.** If the Contractor fails to meet the DBE participation commitment(s), to exert a good faith effort, or otherwise fails to comply with the DBE Program requirements, the Department will take appropriate actions. Such actions may include, but not be limited to: suspension of contract payments in accordance with Article 8 No Payment on Contractor's Non-Compliance of the contract agreement; direction to the Contractor to attend a hearing before the Department's Contract Review Unit; or any other lawful procedure upon due notice in writing to the Contractor, including cancellation, termination, or suspension in whole or in part in accordance with Article 11 *Right to Suspend Work and Cancel Contract* of the contract agreement.

Where the Department determines that the Contractor is not in compliance with the requirements of the contract and the Contractor refuses to comply with such requirements, or if the Contractor is found to have willfully and intentionally failed to comply with the DBE participation goal, the Contractor will be obligated to pay to the Department Liquidated Damages.

Such Liquidated Damages for failure to meet the DBE requirements shall be calculated as an amount equaling the difference between the amount committed to the DBEs by the Contractor at award and the amount actually paid to the DBEs for creditable work performed or materials supplied under the Contract, not including any amount for work deleted by the Department or work which a DBE declined or failed to reasonably perform. For Response Contracts, such Liquidated Damages for failure to meet the DBE requirements shall be calculated as an amount equaling the difference between the goal amount based on the Contractor's total bid price and the

amount actually paid to the DBEs for creditable work performed or materials supplied under the Contract.

If a determination has been made which requires the payment of Liquidated Damages and such identified sums have not been withheld by the Department, the Contractor shall pay such Liquidated Damages to the Department within sixty (60) days after they are assessed.

The Contractor may also be referred to the USDOT for possible suspension or debarment as provided in 49 CFR 26 and such other sanctions as may be imposed and remedies invoked as provided under the authority of 49 CFR 26, or by rule, regulation, or order of the Commissioner or as otherwise provided by law.

**5. Contractor's Compliance with M/WBE Program Requirements.** If the Contractor fails to meet the M/WBE participation commitments, to exert a good faith effort, or otherwise fails to comply with the M/WBE Program requirements, the Department will take further actions.

Such actions may include, but not be limited to, suspension of contract payments in accordance with Article 8 *No Payment Due to Contractor's Non-Compliance* of the contract agreement; the Contractor may be directed to attend a hearing before the Department's Contract Review Unit; or any other lawful procedure upon due notice in writing to the Contractor, including cancellation, termination, or suspension in whole or in part in accordance with Article 11 *Right to Suspend Work and Cancel Contract* of the contract agreement.

If the Contractor does not meet the M/WBE participation goals, the Contractor will submit to the Engineer a request for a partial or total waiver in accordance with 5 NYCRR 142.7.

- a. The Contractor will submit a waiver request documenting such good faith efforts and providing sufficient justification as to why the M/WBE goals should be waived or reduced based upon the following factors: The number and types of certified M/WBEs available to perform on any subcontractable scopes of the contract;
- b. The total dollar value of the contract;
- c. The contract scope of work to be performed;
- d. The project size;
- e. The project term;
- f. The availability of other business enterprises located in the region qualified to do the work to be performed;
- g. The ability of certified M/WBEs located outside the region to perform the contract; and
- h. The extent to which the Contractor's own actions, including but not limited to, any failure by the Contractor to discharge the Contractor's duties pursuant to this Part or Article 15-A of the Executive Law, contributed to the Contractor's inability to meet the maximum feasible portion of the contract goals.

Where the Department determines that the Contractor is not in compliance with the requirements of the Contract and the Contractor refuses to comply with such requirements, or if the Contractor is found to have willfully and intentionally failed to comply with the M/WBE participation goals, the Contractor shall be obligated to pay to the Department Liquidated Damages.

Such Liquidated Damages for failure to meet the M/WBE requirements shall be calculated as an amount equaling the difference between the amount committed to the M/WBEs by the Contractor at award, and the amount actually paid to the M/WBEs for creditable work performed or materials supplied under the Contract, not including any amount for work deleted by the Department. For Response Contracts, such Liquidated Damages for failure to meet the DBE requirements shall be calculated as an amount equaling the difference between the goal amount based on the Contractor's total bid price and the amount actually paid to the DBEs for creditable work performed or materials supplied under the Contract.

If a determination has been made which requires the payment of Liquidated Damages and such identified sums have not been withheld by the Department, the Contractor shall pay such

Liquidated Damages to the Department within sixty (60) days after they are assessed, unless prior to the expiration of such sixtieth day, the Contractor has filed a complaint with the Director of the Division of Minority and Woman Business Development pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the Liquidated Damages shall be payable if Director renders a decision in favor of the Department.

The Department may file a complaint with the NYS Department of Economic Development, Division of Minority and Women's Business Development pursuant to Executive Law Article 15-A, or other sanctions may also be imposed and remedies invoked as provided under the authority of Executive Law Article 15A, 5 NYCRR 140-145, or by rule, regulation, or order of the Commissioner or as otherwise provided by law.

**6. Contractor's Compliance with SDVOB Program Requirements.** If the Contractor fails to meet the SDVOB participation commitments, to exert a good faith effort, or otherwise fails to comply with the SDVOB Program requirements, the Department will take further actions.

Such actions may include, but not be limited to, suspension of contract payments in accordance with Article 8 *No Payment on Contractor's Non-Compliance* of the Contract Agreement; the Contractor may be directed to attend a hearing before the Department's Contract Review Unit; or any other lawful procedure upon due notice in writing to the Contractor, including cancellation, termination, or suspension in whole or in part in accordance with Article 11 *Right to Suspend Work and Cancel Contract* of the Contract Agreement.

If the Contractor does not meet the SDVOB participation goals, the Contractor shall submit to the Engineer a request for a partial or total waiver under the Department's authority as set forth in 9 NYCRR 252.2(m).

Where the Department determines that the Contractor is not in compliance with the requirements of the Contract and the Contractor refuses to comply with such requirements, or if the Contractor is found to have willfully and intentionally failed to comply with the SDVOB participation goals, the Contractor shall be obligated to pay to the Department Liquidated Damages.

Such Liquidated Damages for failure to meet the SDVOB requirements shall be calculated as an amount equaling the difference between the amount committed to the SDVOBs by the Contractor at award, and the amount actually paid to the SDVOBs for creditable work performed or materials supplied under the Contract, not including any amount for work deleted by the Department. For Response Contracts, such Liquidated Damages for failure to meet the DBE requirements shall be calculated as an amount equaling the difference between the goal amount based on the Contractor's total bid price and the amount actually paid to the DBEs for creditable work performed or materials supplied under the Contract.

If a determination has been made which requires the payment of Liquidated Damages and such identified sums have not been withheld by the Department, the Contractor shall pay such Liquidated Damages to the Department within sixty (60) days after they are assessed, unless prior to the expiration of such sixtieth day, the Contractor has filed a complaint with the Director of the Division of Service-Disabled Veteran's Business Development pursuant to Article 3 of the Veteran Services Law in which event the Liquidated Damages shall be payable if the Director renders a decision in favor of the Department.

The Department may file a complaint with the NYS Office of General Services' Division of Service-Disabled Veteran's Business Development pursuant to Veteran Services Law Article 3, or other sanctions may also be imposed and remedies invoked as provided under the authority of Veteran Services Law Article 3, 9 NYCRR 252.2(s), or by rule, regulation, or order of the Commissioner or as otherwise provided by law.

**E. Compliance Reviews.** The Department conducts annual civil rights contract compliance reviews of selected Federal-Aid contracts in accordance with 23 CFR 230.409. A compliance review consists



## 106-01 SOURCES OF SUPPLY.

of a thorough review of all civil rights contract requirements, including Nondiscrimination in Labor/Employment, EEO, Training, and DBE requirements. A Contractor will typically not be selected for more than one compliance review per year statewide. Based on contract monitoring and/or the results of compliance review(s), the Department may conduct a review of some or all ongoing contracts with a single Contractor, regardless of funding source.

### **SECTION 106 - CONTROL OF MATERIAL**

(Last Revised January, 2025)

#### **106-01 SOURCES OF SUPPLY.**

Within seven (7) days of contract award, the Contractor shall notify the Deputy Chief Engineer, Structures (DCES), with a copy to the Engineer, of the name and address of the fabricator of materials provided under contract pay items contained in the following sections:

- Section 551 Piles and Pile Driving Equipment,
- Section 562 Reinforced Concrete Three-Sided Structures,
- Section 563 Prestressed Concrete Units (Structural),
- Section 564 Structural Steel,
- Section 565 Bridge Bearings,
- Section 566 Modular Expansion Joint Systems,
- Section 567 Bridge Joint Systems,
- Section 568 Bridge Railing,
- Section 576 Bridge Drainage System,
- Section 587 Bridge Railing Reconstruction,
- Section 594 Timber and Lumber,
- Section 596 Open Steel Floor,
- Section 597 Timber Bridge Railing and Transitions,
- Section 644 Overhead Sign Structures, and
- Section 656 Miscellaneous Metals.

The above list is those that commonly require source of supply notification to the DCES. The list may not be all inclusive, and does not supersede requirements found elsewhere in the Standard Specifications, Steel Construction Manual, or Prestressed Concrete Construction Manual. The source of supply notification shall list the shop or shops in which the materials will be manufactured and/or fabricated. The Contractor shall notify the DCES a minimum of 7 calendar days prior to any changes in the scheduled start of fabrication or changes in shop location in order to ensure that appropriate staff are available and present to perform shop inspections.

At the Preconstruction Meeting, the Contractor shall furnish the sources of supply, types and associated contract pay item(s) of all other materials that require testing or other prior approval which it proposes to use in the work, to the Engineer in writing. The Contractor shall notify the Engineer a minimum of 7 calendar days prior to any changes in sources of supply in order to ensure that the materials are obtained from approved sources or that required inspection or approval will be completed in a timely manner.

#### **106-02 QUALITY REQUIREMENTS.**

All materials permanently incorporated into the work shall meet the quality requirements described in Section 700 *Materials and Manufacturing*, unless the requirements are altered by a contract pay item specification or the contract documents. Materials will be inspected, sampled, and tested by the Department, or its designated representative, as described in Section 700 *Materials and Manufacturing*, as indicated in the contract documents, or by procedural directives issued by the Department.

Safety Data Sheets, catalog cuts, manufacturer's directions and other documents prepared for general use may use U.S. Customary (USC) or International System of Units (SI) measurement units, or units

from both systems. In drawings and documents containing dual units, the USC units shall be the primary units, and the USC units will be reviewed. The Contractor shall be responsible for all annotations on the source documents, conversions between the measurement systems and all errors resulting therefrom.

Measurements, dimensions, and all other numerical data included in contract specific documents such as Material Acceptance Records, shop drawings, computations, and Material Details shall be presented in USC units, but they may also include SI units within parenthesis. The USC units shall be listed first, will take precedence and reviews will be based on these units. Documents that fail to adhere to this convention will be rejected.

When a reference is made to a specification or test designation of the AASHTO, ASTM, Federal Specifications, or any other recognized nonproprietary national organization, it shall mean the specification or test method (including Provisional AASHTO and Tentative ASTM) which is current on the date of advertisement for bids.

The Contractor shall provide to the Engineer a Safety Data Sheet (SDS) in accordance with 29 CFR 1926 Subpart D, for materials to be incorporated into the work and products that are used at the contract site, before the material or product is first used. The instructions for the use of all materials and products, as well as all identifying information required by the specifications (i.e. labels, tags, certifications, etc.) shall be in the English language.

Samples for testing shall be selected in the presence of the Department representative, prepared for testing, and shipped as directed by the Department. The cost of all samples; shipment of samples; and any other expenses incurred in making materials or products ready for inspection, sampling and/or testing; shall be included in the unit prices bid for the various items in the contract. Where testing methods used by the Department are not described in the specifications, details of test methods may be obtained by application to the Department.

Material shall be used only so long as the quality remains equal to that of an acceptable sample. Initial acceptance of a material will in no way preclude further examination and testing of a material at any time it appears that the material quality is no longer represented by an accepted sample. The acceptance at any time of any material will not bar its future rejection if it is subsequently found to be defective in quality, uniformity or ability to meet the material specification.

Documents relevant to the production and acceptance of Hot Mix Asphalt (HMA) and Portland Cement Concrete (PCC) mixtures, including mix design forms, Quality Control (QC) forms, batching tickets, delivery tickets, and other documents shall be submitted in USC units. All materials requiring gradation tests shall be evaluated using U.S. Standard Screen Sieves meeting the requirements of ASTM E11.

The cost of all required inspection, sampling and testing performed in the 48 contiguous states of the United States and the provinces of Canada shall be paid for by the Department unless specifically excluded elsewhere in the contract documents or procedural directives.

#### **106-03 PLANT INSPECTED MATERIALS.**

The manufacture, production and/or fabrication of some materials and products may require acceptance on a recurring basis of a facility, its capability, and qualifications to produce acceptable materials, including but not limited to: a mill, plant, shop or other location prior to the production and inspection of materials produced.

Materials inspected at manufacturing or fabrication plants shall be marked with the contract number and the contract pay item number prior to shipment to the contract site. Any material which has been plant inspected and accepted by this Department for any Department contract, shall not be shipped to other work unless authorized by the Department.

Where plant inspection is not provided, the method and procedure for sampling, inspecting and reporting shall be in accordance with the procedural directives of the Department, issued by the Materials Bureau.

**A. Covered Locations.** The Department maintains plant inspection capabilities throughout the contiguous 48 states of the United States and the provinces of Canada. The Contractor shall notify the Department 60 calendar days in advance of beginning of the work in any mill, plant, shop or other manufacturing location that is not currently accepted, to allow time for a qualification inspection and arrangements for inspection, sampling and/or testing during the work.

**B. Non-Covered Locations.** When inspection, sampling, and/or testing of materials and products manufactured, produced and/or fabricated in a noncovered location, and deemed by the Department to require inspection, sampling and/or testing at the site of manufacture, production and/or fabrication, the plant, and manufacturer and/or fabricator shall be qualified by the Department prior to production. The Contractor shall notify the Department 60 calendar days in advance of beginning of the work in any such location to allow time for a qualification and arrangements for inspection, sampling and/or testing during the work.

The expense of all facility qualification, required inspection, sampling, and testing in non-covered locations shall be paid for by the Contractor. These expenses shall include the costs of wages and benefits, travel, meals, lodging, markups and all other direct costs of inspection, sampling and testing incurred by the Department for Department employees or designated representatives under contract to the Department. Reimbursement to the Department will be made in the form of a deduction from payments due the Contractor. The costs of tests performed in a Department Laboratory will not be charged to the Contractor.

**C. Alternate Locations.** When location of inspection, sampling and/or testing materials and products manufactured, produced, and/or fabricated in a non-covered location, and deemed by the Department to not require inspection, sampling, and/or testing at the site of manufacture, production, and/or fabrication, at the option of the Department, inspection, sampling, and/or testing may be performed at a different covered location designated by the Contractor and approved by the Department.

**D. Stock Lot Testing.** When the Department determines that conformance with the contract requirements of plant inspected materials from non-covered locations may be determined by visual inspection and/or testing, specimens may be presented at a covered location in specifically defined lot quantities as directed by the Department. Such materials or products shall be offered for inspection not less than 30 days prior to their intended shipment to the contract. All expenses attendant to making such materials or products available for inspection, sampling and/or testing shall be paid by the Contractor.

**E. Sample Shipment.** The shipment of samples to the Department Laboratory from locations outside of the 48 contiguous states of the United States and the provinces of Canada shall be a direct cost borne by the Contractor or its agent and all such shipments shall be made under provisions established by the Department to ensure identity and security of the sample.

#### **106-04 MATERIAL ACCEPTANCE RECORDS.**

Whenever any specification provides for Approved List, Material Certification or Manufacturer's Certifications as a Basis of Acceptance, the Department reserves the right to sample and/or test any material prior to incorporation in the work. Approved List shall mean the list which is current on the date of incorporation of material into the work. The Contractor may request reimbursement from the Department for additional costs for materials that were purchased after contract award and prior to the product being removed from the Approved list, but are removed from the Approved list after contract award.

Some specifications reference a Manufacturer's Certification or a Material Certification as evidence of acceptability of specific materials or products. A Manufacturer's Certification can only be properly executed by the Manufacturer or Producer of the material or product. When manufactured products are

subsequently modified by another party such as a Fabricator or provided by a Material Supplier other than the Manufacturer, an additional Material Certification from each party that modifies or takes ownership of the product prior to the installation of the material shall be provided in addition to all of the previous certifications.

**A. Material Certification.** When products are supplied by a Manufacturer, Producer, Fabricator, or Material Supplier, a Material Certification that includes the essential components outlined below shall be provided to the Engineer.

- 1. Identification of Manufacturer or Producer.** Name of the company and address of its manufacturing or producing facility.
- 2. Identification of Material or Product.** Generic name of the material or product and the corresponding Section 700 Materials and Manufacturing material code.
- 3. Identification of Shipment.** Sufficient detail to describe the quantity contained in the shipment, the contract number and a date of shipment. A Material Supplier's Certification shall clearly indicate that the shipment is all or a portion of the quantity detailed on the accompanying Manufacturer's Certification.
- 4. Statement of Conformance.** The certification shall definitively state that the material contained in the shipment meets the requirements of a specific Department specification or a specific specification or standard of another agency (i.e., ASTM, AASHTO, AWWA, etc.).  
If the material in the shipment contains steel and/or iron, manufactured products, or construction materials, the certification shall definitively state that the material is or is not of domestic origin. Acceptable statements are: "Conforms (or Does not conform) to the requirements of NYSDOT Standard Specifications §106-11 Buy America" (acceptable for steel/iron, manufactured products and construction materials), "Conforms (or Does not conform) to the requirements of 23 CFR 635.410 Buy America Requirements (acceptable for steel/iron and manufactured products only) or "Conforms (or Does not conform) to the requirements of the Build America, Buy America Act" (acceptable for construction materials only)". If the product supplied has been altered subsequent to the certification by the manufacturer, the Material Certification shall definitively state that the material or product contained in the shipment meets the requirements of an identified contract specification
- 5. Certification Execution.** The certification shall be signed by a person authorized to legally bind the company, as indicated by statement or title/position. Notarization of the signature is not required.

## 106-05 RECYCLED MATERIALS.

To promote sustainable management practices that protect our natural resources and reduce energy and resource consumption, the Contractor should provide reused or recycled materials to the maximum extent practicable. Recycled materials currently approved by the Department include glass, recycled asphalt pavement (RAP), recycled portland cement concrete aggregate (RCA), blast furnace slag, fly ash, microsilica, waste stream plastics and tires.

In order to be considered for use by the Department, recycled or waste material must exhibit the desired engineering characteristics, consistently satisfy specification requirements, provide an acceptable level of performance, be economically competitive with available materials, and not be harmful to the environment. If waste materials are proposed to be used, the Contractor may need to obtain a beneficial use determination (BUD) from the NYSDEC prior to its use as specified in 6 NYCRR 360.12. The beneficial use determination, testing, evaluation and approval for some unapproved waste materials can be a long-term process, and should not be presumed to be completed for any given contract.

**106-06 STORAGE AND HANDLING OF MATERIALS.**

Materials shall be so stored as to ensure the preservation of their quality and fitness for the work. Stored materials, even though accepted before storage, shall be inspected prior to their use in the work and shall meet the contract requirements at the time of their use. Railroad cars, barges and other containers used for the transportation of materials shall be clean when any materials are deposited therein.

**106-07 BASIS FOR MEASUREMENT.**

Weight shall be used in all cases for percentage determination unless otherwise specified.

**106-08 REJECTED MATERIALS.**

Any material which is rejected because of failure to meet the required tests or that has been damaged so as to cause rejection, shall be immediately removed from the site of the work by the Contractor at no additional cost to the State unless otherwise directed by the Engineer. Material which has been rejected on the results of Department tests will not be resampled or retested unless otherwise directed by the Department. No rejected materials, the defects of which have been subsequently corrected, shall be used until written notification of the acceptance of the material has been received by the Engineer.

**106-09 EQUIVALENTS.**

The requirements for apparatus, articles, or materials shall be specified, if feasible, in generic terms which afford competition for equivalent products or items. When no generic specification can be found or devised, a minimum of at least three, if available, known acceptable trade names or proprietary products shall be provided for the Contractor's benefit and to afford the desired competition. The Department will determine whether a product proposed by a Contractor meets the requirements of the specifications.

**106-10 QUALITY ASSURANCE.**

The policies, procedures and guidelines required by the FHWA to assure the quality of materials and construction in Federal-Aid projects are defined in 23 CFR 637 Subpart B *Quality Assurance Procedures for Construction*.

The Department has established a Quality Assurance (QA) Program in accordance with 23 CFR 637 to assure that the materials and workmanship incorporated into each Department project are in conformity with the contract documents. The Department's QA Program includes both an Acceptance Program and an Independent Assurance Program. The Department's QA Program applies to both Federal-Aid and non Federal-Aid contracts.

Quality Assurance is defined as "all those planned and systematic actions necessary to provide confidence that a product or service will satisfy given requirements for quality." Contractor/vendor operational techniques and activities that are performed or conducted to fulfill contract requirements are a core part of the QA Program.

In accordance with §108-05 *Subletting or Assigning the Contract*, the Contractor is responsible for all work performed by Subcontractors, Trucking Firms, Manufacturers, Fabricators, Materials Suppliers and any other parties in the performance of the contract. The Contractor is responsible to assure that all materials used meet the appropriate requirements, all products produced from approved component materials meet established quality and performance requirements, and the final constructed product meets all requirements and is free from defects that affect the service life of the installed product. The Contractor is therefore responsible for all quality assurance activities necessary, performed by itself or other parties, to assure that the materials and workmanship meet established Department requirements. The Department's Acceptance Program activities shall not be incorporated as part of, or as a replacement for, the Contractor's quality assurance activities.

**A. Acceptance Program.** The Department's Acceptance Program defines the requirements for Verification Sampling and Testing activities, which are those activities performed by the Department or its representatives used to verify that materials and workmanship meet established requirements.

Verification Sampling and Testing requirements define the frequency of inspection, sampling and testing; the specific location(s) of inspection, sampling and testing; and the specific quality characteristics (attributes/properties) to be inspected and/or tested; for materials and workmanship incorporated into the work.

The Department reserves the right to take samples at any time and location to assure the materials and workmanship incorporated into the work are in conformity with the contract documents. If sampled material is found to not meet specification requirements, the Department reserves the right to reject all material or work represented by the sample tested.

**B. Independent Assurance Sampling and Testing.** Independent Assurance Sampling and Testing (IAST) assures that when acceptance testing is performed on Department contracts, proper procedures are followed and equipment used is in proper working order and calibration. IAST is separate and independent from acceptance testing. Testing performed for IAST will in no way affect any acceptance or payment decision. The results of IAST testing will be used to determine the qualifications of inspectors performing acceptance testing and the condition of equipment used in acceptance testing on Department projects.

The IAST program will evaluate the personnel and equipment responsible for performing quality control sampling and testing that is used to make acceptance decisions. The Contractor and all personnel, organizations, who are responsible for performing acceptance sampling and testing on behalf of the Contractor shall cooperate with and accommodate this program by performing, and allowing State representatives to perform sampling and testing at the times and locations requested by the Regional IAST personnel. The required sampling and testing procedures are listed in the Department's Independent Assurance Sampling and Testing Manual. IAST personnel will observe the tester obtaining samples and performing the tests. IAST personnel will also take split samples to the Regional Laboratory for testing.

## **106-11 BUY AMERICA.**

In accordance with 23 USC 313, 23 CFR 635.410, the Build America Buy America (BABA) Act in Title IX of the Bipartisan Infrastructure Law's (BIL), and Section 146 of the State Finance Law, permanently incorporated predominantly steel and/or iron materials, manufactured products, and construction materials shall be domestically produced.

### **A. Control of Materials.**

To qualify as domestic, all manufacturing processes, including melting, manufacturing, fabricating, grinding, drilling, welding, finishing, and coating of any product containing steel and/or iron materials, must have been performed in the United States. A domestic product is a manufactured steel and/or iron material/product and/or construction material that was produced in one of the 50 States, the District of Columbia, or in the territories and possessions of the United States. Raw materials used in the steel and/or iron materials may be imported. Raw materials are materials such as raw iron ore and waste products which are used in the manufacturing process to produce the steel and/or iron material/product. The FHWA has granted a nationwide waiver for pig iron and processed, pelletized and reduced iron ore. Waste products include scrap (i.e., steel no longer useful in its present form from old automobiles, machinery, pipe, railroad rail, steel trimmings from mills or product manufacturing). Extracting, crushing, and handling the raw materials which are customary to prepare them for transporting are exempt from Buy America. The use of foreign source steel billets or iron ingots are not acceptable under Buy America. All items, regardless of origin, shall comply with their individual specification requirements and with the requirements stated elsewhere in this subsection.

The Contractor shall ensure the domestic steel and/or iron materials are supplied in conformance with the above referenced laws.

The Buy America provisions only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies brought to the construction site and removed at or before the completion of the infrastructure project, such as temporary scaffolding. In addition, it does not apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of or permanently affixed to the structure.

### ***1. Federal-Aid Contracts.***

For Federal-Aid contracts, all iron and steel, manufactured products, and construction materials incorporated into the contract shall be produced/manufactured in the United States as follows:

- a. All iron and steel used in the project shall be produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- b. All manufactured products used in the project shall be produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product. Manufactured products means articles, materials, or supplies that have been: (i) processed into a specific form or shape; or (ii) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
- c. All construction materials shall be manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States. Construction materials includes an article, material, or supply that is or consists primarily of:
  - ***Non-ferrous metals:*** All manufacturing processes means initial smelting or melting through final shaping, coating and assembly occurred in United States;
  - ***Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables):*** All manufactured processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States;
  - ***Glass (including optic glass):*** All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States;
  - ***Fiber optic cable (including drop cable):*** All manufacturing processes, from the ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for nonferrous metals, plastic and polymer-based products, or any others;
  - ***Optical fiber:*** All manufacturing processes, from initial preform fabrication stage through the completion of the draw, occurred in the United States;
  - ***Lumber:*** All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States;

- **Engineered wood:** All manufacturing processes, from initial combination of constituent materials until the wood product is in its final form, occurred in the United States; or
- **Drywall:** All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.

Minor additions of articles, materials, supplies. Or binding agents to a construction material do not change the categorization of the construction material. Items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than construction materials.

Construction materials do not include an item of primary iron or steel; a manufactured product; or Section 709179(c) materials. 709179(c) materials include cement or cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives).

An article, material, or supply should be classified into only one of the following categories: (1) iron or steel; (2) a manufactured product; (3) a construction material; or (4) Section 70917(c) materials. An article, material, or supply should not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the categories listed. The classification of an article, material, or supply falling into one of the four categories must be made based on its status at the time it is brought to the work site for incorporation into the project.

For Federal-Aid Contracts, FHWA allows the Contractor to permanently incorporate in the construction of the contract a minimal amount of foreign steel and/or iron materials, if the combined cost of such materials does not exceed one-tenth of one percent (0.1 %) of the total contract cost or \$2,500, whichever is greater. The combined cost of foreign steel and/or iron materials will be the value of the materials as they are delivered to the contract, documented by invoice or bill of sale to the Contractor.

For Federal-Aid Contracts, USDOT's Waiver of Buy America Requirements for De Minimis Costs and Small Grants allows the Contractor to permanently incorporate in the construction of a contract (under a single financial assistance award) a minimal amount of foreign manufactured products and construction materials, if the total value of the non-compliant products/materials is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the project. This does not apply to iron and steel subject to the requirements of 23 U.S.C. 313 on financial assistance administered by FHWA. The de minimis threshold in 23 CFR 635.410(b)(4), and stated above, continues to apply for steel and iron. The "total applicable costs for the project" are defined as the cost of materials (i.e., steel/iron, manufactured products, and construction materials) used in the project that are subject to Buy America, including materials that are within the scope of an existing waiver. Based on USDOT's waiver, if the total amount of federal financial assistance applied to the project, through awards or subawards, is below \$500,000, then Buy America does not apply.

## **2. Non-Federal-Aid Contracts.**

For Non-Federal-Aid contracts, the Contractor shall provide structural steel, structural iron, reinforcing steel and/or other major steel items to be permanently incorporated in the work produced or made in whole or substantial part in the United States, its territories or possessions. In the case of a structural iron or structural steel product, all manufacturing must take place in the United States, its territories or possessions, from the initial melting stage through the application of coatings, except metallurgical processes involving the refinement of steel additives.



**B. Waivers.**

**1. Federal-Aid Contracts.**

The Contractor may request a waiver if it can be demonstrated that:

- a. Applying a Buy America preference would be inconsistent with the public interest (a “public interest waiver”);
- b. Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality (a “nonavailability waiver”); or
- c. The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”).

The Contractor shall submit a waiver request to the Engineer which includes a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States and including copies of all documentation verifying the unavailability of the material or product.

The Department will submit approved waiver requests to the FHWA for review. The Contractor shall investigate and respond to any public comments made to the FHWA Office of Program Administration, indicating that a domestic supplier can provide the material for which a waiver has been requested. Final approval of the Buy America Waiver request will be made by the Administrator, Federal Highway Administration. The waiver will be effective when it is posted in the Federal Register.

**2. Non-Federal-Aid Contracts.**

The Contractor may request a waiver if it can be demonstrated that the use of domestic steel and/or iron materials would not be in the public interest, would result in unreasonable costs, or that such iron or steel, including without limitation structural iron and structural steel, cannot be produced or made in the United States in sufficient and reasonably available quantities and of satisfactory quality.

The Contractor shall submit a waiver request to the Engineer which includes copies of all documentation verifying the unavailability of the material or product, and/or justification.

Waiver requests will be reviewed by the affected Department program areas and approved by the Deputy Chief Engineer, Construction (DCEC).

**C. Certifications.**

A Manufacturer’s Certification is required to certify that the material / product is of domestic origin. Acceptable statements are: “Conforms (or Does not conform) to the requirements of NYSDOT Standard Specifications §106-11 *Buy America*” (acceptable for steel/iron, manufactured products and construction materials) or “Conforms (or Does not conform) to the requirements of 23 CFR 635.410 *Buy America Requirements*” (acceptable for steel/iron and manufactured products only) or “Conforms (or Does not conform) to the requirements of the Build America, Buy America Act” (acceptable for construction materials only). Certifications shall comply with §106-04 *Material Acceptance Records*.

**SECTION 107 - LEGAL RELATIONS AND RESPONSIBILITY TO PUBLIC**

(Last Revised September, 2025)

**107-01 LAWS, RULES, REGULATIONS AND PERMITS.**

The Contractor shall conduct its operations in compliance with all the laws and regulations of the United States, State of New York and Public Authorities and the applicable ordinances of any county, city, town, or village and the lawful direction of the officers, agents or representatives of the United States, the State of New York, Public Authorities or of said county, city, town, or village. The Contractor

shall procure all licenses and permits necessitated by the Contractor's operations. All costs due to compliance with the above described laws, regulations, and ordinances shall be included in the contract bid prices unless otherwise provided for in the contract.

**A. *Independent Contractor.*** The relationship of the Contractor to the State is that of an independent Contractor, and said Contractor, in accordance with its status as such Contractor, covenants and agrees that it will conduct itself consistent with such status, that it will neither hold itself out as nor claim to be an officer or employee of the State by reason hereof, and that it will not, by reason hereof, make any claim, demand or application to or for any right or privilege applicable to an officer or employee of the State, including, but not limited to workers' compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit.

**B. *Cooperation with Investigations.*** The Contractor hereby agrees to the provisions of §139-a and §139-b of the State Finance Law which require that upon the refusal of a person, when called before a grand jury, head of a State department, temporary State commission or other State agency, or the organized crime task force in the NYS Department of Law, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation, concerning any transaction or contract had with the State, any political subdivision thereof, a public authority or with any public department, agency or official of the State or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract;

1. Such person, and any firm, partnership or corporation of which he/she is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with the State or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and;

2. Any and all contracts made with the State or any public department, agency or official thereof, since the effective date of this law, by such person, and by any firm, partnership or corporation of which he is a member, partner, director or officer may be canceled or terminated by the State without incurring any penalty or damages on account of such cancellation or termination, but any moneys owing by the State for goods delivered or work done prior to the cancellation or termination shall be paid.

**C. *Invasive Species.*** *The Contractor is required to follow all federal and state regulations regarding invasive species (e.g. plants, insects, diseases). This includes but is not limited to:*

- 7 USC §7701 Plant Protection Act
- 16 USC §4701 National Invasive Species Act
- 6 NYCRR Part 192 Forest Insect and Disease Control
- 6 NYCRR Chapter V(C) Invasive Species
- 1 NYCRR Chapter III(C) Prevention and Control of Disease in Trees and Plants; Insect Pests

*The Contractor shall thoroughly sanitize all construction equipment, vehicles and appurtenances operating or being placed in infested areas prior to moving to non-infested areas.*

**D. *Archaeological Salvage.*** Whenever, during the course of construction, historical or prehistoric objects or human remains are encountered that were not identified in the contract documents, such objects shall not be destroyed or moved. The Contractor shall stop work to avoid disturbing such areas and notify the Engineer immediately.

## 107-02 PATENTED DEVICES, MATERIALS AND PROCESSES.

The Engineer will notify the appropriate Department personnel and other authorities and arrange to have an immediate inspection of the site conducted.

Removal or salvage of archaeological objects will be considered extra work. Such work will be limited to that performed within the right-of-way, and at any location under direct control of the Contractor used as a source of approved borrow material or a spoil disposal area.

### **107-02 PATENTED DEVICES, MATERIALS AND PROCESSES.**

The contract bid prices shall include all royalties and costs arising from patents, trademarks, trade secrets, and copyrights in any way involved in the work. Whenever the Contractor is required or desires to use any design, device, material or process covered by letters, trade secrets, patent or copyright, the Contractor shall indemnify and save harmless the State from any and all claims for infringement by reason of the use of any such protected design, device, material or process, to be performed under the contract, and shall indemnify the said State for any costs, expenses and damages which it may be obliged to pay, by reason of any such infringement, at any time during the prosecution or after the completion of the work.

### **107-03 FEDERAL AID PARTICIPATION.**

All contracts in which the Federal Government participates financially are designated as Federal-Aid contracts. For all Federal-Aid contracts, the Contractor shall conform in all respects in accordance with the true intent and meaning of each and all of the requirements contained in the FHWA-1273 *Required Contract Provisions Federal-Aid Construction Contracts*, a copy of which will be found incorporated in each Federal-Aid contract proposal. When any of such Federal Provisions may be in conflict with any other provisions of the contract the Federal Provisions shall prevail and take precedence and be of force over and against any said conflicting provisions of said contract.

### **107-04 PUBLIC NOTICES.**

Before commencing any work on the site, the Contractor shall provide a satisfactory weather resistant surface, and post, in a location accessible to all workers, a copy of the NYSDOL schedules of prevailing wages and supplements for this contract, a copy of all redeterminations of such schedules for the contract, the Workers' Compensation Law notice, required safety notices, and all other notices required by law to be posted at the site. The Contractor shall maintain such notices in a legible manner and shall replace any notice or schedule which is damaged, defaced, illegible or removed for any reason. The notices shall be maintained until all work on the site is complete.

### **107-05 SAFETY AND HEALTH REQUIREMENTS.**

The Contractor shall perform all work in the contract with due regard to the safety and health of the employees and of the public. The Contractor shall comply with 29 CFR 1926 *Safety and Health Regulations for Construction*, administered by the Federal Occupational Safety and Health Administration (OSHA); NYS Labor Law and 12 NYCRR regarding the safety and protection of persons employed in construction and demolition work.

The Contractor shall notify the Engineer of any inspections scheduled or conducted on the contract by OSHA, NYS Department of Labor (NYSDOL), or other safety and health agencies, of any resulting closing conference, and provide the Engineer with the opportunity to be present at such inspections and closing conference. The Contractor shall notify the Department in writing of the results of any safety and health inspections conducted by representatives of OSHA, NYSDOL, or other safety and health agencies, within one work day of the completion of the closing conference resulting from such inspections. If any citations are issued for alleged violations of OSHA Regulations, a copy shall be provided to the Engineer within one work day of their receipt by the Contractor, and a copy of the final disposition of such citations shall be provided to the Engineer within one work day of receipt by the Contractor.

**A. High Visibility Apparel.** All workers shall wear at all times protective helmets and construction apparel or traffic control apparel when working within a highway right of way or contract limits. High visibility apparel is intended to contrast with the background for worker conspicuity. All high-visibility apparel shall be closed front and rear; in good condition to maintain the color, visibility, reflectivity, and conspicuity. Workers shall include Contractor employees, Subcontractor employees, material suppliers, and other personnel under the direction of the Contractor. Protective helmets and high-visibility apparel are not required for employees when they are within a completely enclosed cab constructed of steel frame and glass, or inside a motor vehicle.

**1. Protective Helmets.** Protective helmets shall meet OSHA standards for impact, electrical shock, and burn protection. Protective helmets used during nighttime operations shall be equipped with a minimum of 3 in<sup>2</sup> of reflective tape on all four sides. Protective helmets for flaggers shall be orange.

**2. Construction Apparel.** Construction Apparel shall consist of a vest, shirt, or jacket; fluorescent orange-red or fluorescent yellow-green or a combination of these colors meeting the requirements of ANSI 107 Class 2.

**3. Traffic Control Apparel.** Traffic Control Apparel shall consist of a vest, shirt, or jacket; fluorescent orange-red with fluorescent yellow-green striping bands or fluorescent yellow-green with fluorescent orange-red striping bands, placed both horizontal and vertical, meeting the requirements of ANSI 107 Class 2.

**B. Project Safety and Health Plan.** The Contractor shall perform all necessary planning, supervision, and training activities to ensure that all of the requirements of 29 CFR 1926 are fully met for all workers employed in the construction of the contract. The Contractor shall provide to the Department prior to the start of work satisfactory evidence that all current requirements of 29 CFR 1926 will be adequately addressed. As a minimum, the Contractor shall provide a written Project Safety and Health Plan which documents the Contractor's company policy relative to safety, and which identifies and addresses specific safety and health concerns to be encountered on the project. Before the work begins and periodically throughout the progress of the work, the Contractor's supervisory staff shall meet with the Engineer to review and discuss the status of safety issues. An appropriate notice shall be posted on the contract site that the Project Safety and Health Plan is available for examination by any worker employed on the project. As a minimum this plan shall include the following items:

- Identification of project and company safety officers.
- Hazardous Materials Communications Plan.
- Employee Safety Training Program.
- Company safety policy.
- Procedures to address project safety and health concerns.
- Procedures to address distraught, emotionally disturbed persons and/or homeless persons.
- Procedures for compelling worker compliance with safety and health requirements, including reasonable suspicion drug and alcohol testing.

Certain of these items may be submitted in the format of a Company Safety and Health Program, with the Project Safety and Health Plan limited to project-specific issues.

The Contractor shall provide to the Department a Project Safety and Health Plan covering all on-site work to be done by each Subcontractor, Owner/Operator and any other party, prior to starting work. As an alternative, the Contractor may provide a certification that all on-site activities performed by and workers employed by each Subcontractor, Trucking Firm, Service, and any other party will be subject to the Contractor's Project Safety and Health Plan.

Submission of the required Project Safety and Health Plan by the Contractor and its acceptance by the Department shall not be construed to imply approval of any particular method or sequence for addressing safety and health concerns, or to relieve the Contractor from the responsibility to adequately protect the safety and health of all workers involved in the project as well as any members of the public who are affected by the project.

In accordance with NYS Labor law §220-h, all laborers, workers, and mechanics shall be certified prior to performing any work on a contract over \$250,000 as having successfully completed a course in construction safety and health approved by the US Department of Labor's Occupational Safety and Health Administration (OSHA) that is at least ten hours in duration. The Contractor shall attach proof of completion to first certified payroll for initial workers, and to subsequent payrolls for new or additional workers. The Contractor shall clearly indicate on subsequent payrolls any workers not previously employed on that contract. If no proof of completion has been submitted for a worker listed on a certified payroll, the Engineer will alert the Contractor to this fact. If the Contractor cannot provide proof of completion and the worker continues to work, the Department will notify the Contractor in writing with a copy to the NYSDOL by e-mail at [Ask.PWAsk@labor.ny.gov](mailto:Ask.PWAsk@labor.ny.gov).

**C. Emergency Contact Person.** The Contractor shall designate someone to be available to respond to emergency calls. The name of the person and the telephone number at which he/she can be reached at any time shall be given to the Engineer and all police agencies in the area. Such person shall have full authority and capability to mobilize forces promptly as required to respond to an emergency and protect the public.

**D. Accident Reporting.** The Contractor shall immediately notify the Engineer verbally of any accident or incident that results in the death of a worker, motorist or pedestrian or that results in emergency medical attention of a worker. The Contractor shall notify the Engineer in writing within 24 hours, with the details relative to any accident or incident occurring within the contract limits. The Contractor shall also notify the Engineer in writing within 24 hours, with the details relative to any accident or incident that is directly related to construction activity or involving any worker employed on the contract or delivering materials, equipment or supplies to the contract, provided:

- The accident or incident results in the death of a worker, or (2) requires that a worker is hospitalized for treatment of the injury, or (3) results in 3 or more personal injuries or:
- The accident or incident involved a utility (overhead or underground) or:
- The accident or incident involved a motorist or pedestrian or:
- The incident was a near miss as defined by 29 CFR 1926 or:
- The accident otherwise meets the recording requirements of 29 CFR 1904.

The Engineer will provide the Contractor with a copy of the Department accident report for any accident occurring within the contract limits or involving the Contractor's personnel, equipment or operations.

**E. Imminent Danger and Emergency Actions.** Any action by the Contractor that presents a potentially imminent danger of injury to the public, a worker, or the inspection staff will be halted immediately by the Engineer, and operations stopped in accordance with §105-01 *Engineer's Authority*. The Contractor's personnel shall have local emergency numbers readily available. These numbers shall include local utility, police/fire and medical assistance. In the event of an emergency, the Contractor shall evacuate all employees and endangered persons from the immediate vicinity to the best of the Contractor's ability.

**F. Restricted Areas.** The Contractor shall identify, guard and protect restricted areas such as open and unattended excavations, areas subject to falling debris and other potentially hazardous locations

in and adjacent to areas lawfully frequented by any person in accordance with the requirements of 29 CFR 1926 Subpart G. Such protection shall consist of one, or a combination of, the following:

- A substantial fence or barricade, not less than 4 feet in height and mounted on satisfactory supports spaced at intervals of not more than 10 feet. Warning signs reading “DANGER-KEEP OUT” shall be mounted on the fence or barricade at no more than 100 foot intervals. The signs shall be a minimum of 24 inches wide by 16 inches high. The lower portion of the sign shall be white and shall bear the words “KEEP OUT” in 5 inch high black letters. The upper portion shall be predominantly red with 5 inch high white lettering spelling out the word “DANGER.” The lettering shall be enclosed by an approximately elliptical, white ring and the entire sign bordered in black. All barricades and warning signs shall be furnished, erected, relocated, maintained, and removed as required.
- A 4 foot (minimum) extension of the trench sheeting above the ground surface adjacent to an excavation.
- A substantial covering over an excavation. Where it is possible that vehicles will move over such covering, the covering shall be of sufficient strength to withstand the loading.

**G. Work Site Access.** The Contractor shall provide safe access to the work site by workers and inspection staff such that no active traffic lanes are routinely crossed by pedestrian workers or inspection staff reporting to and leaving the work site. Vehicles and equipment used to transport personnel to the work site shall safely enter and depart the work site.

The Contractor shall designate a safe parking area(s) for workers to park private vehicles near the project site acceptable to the Engineer. Contractor personnel shall park in non-designated parking areas within the right of way only with the prior approval of the Engineer.

**H. Fall Protection.** The Contractor shall provide fall protection for all workers in compliance with 29 CFR 1926 and NYS Labor Law. The Contractor shall include procedures to provide fall protection in the Project Safety and Health Plan. The minimum fall protection requirements include the following:

**1.** Fall protection shall be provided for all workers at or above 6 feet or the height thresholds listed in 29 CFR 1926, Subpart L *Scaffolds*, Subpart M *Fall Protection* and Subpart R *Steel Erection*, whichever is lower, and for all locations where there is a risk of a fall onto dangerous equipment or an impalement hazard, regardless of height. All fall protection systems shall meet the requirements of 29 CFR 1926, Subpart M. For situations where lifelines are interrupted, double lanyards shall be utilized to ensure that workers are continuously protected. One lanyard shall remain connected at all times.

**2.** Attachments or other temporary appurtenances on all beams and other structural elements shall be in place prior to erection or removal to provide fall protection until other means of protection such as deck forms are in place. Fall protection shall consist of personal fall arrest systems, safety nets or other means. During placement or removal of structural members when the member is supported by a lifting device, workers exposed to moving members shall be required to tie off only if they are not exposed to a greater risk from the moving member. Fall protection systems utilized shall enhance safety rather than create a secondary hazard.

**3.** The Contractor shall establish procedures to minimize occurrences of unprotected exposure to fall hazards. When a worker must rig a fall protection system, and rigging cannot be accomplished from an aerial lift or by tying-off to the existing structure, momentary exposure to a fall hazard may be unavoidable.

**4.** Ladders or stairways meeting the requirements of 29 CFR 1926, Subpart X *Stairways and Ladders* shall be provided at all points of personnel access where there is a change in elevation of

19 in or more, and no ramp, runway, sloped embankment or personnel hoist is provided. Climbing on forms, falsework, or the structure to gain access to work areas is expressly prohibited.

5. Scaffolds necessary to provide temporary access to work areas shall be in compliance with 29 CFR 1926, Subpart L and shall include a top rail, mid rail, and toe board on all open sides and ends. Scaffolds shall be erected, moved, altered and/or dismantled only under the supervision and direction of a competent person.

6. Suspended scaffolds may be used only if personnel lifts, scaffolds, or other means are not practical, and shall meet the requirements of 29 CFR 1926, Subpart L. Specifically, the scaffold shall be secured to the suspension cables at all times. All personnel working on a suspended scaffold shall be provided fall protection using an independent anchorage.

7. Workers in personnel aerial lifts shall use a personal fall arrest system attached to the boom or basket. Aerial lifts shall be operated in accordance with 29 CFR 1926, Subpart L.

**I. Working Over or Near Water.** The Contractor shall protect workers from drowning in accordance with 29 CFR 1926.106 *Working over or near water*. Any worker who is exposed to the risk of drowning shall wear a U.S. Coast Guard approved personal flotation device (PFD) at all times. A risk of drowning shall be considered to exist where a worker has the possibility of falling from above, or from an adjacent slope, into water depths that exceed 5 feet, or into water depths subject to sudden fluctuations to a depth exceeding 5 feet. A risk of drowning may also exist where water depths as little as 2 feet are combined with swift currents, or where a fall into the water may result in a person being rendered unconscious or otherwise disabled. Working on top of ice shall be considered as working over water.

When continuous fall protection is used, without exception, the drowning hazard has effectively been removed, and workers are not required to wear a PFD. When aerial lifts are used over or near water, the drowning hazard has not been removed, and occupants of the lift are required to wear a PFD, regardless of whether a personal fall arrest system is used. When safety nets are used as fall protection, the drowning hazard has not been removed, and workers are required to wear a PFD.

Workers shall not work alone in situations where a risk of drowning exists. There shall be an acceptable plan in place that enables a worker to be retrieved within 4 minutes from the time they entered the water. If greater hazards exist, including very cold water, rapids, or a wide channel, safeguards shall enable the worker to be retrieved before being overcome by that hazard, including multiple skiffs when warranted.

A boat/skiff for emergency response shall be in place prior to the exposure. The boat/skiff shall be unlocked and available for immediate use. The boat/skiff for emergency rescue operations shall be equipped with a motor in good operation, paddles or oars, a ring buoy, and a reach extension device. The boat/skiff shall be equipped and operated in accordance with NYS Navigation Law. Ring buoys shall be provided. The height above the water shall be considered in determining the appropriate length of line attached, but in no case shall the line be less than 100 feet. The ring buoys shall be placed at appropriate intervals, but in no case shall the spacing be greater than 200 feet along the work site shoreline, work limits, and across the structure.

**J. Electrical Safety.** Electrical safety policy and procedures are based on the New York State High Voltage Proximity Act and 29 CFR 1926 Subpart K. They apply to all operations that could cause employees or the vehicles or equipment they are operating to come into contact with (“direct contact”) or enter into dangerous proximity to (“indirect contact”) energized electrical systems. Electrical systems shall be assumed to be energized high voltage until verified otherwise by the Utility. The Contractor shall identify and reference all potential electrical hazards and document such actions to the Engineer as part of the Project Safety and Health Plan.

Pursuant to the High Voltage Proximity Act, for all electrical systems carrying 600 volts or more, the Contractor shall:

- Notify the Utility at least 5 work days before any work begins which requires the Utility to identify voltages and clearances, or de-energize, insulate or relocate lines.
- Ensure employees are not placed in dangerous proximity to high voltage. Dangerous proximity is defined as within 10 feet for voltages up to 50 kilovolts, and an additional 4 inches for every 10 kilovolts over 50 kilovolts. Dangerous proximity applies to the individual and any conductive object.
- Inform employees of the hazards and corresponding precautions when working near high voltage.
- Post warning decals on equipment regarding the 10foot minimum clearance.
- Ensure that when any equipment operator is unable to assess clearances, a "spotter" observes for clearance and directs the operator.

Prior to the start of work where contact with energized electrical systems is possible, the Contractor shall identify existing facilities and reference their location to prominent physical features. In advance of work, the Utility shall be called upon to identify energized facilities, and to determine the need to de-energize, insulate, or otherwise protect the facilities against accidental contact. The actual work of protecting facilities will be carried out by the Utility. Facility relocation or protection provided at the request of the Department will be as described in the contract documents. Protection provided for the benefit, or at the request, of the Contractor shall be the financial responsibility of the Contractor.

Energized electrical lines or equipment shall be conspicuously marked and workers shall be reminded of their locations and the safeguards and precautions to be taken prior to beginning any nearby work that may cause the workers to approach electrical lines. New employees shall be informed of electrical hazards and proper precautions and procedures.

**1. Paving Operations.** Prior to the start of each workday high visibility markers or other devices approved by the Engineer shall be placed to mark the location of all overhead wires, including, but not limited to electrical, telephone and cable television. As an alternative, the pavement beneath overhead lines may be marked with spray paint or by other means approved by the Engineer. This requirement shall also apply to off-site areas used for contract purposes. The Contractor shall periodically patrol the worksite to ensure that the markings are in place and shall replace any that are missing and shall maintain all markings in good condition.

**2. Aerial Lifts, Lifting Equipment, Boom Devices.** Where there is potential for proximity or contact with energized lines or equipment, work shall not begin until a safety meeting is conducted and appropriate steps are taken to identify, mark, and warn against accidental contact.

**3. Tree Work.** Branches touching wires shall be removed by the Utility before work begins. Limbs and branches shall not be dropped onto overhead wires. If limbs or branches fall across electrical wires, work shall stop immediately and the Utility shall be notified. Workers shall be equipped with appropriate personal protective gear for working near electricity.

**4. Building Electrical Work.** Employees working on electrical systems for buildings shall be knowledgeable about and shall employ, when appropriate, OSHA Lock-Out/Tag-Out procedures to prevent exposure to unguarded electrical systems.

**K. Open Excavations and Trenches.** In accordance with 29 CFR 1926.650, a trench is a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet.



If forms or other structures are installed or constructed in an excavation so as to reduce the dimension measured from the forms or structure to the side of the excavation to 15 feet or less, the excavation is also considered to be a trench. The Contractor shall provide protection from collapse and cave-in for any employee who enters a trench or other excavation in accordance with the requirements of 29 CFR 1926 Subpart P, unless the excavation is less than 5 feet in depth and examination of the ground by the Contractor's competent person provides no indication of a potential cave-in. The Contractor shall include procedures to meet the excavation safety requirements in the Project Safety and Health Plan.

Trenching and excavation work shall be carried out under the supervision of the Contractor's competent person. The Contractor shall provide ladders or ramps for access and egress within 25 feet of an employee work area if a trench is 4 feet or more deep. The Contractor shall keep traffic, equipment and materials at least 2 feet away from the edge of any trench or excavation, or use retaining devices. When mobile equipment is operated near an excavation or must approach the edge of an excavation, either the operator must have a clear and direct view of the edge of the excavation; or a warning system of barricades, hand signals or mechanical signals shall be used. Workers shall not be permitted under loads that are being handled by lifting or digging equipment.

For the purposes of open excavations and trenches, the term "competent person" shall be defined as one who has had specific training in, and is knowledgeable about, soil analysis, the use of protective systems and the requirements of 29 CFR 1926 Subpart P.

**L. Hazardous Materials.** The Contractor shall provide workers Hazard Communication Training (29 CFR 1926.59), Safety Training (29 CFR 1926.21), and other training as required by 29 CFR 1926.

**1. Asbestos.** Asbestos abatement contractors and workers shall be appropriately licensed and certified by the NYSDOL. The asbestos abatement contractor shall perform all removal and disposal of asbestos-containing material in accordance with Section 210 *Removal and Disposal of Asbestos-Containing Material (Buildings, Bridges, and Highways)*.

**2. Lead Safety and Health.** The Contractor shall provide worker lead protection in accordance with 29 CFR 1926.62. The Contractor shall provide to the Engineer a written Lead Compliance program addressing as a minimum the specific issues listed in 29 CFR 1926.62 (e)(2), a written Hazard Communication program and Worker Lead Training program as components of the Project Safety and Health Plan. The Contractor shall provide detailed information describing the training and experience of the competent person who will supervise the compliance program on site, provide a description of procedures to monitor worker exposures to lead and provide the proposed medical monitoring program. If respirators are to be used to protect workers from lead exposure, a written respirator program shall be provided.

Specific operations that would likely result in worker exposure to lead include, but are not limited to:

- Removal of lead based paint coatings by abrasive blasting or other procedures.
- Cleanup and removal of paint debris.
- Cleanup, relocation, and dismantling of paint removal containment structures.
- Flame cutting, heating, or welding of steel coated with lead-based paint.
- Removal of bolts or rivets coated with lead-based paint.
- Any other operations that may dislodge existing coatings of lead-based paint, or subject them to abrasion or elevated temperatures.

The Contractor shall identify and implement engineering and work practice controls to reduce worker exposure to lead to a level at or below the Permissible Exposure Level (PEL). The use of respirators and protective clothing shall be used to supplement engineering and work practice controls, if necessary, to protect workers from exposures above the PEL. Reliance on respirators

or protective clothing to protect workers from exposures above the PEL, without first implementing feasible engineering and work practice controls, shall not be permitted except for initial assessment of exposure levels as described in 29 CFR 1926.62 (d). The removal of lead-based paint from structural steel shall be required prior to heating, welding, or flame cutting to reduce worker exposure below the PEL. In cases where the Contractor can clearly demonstrate through exposure monitoring that other work practices and engineering controls, under the oversight of a certified industrial hygienist, can effectively maintain actual worker exposure below the permissible exposure level, exceptions to this requirement may be granted by the Engineer.

The Contractor shall provide to the Engineer copies of documentation, as they are completed, to demonstrate full compliance with 29 CFR 1926.62. These records shall include, as applicable, the completed worker lead training, completed respirator programs, air monitoring results, exposure monitoring results, worker medical monitoring results, and other such records as are necessary to document compliance with the standard.

**3. *Equipment Involving Radioactive Materials.*** The use of equipment involving radioactive materials, including but not limited to nuclear density gauges, shall adhere to all applicable regulations, including U.S. Nuclear Regulatory Commission regulations, related USDOT regulations concerning transportation of radioactive materials, and 12 NYCRR 38. Fourteen (14) days prior to the start of any work involving such equipment, the Contractor shall submit to the Engineer a written Radiation Safety Plan. The plan shall address in detail transportation and storage of the equipment and operating and emergency procedures. It shall provide the name and address of the Contractor's Radiation Safety Officer. A copy of the owner's license to possess the radiation source, issued by the NYSDOL, shall also be provided. All operators of the equipment shall be certified by a gauge manufacturer as to having completed training on the safe use of the equipment. A copy of the certification shall be provided to the Engineer for each operator prior to their work on the project.

**4. *Silica.*** The Contractor shall provide protection to all workers from exposure to hazardous levels of silica in accordance with 29 CFR 1926.55 and 29 CFR 1926.1153 *Respirable Crystalline Silica*. In accordance with §107-05B, *Project Safety and Health Plan*, the Contractor shall identify and address silica safety and health with a Silica Exposure Control Plan as a part of the written Project Safety and Health Plan. The Contractor shall provide medical surveillance to workers that are required to wear a respirator for more than 30 days per year.

The Contractor shall identify and implement worker training, engineering controls, work practices, and respiratory protection to reduce worker exposure to silica in accordance with 29 CFR 1926.1153. Exposure control methods shall either be fully and properly implemented in accordance with Table 1, or the Contractor shall assess and limit the exposure of workers to respirable crystalline silica in accordance the alternative exposure control methods. The accumulation of silica dust in enclosed areas shall be controlled by means of exhaust. . Engineering and work practice control methods shall include, but shall not be limited to; dust suppression through the application of water or other methods, use of general or local ventilation, HEPA filtered vacuum systems, and containment/isolation. Work practice control methods shall include proper use and implementation of supervision, task procedures, employee training, signing, protective clothing, housekeeping, and personal hygiene. If engineering and work practice control methods cannot reduce exposures below the permissible exposure limit (PEL), the Contractor shall institute a respirator program. Each of these safety components is covered individually by 29 CFR 1926.

Many materials disturbed by the Contractor's operations may contain hazardous levels of silica. Silica may be in soil, concrete or asphalt pavement, superstructure or substructure materials. Exposure can occur during common construction tasks including, but not limited to:

- Using masonry saws, grinders, drills, jackhammers and/or chipping of rock, cement concrete, or asphalt concrete;
- Operating vehicle-mounted drilling rigs; milling; operating crushing machines
- Concrete pavement rubblizing;
- Using heavy equipment for demolition of brick, cement concrete, or masonry structures;
- Abrasive blasting, if the abrasive contains silica, or of cement concrete, rock, or asphalt concrete;
- Dry sweeping or pressurized air blowing of cement concrete, rock, sand, or asphalt concrete dust.

**M. Demolition/Removal of Buildings and Structures.** Demolition or removal work shall not be performed by the use of explosives unless approved by the Regional Director.

**N. Drilling and Blasting.** Blasting shall be performed in accordance with the Department publication entitled *Procedures for Blasting*. This publication is available upon request from the Regional Director or the Director, Geotechnical Engineering Bureau.

The Contractor shall submit a written Blast Plan in accordance with *Procedures for Blasting* for approval by the Department a minimum of 10 work days prior to start of blasting operations. A preblast meeting relative to the method, manner and procedure of blasting operations shall be held with the Engineer, the Contractor, the Blaster, a Departmental Engineering Geologist and representatives of all interested agencies prior to the commencement of drilling and blasting operations.

Whenever explosives are used, they shall be of such character and strength and in such amounts as permitted by state and local laws and ordinances and all agencies having jurisdiction over them. The Department reserves the right to specify the maximum size of the charges. Blasting shall be done only when the Engineer and those agencies shall approve and under such restrictions as they may impose.

If a blast causes injury, damage to property, adverse affects upon traffic, or causes gases to migrate and/or accumulate in a potentially harmful manner, all blasting operations shall cease by order of the Engineer for a review of the procedures. The review will be conducted by the Engineer in conjunction with an Engineering Geologist to ensure that proper procedures and practices were used to determine if the approved procedures need to be revised. Should the findings of the review indicate the injury, damage, traffic delay, or migration/accumulation of gases was attributed to improper blasting operations, the blaster of record may be removed at the Department's option.

The Contractor shall meet all the requirements of 12 NYCRR 23, 12 NYCRR 39, and 12 NYCRR 61, which include but are not limited to the licensing for ownership, possession, transportation, or use of explosives, certifications for blasters, and provisions for storage, construction and maintenance of magazines.

**O. Equipment Safety Procedures.** The following provisions shall apply to all work on the project, including but not limited to, the activities of all Subcontractors, Manufacturers, Fabricators, Material Suppliers, independent truckers and owner-operators. The Contractor shall include the proposed equipment safety procedures in the Project Safety and Health Plan.

- A spotter shall guide the backing of any vehicle or equipment with restricted visibility to the rear. This rule applies in any location where workers on foot, pedestrians, private vehicles or similar hazards may be present.
- If the operator loses visual contact, the vehicle shall immediately be brought to a full stop until visual contact with the spotter is reestablished.
- Dump truck boxes may be raised only under the control of a spotter, unless the vehicle is in an area clearly marked to be free of overhead wires and safe for dumping.

- Dump truck boxes shall be lowered prior to moving, except when dumping into a paver or similar operations, under the control of a spotter.
- All excavating, lifting and similar equipment shall comply with electrical safety requirements, and shall operate under the control of a spotter whenever working within 15ft of an overhead line. The distance shall be measured as a slope distance perpendicular from the conductor to the nearest point on the vehicle.
- Any operator found in violation of the above rules by the Engineer or his/her representative will be removed from the project immediately, and will not be allowed to work on any Department project for a minimum of one year.

**P. Lifting.** The following shall apply for all lifting operations when utilizing lift equipment. The Contractor shall conduct construction lifting operations that use a crane or a derrick in compliance with 29 CFR 1926 Subpart CC *Cranes and Derricks in Construction* and shall conduct lifting operations for demolition and underground construction that use a crane or a derrick in compliance with 29 CFR 1926 Subpart DD *Cranes and Derricks Used in Demolition and Underground Construction*. This paragraph does not apply to lifting operations covered under Section 585 *Structural Lifting Operations*, nor ordinary excavation operations. This paragraph does apply to cranes with either fixed or swinging leads that are dedicated to pile driving operations.

When a vibratory hammer is used to hoist, move, or extract sheeting (or a pile), the Contractor shall securely attach an independent safety line between the sheeting (or pile) and the crane (or other equipment). The independent safety line shall remain attached to the sheeting (or pile) until it is stabilized in the ground, sufficiently interlocked with other piling, or extracted and positioned into the salvaged stack. At no time shall a vibratory hammer be clamped to sheeting (or a pile) and disconnected from the crane. When the vibratory hammer is not in use, the Contractor shall lay the unit on the ground.

**1. Lift Equipment.** Lift equipment is defined as equipment capable of lifting an item more than 15 feet high, has the ability to swing or rotate a boom, and has a maximum rated lifting capacity exceeding one ton. Lift equipment shall have durable, legible load charts which shall have been prepared by either the equipment manufacturer or a Professional Engineer. If manufacturer's load charts are unavailable, charts may be prepared by a Professional Engineer. The Professional Engineer shall utilize the same factors of safety against overturning as the equipment manufacturer. The charts shall be attached to the equipment in a location accessible to the operator while at the controls. The charts shall contain a full range of load ratings at all stated operating radii. The charts shall also note conditions such as outriggers, counter weights, and work area, i.e., over side, over front, or over rear of equipment.

Equipment may lift loads up to those indicated on the Manufacturer's or Professional Engineer's load chart if the equipment has the following safety devices and the safety devices are operating:

- a. Load and radius measuring device pre-programmed to continuously relate the measured data to the load radius chart as a direct reading of load or percentage of the rated load, and connected to a warning light and an acoustical signal located at the operator's position or in the cab to indicate overload.
- b. A device that continuously indicates the levelness of the machine and is visible from the operator's controls.

Lift equipment with non-operational safety devices or no safety devices shall be operated at levels not to exceed 78% of the Manufacturer's or Professional Engineer's load charts. This equipment shall have a separate load chart labeled *78% Load Chart* and it shall be attached to the equipment.

Lift Equipment with operational safety devices that is operating from a barge shall utilize a manufacturer's or Profession Engineer's load chart that is established specifically for operating from a barge. Lift Equipment on barges with non-operational safety devices or no safety devices shall operate at 78 % of the Manufacturer's or Professional Engineer's load chart for working on barges. This equipment shall have a separate load chart labeled *78% Load Chart for Equipment on Barges*.

Equipment used for lifting over a railroad shall be restricted such that the operational capacity shall be limited to 66 2/3% of its tipping load as specified in §105-09 *Work Affecting Railroads* or be limited to the load limits indicated in the previous three paragraphs, whichever is lower.

**2. Lift Plans.** A written lift plan may be a component of an Erection Plan, Demolition Plan, or other plan that is submitted and approved by the Department in accordance with the Steel Construction Manual, the Prestressed Concrete Construction Manual or other requirement. A written lift plan need not be submitted separately for approval, provided the required minimum elements are contained in the approved plan.

Structural elements shown on shop drawings and erection drawings may have units expressed in both metric and USC units, however the measurements or dimensions in the predominant unit system used in the contract documents shall control.

*a. Type A Lifts.* A Type A Lift is the most complex type of lift, poses a greater risk, and requires significant prior planning. Type A lifts include, but are not limited to lifting primary structural steel or structural concrete elements, span type overhead sign structures, arm type overhead sign structures with a lift weight greater than 20,000 lbs.

A lift will also be considered Type A when lift equipment to perform a Type B lift is placed on a bridge structure, on false work; over a railroad; over a sensitive underground utility facility; when there is a two machine lift; or when a slider beam is used.

The Contractor shall submit a written Type A Lift Plan to the Engineer 30 calendar days prior to the lift for review and approval by the Department and, when applicable, any railroad affected by the proposed procedure. The Type A Lift Plan and supporting calculations shall be sealed and signed by a Professional Engineer. Any and all alterations or modifications to a Type A Lift Plan shall be sealed and signed by a Professional Engineer. The Engineer shall be notified of any alterations or modifications to approved lift plans.

As a minimum, a Type A lift plan shall include the following:

1. Title Block with contract number, PIN, contract description, county, contractor name and bridge identification number (BIN)/or sign identification number (SIN) as appropriate.
2. Plan of the work area showing support structures, roads, railroad tracks, canals, streams and utilities.
3. Lifting sequence, if applicable
4. Location of trucks for delivery or removal of materials.
5. Location of lift equipment, including pin locations, length of boom, and counterweight size and location.
6. Lift radii, lift configuration(s) and restrictions on swing radii.
7. Capacity chart for lift equipment, including a comparison of total lift weight vs. capacity for the pick radius.
8. Weight of the item to be lifted, including additional equipment such as rigging, beam clamps, jibs, swing-away, super-lifts, blocks, cheek plates, headache balls, and cables
9. Wind restrictions if they are requirements of the Manufacturer.
10. Sectional views of all lifts where electrical facilities are within a 15 foot radius of any part of the lifting equipment or object being lifted.

11. Description of lifting devices or other connecting equipment, and pertinent rigging with dimensions.
12. Location of outriggers, outrigger supports, and outside dimensions of tracks for track mounted lifting equipment.
13. Cranes or crane outriggers shall not be placed on a reinforced earth structure, within the limits specified, during a lift.

*b. Type B Lifts.* A Type B Lift includes arm type overhead sign structures with a lift weight less than 20,000 lbs, structural elements with a lift weight greater than 20,000 lb; when the lift equipment or the item being lifted is within 15 feet of energized overhead electrical lines, or where the operator cannot directly see the item being lifted at all times during the lift.

The Contractor shall submit a written Type B Lift Plan, including all of the applicable elements required for a Type A Lift Plan, prepared by the Competent Person.

*c. Type C Lifts.* A lift will be considered a Type C Lift when it does not meet the requirements for a Type A or Type B Lift. A written lift plan is not required for Type C Lifts.

### **3. Pre-Lift Meeting.**

*a. Type A Lifts.* A pre-lift meeting will be required for lifts that require a Type A Lift Plan, a written Erection Plan, Demolition Plan, or other requirement that includes a lift plan. The Competent Person, and other appropriate contractor staff, shall attend the pre-lift meeting with the Engineer, as well as representatives from the utilities and railroads if deemed applicable, a minimum of five work days before lifting operations are to be performed. The meeting shall include but not be limited to: the review of site conditions, erection or demolition plans, lift loads vs. lift equipment capacity, obstructions, utilities, and the roles of Department and Contractor personnel.

*b. Type B Lifts.* The Competent Person, and other appropriate contractor staff, shall review the lift operations with the Engineer at the location of the lift, before lifting operations are performed. The review shall include but not be limited to: the review of site conditions, lift loads vs. lift equipment capacity, and obstructions, and the roles of Department and Contractor personnel.

*c. Type C Lifts.* A pre-lift meeting is not required for Type C lifts.

**4. Competent Person.** The Contractor shall designate, to the Engineer, one person, who is competent in lifting operations, to be completely in charge of each lifting operation. In general, Competent Person shall mean one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them. The Competent Person shall have the authority to take an unsafe piece of equipment out of service until the hazard is eliminated. The Competent Person shall be knowledgeable about lifting equipment and equipment operations, Manufacturer's specifications and recommendations, and have a thorough knowledge of the requirements, regulations and standards governing his/her duties. The Competent Person shall, as a minimum, have the ability to interpret load charts, calculate lift loads, recognize overhead wire hazards and know all aspects of the rigging.

The Competent Person shall inspect all lift equipment prior to and during usage to make sure the equipment is in a safe operating condition.

**5. Lift Operations.** The Competent Person shall be present for all lifting operations. If a crane is utilized in a lifting operation, or a crane with either fixed or swinging leads is utilized in a pile driving operation, the operator shall present to the Engineer a valid New York State Certificate of Competence to operate a crane, except an individual operating a crane within a city having a population of one million or more. Individuals operating a crane within a city having a population of one million or more shall present the Engineer with a valid license or certification to operate a crane issued by such city. If there are any other local crane license requirements, they too shall be presented to the Engineer. In addition, a copy of the annual inspection report of the crane shall be readily available and provided upon the Engineer's request.

Any crane or other lift equipment that extends into the identified sloped test surface around an airport, military airport or heliport, or 200 feet or more above ground level, as defined in 14 CFR Part 77.9 shall have the appropriate flags, lights, beacons or markings in accordance with Federal Aviation Administration (FAA) Advisory Circular (AC) 70-7460-1K *Obstruction Marking and Lighting*, and the owner shall file a *Notice of Proposed Construction or Alteration* with the FAA.

Any discrepancies between the Lift Plan and the actual lift conditions shall be reported immediately to the Competent Person in charge of the lift operations and to the Engineer. The operation shall not proceed until all issues are resolved.

**Q. Histoplasmosis.** Histoplasmosis is a fungal infection caused by a soil organism found in large masses of bird or bat droppings, and is a potential health hazard in areas where birds or bats have nested for long periods. Such conditions are often found on bridge structures, in barns, farm buildings and cold storage facilities. Areas with small amounts of dried droppings pose minimal hazard. Airborne material may enter the body by inhalation or ingestion.

Prior to work in any area where birds nest or bats roost, the Contractor shall conduct a thorough inspection to determine if, and to what extent there is a build-up of droppings. Workers conducting an inspection shall be equipped with personal protective equipment, which include gloves, rubber boots, rain suit components, goggles and a dust/nuisance respirator. Questions regarding proper equipment for this activity shall be directed to the Engineer.

If substantial material is found, the Contractor shall clean the work area using a high-powered water hose or by scraping. If the material is to be scraped away, it shall be kept wet during the entire process. Workers engaged in cleaning activity shall wear personal protective equipment specified above. Application of a cleaning agent (bleach, for example), before removal may help dissolve the material, and a disinfectant shall be applied to cleaned surfaces. No solvents or chemical cleaning agents shall be dispersed into waterways when cleaning surfaces. Compressed air shall not be used to remove bird droppings because it produces airborne particles and exposure to particles may cause histoplasmosis.

When cleaning has been successfully completed, the personal protective equipment specified above is no longer required. Employees engaged in cleaning, or any other activity which involves exposure to bird droppings, shall observe a high degree of personal hygiene, even if the exposure is casual. Special care shall be taken to wash hands thoroughly before eating or smoking.

**R. Confined Spaces.** Confined spaces are defined as any space having limited means of egress, which is subject to the accumulation of toxic or flammable contaminants or has an oxygen deficient atmosphere. Confined spaces include, but are not limited to: sanitary sewers, sanitary manholes and structures, drainage lines and drainage structures, underground utility vaults, enclosed bridge beams and heated enclosures. All personnel required to enter confined spaces shall be instructed as to the nature of the hazards, the necessary precautions and in the use of protective and emergency equipment required.

Fuel-fired heated enclosures are frequently constructed to provide the requirements for winter concrete placement or similar operations. The Contractor shall provide adequate ventilation to

maintain acceptable air quality or conduct air quality monitoring when heaters are or have been operating prior to personnel entry. If acceptable air quality cannot be verified, then appropriate respirators shall be worn. No worker shall enter a confined, heated space unless that space can be ventilated or the worker removed from outside the enclosure if the worker is overcome by fumes. Particularly during off-shift hours, no worker shall enter an unventilated, heated enclosure unless another worker is present immediately outside the enclosure. All unnecessary combustibles and debris shall be removed from the enclosure and escape exits shall be provided so workers can escape safely if a fire starts, prior to heating.

***S. Fire and Explosion Prevention.*** The Contractor shall ensure that combustibles do not accumulate. Flammable materials shall be handled and stored as required by OSHA regulations. "No Smoking" signs shall be posted and enforced wherever flammable materials are stored or used. Fire extinguishers shall be provided and maintained throughout the site, in accordance with the requirements of 29 CFR 1926, Subpart F. Fires will be considered, as a minimum, a near-miss accident, and therefore shall be reported in accordance with existing reporting requirements.

During refueling, all possible sources of ignition, including, but not limited to sparks, open flames and electrical equipment shall be eliminated. Fuel containers shall be grounded to the tank to prevent static electrical sparks. A "No Smoking or Open Flame" sign shall be posted conspicuously in the vicinity of refueling operations.

Cutting and welding equipment shall be stored according to recognized safety standards. Any defective tanks or equipment shall be removed to a safe storage area immediately until repairs are made. When cutting or burning is underway, steps shall be taken to ensure that sparks do not ignite combustibles.

***T. Use of Personal Entertainment Devices and Portable Phones.*** The Contractor shall ensure that workers are able to perceive hazards, are not distracted from their tasks, and are not creating hazard(s) through the use of personal entertainment devices. The Contractor shall ensure that portable phones, two-way radios, and other communication devices are used by workers for performing work tasks only. Flaggers shall use portable phones, two-way radios, and other communication devices only to communicate with other flaggers, workers or supervisors regarding flagging operations. Equipment operators shall use portable phones, two-way radios or other communication devices while actively operating equipment only for communicating with workers performing directly related work tasks. Truck drivers shall use hands free technology for all calls while driving within work zones. Portable phones, two-way radios, and other communication devices shall be equipped with hands-free technology whenever practicable. Workers shall not use personal entertainment devices with earphones such as radios, cellular/smart phones, portable media players, or other personal listening devices while working.

## **107-06 INSURANCE.**

The Contractor shall procure, at its own sole cost and expense, and shall maintain in force at all times during the term of the contract including any time extensions or renewals until Contract Final Acceptance, the policies of insurance covering all operations under the contract as herein set forth whether performed by the Contractor or by any other firm or company subcontracted by the Contractor, written by companies authorized by the New York State Department of Financial Services to issue insurance in the State of New York and that have an A.M. Best Company rating of (A-) or better or approved by the Department. The Department may, at its sole discretion, release the Contractor from the requirement to provide certain specified types of insurance if the Department determines that the Work related to that specific type of insurance (i.e., Railroad Protective Liability, Marine Protection & Indemnity) has been satisfactorily completed, therefore obviating the utility of the required insurance. The Department may, at its sole discretion, permit the placement of policies with a non-authorized carrier or carriers upon request by the Contractor accompanied by the documentation required by 11 NYCRR §27.0 et seq.; provided that



nothing herein shall be construed to require the Department to accept insurance placed with a non-authorized carrier under any circumstances. The Contractor shall deliver to the Department evidence of such policies as the Department deems necessary to verify that the required insurance is in effect.

**A. Conditions Applicable to Insurance.** All policies of insurance required by this contract must meet the following requirements:

**1. Coverage Types and Policy Limits.** The types of coverage and policy limits required from the Contractor are specified in Paragraph B Insurance Requirements below. General liability insurance shall apply separately on a per-job or per-project basis. Unless otherwise indicated, the required limits of liability for any insurance may be secured through any satisfactory combination of primary and/or excess /umbrella policies.

**2. Policy Forms.** Except as may be otherwise specifically provided herein or agreed in writing by the Department, policies must be written on an occurrence basis. In the event that occurrence based coverage is not commercially available, claims-made policy forms will be considered provided that, at minimum, it includes provisions that allow for (a) reporting circumstances or incidents that may give rise to future claims and (b) an extended reporting period of not less than three (3) years with respect to events that occurred but were not reported during the term of the policy. *Insurance policies that remove or restrict blanket contractual liability located in the “insured contract” definition (as stated in Section V, Number 9, Item f in the ISO CGL policy) or that remove or modify the “insured contract” exception to the employer’s liability exclusion so as to limit coverage for claims that arise out of contract work, or that do not cover the additional insured for claims involving injury to employees of the named insured or Subcontractors (as the term subcontractor is used in CG 00 01 04 13), are not acceptable.* Policy forms must be provided to the Department upon request.

**3. Certificates of Insurance/Notices.** Contractor shall provide a Certificate or Certificates of Insurance, in a form satisfactory to the Department, before commencing any work under this contract. Certificates or transmittal correspondence shall reference the NYSDOT Contract D Number. Contractor is strongly encouraged to transmit certificates and other materials concerning insurance coverage, referencing the contract D-number and the name of the contractor in the Subject Line, by email to:

*Insur.constr.contr@dot.ny.gov*

Certificates may be mailed to the:

**New York State Department of Transportation  
Office of Contract Management  
50 Wolf Road, First Floor, Suite 1CM  
Albany, NY 12232**

Unless otherwise agreed, policies shall be written so as to require that the policy will not be (i) canceled, (ii) materially changed or (iii) permitted to expire or lapse for any reason except upon ten (10) days’ prior written notice to the Department by Certified Mail, Return Receipt Requested at the address stated above. In addition, if required by the Department, the Contractor shall deliver to the Department within ten (10) work days of such request a copy of any or all policies of insurance not previously provided, certified by the insurance carrier as true and complete. Certificates of Insurance shall:

- a. Be in a form satisfactory to the Department. The ACORD 25 Certificate must be accompanied by an ACORD 855 “New York Construction Addendum” completed to indicate information about the liability insurance.
- b. Be signed and dated by an authorized representative of the insurance carrier or producer.
- c. Disclose any deductible, self-insured retention, aggregate limit.
- d. Refer to this Contract by number on the face of the certificate.

If at any time during the term of this contract, it shall come to the attention of the Department that required insurance is not in effect or that adequate proof of insurance has not been provided, the Department may, at its option:

- a. Direct the Contractor to suspend work and not re-enter the premises with no additional payment or extension of time due on account thereof, or
- b. May withhold further contract payments in accordance with Article 8 No Payment Due to Contractor’s Non-Compliance of the contract agreement, or
- c. Treat such failure as a breach or default of the contract.

**4. Additional Insureds.** All insurance policies required by these specifications, except workers’ compensation, disability, and professional liability shall be endorsed to provide coverage to **“The State of New York/New York State Department of Transportation, any municipality in which the work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the work, and any consultants working for or on the project, and their agents or employees”** with respect to any claim arising from the Contractor’s Work under this contract or as a result of the Contractor’s operations. The coverage for parties required to be “additional insureds” shall be effected by endorsement of the applicable policy using the following ISO forms, or such forms providing equivalent coverage:

ISO form CG 20 10 04 13, CG 20 33 10 01, CG 20 33 07 98 when used in combination with CG 20 37 07 04, CG 20 37 04 13, CG 20 38 04 13 and CA 20 48 10 13.

**5. Primary Coverage.** The liability and protective liability insurance policies shall provide primary and non-contributory coverage to the Department for any claim arising from the Contractor’s Work under this contract, or as a result of the Contractor’s activities.

**6. Waiver of Subrogation.** As to every type and form of insurance coverage required from the Contractor, there shall be no right of subrogation against **the State of New York/New York State Department of Transportation, its agents or employees**. To the extent that any of Contractor’s policies of insurance prohibit such a waiver of subrogation, Contractor shall secure the necessary permission to make this waiver.

**7. Policy Renewal/Expiration.** At least ten (10) calendar days prior to the expiration of any policy required by this contract, evidence of renewal or replacement policies of insurance with terms no less favorable to the Department than the expiring policies shall be delivered to the Department in the manner required for service of notice in Paragraph A.3. Certificates of Insurance/Notices above.

**8. Self-Insured Retention/Deductibles.** Contractors utilizing self-insurance programs are required to provide a description of the program for Department approval. Collateralized deductible and self-insured retention programs administered by a third party may be approved. Except as may be specifically provided in the Contract Documents of a particular project, the Contractor or third-party administered insurance deductible shall be limited to the amount of the

bid deposit or \$100,000, whichever is less. Security is not required if it is otherwise provided to an administrator for an approved risk management program. The Department will not accept a self-insured retention program without security being posted to assure payment of both the self-insured retention limit and the cost of adjusting claims. The Contractor shall be solely responsible for all claim expense and loss payments within any permitted deductible or self-insured retention. If the Contractor's deductible in a self-administered program exceeds the amount of the bid deposit, the Contractor shall furnish an irrevocable Letter of Credit as collateral to guarantee its obligations. Such Letter of Credit or other collateral as may be approved by Department must be issued by a guarantor or surety with an AM Best Company rating of (A -) or better. If, at any time during the term of this agreement, the Department, in its sole discretion, determines that the Contractor is not paying its deductible, it may require the Contractor to collateralize all or any part of the deductible or self-insured retention on any or all policies of insurance or, upon failure to promptly do so, the same may be withheld from payments due the Contractor.

**9. Waiver of Indemnities.** The Contractor waives any right of action it and/or its insurance carrier might have against the Department (including its employees, officers, commissioners, or agents) for any loss that is covered by a policy of insurance that is required by this contract. The Contractor waives any right of action it and/or its insurance carrier might have against the Department (including its employees, officers, commissioners, or agents) for any loss, whether or not such loss is insured.

**10. Insurance for Subcontractors, Trucking Firms, and Professional Services.** In the event that any portion of the work described in this contract is performed by a Subcontractor, Trucking Firm, and/or any entity or person providing a Professional Service, the applicable insurance requirements shall be incorporated into the subcontract agreement. Subcontractor insurance requirements shall include the requirements for Workers' Compensation, Disability, Commercial General Liability, and other insurances set forth in §107-06B applicable based on the nature of the subcontracted work. Excess or umbrella insurance, and Special Protective and Highway Liability insurance, is not required for Subcontractors. Insurance requirements for Trucking Firm(s) shall include Workers' Compensation, Disability, Commercial General Liability, and Commercial Automobile insurance. Insurance requirements for Professional Service(s) requiring the signature, stamp, or certification of a licensed professional shall include Workers' Compensation, Disability, Professional Liability / Errors and Omissions insurance, and Commercial General Liability (if conducting work on-site). Contractor shall certify, in a form deemed acceptable by the Department, that the Contractor has received an Accord 25 from the insurer or authorized representative of each Subcontractor, Trucking Firm, and/or Professional Service and that the insurance coverage meets or exceeds the Department's insurance requirements for each and every Subcontractor, Trucking Firm, and Professional Service utilized by the Contractor to conduct work under this contract.

**B. Insurance Requirements.** The types of insurance and minimum policy limits shall be as follows:

**1. Workers' Compensation.** (Applicable to all contracts). For work to be performed in New York State, as required by State Finance Law §142 and Workers' Compensation Law Section 57, the Contractor shall maintain in force workers' compensation insurance upon forms required by or acceptable to the Workers Compensation Board for all of Contractor's employees.

Evidence of Workers' Compensation and Employers Liability coverage shall be provided on one of the following forms specified by the Chairman of the New York State Workers' Compensation Board:

- (1) C-105.2 (September 2007 or most current version) – Certificate of Workers' Compensation Insurance;
- (2) U-26.3 – Certificate of Workers' Compensation Insurance from the State Insurance Fund;
- (3) GSI-105/SI-12 – Certificate of Workers' Compensation Self Insurance; or
- (4) CE-200 – Certificate of Attestation of Exemption (When Contractor meets the requirements).

All forms are valid for one year from the date the form is signed / stamped, or until policy expiration, whichever is earlier.

**2. Disability** (*Applicable to all contracts*). For work to be performed in New York State, as required by Workers' Compensation Law Section 220 (8), the Contractor shall provide and maintain coverage during the life of the related contract for the benefit of such employees as are required to be covered by the New York State Disability Benefits Law. Any waiver of this requirement must be approved by the Agency and will only be granted in unique or unusual circumstances.

Evidence of Disability Benefits coverage must be provided on one of the following forms specified by the Chairman of the Workers' Compensation Board:

- (1) DB-120.1 (May 2006 or most current version) – Certificate of Insurance Coverage under the New York State Disability Benefits Law;
- (2) DB-155 – Certificate of Disability Self Insurance; or
- (3) CE-200 – Certificate of Attestation of Exemption.

All forms are valid for one year from the date the form is signed / stamped, or until policy expiration, whichever is earlier.

**3. Commercial General Liability (CGL).** (*Applicable to all contracts*). The Contractor shall maintain a commercial general liability policy or policies, on an occurrence form, insuring against liability arising from premises (including loss of use thereof), personal injury or death, advertising injury, liability insured under an insured contract (including the tort liability of another assumed in a business contract) occurring on or in any way related to the premises or occasioned by reason of the operations of Contractor. Such coverage shall be written on an ISO occurrence form (ISO Form CG 00 01 12 07 or a policy form providing equivalent coverage) in an amount no less than the minimum coverage set forth in Table 107-1 *Insurance for Contracts*. Unless otherwise provided, the policy or policies of insurance providing the liability coverage shall include:

*a.* Coverage for contractual liability assumed by the Contractor insured under an insured contract (including the tort liability of another assumed in a business contract).

*b.* All insurance policies required by these specifications except workers' compensation, disability, and professional liability shall be endorsed to provide coverage to **“the State of New York / New York State Department of Transportation, any municipality in which the work is being performed, any public benefit corporation, railroad, or public utility whose property or facilities are affected by the work, and any consultants working for or on the project, and their agents or employees”** with respect to any claim arising from the Contractor's Work under this contract or as a result of the Contractor's operation using ISO forms, or such forms providing equivalent coverage: ISO form CG 20 10 04 13, CG 20 33 10 01, CG 20 33 07 98 when used in combination with CG 20 37 07 04, CG 20 37 04 13, CG 20 38 04 13, and CA 20 48 10 13.

c. Products-Completed Operations Coverage, as provided in the General Liability Policy, or in certain instances, through ISO form CG 26 11 09 99 or suitable equivalent.

d. Where contract work will be performed by unregistered off-road equipment, Contractor shall provide documentation of a blanket Pollution Liability policy, or an endorsement to cover short-term pollution events, ISO form CG 04 33 10 01 or equivalent.

e. Coverage for claims for bodily injury asserted by an employee of an additional insured and any Employer Liability Exclusion which may otherwise operate to exclude such coverage shall be voided in this respect.

f. Explosion, Collapse and Underground Hazards coverage ("XCU") (for contracts that call for the performance of excavating, underground work, and/or the use of blasting equipment).

**4. Commercial Automobile including liability and required coverage for**

**New York.** (Applicable to all contracts). The Contractor shall maintain a commercial or other automobile policy or policies insuring against liability for bodily injury, death, or damage to property and other mandatory coverages, relating to the use, operation, loading or unloading of any of Contractor's automobiles (including owned, hired and non-owned vehicles) on and around the project. This shall be ISO form CA 00 01 10 01, CA 00 01 01 87 or a policy form providing equivalent coverage along with mandatory New York endorsements. If the contract involves the removal of hazardous waste or otherwise transporting hazardous materials, pollution liability coverage for covered autos shall be provided by form CA 99 48 03 06 or CA 00 12 03 06 and the Motor Carrier Act Endorsement (MCS90) shall be attached. Coverage shall be in an amount no less than the minimum coverage set forth in Table 107-1 *Insurance for Contracts*.

**5. Umbrella or Excess Liability.** (Applicable to all contracts). When the limits of the CGL, Auto, and/or Employers' Liability policies procured are insufficient to meet the limits specified, the Contractor shall procure and maintain Commercial Umbrella and/or Excess Liability policies with limits in excess of the primary; provided, however, that the total amount of insurance coverage is at least equal to the requirements set forth, and shall be sufficient to provide, when combined with the Commercial General Liability, no less than the minimum coverage set forth in Table 107-1 *Insurance for Contracts*. The policy or policies shall provide insurance insuring against liability arising from premises (including loss of use thereof), operations, independent Contractors, products-completed operations, personal injury and advertising injury, and liability insured under an insured contract (including the tort liability of another assumed in a business contract) occurring on or in any way related to the premises or occasioned by reason of the operations of Contractor or arising from automobile liability as described above. Such coverage shall be written on an ISO occurrence form CU 00 01 12 07 or a policy form providing equivalent coverage.

**6. Special Protective and Highway Liability.** (Applicable to all contracts). The Contractor shall maintain, separate and apart from its umbrella policy, a policy issued to and covering the liability of **the People of the State of New York; The State of New York; the Commissioner of Transportation; all employees of the Department of Transportation; any municipality in which the work is being performed; and any public benefit corporation, railroad, or public utility whose property or facilities are affected by the Work, against damages that the insureds may be held legally liable to pay for property damage, personal injuries, or death that is caused by any occurrence that takes place within any location where work is to be or is being performed by Contractor, including at the location of any of the Work.** This should be ISO form CG 00 14 12 or a policy form providing equivalent coverage along with mandatory

New York endorsements. Coverage shall be in an amount no less than the minimum coverage set forth in Table 107-1 *Insurance for Contracts*.

**7. Professional Liability / Errors and Omissions.** *(Applicable to professional services requiring the signature, stamp or certification of a licensed professional, including, without limitation, erection plans, demolition plans, containment plans, coffer dams, and temporary sheeting).* The Contractor shall maintain at its own expense or shall require to be maintained, such insurance as is customary to compensate the Department for any claims or losses that occur because of Contractor's errors, omissions, malpractice or breach of professional obligations. Such policy or policies may be written on a claims-made form so long as coverage is maintained to be in effect to cover claims arising from the performance of services under this contract. Said coverage may be subject to a deductible or self-insured retention level of no more than \$250,000 subject to approval by the Department, such approval not to be unreasonably withheld, except that it is also agreed that the Department may withhold payment for services rendered under this contract in the event, and to the extent of any deductible in the event that a claim is asserted. Such coverage shall be written on a claims-made basis (or a policy form providing equivalent coverage) in an amount no less than the minimum coverage set forth in Table 107-1 *Insurance for Contracts*.

**8. Railroad Protective Liability.** *(Applicable to any Work Affecting Railroads as described in §105-09).* The Contractor shall maintain at its own expense railroad protective liability policy of insurance in the name of the affected railroad and with limits of coverage as specified in the Special Note in the Contract Proposal, or if no limits of coverage are specified, in an amount no less than the minimum coverage set forth in Table 107-1 *Insurance for Contracts*. The aggregate limit shall apply separately to each annual period. Said policy shall be subject to the approval of the railroad and comply with 23 CFR 646 Subpart A.

**9. Marine Protection & Indemnity.** *(Applicable to any Work performed on a navigable waterway using barges or other watercraft or necessitating the use of a rescue boat / skiff as described in §107-05).* Anytime the activity involves work on navigable water or the Work is connected to water related activities, Marine Protection & Indemnity and Hull and Machinery coverage is required. Hull and Machinery coverage shall be provided for the total value of the watercraft or equipment. The Contractor shall maintain at its own expense, or shall require to be maintained, Protective and Indemnity Liability insurance for all marine operations under the Agreement in an amount no less than the minimum coverage as set forth in Table 107-1 *Insurance for Contracts*. The policy shall be endorsed to add the Department as an Additional Insured. Any coverage required within this subsection may be satisfied by the CGL and Excess policies, or endorsement thereto, only when total coverage meets or exceeds the sum of the individual coverages had each been procured separately.

**10. Pollution Liability.** *(Applicable where the Contractor will employ mobile equipment or tanks; facilities for fueling vehicles or equipment on-site; or where the work involves the handling or removal of any contaminant, including but not limited to asbestos or lead paint or petroleum products including the abatement or removal of such materials, or some other identified environmental condition).* The Contractor shall maintain at its own expense, or shall require to be maintained, either through an endorsement to a commercial general liability policy or through a separate policy not to be combined with any other coverage, insurance protecting Contractor and the Department from the liability and financial loss relating to Contractor's contamination of soil and the accidental release of petroleum products, chemicals and/or toxic gases from broken pipelines, utilities and stationary and mobile fuel tanks that can result from Contractor's operations. Such coverage shall be written on policy form providing coverage for contamination

both on and off the leased premises and shall provide coverage in an amount no less than the minimum coverage as set forth in Table 107-1 *Insurance for Contracts*.

**11. Builders' Risks.** *(Applicable to projects that call for the construction of any "Structure" or building, including, but not limited to bridges and pump stations and in connection with such projects, as part of a project valued at \$25,000,000 or more and then only to the extent of the specified value associated with such construction).* The Contractor shall procure and maintain a Builders' Risk policy in a form such as ISO form CP 00 20 10 90 or a policy form providing equivalent coverage, covering all risks in completed value form. Such policy shall cover the total value of the work performed in accordance with the contract, as well as the value of any equipment, supplies and/or materials to be installed in the contract that may be in storage (on or off the Site) or in transit. The policy shall cover the cost of removing debris, including demolition as may be legally necessary by the operation of any law, ordinance or regulation, and property of the State held in their care, custody and/or control. Such policy shall name as insureds the State, the Contractor, and the State of New York. The Builders' Risk policy shall contain endorsements that provide for the following:

- The State and the Contractor shall be named as loss payees for the work in order of precedence, as their interest may appear; and
- In the event the loss occurs at an occupied facility, the policy shall permit occupancy without the consent of the insurance company; and
- In the event that the insurance policy has been issued by a mutual insurance company, the following language shall be included: "The Department is not liable for any premium or assessment under this policy of insurance. The First Named Insured is solely liable therefore."

Any required Builders' Risk policy shall be written to cover specific structures identified in the Contract Proposal to the specified value for the completed structure(s). Self-insured retention / deductibles shall not exceed \$250,000 or 20% of the total value of work performed and equipment, supplies and materials at the location of the Work as well as at any off-site storage locations.

**12. Unmanned Aircraft Systems Liability.** *(Applicable where the Contractor is required to or chooses to utilize unmanned aircraft systems or "drones" for any purpose related to contract work or within the contract limits).* Unmanned Aircraft Systems Liability will be required whenever the contracted work includes, or the Contractor utilizes, the operation of an Unmanned Aircraft System. The Contractor shall maintain at its own expense, or shall require to be maintained, an Aviation Liability Insurance Policy covering the liability of the operator for bodily injury, property damage, and personal injury arising from all operation in an amount no less than the minimum coverage set forth in Table 107-1 *Insurance for Contracts*. A certificate of insurance demonstrating proof of coverage is required. The proof of coverage shall include Additional Insured Endorsements, 30-Day Notice of Cancellation Endorsements and Waiver of Subrogation Endorsements.

### **C. Table of Insurance Requirements**

<b>TABLE 107-1 INSURANCE FOR CONTRACTS<sup>1</sup></b>				
<b>INSURANCE TYPE</b>	<b>CONTRACT VALUE</b>			
	<b>\$0 - \$10,000,000</b>	<b>\$10,000,000.01 - \$20,000,000</b>	<b>\$20,000,000.01 - \$100,000,000</b>	<b>Over \$100,000,000</b>
<b>Commercial General Liability (CGL)</b>	\$1 million per occurrence; \$2 million aggregate <sup>2</sup>	\$1 million per occurrence; \$2 million aggregate <sup>2</sup>	\$1 million per occurrence; \$2 million aggregate <sup>2</sup>	\$1 million per occurrence; \$2 million aggregate <sup>2</sup>
<b>Commercial Automobile</b>	\$1 million per accident	\$1 million per accident	\$1 million per accident	\$1 million per accident
<b>Umbrella or Excess Liability</b>	At least \$6 million when combined with CGL <sup>2</sup>	At least \$9 million when combined with CGL <sup>2</sup>	At least \$13 million when combined with CGL <sup>2</sup>	At least \$20 million when combined with CGL <sup>2</sup>
<b>Special Protective and Highway Liability</b>	\$1 million per occurrence; \$2 million aggregate	\$1 million per occurrence; \$2 million aggregate	\$2 million per occurrence; \$4 million aggregate	\$2 million per occurrence; \$4 million aggregate
<b>Professional Liability / Errors and Omissions</b>	Design Bid Build \$1 million per occurrence; \$1 million aggregate	Design Bid Build \$1 million per occurrence; \$1 million aggregate	Design Bid Build \$1 million per occurrence; \$1 million aggregate	Design Bid Build \$1 million per occurrence; \$1 million aggregate
	Design Build \$2 million per occurrence; \$2 million aggregate	Design Build \$2 million per occurrence; \$2 million aggregate	Design Build \$3 million per occurrence; \$3 million aggregate	Design Build \$4 million per occurrence; \$4 million aggregate
<b>Railroad Protective Liability</b>	\$2 million per occurrence; \$6 million aggregate	\$2 million per occurrence; \$6 million aggregate	\$2 million per occurrence; \$6 million aggregate	\$2 million per occurrence; \$6 million aggregate
<b>Marine Protection &amp; Indemnity</b>	\$1 million	\$1 million	\$1 million	\$1 million
<b>Pollution Liability</b>	\$1 million per occurrence; \$1 million aggregate	\$1 million per occurrence; \$1 million aggregate	\$1 million per occurrence; \$1 million aggregate	\$1 million per occurrence; \$1 million aggregate
<b>Builders' Risks</b>	Not Applicable	Not Applicable	See Note in Contract Proposal	See Note in Contract Proposal
<b>Unmanned Aircraft Systems Liability</b>	\$1 million per occurrence	\$1 million per occurrence	\$1 million per occurrence	\$1 million per occurrence

<sup>1</sup> See Special Notes in Contract Proposal for modifications to minimum insurance coverages, additional insured, and/or indemnification.



## 107-07 PROTECTION OF UNDERGROUND FACILITIES.

<sup>2</sup> Insurance afforded to additional insureds shall not be limited by contractual minimum coverage requirements when insurance limits stated in the Certificate of Insurance or Declarations exceed minimum coverage.

**D. Contractor's Risks.** The Contractor shall be responsible for obtaining any insurance it deems necessary to cover its own risks, including without limitation: (a) business interruption, such as gross earnings, extra expense, or similar coverage, (b) personal property, and/or (c) automobile physical damage and/or theft. In no event shall the Department be liable for any damage to, or loss of, personal property, business interruption, lost income, lost wages, or damage to, or loss of, an automobile, even if such loss is caused by the negligence of the Department.

### 107-07 PROTECTION OF UNDERGROUND FACILITIES.

The Contractor shall use the necessary precautions to prevent damage to pipes, conduits, and other underground facilities in accordance with 16 NYCRR 753 Protection of Underground Facilities. All costs associated with verification of the location of underground facilities shall be included in the prices bid for the respective contract items involved unless separate payment is otherwise provided for in the contract. The Contractor shall provide access to Public Service Commission personnel to examine and inspect excavation and demolition methods used within 15 feet in any direction of any underground facility.

Prior to commencement of excavation, the Contractor shall ensure that appropriate staff have completed an approved Public Service Commission "One-Call" training program on safe digging best practices in accordance with New York State General Business Law.

**A. Excavation.** Prior to non-emergency excavation for the purpose of movement or removal of earth, rock, pavement or other materials in or on the ground by use of mechanical equipment or blasting, including, but not limited to; digging, auguring, backfilling, boring, drilling, grading, plowing in, pulling in, fence post or pile driving, jack hammering, pipe jacking, pavement milling, tree root removal, sawcutting, trenching, tunneling and the installation of guiderail posts, sign posts, or underground conduit, the Contractor shall notify the One-Call system of the date and location of the proposed work. Excavation does not include the movement of earth by tools manipulated only by human or animal power, vacuum excavation, or saw cutting and jack hammering in connection with pavement restoration of a previous excavation where only the pavement is involved.

**B. Demolition.** Prior to the demolition, including; the total or partial wrecking, razing, rending, moving or removal of any structure, the Contractor shall notify the One-Call system of the date and location of the proposed work. At least 7 State work days prior to the start of demolition, the Contractor shall request a pre-demolition conference through the One-Call notification system, with all Utilities that have underground facilities at or within 15 feet of the work area. The pre-demolition conference may encompass one or more demolitions performed as a part of the contract.

**C. Notification.** The Contractor shall contact the One-Call notification system serving the area a minimum of 2 days and a maximum of 10 days, not including the date of the call, prior to work. The Contractor shall mark proposed locations of excavation, or other activity listed above, with white paint, white stakes or other indications as agreed to by the Utilities to facilitate the work of underground utility designation. If additional work is required, and staking, marking or other designation has been lost, the Contractor shall contact the One-Call notification system for subsequent designation. If an underground facility has been designated, but the Contractor cannot physically locate the facility, the Utility shall be notified, so that the designation can be verified. If an unmarked or unknown facility is discovered during the course of the Contractor's operations, the Utility or suspected Utility shall be notified. If the owner cannot be determined, the One-Call notification system shall be notified. The Contractor shall support and protect from damage all exposed underground facilities. The Contractor

shall notify the Engineer of any accidental contact with or potential damage to any underground facility, regardless of whether the damage is visible or not.

The Contractor shall provide to the Engineer, in writing, the information provided to the One-Call notification system or the Utility if it is not a One-Call notification system member, and the control number issued for each call placed to request designation of underground facilities. The Contractor shall protect and preserve designations until no longer required for safe work near the underground facility.

The Contractor shall identify and provide to all forepersons and equipment operators, a list of emergency phone numbers for each Utility having facilities within the contract limits. Supervisors shall periodically review the location of underground facilities with all workers who are subject to exposure, including new employees.

**D. Verification.** The Contractor shall verify precise location, size, depth and direction of run of an underground facility or its encasement, by hand shovel or vacuum excavation, prior to the use of powered equipment or the installation of any proposed work, including the projected line of a trenchless installation such as boring or drilling, within the tolerance zone. Powered equipment may be used to remove pavement or masonry within the tolerance zone, but only to the depth of such pavement or masonry. Powered equipment shall not be used within 4 inches of the verified location of an underground facility.

**E. Contact or Damage.** The Contractor shall, in the event of contact or damage to an underground facility, immediately notify the Utility and the Engineer, suspend excavation or demolition in the immediate vicinity of the contacted or damaged facility and take such emergency actions as are warranted to protect all endangered persons to the best of its ability.

**F. Quality Level Designations.** The quality of information gathered about underground utilities is shown on contract plans using a Quality Level Designation. The Quality Level Designation may be different within the same area for different underground utilities, depending on the accuracy and availability of information. If Quality Level Designations are not shown in the contract documents, information shall be assumed to be Quality Level D. Below are the Quality Level Designation definitions:

**1. Quality Level A.** Quality Level A is the highest degree of accuracy. The information shown on the plans has been obtained by the actual exposure (or verification of previously exposed and surveyed utility facilities) of subsurface utilities, using (typically) minimally intrusive excavation equipment to determine their precise horizontal and vertical positions, as well as their other utility facility attributes. Shown on contract plans as QLA.

**2. Quality Level B.** Quality Level B is the second highest degree of accuracy. The information shown on the plans has been obtained through the application of appropriate surface geophysical methods (i.e., underground cameras, radar, sonar, tone outs, etc.) to identify the existence and appropriate horizontal position of subsurface utility facilities. Quality Level B data are reproducible by surface geophysics at any point of their depiction. The information was surveyed to applicable tolerances and reduced onto the plans. No excavations were performed. Shown on contract plans as QLB.

**3. Quality Level C.** Quality Level C is the third highest degree of accuracy. The information shown on the plans has been obtained by surveying and plotting visible above-ground utility features and by using professional judgment in correlating this information to Quality Level D information. Shown on contract plans as QLC.

**4. *Quality Level D.*** Quality Level D is the lowest degree of accuracy. The information shown on the plans was derived solely from existing NYSDOT and/or utility company records or recollections. Shown on contract plans as QLD.

### **107-08 PROTECTION AND RESTORATION OF PROPERTY AND LANDSCAPE.**

The Contractor shall protect and preserve all public and private property, including all existing vegetation, existing landscape features, and monuments within, along, and adjacent to the highway right of way. The Contractor shall use every precaution necessary to prevent damage, injury, pollution or destruction; shall protect all trees and other woody plants which are to remain; and shall take special care to protect the natural vegetation and surroundings including all natural drainageways, waterways, wetlands, groundwater, woods and fields. The Contractor shall store materials in such a manner as to prevent leaching and soil compaction which could be injurious to water, soils, and plants.

**A. *Within the Right of Way.*** Before beginning the use of any area within the right of way, but not within the limits of disturbance shown in the contract documents, the Contractor shall obtain the written approval of the Engineer. Before beginning the use of any area within the right of way, but outside the contract limits, the Contractor shall obtain the written approval of the Department through modification of the contract limits by change order or the issuance of a highway work permit.

Approval will not be given if the area is not suitable for acceptable restoration or if serious or permanent environmental damage is foreseeable. This applies to areas such as, but not limited to: borrow areas, spoil areas, equipment and/or material storage areas, haul roads, batching areas, water points, shop areas and all similar areas.

Where a contract pay item for turf establishment is not included in the contract, disturbed earth areas within the work limits shall be graded and seeded as specified for the standard turf establishment item. The cost of this work shall be included in the prices bid for the various items in the contract and no separate payment will be made therefore.

**B. *Outside the Right of Way.*** The Contractor shall notify the Engineer of the use of any specific area outside the right of way before work in any such area is begun, except areas which have been or are being used by the Contractor as its established and permanent headquarters, equipment storage sites or to commercial borrow sources, commercial gravel pits, commercial quarries, and all similar areas. The Contractor shall provide the Engineer with a copy of any permit application or notice of intent, without attachments.

In accordance with the SPDES General Permit for Stormwater Discharges from Construction Activity, any construction activity that results in a soil disturbance of more than 1 acre on a single property will require SPDES permit coverage from the NYS Department of Environmental Conservation (NYSDEC). When SPDES permit coverage is required, the property owner, as the "Operator" must develop and implement a NYSDEC approved stormwater pollution prevention plan (SWPPP) and conduct required periodic inspections until the permit coverage is terminated.

In accordance with the Mined Land Reclamation Law, (Environmental Conservation Law Article 23, Title 27), all borrow pits and aggregate sources outside of the State right of way, where more than 1,000 tons or 750 cubic yards, whichever is less, of minerals are removed from the earth within any twelve successive calendar months, require mining permits obtained from NYSDEC. When a mining permit is required, the Contractor, in addition to complying with restoration requirements for all areas as stated below, may be required by the Engineer to meet pertinent standards contained in the law and/or 6 NYCRR Part 420 et. seq.

Where borrow pits result in the formation of ponds or low areas intermittently filled with water, the Contractor shall furnish the Engineer with a copy of its agreement with the landowner permitting the use of such areas. If such an area is within sight of any highway, the Regional Director's written approval shall be obtained prior to the removal of borrow from such a location. If such approval is not granted, material for use on the contract or for any other State contract may not be removed from the

area. If the Contractor removes material from such an area without the written approval of the Regional Director, payment will not be made for any item of work in which the material has been used. Grading plans may be required for such areas and due consideration given to the appearance of the areas if they are visible from any highway.

**C. Restoration.** All areas disturbed by the Contractor shall be restored to a pleasing and acceptable condition, particularly those areas within sight of the finished highway or any other highway. All such areas shall present a pleasing appearance to travelers on any highway. Where deemed necessary by the Engineer, the Contractor shall submit a grading plan. Grading plans shall include the sequence of operations, the erosion and sediment controls, final slopes and surface restoration details.

Because the extent of such areas and the use and treatment during construction is within the discretion of the Contractor, within the limitations and requirements outlined, no direct payment will be made for any labor, material or equipment necessary for the restoration of these areas. The cost of the work shall be included in the amount bid for other items of work. Work shall be done in general accordance with the Department's specifications for similar items of work.

The Contractor shall repair all injuries to woody plants which are to remain by approved horticultural methods; and shall scarify the compacted soil and regrade so as to restore the property to a natural condition. Where the soil over the root area of trees to be preserved has been compacted, it shall be restored by proper cultivation to a condition to permit the entrance of water and the proper aeration of roots.

In general, the restoration of disturbed areas shall include:

1. The removal of all equipment and parts, junk, rubbish, excess materials and debris of all kind;
2. Clean up as required, grading as shown on a grading plan if required; or graded so as to blend into the surrounding ground forms;
3. Scarification of yards, batch sites, haul roads, etc., to the depth necessary to support vegetation;
4. The removal of pavement or granular surfacing from, and regrading of, temporary roads or areas;
5. The repair/removal of damaged trees;
6. The fertilizing, seeding and mulching of disturbed areas;
7. Grading the slopes of excavated areas to a stable condition, but in no case shall earth cut faces be left steeper than one (1) vertical on one and one-half (1.5) horizontal. All rock cut slopes shall be scaled to remove any loose or unstable rock.

The restoration of disturbed areas shall be accomplished prior to contract final acceptance. The work of restoring Contractor's work areas (storage, batching, equipment, shop areas, etc.) may be done after contract final acceptance, but shall be completed prior to execution of the final agreement.

## 107-09 DAMAGE.

All damage, direct or indirect, of whatever nature resulting from the performance of the work or resulting to the work during its progress from whatever cause, including omissions and supervisory acts of the State, shall be borne and sustained by the Contractor, and all work shall be solely at its risk until it has been finally inspected and accepted by the State except that:

**A. Damage by Public Traffic.** Payment shall be made to the Contractor for repair or replacement of any permanent element of the highway which is completed to the stage of serving its intended function and is subsequently damaged by accident by public traffic. The Contractor must supply satisfactory evidence that such damage was caused by a public traffic accident and not by vandalism or by the Contractor's equipment. Satisfactory evidence shall generally be limited to: accident reports filed with the NYS Department of Motor Vehicles, police agencies or insurance companies; statements by reliable, unbiased eye witnesses; or identification of the vehicle involved in the

accident. Physical evidence that the damage was caused by a motor vehicle (such as tire marks or broken headlight glass) will not be sufficient unless it can be shown that the damage was not caused by the Contractor's vehicles or by vandalism. Payment for damage by public traffic will be made only after the Contractor has demonstrated to the satisfaction of the Regional Director that it had made every reasonable effort to collect the costs from the person or persons responsible for damage.

Work for which there is a item in the contract will be paid for at the unit price for that contract pay item. Work for which there is no item in the contract will be paid for at an agreed price or by means of force account. Payment will not be made for repair or replacement in any way connected with untimely failure of any portion of the highway under public traffic, and the determination regarding this matter shall be made by the Regional Director, taking into consideration the normal life and the amount of normal wear of the element involved. This provision does not relieve the Contractor of the responsibility of work zone traffic control for the contract or the responsibility of having wholly complete and acceptable work at the time of final inspection and contract acceptance.

The Contractor shall not be responsible for damages resulting from faulty designs as shown in the contract documents nor damages resulting from willful acts of Department officials or employees and nothing in this paragraph or contract shall create or give to third parties any claim or right of action against the Contractor or State beyond such as may legally exist irrespective of this paragraph or contract.

***B. Damage by Occurrence.*** The term "Occurrence" shall include only those floods, droughts, tidal waves, fires, hurricanes, earthquakes, windstorms or other storms, landslides or other catastrophes when such occurrences or conditions and effects have been proclaimed a disaster or state of emergency by the President of the United States, or the Governor of New York State, or the Federal Highway Administrator, or the chief executive of a county or city.

If damage to the work in progress is caused by an Occurrence, and to the extent that such damage has been determined by the Department to be beyond that which may be anticipated from heavy storms, and also to the extent that such damage is not reimbursable by insurance carried by the Contractor, the Contractor may apply to the State to pay or participate in the cost of repairing the damage to the work, unless such damage is caused by the Contractor's action or inaction or the Contractor's means and methods of construction.

The Contractor's written request for the State to pay or participate in the cost of rebuilding, repairing, restoring or otherwise remedying damage to the work caused by an occurrence shall be submitted to and approved by the Commissioner before performing any work other than emergency work, including emergency work necessary to provide for passage of public traffic.

At the sole discretion of the Department, the contract may be terminated and the Contractor relieved of further obligation to perform the work.

***C. Obligation to Indemnify by the Contractor.*** To the fullest extent permitted by law, the Contractor shall indemnify and save harmless the State, any municipality in which the work is being performed, and/or any public benefit corporation, railroad, or public utility whose property or facilities are affected by the work, from suits, claims, actions, damages and costs, of every name and description arising from the work under its contract during its prosecution and until the final acceptance thereof. The Contractor and any assigns, heirs, or successors in interest shall also indemnify and save harmless, to the fullest extent permitted by law, any consultant working for or on the project from suits, claims, actions, damages and costs involving personal injury and property damage arising from the Contractor's work under the contract during its prosecution and until the final acceptance thereof. The State may retain such monies from the amount due the Contractor as may be necessary to satisfy any claim for damages recovered against the State, any municipality in which the work is being performed, and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the work, or consultants working for the State on or for the project. The Contractor's obligation under this paragraph shall not be deemed waived by the failure of the State to retain the

## 107-10 MANAGING SURPLUS MATERIAL AND WASTE.

whole or any part of such monies due the Contractor, nor where such suit, action, damages and/or costs have not been resolved or determined prior to release of any monies to the Contractor under the contract, nor shall such obligation be deemed limited or discharged by the enumeration or procurement of any insurance for liability for damages imposed by law upon the Contractor, Subcontractor or the State, any municipality in which the work is being performed, and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the work, or any consultants working for the State on or for the project.

The Contractor has the obligation, at its own expense, for the defense of any action or proceeding which may be brought against the parties specified in paragraph §107-09C. *Obligation to Indemnify by the Contractor*. This obligation shall include the cost of attorneys' fees, disbursements, costs and other expenses incurred in connection with such action or proceeding.

Such obligation does not extend to those suits, actions, damages and costs of every name that arise out of the sole negligence of the State, any municipality in which the work is being performed, and/or any public benefit corporation, railroad or public utility whose property or facilities are affected by the contract work, or any consultants working for the State, their agents or employees, relative to the construction, alteration, or repair or maintenance of a building, highway or structure and appurtenances and appliances thereof including moving, demolition and excavating connected therewith.

The State reserves the right to join such action, at its sole expense, when it determines there is an issue involving a significant public interest.

**D. Prompt Response to Claims by the Public.** The Contractor's responsibility for the contract site applies to the full limits of the contract regardless of the extent or nature of contract work at a particular location. This obligation begins when the contract is awarded and continues until contract final acceptance. The Contractor shall promptly address all written damage claims of the public and, if not addressed directly, claims shall be promptly turned over to the Contractor's insurance carrier without prejudicing the validity of the claim. There should be an interval of no more than 10 work days between receipt of a written claim by the Contractor and receipt by the carrier. The Contractor and/or the Insurance Carrier are expected to investigate, determine and adjust such claims promptly and fairly with notice to the Engineer. The Engineer will monitor claims by the public. If the Contractor fails to provide satisfactory resolution through a timely claims adjustment process or denies the claim without proper cause and justification, the Department may invoke Article 8 *No Payment Due to the Contractor's Non-Compliance* of the contract agreement or utilize other remedies.

## 107-10 MANAGING SURPLUS MATERIAL AND WASTE.

The Contractor shall manage all surplus materials and waste generated in the performance of the contract in accordance with applicable federal, state, and local laws and regulations. Nothing herein is intended to prevent the Contractor from removing surplus materials or waste to appropriate off-site locations for beneficial reuse, recovery, or recycling purposes. The Contractor is encouraged to reuse, salvage or recycle materials to the maximum extent possible. Surplus or used materials generated from Department contracts that are easily recognizable, maintain their physical properties, are easily separated and transported, and have value as commodities are often recycled. These include metals (steel, iron, etc.), recycled asphalt pavement (RAP) in the form of chunks or millings, and recycled portland cement concrete aggregate (RCA). Surplus and used materials, unless identified otherwise, become the property of the Contractor.

Waste Management shall mean the collection, transportation, transfer, processing, recovery, storage, reclamation, treatment, handling and disposal of waste whether performed directly by the Contractor or others. Unless otherwise noted in the contract documents, all materials or substances that are spent, useless, worthless, or in excess to the Department, including materials generated on-site by the Department's contract supervision and inspection activities, are covered by this subsection.

Unless specifically noted in the contract documents, placement of surplus materials or spoil will not be allowed within the right of way. Payment for managing surplus material and solid waste shall be included in the various contract pay items. The absence or unavailability of disposal areas on the contract site or the refusal of a permitted solid waste management facility to accept waste will not be the basis for a dispute for additional compensation for the disposal of wastes.

**A. *Excess Soil and Rock.*** Excess soil and rock may be generated by construction activities associated with the work. Excess soil and rock may be presumed suitable for reuse onsite absent records, existing data, or knowledge/observation to the contrary. These materials may be excess because the quantity available exceeds the quantity required, or they do not have the engineering properties required for use, or they may not be of economic value in the current location, such as when the cost to transport the material approaches or exceeds its sale value. These excess materials are not considered waste when used within the contract limits.

**B. *Spoil.*** Spoil is excess soil and rock intermixed with certain other materials that is not reused within the contract limits. Spoil may include recognizable, uncontaminated concrete (including incidental pavement markings), asphalt pavement (including incidental pavement markings), brick, glass or soil. Reinforcing steel embedded in concrete is considered an incidental metal and is included within the definition of concrete.

Excess soil generated outside of New York City may be presumed to meet the criteria for Fill Material in accordance with 6 NYCRR 360.12 and may be managed as spoil absent records, existing data, or knowledge/observation to the contrary. Excess soil generated within New York City requires analytical confirmation to be performed in accordance with 6 NYCRR 360.13.

Spoil may be sold ("placed in commerce") to a consumer and the consumer is responsible for its use/placement. Spoil shall be evaluated in accordance with 6 NYCRR 360.13 for placement as fill for beneficial use. The Contractor may dispose of Spoil that qualifies as fill under 6 NYCRR 360.13 Table 2 as General Fill, Restricted Use Fill or Limited Use Fill. Spoil shall not be pulverized, shredded, or otherwise processed such that the individual waste components are rendered unrecognizable. Spoil may be placed in accordance with 6 NYCRR 363-2.1(h) at appropriate locations outside of Suffolk and Nassau counties that are exempt from solid waste permit requirements, between sunrise and sunset, at a facility that receives less than 5,000 cubic yards during its lifetime and takes no compensation, fee or other form of consideration. Within the Adirondack Park, spoil shall only be deposited in accordance with the requirements of the Adirondack Park Agency.

Spoil that cannot be disposed of in accordance with 6 NYCRR Part 360.13 due to heavy metals, chemical or petroleum contamination shall be disposed of in accordance with Section 205 *Contaminated Soil*.

Spoil disposal areas shall be established and restored in accordance with §107-08 *Protection and Restoration of Property and Landscape*.

**C. *Excess Asphalt and Concrete.*** Excess asphalt and concrete generated by construction activities associated with the work are not solid wastes when these materials are reused in accordance with the beneficial use determinations at 6 NYCRR 360.12. This includes asphalt and asphalt millings used in making hot mix asphalt or when recycled in place. Recognizable concrete, rock, and brick are not solid wastes when used as a substitute for conventional aggregate.

**D. *Tree Shrub and Plant Debris.*** Unadulterated wood, wood debris, wood chips, yard trimmings, and plant debris (trees, shrubs and other) are not solid waste when used for compost, mulch, landscaping or erosion control purposes. Such material can be used on-site or transported off-site provided the material is recycled or reused. If locations are identified within the contract documents, trees, stumps, wood chips and yard waste generated from activities within the right-of-way may be disposed of in areas within the right of way but are not subject to the provisions governing lift

placement and compaction. Otherwise, such debris shall be handled by a recycling facility per 6 NYCRR 361-3 or disposed of at other permitted solid waste management facilities.

**E. Construction and Demolition Debris.** In accordance with 6 NYCRR 360, Construction and demolition (C&D) debris is uncontaminated solid waste resulting from construction, remodeling, repair and demolition of structures, buildings and roads. C&D debris includes fill material, demolition wastes, and construction wastes. C&D debris may include excess soil and rock or spoil, and includes but is not limited to: wood (including painted, treated and coated wood and wood products), land clearing debris, plumbing fixtures, electrical wiring, electrical components containing no hazardous liquids, nonfriable asbestos, wall coverings, plaster, drywall, roofing shingles and other roof coverings and pipes or metal attached to or embedded in these waste materials.

C&D debris shall not be pulverized, shredded, or otherwise processed such that the individual waste components are rendered unrecognizable. C&D debris shall be disposed of in an permitted C&D waste management or processing facility. Nonfriable asbestos shall be disposed of at permitted C&D waste management facility. If a C&D waste facility is not available, C&D debris may be disposed of at a solid waste facility.

Transport of C&D debris in quantities greater than 10 cubic yards in a single load shall be shall be shipped by a 6 NYCRR Part 364 registered waste transporter with waste tracking documentation.

**F. Non-Hazardous Solid Waste.** Non-hazardous solid waste includes, but is not limited to: tires, office trash, garbage, roadside litter and street sweepings. The Contractor may collect and store non-hazardous solid waste on the contract site in transfer containers or other appropriate containers pending transportation to a legally permitted solid waste management facility. The Contractor shall meet the following conditions:

- Waste management activities shall be controlled to prevent odors and other nuisance conditions.
- Putrescible solid waste shall be removed when transfer containers become a nuisance, are full, or weekly, whichever comes first.
- Non-putrescible solid waste may be collected and stored on the site in a transfer or other appropriate container not longer than 45 days.

**G. Non-Hazardous Industrial Waste.** Non-hazardous industrial waste includes, but is not limited to: asbestos, pavement marking waste, chemically contaminated soil, empty drums and treated wood products. These wastes require disposal at permitted solid waste management facilities or may be used in applications that have received generic or case-specific beneficial use determinations from NYSDEC. A waste transporter permitted by NYSDEC is required for transport of over 2000 pounds of waste in a single load to a disposal facility.

**1. Asbestos.** Friable and nonfriable asbestos containing materials (ACM) shall only be handled or packaged for transport by a NYS Department of Labor licensed contractor using certified personnel. Friable asbestos waste shall only be transported by a permitted waste transporter under a waste shipment record and disposed of at a permitted waste management facility approved to accept friable asbestos. Non-friable asbestos shall be transported and disposed of as C&D debris.

**2. Pavement Marking Wastes.** Pavement marking wastes, including millings from the localized removal of only pavement markings and not surface milling, including the pavement material and debris containing the removed markings generated by cleaning and removal operations shall be disposed of as non-hazardous industrial solid waste, at a permitted solid waste management facility. Pavement marking waste should be collected by typical construction methods such as sweeping and/or vacuuming.



**3. *Contaminated Soil.*** Soil chemically contaminated with petroleum or other non-hazardous material or used in applications that have received generic or case-specific beneficial use determinations from the NYSDEC.

**4. *Empty Drums or Containers that Previously Held a Known Hazardous Material.*** In accordance with 6 NYCRR Part 371.1(h), drums and containers that have had the contents removed by common practices, have less than one inch of product residue on the bottom, and less than 3% of the original product are considered “empty” and non-hazardous, even if the material they previously contained would otherwise have been classified as a hazardous waste. This does not apply to drums or containers that held acutely hazardous wastes. Empty drums and containers shall be recycled at a registered (or exempted) material recovery facility or disposed of at a permitted waste landfill. Empty containers may be returned to the manufacturer, sent to a reconditioner or handled as scrap metal, cardboard, etc. and are exempt from waste transporter requirements when destined for such reuse.

**5. *Treated Wood Products.*** Creosote treated wood products such as railroad ties and utility poles cannot be reused (unless they remain within the control of the railroad or Utility that owns them). Treated wood products including wood treated with creosote, chromated copper arsenate (CCA) and waterborne preservatives are typically non-hazardous wastes requiring disposal at a permitted disposal facility.

**6. *Polymer Based Concrete Overlay Slurry.*** Polymer Based Concrete Slurry (i.e., Polyester Polymer Concrete (PPC), Hybrid Composite Synthetic Concrete (HCSC), etc.) generated from diamond grinding and sawcut grooving operations associated with new or historic overlay and joint header applications shall not be discharged within NYSDOT right-of-way or private / commercial property. The Contractor shall dispose of both dewatered (solidified) and excess liquid in accordance with all applicable NYSDEC non-hazardous solid and industrial waste regulations. Slurry may be temporarily stored within 10 mil polyethylene-lined containers or pits to facilitate separation of solids from liquids and to allow for air and/or absorbent-additive drying. Contractor shall consider solidified slurry waste that passes a paint filter test approved for disposal as non-hazardous solid waste and excess liquid waste meeting minimum solids percentage (less than 3 percent) for disposal as non-hazardous petroleum-affected liquid waste. The Contractor shall be responsible for temporary storage, onsite treatment, disposal facility waste characterization, transport and disposal of all generated slurry waste.

The Contractor shall submit for review and acceptance by NYSDOT a Slurry Plan that includes any necessary onsite drainage protection, proposed location(s) and containers for temporary storage of generated slurry, slurry liquid and solid transporter information, and slurry liquid and solid waste facility information. The Slurry Plan shall be submitted to NYSDOT for review and acceptance at least three weeks prior to any grinding and/or grooving activity. The cost of storing, testing, transport and disposal of any diamond grinding and saw cutting slurry shall be included in the price bid for the concrete overlay, diamond grinding, saw cut grooving and/or joint header item(s).

**H. *Recycling of Coated Steel.*** Scrap metal is not solid waste when being recycled, in accordance with 6 NYCRR 371.1. The receiving facility shall be provided notification that metal components to be recycled or reused may have lead-based paint coatings. The Contractor shall obtain written confirmation from the facility that it can accept the coated metals and will recycle/reuse the metal.

For any metal components for which the coated object could potentially meet the definition of a hazardous waste, a C7 NOTIFICATION FOR GENERATORS shall be submitted to NYSDEC per 6 NYCRR Part 371.1 prior to utilizing the recycling/reuse exemption. A copy of the notification shall be provided to the Engineer prior to shipment of the material.

**I. Hazardous Waste.** Hazardous wastes are those wastes that are specifically “listed wastes” per 6 NYCRR 371 and/or those that display hazardous wastes characteristics for ignitability, corrosivity, reactivity and/or toxicity.

**1. Generator Status.** Unless specifically noted otherwise in the contract documents, for all contacts that generate 2200 pounds or more of hazardous waste per month, the Contractor shall comply with the regulations governing a Large Quantity Generator.

*a. Conditionally Exempt Small Quantity Generator (CESQG).* Hazardous waste regulations classify a CESQG as one that generates less than 220 pounds of hazardous waste per month and stores less than 2,200 pounds of hazardous waste.

*b. Small Quantity Generator (SQG).* Hazardous waste regulations classify an SQG as one that generates between 220 and 2,200 pounds of hazardous waste per month or stores between 2,200 pounds and 13,200 pounds of hazardous waste.

*c. Large Quantity Generator (LQG).* Hazardous waste regulations classify an LQG as one that generates 2,200 pounds or more of hazardous waste per month.

**2. Hazardous Waste Handling Requirements.** The Contractor shall meet the following hazardous waste requirements:

*a.* Waste shall be properly packaged with containers labeled with the contents, date of generation, “Hazardous Waste” and the hazard reason for which they are identified as hazardous waste (i.e. flammable, toxic, etc.).

*b.* Waste shall be inspected at least weekly while stored on site.

*c.* Waste shall be shipped by a permitted waste transporter with a hazardous waste manifest and required documentation.

*d.* Waste shall be disposed of at a permitted hazardous waste treatment storage and disposal facility (TSDF).

*e.* Waste shall be removed within 90 days after generation, unless a specific contract pay item requires removal sooner.

*f.* Hazardous waste shall be stored on the site of generation until manifested and shipped for disposal.

*g.* Preparedness and prevention features and contingency planning and emergency procedures shall be developed as per 6 NYCRR 373-3.3 and 373-3.4, respectively.

*h.* Personnel must be trained in hazardous waste management procedures relevant to the positions in which they are employed (6 NYCRR Part 373-3.2(g)).

*i.* Appropriate security shall be provided for hazardous wastes while stored on site.

**J. Medical Waste.** Medical waste is material that may be contaminated by blood, body fluids or other potentially infectious substances, thus posing a significant risk of transmitting infection.

1. The Contractor shall notify the Engineer upon discovery of suspected medical waste and restrict access to the location(s) using caution tape, construction fence, or similar type barrier.

2. The Department will contact the appropriate authorities (NYSDEC, NYSDOH, Police, Fire, etc.) to determine if public resources are available to remove and dispose of medical waste.

3. If public resources are not available, the Contractor shall remove and dispose of medical waste using either appropriately trained in-house or subcontracted resources. This will be considered extra work.

## 107-11 AIR QUALITY PROTECTION.

The Contractor shall schedule and conduct activities to minimize impacts to air quality and to prevent hazardous or objectionable air quality conditions within the contract limits and in areas adjacent to or

affected by the work. The Engineer will suspend the performance of any construction activity that creates hazardous or objectionable air quality conditions until the unsatisfactory condition has been corrected.

**A. *Dust.*** The Contractor shall apply pro-active measures to prevent discharge of dust into the atmosphere that unreasonably interferes with the comfortable enjoyment of life and property or is harmful to plants or animals.

The Contractor shall minimize dust from disturbed soil surfaces or other materials that can cause off-site damage, health hazards and traffic safety problems. Dusty conditions resulting from the Contractor's operations shall be corrected at no additional cost to the State. Buffer areas of vegetation should be left where practical. Water quality shall be considered when selecting materials for dust control. An approved dust palliative may be used in conformance with applicable conditions placed on its use. A list of acceptable dust palliatives is available at:

[www.dot.ny.gov/divisions/engineering/technical-services/geotechnical-engineering-bureau/dust-palliatives](http://www.dot.ny.gov/divisions/engineering/technical-services/geotechnical-engineering-bureau/dust-palliatives) .

For areas not subject to traffic, products and materials may be applied or placed on soil surfaces to prevent airborne migration of soil particles, including:

- Vegetative Cover –provides the most practical method of dust control.
- Mulch (including rolled erosion control products) –provides a fast, effective method of dust control.
- Spray Adhesives –Generally composed of polymers in a liquid or solid form mixed with water to form an emulsion that is sprayed on the soil surface. The mixing ratios and application rates shall be in accordance with the manufacturer's recommendations for the specific soils on the site. Adhesives shall not be applied to wet soils or if there is a probability of precipitation within 48 hours.

For areas subject to traffic (traveling public or construction traffic), the Contractor may apply or place products and materials on soil surfaces to prevent airborne migration of soil particles, including:

- Water Sprinkling – The site, especially haul roads and access routes, may be sprayed with water until the surface is wet.
- Polymer Additives –Polymers mixed with water may be applied to the driving surface using mixing ratios and application rates in accordance with the manufacturer's recommendations. The Contractor shall not apply polymer if there is a probability of precipitation within 48 hours of its proposed use. Polymers must be used in accordance with the NYSDEC issued conditions for use and application instructions.
- Barriers – Woven geotextiles or stone may be placed on the driving surface to effectively reduce dust throw and particle migration on haul roads.
- Windbreak – A silt fence or similar barrier may be installed to control air currents at horizontal intervals equal to ten times the barrier height. Existing vegetation that acts as a wind barrier should be preserved as much as practical.
- Wheel Washing – On-road construction vehicle tires may be cleaned by mechanical or manual wet method prior to leaving the site.

**B. *Burning.*** Any material generated by any activity for the development, modification and construction of any transportation facility shall not be burned on the contract site. This shall include but not be limited to products of land clearing and demolition.

**C. *Prevention.*** The Contractor shall employ appropriate protection techniques and/or systems to prevent hazardous or objectionable air quality conditions, particularly when conducting drilling, cutting, grinding, abrasive blasting or similar operations that impact air quality.

**D. *Controlling Exposure to Diesel Exhaust.*** The Contractor shall exercise measures to protect Sensitive Receptors from the impacts of diesel exhaust fumes. Sensitive Receptors include, but are not

## 107-12 WATER QUALITY PROTECTION.

limited to: hospitals, schools, daycare facilities, building fresh air or ventilation intakes, elderly housing or convalescent facilities. The Contractor shall ensure that diesel powered engines are located away from building air conditioners and windows.

The goal is to minimize exposure of Sensitive Receptors in close proximity to diesel exhaust, in terms of both concentration and time. Close proximity is defined as within 50 feet of a Sensitive Receptor. Mitigation techniques include positioning stationary equipment exhausts greater than 50 feet from Sensitive Receptors, extension of equipment exhausts through the use of flexible tubing; protecting building air intakes; and the use of moving operations.

The Contractor shall limit idling time for diesel powered equipment to 3 consecutive minutes for delivery and dump trucks and all other diesel powered equipment except as follows:

- When a vehicle is forced to remain motionless because of traffic conditions or mechanical difficulties over which the operator has no control.
- When it is necessary to operate a loading, unloading or processing device.
- When the outdoor temperature is less than 27°F.
- When the vehicle or engine is being repaired.

Whenever possible and practicable, the Contractor shall locate staging areas for diesel powered vehicles waiting to load or unload materials where diesel emissions will have the least impact on Sensitive Receptors and the general public.

### 107-12 WATER QUALITY PROTECTION.

Water quality protection is a joint responsibility of the Department, as the owner and the holder of environmental permits, and the Contractor, acting as an agent for the Department. The Contractor shall protect all water resources within the contract limits and on lands adjacent to or affected by the work, and take measures to maintain water quality of receiving water bodies.

The Contractor shall schedule and conduct its work to minimize soil erosion, not cause or contribute to a violation of water quality standards and prevent sedimentation on lands adjacent to or affected by the work. Construction of temporary and permanent soil erosion and sediment control measures, temporary and permanent soil stabilization, construction of drainage facilities and performance of other contract work which will contribute to the control of erosion and sedimentation shall be carried out in conjunction with related construction operations. The area of disturbance at any one time by construction operations shall be kept to a minimum and shall not exceed the limits established in the contract documents or applicable permits.

Prior to the start of related construction, the Contractor shall review the erosion and sediment control plan included in the contract documents, and if necessitated by the Contractor's operations, modify the plan for compatibility with the Contractor's intended sequence of construction operations, to include, but not limited to: construction phases; contract milestones, installation of control measures, clearing and grubbing operations, earthwork, etc. The Contractor's modified erosion and sediment control plan shall be submitted to the Engineer for approval, along with a progress schedule for accomplishment of temporary and permanent erosion and sediment control work in accordance with §108-01 *Progress Schedule*.

Prior to the start of related construction, the Contractor shall submit for approval a proposed plan of erosion and sediment control and water pollution control on material storage areas, haul roads and borrow pits and a plan for stabilization, control and disposal of surplus excavated materials within the right of way. The Contractor shall submit for approval the names of individuals who will be inspecting control measures, a description of their qualifications and documentation of required training in erosion and sediment control. The Contractor's erosion and sediment control plan shall be prepared in accordance with Department specifications and the *New York State Standards and Specifications for Erosion and Sediment Control*. No related work shall be started until the erosion and sediment control plans and progress schedules have been approved by the Engineer. As conditions change during construction or work is not progressed in accordance with the schedule, the Contractor shall regularly submit a progress schedule update in accordance with §108-01 *Progress Schedule* and an updated erosion and sediment control plan, as necessary, for approval by the Engineer.

The Contractor's operations shall be carried out in accordance with the approved erosion and sediment control plans, progress schedule, contract documents and permits. The Contractor shall comply with the following:

**A. *Permits.*** All applicable statutes, regulations, permits and approvals of the NYSDEC, USACE, and/or other water quality protection agencies and fish and wildlife agencies shall be complied with in the performance of the contract. Care shall be taken so as not to cause turbidity that will result in a visible contrast to the natural conditions of a waterway or impoundment, cause sedimentation, discharge pollutants or impair the waters for their best usages.

**B. *Borrow or Spoil Areas.*** Erosion and sediment control of borrow areas, spoil areas and construction roads shall be conducted both during and after completion of the work, to minimize soil erosion and not cause or contribute to a violation of water quality standards and prevent sedimentation on lands adjacent to or affected by the work.

**C. *Fording.*** Fording of waterways may require permit from NYSDEC, USACE, and other regulatory agencies, and will not normally be allowed. Temporary bridges or other structures may be used where a waterway crossing is necessary, but may also require permits from NYSDEC, USACE, and other regulatory agencies. Unless otherwise approved in writing by the Engineer, the Contractor shall not ford or operate mechanized equipment in waterways.

**D. *Work Areas Within and Adjacent to Waterways.*** Work areas within or adjacent to waterways, wetlands or impoundments may require authorization or a permit. Any method, structure, or work area proposed by the Contractor which may impede flood flows whether within or adjacent to the waterway, that is not included in the environmental permitting that has been obtained by the Department, shall be the responsibility of the Contractor. When work areas (including but not limited to staging areas, borrow areas, spoil areas, or gravel pits) are located within or adjacent to waterways, wetlands or impoundments, such work areas shall be isolated from the waterway, wetland or impoundment to prevent entry of sediment and shall not risk contravening water quality standards. Care shall be taken during both the construction and removal of barriers so as not to cause turbidity or sedimentation.

**E. *Removal of Temporary Obstructions.*** All waterways shall be cleared as soon as practicable of false work, temporary causeways, piling, debris or other obstructions placed during construction operations and which are not a part of the finished work.

**F. *Maintenance.*** Ditches and drainage structures which are filled or contain debris, or are partly or wholly inoperative, shall be cleaned and made operative before the Contractor stops work for each day, and shall be maintained in a satisfactory condition for the duration of the contract. All erosion and sediment control measures which have been displaced, or are partly or wholly inoperative, shall be repaired within 24 hours of discovery or notification to the Contractor, unless repairs are required sooner by the contract documents or by conditions that may cause a violation or nuisance.

**G. *Water Discharges.*** Water containing sediment from aggregate washing, pump discharges or other operations shall be treated by filtration, settling basin or other means sufficient to prevent turbidity or sedimentation of receiving waterways. Turbid wash water or pump discharges shall not be allowed to enter waterways or impoundments.

**H. *Control of Wet Concrete Waste.*** *No wet or fresh concrete shall be allowed to escape directly or indirectly into* any waterway or drainage structure. Washings from concrete trucks, mixers or other devices shall not be allowed either directly or indirectly onto the ground or into any waterbody or

## 107-13 POLLUTION PREVENTION AND SPILL RESPONSE

drainage structure. All concrete washout facilities shall be designed and constructed in accordance with the *New York State Standards and Specifications for Erosion and Sediment Control*.

The Contractor shall ensure that water quality controls are functioning in an effective manner and address all failures or other problems in a pro-active manner, immediately. If a situation comes to the Engineer's attention, the Engineer will inform the Contractor of unsatisfactory construction procedures and operations insofar as water quality management are concerned. The Engineer will also review the Contractor's compliance with state and federal permit conditions as they relate to water quality. If the unsatisfactory construction procedures and operations are not corrected in a timely manner, the Engineer will suspend the performance of any or all operations in accordance with §105-01 *Engineer's Authority* until the unsatisfactory condition has been corrected.

### 107-13 POLLUTION PREVENTION AND SPILL RESPONSE

**A. Discharge of Pollutants.** The Contractor shall implement appropriate spill and control procedures for the prevention of any discharge of fuels, chemicals, raw sewage or any other hazardous or harmful material or product to the environment. Such procedures shall include, but not be limited to, proper construction equipment maintenance practices, establishment of fuel/hazardous material handling areas, use of appropriate containment/containers and making available appropriate spill response resources. The Contractor shall promptly notify the Engineer of any petroleum or other hazardous material release to the environment. The Contractor shall also promptly notify the Engineer and stop work immediately if any signs of contamination and/or underground impediments or storage tanks, not identified in the contract documents, are discovered during earthwork activities. Signs of contamination include, but are not limited to, odor, oily sheen, sludge, soil staining and unusual fill material. Upon Contractor notification, the Engineer will immediately notify the Construction Environmental Coordinator.

**B. Fuel Storage.** Petroleum stored onsite in tanks and containers shall comply with EPA Spill Prevention Control and Countermeasures (SPCC) requirements in 40 CFR 112 and NYSDEC Petroleum Bulk Storage (PBS) requirements in 6 NYCRR 613. An SPCC plan is required for any site where onsite petroleum/oil storage in tanks and containers of 55 gallons or more will exceed 1,320 gallons in combined capacity. PBS registration is required for any project where onsite petroleum storage in stationary tanks or drums equal to or greater than 55 gallons exceeds 1,100 gallons in combined capacity.

**C. Pesticide Application.** The Contractor shall also notify the Engineer and provide product information and intended application method for any pesticide (herbicide, insecticide, rodenticide, etc.) use within the project limits. Pesticides used shall comply with the materials requirements described in §713.13 *Pesticides*. Application shall be performed by an appropriate licensed individual in accordance with the product label and applicable requirements of NYS Conservation Law Article 33 and 6 NYCRR 325. Additional pesticide permits may be required for aquatic applications and pesticide applications within the New York City Watershed.

### 107-14 VACANT

### 107-15 USE OF UNITED STATES-FLAG VESSELS

In accordance with the Cargo Preference Act and 46 CFR 381, the requirements below apply to material, equipment, or commodities that are acquired for a specific Federal-aid construction contract and transported on ocean vessels (or transported across the Great Lakes). The requirements are not applicable to goods or materials that come into inventories independent of a specific Federal-aid construction contract.

## 107-16 ENSURING PAY EQUITY BY STATE CONTRACTORS

**A.** The Contractor shall utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to the contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

**B.** The Contractor shall furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in Paragraph A to both the Contracting Officer (through the prime Contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

**C.** The Contractor shall insert the substance of the provisions of this section in all subcontracts issued pursuant to the contract.

### **107-16 ENSURING PAY EQUITY BY STATE CONTRACTORS**

In accordance with Executive Order 162, the Contractor shall provide to the Department, on a monthly basis, detailed workforce utilization reports of the Contractor and each subcontractor that include, in addition to equal employment opportunity information, the job title and salary of each employee directly performing work on a State contract.

If the Contractor cannot identify the individuals working directly on a State contract, then the Contractor shall provide such information of each employee in the Contractor's and each subcontractor's entire workforce.

The reporting shall be defined as each calendar month, beginning and ending on the first and last day of each month, respectively. The reporting requirement shall begin on the effective date of the contract and continue for the duration of the contract term. Reports shall be submitted within 15 calendar days from the end of each reporting period. This provision is in effect for the reporting period beginning on the effective date of the contract.

This provision shall not relieve the Contractor's responsibility to submit payroll certification as elsewhere provided. If information within the Contractor's payroll certification is sufficient to fulfill the requirements of Executive Order 162, additional information shall not be required.

Detailed workforce utilization reports, as required above, shall be submitted in such form, in such manner, and in such timeframe as shall be required by the Department.

The Contractor shall include this provision in every subcontract so that such provision shall be binding upon each subcontractor.

## **SECTION 108 - PROSECUTION AND PROGRESS**

(Last Revised September, 2025)

### **108-01 PROGRESS SCHEDULE.**

The purpose of a progress schedule is to ensure adequate planning and execution of the work and to evaluate the progress of the work. The Contractor's progress schedule, updates, revisions and reports will be an integral part of the Department's management of the capital program. The Contractor's schedules will be used by the Department to monitor progress, plan the level of effort by its own work forces and consultants, and as a critical decision making tool. Accordingly, the Contractor shall ensure that its progress schedule submissions are both accurate and timely.

Approval of the progress schedule shall not be construed to imply approval of any particular method or sequence of construction or to relieve the Contractor of providing sufficient materials, equipment and

labor to guarantee completion of the contract in accordance with the contract documents. Approval shall not be construed to modify or amend the contract agreement or the completion date therein.

All costs to create and update the progress schedule shall be solely the Contractor's obligation and will be at no additional cost to the State unless specifically provided for in other contract provisions.

If the work falls behind the progress schedule, the Contractor shall take such actions as necessary to improve its progress. If the Contractor is behind schedule any month, the Contractor shall indicate what measures it will take in the next thirty (30) days to put the work back on schedule so as to meet the contract completion date specified in the contract. In preparing the revised schedule, the Contractor shall consider increasing its work force, construction plant and equipment, the number of work shifts, etc.

**A. *Contracts Without Type 2 CPM Schedule Requirements.*** The following requirements shall apply to all contracts that do not contain a requirement for a CPM Schedule.

**1. *Baseline Progress Schedule.*** At the Preconstruction Meeting, the Contractor shall prepare and submit a complete baseline progress schedule to the Engineer for approval, showing the significant on-site construction activities with planned start and completion dates, including activities of the Contractor, subcontractors, fabricators, and suppliers to ensure adequate planning and communication.

Activities shall include, the following items, as applicable: (a) milestone events; (b) seasonal weather limitations (c) the procurement and fabrication of materials, plant and equipment; (d) the order in which the Contractor proposes to complete activities; (e) temporary structures or systems; (f) major construction or work zone traffic control stages; (g) activities assigned to Utilities, railroads and other parties; (h) activities assigned to the Department and other State or municipal entities; (i) sampling and testing of materials; (j) settlement, surcharge or cure periods; (k) punch list work, and (l) inspection activities assigned to the Department, including final inspection.

Any graphical representations shall be shown at a suitable scale to be legible and readable.

**2. *Progress Schedule Updates and Revisions.*** On a monthly basis the Contractor shall update and revise the schedule to reflect any major changes in the work, completion time, or both, and submit the updated and revised schedule to the Engineer. The modification of a date, either planned or actual, is considered an update. The modification of progress schedule logic in any manner is considered a revision.

When requested by the Regional Construction Engineer, the Contractor shall furnish weekly progress schedule updates and revisions indicating number of personnel, equipment type, and location and nature of the work to be performed.

The Engineer will acknowledge in writing within 7 days of receipt that the submittals are accepted, or that revisions are needed. If the proposed progress schedule is not acceptable, the Engineer may direct the Contractor to submit a new schedule. The Department may request that meetings be held by the Contractor at least on a monthly basis and be attended by the Engineer who will monitor the Contractor's progress and performance.

**3. *Failure to Submit Progress Schedule.*** If the Contractor fails to submit a progress schedule to a degree that the Regional Construction Engineer deems such failure to adversely affect the management and/or administration of the contract,, the Engineer may withhold approval of contract payments pursuant to Article 8 *No Payment on Contractor's Non-Compliance* of the contract agreement until such time as the Contractor submits the required progress schedule.

**B. *Contracts With Type 2 CPM Schedule Requirements.*** The Contractors progress schedule will be used to establish a standard methodology for time adjustment analysis, based on the principles of the Critical Path Method of scheduling, to identify work items and paths that are critical to the timely



completion of the work, to identify upcoming activities on the critical path(s), to evaluate the best course of action for recovering schedule delays, to facilitate efforts to complete the work in a timely manner, and to evaluate resource requirements of the Contractor and the Department.

The Contractors progress schedule will be used as the basis for analyzing the time impact of changes in the work and unanticipated delays on any contract milestone dates; to resolve contract disputes concerning time; and as the basis for recommendations for changes to the contract completion date.

Events, actions, and progress that cause delays or gains to the progress schedule will be analyzed solely by the Contemporaneous Period Analysis method.

**1. Baseline Progress Schedule.** The Contractor shall prepare and submit a complete baseline progress schedule to the Engineer for approval, showing all of the on-site construction activities with durations and seasonal or other limitations, including activities of the Contractor, subcontractors, fabricators, and suppliers to ensure adequate planning and communication. The number and details of the activities will be dependent upon the nature, size, and complexity of the work.

Activities shall include, but shall not be limited to: (a) milestone events; (b) a list of activities on the critical path; (c) the procurement/submittal process including shop drawings and sample submittals; (d) the fabrication and delivery of key elements and those with long lead times; (e) temporary structures or systems; (f) falsework and shoring; (g) major construction or work zone traffic control stages; (h) activities assigned to Utilities, railroads and other parties; (i) activities assigned to the Department and other State or municipal entities; (j) sampling and testing of materials; (k) settlement, surcharge or cure periods; (l) punch list work, and (m) inspection activities assigned to the Department, including final inspection.

**2. Progress Schedule Updates and Revisions.** The Contractor shall update and revise the progress schedule to reflect changes in the work, completion time, or both, and submit the updated and revised schedule to the Engineer. The modification of a date, either planned or actual, is considered an update. The modification of progress schedule logic in any manner is considered a revision.

The Engineer will acknowledge in writing within 7 days of receipt that the submittals are accepted, or that revisions are needed. If the proposed schedule is not acceptable, the Engineer may direct the Contractor to submit a new schedule. The Department may request that meetings be held by the Contractor at least on a monthly basis and be attended by the Engineer who will monitor the Contractor's progress and performance.

**3. Documentation of Delay.** The Contractor shall document delays and shall provide detailed information including but not limited to; the events that caused the delay, the party or parties responsible for the delay, activities in the current progress schedule affected by the events, and the magnitude of the delay using the current progress schedule update.

The Contractor shall maintain a contemporaneous tally of all delay days, those it contends are attributable to the State, and those it contends attributable to the Contractor. The Contractor shall submit the tally of delay days to the Engineer on a monthly basis. The Engineer will also maintain a contemporaneous tally of delay days, in order to facilitate agreement on the status and responsibility for delays, or to limit and document disagreements between the Contractor and the Department.

If the Contractor alleges that a time related delay has or is occurring that impacts the Critical Path, the Contractor shall submit a monthly progress schedule update and revision with the next progress schedule submission, and a narrative Time Impact Analysis.

The Department, as necessary, will either request in writing that the Contractor submit an Application for Extension of Completion Date and/or request in writing that the Contractor

## 108-02 COMPLETION DATE.

accelerate the work impacted, and submit a schedule revision which demonstrates how the acceleration will recover the necessary time. Upon submission of a progress schedule update and revision containing a Time Impact Analysis, the Department will evaluate the merit of the requested time extension.

The Engineer will review the documentation of delay within 14 calendar days of receipt and will provide a written response to the Contractor regarding deficiencies of the submission, required additional information and the Department's technical review and findings to date.

**4. Failure to Submit Progress Schedule.** If the Contractor fails to submit a progress schedule to a degree that the Regional Construction Engineer deems such failure to adversely affect the management and/or administration of the contract, the Engineer may withhold approval of contract payments pursuant to Article 8 *No Payment on Contractor's Non-Compliance* of the contract agreement until such time as the Contractor submits the required progress schedule.

If the Contractor fails to submit the required progress schedule updates and revisions, the Contractor waives its rights to adjustments of time and related compensation for delays that accrue during the period in which the progress schedule has not been submitted in accordance with the detailed CPM scheduling requirements. The Department will have no liability for any subsequent Contractor time related disputes which occurred during the period of time in which the Contractor failed to submit monthly progress schedule updates and revisions in a timely manner.

## 108-02 COMPLETION DATE.

The Contractor shall employ and supply a sufficient force of workers, materials and equipment and shall progress the work with such diligence so as to ensure completion of the work prior to the contract completion date.

In accordance with Article 4 *Date of Completion* of the contract agreement, the Contractor shall complete all work to be performed under the contract within the time stated in the contract agreement or within such extended time for completion as may be granted by the Commissioner. If the Contractor desires an extension of time, an *Application for Extension of Completion Date* shall be submitted to the Engineer sufficiently early for the Engineer to make a recommendation and forward the application so that it may be filed with the Regional Director at least 15 days prior to the contract completion date.

The Contractor may propose a projected early completion date on any progress schedule submission. If the Contractor desires reimbursement for delay damages caused by the Department in accordance with §109-05D *Time Related Compensation* related to an early completion date, the Contractor shall obtain approval of the change to the completion date via a separate Value Engineering Change Proposal (VECP) in accordance with §104-10 *Value Engineering Change Proposal*.

If the VECP is approved by the Department, the contract completion date will be revised to the proposed early completion date, via Change Order.

If the Contractor fails to complete all contract work by the revised contract completion date, the Department will assess Engineering Charges, but not Liquidated Damages, for the work that remains uncompleted, for the period after the revised contract completion date to the original contract completion date, in accordance with §108-03 *Failure to Complete Work on Time*.

If the Contractor fails to complete all contract work by the original contract completion date, the Department will assess Engineering Charges for the work that remains uncompleted, and Liquidated Damages, for each calendar day from the original contract completion date to the final date of completion of the work, in accordance with §108-03 *Failure to Complete Work on Time*.

## 108-03 FAILURE TO COMPLETE WORK ON TIME.

For each calendar day, or any portion thereof, that any work remains uncompleted after the contract completion date specified in the contract agreement, Liquidated Damages and/or Engineering Charges from the contract completion date to the final date of completion of the work will be assessed against the

Contractor. In addition, for each calendar day, or any portion thereof, that a Work Order remains uncompleted after the time frame specified in the contract documents, Liquidated Damages and/or Engineering Charges, from the date the Work Order should have been completed to the date of final completion of the Work Order, will be assessed against the Contractor.

Reasonable time necessary for reviews of shop drawings by the State or its agents, for changes or additions to the work to meet field conditions which do not significantly affect the scheduled completion of the contract, delays incurred by seasonal and weather limitations, localized labor actions and shortages of supplies or materials, and other situations which should be anticipated are neither compensatory nor eligible for extensions of time without the assessment of Liquidated Damages and Engineering Charges, except as provided for under §108-04 *Delay Provisions*.

Before assessing Liquidated Damages and/or Engineering Charges, the Department will give due consideration to factors attributing to such delay due to extenuating circumstances beyond the control of the Contractor limited to the following:

1. The work or the presence on the contract site of any third party, including but not limited to that of other contractors or personnel employed by the State, by other public bodies, by railroad, transportation or utility companies or corporations, or by private enterprises, or any delay in progressing such work by any third party except as indicated or disclosed in the contract documents or ordinarily encountered or generally recognized as inherent in the work.
2. The existence of any facility or appurtenance owned, operated, or maintained by any third party, except as indicated or disclosed in the contract documents or ordinarily encountered or generally recognized as inherent in the work.
3. The act, or failure to act, of any public or governmental body, railroad, transportation or utility companies or corporations, including, but not limited to, approvals, permits, restrictions, regulations or ordinances not attributable to a Contractor's submission, action or inaction or Contractor's means and methods of construction.
4. Restraining orders, injunctions, or judgments issued by a court not caused by a Contractor's submission, action or inaction or Contractor's means and methods of construction.
5. Any industry-wide labor boycotts, strikes, picketing or similar situations, as differentiated from jurisdictional disputes or labor actions affecting a single or small group of contractors or suppliers.
6. Any industry-wide shortages of supplies or materials required by the contract work, as differentiated from delays in delivery by a specific or small group of suppliers.
7. Unusually severe storms of extended duration or impact, other than heavy storms or climatic conditions which could generally be anticipated by the bidders, as well as floods, droughts, tidal waves, fires, hurricanes, earthquakes, landslides, or other catastrophes.
8. Decisions by the Department to open certain sections of the contract to traffic before the entire work is completed.
9. Significant changes in contract quantities, major extra contract work, delays in the review or issuance of change orders or field change sheets, or delays beyond the established time periods for review and approval for shop drawings, which significantly affect the overall completion of the contract.
10. Failure of the State to provide individual rights-of-way parcels for an extended period of time beyond that indicated by the contract if such unavailability, as determined by the Commissioner, significantly affects the scheduled completion of the contract.
11. Award of the contract by the State more than 45 days beyond the letting date.
12. Situations covered by §104-03 *Differing Site Conditions*, §104-04 *Significant Changes in the Character of Work* and §104-05 *Suspensions of Work Directed by the Engineer*.

**A. *Engineering Charges.*** Engineering Charges include all appropriate engineering and inspection expenses incurred by the State, its consultants and inspection agencies, and by railroad companies.

Engineering Charges will be assessed in cases where the work has been unduly delayed by the Contractor because of unwarranted reasons, inefficient operation, or for any other reason for which the Department determines the Contractor to be responsible.

**B. Liquidated Damages.** Liquidated damages for contract work, except Work Orders, will be in the amount per calendar day specified in Table 108-1 *Schedule of Liquidated Damages*, in addition to Engineering Charges as provided for in §108-03A. *Engineering Charges*. Liquidated Damages for special or very large contracts may be specified in the contract proposal. The Commissioner may waive such portions of the liquidated damages as may accrue if the work is deemed to be in such condition as to be safe and convenient for use by the traveling public.

When specified in the contract documents, Liquidated Damages may also be assessed for each calendar day, or portion thereof, for failure to complete certain portions of work or for failure to comply with requirements shown in the contract documents, including in-stream or in-water work or restriction dates specified by environmental regulatory agencies. Liquidated Damages will be assessed not as a penalty, but as liquidated damages; provided however that due account shall be taken of any adjustment of the contract time for completion of the work as provided elsewhere in the specifications.

Permitting the Contractor to continue and finish the work or any part of it after the time fixed for its completion or after the date to which the time for completion may have been extended, will in no way constitute a waiver on the part of the State of any of its rights under the contract.

The Contractor is responsible and liable for said liquidated damages even in the event that the Contractor abandons the performance of the contract or the Contractor's employment is terminated pursuant to the provisions of this contract.

<b>TABLE 108-1 SCHEDULE OF LIQUIDATED DAMAGES</b>		
<b>Original Total Contract Bid Price</b>		<b>Liquidated Damages per Calendar Day</b>
<b>From More Than</b>	<b>To and Including</b>	
<b>\$0</b>	<b>\$2,000,000</b>	<b>\$2,500</b>
<b>\$2,000,000</b>	<b>\$5,000,000</b>	<b>\$3,250</b>
<b>\$5,000,000</b>	<b>\$10,000,000</b>	<b>\$4,000</b>
<b>\$10,000,000</b>	<b>\$20,000,000</b>	<b>\$6,500</b>
<b>\$20,000,000</b>	<b>-</b>	<b>\$11,000</b>

Liquidated Damages shall apply to Work Orders when the required time frame(s) for completion of the Work Orders is included in the contract documents. If the Contractor fails to complete the Work Order within the time frame specified in the contract documents, Liquidated Damages will be assessed in accordance with Table 108-2 *Schedule of Liquidated Damages – Work Orders*. No Liquidated Damages will be assessed for Work Orders where the time frame for completion of the Work Orders has not been included in the contract documents. If a Contractor fails to start or complete a Work Order, liquidated damages will be assessed based on the estimated value of the Work Order.

TABLE 108-2 SCHEDULE OF LIQUIDATED DAMAGES – WORK ORDERS		
Final Total Work Order Cost		Liquidated Damages per Calendar Day
From More Than	To and Including	
\$0	\$125,000	\$ 500
\$125,000	\$250,000	\$1,000
\$250,000	\$500,000	\$1,500
\$500,000	\$1,000,000	\$2,000
\$1,000,000	\$2,000,000	\$2,500
\$2,000,000	\$4,000,000	\$3,000
\$4,000,000	-	\$3,500

**108-04 DELAY PROVISIONS.**

**A. *Compensable Delays.*** The Department may provide monetary compensation for delays and interference in certain defined instances. The Contractor will only be eligible for extra compensation caused by delay or interference affecting the performance or the scheduling of contract work for those instances arising out of:

1. §104-03 *Differing Site Conditions*;
2. §104-04 *Significant Changes in the Character of the Work*;
3. §104-05 *Suspensions of Work Directed by the Engineer*; and
4. Situations not referenced in this paragraph and which are not within the contemplation of the parties at the time of entering into the contract.

These aforementioned provisions may also form the basis for extra work compensation pursuant to §105-14 *Disputed Work and Dispute Resolution* and §109-05 *Extra Work and Time Related Compensation*. Failure of the Contractor to adequately progress completion of the work will be considered in determining whether the aforementioned instances are the primary causes of delay. In all such instances, for any requests made under this subsection, the Contractor shall keep detailed written records of the costs in accordance with §104-06 *Notice and Recordkeeping*. Any dispute shall be promptly submitted to the Engineer in writing, pursuant to §105-14 *Disputed Work and Dispute Resolution*.

**B. *Non-Compensable Delays.*** The Contractor agrees to make no monetary request for, and has included in its bid prices for the various items of the contract, any extra/additional costs attributable to any delays, inefficiencies or interferences in the performance of the contract caused by or attributable to the items set forth below. The Contractor shall be compensated solely by an extension of time, with or without engineering charges as appropriate, to complete the performance of the work in accordance with the provisions of §108-02 *Completion Date*.

1. The work, or the presence on the contract site, of any third party, including but not limited to personnel or other contractors employed by the State, by other public bodies, by railroad, transportation or utility companies or corporations, or by private enterprises.
2. Any delay in progressing work by any third party as indicated or disclosed in the contract documents or ordinarily encountered or generally recognized as inherent in the work.
3. The existence of any facility or appurtenance owned, operated, or maintained by any third party, as indicated or disclosed in the contract documents or ordinarily encountered or generally recognized as inherent in the work.

## 108-05 SUBLETTING OR ASSIGNING THE CONTRACT.

4. The act, or failure to act, of any other public or governmental body, railroad, transportation or utility companies or corporations, including, but not limited to, approvals, permits, restrictions, regulations or ordinances attributable to a Contractor's submission, action or inaction or Contractor's means and method of construction.
5. Restraining orders, injunctions, or judgments issued by a court which were caused by a Contractor's submission, action or inaction or Contractor's means and method of construction.
6. Any labor boycott, strike, picketing or similar situation.
7. Any shortages of supplies of materials required by the contract work.
8. Climatic conditions, storms, floods, droughts, tidal waves, fires, hurricanes, earthquakes, landslides, or other catastrophes. However, payment may be made for repairing damage to the work caused by an "occurrence" as provided in §107-09 *Damage*.
9. Extra work which does not significantly affect the overall completion of the contract, delays in the review or issuance of change orders, or field change sheets or delays within the established time periods for review and approval for shop drawings.
10. Any situation which was within the contemplation of the parties at the time of entering into the contract.
11. Award of the contract by the State more than forty-five (45) days beyond the letting date.

### 108-05 SUBLETTING OR ASSIGNING THE CONTRACT.

The Contractor shall perform, with its own organization, contract work amounting to not less than 30 percent of the total contract bid price. The Contractor's own organization shall include only workers employed and paid directly by the Contractor and equipment owned or rented by it. The amount subcontracted will be computed based on contract pay item bid prices, except where a Subcontractor is identified as performing less than the full scope of an item.

The Contractor is responsible for all work performed by Subcontractors, Trucking Firms, Manufacturers, Fabricators, Material Suppliers, Services and any other parties in the performance of the contract, regardless of whether Department approval has been obtained. The Contractor shall not enter into any subcontract with any person or firm listed as debarred from government contracts by the New York State Department of Labor or Workers Compensation Board on <https://apps.labor.ny.gov/EDList/searchPage.do> or by the Federal Government, General Services Administration on <https://www.sam.gov/SAM/>. Work shall be performed only by Subcontractors and Trucking Firms specifically approved by the Regional Construction Engineer or designee, and work shall not begin prior to approval by the Department. Work shall not be assigned by a Subcontractor to a lower tier Subcontractor. Work shall not be assigned by a trucking broker or by a Trucking Firm to a lower tier trucking firm. Work by a non-approved Subcontractor, Trucking Firm, or DBE/MBE/WBE/SDVOB will be suspended by the Engineer and payment for work by a non-approved Subcontractor, Trucking Firm, or DBE/MBE/WBE/SDVOB may be withheld.

**A. Subcontract Provisions.** A subcontract is any agreement between the Contractor and another firm, entity, person, or party for any part of the work in connection with the Contract. All Subcontracts shall be in writing and shall contain all pertinent provisions of the contract, including Federal and State Laws and Regulations. Upon request, the Contractor shall provide a copy of any requested written subcontract. All Subcontractors, Trucking Firms and Professional Services shall maintain insurance coverages as required by §107-06 *Insurance*.

All subcontracts, supply or equipment contracts in excess of \$10,000, shall incorporate the provisions of §102-11 *Equal Employment Opportunity Requirements*. The provisions may be incorporated by reference.

All subcontracts shall incorporate the provisions of §105-21 *Civil Rights Monitoring and Reporting*. The provisions may be incorporated by reference.

All subcontracts shall incorporate the provisions of §107-16 *Ensuring Pay Equity by State Contractors*. The provisions may be incorporated by reference.

All subcontracts shall incorporate the provisions of §108-05G. *Title VI Assurance*, including supply and equipment contracts, unless exempt by 49 CFR 21, or directives issued pursuant thereto. The provisions may be incorporated by reference.

All subcontracts, supply or equipment contracts shall incorporate the provisions of §105-14 *Disputed Work and Dispute Resolution*. The provisions may be incorporated by reference. If such subcontracts or supply or equipment contracts do not have similar provisions, then the State payments to the Contractor for such subcontract or supply or equipment work shall be limited to only that which are provided by the provisions of §105-14 *Disputed Work and Dispute Resolution* as if it were in effect for such subcontract or supply or equipment contract.

All Subcontractors and Trucking Firms working within the contract limits or at a facility dedicated to the contract shall have a written Project Safety and Health Plan in accordance with §107-05 *Safety and Health Requirements* or shall have a copy of the Contractor's written Project Safety and Health Plan and shall confirm by written agreement with the Contractor that all construction operations are adequately addressed. If a Subcontractor or Trucking Firm are following their own written Health and Safety Plan, the Contractor shall have a copy and shall ensure that the Subcontractor's and Trucking Firm's plans are not in conflict with the Contractor's written Safety and Health Plan.

All Subcontractors shall have a written policy addressing sexual harassment prevention in the workplace and provide annual sexual harassment prevention training to all of its employees. Such policy shall, at a minimum, meet the requirements of Section 201-G of the New York State Labor Law.

For Federal-Aid contracts, the Contractor shall insert Form FHWA-1273 *Required Contract Provisions Federal-Aid Construction Contracts*, into all subcontracts (excluding purchase orders, rental agreements and other agreements for supplies or services). The Contractor (or Subcontractor) shall incorporate by reference the applicable requirements of Form FHWA-1273 for work done under any purchase order, rental agreement, or agreement for other services.

For Federal-Aid contracts, the Contractor shall directly incorporate the provisions of §108-05F. *DBE Program Assurance* in every subcontract. The provisions may not be incorporated by reference.

For Federal-Aid contracts, the Contractor shall directly incorporate the provisions of §107-15 *Use of United States-Flag Vessels* in every subcontract. The provisions may not be incorporated by reference

## **B. Subcontractors.**

1. Subcontractor approval is required for:
  - Firms performing on-site work as defined in the contract documents.
  - Firms performing the on-site maintenance of previously furnished and installed products.
  - Firms delivering materials to the contract site and incorporating them directly into the work by the firm's on-site work force.
2. Subcontractors do not include the following:
  - Manufacturers, Fabricators and Material Suppliers who do not incorporate supplies or materials directly into the contract work.
  - Work Services and Professional Services not accounted through labor, equipment and materials.

- On-Site Trucking, Off-Site Trucking, Owner/Operator Trucking and Material Delivery. (For Trucking Firm approval, see §108-05D *Trucking Firms*).

**3. Subcontractor Approval.** Prior to approval of a Subcontractor by the Department, the Subcontractor shall file and have approved a completed Form CCA-2 *New York State Vendor Responsibility Questionnaire – For Profit Construction* with the Office of Contract Management.

If a Contractor is not SSPC certified, Subcontractors performing structural paint removal operations and painting work shall be SSPC certified or alternatively certified by the Department in accordance with §105-03 *Methods and Equipment*.

The Contractor shall submit Subcontractor approval requests to the Regional Construction Group for approval by the Regional Construction Engineer or designee. For each Subcontractor approval request, the Contractor shall submit the following:

- CONR89 *Approval to Subcontract*
- AAP20E *DBE/MBE/WBE/SDVOB Participation* (EBO form required for all DBE/MBE/WBE/SDVOB firms)
- Labor affidavit Form AC 2948 *Subcontractor's Certification*;
- HC-108 *Certification for Subcontracted Work – Project Specific Safety and Health Plan*;
- CONR2 *Prime Contractor's Certification* (required for proof of insurance for Subcontractors in accordance with §107-06 *Insurance*);
- CONR5 *Contractor/Subcontractor SPDES Permit Certification* (required if there is a contract SPDES Permit);
- CONR1 *Bidder Assurance of No Conflict of Interest or Detrimental Effect*, signed by an authorized executive or legal representative of the firm;
- Scope of Work.

The Department reserves the right to suspend or withdraw its approval of Subcontractors where the Department determines it is in the best interest of the State to do so, including, but not limited to a Subcontractor's failure to comply with Health and Safety requirements, failure to comply with the terms of the Contract, and/or failure to remain a responsible Subcontractor for the entire duration of the Contract.

**C. Professional Services.** Professional Services provide specialized technical work to the Contractor for a fee or other basis not generally accounted for through labor, materials and equipment billing. For definition of Professional Services, see §101-02 *Definitions*.

For each Professional Service, the Contractor shall submit the following:

- CONR2 *Prime Contractor's Certification* (required for proof of insurance for the Professional Service in accordance with §107-06 *Insurance*);
- AAP20E *DBE/MBE/WBE/SDVOB Participation* (EBO form required for all DBE/MBE/WBE/SDVOB firms);
- HC-108 *Certification for Subcontracted Work - Project Specific Safety and Health Plan*;
- Scope of Work (required for all DBE/MBE/WBE/SDVOB firms).

**D. Trucking Firms.** Trucking approval is required for On-Site Trucking, Off-Site Trucking, and Owner-Operators. Material Delivery does not require approval by the Department. The Contractor shall submit approval requests to the Regional Construction Group for approval by the Regional Construction Engineer or designee. Upon request, proof of vehicle registration shall be submitted to the Department. Work shall not be assigned or delegated by a Trucking Firm to a separate (lower-tiered) trucking firm or trucking broker(s). Trucking Firms shall be paid directly by the Prime Contractor or Subcontractor.



The Department reserves the right to withhold, suspend or withdraw its approval of Trucking Firms where the Department determines it is in the best interest of the State to do so, including, but not limited to, a Trucking Firm's failure to comply with the terms of the Contract and/or failure to remain a responsible firm for the entire duration of the Contract.

**1. On-Site Trucking.** On-Site Trucking involves trucking operations, not defined elsewhere within §108-05, where the truck driver is required to be paid prevailing wages (see §102-10 *Labor and Employment*). Certified payrolls are required to be submitted to the Engineer on a weekly basis.

For each On-Site Trucking approval request, the Contractor shall submit the following:

- CONR90 *Trucking Firm Approval*;
- AAP20E *DBE/MBE/WBE/SDVOB Participation* (EBO form required for all DBE/MBE/WBE/SDVOB firms);
- AAP23 *DBE/MBE/WBE/SDVOB Trucking Form* (required for all DBE/MBE/WBE/SDVOB firms);
- Labor affidavit Form AC 2948 *Subcontractor's Certification*;
- HC-108 *Certification for Subcontracted Work - Project Specific Safety and Health Plan*;
- CONR2 *Prime Contractor's Certification* (required for proof of insurance for Trucking Firms in accordance with §107-06 *Insurance*);
- Long-term trucking leases (if applicable, required for all DBE/MBE/WBE/SDVOB firms).

**2. Off-Site Trucking.** Off-Site Trucking involves trucking operations where the truck driver is not required to be paid prevailing wages (see §102-10 *Labor and Employment*).

For each Off-Site Trucking approval request, the Contractor shall submit the following:

- CONR90 *Trucking Firm Approval*;
- AAP20E *DBE/MBE/WBE/SDVOB Participation* (EBO form required for all DBE/MBE/WBE/SDVOB firms);
- AAP23 *DBE/MBE/WBE/SDVOB Trucking Form* (required for all DBE/MBE/WBE/SDVOB firms);
- HC-108 *Certification for Subcontracted Work - Project Specific Safety and Health Plan*;
- CONR2 *Prime Contractor's Certification* (required for proof of insurance for Trucking Firms in accordance with §107-06 *Insurance*);
- Long-term trucking leases (if applicable, required for all DBE/MBE/WBE/SDVOB firms).

**3. Owner/Operator Trucking.** Owner/Operators are individual businesses operated by the owner, who do not have any employees, and therefore are not subject to prevailing wage rates.

In order to be an Owner/Operator, the following conditions shall be met:

- a. The operator shall be the owner of the business.
- b. The registration of the vehicle shall be in the Owner/Operator's legal business name.
- c. Insurance for the vehicle shall be in the Owner/Operator's legal business name.

For each Owner/Operator Trucking approval request, the Contractor shall submit the following:

- CONR90 *Trucking Firm Approval*;
- AAP20E *DBE/MBE/WBE/SDVOB Participation* (EBO form required for all DBE/MBE/WBE/SDVOB firms);

- AAP23 *DBE/MBE/WBE/SDVOB Trucking Form* (required for all DBE/MBE/WBE/SDVOB firms);
- HC-108 *Certification for Subcontracted Work - Project Specific Safety and Health Plan*;
- CONR2 *Prime Contractor's Certification* (required for proof of insurance for Trucking Firms in accordance with §107-06 *Insurance*);
- Long-term trucking leases (if applicable, required for all DBE/MBE/WBE/SDVOB firms).

**4. Material Delivery.** Material Delivery includes delivery of materials or supplies to a public worksite by a Manufacturer, Fabricator, or Material Supplier by either direct delivery or through use of a trucking firm to drop or stockpile. If material delivery is subject to the Davis Bacon Act or NYS Labor Law, Material Suppliers shall submit certified payrolls as set forth in §102-10 *Labor and Employment*. Material Delivery does not require approval by the Department.

**E. Manufacturers/Fabricators, Material Suppliers, Distributors, Brokers, and Work Services.** For definition of Manufacturers, Fabricators, Material Suppliers, Brokers, and Work Services, see §101-02 *Definitions*. For definition of Distributor, see §102-12 *DBE/MBE/WBE/SDVOB Participation*. Material Suppliers include equipment rental without an operator.

For each DBE/MBE/WBE/SDVOB Manufacturer/Fabricator, Material Supplier, Broker, and Work Service, the Contractor shall submit the following:

- AAP20E *DBE/MBE/WBE/SDVOB Participation* (EBO form required for all DBE/MBE/WBE/SDVOB firms);
- AAP22 *DBE/MBE/WBE/SDVOB Material Supply Form* (required for DBE/MBE/WBE/SDVOB Material Suppliers and Brokers);
- HC-108 *Certification for Subcontracted Work - Project Specific Safety and Health Plan*;
- Long-term trucking leases (if applicable, required for DBE/MBE/WBE/SDVOB Material Suppliers and Brokers);
- Purchase Order / Rental Agreement (if applicable, required for DBE/MBE/WBE/SDVOB Material Suppliers);
- Scope of Work (required for DBE/MBE/WBE/SDVOB Work Services).

**F. DBE Program Assurance.** The Contractor shall carry out the applicable requirements of 49 CFR 26 in the award and administration of Federal-Aid contracts. Failure by the Contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Department deems appropriate.

**G. Title VI Assurance.**

**1. Compliance with Regulations.** The Subcontractor shall comply with the Regulation relative to nondiscrimination in federally assisted programs of the USDOT 49 CFR 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

**2. Nondiscrimination.** The Subcontractor, with regard to the work performed by it during the contract, shall not discriminate on the grounds of race, color or national origin in the selection and retention of Subcontractors, including procurements of materials and leases of equipment. The Subcontractor shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices when the contract covers a program set forth in 49 CFR 21Appendix B.

## 108-06 COMMENCEMENT OF ACTIONS ON STATE PUBLIC WORKS CONTRACTS.

**3. *Solicitations for Subcontractors, Including Procurements of Materials and Equipment.*** In all solicitations either by competitive bidding or negotiation made by the Contractor for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential Subcontractor or supplier shall be notified by the Contractor of the Contractor's obligations under this contract and 49 CFR 21 relative to nondiscrimination on the grounds of race, color, or national origin.

**4. *Information and Reports.*** The Subcontractor shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by the Department or the Federal Highway Administration to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a Subcontractor is in the exclusive possession of another who fails or refuses to furnish this information the Subcontractor shall so certify to the Department, or the Federal Highway Administration as appropriate, and shall set forth what efforts it has made to obtain the information.

**5. *Sanctions for Noncompliance.*** In the event of the Subcontractor's noncompliance with the nondiscrimination provisions of this contract, the Department shall impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:

- a. withholding of payments to the Contractor under the contract until the Subcontractor complies, and/or
- b. cancellation, termination or suspension of the contract, in whole or in part.

### **108-06 COMMENCEMENT OF ACTIONS ON STATE PUBLIC WORKS CONTRACTS.**

In accordance with State Finance Law §138-a, the time within which an action on this contract, against the Contractor, must be commenced shall be computed from the date of completion of the physical work. The Contractor may notify the Department in writing that such physical work has been completed by specifying a completion date, which date shall be no more than 30 days previous to the date of such notice, in which case the completion date set forth in such notice shall be deemed to be the date of completion of the physical work unless the Department, within 30 days of receipt of such notice, notifies the Contractor in writing of its disagreement.

In the event the Contractor fails to send a notice provided for herein, or the State disagrees, then the date of completion of the physical work shall be determined in any other manner provided by law. If the Contractor elects to send such a notice, it shall be sent by certified mail to:

New York State Department of Transportation  
Office of Legal Affairs  
50 Wolf Road  
Albany, New York 12232

The Department hereby disagrees with any date selected by the Contractor pursuant to §138-a of the State Finance Law which is earlier than the date of contract final acceptance as determined by the Commissioner or his/her designee. The provisions of §138-a shall in no way modify the duties and obligations of the Department to comply with Article eleven-A of the State Finance Law (prompt payment legislation).

### **108-07 SEASONAL SHUT-DOWN.**

If it should become necessary to stop the work due to the lateness of the season, the Contractor shall open proper draining ditches, erect temporary structures where necessary, prepare the contract site so that

there will be a minimum interference with traffic, set up and maintain a competent organization to maintain traffic through the contract site, and take precautions to prevent damage or unreasonable deterioration of the work during the time it is closed.

## **SECTION 109 - MEASUREMENT AND PAYMENT**

(Last Revised September, 2025)

### **109-01 MEASURING QUANTITIES.**

All contract payments, including the final, will be made for quantities of work performed and materials placed in accordance with the contract documents as determined by the measurements of the Engineer, and the resulting quantities shall be accepted as final, conclusive and binding upon the Contractor.

The Engineer will choose the method by which the work will be measured, such as: measured from documents/data (contract plans, cross sections, CADD files, etc.); measured with an appropriate device such as measuring tape or wheel; or measure from field survey of completed work. Measurements on slopes will generally use the slope distance to determine lengths and areas. Measurements on slopes of 1 on 4 or steeper will use the slope distance.

Various methods of quantity computation may be used by the Engineer, including but not limited to: arithmetic calculations, manual measuring tools such as a planimeter, or computer based tools/software. The Engineer will choose the computation method, and the method may vary by contract and by contract pay item as appropriate, with the goal of obtaining reasonably accurate quantities of work for payment using a commensurate amount of effort and resources.

### **109-02 COMPENSATION FOR ALTERED QUANTITIES.**

The Department reserves the right to order changes in quantities of contract pay items as is necessary to complete the work, in accordance with the intent of the contract documents.

**A. Major Items.** For Major Items (as defined in §101-02 *Definitions of Terms*), payment will be made for all extra work at the contract unit bid price for work up to 125% of the original contract quantity. For Major Item quantities less than 75% or more than 125% of the original contract quantity, consideration of contract adjustment will be in accordance with §104-04B. *Major Items*. Total payments made for all work on a Major Item that decreases to below 75% of the original contract item quantity, will not exceed the total payments which would have been made if the original contract quantity had been completed at the original unit price bid.

**B. Minor Items.** For Minor Items (as defined in §101-02 *Definitions of Terms*), payment will be made for extra work at the contract unit bid price, except for any extra work that is both: (1) more than 200% of the original contract quantity and (2) results in an increase of more than \$5,000 from the original contract amount, will be considered a Significant Change in accordance with §104-04C *Minor Items*.

### **109-03 SCOPE OF PAYMENT.**

The Contractor is directed to the provisions of Sections 70, 71 and 79-a of the Lien Law that apply to funds being received by a Contractor for a public improvement. The funds received by the Contractor shall constitute trust funds in the hands of the Contractor and shall be applied first to the payment of certain claims.

No certificate approving or authorizing the first partial payment, or in the event there shall be no first partial payment, then no certificate approving or authorizing any final payment will be made to a foreign Contractor unless such Contractor shall have furnished satisfactory proof that all taxes due by such Contractor under the provisions of Articles 9, 9A, 16 and 16A of the Tax Law have been paid. The certificate of the State Tax Commission to the effect that all such taxes have been paid shall be conclusive

## 109-04 PARTIAL PAYMENTS.

proof of the payment of such taxes. The term foreign Contractor means: in the case of an individual, a person who is not a resident of this State; in the case of a partnership, one having one or more partners who is not a resident of this State; and in the case of a corporation, one not organized under the laws of this State.

Section 179 of the State Finance Law requires the Department to make payment on highway construction contracts within certain time frames. If the Department unjustifiably fails to pay within the prescribed time, it may be required to pay interest for each day in excess of the prescribed time.

### **109-04 PARTIAL PAYMENTS.**

Upon application by the Contractor, and approval by the Regional Construction Engineer, reimbursements for the actual cost of certain materials may be made to the Contractor prior to incorporation of such material in the permanent work.

**A. *Eligibility.*** To be eligible for partial payment, materials must meet all the following conditions:

1. Materials shall be only those that will be permanently incorporated into the work;
2. Materials shall be included in the List of Materials below;
3. Materials shall have a minimum material cost of \$15,000. Individual components of an item or related items may be combined to meet the minimum (e.g. combination of all guiderail components);
4. Steel and iron materials shall be in a condition which is ready for fabrication or installation. Other materials shall be in a condition which is ready for on-site installation without further fabrication or processing;
5. Materials shall be delivered and stored at the work site or at a site and in a manner approved by the Regional Construction Engineer; and
6. Materials shall be those which will be stored, or already have been stored, for a minimum of 60 days.

**B. *Application for Partial Payment.*** With application for partial payments, the Contractor shall provide documentation as follows:

1. Bill(s) of sale or vouchers indicating the actual dollar value of the materials as stored;
2. Certification of Title showing that title to the materials, without encumbrances, is in the name of the Contractor and that title is warranted to the NYS Department of Transportation;
3. Documented evidence of acceptability of the materials; and
4. If the materials are stored on private property, a release and waiver covering such materials, and providing access to the storage site, which release and waiver shall be executed by the property owner in favor of the NYS Department of Transportation or its agents.

The amount of partial payments will not exceed the total invoice amount for stored materials, nor will the partial payment for materials relating to any contract work item exceed eighty five percent (85%) of the unit price for that item. The quantity of material for which payments are made will not exceed the estimated contract quantity for that item.

When applying for partial payment of products which are claimed to be in short supply or unique to an individual contract, the Contractor shall include documentation supporting that claim. The making of partial payments will not be a final acceptance of materials, nor will it relieve the Contractor of responsibility for such materials.

Costs associated with handling, transportation and storage of materials; including storage site rental, security, and weather protection; shall be borne by the Contractor and included in the prices bid for contract work. Materials, other than those which are determined by the Regional Construction Engineer to be unique to the contract, not incorporated into the work shall remain the property of the Contractor. Partial payments made for such unused materials will be withdrawn with no further obligation.

## 109-05 EXTRA WORK AND TIME RELATED COMPENSATION.

The Contractor shall submit proof of payment to the Engineer for payment made to the Manufacturer, Fabricator, or Material Supplier for stored materials, within thirty (30) calendar days from the date the contract payment is approved by the Engineer. Failure to submit the required proof of payment will result in the partial payment amount being deducted from the next contract payment to the Contractor.

### LIST OF MATERIALS

- Iron, Steel and Aluminum products (including bridge bearings and all metal components of railings and bridge superstructures);
- Precast and Prestressed Concrete products;
- Pipe and Underdrain products;
- Concrete and Stone curb or masonry products;
- Concrete, Steel and Timber piles and appurtenances;
- Timber products;
- Traffic Signal, Traffic Control, Signing and Lighting components;
- Intelligent Transportation System (ITS) components (cameras, telecommunications components, computers, etc.)
- Cable, Wire and Conduit;
- Impact Attenuator components;
- Materials in short supply; or
- Materials meeting specific, unique requirements

### 109-05 EXTRA WORK AND TIME RELATED COMPENSATION.

The Contractor will be compensated for extra work under existing unit prices in accordance with §109-02 *Compensation for Altered Quantities*, by agreed price in accordance with §109-05A *Agreed Price Work*, or by force account in accordance with §109-05B *Force Account Work*.

**A. Agreed Price Work.** Agreed prices for new items of work or materials in accordance with one of the methods outlined below may be accepted by the Engineer and incorporated into a change order as the Department may deem them to be just and fair and beneficial to the State. An agreed price may be offered by the Contractor and accepted by the Engineer for a defined quantity of additional work. The Contractor shall provide an agreed price proposal generally not later than 7 calendar days prior to beginning the work. If a price has not been agreed to, in writing, prior to starting the work, the Contractor shall keep and submit daily records to document all labor, material and equipment used to complete the work in accordance with §109-05C.1 *Daily Summary*. A change order containing an agreed price not supported by one of the following may be subsequently rejected by the Department or the Office of the State Comptroller.

**1. Original/Adjusted Contract Bid Price.** The original contract bid price, or the original contract bid price adjusted for documented increase or decrease in labor cost, material cost, equipment rate, mobilization, and/or site conditions.

**2. Weighted Average Price.** The statewide or regional weighted average price (WAP) for a contract pay item for minimum of 3 contracts of similar type, quantity, and/or location of work over a one to two-year period; as shown in the Pay Item Catalog (PIC). The Engineer may adjust the WAP for documented increase or decrease in labor, materials, equipment, mobilization, and/or site conditions.

**3. Average of 3 Lowest Bidders.** The average bid price for a contract pay item by the 3 lowest responsible bidders on the contract, including the Contractor, presented in the Tabulation of Bids. If less than 3 responsible bids were received, this option shall not be used.

**4. Price Analysis.** A price analysis shall be based on an estimated breakdown of charges listed in §109-05B *Force Account Work*, using the labor, equipment and other rates available when the agreed price is developed by the Contractor. The analysis shall be based on crew composition, material prices, equipment production and overall production rates that are reasonable in comparison with contract bid price work. Price analyses shall be submitted in a format acceptable to the Department. Price Analysis forms are available from the Department's website at [www.dot.ny.gov/main/business-center/contractors/construction-division/forms](http://www.dot.ny.gov/main/business-center/contractors/construction-division/forms).

The Contractor will be reimbursed for labor in accordance with §109-05B.1.a *Labor*. The Contractor will be reimbursed for each class of labor, not individual workers, at the prevailing wage rate for that trade and classification.

The Contractor will be reimbursed for materials in accordance with §109-05B.1.b *Materials*.

The Contractor will be reimbursed for equipment in accordance with §109-05B.1.c *Equipment*. Equipment rates shall be used with no rate adjustment factor and no regional adjustment factor. An appropriate type and size of equipment similar to that available on the contract site, if present, shall be used.

The Contractor will be reimbursed for required insurances in accordance with §109-05B.1.d *Insurance*.

The Contractor will be reimbursed for overhead at 10% of items §109-05B.1.a *Labor*, §109-05B.1.b *Materials* and §109-05B.1.c *Equipment*.

The Contractor will be reimbursed for profit at 10% of items §109-05B.1.a *Labor*, §109-05B.1.b *Materials* and §109-05B.1.c *Equipment*.

Due to the cost and effort associated with development, a price analysis should generally be reserved for extra work under an individual contract pay item or a single price analysis, of more than \$5,000.

**B. Force Account Work.** Where there are no applicable unit prices for extra work and agreed prices cannot be readily established or substantiated, the Contractor will be reimbursed by Force Account for the actual, reasonable and verifiable cost of the items listed below. The Contractor shall maintain and submit force account records in accordance with §109-05C *Force Account Report*.

**1. Contractor Costs.** At the preconstruction meeting, the Contractor should provide the Engineer documentation supporting its insurance rates for the current period and provide updates within 30 days after the renewal date, to assist in timely preparation and review of force account reports. All rates will be those in effect at the time the work is performed.

**a. Labor.** Necessary labor costs include wages, supplemental (fringe) benefits, FICA, Medicare, Federal Unemployment Tax (FUTA), State Unemployment Insurance (SUI), paid holidays, paid sick leave, and other such reasonable charges that are paid by the Contractor pursuant to existing written agreements with its employees and/or labor organizations. Labor shall be recorded in hours to the nearest half hour.

**(1) Wages and Fringe Benefits.** The Contractor will be reimbursed for each worker separately at the actual payroll rate, an average rate based on different workers will not be accepted. The wage rate for an individual worker may be up to 150% of the prevailing wage and 100% of the supplemental (fringe) benefits, provided the Contractor documents through certified payrolls that the worker has and continues to be paid more than the prevailing wage for

contract work. The Contractor shall obtain the approval of the Engineer for wage rates for individual workers over 110% of the prevailing wage prior to that individual starting work.

There are no prevailing wage rates for foremen/forewomen. Foremen/forewomen are typically paid at a higher rate than the trades they supervise, due to additional responsibilities. The reimbursement for foremen/forewomen will be based on previous certified payrolls or other payroll records for that individual, if available, provided crew composition and overall production rates are reasonable.

If the Contractor is obligated by a labor agreement to pay a full day's pay for an individual in a required labor classification and cannot find other work on that day for that individual, the Contractor will be reimbursed for a full day's pay for that individual.

Professional or technical personnel specifically required or agreed to by the Department, in writing, to be present for specific critical work operations will be reimbursed as a direct labor cost. The reimbursement for these professional or technical personnel will be based on previous payrolls for that individual, as certified by the employer, or by comparison to costs for similarly qualified personnel.

No reimbursement will be made for travel, lodging, bonuses, or other similar payments made to workers.

(2) *Standard Markups.* The Contractor will be reimbursed for FICA, Medicare, Federal Unemployment Tax (FUTA), State Unemployment Insurance (SUI), paid holidays, and paid sick leave using the Standard Labor Markup Rate, on all wages, not including supplemental (fringe) benefits. The Standard Labor Markup Rate, initially 15.2%, may be modified by the Department via Official Issuance.

The Contractor will be reimbursed for FICA and Medicare using the Standard Fringe Markup Rate on all supplemental (fringe) benefits paid in a payroll check or in cash to the employee. The Standard Fringe Markup Rate, initially 7.65%, may be modified by the Department via Official Issuance.

*b. Materials.* Materials are necessary products incorporated in the temporary or permanent work. The Contractor will be reimbursed for the costs of materials, including transportation to the site and sales taxes for materials not permanently incorporated into the work. Material transportation may be accounted for as part of the material unit price, a material unit price for transportation, a fee for transportation, or equipment and operator charges. Contractor or Subcontractor costs for transportation of materials shall be accounted for as labor and equipment in accordance with §109-05B.1.a *Labor* and §109-05B.1.c *Equipment* respectively. Because force account work has no associated pay lines/limits, materials will be measured as actual quantities delivered and incorporated, including any required overlap, and appropriate allowances for waste and/or disposal due to construction operations and/or installation practices.

The Contractor will be reimbursed, including sales taxes when applicable, for expendable materials such as oxygen, acetylene, propane, welding rods, form lumber, form oil, grinding wheels, saw blades, hammer and drill bits, drill steel, and tooth-bits consumed in progressing the work. Other small tools and tool/equipment supplies used or consumed in progressing the work are considered to be included in overhead and no separate reimbursement will be made.

Material acquired by direct purchase shall be documented by bills or acceptable invoices. All prices on used material incorporated in either temporary or permanent work shall be billed at a fair value, less than the original cost when new. A reasonable salvage credit will be determined by the Engineer in coordination with the Contractor for substantial salvageable material recovered.



*c. Equipment.* Equipment, other than small tools, used by the Contractor shall be of suitable size and suitable capacity required for the work to be performed. If the Contractor elects to use equipment of a higher rate than the equipment suitable for the work, payment will be made at the rate applicable to the suitable equipment. The equipment actually used and the suitable equipment upon which the rate is based will be recorded as a part of the Force Account Report. Usage shall be recorded in hours to the nearest half hour to align with the recorded labor associated with the work. The Engineer will verify the suitability of the equipment. If there is a differential in the rate of pay of the operator of oversize or higher rate equipment, the rate paid for the operator will likewise be related to the suitable equipment.

*(1) Mobilization Costs.* If the Contractor does not have a needed type or piece of equipment on the contract site or the equipment is not available to perform the extra work, the Contractor will be reimbursed for the reasonable cost of mobilization to and demobilization away from the work site. Mobilization and demobilization include the cost of transporting equipment; 50% of the hourly ownership rate of transported equipment during transportation, including loading, unloading, assembly, and disassembly; and fees for any required regulatory permits. Costs for demobilization away from the work site will not be paid if the equipment is kept on the site and performs additional contract bid price work.

*(2) Ownership Costs.* The Contractor will be reimbursed for its costs for providing equipment at the rates listed in the Rental Blue Book Rate software produced by Equipment Watch (hereafter referred to as Blue Book). The hourly ownership rates will reimburse the Contractor for all non-operating costs of providing equipment, including depreciation on the original purchase, costs of major overhaul repairs, facilities capital, normal risk insurance, property taxes, storage, licenses, security, record keeping, and mechanic's supervision.

The hourly ownership rate will be the Blue Book monthly rate divided by 176, multiplied by the rate adjustment factor for the equipment model year and then multiplied by the regional adjustment factor. If the Contractor has a piece of equipment remanufactured, rebuilt, or significantly altered, the rate adjustment factor may be modified, as documented by Equipment Watch.

For equipment required to be present and operating, the Contractor will be reimbursed for the product of the hours of actual use, multiplied by the hourly ownership rate. For equipment required to be present; dedicated exclusively to the force account, not available for mobilization elsewhere, and not used on contract bid price work that day; the Contractor will be reimbursed for the product of the remaining non-operating hours in the shift, multiplied by 50% of the hourly ownership rate.

Equipment that is not required to be present will not be eligible for reimbursement of non-operating hours. If the Engineer directs or agrees that equipment mobilized for the operation is no longer required to be present, the Contractor may demobilize the equipment. If the equipment is demobilized, and subsequently determined to be required to be present, the Contractor will be reimbursed for remobilization.

For equipment without an operator that is designed to operate on a continuous long-term basis, such as a pump, portable variable message sign (PVMS), or temporary traffic signal, the Contractor will be reimbursed for a maximum of 176 hours a month.

Equipment with an hourly ownership rate of less than \$2 or a current purchase price of less than \$500 will be considered as small tools and equipment and will not be directly reimbursed.

*(3) Operating Costs.* The hourly operating rate includes preventative and field maintenance, fuel, lubricants, and other operating expenses as outlined in Blue Book, not including consumables or the operator's wages. The Contractor will be reimbursed for the product of

the number of hours of actual use multiplied by the hourly operating rate. No reimbursement for operating costs will be made for equipment that is not operating.

(4) *No Established Rate.* If rates are not established in Blue Book for a particular piece of equipment, the Contractor shall contact the Blue Book publisher, Equipment Watch to establish rates. If Equipment Watch will not establish rates, the Department, in coordination with the Contractor, may establish rates for ownership costs and operating costs for that piece of equipment consistent with its cost and expected life.

(5) *Maximum Ownership Costs.* The maximum amount reimbursed for ownership costs of equipment, is limited, on a contract basis, to the original purchase price as listed in the Equipment Watch Value and Market Data. The Contractor shall not exchange equipment for a similar item for the purpose of extending the maximum ownership cost. Exchange of equipment for an engineering or mechanical reason shall be approved by the Engineer, or the maximum ownership cost will be limited to that reimbursed for the original piece of equipment. If the ownership cost is limited by the original purchase price, the Contractor will continue to be reimbursed for the operating cost for hours of actual use.

(6) *Backup Equipment.* The Contractor will be reimbursed at 50% of the hourly ownership rate for redundant/backup equipment specifically required, or agreed to by the Department in writing, to be present for specific critical work operations.

(7) *Owner/Operator Equipment.* Equipment Owner/Operators utilized by the Contractor in the performance of work shall be accounted for as a service charge in accordance with §109-05B.3 *Service Charges*.

*d. Insurance.* The Contractor will be reimbursed for Workers Compensation, Commercial General Liability (CGL), Umbrella or Excess Liability, Special Protective and Highway Liability, Professional Liability/Errors and Omissions, Railroad Protective Liability, Marine Protection and Indemnity, and Pollution Liability insurances required in accordance with §107-06 *Insurance*, at the rate paid by the Contractor, in accordance with the method procured from its insurer(s), to the extent the insurance costs are attributable to the force account work. All insurance rate documentation shall include the Contract number (i.e., D#), policy number, and the effective dates for the time period that the work was performed.

(1) Contractors or Subcontractors that pay insurances on the basis of a percentage of payroll will be reimbursed that percentage of the portion of item §109-05B.1.a *Labor* specified in the Contractor's insurance policy.

(2) Contractors or Subcontractors that pay insurances on the basis of a percentage of gross sales will be reimbursed that percentage of the total of items §109-05B.1.a *Labor*, §109-05B.1.b *Materials*, §109-05B.1.c *Equipment*, §109-05B.1.e *Overhead* and §109-05B.1.f *Profit*.

(3) *Workers Compensation Insurance.* The Workers Compensation insurance rate will be the statutory loss cost rate established by the NYS Workers Compensation Insurance Rating Board, with the insurer's approved lost cost multiplier, all assessments and credits, and an experience modifier of 1.00, subject to the Construction Employment Payroll Limitation (CEPL) Program limits where applicable. The Contractor shall submit an insurance policy declaration/rate page from its insurer to validate the Workers Compensation insurance rate.

Where the Longshore and Harbor Workers' Compensation Act, Jones Act, Federal Employees Liability Act or other legal requirements impose additional liability on the Contractor, additional differentials will be added to the Worker's Compensation insurance rate.

For Contractors that obtain Workers Compensation insurance through a pooled fund or similar arrangement, the Contractor shall supply documentation from the Contractor's insurance carrier detailing the rate and basis for application.

The Contractor will be reimbursed for Workers Compensation insurance based on the Workers Compensation insurance rate described above, multiplied by gross wages, not including the premium portion of overtime nor supplemental (fringe) benefits, except when supplemental benefits are paid directly to the employee, up to the CEPL wage limit, where applicable.

*e. Overhead.* The Contractor will be reimbursed for overhead at 10% of items §109-05B.1.a *Labor*, §109-05B.1.b *Materials* and §109-05B.1.c *Equipment*. Overhead will be defined to include the following:

- (1) Additional costs for bond(s), Disability Benefits and Commercial Automobile insurance;
- (2) All salary, benefits and expenses of executive officers, supervising officers/employees, superintendents, project engineers, office engineers, CPM Schedulers, clerical or administrative employees, and other project level staff, but not including working forepersons; including payroll taxes, unemployment insurance, workers compensation insurance, and charges that are paid by the Contractor to or on behalf of those employees pursuant to written agreement with its employee(s) and/or labor organizations;
- (3) Small tools and small tool/equipment supplies, including shovels, picks, axes, saws, bars, sledges, lanterns, etc.;
- (4) Contractor's field office rental, utility charges, potable water, sanitation, cleaning, computers, CADD equipment, office equipment, office supplies, reproduction costs, etc.;
- 5) Administrative or other efforts required to maintain records and produce force account reports.

*f. Profit.* The Contractor will be reimbursed for profit at 10% of items §109-05B.1.a *Labor*, §109-05B.1.b *Materials* and §109-05B.1.c *Equipment*.

**2. Subcontractor Costs.** When the work is performed by a Subcontractor, the Contractor will be reimbursed the actual, reasonable and verifiable cost of such subcontracted work as outlined above in §109-05B.1. *Contractor Costs*, plus an additional 5% for subcontract administration, and the Contractor's costs for insurance in accordance with §109-05B.1.d *Insurance*.

Specialty Subcontractors are Subcontractors that are experts in a unique trade or are trained to perform very specialized work (i.e., pipe jacking, soil nail walls, fiber wrapping, pile installation, etc.) Only when the Deputy Chief Engineer (Construction) has given advanced approval of projected actual costs, the Department will reimburse the actual, reasonable and verifiable costs for tolls, mileage, lodging, and meals for Specialty Subcontractors required to perform the work when such costs are deemed necessary due to the Specialty Subcontractor's considerable distance from the location of the work and consideration of alternative Specialty Subcontractors. The reimbursement amount will be the lesser of: (1) the advanced approved actual costs; (2) actual

incurred charges; or (3) the current maximum per diem and mileage rates for the contract location within New York State as posted on [www.gsa.gov](http://www.gsa.gov). Specialty Subcontractors shall maintain all records of costs and provide them to the Department upon request. Any extra or unapproved expense to include personal travel or other non-NYSDOT business travel in the official transportation ticket shall be borne by the traveler. This shall include costs as a result of indirect-route or interrupted travel.

**3. Service Charges.** When work is performed by, and a fee is paid to a Professional Service, a Work Service, Trucking Firm, or an equipment owner/operator, the Contractor will be reimbursed the actual cost of the service fee plus 5% for service administration. This 5% will be applied only once to the service fee regardless of the firm making direct payments. The rate for equipment with an operator shall not exceed the total of the Blue Book ownership rate, the Blue Book operating rate, and the wages for an appropriate operator. For specialized equipment or circumstances, the wages for an appropriate operator may be up to 150% of the prevailing wage rate.

**C. Force Account Report.** Payment for force account work will be made on the basis of the following reports. Reports shall be submitted in a format acceptable to the Department. Force Account MURK forms are available from the Department's website at [www.dot.ny.gov/main/business-center/contractors/construction-division/forms](http://www.dot.ny.gov/main/business-center/contractors/construction-division/forms). If the Engineer or his/her representative disagrees with the accuracy, applicability, or reasonableness of any portion of a Contractor's submission, he/she will promptly notify the Contractor.

**1. Daily Summary.** The Contractor shall deliver a daily summary of force account work to the Engineer in a format acceptable to the Department, not later than close of business on the work day following that for which the work is reported. The daily summary shall be dated and signed by the Contractor's authorized representative.

The Engineer's signature indicates that the record, as modified, is contemporaneous and accurate, but does not indicate concurrence with any dispute. The Engineer will annotate the record as necessary, sign and date, and provide a copy to the Contractor.

The summary shall contain:

- a. *The contract number, other contract information, and the Contractor name/information.*
- b. *A brief description of the work performed and the work location for that day.*
- c. *A list of personnel by name, including the hours worked, and labor classification.*
- d. *A list of materials used indicating the quantity and nature. The cost shall be documented later by proper receipts.*
- e. *A list of equipment used indicating the number of hours used and the type, manufacturer, model, model year, size of equipment, and any required attachments.*

**2. Labor Summary.** If there is an approved Force Account Estimate, in order to receive progress payments, the Contractor shall deliver to the Engineer a summary of labor used on the work. The Contractor shall provide the Weekly Summary of Force Account Labor using forms provided by the Department, and shall include the first and last name, labor classification, regular and premium hourly rates of pay, supplemental (fringe) benefit hourly rates, regular and premium hours worked, supplemental (fringe) benefit amounts paid in cash, and/or other items necessary to calculate the amount due to the Contractor. Progress payments on the force account will not be made until the Contractor provides required documentation to the Engineer.

**3. Force Account Report Submission.** On completion of the specific force account work, the Contractor shall deliver to the Engineer a Force Account Report, wherein all labor, materials,

equipment, and other charges are shown and totaled using forms provided by the Department. The Force Account Report shall be dated and signed by the Contractor's authorized representative. When the Contractor and the Engineer agree on the Force Account Report, the Engineer will prepare and submit a change order containing the Force Account Report to the Regional Construction Engineer for approval.

**4. Force Account Review.** The Regional Construction Engineer, or designee, will review the Force Account Report and make any notations, remarks or comments on this form that may assist in final payments. The emphasis of this review will be on labor rates, markups, workers compensation limits, material costs, equipment rates, insurance rates, and overall documentation. The Regional Construction Engineer will forward the change order to the Deputy Chief Engineer, Construction (DCEC). The DCEC, after review and approval, will forward the change order to the Office of the State Comptroller (OSC) for review and filing. Only after filing by OSC may the Engineer begin to process contract payments based on the change order, as the work is completed.

**D. Time Related Compensation.** The Contractor will only be eligible for extra compensation for expenses or costs which are identified as compensable under §108-04A *Compensable Delays*. In the event any legal action is instituted against the State by the Contractor for additional compensation, whether due to time related dispute, delay, acceleration, breach of contract, or otherwise, the State's liability will be limited to those items which are specifically identified as compensable under §109-05D.1 *Recoverable Contractor Costs*. Nothing in this subsection is intended to create any liability of the State not existing at common law or pursuant to the terms of this contract or to prevent the Contractor from filing a claim in the New York State Court of Claims. The remedies contained herein are exclusive.

**1. Recoverable Contractor Costs.** Only the following elements will be recoverable by the Contractor as "time related compensation" provided that they are actual, reasonable and verifiable. Any such adjustment will be made via change order. Escalated costs will include unanticipated higher or lower costs attributable, with appropriate credits, to the performance of work or portions of work in an extended time period due to extenuating circumstances beyond the control of the Contractor.

**a. Extra work.** The Contractor will be reimbursed for extra work required due to a time related matter in accordance with §109-05B. *Force Account Work*, less any appropriate credit.

**b. Labor.** The Contractor will be reimbursed for documented escalated labor costs determined in accordance with §109-05B.1.a *Labor*.

**c. Materials.** The Contractor will be reimbursed for documented escalated material costs determined in accordance with §109-05B.1.b *Materials*.

**d. Equipment.** The Contractor will be reimbursed for documented escalated equipment costs less appropriate credits, determined in accordance with §109-05B.1.c *Equipment*. The costs for idle equipment will be 50% of the ownership rate set forth in §109-05B.1.c *Equipment*. Idle time shall not exceed 8 hours per day, 40 hours per week, or the annual usage hours established in the Equipment Watch Rental Blue Book Rate software. The Contractor will be reimbursed for backup equipment costs, in accordance with §109-05B.1.c.(6) *Backup Equipment*. Equipment with an hourly ownership rate of less than \$2 or a current purchase price of less than \$500 will be considered as small tools and equipment and will not be directly reimbursed. No operating costs will be paid for idle equipment.

*e. Insurance.* The Contractor will be reimbursed for documented additional or escalated insurance costs during the extended period.

*f. Extended Contract Site Supervision and Management.* The Contractor will be reimbursed for documented additional or escalated contract site overhead costs during the extended period, including those for superintendents, project engineers, office engineers, CPM schedulers, clerical and other project level staff, but not including working forepersons. Allowable costs will include salary, Standard Labor Markup on salary, and benefits not included in the Standard Labor Markup.

*g. Extended Contractor's Field Office Costs.* The Contractor will be reimbursed for fees paid to service provider(s) during the extended period, for required Contractor's field office rental, utility charges, potable water, sanitation, cleaning, etc.

*h. Bond Costs.* The Contractor will be reimbursed for documented additional or escalated bond costs during the extended period.

*i. Home Office Overhead.* The Contractor will be reimbursed for home office overhead at 10% of items §109-05D.1.b *Labor* and §109-05D.1.c *Materials*. The Contractor will be reimbursed for home office overhead at 10% of documented escalated equipment costs under §109-05D.1.d *Equipment*. No home office overhead will be paid for idle equipment.

*j. Profit.* The Contractor will be reimbursed for profit at 10% of items §109-05D.1.b *Labor* and §109-05D.1.c *Materials*, except when §104-05 *Suspensions of Work Ordered by the Engineer* applies, no profit will be allowed. The Contractor will be reimbursed for profit at 10% of documented escalated equipment costs under §109-05D.1.d *Equipment*. No profit will be paid for idle equipment.

**2. Recoverable Subcontractor Costs.** When costs are recoverable by a Subcontractor as "time related compensation", the Contractor will be reimbursed the actual, reasonable and verifiable Subcontractor costs as outlined above in §109-05D.1, an additional 5% of those costs for subcontract administration, and costs for Contractor insurances in accordance with §109-05D.1.e *Insurance*.

**3. Non-Recoverable Costs.** In any dispute for time related compensation, the Department will have no liability for the following items and the Contractor shall make no claim for the following items:

- a.* Home office overhead in excess of that provided in §109-05D.1.i *Home Office Overhead*;
- b.* Profit, in excess of that provided in §109-05D.1.j *Profit*;
- c.* Loss of anticipated or unanticipated profit;
- d.* Labor inefficiencies and loss of productivity;
- e.* Consequential damages, including but not limited to interest on monies in dispute, including interest which is paid on such monies, loss of bonding capacity, bidding opportunities, or interest on investment, or any resultant insolvency;
- f.* Indirect costs or expenses of any nature;
- g.* Direct or indirect costs attributable to performance of work where the Contractor, because of situations or conditions within its control, has not progressed the work in a satisfactory Manner;
- h.* Attorney's fees and dispute or claims preparation expenses.

**E. Acceleration Compensation.** The Contractor will be reimbursed for additional costs associated with acceleration directed by the Department in writing.

**1. Recoverable Contractor Costs.** The following elements will be recoverable by the Contractor as compensation for acceleration, provided that they are actual, reasonable and verifiable. Recoverable costs include costs attributable, with appropriate credits, to the performance of work or portions of work during the original contract period, but at an accelerated rate, attributable to the Department's directed acceleration.

*a. Labor.* The Contractor will be reimbursed for additional labor costs, primarily the premium portion of overtime;

*b. Materials.* The Contractor will be reimbursed for additional material costs, primarily costs for accelerated production and delivery costs or additional fabrication costs associated with a revised delivery schedule;

*c. Equipment.* The Contractor will be reimbursed for additional equipment costs, primarily costs for mobilization and demobilization of additional equipment required;

*d. Insurance.* The Contractor will be reimbursed for additional insurance costs, including Commercial General Liability (CGL), Umbrella or Excess Liability, Special Protective and Highway Liability, Professional Liability/Errors and Omissions, Railroad Protective Liability, Marine Protection and Indemnity, and Pollution Liability insurances required in accordance with §107-06 *Insurance*, at the rate paid by the Contractor, in accordance with the method procured from its insurer(s).

(1) Contractors or Subcontractors that pay insurances on the basis of a percentage of payroll will be paid that percentage of the portion of item §109-05E.1.a *Labor* specified in the Contractor's insurance policy.

(2) Contractors or Subcontractors that pay insurances on the basis of a percentage of gross sales will be paid that percentage of the total of items §109-05E.1.a. *Labor*, §109-05E.1.b. *Materials*, §109-05E.1.c. *Equipment*, §109-05E.1.e. *Overhead* and §109-05E.1.f. *Profit*.

*e. Overhead.* The Contractor will be reimbursed for overhead at 10% of items §109-05E.1.a. *Labor*, §109-05E.1.b. *Materials* and §109-05E.1.c. *Equipment*.

*f. Profit.* The Contractor will be reimbursed for profit at 10% of items §109-05E.1.a. *Labor*, §109-05E.1.b. *Materials* and §109-05E.1.c. *Equipment*.

**2. Recoverable Subcontractor Costs.** When costs are recoverable by a Subcontractor as acceleration compensation, the Contractor will be reimbursed the actual, reasonable and verifiable Subcontractor costs as outlined in §109-05E.1. *Recoverable Contractor Costs*, an additional 5% of those costs for subcontract administration, and the Contractor's costs for insurance in accordance with §109-05E.1.d *Insurance*.

## 109-06 CONTRACT PAYMENTS.

Payments will be made to the Contractor for work satisfactorily performed monthly in accordance with Article 7 *Contract Payments* of the contract agreement. No contract payment will be rendered unless the value of the work done equals 5% of the Contract Amount or \$1,000, whichever is the lesser. At the

## 109-07 PROMPT PAYMENTS BY THE CONTRACTOR.

Contractor's request, semimonthly contract payments may be rendered provided the value of the work performed in a two-week interval is in excess of \$50,000 or if, in the opinion of the Department, it is to the best interests of the State to do so.

In order to enable the Department to process a contract payment properly and expeditiously, the Contractor shall submit certified payroll statements weekly for the Contractor, Subcontractors and Trucking Firms; required material certifications; Subcontractor/Vendor prompt payment data; Form AAP13 *Contract Payment Certification*; and other required documents and submissions as may be appropriate to this contract. Unless otherwise specified in a particular contract pay item, no progress payment will be made for any item of work until its completion in accordance with the specification. In accordance with Article 8 *No Payment on Contractor's Non-Compliance* of the contract agreement, no contract payment will be completed so long as any lawful or proper direction to the Contractor by the Commissioner or his/her representative concerning the work or material has not been complied with.

This contract may be funded by monies from other governmental or non-governmental entities which may include municipalities, counties, towns, villages, or authorities. Extra work for others, including municipalities, utilities, or other entities added to the contract by change order may require funds to be deposited with the State prior to approval of the change order. Funding delays for extra work for others may cause payment delays. If extra work for others is combined with Department funded work, payment for all the work may be delayed.

The Contractor will receive all payments by electronic transfer only, which are generated by the Office of the State Comptroller (OSC). The Contractor shall comply with the OSC procedures to authorize payments via the electronic payments program, known as *e-payments*. Information on the *e-payments* program is available on the OSC website at [www.osc.state.ny.us/epay/index.htm](http://www.osc.state.ny.us/epay/index.htm). A single authorization by the Contractor to OSC will be used for all payments made to that firm for all State contracts. Information for Contractor management of their New York State vendor account is available from OSC at [www.osc.state.ny.us/vendor\\_management/index.htm](http://www.osc.state.ny.us/vendor_management/index.htm).

### **109-07 PROMPT PAYMENTS BY THE CONTRACTOR.**

In accordance with Section 139-f(2) of the State Finance Law, the Contractor shall pay each Subcontractor and materialman for the value of work performed pursuant to contract no later than 7 calendar days from the receipt of each payment the Contractor receives from the State. Payment by the Contractor to Subcontractors or materialmen shall reflect the quantities or percentage of work completed by the Subcontractor or materials furnished by the materialmen, and paid by the State; and such payment shall be based upon the actual conditions of the subcontract or purchase order. The Contractor shall not hold any retainage, but may deduct an amount necessary to satisfy any claims, liens or judgments against a Subcontractor or materialman which have not been fully discharged.

The Contractor shall not issue a joint check for payment to a Disadvantaged Business Enterprise (DBE) and another entity, such as a material supplier, without the prior approval of the Department.

In accordance with Section 179-f of the State Finance Law, if the State makes an interest payment to the Contractor on a contract payment which is due, a pro rata share of such interest shall be paid to subcontractors and materialmen in a proportion equal to the percentage of their pro rata share of the contract payment. Such pro rata share of interest shall be due to such subcontractors and materialmen only for those payments which are not paid prior to the date upon which interest begins to accrue between the State and the Contractor. Such pro rata share of interest shall be computed daily until such payments are made to the subcontractors and materialmen.

The Contractor shall maintain an accounting system acceptable to the Department to track payments made by the State to the Contractor and payments made by the Contractor to each Subcontractor, Trucking Firm, Manufacturer, Fabricator, Material Supplier, Distributor, Broker, Professional Service, or Work Service by item and by date. Upon request by the Department, the Contractor shall submit proof of payment to any firm that performed work and/or supplied materials on the contract. The Contractor shall enter payment data into the current Department approved civil rights reporting system in accordance with §105-21 *Civil Rights Monitoring and Reporting*, with any exceptions noted and explained.



**109-08 ELIMINATED MATERIALS.**

Materials required by the contract documents and not incorporated into the work due to changes caused by field conditions or revisions to the design by the State after the material was ordered or purchased may be eligible for reimbursement. Materials will be eligible for reimbursement if they are determined by the Regional Director to be unique to the contract, and meet one or more of the following conditions:

- The material order cannot be canceled or changed to reflect the revised quantity required.
- The material cannot be restocked or the cost of restocking is excessive.
- The Contractor or Subcontractor does not maintain a supply of the material.
- The cost of the material exceeds \$1000. or five percent (5%) of the item, whichever is greater.

The Contractor will be reimbursed its material cost minus salvage value, or the material cost plus necessary delivery costs to a site identified by the Engineer, if the Department opts to take the material. Overhead and profit will be paid once, at a maximum of five percent (5%) for all materials not incorporated into the work, regardless of whether the Contractor or the Subcontractor pays for the material and/or delivery costs.

**109-09 FINAL ACCEPTANCE AND FINAL AGREEMENT.**

The provisions of Article 9 *Final Acceptance of Work* and Article 10 *Final Agreement* of the Contract Agreement shall apply.

**A. *Final Additions or Deductions.*** Upon the completion of the work as shown in the contract documents, should the final completed quantities show either an increase or decrease from the original estimate of quantities, as modified by any Change Orders, then such increases or decreases will be included in a cleanup Change Order. Payments will be made promptly as any outstanding Change Orders are filed with OSC.

**B. *Final Inspection.*** Within 30 days of notice by the Contractor to the Engineer after the work required under the contract has been completed, the Regional Director or designee(s) will inspect the work. The work may also be inspected, accepted and approved by other agencies, municipalities, and/or other entities who will have jurisdiction over the work after Final Acceptance.

**C. *Partial Acceptance.*** For Standby Where and When, Requirements, Job Order (JOC), Emergency, and other contracts of similar types where the work occurs in a variety of separate and distinct locations that are not defined at the time of Letting, or for separate and distinct sites where extra work was added to the contract, the Department may issue a Partial Acceptance of an individual work site(s), constituting Partial Acceptance of the overarching contract. Partial Acceptance will release the Contractor from the requirement to provide insurance in accordance with §107-06 *Insurance* for that site only, and from responsibility for any damages to the work at that site after Partial Acceptance. Remaining payments, in accordance with §109-09D *Remaining Payments*, will be made for any completed work order locations where the Department approved Partial Acceptance.

**D. *Final Acceptance.*** After satisfactory Final Inspection of the work and prior to the Final Acceptance of the work, the Contractor shall provide or execute the following:

- All Certified Payrolls;
- Final Survey Notes/Computations;
- Approved Reproducible Drawings;
- Approved Field Change Sheets from VECP or other Contractor Proposals;
- Uncompleted Work Agreement (UWA) (if applicable); and

- Any and all deliverables, submittals, and certifications required under the agreement.

Upon completion of the items listed in this section, the Regional Director, or designee, will recommend to the Deputy Chief Engineer Construction (DCEC) that the completed work be accepted. After Final Acceptance, the Contractor is released from the requirement to provide insurance in accordance with §107-06 *Insurance*.

**E. Remaining Payments.** Section 179-f of the State Finance Law (SFL) and Highway Law (HWY) Section 38(7)(g) requires the Department to make final payment on highway construction contracts within seventy-five (75) calendar days after Final Acceptance by the Commissioner. For the purpose of Section 179-f of the State Finance Law, final payments shall be defined as all remaining monies owed to the Contractor for contract work as of the date of Final Acceptance, subject to those exceptions set forth in SFL 179 and HWY 38. If the Department unjustifiably fails to pay the final payment within the prescribed 75 calendar days, it may be required to pay interest for each day in excess of the 75 calendar days, subject to SFL 179 and HWY 38.

**F. Final Agreement.** The Final Agreement will not be drawn and finalized until all work required under the contract has been satisfactorily completed; all disputes presented; and all accounts for extra work and materials have been rendered, considered, and if agreed to, incorporated by Change Order; and resulting payments made to the Contractor. Work remaining to be accomplished under an Uncompleted Work Agreement shall be considered as completed work for the purpose of the Final Agreement, provided the Uncompleted Work Agreement has been executed in accordance with §109-10 *Uncompleted Work Agreement*. Work accomplished under a warranty agreement shall be considered as completed work for the purpose of the Final Agreement, provided the warranty agreement has been executed and any required bond deposited by the Contractor.

After Final Acceptance, but no later than 20 calendar days after the mailing of the Final Agreement, the Contractor shall promptly submit the following:

- Final Labor Affidavits;
- Verification of final payments to all Subcontractors/vendors;
- Complete and accurate information in the Department's civil rights reporting software;
- Resolution of any outstanding disputes; and
- Any other required submissions, as may be appropriate.

The Commissioner, or his/her/their designee, will approve a Final Agreement as prepared and approved by the Regional Director.

Other submissions may be required to enable the processing of the final payment. Any time taken beyond the date of Final Acceptance to satisfy or furnish the above information shall extend the required payment date by an equal period of time. If the Contractor fails to respond to a Department request for information or fails to sign the Final Agreement within 20 calendar days after the mailing of the Final Agreement, the Department may execute the Final Agreement based upon the best available information and close the contract.

**G. Initiation of Claim.** The signature by the Contractor of the Final Agreement; shall constitute and operate as a release to the State from any and all claims of any liability to the Contractor for anything theretofore done or furnished for or relating to or arising out of the work done under the Contract, and for any prior act, neglect, or default on the part of the State or any of its officers, agents, or employees, unless the Contractor serves a detailed and verified statement of claim upon the NYS Department of Transportation not later than 40 days after the mailing of the final payment as set forth under State Finance Law Section 145. As contract payments are routinely made via electronic funds transfer, and Final Agreements do not include any further payment to the Contractor, for the purposes

## 109-10 UNCOMPLETED WORK AGREEMENTS.

of State Finance Law Section 145, the final payment shall be deemed the amount of zero dollars as stated on the Final Agreement and the date of mailing of the final payment shall be deemed to be the date the Department mailed the Final Agreement to the Contractor. Such statement of claim shall specify the items and details upon which the claim will be based and any such claim shall be limited to such items. Should the Contractor refuse to accept any payment as tendered by the State, it shall constitute a waiver of any right to interest thereon.

### **109-10 UNCOMPLETED WORK AGREEMENTS.**

Whenever a contract shall, in the judgment of the Department, be substantially completed, and keeping the contract open and maintaining the contract bonding, would be an injustice to the Contractor, the Department may enter into an Uncompleted Work Agreement with the Contractor. Prior to entering into an Uncompleted Work Agreement, the essential items in the contract shall have been completed by the Contractor in accordance with the terms of the contract and the provisions of §109-09E. *Final Agreement*, and certified by the Regional Construction Engineer. The essential items in the contract shall include, but will not be limited to the completion of or the safe working order of all pavement, shoulders, barrier, guide rail, impact attenuators, drainage, signs, signals and other safety appurtenances, so that the highway is safe for use by the traveling public without the use of temporary or emergency devices.

The final contract accounting will include such uncompleted items and pay therefore at the item prices in the contract, upon execution of the Uncompleted Work Agreement. The Uncompleted Work Agreement will be based on an estimate of work remaining to be completed. When the cost to perform the work is not reflected by the unit prices bid, the Engineer will estimate the value of the uncompleted work. If actual quantities are later found to vary from the estimate, no additional quantities can be added under an Uncompleted Work Agreement.

The Contractor shall execute an Uncompleted Work Agreement upon depositing with the Department a certified check drawn upon a legally incorporated bank or trust company, or securities as are listed in State Finance Law §139(3). The deposit shall be an amount equal to at least double the value of such uncompleted work, including those pay items that are uncompleted and such work that is required but not included as a contract pay item. The deposit will be held by the Department until the Engineer certifies that all previously uncompleted work has been satisfactorily completed. When the Contractor satisfactorily completes the uncompleted portions of work, the deposit will be returned. No partial releases of funds from an Uncompleted Work Agreement will be made. If portions of uncompleted work will be completed at varying times, the Department may consider the use of multiple Uncompleted Work Agreements.