109-05 EXTRA WORK, FORCE ACCOUNT WORK, DISPUTE COMPENSATION AND RECORDKEEPING.

A. Contract Item Changes. The Department reserves the right to order changes in quantities of contract work items as is necessary to complete the project, in accord with the intent of the contract documents. For contract work items that meet the criteria of a “major item”, consideration of contract adjustment shall be in accordance with §109-16 A.(3) Significant Changes in the Character of Work. In the case of a “major item” that decreases to below 75% of the original contract quantity, total payments made for all work under such decreased quantities of work shall not exceed the total payments which would have been made if the original contract quantity had been completed at the original unit bid price.

For other than “major items”, payment shall be made for all additional work at the contract unit bid price for work up to 200% of the original contract quantity, or that results in an increase of less than $1,000 from the original contract amount. Once the additional work increases to more than 200% of the original contract quantity and results in an increase of more than $1,000 from the original contract amount, any additional work shall be considered to be new work, with payment determined in accordance with §109-05(B).

B. New Item Charges.

1. Agreed Prices. Agreed prices for new items of work or materials may be incorporated in the order-on-contract as the Commissioner may deem them to be just and fair and beneficial to the State. These prices shall be supported by a complete price analysis in the order-on-contract or if approved by the Director, Construction Division, by reference to the weighted average bid prices for similar type and quantity of work from other recent contracts. The price analysis will be based on an estimated breakdown of charges listed in the following paragraph 2. “Force Account Charges,” unless some other basis is approved by the Commissioner.

2. Force Account Charges

a. Contractor Charges. Where there are no applicable unit prices for extra work ordered and agreed prices cannot be readily established or substantiated, the Contractor shall be paid the actual and reasonable cost of the following:

(1) Necessary Materials (including transportation to the site.) Materials is defined to include all products incorporated in the temporary or permanent work. The following items consumed in progressing the work are also considered to be materials for which reimbursement with an allowance for profit and overhead will be made. These are oxygen, acetylene, propane, welding rods, grinding wheels, and saw blades. Separate reimbursement will not be made for all other products which may be consumed in progressing the work and reimbursement for these items is considered to be included in the reimbursement for overhead. Material used, if acquired by direct purchase, must 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 shall be given for substantial salvageable material recovered. Salvage value of substantial material recovered shall be determined by the Engineer-in-Charge in coordination with the Contractor.

(2) Necessary labor costs including supplemental benefit payments. Each class of labor shall be billed separately at actual payroll rates. Average rates based on different classes of labor will not be accepted.

(3) Necessary payroll taxes and insurance payments and other such reasonable
§109-05

charges that are paid by the Contractor pursuant to existing written agreements with its employees and/or labor organizations.

(4) Sales taxes, if any, required to be paid on materials not permanently incorporated into the work under the order-on-contract.

(5) Equipment, truck and plant rentals, other than small tools. The Contractor shall be reimbursed for the number of hours that the equipment, truck or plant is actually used on a specified force account job. Equipment used by the Contractor shall be specifically described by the manufacturer, model number and date of manufacture and be of suitable size and suitable capacity required for the work to be performed. In the event the Contractor elects to use equipment of a higher rental 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 rental rate is based will be recorded as a part of the record for force account work. The Engineer shall determine 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.

(a) Contractor Owned Equipment, Trucks and Plant--Contractor shall be reimbursed for its ownership costs and for its operating costs for self owned equipment at the rates listed in the Rental Rate Blue Book published by the Dataquest, Inc. applied in the following manner as modified by the 'Rate Adjustment Table'.

i) Ownership Costs--It is mutually understood that the rates for ownership costs reimburse the Contractor for all nonoperating costs of owning the equipment, truck or plant including depreciation on the original purchase, insurance, applicable taxes, interest on investment, storage, overhead, repairs, moving the equipment onto and away from the project or work site, and profit. Reimbursement will be made for the hours of actual use as described below:

ii) Less than 8 hours of actual use, the product of the actual number of hours used or fraction thereof multiplied by the hourly rate, or the daily rate, whichever is less

iii) Between 8 hours and 40 hours of actual use, the product of the actual number of hours used divided by 8 multiplied by the daily rate, or the weekly rate, whichever is less.

iv) Between 40 and 176 hours of actual use, the product of the actual number of hours used divided by 40 multiplied by the weekly rate, or the monthly rate, whichever is less.

v) Over 176 hours of actual use, the product of the actual number of hours used divided by 176 multiplied by the monthly rate.

vi) Operating Costs –The rate for operating costs includes fuel, lubricants, other operating expendables, and preventative and field maintenance. Operating cost does not include the operator’s wages. The Contractor shall be reimbursed the product of the number of hours of actual use multiplied by the Estimated Operating Cost/Hour.

vii) The rates used shall be those in effect at the time the force account work is done as reflected in the then current publication of the Rental Rate Blue
Book. When force account type analysis are used to establish agreed prices in accordance with Section B.1 above, the rates used shall be those in effect when the agreed price is developed by the Contractor and submitted to the Engineer-in-Charge.

viii) The geographic Area Adjustment Factor shown on the map at the beginning of each section of the Rental Rate Blue Book shall not be applied to the equipment rates subsequently listed in each section, and shall not be used as a basis for payment.

ix) In the event that a rate is not established in the Rental Rate Blue Book for Construction Equipment for a particular piece of equipment, truck or plant, the Commissioner shall establish rates for ownership costs and operating costs for that piece of equipment, truck or plant that is consistent with its cost and expected life.

(b) Rented Equipment, Trucks and Plant-

i) In the event that the Contractor does not own a specific type of equipment and must obtain it by rental, it shall be paid the actual rental rate for the equipment for the time that the equipment is used to accomplish the work or is required by the Engineer-in-Charge to be present, not to exceed the adjusted rental rate in the Rental Rate Blue Book, plus the reasonable cost of moving the equipment onto and away from the project site.

ii) The Contractor shall also be reimbursed for the operating cost of the equipment unless reflected in the rental price. Such operating cost shall be determined in the same manner as specified for Contractor Owned Equipment above.

iii) In the event that area practice dictates the rental of equipment with an operator or fully fueled and maintained equipment, truck or plants, payment will be made on the basis of an invoice for the rental of the equipment with an operator, fully fueled and/or maintained equipment, trucks or plants including all costs incidental to its use, including costs of moving to and from the site, provided the rate is substantiated by area practice.

(c) Maximum Amount Payable--The maximum amount of reimbursement for the ownership costs of Contractor owned or the rental cost of rented equipment, trucks or plant is limited to the original purchase price of the equipment, truck or plant for any force account work as listed in the Green Guide for Construction Equipment published by the Dataquest, Inc. In the specific event when the ownership or rental reimbursement is limited by the original purchase price, the Contractor shall, nevertheless, be reimbursed for the operating Cost/Hour for each hour of actual use.

(6) Profit and Overhead. Profit and overhead cost shall be computed at 20 percent of the following:

(a) Total Direct Labor Cost (actual hours worked multiplied by the basic hourly wage rate) plus supplemental benefits payments, payroll taxes, insurance payments and other labor related fringe benefit payments as defined in (2) and (3) above, but not including the overtime additive payments. Profit and overhead shall not be paid on the premium portion of overtime.

(b) Total Cost of Materials as defined in (1) above including the cost of
transportation to the project site.

(7) Overhead shall be defined to include the following:

(a) Premium on bond;

(b) Premium on insurance required by the State other than Workers Compensation Insurance, premium on public liability and property damage insurance, unemployment insurance, Federal old-age benefits, other payroll taxes and such reasonable charges that are paid by the Contractor pursuant to written agreement with its employee;

(c) All salary and expenses of executive officers, supervising officers or supervising employees;

(d) All clerical or stenographic employees;

(e) All charges for minor equipment such as small tools, including shovels, picks, axes, saws, bars, sledges, lanterns, jacks, cables, pails, wrenches, etc., and other miscellaneous supplies and services;

(f) All drafting room accessories such as paper, tracing cloth, reproduction costs, etc.

b. Subcontractor Charges. When the work is performed by a subcontractor, the Contractor shall be paid the actual and reasonable cost of such subcontracted work as outlined above in items (1) through (5) under a. Contractor Charges, but profit and overhead shall be figured at (25%) unless some other basis is approved by the Commissioner.

c. Service Charges. When work is performed by, and a fee is paid to, a service provider, the contractor shall be paid the actual cost of the service fee plus a maximum five percent (5%) for contract supervision, overhead and profit. This 5% shall be applied once to the service fee regardless of the firm making direct payments to the service provider.

For the purposes of this section, “services” shall be considered to include professional fees, testing fees, dumping fees, utility charges, and other specialized work which is not accounted through labor, equipment and materials. For work reimbursed under force account procedures, service fee schedules shall be approved by the engineer.

C. Force Account Report. Payment for force account work will be made on the basis of the following reports.

1. The Contractor will deliver to the Engineer-in-Charge a daily summary of FORCE ACCOUNT WORK done on the contract. This summary will be delivered to the Engineer-in-Charge not later than closing time on the day following that for which the work is reported. The summary shall be on the appropriate form as described by MURK. The Engineer-in-Charge will supply the forms.

The summary shall contain:

a. A list of materials used indicating the quantity and nature of each material. The cost (if known) should also be included. This must be documented later by proper receipts.
b. A list of equipment used indicating the number of hours used and the kind, type, and size of equipment.
c. A list of personnel by name, including the hours worked, and labor classification at which they were used on the force account work and the location by station or station of the work proposed.
d. A statement of the work accomplished by force account for that day.
e. This summary will be dated and signed by the Contractor’s authorized representative.
§109-05

and the Engineer-in-Charge.
f. The contract number and other identification as well as the name of the Contractor shall appear on the statement.
g. The Engineer-in-Charge will make any notations, remarks or comments on this form that may assist in final payments.

2. Within 5 calendar days after the end of each pay period, the Contractor shall deliver to the Engineer-in-Charge a FORCE ACCOUNT SUMMARY OF LABOR used on the work which shall include the name, hourly rate of pay, hours worked, fringe benefits, and/or other items as shown on the actual payroll.

3. On completion of the specific force account work, the Contractor shall within 10 calendar days, deliver to the Engineer-in-Charge a Force Account Summation wherein all materials, equipment, and labor charges are shown and totaled together with such other expenditures as are concerned with the force account item. This summation shall be dated and signed by the Contractor’s authorized representative and the Engineer-in-Charge.

4. In the event the contractor fails to deliver the required force account documentation to the EIC within the time period specified in §109-05, subsection C, of these General specifications, and as a result the Order-on-Contract for the force account work is not fully approved at the date of final acceptance, the number of calendar days of the time period between final acceptance and the issuance of this force account Order-on-Contract, attributable to the Contractor’s late force account submissions will extend the required payment data by an equal period of time.

D. TIME RELATED DISPUTE COMPENSATION.

1. As limited by Section 109-16, the following elements of damage, and only the following elements, will be recoverable by the Contractor as “time related dispute damages” provided that they are actual and reasonable. Any such adjustment shall be made via order-on-contract and in accordance with the provisions of Section 109-05 (B.) of the Standard Specifications.

   a. Documented additional or escalated job site labor expenses;

   b. Documented additional or escalated costs for materials;

   c. Documented additional or escalated equipment costs less appropriate credits, as such are determined in accordance with this Section;

   d. Documented costs of extended job-site overhead (field costs, including field supervision); job-site overhead would include job superintendent, office engineer and clerical staff, but would not include working foremen;

   e. An additional 10 percent of the total of items A, B, C and D, immediately above, for home office overhead and 10% for profit thereon except when the differing site conditions or significant change in character of the work clauses (§109-16 A. 1. and 3.) apply, no anticipated profits shall be allowed and where the suspension of work clause (§109-16 A 2.) applies, no profit or anticipated profits shall be allowed;

   f. Documented additional or escalated insurance and bond costs;

   g. When the work is performed by a subcontractor, the Contractor shall be paid the actual and reasonable cost of such subcontracted work as outlined above in paragraphs 1. a. through 1.d. and the Contractor’s main office overhead and profit shall be figured at 15% and 10% respectively, except for where the differing site conditions or significant change in character of the work clauses (§109-16 A. 1. and 3.) apply, no anticipated profits shall be allowed and where the suspension of work clause (§109-16 A. 2.) applies, no profit or
§109-05

anticipated profits shall be allowed;

h. The phrase “additional expenses” shall include expenses above or below those normally incurred in the performance of the work, less any appropriate credit. The phrase “escalation expenses” shall include unanticipated higher or lower costs and expenses attributable, with appropriate credits, to the performance of work or portions of work in a different time period than that which was indicated on the Department approved progress schedule.

2. Equipment, truck or plant rentals, other than small tools:

a. Equipment used by the Contractor shall be specifically described by the manufacturer, model number and date of manufacture and be of suitable size and capacity required for the work to be performed. In the event the Contractor elects to use equipment of a higher cost than the equipment suitable for the work, payment will be made at the actual cost rate applicable to the suitable equipment unless otherwise provided for in this section. The Engineer shall determine the suitability of equipment. For purposes of computing Contractor’s self-owned equipment, truck or plant costs, the rate used shall be based on the rate listed in the "Rental Rate Blue Book" published by Dataquest, Inc., with the appropriate adjustments noted in §109-05 B. 2. of these Standard Specifications.

b. In the event that a rate is not established in the "Rental Rate Blue Book" for Construction Equipment for a particular piece of equipment, truck or plant, the Commissioner shall establish a rate for ownership costs and operating costs for that piece of equipment, truck or plant that is consistent with its cost and expected life.

c. The Contractor shall be reimbursed for its operating costs for self-owned equipment based on actual cost data. Operating costs shall include fuel, lubricants, other operating expendables and preventive and field maintenance. Operating costs do not include the operator’s wages. In the event, after documented and demonstrated due diligence, actual operating costs are not ascertainable, then the Contractor will be compensated utilizing not more than 50% of the operating costs set forth in the “Rental Rate Blue Book” and the Contractor shall be reimbursed the product of the number of hours of actual use multiplied by the operating cost per hour.

d. The rate for idle equipment and stand-by equipment, shall be based upon the rate of depreciation specified in the Contractor’s books and records, or 50% of the rate set forth in the “Rental Rate Blue Book,” published by Dataquest, Inc. with the appropriate adjustments noted in §109-05 of these Standard Specifications, whichever is greater. In the event the equipment is fully depreciated, the Commissioner will pay the actual ownership costs based upon Department audit of the Contractor’s books and records.

e. The maximum amount of reimbursement for the ownership costs of Contractor owned or the rental cost of rented equipment, trucks or plant is limited to the original purchase price of the equipment, truck or plant as listed in the "Green Guide for Construction Equipment" published by the Dataquest, Inc. In the specific event when the ownership or rental reimbursement is limited by the original purchase price, the Contractor shall, nevertheless, be reimbursed for the operating cost per hour for each hour of actual use.

f. For purposes of rented equipment, the provisions of §109-05 B, New Item Charges, are controlling.

3. The parties agree that, in any dispute for time related damages, the Department will have no liability for the following items and the Contractor further agrees it shall make no claim for the following items:
a. Profit, in excess of that provided in §109-05 D. 1.e. and g.;

b. Loss of anticipated or unanticipated profit;

c. Labor inefficiencies and loss of productivity;

d. Home office overhead in excess of that provided in §109-05 D. 1.e. and g.;

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 retainage or 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 in a manner satisfactory to the Engineer.

h. Attorneys fees, or claims preparation expenses.

4. Remedies Exclusive: With respect to time related dispute compensation provisions, the parties agree that the State shall have no liability to the Contractor for expenses, costs, or items of damage other than those which are specifically identified as payable under §109-05 D. In the event any legal action is instituted against the State by the Contractor on account of any such dispute for additional compensation, whether on account of time related dispute, delay, acceleration, breach of contract, or otherwise, the Contractor agrees that the State’s liability will be limited to those items which are specifically identified as compensable under §109-05 D. The Contractor further agrees to make no claim for expenses other than those which are specifically identified as compensable under §109-05 D. Nothing in this Section 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.

E. Required Content of Dispute Submission. All disputes must be submitted in writing to the Engineer, and must 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 must be provided when such information is ascertainable by the Contractor:

1. 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. An as-built chart, “Critical Path Method” scheme or other diagram or chart depicting in graphic form how the operations were or are presumed to be adversely affected.

c. The date on which actions resulting in the dispute occurred or conditions resulting in the dispute became evident.

d. A copy of the “notice of dispute” required as per §105-14 A. 3. for the specific dispute by the Contractor.

e. 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.

f. 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.
§109-05

§109-05

g. The identification of any pertinent documents, and the substance of any material oral communication relating to such dispute.

h. 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.

i. The amount of additional compensation sought and a breakdown of that amount into the categories specified as payable under §109-05 D. above.

j. 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. For Other Disputes Including Acceleration Disputes.

a. A detailed factual statement of the dispute providing all necessary dates, locations and items of work affected by the dispute.

b. The date on which actions resulting in the dispute occurred or conditions resulting in the dispute became evident.

c. A copy of the “notice of dispute” required for the specific dispute by the contract pursuant to §105-14 B or C.

d. 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.

e. The name, function and activity of each Contractor or subcontractor official, employee or agent involved in or knowledgeable about facts that gave rise to such dispute.

f. The specific provisions of the contract which support the dispute and a statement of the reasons why such provisions support the dispute.

g. The identification of any pertinent documents and the substance of any material oral communications relating to such dispute.

h. A statement as to whether the additional compensation or extension of time requested is based on the provisions of the contract or an alleged breach of contract.

i. 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 schedule.

j. The amount of additional compensation sought and a breakdown of that amount shall conform to the requirements of §109-05 B. except for acceleration disputes which shall conform to the requirements and categories specified in §109-05 D. above.

F. Required Certification of Disputes. When submitting any dispute over $50,000, the Contractor must 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 and the dispute itself accurately reflects what the Contractor in good faith believes to be the Department’s liability;

3. If the Contractor is an individual, the certification shall be executed by that individual.

4. If the Contractor is not an individual, the certification shall be executed by:

   a. Senior company official in charge at the Contractor’s plant or location involved; or
§109-11

b. An officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor’s affairs.

109-06 PROGRESS PAYMENTS. Unless otherwise specified in a particular pay item, no payment will be made for an item of work until its completion in accordance with the specification.

109-07 PAYMENT OF ESTIMATES. The provisions of §102-17, Sample Form of Agreement, Article 7, shall apply.

109-08 NO ESTIMATE ON CONTRACTOR’S NON-COMPLIANCE. The provisions of §102-17, Sample Form of Agreement, Article 8, shall apply.

109-09 FINAL ACCEPTANCE OF WORK. The provisions of §102-17, Sample Form of Agreement, Article 9, shall apply.

Prior to the final acceptance of the work by the Commissioner or his/her 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.

109-10 UNCOMPLETED WORK AGREEMENT. Whenever a contract shall, in the judgment of the Department, be substantially completed and the withholding of the retained percentage 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 §109-11, Final Agreement, and certified by the Regional Director. The final contract account will include such uncompleted items and pay therefor at the item prices in the contract, upon execution of the 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 subdivision 3 of Section 139 of the State Finance Law. 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 pay item. When the cost to perform the work is not reflected by the unit prices bid, the Engineer will estimate the value of uncompleted work. The deposit will be held by the Department until the Engineer certifies that all previously uncompleted work has been satisfactorily completed, and may be used by the Department to complete the uncompleted portion of the contract. 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.

109-11 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, made a part of such final agreement. Work remaining to be accomplished under an uncompleted work agreement, shall be considered as completed work for the purpose of the final agreement.

The Commissioner, or his/her designee, will approve a final agreement as prepared and approved by the Regional Director, less any and all deductions authorized to be made by the Commissioner under the contract. Payment pursuant to such final agreement less any deductions authorized to be made by the Comptroller shall constitute the final payment to the Contractor.
§109-12

109-12 PROMPT PAYMENTS BY THE CONTRACTOR.

A. General. As referenced in §109-03, Section 139-f(2) of the State Finance Law requires the Contractor to pay each subcontractor and materialman for the value of work performed pursuant to contract no later than fifteen (15) calendar days from the receipt of each payment the Contractor receives from the State.

B. Release of Retainage. For Federal-Aid Contracts, the Contractor is required pursuant to 49 CFR 26.29 to promptly return retainage payments to each subcontractor after work is satisfactorily completed. When the Contractor and subcontractor determine that all work items and/or activities of the subcontractor have been satisfactorily completed and paid for, thereafter the Contractor shall pay the retained amounts (if any) to that subcontractor within forty-five (45) days after receipt of an invoice from such subcontractor. The retained amount shall be paid irrespective of whether the Department has released the retained amounts to the Contractor.

C. Exceptions. Any delay or postponement of payment from the above-referenced time frames for payment or return of retainage may occur only upon written notice to the Engineer with a written explanation of the reasons for the delay or postponement.

D. No Circumvention. For Federal-Aid Contracts, the Contractor shall not include any provision in its subcontracts that would circumvent 49 CFR 26.29.

109-13 FINAL PAYMENT. The provisions of §102-17, Article 10 of the Sample Form of Agreement shall apply. Section 179 of the State Finance Law requires the Department to make final payment on highway construction projects within seventy-five (75) days after acceptance by the Commissioner. If the Department unjustifiably fails to pay the final payment within the prescribed seventy-five (75) calendar days, it may be required to pay interest for each day in excess of the seventy-five (75) calendar days.

In order to enable the Department to process the final payment properly and expeditiously the Contractor is advised that submission of all of the following documents, as may be appropriate to this contract, are considered to be necessary to enable the processing of the final payment as described above.

Outstanding Claims and Disputes
Extra Work Cost Accounts
Final Labor Affidavits (Forms AC 2947 & AC 2948)
Approved Original Reproducibles
Material Certifications
Certified Payrolls
FHWA Record of Materials, Supplies and Labor (Form FHWA-47)
Tax Clearance for “Foreign” (out of State) Contractors, Corporations or entities
Contractor’s Final Report of Contract Payments (Form AAP-21c)

The Contractor is advised that the above list is general in nature, that every item may not be applicable to the contract and that other documents and submissions not shown above may be required to enable the processing of the final payment. It should be noted that 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.

The Department, in accordance with Section 179 of the State Finance Law, has determined that a thirty (30) calendar day inspection period, after final acceptance of the project, is required for final payments after which time the seventy-five (75) day interest-free processing period will commence.
109-14 ACCEPTANCE OF FINAL PAYMENT. The acceptance by the Contractor, or by anyone claiming by or through it, of the final payment 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 thereunder, 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 Department of Transportation not later than 40 days after the mailing of such final payment. Such statement 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 the final payment as tendered by the Comptroller, it shall constitute a waiver of any right to interest thereon.

109-15 CONTRACTOR’S COST RECORDS. The Contractor shall maintain records of all required payrolls, and of the details that comprise its total cost pursuant to any of the provisions under §104-03, Contingencies, Extra Work, Deductions, and all records maintained pursuant to §105-14, Dispute Resolution and Disputed Work Provisions and §109-05, Extra Work, Force Account Work, Dispute Compensation and Recordkeeping, and it shall, at any time within six years following the date of final payment of the project, make such records available, upon request therefor, to the Department for review and audit, if deemed necessary by the Commissioner. 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 therefor has already been made, the Contractor shall, upon demand in writing by the Commissioner, refund to the Department the amount so disallowed.

109-16 CHANGED CONDITIONS AND DELAY PROVISIONS.

A. Compensable Delays and Changed Conditions.

The provisions of this contract permit monetary compensation for delays and interference in certain defined instances. The Contractor agrees that the only claims it may make for extra compensation caused by delay or interference affecting the performance or the scheduling of contract work are for those instances arising out of:

1. different site conditions;
2. suspension of work (other than stop orders pursuant to §105-01);
3. significant changes in the character of the work; and
4. situations not referenced in subsection B and which are not within the contemplation of the parties at the time of entering into the contract.

In addition, these aforementioned provisions may also form the basis for extra work compensation pursuant to §105-14 and §109-05. Failure of the Contractor to adequately progress the 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 claim asserted under this section, the Contractor shall keep detailed written records of the costs and agrees to make them available to the Department at any time for purposes of audit and review.

Any dispute relating to such claims shall be promptly submitted to the Engineer in writing, pursuant to the notice provisions of the contract. Failure by the Contractor to notify the Engineer in writing pursuant to the provisions of this contract, or to maintain and furnish cost records of such claims, shall constitute a waiver of the claim.

1. Different Site Conditions.

a. 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 in writing of the specific differing conditions before the site is further disturbed and before the affected work is performed. The Contractor shall comply with notice provisions of §105-14 A. 3.

b. Upon written notification, the Engineer will investigate the 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 of the contract is warranted.

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

d. The aforesaid differing site condition clause (§109-16 A. 1.) shall be governed by the notice provisions set forth above, and the recordkeeping and other requirements of §105-14, Dispute Resolution and Disputed Work Provisions, §109-5 E., Required Content of Dispute Submission and F., Required Certification of Dispute. Additional compensation via order on contract(s) shall be made for time related costs, if any, pursuant to §109-5 D., Time Related Dispute Compensation. For any increased costs of the work resulting from the differing site condition, payment shall be made pursuant to §109-05 B, New Item Charges, 1 (Agreed Price) or 2 (Force Account Charges), but, the equipment compensation shall be governed and controlled by the provisions of §109-05 D. 2.

2. Suspensions of Work Ordered by the Engineer.

a. 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, customary, or inherent to the construction industry) and the Contractor believes that 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. The record keeping requirements of Section 105-14 must be complied with in connection with any requests for reimbursement.

b. 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 conditions beyond the control of and not the fault of the Contractor, its suppliers, or subcontractors at any approved tier, and not caused by weather, 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 of the contract is warranted.

c. No contract adjustment will be allowed unless the Contractor has submitted the request for adjustment within the time prescribed.

d. 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 for or excluded under any other term or condition of this contract.

e. The aforesaid suspension of work clause (§109-16 A. 2.) shall be governed by the notice provisions set forth above, and the recordkeeping and other requirements of §105-14, Dispute Resolution and Disputed Work Provisions, §109-5 E., Required Content of
Dispute Submission and F., Required Certification of Dispute. Additional compensation via order on contract(s) shall be made for time related costs, if any, pursuant to §109-05 D, Time Related Dispute Compensation. For any increased costs of the work resulting from a suspension of work, payment shall be made pursuant to §109-05 B, New Item Charges, 1 (Agreed Price) or 2 (Force Account Charges) but, the equipment compensation shall be governed and controlled by the provisions of §109-05 D. 2.


a. 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.

b. If the alterations or changes in quantities significantly change the character of the work under the contract, whether such alterations or changes are in themselves significant changes to the character of the work, or by affecting other work, cause such other work to become significantly different in character, an adjustment, excluding anticipated profit, 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, either for or against the Contractor, in such amount as the Engineer may determine to be fair and equitable.

c. 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.

d. The term “significant change” shall be construed to apply only to the following circumstances:

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

(2) When the quantity of a major item of work, as defined elsewhere in the contract, goes above 125 percent, or below 75 percent 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 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

(3) The term ‘major item’ of work shall mean any item for which the original bid price multiplied by the original bid quantity exceeds the following major item value based on total contract bid price or 2% of the total contract bid price, whichever is greater:

<table>
<thead>
<tr>
<th>Total Contract Bid Price</th>
<th>Major Item Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>≤ $1,000,000</td>
<td>$20,000</td>
</tr>
<tr>
<td>&gt; $1,000,000 - $5,000,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>&gt; $5,000,000 - $20,000,000</td>
<td>$200,000</td>
</tr>
<tr>
<td>&gt; $20,000,000</td>
<td>$500,000</td>
</tr>
</tbody>
</table>

Note: For contracts subject to A+B Bidding, the total contract bid price will include only the “A” portion of the bid.

(4) Certain items of work may be ‘fixed quantity’ items. That is, payment will be restricted to the quantity stated in the Estimate of Quantities. A fixed quantity is an item of work that does not require measurement(s) to establish the actual quantity. If, during the progress of the work the stated quantity is determined to be in error, the major item of work requirement shall not apply and a payment may be considered if
there is a significant change when the actual quantity is in excess of 125 percent of the stated fixed quantity or less than 75 percent of the stated fixed quantity.

(5) Composite items, for the purposes of this section, consist of rock and non-rock components, and are limited to unclassified excavation and trench excavation. These composite items can be adjusted as a significant change if any individual component of the composite varies by more than 25 percent from the quantity stated in the Earthwork Summary Sheet used by the Department in preparing the Contract. An adjustment will only be allowed if the affected composite item meets the major item definition and the reasonable costs of the composite item either increases or decreases as a result of the change. The adjustment in payment shall be based on variance in quantity of the individual components from the quantity stated in the Earthwork Summary Sheet. For contracts containing major items of unclassified excavation and/or trench and culvert excavation, the Contractor shall submit, at the request of the Engineer, its price breakdown of the bid price of the composite item for the rock and non-rock components.

e. The aforesaid significant change in character of work clause (§109-6 A. 3.) shall be governed by the notice, recordkeeping and other requirements of §105-14, Dispute Resolution and Disputed Work Provisions, §109-5 E., Required Content of Dispute Submission and F., Required Certification of Dispute. Additional compensation via order on contract(s) shall be made for time related costs, if any, pursuant to §109-05 D. For any increased costs of the work resulting from a significant change in the character of the work, payment shall be made pursuant to §109-05 B, New Item Charges, 1 (Agreed Price) or 2 (Force Account Charges) and E (2), but, the equipment compensation shall be governed and controlled by the provisions of §109-05 D. 2.

f. With respect to the aforesaid significant change in the character of work clause (above), the Contractor or the State, as the case may be, must make written notification to the other party of the existence of the apparent ‘significant change’ if that party wishes to adjust the contract price or time of performance. Such notice shall be given within ten (10) days of the time at which the party had, or should have had, knowledge of an event, matter or occurrence which results in a significant change in the character of the work. Work which is substantially completed prior to the issuance of notice may not be considered for contract adjustment.

g. With respect to the aforesaid significant changes involving an increase or decrease in a major item (above), the Contractor or the State, as the case may be, must make written notification to the other party of the “significant change” in quantity of a major item if that party wishes to adjust the contract price or time of performance. Such notice shall be given within 10 days of knowledge of the change. Knowledge of a significant change in quantity could result from: receipt of a written change order (approved or unapproved) or a letter indicating 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.

h. Timely issuance of notice shall be a necessary requirement for consideration of contract adjustment as provided in this section.

4. If the Department determines that, as a result of the aforesaid Differing Site Condition, Suspension of Work and Significant Changes in Character of Work clauses, an adjustment in the contract price is warranted, the Department shall first attempt to arrive at an agreement with the Contractor. If unsuccessful, the Department will make such adjustments to the contract as is determined to be fair and equitable utilizing Department estimates. When the Department and the Contractor, are not in agreement regarding contract adjustment, the work
shall be treated as Disputed Work, requiring daily recordkeeping in accordance with the provisions of Section 109-05 C. Force Account Report.

5. If any of the notice or other provisions of this Section are in conflict with any other of the provisions of the Standard Specifications, then the provisions of this Section shall prevail and take precedence and be of force over and against any said conflicting provision of said contract.

6. 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. To the extent that significant changes in other contract work items result in a significant change in the work effort required to complete "Lump Sum" items of work, payments under those lump sum items may be considered for adjustment. Any such adjustments shall be made via order-on-contract, and in accordance with the provisions of Section 109-05 B of these Standard Specifications.

B. Non-Compensable Delays.

The Contractor agrees to make no monetary claim 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 items 1 through 10 set forth below.

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 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, 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 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.

4. 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.

5. Any labor boycott, strike, picketing or similar situation.

6. Any shortages of supplies of materials required by the contract work.

7. 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.

8. Contract quantities up to 125% of the original contract quantity, additional contract work, or extra work which does not significantly affect the overall completion of the contract, delays in the review or issuance of orders-on-contract, or field change sheets or delays within the established time periods for review and approval for shop drawings.

9. Any situation which was within the contemplation of the parties at the time of entering into the contract.

10. Award of the contract by the State more than forty-five (45) days beyond the letting date.
§109-16

This aforementioned agreement, as set forth in subsection B above, by the Contractor, not to make a claim for additional costs for the items set forth above shall apply in the event the Contractor completes work prior to the contract completion date set forth in the proposal, even if the Contractor submits to the Department a schedule depicting early completion. For the items in subsection B, 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 Section 108-04 of the Standard Specifications.

109-17 MATERIALS NOT INCORPORATED INTO THE CONTRACT. 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 project, 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.