

**SECTION 1.08
PROSECUTION AND PROGRESS**

1.08.01--Subletting or Assigning of Contracts: The Contractor shall not sublet, sell, transfer, assign, or otherwise dispose of the Contract or any portion thereof, or of the work provided for therein, or of its right, title, or interest therein, to any person, firm, partnership, or corporation without the prior written consent of the Commissioner. No payment will be made for any part of the work sublet, sold, transferred, assigned, or otherwise disposed of, prior to the authorization date given in the written consent of the Commissioner. The Contractor shall perform with his own organization work of a value under the Contract amounting to not less than 50 percent of the original total Contract value. If any part of the work is sublet, sold, transferred, or otherwise disposed of, with or without the Commissioner's consent, the Contractor will not be relieved of any responsibility in connection therewith.

The Contractor shall include the following alternative dispute resolution clause in all of its subcontracts:

"For any dispute arising out of the agreement between the Contractor and a subcontractor, including claims of late or non-payment, which cannot be settled within 60 days of the subcontractor submitting a written claim to the Contractor, either party may bring the dispute before an alternative dispute resolution entity for resolution. If the parties do not agree upon a particular dispute resolution entity for that purpose, the dispute shall be resolved under the auspices and construction arbitration rules of the American Arbitration Association. The Department may not be made a party to such dispute proceedings. These rights and restrictions shall not be waivable, and if these provisions are not included in the Contractor's sub-contracts for the Project, these provisions shall nonetheless be read into them."

1.08.02--Installation of Construction Field Office: Prior to the start of the Project work, and within 10 calendar days after the award of the Contract, the Contractor shall propose in writing a field office location which is acceptable to the Engineer. The proposal shall include the nearest utility pole number and the distance from that pole to the proposed field office. After the award of the Contract, the Engineer may order the Contractor to install only the "Construction Field Office" at that time. The office shall be made acceptable and available for use, including all utility hookups, local permits and inspections, within 30 days of the date of the order to install, which order shall not be considered the "Notice to Proceed."

1.08.03--Prosecution of Work: The Contractor shall commence construction operations with that part of the Project designated for such commencement in the progress schedule which it has submitted to the Department, unless the Engineer directs the Contractor to commence with a different part of the Project, in which case the Contractor shall follow the Engineer's direction. The work shall be conducted in such manner and with sufficient materials, equipment and labor as are necessary to ensure completion of construction work in accordance with the plans and specifications within the time set forth in the Contract. The Contractor shall notify the Engineer of its intention to commence or recommence any Project operation at least 48 hours in advance of doing so. The Contractor shall also give the Engineer such advance notice of any intent to discontinue any Project operation, unless emergency conditions make it impracticable to do so. The Engineer retains the right to disallow such commencement, re-commencement or discontinuance of operations.

1.08.04--Limitation of Operations: The Contractor shall conduct the work at all times in such a manner and in such sequence as will ensure the least interference with vehicular, railroad, aircraft, pedestrian or other traffic which is practicable. The Contractor shall plan the location of detours and the provisions for handling the various types of traffic with due regard for this concern. The Contractor shall be governed by the orders of the Engineer regarding these matters. The Contractor shall cooperate with the public utilities and shall schedule its operations in accordance with Article 1.05.06.

The Contractor shall give the Engineer a seven (7) day advance written notice of proposed changes in construction activities that will alter vehicular traffic patterns that result in lane shifts, detours, temporary closures of lane(s), permanent closure of lane(s), or lane reductions, or that would in any way alter railroad, aircraft, pedestrian or other traffic patterns affecting usage of the particular facility by the traveling public. This advance notification will allow the Department to publish news releases and/or provide public radio announcements to inform the public of revised traffic patterns or possible traffic delays. Failure of the Contractor to provide such timely notice will subject the Contractor to stop work orders until such time as the seven day notice has been satisfied.

1.08.05--Workmen and Equipment: The Contractor shall employ superintendents, foremen and workers who are careful and competent. The Engineer may demand the dismissal of any person employed by the Contractor on the Project who misconducts himself or is incompetent or negligent in the performance of his duties or any portion thereof, or who neglects or refuses to comply with directions given within the requirements of the Project; and such person shall not work again on the Project without the written consent of the Engineer. Should the Contractor continue to employ or again employ such person on the Project, the Commissioner may withhold all estimated payments which are or may become due, or the Engineer may shut down the work until the Contractor has complied with the Engineer's orders concerning that person. The use of convict labor on federally funded projects is prohibited.

The Contractor shall furnish whatever equipment is necessary for the work to be performed in an acceptable manner and at a satisfactory rate of progress. Equipment used on any portion of the work shall not be used in any way that may cause injury to the roadway, adjacent property, or other highways, features of, on or adjacent to the project site, unless such injury is necessary for the performance of the work.

The Contractor may submit to the Engineer a request to use equipment or methods other than those specified in the Contract. If the Engineer so directs, there shall be a trial of such equipment or methods. If the results of the trial are satisfactory to the Engineer, the Contractor may commence with the performance of the work utilizing such equipment or methods. Failure of the equipment or method under trial to meet the specified Contract performance standards, or, in the absence of such standards, to perform to the satisfaction of the Engineer, shall be cause for rejection of the method or equipment or both. Equipment rejected by the Engineer shall be immediately removed from Project site.

1.08.06--Suspensions of Work Ordered by the Engineer: The Engineer shall have the authority to suspend the work wholly or in part, for such period or periods as he considers to be in the best interests of the State, or in the interest of public necessity, convenience or safety.

During such periods of suspension, and subject to any related directions from the Engineer, the Contractor shall store all materials and equipment in such manner that they will not obstruct or impede the traveling public unnecessarily or allow the materials to become damaged in any way; shall take precautions to prevent damage to the work performed; shall provide suitable drainage of the roadway or project site by opening ditches, shoulder drains, etc.; and shall erect temporary structures to prevent damage to the work or to other property, or to protect the public, where necessary.

The Contractor shall maintain the roadway, project site, and building in safe condition for travel or occupancy, and shall maintain all barricades, signs, and lights during the period of suspension (Items 1-4, Reference 23 CFR, Section 635.109, "Standardized Changed Condition Clause," Required FHWA Contract Specification):

- (1) 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 a Contract adjustment within 7 calendar days of receipt of the notice to resume work. The request shall set forth the specific reasons and support for such adjustment.
- (2) Upon its 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 was not caused by weather, the Engineer will make an adjustment (excluding profit) and modify the Contract in writing accordingly. The Engineer will notify the Contractor of his determination as to whether or not an adjustment of the Contract is warranted.
- (3) No Contract adjustment will be allowed unless the Contractor has submitted the request for adjustment within the time prescribed.

- (4) No Contract adjustment will be allowed under this clause to the extent (a) that performance would have been suspended or delayed by any other cause, or (b) that an adjustment is provided for or excluded under any other term or condition of this Contract.

1.08.07--Determination of Contract Time: The number of calendar days allowed for the completion of the Project will be fixed by the Department, will be stated in the proposal form and Contract, and will be known as the "Contract time." If a Contractor, prior to award of the Contract, anticipates completing the project before the Contract completion date or in less time than the calendar days allowed, the Contractor must submit to the Transportation Manager of Contracts, prior to award, a project schedule indicating the anticipated early completion date and the schedule by which the Contractor would achieve that early completion. If the Contractor does not submit such a schedule prior to award of the Contract, the Contractor shall be barred from making any formal or informal claim for damages or additional compensation that is based (in whole or in part) on an assertion that the Contractor could have completed the Project prior to the Contract completion date if not for the action or inaction of the State. If such a schedule is submitted to the Transportation Manager of Contracts prior to award of the Contract, the failure of the Department to challenge the feasibility or reasonableness of the schedule at that time may not be construed as an admission or acknowledgment that the schedule is feasible or reasonable.

If the Contractor has submitted, prior to commencement of the Project, a schedule that indicates completion of the Project more than 30 calendar days in advance of the Contract completion date, the Department, after award, may issue a no-cost construction order revising the allowable Contract time to that shown on the Contractor's schedule.

When the Contract time is on a calendar-day basis, that time shall be the number of consecutive calendar days contained in the Contract period designated in the Contract, excluding the time period from December 1 through March 31 of the following year. The Contract time will begin to run on the date specified in the Engineer's "Notice to Proceed" as the date for commencement of the Project work, and it will be computed as herein provided on a consecutive-day basis, including all Saturdays, Sundays, holidays, and non-work days from April 1 through November 30 of each included year.

Time will not be charged for days in the months of December, January, February and March, except for time used in working on planting projects and any other projects with regard to which the Department's standard specifications or project bid documents provide otherwise. If the Engineer so approves, the Contractor may work on the Project during this period with no charge being made against the Contract time specified in the Contract.

If the time specified for the completion of the Project, with time extensions, is due to expire before December 1 of a given year but the Project has not been completed by that December 1, the time charged the Contractor will continue through the winter months from December 1 through March 31 of the following year.

The total elapsed time in calendar days, computed as described above, from the commencement date specified in the Engineer's "Notice to Proceed" to the completion date specified in the Engineer's "Notice of Completion" shall be considered as the time spent in the performance of the Contract work.

In case of total suspension of the work ordered by the Engineer, not due to any fault of the Contractor, the elapsed time during which the work is suspended will not be charged against the contract time. Suspension involving cessation of work on all items except minor construction not affected by or connected with the cause of suspension, shall be considered as total suspension. Work of an emergency nature ordered by the Engineer for the convenience or safety of the public or the protection of the work, if performed during a period of total suspension, will not be charged against Contract time. No such time allowance will be granted in case of partial suspension; provided, however, that the Contractor may request and the Engineer may grant permission to perform specific limited operations during such a partial suspension, in which case Contract time chargeable for those operations shall be negotiated and agreed to in writing before such operations may commence.

1.08.08--Extension of Time: The Contractor may present to the Engineer a request in writing for an extension of Contract time for completion of the work due to extra or added work or delays resulting from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, except for weather or seasonal conditions. Such causes may be, but are not restricted to, natural catastrophes, acts of the State in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the State, the presence of utility facilities including railroads, fires, strikes, floods, or delays by suppliers arising from unforeseeable causes beyond

the control and without the fault or negligence of either the Contractor or such suppliers. The Contractor's plea that insufficient Contract time was allowed under the Contract is not a valid reason for extension of time. Requests for an extension of time with adequate substantiation must be presented within 60 calendar days of the event which is the basis of the request or of the first effect of such an event on the work. The Contractor must provide to the Engineer all documentation necessary to support the reasonableness of the additional time requested. When applicable, the documentation shall include, but not be limited to, the following: (a) a complete description of the request or relevant delay(s); (b) all correspondence that shows or reflects how critical-path project activities were affected or delayed; (c) for material delays, all relevant purchase order requests and delivery dates, including all correspondence relating to those matters; and (d) a time chart comparing (i) an original baseline or recovery schedule created prior to the alleged causes underlying the request for a time extension with (ii) a schedule showing the actual or anticipated time effects of said underlying causes on the project's progress and completion. Such requests will be considered by the Engineer and granted to the extent which he deems fair and reasonable. Requests will not be considered if based on delays caused by conditions existing at the time the bids were received and of which the Contractor might reasonably be expected to have full knowledge, or upon delays caused by failure on the part of the Contractor to anticipate properly the requirements of the work contracted for as to materials, labor or equipment.

For all Project delays or time increases, except as directed below, additional Contract time is the sole remedy the Contractor may have, and such periods of additional Contract time shall be deemed "Non-Compensable Delays." For delays caused by the State in its contractual capacity the Contractor may, in addition to a time extension, request additional compensation to reimburse it for damages sustained as a direct result of the delay, and such periods of extended Contract time may be deemed "Compensable Delays." The period of a compensable delay is limited as follows: (1) it may not include time more than 60 days prior to the Engineer receiving written notice with adequate substantiation from the Contractor of its intent to claim damages for the delay, (2) and it may not include periods of delay for which the State was responsible, but during which the Contractor experienced concurrent delays for which the State was not responsible. If, in the opinion of the Contractor, an unanticipated event or sequence of events subsequent to award of the Contract makes it feasible for the Contractor to complete the Project at least thirty (30) calendar days earlier than the then-current Contract completion date, the Contractor must either (a) submit to the Engineer, within thirty (30) calendar days of said event(s), a revised Project schedule showing the anticipated early completion, with a written explanation of how said event(s) made that early completion feasible when it otherwise would not have been feasible; or (b) forego any formal or informal claims based on the assertion that the Contractor, because of that event or sequence of events, could have completed the Project early if not for the action or inaction of the State.

Damages for periods of Project delay for which the State had sole responsibility shall be limited to the increased costs incurred by the Contractor (which shall not include lost profits), which the Contractor substantiates and which the Contractor shows were caused by such delays.

If an approved extension of time extends beyond November 30, the number of days of the approved extension remaining on that date will not begin to run again until April 1 of the following year.

1.08.09--Failure to Complete Work on Time: Time is an essential element of the Contract; since the prosecution of the work may inconvenience the public, obstruct traffic and interfere with business, it is important that the work be pressed vigorously to completion. The cost to the Department of the administration of the Contract, including engineering, inspection and supervision, will also be increased as the time occupied by the work is lengthened. Therefore, for each calendar day that any work shall remain uncompleted after the Contract time (including adjustments of Contract time) has expired, the per diem sum of liquidated damages specified in the proposal form and Contract shall be deducted from any money due the Contractor, not as a penalty but as liquidated damages, being a reasonable estimate and prediction of the damages caused by such delay. Due account, however, shall be taken of any extension of the Contract time granted under the provisions of these specifications.

When the Contract date for Project completion is based on calendar days (as that date may be adjusted by the Department), all work on the project shall be completed by that date. If that date is before December 1, liquidated damages as specified in the Contract shall be assessed against the Contractor per calendar day (including any such days during a winter shutdown period) from that day until the date on which the Project is completed.

When the Contract date for Project completion is a fixed calendar date specified in the Contract, all work on the Project shall be completed by that date. If the Project is not completed by that date, liquidated damages as specified

in the Contract shall be assessed against the Contractor per calendar day from that day until the date on which the Project is completed.

The Engineer has the right to deduct the amount of the liquidated damages assessed against the Contractor from any estimate payment for work performed on the Contract or on any other State contract, or from any other sums owed by the State to the Contractor, or to claim and recover such sums by process of law.

1.08.10--Annulment of Contract: The Commissioner may give notice in writing to the Contractor and its surety of any particular delay, neglect, or default of the Contractor due to one or more of the following:

1. Failure to begin the work under contract within the time specified;
2. Failure to perform the work with sufficient workmen, equipment or materials to insure the prompt completion of said work;
3. Unsuitable performance of the work or failure to perform anew such work as shall be rejected as defective and unsuitable;
4. Failure or refusal to remove material rejected as defective and unsuitable;
5. Discontinuance of the suitable prosecution of the work for a period of 72 hours, excluding Sundays and holidays, without written authorization of the Engineer;
6. Failure to recommence discontinued work within 48 hours (excluding Sundays and holidays) after being ordered to do so by the Engineer;
7. Insolvency, filing for bankruptcy or any act or occurrence which may render the Contractor financially incapable of completing the Project;
8. Failure to satisfy any final judgment for a period of 30 calendar days;
9. Making of any assignment for the benefit of creditors;
10. Violation of any provisions of the Contract.

If the Contractor or surety within a period of 10 calendar days after such notice does not proceed in conformance with the directions set forth in the notification, or fails to present a remedial plan of operation satisfactory to the Commissioner, then the Commissioner may, at his discretion, order the surety to complete the work or, without violating the Contract, take the right to control and prosecute the work out of the hands of said Contractor and surety. The Commissioner may appropriate or use any or all stockpiled materials and any and all equipment required by the Contract as may be suitable and acceptable and may enter into an agreement, either by negotiation or public letting, for the completion of said Contract according to the terms and provisions thereof, or use such other methods or combinations thereof as in his opinion shall be required or desirable for the completion of the Contract in an acceptable manner. All costs and charges incurred by the Department, in connection with completing the work under the Contract, or as a result of the Contractor's default, shall be deducted from any monies due to or which may become due to the Contractor. In case such expense exceeds the sum which would have been payable under the Contract, then the Contractor and the surety shall be liable for, and shall pay to the State, the amount of the excess.

1.08.11--Final Cleaning Up: The construction work will not be considered complete and will not be accepted until the right of way, borrow pits, and all other ground, both public and private, occupied by the Contractor in connection with the work shall be cleared of all surplus and discarded materials, rubbish and temporary structures. All borrow pits must be drained where practicable. All property, both public and private, which has been damaged during the prosecution of the work shall be restored to a neat and presentable condition acceptable to the Engineer.

All ditches, waterways, drainage structures and culverts constructed under the Contract shall be cleaned and cleared of obstructions in a satisfactory manner and shall be left in a neat and trimmed condition. When so directed by the Engineer, the Contractor shall clean all existing ditches, waterways, drainage structures and culverts of

obstructions resulting from construction operations.

1.08.12--Final Inspection: The Engineer shall perform an inspection of the Project within 10 calendar days after the Engineer determines that the entire construction work has been completed. If the work provided for by the Contract is found to have been completed, the inspection shall constitute the final inspection and the Engineer will notify the Contractor in writing that the final inspection has been performed.

If the inspection discloses any unsatisfactory or incomplete work, the Engineer will notify the Contractor of such deficiencies. The Contractor shall immediately correct the deficiencies. Upon such correction, another inspection will be made that shall constitute the final inspection, provided the work has been satisfactorily completed. In such event, the Engineer will notify the Contractor in writing that the final inspection has been performed.

On projects consisting of two or more individual, geographically-separated sections of roadways, sites, or physically-separated buildings or portions of buildings, a partial final inspection of individual, fully-completed sections will be performed by the Engineer upon specific request by the Contractor.

If at any time during the prosecution of the Project the Contractor substantially completes a unit or portion of the Project, such as, but not limited to, a structure, an interchange, building, portion of a site, a branch circuit in highway illumination that has been in satisfactory and continuous operation for a period of at least 30 days, or a section of road or pavement, then, to the extent that its stability and integrity is not dependent upon the completion of other work required in the Contract, the completed unit or portion of the Project may be opened (1) to vehicular or pedestrian traffic under the provisions of Article 1.07.11; or (2) to railroad, aircraft, pedestrian or other traffic, or to occupancy, at the direction of the Engineer. A final inspection of the substantially completed unit or portion of the Project will be arranged by the Engineer. Upon evidence of such completion, including issuance of a Certificate of Compliance for any building, and upon agreement by the Engineer, the Contractor will be relieved of the responsibility for that work which as placed upon it by Article 1.07.12. The Contractor shall be responsible for all damages to the completed unit or portion of the Project that may be caused by or that may result from the operations of the Contractor, its subcontractors or employees; and the Contractor shall take such precautions and shall provide such protection as may be necessary to avoid possible damage to the completed unit or portion of the Project. The acceptance of the completed unit or portion of the Project shall in no way affect any other requirements governing the completion and acceptance of the Project as a whole.

1.08.13--Completion of Construction Work and Termination of the Contractor's Responsibility: For the purpose of termination of the Contractor's responsibility, the construction work will be considered completed when the final inspection has been held, any required additional work and the final cleaning up has been completed, and all equipment and construction signs have been removed. When these requirements have been met to the satisfaction of the Engineer, the Engineer will certify to the Contractor within 7 days, in writing, that the construction work has been satisfactorily completed.

1.08.14--Acceptance of Project: The Project will be accepted by the Commissioner when all construction work has been completed, as defined by the requirements of Article 1.08.13, and the following have been submitted:

1. Supporting information necessary to substantiate pay quantities, such as cost-plus sheets;
2. Reports and forms required on all Federal Aid Projects;
3. warranties, guaranties, final operation and maintenance manuals, and documentation that training and start-up support required by the Contract was completed;
4. Any other documents required under the terms of the Contract.