

## SECTION 101: ABBREVIATIONS, SYMBOLS, TERMS, AND DEFINITIONS

### 101.1 ACTIVE VOICE, IMPERATIVE MOOD, REFERENCES, USE OF LANGUAGE

The New Mexico Department of Transportation publishes this edition of the Standard Specifications for Highway and Bridge Construction with an emphasis on the active voice. In a sentence written in the active voice, someone acts on something. For example: "The Engineer will take a sample." A similar sentence in the passive voice "A sample will be taken" would be unclear about who was responsible for taking the sample.

This edition of the Standard Specifications also makes use of the imperative mood. The imperative mood is used when the party issuing an instruction and the party receiving it are already understood. In these Standard Specifications, the Department is stating its requirements or directions for Work to the Contractor; such statements have the same force as if they contained the word "shall." In an imperative sentence such as, "Pour the concrete," the Department is indicating that it requires the Contractor to pour the concrete. Before an Award of a Contract, imperative statements are directed to the Bidder. After a Contract has been Awarded, imperatives are directed to the Contractor. The Standard Specifications are divided into various parts in this order: divisions, sections and subsections.

The Department will identify parties other than the Bidder or Contractor to whom it gives a responsibility in these Standard Specifications. In phrasings where the responsible party has already been clearly identified or in factual statements when it is not important to do so, the Department may use the passive voice.

The word "shall" is used in a mandatory or imperative sense and signifies that the Department is imposing a duty on a person or body that is the subject in the sentence. The word "may" is used to signify the conferring of a discretionary power, privilege, or right. However, use of the term "may not" signifies that a right, privilege, or power is intended to be denied.

The titles or headings of the sections and subsections herein are intended for convenience of reference and shall not be considered as having any bearing on their interpretation.

The Contractor, having an obligation to observe and comply with all federal and State law and regulations, any reference to any federal or State law or regulation shall constitute a reference to any applicable amendment or successor law or regulation.

### 101.2 ABBREVIATIONS

When the following abbreviations are used in the Plans, the Specifications, other Contract documents, and Department correspondence, their meaning is as follows:

| <b>Table 101.2:1</b>              |  |
|-----------------------------------|--|
| <b>Acronyms and Abbreviations</b> |  |
| <b>Acronym or short form</b>      | <b>Full name or meaning</b>  |
| AASHTO                            | American Association of State Highway and Transportation Officials |
| ACI                               | American Concrete Institute  |
| ADE                               | Assistant District Engineer  |
| AI                                | Aggregate Index  |

| Table 101.2:1<br>Acronyms and Abbreviations |  |
|---|--|
| Acronym or short form                       | Full name or meaning                                 |
| AMRL  | AASHTO Material Reference Laboratory                 |
| AISC  | American Institute of Steel Construction             |
| AMPP  | Association for Materials Protection and Performance |
| ANSI  | American National Standards institute                |
| APL   | Approved Products List                               |
| ASTM  | American Society for Testing and Materials           |
| AWG   | American Wire Gauge                                  |
| AWPA  | American Wood Preservers' Association                |
| AWS   | American Welding Society                             |
| AWWA  | American Water Works Association                     |
| BA  | Buy America  |
| BABA  | Build America, Buy America Act                       |
| BCS   | Bridge Construction Section                          |
| CBC   | concrete box Culvert                                 |
| CCD   | closed circuit detection                             |
| CCRL  | Cement and Concrete Reference Laboratory             |
| CD  | compact disc   |
| CFR   | Code of Federal Regulations                          |
| CMP   | corrugated metal pipe                                |
| CN  | control number                                       |
| CPM   | Critical Path Method                                 |
| CSP   | concrete surface preparation                         |
| CTR   | certified test report                                |
| CWB   | concrete wall barrier                                |
| DBE   | disadvantaged business enterprise                    |
| EA  | Entrance Angle                                       |
| ESAL  | equivalent single axle loading                       |
| FHWA  | Federal Highway Administration                       |
| GRT   | gross receipt tax                                    |
| HDPE  | high density polyethylene                            |

| Table 101.2:1<br>Acronyms and Abbreviations |  |
|---|--|
| Acronym or short form                       | Full name or meaning   |
| HFE   | high-float emulsion  |
| HID   | high-intensity discharge   |
| HMA   | hot-mix asphalt  |
| HMIB  | Hazardous Material Investigations Bureau                         |
| HMWM  | high molecular weight methacrylate                               |
| IA  | Independent Assurance  |
| ICRI  | International Concrete Repair Institute                          |
| IES   | Illuminating Engineering Society                                 |
| IMC   | intermediate metallic conduit                                    |
| ITE   | Institute of Transportation Engineers                            |
| JMF   | Job Mix Formula  |
| LCD   | liquid crystal display   |
| LL  | liquid limit   |
| MSSI  | Major Structure specialty inspection                             |
| MTR   | mill test report   |
| MTRs  | Minimum Testing Requirements                                     |
| MUTCD                                       | Manual on Uniform Traffic Control Devices                        |
| MFBM  | thousand board feet  |
| NBIS  | National Bridge Inventory Standards                              |
| NEC®  | National Electrical Code®  |
| NEMA  | National Electrical Manufacturers Association                    |
| NEPCOAT                                     | Northeast Protective Coatings Committee                          |
| NMAC  | New Mexico Administrative Code                                   |
| NMDA  | New Mexico Department of Agriculture                             |
| NMED  | New Mexico Environment Department                                |
| NMSA  | New Mexico Statutes Annotated                                    |
| NMSSPWC                                     | New Mexico Standard Specifications for Public Works Construction |
| NPDES                                       | National Pollutant Discharge Elimination System                  |
| NRMCA                                       | National Ready Mixed Concrete Association                        |
| NSBA  | National Steel Bridge Alliance                                   |

| Table 101.2:1<br>Acronyms and Abbreviations |  |
|---|--|
| Acronym or short form                       | Full name or meaning   |
| NTIS  | National Tunnel Inventory Standards  |
| NTSC  | National Transmission Standards Committee                                  |
| OA  | Observation Angle  |
| OGFC  | open-graded friction course  |
| OSHA  | Occupational Safety and Health Administration                              |
| PCC   | portland cement concrete   |
| PCCP  | portland cement concrete pavement  |
| PCI   | Prestressed Concrete Institute   |
| PCT   | process control technician   |
| PE-P  | penetrating emulsified prime   |
| PEAS  | Product Evaluation and Audit Solutions                                     |
| PI  | plasticity index   |
| PM  | Project Manager  |
| PTL   | private testing Laboratory   |
| PVC   | polyvinyl chloride   |
| QA  | Quality Assurance  |
| QC  | Quality Control  |
| QCT   | Quality Control technician   |
| QLA   | Quality Level Analysis   |
| RAP   | reclaimed asphalt pavement   |
| ROW   | Right of Way   |
| SDS   | Safety Data Sheet(s)   |
| SSPC  | Society of Protective Coating (formerly Steel Structures Painting Council) |
| SWPPP                                       | storm water pollution prevention plan                                      |
| TCS   | Traffic Control Supervisor   |
| TERO  | Tribal Employment Rights Organization                                      |
| TTCP  | Technician Training and Certification Program                              |
| TV  | target value   |
| UBC™  | Uniform Building Code™   |
| UL  | Underwriters Laboratories  |

| <b>Table 101.2:1</b><br><b>Acronyms and Abbreviations</b> |   |
|---|---|
| <b>Acronym or short form</b>                              | <b>Full name or meaning</b>                   |
| USEPA   | United States Environmental Protection Agency |
| UV  | Ultraviolet                                   |
| VMA   | voids in mineral aggregate                    |
| VTM   | voids in total mix                            |
| WMA   | warm mix asphalt                              |

### 101.3 SYMBOLS

Within the Specifications and Contract, reference to the English system of measurement symbols is a reference to the U.S. Customary (Inch-pound) system.

Some of the symbols for units of measurement used in the Specifications and in the Bid Schedule are defined as shown in Table 101.3:1, "Measurement Symbols." The symbols for other units of measurement used in the Specifications are as defined in the various Specifications and tests referenced in the Specifications.

| <b>Table 101.3:1</b><br><b>Measurement Symbols</b> |                       |                 |
|--|-----------------------|-----------------|
| <b>Physical Characteristic</b>                     | <b>Unit name</b>      | <b>Symbol</b>   |
| Length   | Microinch             | μin             |
|  | mil (0.001 inch)      | Mil             |
|  | Inch                  | In              |
|  | Foot                  | Ft              |
|  | Yard                  | Yd              |
|  | Mile                  | Mi              |
| Area   | square inch           | in <sup>2</sup> |
|  | square foot           | ft <sup>2</sup> |
|  | square yard           | yd <sup>2</sup> |
|  | square mile           | mi <sup>2</sup> |
|  | Acre                  | Acre            |
| Volume   | Pint                  | Pt              |
|  | Quart                 | Qt              |
|  | Gallon                | Gal             |
|  | cubic inch            | in <sup>3</sup> |
|  | cubic foot            | ft <sup>3</sup> |
|  | cubic yard            | yd <sup>3</sup> |
| Mass (weight)                                      | Ounce                 | Oz              |
|  | Pound                 | Lb              |
|  | ton, short (2,000 lb) | Ton             |
| Temperature  | degree Fahrenheit     | °F              |

**Table 101.3:1  
Measurement Symbols**

| <b>Physical Characteristic</b>    | <b>Unit name</b>            | <b>Symbol</b> |
|-----------------------------------|-----------------------------|---------------|
| Time                              | Millisecond                 | Ms            |
|                                   | Second                      | S             |
|                                   | Minute                      | Min           |
|                                   | Hour                        | H             |
| Speed                             | miles per hour              | mph           |
| Pressure                          | pound-force per square inch | psi           |
| Power, energy and electricity     | Watt                        | W             |
|                                   | Kilowatt                    | kW            |
|                                   | Milliampere                 | mA            |
|                                   | Ampere                      | A             |
|                                   | Volt                        | V             |
|                                   | Volt-ampere                 | VA            |
|                                   | Ohm                         | Ω             |
|                                   | Hertz                       | Hz            |
|                                   | Joule                       | J             |
|                                   | Lumen                       | Lm            |
|                                   | Footcandle                  | Fc            |
|                                   | Horsepower                  | Hp            |
| Force                             | pound-force                 | lbf           |
|                                   | 1,000 pounds-force          | kip           |
| Torque                            | pound-force foot            | lbf•ft        |
| Viscosity, dynamic                | Centipoises                 | cP            |
|                                   | Poise                       | P             |
| Viscosity, kinematic              | Centistokes                 | cSt           |
| Flow                              | gallons per minute          | Gpm           |
| Concentration                     | parts per million           | ppm           |
| Inductance                        | Henries                     | H             |
| Frequency, concrete consolidation | vibrations per minute       | Vpm           |
| Sound                             | Decibel, A-Scale            | dbA           |

#### 101.3.1 Bid Schedule Symbols

The measurement symbols shown on the Bid Schedule may differ from those found in the rest of Contract documents. Table 101.3.1:1, "Symbols for Bid Schedule," lists and defines the symbols found in both the Bid Schedule and Contract documents.

**Table 101.3.1:1  
Symbols for Bid Schedule**

| <b>Symbol</b> | <b>Unit of measure or meaning</b> |
|---------------|-----------------------------------|
| LS            | Lump Sum                          |

**Table 101.3.1:1**  
**Symbols for Bid Schedule**

| <b>Symbol</b> | <b>Unit of measure or meaning</b> |
|---------------|-----------------------------------|
| EACH          | Each                              |
| ALLOW         | Allowance                         |
| L.F.          | Linear Foot                       |
| MILE          | Mile                              |
| S.F.          | Square Foot                       |
| S.Y.          | Square Yard                       |
| SYIN          | Square Yard Inch                  |
| ACRE          | Acre                              |
| C.Y.          | Cubic Yard                        |
| LB            | Pound                             |
| TON           | Ton                               |
| GAL           | Gallon                            |

#### **101.4 TERMS AND DEFINITIONS**

If the following terms are used in the Contract documents, and Department correspondence, the intent and meaning shall be interpreted as follows:

**Acceptance.** (Also called **Accept, Accepted and Acceptable**) 1) The determination by the **Department** that **Materials** and **Work** are in compliance with the **Contract**. 2) The process by which the **Department** determines whether or not the quality of produced **Material** or **Work** is **Acceptable** pursuant to the **Contract**, including sampling, testing, certifications and assessment of test results. **Acceptance** shall not be construed as a warranty by the **Department** that the **Contractor's** methods will succeed or will be the most efficient or economical method of accomplishing the **Work**, nor shall the term be construed that the actual **Materials** used in construction will perform as represented in test results supplied to the **Department** by the **Contractor**. **Acceptance of Materials** and **Work** will be in writing by the **District** to recognize an obligation to pay.

**Addendum.** A change in the **Contract** issued after the **Advertisement** and before the **Bid Opening**.

**Advertisement.** (Also called **Invitation for Bids**) A public announcement, as required by law, inviting **Bids** for **Work** to be performed or **Materials** to be provided.

**Apparent Low Bidder.** The **Bidder** who submits a **Total Bid Amount** that is numerically lower than the **Total Bid Amount** submitted by other **Bidders**, but whose **Bid** may later be subject to rejection, recalculation or other modification that may change the order of **Bidders**.

**Approved.** A general conformity with Contract or other requirements. **Approved** does not indicate taking responsible charge of submitted **Work** or product.

**Assistant District Engineer (ADE) - Construction.** The **Engineer** in charge of the construction operations in a **District**.

**Award.** The **Department's** selection of a **Bidder's Bid** subject to the **Contractor's** and **Department's** execution of the **Contract**.

**Base Course.** The layer or layers of specified **Material** placed on a **Subbase** or a **Subgrade** normally used to support a **Surface Course**.

**Basis of Payment.** The terms under which **Work** is paid, as a designated **Pay Item** in accordance with the quantity measured and the **Pay Unit**. **Basis of Payment** includes the performance of all **Work** and furnishing of all labor, **Equipment**, **Materials** and **Incidentals** described in the text of a specific item included in that **Contract**.

**Bid.** The offer of a **Bidder** for performing the **Work** at the prices quoted.

**Bidder.** An individual, partnership, firm, corporation, joint venture, or their authorized representative submitting a **Bid**.

**Bid Form.** The approved form on which the **Department** requires **Bidders** to prepare and submit **Bids**.

**Bid Guaranty.** The security provided with a **Bid** to guarantee that the **Bidder** will enter into the **Contract** if the **Department Accepts** its **Bid**.

**Bid Item.** (Also called **Contract Item**, **Pay Item**) A specifically described unit of **Work** for which a **Bidder** provides a **Bid Item Unit Price** and **Bid Item Price**. The **Bid Items** become **Contract Items** when the **Contract** is fully executed. The **Contract Items** become **Pay Items** when calculating **Progress Payments**.

**Bid Item Price.** The extended price established by the **Contractor** for each individual **Bid Item** on the **Bid Schedule** which is the product of the **Bid Item** quantity and the **Bid Item Unit Price**.

**Bid Item Unit Price.** The price established by the **Contractor** for each unit of an individual **Bid Item** on the **Bid Schedule**. A **Bid Item Unit Price** reflects a **Bidder's** actual and direct costs for the item plus a reasonable proportionate share of the **Bidder's** anticipated profit, overhead costs, and other indirect costs.

**Bid Opening.** A public reading of the properly submitted **Bids**, on a date established by the **Advertisement**.

**Bid Schedule.** Listing or table of **Bid Items** containing the estimated quantities for which **Bid Item Unit Prices** are invited.

**Borrow Pit.** A **Contractor** selected source outside the **Roadway Prism** from where suitable **Material** is obtained.

**Breakaway.** The ability of a system to yield at a predetermined impact force.

**Bridge.** A **Structure** having a length — as measured along the center of the **Roadway** — of more than twenty (20) ft between undercopings of abutments or extreme ends of openings for multiple boxes or extreme ends of openings for **Culverts** placed in series with a spacing between **Culverts** not exceeding  $\frac{1}{2}$  the diameter, and carrying a pathway or **Roadway** over a depression or obstacle and is assigned a Bridge Inventory Number.



It includes all appurtenances necessary to its proper use. The length of a **Bridge** structure is the distance along the line of survey stationing back-to-back of backwalls of abutments, if present, or end-to-end of the **Bridge** floor, and in no case less than the total clear opening of the structure. The **Bridge Roadway** width is that clear unobstructed width of **Bridge** deck available for vehicle use measured normal to the centerline of the **Bridge**.

**Bridge Construction Section (BCS).** The representative of the State Bridge Engineer for **Major Structure** construction and administration and operations of MSSI.

**Business Hours.** The **Department's Business Hours** are from 7:45 a.m. to 4:30 p.m., Monday through Friday, official **State Holidays** and emergency closures excluded.

**Cabinet Secretary.** The individual in charge of the **Department** as defined by law. Also referred to as the "**Secretary.**"

**Calendar Day.** Each and every **Day** shown on the calendar, beginning and ending at midnight. Also referred to as "**Day.**"

**Certificate of Compliance.** A certification, including a signature by a person having legal authority to act for the manufacturer, stating that the product, assembly, or **Material** to be incorporated into the **Project** was fabricated in accordance with and meets the applicable terms of the **Contract**.

**Change Order.** A **Change Order** is the only method authorized for changing the **Contract**. A written order, with or without the consent of the **Contractor**, implementing the **Contract** changes. A **Change Order** may consist of a **Supplemental Agreement** or **Field Sheet**.

**Chief Engineer.** The **Engineer** in charge of the design of **Projects**, acting either directly or through his duly authorized representatives, for the **Department**.

**Chill Factor.** Is the ambient temperature (in degrees Fahrenheit) minus wind velocity (in miles per hour).

**Claim.** A timely **Contractor** request or demand for a **Contract** adjustment, equitable adjustment, additional time or compensation and other contractual damages, **Delay** damages, an extension of **Contract Time**, certified pass-through **Subcontractor Claims**, or for any other remedy arising from a dispute, disagreement, or controversy concerning respective rights and obligations under the **Contract**.

**Commercial Material Source.** A **Material** source that has been utilized by a private producer in a commercial operation from which **Material** has been sold within the last twenty-four (24) months before the date of the letting.

**Completion Dates.** **Contracts** may have the following **Completion Dates** as defined herein:

**Substantial Completion Date;**  
**Physical Completion Date;** or  
**Mandatory Completion Date.**

**Construction Maintenance Easement (CME).** A real property interest in land acquired by the **Department** in conjunction with a **Highway, Street, or Road Project** to provide permanent access to private property to perform specific construction and maintenance functions.

**Construction Zone.** The area within the **Right of Way** from the first traffic control sign announcing the **Road Work** to the last sign announcing the end of **Road Work** within which the **Contractor** shall perform construction activities.

**Contract.** The entire and integrated written agreement between the **Department** and the **Contractor** setting forth the obligations of the parties, including, but not limited to, the performance of the **Work** and the **Basis of Payment**.

The **Contract** includes the **Advertisement, Required Documents for Bid Submittal, Standard Specifications, Supplemental Specifications, Special Provisions, Addenda, Notice to Contractors**, general and detailed **Plans, Standard Drawings**, and **Notice to Proceed** — also any **Change Orders** and agreements that are required to complete the construction of the **Work** in an **Acceptable** manner, including authorized extensions thereof, all of which constitute one (1) instrument.

**Contract Bonds.** The approved form of security executed by the **Contractor** and the **Contractor's Surety** or **Sureties**. The performance bond guarantees complete execution of the **Contract** and all **Change Orders** pertaining thereto, and the payment bond guarantees payment of all legal debts pertaining to the construction of the **Project**.

**Contractor.** The individual, partnership, firm, corporation, or joint venture contracting with the **Department** for performance of the **Work**.

**Contract Time.** The time specified in the **Advertisement** for completion of the **Contract**. This time may be defined as a specified fixed date(s), **Mandatory Completion Date**, a given number of **Working Days**, or a given number of **Calendar Days** or a combination of the above. The **Contract Time** may be amended by a **Supplemental Agreement** to include authorized time extensions as the performance of the **Contract** requires.

**County.** The **County** in which the **Work** herein specified is to be done.

**Critical Path.** The longest continuous sequence of **critical** activities through the **Project** schedule that establishes the minimum overall **Project** duration to **Substantial Completion**.

**Critical Path Method (CPM) Schedule.** A network based method to represent the **Contractor's** plan for constructing the **Project**. The **Critical Path Method Schedule** consists of two primary components 1) Activities that represent the entire **Project** scope of **Work** and 2) logic relationships that connect the activities to one another to determine the sequence of **Work**.

**Cultural Resource.** Any prehistoric or historic period artifact, site, building, **Structure**, material remains, or traditional use area resulting from, or associated with, human cultural activity. Historically important **Cultural Resources** are those eligible for inclusion on the National Register of Historic Places or placed on the New Mexico Register of Cultural Properties either permanently or temporarily per NMSA 1978, § 18-6-3 (1993) and the National Historic Preservation Act Section 106.

**Cultural Resource Professional.** An individual that is permitted to meet the requirements of the Cultural Properties Act, NMSA 1978, §§ 18-6-1 to -17 (1953, as amended 2005) and issued by the Cultural Properties Review Committee with the concurrence of the **State** Archaeologist and the **State** historic preservation officer or appropriate tribal preservation officer, or federal land managing agency when applicable.

**Culvert.** Any **Structure** not classified as **Bridge** or casing that provides an opening under a **Roadway**.

**Day.** See **Calendar Day**.

**Delay.** Any event, action, force or factor that negatively impacts the **Critical Path** on the **Project**, whether it be excusable, inexcusable, non-excusable, concurrent, compensable or non-compensable.

**Deleterious Material.** Unacceptable **Material** detrimental to the final product.

**Department.** The New Mexico Department of Transportation as constituted under the laws of the **State** for the administration of transportation **Work**. Any reference to **Contract** documents, **Plans**, **Special Provisions**, **Standard Drawings**, forms, **Change Orders**, and any other pertinent written communication in which the terms "New Mexico State Highway Department" or "New Mexico State Highway and Transportation Department" appears shall be the same as the term New Mexico Department of Transportation or its designated agent.

**Detour.** A temporary route for traffic (vehicular or otherwise) around a closed portion of a **Project**.

**District.** A subdivision of the **State** for the purpose of executing the **Department's** construction, maintenance, and administrative activities.

**District Engineer.** The **Engineer** in charge of a **Department District**.

**Embankment.** The portion of a **Roadway** that is below the **Subbase**, **Base Course**, and **Surface Courses** and that is built up in layers consisting principally of soil and broken rock or a combination thereof.

**Engineer.** A **Department** "Engineer" authorized as the **Department's** representative responsible for the engineering supervision of the **Work** and who is qualified and licensed by the board to practice engineering per the Engineering and Surveying Practice Act.

**Entrance Angle (EA).** The angle between the reference axis and the axis of incident light (Counter-clockwise rotation of the reference axis relative to the axis of incident light is considered positive.)

**Environmental Professional.** An individual qualified to perform **Hazardous Material** investigations. This individual must possess the qualifications described in 40 CFR Part 312 Subpart C, the USEPA's Standards and Practices for All Appropriate Inquiries.

**Environmental Bureau Manager.** The individual in charge of the Environmental Bureau of the **Department**.

**Environmental Resource.** The physical and biological components of the human and natural environment.

**Environmental Specialist.** An individual with at least four (4) years of full-time paid experience in environmental investigations, including analyzing and preparing documentation needed to meet the FHWA approval requirements for the National Environmental Policy Act and related legislation.

**Equipment.** All machinery, tools, and **Equipment**, together with the necessary supplies for upkeep and maintenance, necessary for the construction and completion of the **Contract**.

**Extra Work.** **Work** not provided for in the **Contract** but found by the **Project Manager** to be essential to the satisfactory completion of the **Contract** within its intended scope.

**Fabricator.** A **Supplier** that fabricates or supplies **Structural Steel**, **precast concrete** or other structural items.

**Field Sheet.** A type of **Change Order** reflecting a quantity change that does not require a **Contractor's** signature.

**Final Acceptance.** The **Department's** payment of the balance due on the final payment voucher.

**Free Float.** The amount of time identified in a specific activity that can be **Delayed** without causing a **Delay** to successor activities.

**Total Float or Float.** The amount of time that an activity can be **Delayed** without causing a **Delay** to the **Critical Path** or negatively impacting the **Project Completion Date**.

**Force Account.** The **Basis of Payment** for the directed performance of **Work**, with payment based on the actual cost of labor, **Equipment**, and **Materials**, and including various constant additives.

**Fractured Face.** At least one-half of the projected particle area exhibits a rough, angular, or broken texture with well-defined edges.

**General Office.** The **Department's** main headquarters.

**Hazardous Materials.** Any substance, product, waste, or other **Material** of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to all applicable laws all as amended, or any other federal, **State**, or local statute law, ordinance, resolution, code, rule, regulation, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning any hazardous, toxic, or dangerous waste, substance, or **Material**.

**Hazardous Material Investigations Bureau Manager.** The individual in charge of the **Hazardous Material** Investigations Bureau of the **Department**.

**Highway, Street, or Road.** A general term denoting a multimodal public way for purposes of vehicular, bicycle, equestrian or pedestrian travel.

**Holiday.** **Holidays** observed by the **State** of New Mexico are published annually. The **Department** will make available the dates for **Holiday** observance by the end of the preceding year for the following calendar year as shown on the Construction and Civil Rights Bureau website at the time of **Bid Opening**.

**Independent Assurance (IA).** A construction management tool in which a third party, not directly responsible for process control or **Acceptance**, provides an independent assessment of the **Work**, **Materials**, or the reliability of test results obtained from process control and **Acceptance** testing.

**Incentive/Disincentive Provision.** Predetermined adjustments to the **Contract** price.

**Incidental.** Occurring or likely to occur at the same time or as a result of other items of **Work** as specified in the **Contract** for which no separate or additional payment will be made. Unless otherwise indicated in the **Contract**, **Incidental** costs shall be included in the **Contractor's Bid Item Unit Price** for **Bid Item** 621000 Mobilization.

**Inspector.** Individual assigned to make detailed inspections of **Contractor's Work**.

**Job Mix Formula (JMF).** The combined aggregate gradation and the percentage of each **Material** component in the mix.

**Laboratory.** A testing **Laboratory** of the **Department**, **Contractor** or any other testing **Laboratory** that is AMRL Certified.

**Landscape Architect.** The individual in charge of Landscape Architecture for the **Department**.

**Lighting and Signal Engineer.** The **Engineer** in charge of the **Department's** signal and lighting design.

**Lowest Responsible Bidder.** The **Department** determined **Bidder** who submits the lowest adjusted and **Responsive Bid**. The **Bidder** shall also be responsible and when required furnish information and data to prove that its financial resources, production or service facilities, personnel, service reputation and experience are adequate to make satisfactory delivery of the services, construction or items of tangible personal property as described in the **Advertisement**.

**Luminaire.** (Also called **Luminaries**) A lighting device designed to illuminate the surface of a specific area from a mounting on a standard (pole), including the housing, optical control, lamps, and necessary ballasts.

**Lump Sum.** The price **Bid** by a **Contractor** as a single amount for a complete **Contract Item** as defined by the **Specifications**, or price proposed by a **Contractor** as a single amount for the performance of **Extra Work**.

**Major Contract Item.** Any item, excluding mobilization, having a **Bid Item Price** of ten percent (10.0%) or more of the **Total Bid Amount** for the **Contract** at the time of **Bid Opening**, minus the amount **Bid** for mobilization.

**Major Structure.** The following Structures are defined as **Major Structures**:

- **Structural Walls**
- **Major Structure Elements**
- **Tunnels**
- Section 541 **Structural Steel** Tier 1 overhead sign **Structures**
- Section 707 Type VI Standard (high mast luminaire support **Structure**)
- **Bridges**

**Major Structure Element.** A part of a **Major Structure** that carries or transfers loads.

**Mandatory Completion Date.** The date on which the **Project** shall be completed. This may be either **Substantial Completion** or **Physical Completion** as specified in the **Contract**. If neither is specified, it shall mean "**Substantial Completion**."

**Materials.** Any substances specified for use in the performance of the **Work**.

**Median.** That portion of a **Highway, Street or Road** separating the **Traveled Way** for traffic in opposing directions.

**Method of Measurement.** The method in which a **Pay Item** is measured to conform with the **Pay Unit**.

**Nominal Maximum Sieve.** One (1) sieve size larger than the first sieve that retains ten percent (10%) or more of a given **Material**.

**Non-Conformance.** **Contractor's** failure to comply with the **Contract**. **Non-Conformances** are subject to a withholding of twenty-five percent (25%) of the **Progress Payment**. **Non-Conformance** withholdings will be paid at the subsequent **Progress Payment** following resolution of all **Non-Conformances**.

**Notice of Preliminary Award of Contract.** The **Department's** written notification issuing preliminary **Award** that is provided before the **Contractor** and the **Department** execute the **Contract**.

**Notice to Proceed.** Written notice to the **Contractor** to proceed with the **Contract Work** including the beginning date of **Contract Time**.

**Notice to Contractors.** An addition to the **Contract** made prior to **Advertisement**.

**Observation Angle (OA).** The angle between the axis of incident light and the observation axis.

**Partial Suspension.** The suspension of **Work** on some, but not all **Contract Items**.

**Pavement Structure.** The combination of **Subbase**, **Base Course**, and **Surface Course** placed on a **Subgrade** to support and distribute the traffic load to the **Roadbed**.

**Pay Adjustment.** An adjustment to a payment for a specific portion of the **Work** based on the quality of the **Work** performed by the **Contractor** and **Accepted** by the **Department**. Other **Department** documents may refer to this term as disincentives, incentives, pay reductions, price adjustments, or price reductions.

**Pay Unit.** The unit of measurement for **Acceptable Work**.

**Petrographer.** Individual with credentials in the study of petrography.

**Physical Completion.** All the **Work** is physically completed on the **Project** and is **Accepted** by the **ADE-Construction** as outlined in Section 109.10.8. All documentation required by the **Contract** and by law shall be furnished by this date.

**Pit Agreement.** An agreement between the **Contractor** and property owner to provide **Material**.

**Plans.** The Professional Engineer stamped and approved **Contract** drawings showing profiles, typical cross sections, that shows the location, character, dimensions, and general or specific details of the **Work** to be done or exact reproductions of the same.

**Post Construction Plans.** Final drawings reflecting **Work** and quantities performed under the **Contract**.

**Pre-Bid Due Diligence.** The **Bidder's** exercise of due diligence before submittal of a **Bid** which includes the reasonable, careful, independent examination of the site of the proposed **Work**, including **Materials** pits and haul **Roads**, the **Bid Package**, all **Contract** documents including **Notice to Contractors**, **Standard Specifications**, **Special Provisions**, **Supplemental Specifications**, and **Standard Drawings**.

**Pre-Construction Conference.** A meeting between the **Department** and the **Contractor** prior to any **Work** taking place to review and discuss **Contract** requirements.

**Pre-Deck Conference.** A meeting between the **Department** and the **Contractor** prior to the commencement of deck placement operations to review, discuss and coordinate the **Work** associated with the deck placement.

**Pre-Drilled Shaft Conference.** A meeting between the **Department** and the **Contractor** prior to the commencement of drilling operation to review, discuss and coordinate the **Work**.

**Pre-Fabrication Conference.** A meeting between the **Department** and the **Contractor** prior to any fabrication **Work** taking place.

**Pre-Pave Conference.** A meeting between the **Department** and the **Contractor** prior to the commencement of paving operations to review, discuss and coordinate the **Work** associated with paving operations.

**Pre-Pile Driving Conference.** A meeting between the **Department** and the **Contractor** prior to the commencement of pile driving operations to review, discuss and coordinate the **Work**.

**Pre-Seeding Conference.** A meeting between the **Department** and the **Contractor** prior to the commencement of seeding operations to review, discuss and coordinate the **Work**.

**Profile Grade.** The location of the **Profile Grade** will be designated by the **Department** and shown on the **Plans**. The **Profile Grade** line is usually the centerline and elevation to which the **Roadway** will be built. The **Profile Grade** may be used to designate the gradient and elevation of other construction features such as tops of curb, channels, **Sidewalks**, etc.

**Progress Payment.** A monthly payment, including zero dollar (\$0.00), provided by the **Department** to the **Contractor** for **Work**, subject to adjustment by the **Department**.

**Project.** The specific section of property on which **Work** is to be performed as specified in the **Contract**.

**Project Manager (PM).** The **Department's** representative who is delegated the responsibility for administration of the **Project**.

**Project Limits.** The beginning of the **Project** (BOP) to the end of the **Project** (EOP) as designated in the **Contract**.

**Punch List.** A list, prepared by the **Project Manager**, of corrective **Work** items not conforming with the **Contract** and to be completed by the **Contractor**. The final **Punch List** is provided after **Substantial Completion** but before **Contractor's** request for final inspection. The **Punch List** is limited to items of the **Work** that are necessary to correct minor imperfections, deficiencies and deviations from the requirements of the **Contract** but which have no material or adverse effect on the full operability of the **Project** for its

intended purpose and may be safely and effectively used by the public without **Delay**, disruption, or impediments.

**Quality Assurance (QA).** The **Department's** sampling, testing, inspection, and other activities to determine payment and make **Acceptance** decisions. Includes **Acceptance** by the agency, and use of qualified **Laboratories** by both parties.

**Quality Control (QC).** The **Contractor's** actions and considerations necessary to assess production and construction processes so as to control the level of quality being produced in the end product. **Quality control** includes sampling and testing by the **Contractor** to monitor and adjust its process. **Quality Control** does not include **Acceptance** sampling and testing by the **Department**.

**Quality Level Analysis (QLA).** Is equivalent to QC/QA.

**Required Documents for Bid Submittal.** Those documents specified for Bid Submittal including, but not limited to, **Advertisement**, **Bid Form**, **Bid Schedule**, **Bid Guaranty**, Bidder's List of Quoters, Non-Debarment Certification, Pay Equity Acknowledgment, Disadvantaged Business Enterprise Goal Form A-585, and Subcontractor's Fair Practices Act Compliance.

**Resource Loading.** The **Contractor's** assigning of resources necessary to develop an **Acceptable Critical Path Method Schedule** for the **Project**. **Resource Loading** shall include personnel, production rates, **Contract** dollars earned, **Materials**, facilities and **Equipment** associated with each activity within the **CPM**.

**Responsive Bid.** A **Bid** which conforms in all material respects to the requirements set forth in the **Advertisement** and the **Contract**. Material respects of a **Bid** include but are not limited to price, quality, quantity or delivery requirements.

**Retainage.** Five percent (5%) of the **Total Original Contract Amount** as amended by **Change Order**. The five percent (5%) shall be retained when the **Progress Payments** equal ninety-five percent (95%) of the amended **Contract** amount. The **Retainage** shall be withheld until the **Department** pays the amount on the proposed final payment voucher.

**Right of Way (ROW).** A general term denoting land or property, or interest therein, usually in a strip, acquired for or devoted to transportation purposes.

**Roadbed.** The graded portion of the **Highway**, **Street or Road**, with top and side slopes prepared as a foundation for the **Subgrade**, **Pavement Structure**, and **Shoulders**.

**Roadway.** A general term denoting the **Traveled Way** and the **Shoulders**.

**Roadway Prism.** The **Roadway** construction limits within the outside limits of the side slopes.

**Secretary.** See **Cabinet Secretary**.

**Shop Drawings.** **Contractor**, **Supplier** or **Fabricator**-furnished drawings or sets of drawings typically required for **Department** review and approval of **Work** components. **Shop Drawings** shall include detailed information to compare to the **Contract** for approval prior to fabrication.



**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**.

**Sidewalk.** That portion of the **Roadway** primarily constructed for use by pedestrians.

**Signal Assembly.** A housing containing the required illuminated **Traffic Signal** indications (vehicular and pedestrian) mounted on a standard (pole).

**Special Provisions.** Additions and revisions to the **Standard Specifications**.

**Specifications.** A general term applied to all written provisions and requirements pertaining to performance of the **Work**.

**Specific Intensity.** Candlepower of the returned light at the chosen **Observation** and **Entrance Angles** for each lumen per square meter, foot-candle of illumination at the reflector on a plane perpendicular to the incident light.

**Standard Drawings.** The **Department's** book of **Drawings** approved for general application and repetitive use available on NMDOT's website.

**Standard Specifications.** The **Department's** book of **Specifications** approved for general application and repetitive use available on NMDOT's website.

**State.** The State of New Mexico acting through its authorized representatives.

**State Transportation Commission.** The six (6) member policy board for the **Department**.

**State Transportation Commissioner.** An individual member of the **State Transportation Commission**.

**Structural Steel.** Steel shapes, plates, H-piling, sheet piling, and any other items identified in the **Contract**.

**Structural Wall.** A **Structure** that provides lateral support for a mass of earth or other material where a grade separation is required, a **Structure** that deflects traffic sound or a **Structure** that supports a **Bridge**.

**Structures.** Buildings, **Bridges**, **Culverts**, catch basins, drop inlets, Walls, **Tunnels**, cribbing, manholes, end-walls, sewers, service pipes, under drains, foundation drains, and other such features that may be encountered in the **Work**.

**Subbase.** The layer or layers of specified **Material** thickness placed on a **Subgrade** to support **Surface Courses**.

**Subcontractor.** An individual, partnership, firm, corporation, or joint venture, at any tier, other than a **Trucker**, who is performing **Work** on the **Project**. A **Subcontractor** has no privity of **Contract** with the **Department** and has no direct or indirect cause of action against the **Department** for any **Claim** or cause of action, including nonpayment by the **Contractor**, arising out of the **Project**.

**Subgrade.** The portion of the **Roadbed** prepared as a foundation for the **Pavement Structure**.

**Substantial Completion.** The day following the last day when **Critical Path Work** was completed and when all the following items are met:

1. All **Critical Path** activities on the **Project** have been completed and deemed **Acceptable**;
2. The **Project** is complete such that it can be safely and effectively used by the public;
3. The **Contractor** has requested a determination of **Substantial Completion** from the **ADE - Construction**; and
4. The **ADE – Construction** has made a determination that the **Project** is **Substantially Complete**.

For safe and effective use by the public, it is the point at which all the following **Work** is complete (or as otherwise defined in the **Contract**):

- **Bridge** deck;
- **Pavement Structure**;
- **Shoulder**;
- Permanent signing;
- A minimum of one (1) application of striping;
- Traffic barrier;
- Seeding;
- Signalization and Lighting; and
- Safety appurtenances.

**Substructure.** The **Bridge** below the bearings of simple and continuous spans, skewbacks of arches, and tops of footings of rigid frames, together with the backwalls, wingwalls, and wing protection railings.

**Superintendent.** The **Contractor's** agent authorized in writing to be in responsible charge of the **Project**.

**Superstructure.** The entire **Bridge** except the **Substructure**.

**Supplemental Agreement.** A type of **Change Order** that may require **Contractor** signature.

**Supplemental Specifications.** Approved additions and revisions to the **Standard Specifications**.

**Supplier.** Any individual, partnership, firm, corporation, or joint venture that manufactures, fabricates or supplies **Materials** to be incorporated into a construction **Project** but who performs no actual **Work** on the **Project** site.

**Surety.** The corporation, partnership, or individual, other than the **Contractor**, executing a bond furnished by the **Contractor**.

**Surface Course.** Layer or layers of a **Pavement Structure** designed to accommodate the traffic load, the top layer of which resists skidding, traffic abrasion, and the disintegrating effects of climate.

**Surfacing Pit.** A source from which suitable **Material** for the production of **Surface Course** aggregate is obtained.

**Temporary Construction Permit (TCP).** A temporary interest in land acquired in conjunction with a **Project** to provide for the temporary use of private property for the duration of the **Project** to perform construction activities as designated in the **Contract**.

**Technical Irregularity.** A minor informality or irregularity that is not a material defect of a **Bid**, that is a matter of form that can be waived without prejudicing other **Bidders**, or result in a change to the order of **Bidders**.

**Termini.** A general term used to describe the **Project Limits**, and including the beginning and end of the **Project**, its **Right of Way**, pit sites, haul **Roads**, and temporary and permanent construction or maintenance easements.

**Total Bid Amount.** The sum of all the **Bid Item Prices** on the **Bid Form**. The **Total Bid Amount** represents the total cost of performing all the **Work** described in the **Contract** based upon estimated quantities.

**Total Original Contract Amount.** The total amount **Bid** as compensation for the **Contract**.

**Town, City, County or District.** Subdivisions of the **State** used to designate or identify the location of the proposed **Work**.

**Traffic Lanes.** See **Traveled Way**.

**Traffic Signal.** The complete installation of a traffic control system at an intersection, including the illuminated signal indications, supports, electrical controls, and distribution system.

**Traveled Way.** The portion of the **Right of Way** designated for the movement of vehicles, exclusive of **Shoulders** and Auxiliary Lanes.

**Trucker.** (Also called **Trucking**, **Trucking Deliveries**, **Deliveries** and **Hauling**) A **Trucker** is an individual, partnership, firm, corporation, or joint venture that transports or delivers **Materials** to and from the **Project** and does not perform **Work** on the **Project** site. A **Trucker** transports, but does not place, **Materials** (i.e., pit **Materials**, plant **Materials**, fabricated **Materials**, demolished and milled **Materials**, trash and waste **Materials**).

**Tunnel.** A **Structure** that provides an artificial underground passage of a **Roadway**.

**Unbalanced Bid.** A **Bid** containing **Bid Item Unit Prices** that are unbalanced, to the potential detriment of the **Department**. There are two types of **Unbalanced Bids**:

1. **Materially Unbalanced.** A **Bid** that generates a reasonable doubt that Award to the Bidder submitting a mathematically unbalanced **Bid** results in the lowest ultimate cost to the **Department**.
2. **Mathematically Unbalanced.** A **Bid** containing Lump Sum or unit **Bid Items** that do not reflect reasonable actual costs plus a reasonable proportionate share of the Bidder's anticipated profit, overhead costs, and other indirect costs.

**Value Engineering Cost Proposal.** A **Contractor**-provided form that details an alternative to the **Work** methods or **Materials** specified in the **Contract** that establishes a better or approved-equal product or result without affecting the functional purpose of the **Work** being revised, and that produce a net savings to the **Department**.

**Weather Day.** A **Day** during which **Work** is scheduled but cannot be performed due to weather conditions or the resulting effects of prior weather conditions. A **Weather Day** is based on review of weather conditions and the actual **Work** performed by the **Contractor**, the

**Project Manager** will determine (between the end of the **Day** and noon of the next **Day**) if the **Department** will charge a **Working Day** or allow a **Weather Day**.

**Work.** The providing of all documentation, supervision, labor, **Materials**, **Equipment**, transportation, and other **Incidentals** necessary for the successful completion of the **Project**, the successful completion of **Pay Items**, and the carrying out of the duties and obligations imposed by the **Contract**.

**Working Day.** Every **Day** except Saturdays, Sundays, **Weather Days**, and **Holidays**. If the **Contractor Works** for six (6) or more hours on a Saturday, Sunday, **Weather Day**, or **Holiday**, a **Working Day** will be charged.

**Working Drawings.** **Contractor**-furnished documents including, but not necessarily limited to:

1. Stress sheets;
2. **Shop Drawings**;
3. Bending diagrams for reinforcing steel;
4. Plans for erection, false **Work**, frames **Work**, cofferdams, and other items; and
5. Such other similar data required for the successful completion of the **Work**.

## **SECTION 102: BIDDING REQUIREMENTS AND CONDITIONS**

### **102.1 RESERVED**

### **102.2 PREQUALIFICATION**

Prequalification of Bidders is a condition for submitting a Bid as authorized by the New Mexico Procurement Code, NMSA 1978, §§ 13-1-82, -133, -134 (1984).

Bidders shall be prequalified in accordance with 18.27.5 NMAC.

### **102.3 SUSPENSION AND DEBARMENT**

The Department may suspend, debar, reject a Bid as non-responsive, prohibit from the performance of Work, or terminate a Contract with any Bidder, Contractor, Subcontractor, at any tier, Suppliers, individual officers, directors in accordance with NMSA 1978, §§ 13-1-177 to -180.1 (1984, as amended 2013) and the Department's Suspension and Debarment rules as per 18.28.4 NMAC.

### **102.4 REQUIRED DOCUMENTS FOR BID SUBMITTAL**

The Department will make available to prospective Bidders the Required Documents for Bid Submittal. The Project's Required Documents for Bid Submittal are those specified in the Contract's Index of Required Documents for Bid Submittal.

### **102.5 REJECTION OF BIDS**

The Department reserves the right to reject any or all Bids, to waive technicalities, or to advertise for new Bids if, in the judgment of the Department, the best interests of the public and the Department would be promoted thereby. The Department may require the Apparent Low Bidder to detail and justify in writing how its prices were determined.

#### **102.5.1 Mandatory Rejection of Bids**

The Department will reject Bid(s) for the following reasons:

1. A Bidder is not Prequalified;
2. A Bidder is determined to be a non-Responsible Bidder;
3. A Bidder fails to comply with any requirement in the Contract documents;
4. A Bidder omits any portion of the Required Documents for Bid Submittal when submitting its Bid;
5. A Bidder adds provisions reserving its right to Accept or reject an Award, or reserving its right to refuse to enter into a Contract after an Award;
6. The Bidder or its principals, individual officers or corporate directors are presently suspended, debarred, declared ineligible, or voluntarily excluded from bidding;
7. The Department issued a notice of proposed suspension or debarment to the Bidder and the Bidder failed to timely respond to the notice of proposed suspension or debarment;
8. A Bidder submits more than one (1) Bid for the same Project control number;
9. A Bid Item Unit Price results in a Materially Unbalanced Bid.
10. A Bidder contacts or communicates with any State Transportation Commissioner or any Department personnel responsible for Bid review or the Award of the Contract in

relation to the Bid review or Award process before the Department's execution of the Contract, except for a response to an inquiry from the Bid review committee; or

11. A Bidder is subject of a judgment or verdict imposing a civil or criminal penalty under either the Federal False Claims Act or the New Mexico Fraud against Taxpayers Act.

#### **102.5.2 Discretionary Rejection of Bids**

The Department may reject Bid(s) for the following reasons:

1. A Technical Irregularity exists;
2. A Bid Item Unit Price or Total Bid Amount differs significantly from the Engineer's estimate or from other Bids;
3. A Bidder is responsible for uncompleted Work that might reasonably be expected to hinder or prevent the prompt completion of additional Work;
4. A Bidder fails to timely pay, satisfactorily settle, or provide security for the payment of Claims for labor, Equipment, Materials, supplies, or services legally due on previous or ongoing Contracts;
5. A Bidder performs previous Work unsatisfactorily, or fails to comply with Section 108.4, "Unsatisfactory Progress of Work;"
6. A Bidder has failed to timely return overpayment on previous or ongoing Contracts as outlined in 109.10.9;
7. The Department issues a notice of proposed suspension or debarment to the Bidder;
8. Evidence exists of collusion among Bidders or prospective Bidders. If the Department becomes aware of an error in the quantity of a Bid Item shown in the Bid Schedule, Plans, or other Contract documents which may call into question the Department's ability to determine which Bid will result in the lowest ultimate cost to the Department;
9. To redesign the Project or change the Contract;
10. A Bidder defaults under a previous Contract, including Contracts with other public entities;
11. A potential benefit to the public or the Department exists if the Contract is re-advertised; or
12. When it is in the best interests of the public or the Department.

#### **102.6 INTERPRETATION OF QUANTITIES**

The quantities appearing in the Contract are approximate only and are prepared for the comparison of Bids. Payment to the Contractor shall be made only for the actual quantities of Work performed and Accepted, or Materials furnished, or as otherwise specified (e.g., computed quantities) in the Contract.

#### **102.7 EXAMINATION OF CONTRACT, SITE OF WORK, AND REQUESTS FOR CONTRACT INTERPRETATION**

1. The submission of a Bid shall be considered conclusive evidence that the Bidder has exercised Pre-Bid Due Diligence and Accepts the conditions to be encountered in performing the Work and Accepts the provisions and requirements of the Contract.
2. When available, subsurface investigation records related to the Project will be provided by the Department through Bid Express. If the Bidder requires additional information other than what the Department furnished the Bidder may, at its own expense, and with Department approval perform its own site investigation. The

Department providing subsurface investigation information does not relieve the Bidder from determining how subsurface conditions may affect the means, methods and cost of the Work. The Bidder shall carefully study and compare all Contract documents and shall immediately report to the Chief Engineer any error, inconsistency or omissions that may be discovered.

#### **102.7.1 Requests for Contract Interpretation**

1. Requests for Contract interpretation shall be addressed to the Chief Engineer to the email provided in the Advertisement at least 72 hours before the Bid Opening time in the Advertisement in order to receive a written response to the request. The Department will not be bound by any statement or representation concerning the Work unless it is included in the Contract. The Bidder shall only rely on written responses from the Chief Engineer or designee and oral responses, explanations, interpretations, or instructions given before the Bid Opening by the Department, its employees or agents, are not binding. Written responses from the Chief Engineer will be posted to Bid Express. Written responses will be provided, whenever practicable, no later than twenty-four (24) hours prior to Bid Opening.
2. The Bidder shall take no advantage of any error or omission in the Contract. In the event the Bidder discovers an error or omission, the Bidder shall notify the Chief Engineer in writing. The Bidder also agrees that it shall make no Claim because of misinterpretation or misunderstanding of the Contract or because of lack of information; and
3. If a written response by the Department to a request for Contract interpretation is not provided, the Bidder shall Bid the Contract according to the Contract documents.

#### **102.8 PREPARATION OF BID**

1. Submit the Bid as provided in the Advertisement;
2. Specify a Bid Item Unit Price for each Bid Item, except when a Bid Item Unit Price is established by the Department;
3. Show the amounts for the respective Bid Item Unit Prices to a maximum of two (2) decimal places. Round additional decimal places in excess of two (2);
4. Exclude the applicable State GRT, local option tax, tribal business tax, TERO tax, and other tax imposed by a tribal government. The Department will pay the applicable tax or increase in the applicable tax effective after the Contract is executed by the Department; and
5. The Standard Specifications and, when applicable, Supplemental Specifications are organized by section numbers that describe the Work, Materials, construction requirements, Methods of Measurement, and Basis of Payment. The Bid Item numbers correlate to section numbers; the first three digits of a Bid Item code correspond to the Specification section number with the same first three digits. Payment for Work will be made only for and under those Bid Items included in the Bid Schedule. For the convenience of the Contractor, some Contract documents may specify Work which is Incidental; identification of such Incidental items of Work is not all inclusive.

#### **102.9 INNOVATIVE INCENTIVE/DISINCENTIVE PROVISIONS**

The Department reserves the right and may include innovative Incentive/Disincentive Provisions in the Contract.

**102.10 RESERVED**

**102.11 BID GUARANTY**

A Bidder shall submit with the Bid, a Bid Guaranty in the amount of five percent (5%) of the Total Bid Amount. The requirement of the Bid Guaranty is to ensure that the Bidder shall promptly execute the Contract in accordance with the Advertisement and in the manner and form required by the Contract Documents and that the Bidder shall furnish good and sufficient Contract Bonds and required insurance. The Bid Guaranty shall be in the form in the Required Documents for Bid Submittal. The Bid Guaranty shall remain in force up to 30 Days after Bid Opening, or until Award of Contract as it may be extended by the NMDOT, notice of which extension(s) to the Surety is hereby waived.

**102.12 RESERVED**

**102.13 RESERVED**

**102.14 WITHDRAWAL OF BIDS**

A Bidder may withdraw its Bid before Bid Opening or may choose circumstances for the operation of the automatic Bid withdrawal functionality. Once a Bid Opening has commenced, at the date, time and place designated in the Advertisement, Bids may not be withdrawn.

**102.15 RESERVED**

**102.16 ENGINEER'S ESTIMATE**

The Engineer's estimate shall not be disclosed to, or be subject to inspection by, members of the public before Bid Opening. The Engineer's estimate shall be confidential and is not subject to the Inspection of Public Records Act prior to Bid Opening. At Bid Opening, the total amount of the Engineer's estimate for the Project will be publicly disclosed.



## **SECTION 103: AWARD AND EXECUTION OF CONTRACT**

### **103.1 CONSIDERATION OF BIDS**

The Department's Bid review committee will review, evaluate Bids and make recommendations for rejection or issuance of the Notice of Preliminary Award of Contract. The Department's Bid review committee will review the Bid Item Unit Pricing to determine if the Bid Item Unit Pricing is responsive, unbalanced either materially or mathematically, or any other abnormalities exist. The Department reserves the right to request justification from the Bidder for any aspect relating to its Bid and the Bidder shall respond to the request. The results of the completed analysis will be available to the public after the Department issues the Notice of Preliminary Award of Contract letter.

If two (2) Contractors submit identical lowest Total Bid Amounts, the Department will determine the successful Bidder by the flip of a coin.

Any or all Bids may be rejected when it is in the best interest of the public and the Department at any time prior to execution of the Contract. If all Bids are rejected the Department may issue a new Advertisement. A Department decision to reject all Bids, rescind the Notice of Preliminary Award of Contract, or to cancel the Award of Contract and issue a new Advertisement is wholly an exercise of executive discretion not subject to review at an informal hearing pursuant to Section 103.3, "Bidding Dispute Resolution Procedures."

### **103.2 NOTICE OF PRELIMINARY AWARD OF CONTRACT**

Except as described in Section 103.3, "Bidding Dispute Resolution Procedures," the Department will issue the Notice of Preliminary Award of Contract within thirty (30) Days after Bid Opening to the Lowest Responsible Bidder. Bidders may agree to a later Notice of Preliminary Award of Contract time if requested to do so by the Department, failure to agree to a later Notice of Preliminary Award of Contract time as requested by the Department will be deemed the Bidder's withdrawal of its Bid. The Notice of Preliminary Award of Contract letter, if it is delivered via electronic mail within thirty (30) Days of the Bid Opening, shall bind the Lowest Responsible Bidder to Accept the Contract or to reject the Contract and forfeit the Bid Guaranty it has provided.

### **103.3 BIDDING DISPUTE RESOLUTION PROCEDURES**

#### **103.3.1 Bidding Disputes**

A Bidder aggrieved in connection with the solicitation or Notice of Preliminary Award of Contract shall file a written protest within fifteen (15) Days of the Notice of Preliminary Award of Contract. Written protests filed prior to the Department's Notice of Preliminary Award of Contract may be deferred at the sole discretion of the Department and not considered until the Department has issued the Notice of Preliminary Award of Contract.

#### **103.3.2 Reserved**

#### **103.3.3 Informal Hearing Procedures**

1. Failure to file a timely protest shall constitute a waiver of the Bidder's right to protest and the Bidder is not entitled to an informal hearing;
2. The written protest must include facts supporting the protest, any pertinent contractual provisions, law, rules or regulations, and other legal authorities supporting the protest and a requested action;

3. Service of the written protest shall be made upon the Cabinet Secretary, with a copy contemporaneously transmitted and separately served upon the Office of General Counsel for the Department, during the Department's regular Business Hours by delivery in person, or by certified mail, postage prepaid, return receipt requested, or by delivery by a nationally recognized overnight or same-day courier service that obtains receipts. Electronic communication (i.e., e-mail, facsimile) shall not be considered. Service of a written protest made after the Department's regular Business Hours shall not be effective until the next business Day;
4. Copies of the protest shall be contemporaneously transmitted by the disputing Bidder to every Bidder when the protest is served upon the Cabinet Secretary and the Office of General Counsel;
5. Any Bidder, other than the disputing Bidder, that considers itself to be an interested party to the Bidding dispute may submit a written response to the protest in advance of the informal hearing. The response shall include a statement of the requested action, a rebuttal of any of the factual matters in the protest, facts supporting the response, and any contractual provisions, laws, rules, or regulations, or other authority supporting the response;
6. When a timely protest is filed, the Cabinet Secretary will not proceed further with the Award by execution of Contract until the dispute is resolved, as detailed below, unless or until the Cabinet Secretary determines that the Award or execution of the Contract is necessary to protect the best interests of the public and the Department. The Cabinet Secretary retains the right to reject all Bids, to rescind the Notice of Preliminary Award of Contract, or cancel the Award of Contract and issue a new Advertisement when it is in the best interest of the public and the Department;
7. When a timely protest is filed, the Bids of both the Apparent Low Bidder and the next Apparent Low Bidder (or all Bidders) shall be automatically extended fifteen (15) Days past the Department receiving a Bid protest by any Bidder;
8. Within seven (7) Days of receiving a timely Bid protest, the Cabinet Secretary or the Cabinet Secretary's designated informal hearing officer will cause to be delivered by mail, postage prepaid, or by email transmission a letter notifying all parties to the protest of the date, time and place to appear with all necessary material evidence for an informal hearing. Such letter shall include a copy of the written protest. Whenever practicable the parties will be afforded at least seven (7) Days' notice of the scheduled informal hearing. If an informal hearing officer is designated by the Cabinet Secretary, the designee shall not be a person who made or approved the Award decision under review or a subordinate of such person during the past twelve (12) months;
9. The formal rules of evidence or civil procedure do not apply to the informal hearing. The informal hearing officer has absolute discretion in establishing the degree of formality for the informal hearing and may limit the presentation of evidence or argument. While parties to an informal hearing may call their own witnesses they are not afforded the opportunity to subpoena or cross-examine witnesses. Parties are permitted to submit documentary evidence and written arguments at the informal hearing. Parties may supplement the record or provide supplemental written arguments after the informal hearing date provided that such materials are submitted to the informal hearing officer three (3) Days after the informal hearing date. The informal hearing officer shall have the authority to question any party or witness;
10. At disposition, the informal hearing officer is not restricted to considering only evidence or argument presented at the informal hearing but may consider evidence that is reliable, accurate, and competently obtained. When such information is obtained the hearing officer shall provide it to both parties and provide twenty-four (24) hours for rebuttal before the final decision.

11. The informal hearing officer is responsible for maintaining a complete record of the informal hearing including all evidence, transcripts of the hearing, and written arguments submitted by the parties. A complete record of the testimony and argument at the informal hearing shall, whenever practicable, be recorded by a certified court reporter or monitor. Transcripts or recordings of the proceeding, if available, may be supplied to any party at their own expense upon request to the court reporter or monitor;
12. Within seven (7) Days of the informal hearing date, the Cabinet Secretary or the Cabinet Secretary's designated informal hearing officer will issue a determination letter stating the reasons for the action taken and informing the losing party of its right, under NMSA 1978, § 13-1-183 (1999), to file an appeal in Santa Fe District Court within thirty (30) Days of the issuance of the adverse determination. The determination letter shall constitute the final Department decision or order;
13. The Award of the Contract to the Lowest Responsible Bidder, based upon the Department's determination letter, shall be conditioned upon the unsuccessful party not appealing, under NMSA 1978, § 13-1-183 (1999), to the Santa Fe District Court within thirty (30) Days of receiving the determination letter. The Award letter, if it is mailed within sixty (60) Days of the Bid Opening, shall bind the Lowest Responsible Bidder to Accept the Contract or to reject the Contract and forfeit the Bid Guaranty it has provided;
14. If an appeal is filed pursuant to NMSA 1978, § 13-1-183 (1999), the Department may extend the date of the Award letter to a later date as agreed upon by the Department and the Lowest Responsible Bidder. When such an extension cannot be agreed upon or for any other reason, the Department may proceed with the Award to the next Lowest Responsible Bidder if the Cabinet Secretary determines that the Award of the Contract is necessary to protect the substantial interests of the public and the Department, or may cancel the Award of the Contract, or reject all Bids and issue a new Advertisement when it is in the best interest of the public and the Department;
15. If a Bidder successfully prevails on appeal, a Bidder is limited to either (1) Award of the Contract or (2) the Contractor's reasonable and documented Bid preparation costs if the Contract can no longer be practicably awarded to the Bidder or it is not in the best interest of the public as determined by the Department; and,
16. Each party shall bear its own attorney's fees and costs.

#### **103.4 CANCELLATION OF AWARD**

The Department may reject all Bids, rescind the Notice of Preliminary Award of Contract, and cancel the Award of any Contract at any time prior to the execution of the Contract by all parties without incurring liability where such cancellation is deemed by the Cabinet Secretary to be in the best interests of the public and the Department. No Bidder has a contractual, equitable, implied, or any other right to the Contract until executed by both parties.

#### **103.5 RESERVED**

#### **103.6 CONTRACTOR EXECUTED CONTRACT**

The Department will provide the Contract to be signed by the Contractor and returned to the Department. The Contractor shall return the signed Contract with Contract Bonds and other documents required by the Notice of Preliminary Award of Contract letter within fifteen (15) Days from the date of the letter. The Contract Bonds shall become binding upon Contract execution.

The value of each bond shall equal the Total Original Contract Amount.

All Contract Bonds shall be procured from Sureties with an A.M. Best Company financial strength rating level of A- or better, Class VII or better, unless otherwise approved in writing by the Department. In no event will the Department approve the use of a Surety with an A.M. Best Company financial strength rating level of B or worse.

#### **103.7 FAILURE TO EXECUTE CONTRACT**

Failure by the Lowest Responsible Bidder to return the signed Contract, Contract Bonds and other documents required by the Notice of Preliminary Award of Contract letter within fifteen (15) Days of receiving the letter shall constitute just cause for rescinding the Notice of Preliminary Award of Contract and the forfeiture of the Bid Guaranty which shall become the property of the Department, not as a penalty but for reasonable damages sustained. The Bid Guaranty remains in effect until the Department has fully executed the Contract. The Department may then issue the Notice of Preliminary Award of Contract to the next Lowest Responsible Bidder or take other actions as the Department may decide.

#### **103.8 EXECUTION OF CONTRACT**

If the Department fails to execute the Contract within thirty (30) Days of receiving the signed Contract, Contract Bonds, and other documents required by the Notice of Preliminary Award of Contract letter from the successful Bidder, the Bidder may withdraw its Bid without penalty. No Contract shall be effective until it has been fully executed by the Department and the Contractor. In no event shall the Contractor commence Work until after execution of the Contract by all parties.

## **SECTION 104: SCOPE OF WORK**

### **104.1 INTENT OF THE CONTRACT**

The intent of the Contract is to provide for the construction and completion of the Work to the satisfaction of the Department. The Contractor shall furnish experienced supervision and labor and all Materials, Equipment, tools, transportation and supplies required to complete the Work in accordance with the Plans, Specifications and terms of the Contract.

Unless otherwise specified in the Contract, the Contractor is vested with the discretion and is wholly and solely responsible for selecting and managing the means and methods for performing the Work.

#### **104.1.1 CONTRACT MODIFICATIONS**

No modifications, limitations, waivers or discharge of the Contract or any of its terms shall bind the Department unless made in a fully executed Change Order. A course of performance or course of dealing on this Contract or any other contract between the Department and a Contractor shall not constitute a modification or waiver of the Contract and shall not give rise to any Claim including any cause of action based upon promissory estoppel, estoppel, waiver, or detrimental reliance.

### **104.2 EXTRA WORK**

The Department reserves the right to modify the Contract at any time. Such revisions shall neither invalidate the Contract nor release the Surety. The Contractor agrees to complete the Contract as revised. The Contractor shall perform Work at the Department's written direction defining the scope of the Work and in accordance with the Specifications.

The Contractor shall provide to the Project Manager its proposal associated with the Work before starting the Work. The submission of the proposal shall not be considered Accepted by the Department until the Acceptance of the cost proposal is in writing from the Department. If the proposal is Accepted by the Department, then the Department will issue a Change Order and allow the Contractor seven (7) Days to review and sign the Change Order. If, after the expiration of seven (7) Days, the Contractor has failed to sign the Change Order the Department may process the Change Order unilaterally.

#### **104.2.1 Significant Changes in the Character of the Work**

The Project Manager reserves the right to make, in writing, at any time during the Work, modifications in quantity and alterations to the Work as are necessary to satisfactorily complete the Project. "Significant change" applies only to modifications or alterations that:

1. Materially changes, in kind or nature, the character of the Work including the Critical Path from that which was previously involved or included in the original proposed construction. When the character of the Work is materially changed in kind or nature then the Project Manager and the Contractor shall agree upon the adjustment prior to the Contractor's performance of the Work. If an agreement is reached, the Project Manager will make an adjustment to the Contract which excludes loss of anticipated profit. If an agreement is not reached, the Project Manager will direct the Contractor to perform the Work. The Project Manager and the Contractor will track the costs in accordance with Section 109.6, "Force Account;"
2. A Major Item of Work, as defined elsewhere in the Contract, has increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity. The Project Manager and the Contractor shall negotiate adjustments to the Contract when

it is discovered that a Major Contract Item of Work, as defined elsewhere in the Contract, has increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of the original Contract Item quantity. In the case of a decrease below 75 percent, the allowance will apply to the actual amount of work performed. For quantities below 75 percent, before an adjustment is made, the Contractor shall provide documents, including invoices, to the Project Manager justifying the requested adjustment price. In no case shall the quantity below 75 percent times the newly established Contract Item price exceed the total cost of the original Bid Item Price. If the final quantities are reestablished to be within the thresholds of 75 percent to 125 percent of the original Contract Item quantity, then the original Bid Item Unit Price applies; and,

3. Affects Work performed under a Subcontract, as solely determined by the Project Manager. The Project Manager will make adjustments if the Contractor requests and demonstrates that the change adversely affects the Subcontractor's Work.

The Department will not consider customary increases or decreases in quantities necessary to complete the Work changed by the Contractor's schedule of operations, the Contractor's planning of the Work, or unscheduled mobilizations.

#### **104.2.2 Differing Site Conditions**

The Contractor shall carefully study and compare the foundation reports and geotechnical reports and Contract documents and shall immediately report to the Project Manager any error, inconsistency, or omission that it discovers. If the Contractor does not understand information in the foundation report and geotechnical report, it shall immediately seek clarification from the Project Manager. The Contractor shall provide to the Project Manager, within seventy-two (72) hours upon discovery, written notice of the following conditions encountered on the Project during the progress of the Work:

1. Present but not visible physical conditions differing materially from those shown in the Contract; or,
2. Unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the Work.

If the issue is related to safety, the Contractor shall immediately notify the Project Manager of the condition that needs correction.

The Project Manager will decide within seventy-two (72) hours after written notification, whether the conditions materially differ and cause an increase or decrease in the cost or time required to perform the Work.

The Project Manager will notify the Contractor of this decision and the Contractor shall not proceed with Extra Work until the Project Manager provides direction.

The Project Manager will adjust the Contract for differing site conditions in accordance with Section 109.5, "Payment for Extra Work," and will include the costs of Delays but exclude anticipated profit in accordance with Section 109.11, "Compensation for Claims." The Department may grant time extensions only to the extent that the activities on the Critical Path of the baseline schedule in effect at the time of the Delay are impacted. No Contract adjustment which results in a benefit to the Contractor will be allowed if a differing site condition could have been discovered or anticipated by the Contractor through the exercise of Pre-Bid Due Diligence.

#### **104.2.3 Department Ordered Work**

The Department will pay for Department ordered Work in accordance with Section 109.5, "Payment for Extra Work."

The Department may grant time extensions only to the extent that the activities on the Critical Path of the baseline schedule in effect at the time of the Delay are impacted.

#### **104.3 RESERVED**

#### **104.4 RESERVED**

#### **104.5 MAINTENANCE OF TRAFFIC**

The Contractor shall furnish traffic control devices, take protective and safety measures, and complete the Work. If the Contractor fails to do so, the Project Manager will notify the Contractor in writing of the deficiency and the Contractor shall take corrective action within the time frame specified by the Project Manager.

The Contractor shall not endanger the traveling public when moving Equipment on or across the ROW and Roadway. The Contractor's Equipment shall enter and leave the ROW and Roadway in the direction of the Traveled Way, except with the written approval of the Project Manager.

The Project Manager may direct the Contractor to maintain the pavement surface. The Department will pay for this Work in accordance with Section 109.5, "Payment for Extra Work."

The Department is responsible for snow removal on sections of Roadway open to the traveling public. The Project Manager will coordinate snow removal with the Contractor and the maintenance patrol.

The Contractor shall provide vehicular and pedestrian ingress and egress to adjoining properties during the duration of the Contract. The Contractor shall advise and schedule access modifications with local business owners and residences and the Project Manager at least forty-eight (48) hours in advance.

The Contractor shall not open partially completed sections of the Traveled Way unless directed or approved by the Project Manager. If the Traveled Way is opened at the Contractor's request, the Contractor remains liable for costs associated with the opening until Final Acceptance of the Project. The Project Manager will provide written instructions approving any sections which are to be opened. Such an opening shall not constitute a full or partial Acceptance of the Work or a waiver of any Contract provisions.

#### **104.6 RIGHTS IN AND USE OF MATERIALS FOUND ON THE WORK**

The Contractor may use Materials found in the excavation while performing established Contract Work for completing Pay Items other than the Work in Standard Specification Section 203, "Excavation, Borrow, and Embankment." Payment will be made for both the excavation of such Materials at the corresponding Contract Item Unit Price and for the Pay Item for which the excavated Material is used.

The Contractor shall obtain written authorization from the Project Manager before excavating Material that is within the Right of Way but outside the grading limits, as shown by the slope and grade lines. Pending review, the Project Manager will verify that the requirements

of Section 107, "Legal Relations, Environmental Requirements, and Responsibility to the Public" have been satisfied. Any unsatisfied requirement will be the responsibility of the Contractor to satisfy prior to obtaining written authorization.

Unless detailed in the Contract documents, the Contractor may temporarily use the Material from existing Structures in the erection of a new Structure but shall not, without the approval of the Project Manager, cut or otherwise damage such Materials.

#### **104.7 FINAL CLEANUP**

Pits located on State or federal land are governed by the appropriate requirements of their agency. The requirements of this section do not apply to a commercial source.

Before Final Acceptance all areas occupied by the Contractor or in connection with the Work shall be cleaned of all Deleterious Material, rubbish, excess Materials, temporary Structures and Equipment, and all parts of the Work shall be left in a condition Acceptable to the Project Manager or otherwise required by the Contract. To avoid the requirement of removal of Equipment from private property before Final Acceptance, the Contractor shall make appropriate arrangements with private property owners and provide documentation of the arrangement to the Project Manager.

The Contractor shall not allow Borrow Pits and Surfacing Pits to change the general pattern of existing drainage. Unless Borrow Pits or Surfacing Pits are suitable to develop as ponds or lakes and the property owner has notified the Department in writing that such development is planned, the Contractor shall where practicable leave all pits well drained.

The Contractor shall, when excavation is complete, contour grade pits, except quarry pits, to blend with the natural topography of the surrounding area or in accordance with the Contract or agreements with the property owners.

#### **104.8 VALUE ENGINEERING COST PROPOSAL (VECP)**

The Department under no circumstances will reimburse the Contractor for the costs of developing the VECP that is rejected or is not Accepted by the Department. The Contractor shall submit its VECP on the Department provided form only. Exempted from Value Engineering Cost Proposals are mix designs and traffic control. Any decision about whether to Accept a VECP will be in the sole discretion of the Department. A VECP shall not be considered Accepted until the Department approves a Change Order implementing the VECP. VECPs are reviewed on a case by case basis and apply only to the ongoing Contracts referenced in the VECP proposal and become the property of the Department upon approval of the Change Order. VECPs shall contain no restrictions imposed by the Contractor on their use or disclosure. The Department has 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 proposal or part thereof on other Projects without obligation or compensation to the Contractor.

The Contractor's share of the VECP is fifty percent (50%) of the net savings. Acceptance of proposals does not extend the Contract Time unless specifically provided for.

The Department will rely exclusively upon the accuracy of the engineering data upon which the VECP is based and will not be required to perform additional investigations, crosschecks, or site examinations. Revisions, plans and engineering analyses must be stamped by a New Mexico Professional Engineer. The Department's Acceptance or adoption of a VECP shall not be construed to alleviate or reduce the Contractor's full and absolute liability if the implementation of the proposal fails to satisfactorily perform.



## **SECTION 105: CONTROL OF WORK**

### **105.1 RESPONSIBILITY AND AUTHORITY OF THE DEPARTMENT**

The Department has the authority to:

1. Administer the Contract;
2. Alter the Contract;
3. Enforce and terminate the Contract as expressly provided in other sections of the Standard Specifications;
4. Wholly or Partially Suspend the Work for cause; and,
5. Take actions as determined to be in the public's best interest.

If the Work is suspended by the Project Manager in writing for an unreasonable time (not originally anticipated, customary, or inherent to the construction industry), the Contractor may submit to the Project Manager a Notice of Potential Claim in accordance with Section 105.19, "Notice of Potential Claim" which must be accompanied by a proposed revised schedule pursuant to Section 108.3, "Schedule."

#### **105.1.2 Contractor Convenience**

The Contractor shall be wholly responsible and liable for any costs or time associated with any requests made for the Contractor's convenience and approved by the Department.

### **105.2 PLANS, WORKING DRAWINGS**

The Plans may be supplemented by Working Drawings as are necessary for the Work. The Contractor shall have the sole responsibility for verifying pertinent dimensions in the field before submitting such Working Drawings to the Project Manager. Working Drawings shall be submitted by the Contractor and Accepted by the Project Manager before beginning Work covered by the drawings. The Project Manager will review the Working Drawings although the Project Manager's review does not relieve the Contractor of the responsibility for the satisfactory completion of the Work or compliance with the Contract. The Contractor shall not alter or amend Working Drawings without the prior written approval of the Project Manager. The furnishing of all Working Drawings is Incidental.

The Contractor's baseline schedule of Work shall show the submittal of any Working Drawing as a milestone thirty (30) Days before the commencement of Work covered by the drawings. Unless otherwise indicated in the Contract, or approved by the Project Manager in writing, the Project Manager will have no longer than thirty (30) Days for Acceptance of the Working Drawings. If the Working Drawings are not Acceptable, the Working Drawings shall be resubmitted by the Contractor and the timeframe for Acceptance starts over. All time required for review of Working Drawings and other Contractor submittals shall be Incidental and shall not be the basis for any Claim for Contract Time extension or additional compensation.

#### **105.2.1 Submittals**

Anything that requires approval is considered a submittal by the Department. Any submittal required, other than the Critical Path Method or Bar Graph Schedules, shall be submitted to the Department thirty (30) Days before the Work related to the submittal is performed. The Project Manager will have no longer than seven (7) Days for Acceptance of APL submittals and thirty (30) Days for Acceptance of any other submittal with fourteen (14) Days for Acceptance of any resubmittals, unless otherwise specified in the Contract.

### **105.3 COMPLIANCE WITH PLANS AND SPECIFICATIONS**

The Contractor shall perform the Work and provide the Materials in substantial compliance with the lines, grades, cross sections, dimensions, and material requirements as specified by the Contract. The Department's failure to discover or reject Work or Materials not in substantial compliance with the Contract during the Work shall not be considered an Acceptance of the Work or Materials, or a waiver of defects. The Department's failure to properly perform inspections or tests shall not relieve the Contractor from its obligation to perform the Work and provide Materials in substantial compliance with the Contract and shall not be considered the Department's Acceptance of the Work or Materials.

If the Project Manager determines that Work or Materials are unacceptable, the Contractor shall remove, replace and correct the Work or Materials at no additional cost to the Department. The Project Manager's determination that the Work or Materials are unacceptable shall not form the basis of a Claim for additional Contract Time or additional compensation.

If Work does not comply or substantially comply with the Contract, the Project Manager may determine the Work is nonetheless Acceptable. If Accepted the Project Manager will, by Change Order, provide an adjustment for Work or Materials.

### **105.4 COORDINATION OF CONTRACT DOCUMENTS**

In case of a discrepancy, the Contract documents will govern in the following order of importance:

1. Addenda;
2. Required Documents for Bid Submittal;
3. Notices to Contractors;
4. Advertisement;
5. Project specific Special Provisions;
6. Special Provisions;
7. Plans;
8. Standard Specifications; and,
9. Standard Drawings.

Dimensions given on the Plans or that can be calculated govern over scaled dimensions.

If a Contract discrepancy is discovered after the Award of the Project, the Contractor shall, upon discovery, promptly notify in writing the Project Manager. The Contractor shall take no advantage of any discrepancy or errors or omissions in the Contract. The Project Manager will resolve the discrepancy in writing before the Contractor proceeds further with performance of the affected Work.

### **105.5 CONTRACTOR RESPONSIBILITIES**

The Contractor shall monitor the Work at all times, and shall select and manage the means and methods for performing the Work.

#### **105.5.1 Duties of Superintendent**

The Contractor shall have on the Project at all times during the course of the Work, a competent and qualified Superintendent who:

1. Reads and understands the Contract documents; and,
2. Possesses substantial experience in the type of Work being performed.

The Contractor and its Superintendent shall communicate with the Project Manager as the Department's contact for all matters relating to the Project and promptly submit all documentation or notice required by the Contract to the Project Manager.

#### **105.6 COOPERATION WITH UTILITIES**

The Contractor shall comply with the Notice to Contractors regarding Cooperation with Utilities for relocations, adjustments, and installations of utilities. The Contractor's responsibility is to adequately coordinate, notify, or comply with the Contract and failure to do so shall not form the basis for an extension of Contract Time or additional compensation.

The Contractor shall copy the Project Manager on all communications with utilities. For telephonic communications a summary of the communication shall be provided to the Project Manager monthly.

The Contractor shall be responsible for complying with the New Mexico Excavation Law, NMSA 1978, §§ 62-14-1 to -10 (1953, as amended 2013) which provides the procedures and requirements related to the performance of Project excavation Work.

Failure by the utility owner to relocate, adjust, or install the utility in accordance with the Contract may result in the Project Manager issuing written direction to the Contractor directing that the Contractor shall relocate, adjust, or install the utility per Section 104.2, "Extra Work."

The Contractor shall terminate operations in the immediate area of a utility conflict not identified in the Contract and encountered during the Work. The Contractor shall immediately provide written notice to the Project Manager of the conflict. The Contractor shall continue Work in other areas. The Project Manager will provide written notification to the Contractor when Work may commence in the area of terminated operations. The Contractor shall make requests for additional Contract Time or compensation per Section 104.2.2, "Differing Site Conditions." Where utility conflicts not identified in the Contract are present, the Contractor shall provide the Project Manager, on a weekly basis, evidence of adequate coordination and cooperation with utilities. Neither additional Contract Time nor compensation will be provided where the Contractor fails to provide the Project Manager, on a weekly basis, evidence including a telephonic log of communications concerning the Contractor's continued cooperation and coordination activities with utilities.

#### **105.7 COOPERATION BETWEEN CONTRACTORS**

The Department reserves the right at any time to Contract for and have performed other Work on or near the Project.

When separate Contracts are let within the limits of any one Project, each Contractor shall conduct the Work without interfering or hindering the progress or completion of the Work being performed by other Contractors. Contractors working on the same Project shall cooperate with each other as directed.

Each Contractor involved shall assume all liability, financial or otherwise, in connection with their respective Contract and shall protect and hold harmless the Department for all damages or Claims as per Section 107.19, "Responsibility for Third Party Claims and Duty to Defend."

If the Contractor and one (1) or more other Contractors are unable to agree upon the sequence of Work or other matters, the Contractor(s) shall request that the Project Manager provide a written decision on the issue. The Project Manager will allow a reasonable time for all parties to respond and, after reviewing the information received, will issue a decision binding on all parties within seven (7) Days of receiving such information.

## **105.8 AUTHORITY AND DUTIES OF THE PROJECT MANAGER**

### **105.8.1 Project Manager Authority**

The Project Manager is a designee of the Cabinet Secretary with authority commensurate with that of the Cabinet Secretary and has the following responsibilities:

1. Interpretation and administration of the Contract;
2. Immediate charge of the details of the Project;
3. Authority to reject Work and Material;
4. Authority to Partially Suspend the Work for reasons beyond the control of the Contractor or not connected to the construction of the Project when the Project Manager deems such a suspension to be in the best interests of the public and the Department; and,
5. Authority to concur with the Contractor's request to Partially Suspend or wholly suspend the Work.

At no cost to the Department, the Project Manager may also wholly or Partially Suspend the Work for cause, including but not limited to, the Contractor's failure to:

1. Correct unsafe conditions;
2. Comply with any term or condition of the Contract;
3. Observe and comply with any Federal or State law or regulation;
4. Carry out directions of the Project Manager;
5. Manage its personnel and Subcontractor and its personnel; or,
6. Perform satisfactory Work.

### **105.8.2 Contractor Inquiries to Project Manager**

The Contractor shall submit all correspondence to the Project Manager. The Contractor shall submit in writing a request for information for any Project issues, including but not limited to discrepancies in the Contract, to the Project Manager who will resolve the issues.

The determination of the Project Manager will be in writing and delivered to the Contractor's Superintendent as soon as reasonably practicable. The Contractor shall continue with Work in other areas not affected by the issue or discrepancy.

## **105.9 DUTIES OF THE INSPECTOR**

### **105.9.1 Inspector Authority**

The Department authorizes its Inspectors to:

1. Inspect the Work;
2. Inspect the preparation, fabrication or manufacture of Materials; and,
3. Notify in writing the Contractor of non-conforming Work, reject non-conforming Materials, and suspend portions of the Work for safety reasons only.

The Contractor shall refer questions at issue to the Project Manager for a decision.

#### **105.9.2 Inspector Authority Limitations**

The Department does not authorize its Inspectors to:

1. Alter or waive any provision of the Contract;
2. Issue instructions contrary to the Contract; or,
3. Provide direction, superintendence or guidance to the Contractor, Subcontractors or Suppliers.

Any action or inaction of the Inspector does not waive the Department's right to pursue any and all legal remedies for defective Work or Work performed by the Contractor in an unworkmanlike manner.

#### **105.10 INSPECTION OF WORK**

The Contractor shall provide the Project Manager in writing with forty-eight (48) hours' notice for inspection of the Work. Failure by the Contractor to provide the proper notice may result in the Department directing the Work performed without inspection to be removed at no cost to the Department.

The Contractor shall provide the Department or its representative access to the Work and provide all information, Equipment, and assistance requested or required to make a complete and detailed inspection of the Work. All Materials and each part or detail of the Work shall be subject to inspection by the Department.

The Project Manager may direct the Contractor to remove or uncover portions of the finished Work, at any time before Final Acceptance of the Work. The Contractor shall restore the portions of the Work to the standard required by the Contract after the Project Manager's examination. If the examined Work is Acceptable, the Department will pay for the removal and restoration as Extra Work under Section 104, "Scope of Work," and Section 109.5, "Payment for Extra Work." However, if the examined Work is unacceptable, the Contractor shall remove and restore the Work at no additional cost to the Department.

Action or inaction by a Department Inspector shall not relieve the Contractor from any responsibility under the Contract for Acceptable Work in conformity with the Contract. The failure to properly perform inspections, tests or approvals by the Department will not relieve the Contractor from its obligation to perform the Work in strict conformance with the Contract.

The Department may allow a unit of government, political subdivision, or a railroad corporation to inspect the Work. This inspection shall not make the unit of government or political subdivision or the railroad corporation a party to the Contract and shall not interfere with the rights of either party.

#### **105.11 REMOVAL OF UNACCEPTABLE AND UNAUTHORIZED WORK**

Work that does not conform to the requirements of the Contract shall be unacceptable, unless it is determined by the Project Manager to be Acceptable under the provisions of Section 105.3, "Compliance with Plans and Specifications."

Should any defective Work or Material be discovered, before Final Acceptance, the Department will issue a Non-Conformance in accordance with Section 109.8.2, "Non-Conformance."

Prior to Department Acceptance, the Contractor shall replace or repair Materials damaged in transit or during handling at no additional cost to the Department.

The Contractor shall remove unacceptable Work resulting from causes existing before the Final Acceptance of the Work and replace in an Acceptable manner at no additional cost to the Department. The Project Manager will set the time limit for the replacement Work.

The Department will not pay for the following under the provisions of the Contract:

1. Work performed contrary to the Project Manager's direction or as provided in the Contract;
2. Work performed beyond the lines and grades on the Plans; or,
3. Work performed without authority.

Upon failure of the Contractor to comply with the removal and replacement of unacceptable or unauthorized Work within the time specified by the Project Manager, the Project Manager shall have authority to cause unacceptable Work to be removed and replaced. The Project Manager will then deduct from the monies due or that become due to the Contractor the cost of removing or replacing the unacceptable or unauthorized Work.

#### **105.12 LOAD RESTRICTIONS**

The Contractor shall observe legal load restrictions when hauling Equipment or Material on public Roads outside of the Project or on Roadways within the Project. The Project Manager may approve exceptions, in writing, provided the Contractor has obtained the proper oversize and overweight permits. The Contractor is liable for damage that may result from moving Equipment, even with the issuance of a special permit.

The Contractor shall not use Equipment or haul loads that will cause damage to Structures, Roadway, or any other construction, regardless of legal load allowances.

If the Project Manager determines that anticipated hauling operations may cause damage to existing Roadways or Structures, the Project Manager will issue a written notice to the Contractor. Within seventy-two (72) hours of the notice, the Project Manager will elect one (1) or more of the following solutions:

1. Change the haul route; or,
2. Reduce the allowable load limit.

If the Project Manager determines that hauling operations are causing damage to existing Roadways or Structures, the Project Manager will issue a written notice to stop operations causing the damage. Within seventy-two (72) hours of the notice, the Project Manager will issue written direction to the Contractor to repair the damage or the Project Manager will elect one (1) or more of the following solutions:

1. Change the haul route;
2. Reduce the allowable load limit; and/or,
3. Allow the operations to continue with the requirement that the Contractor repair all damaged areas at  $\frac{1}{2}$  of the negotiated repair cost based on Bid Item Unit Prices. In the absence of a Bid Item Unit Price, the current published average unit bid prices shall be used.

## 105.12.1 Corrective Actions and Methods of Payment

### 105.12.1.1 Change in Haul Route

If the Project Manager changes the haul route, the Department will modify the Contractor's payment per the following equation:

$$P = R \times t \times (d_1 - d_0) \quad (1)$$

Where,

- $P$  is the payment modification (in dollars)
- $R$  is the rate (in dollars per ton mile determined in accordance with Section 109, "Measurement and Payment.")
- $t$  is the weight of Material hauled from the new stockpile area (in tons)
- $d_0$  is the original haul distance measured from the Roadway access point to the original stockpile area
- $d_1$  is the new haul distance measured from the Roadway access point to the new stockpile area

### 105.12.1.2 Change in Allowable Load Limit

If the Project Manager reduces the allowable load limit, the Department will pay the Contractor in accordance with the following equation:

$$P = \frac{QF \times R \times d \times (LA - LR)}{LA} \quad (2)$$

Where,

- $P$  is the additional payment (in dollars)
- $R$  is the rate (in dollars per ton mile determined in accordance with Section 109, "Measurement and Payment.")
- $QF$  is the total quantity of Material hauled at the reduced load limit (in tons)
- $LA$  is the allowable load limit (in tons)
- $LR$  is the reduced load limit (in tons)
- $d$  is the haul distance (in miles)

### 105.12.1.3 Negotiated Repair Cost

If the Project Manager allows operations to continue or because of damage to an existing Roadways or Structures, the Department will pay the Contractor for the Material used to make the repairs at ½ of the negotiated repair cost based on Bid Item Unit Prices, or in accordance with Section 109, "Measurement and Payment." If an item is not part of the Contract, the Department will negotiate a new unit price. If a Structure or existing Roadway must be repaired, the Department may pay the Contractor for hauling repair Materials using a rate requested and justified by the Contractor and approved by the Project Manager.

**105.13 RESERVED**

**105.14 RESERVED**

**105.15 MAINTENANCE DURING CONSTRUCTION**

The Contractor shall maintain the Work during construction and until the Department Accepts the Work, except as otherwise provided in Section 104.5, "Maintenance of Traffic," and Section 105.18, "Acceptance." This maintenance shall consist of continuous, daily Work with adequate Equipment and forces so that the Roadway and Structures are kept in satisfactory condition. The Contractor shall be responsible for maintaining the Project free and clear of Deleterious Materials including debris, weather related remnants, snow outside the Travelled Way, loose Materials and trash. The Department will be responsible for snow removal operations on travel lanes open and utilized by the public.

The Contractor shall maintain the previous course and Subgrade when the Plans require the Contractor to place traffic on the unfinished Roadway.

All maintenance Work during construction and before the Project is Accepted shall be Incidental. The Department will not pay the Contractor an additional amount for this Work except in accordance with Section 104.5, "Maintenance of Traffic," and Section 105.18, "Acceptance."

**105.16 FAILURE TO MAINTAIN ROADWAY OR STRUCTURE**

If the Contractor fails to maintain the Project in accordance with Section 105.15, "Maintenance During Construction," the Project Manager shall notify the Contractor in writing of the failure. If the Contractor does not take corrective action in timeframe specified by the Project Manager, the Project Manager may issue a written notice per Section 109.8.2, "Non-Conformance" or notice of the Contractor's apparent default per Section 108.9, "Default of Contract."

If the Contractor does not begin maintenance after notice from the Project Manager, the Project Manager may begin maintenance of the Project. For corrective actions implemented by the Project Manager the Contractor shall reimburse the Department for Department incurred costs of such maintenance plus an additional ten percent (10%) for administrative costs.

**105.17 RESERVED**

**105.18 ACCEPTANCE**

**105.18.1 Partial Acceptance**

The Contractor may request in writing that the Project Manager inspect a portion of the Project (e.g., a Structure, a section of Road, etc.) at any time during the Work. If the Project Manager finds that portion to be in accordance with the Contract, the Project Manager may Accept in writing, that portion as complete, and, without waiving the provisions in Section 105.3, "Compliance with Plans and Specifications," Section 107.26, "No Waiver of Legal Rights" and Section 109.10, "Project Closure" the Contractor may be relieved of further responsibility for that portion unless the Department discovers latent defects before Final Acceptance of the Work. Such partial Acceptance does not void or alter the Contract.

The Department will Accept permanent traffic safety and control devices installed in accordance with the Contract (with all ancillary components) and being used by the public upon installation but before completion of the remaining Work.



Permanently installed items Accepted on this basis are limited to the following:

1. Guardrail;
2. Cattleguards;
3. Impact attenuators;
4. Traffic Signals;
5. Signs;
6. Lighting;
7. Raised pavement markers;
8. CWB;
9. Concrete Bridge parapet;
10. Bridge railing;
11. Post and cable barrier ;
12. Guardrail anchorages;
13. Permanent pavement markings; and,
14. Fence.

All required performance tests and guarantees shall remain applicable.

The Contractor shall repair or replace any damage, theft, or vandalism to these items after Acceptance in accordance with Section 104.2, "Extra Work." The Contractor shall repair or replace items damaged due to the Contractor's negligence or as a result of the Contractor's failure to protect the Work per Section 107.20, "Contractor's Responsibility to Protect the Work," at no additional cost to the Department.

The Contractor shall erect these items in a logical construction sequence. The Department will not Accept prematurely constructed items until they may be used for their intended purposes.

#### **105.18.2 Final Acceptance**

The Department will make the Final Acceptance in accordance with Section 109.10.8, "Physical Completion, Release of Retainage, Final Payment and Final Acceptance."

#### **105.19 NOTICE OF POTENTIAL CLAIM**

A notice of potential Claim shall be given in order that the Department can assess the situation and make an initial determination as to the causes of the issue. A notice of potential Claim submitted timely and in its entirety allows the Department to institute appropriate changes or procedures to resolve the issue, keep documentation related to the issue, track actual costs and Delay resulting from the issue, and facilitate resolution of the issue. The failure of the Contractor to provide a timely and complete Notice of Potential Claim form, a contemporaneous statement of estimated damages or Delay (impacts), and to comply with the other requirements of this section shall constitute a waiver or abandonment of the potential Claim.

The Contractor's submission of the Notice of Potential Claim form and the Project Manager's actions related to the notice of potential Claim shall not be construed to prove or validate the impacts or be construed as an admission of liability.

1. Unless otherwise specified by the Contract, the Contractor shall only make Claims in accordance with the exclusive administrative remedy and procedures set forth in Section 105.20, "Administrative Remedy."

2. The Contractor shall submit to the Project Manager the notice of potential Claim on the Department's current Notice of Potential Claim form. The Notice of Potential Claim form and documents or information submitted with the form shall constitute the Contractor's entire potential Claim. The notice of potential Claim shall provide a contemporaneous statement of estimated damages or Delay (impacts) before beginning the Work on which the impacts are based, but in no event shall notice be given later than seven (7) Days of the Contractor discovering the condition or issue giving rise to the impacts, or within seven (7) Days of receipt of a notice of a differing site condition from the Project Manager. A notice of potential Claim shall include, when relevant to the impacts (e.g., when the Contractor intends to seek a Contract adjustment for time, Delay damages, or reduction in Liquidated Damages, etc.), a revised schedule that identifies the impacts pursuant to Section 108.3, "Schedule." Failure to include a revised schedule shall render the notice of potential Claim incomplete. This section and the deadlines stated herein do not modify any of the deadlines for submitting revised schedules as provided in Section 108.3, "Schedule."
3. If the Contractor submits a timely Notice of Potential Claim form the Project Manager will without admitting liability for the impacts, direct the Contractor to keep a complete and accurate account, in detail, of the cost of doing the Work on a Force Account basis per Section 109.6, "Force Account." Failure to maintain records on a Force Account basis when so directed by the Project Manager shall waive any associated Claim by the Contractor.
4. The Contractor shall provide the Project Manager proper facilities to keep account of the actual cost associated with the notice of potential Claim; the Contractor waives the right to assert a Claim if the Project Manager is not afforded proper facilities to keep account of actual cost. The Project Manager may, in writing, waive this requirement to keep account of actual cost upon a showing of adequate justification by the Contractor.
5. If the Project Manager finds that the notice of potential Claim is justified the Project Manager will process a Supplemental Agreement to resolve the notice of potential Claim.
6. If the notice of potential Claim is unresolved to the Contractor's satisfaction, the Contractor may pursue its administrative remedies by complying with Section 105.20, "Administrative Remedy."

#### **105.20 ADMINISTRATIVE REMEDY**

This section governs the administrative remedy procedure to resolve all Claims, unless otherwise specified in the Contract. The administrative remedy procedure is the sole Contractual procedure to resolve Claims. No Claim shall be accorded any level of review unless the procedure below is followed sequentially. The sequential steps of the process are as follows:

- |           |  |
|-----------|--|
| Step I.   | Notice of Potential Claim;   |
| Step II.  | Submittal of the Claim to the Project Manager;   |
| Step III. | District Engineer Review and Decision;   |
| Step IV.  | Service of Request for Reconsideration of Claim to Cabinet Secretary;  |
| Step V.   | Cabinet Secretary's Review, which may include Referral to Claims Board for an Informal Hearing, and Cabinet Secretary's Decision; and, |
| Step VI.  | Service of Request for Arbitration or Service of Summons and Complaint in State District Court.  |

The Contractor shall not proceed to the subsequent step without a written determination from the preceding step.

The complete terms of a resolved Claim, regardless of the level of the administrative remedy, shall be documented and memorialized via a Change Order executed by the Contractor and the Department. The executed Change Order shall represent a final agreement to the total additional compensation and time due for any and all Work and items pertaining to the Work associated with the Change Order. Unless otherwise provided in the terms of the Change Order, the executed Change Order shall operate as an accord and satisfaction of the Claim and shall operate as a bar to any further Claim by the Contractor.

Each party shall bear its own attorneys' fees, costs, and expert fees.

#### **105.20.1 Project Manager Level**

##### **Step I. Notice of Potential Claim**

See Section 105.19, "Notice of Potential Claim"

The Department will dismiss a Contractor's Claim for failure to comply with the time limitations, requirements and procedures set forth in Section 105.19, "Notice of Potential Claim."

##### **Step II. Submittal of the Claim to the Project Manager**

The Contractor shall submit its Claim on the Department's Claim Form. The Project Manager retains the right to request additional information and documents from the Contractor to support the Claim. The Contractor shall provide the requested additional information and documents.

1. A Claim shall be rejected, and rejection shall constitute a waiver or abandonment of the Claim and a failure to exhaust its administrative remedy by the Contractor for the Contractor's failure to comply with the following conditions:
  - a. The Claim shall be in writing;
  - b. The Claim shall be submitted on the Department's Claim Form;
  - c. The Claim shall be submitted within thirty (30) Days of the date that the Work associated with the Claim has been completed;
  - d. The Claim shall be submitted only once;
  - e. The Claim shall include all required supporting documentation and information; and
  - f. A Contractor's, Subcontractor's or Supplier pass-through Claim shall be certified by the Contractor as the Contractor's Claim on the Department's current approved forms.
2. The Contractor has the burden of fully justifying and documenting the Claim and shall provide to the Project Manager the following supporting documentation and information in support of the Claim. The following supporting documentation shall also be updated from those documents submitted with the notice of potential Claim:
  - a. Description of the issue upon which the Claim is based;
  - b. Location where the issue arose;
  - c. The dates impacted including the time and date the issue arose;
  - d. Clear explanation of why the issue requires additional compensation or time or a change to the Contract, including references to the relevant portions of the Contract;

- e. Copies of all written communications including correspondence and emails related to the issue;
- f. A detailed compilation of the amount of additional compensation sought and a breakdown of the amount sought as follows: documented additional job site labor expenses; documented additional cost of Materials and supplies; a list of additional job site Equipment costs claimed, including each piece of required Equipment for the Work and the Blue Book rental rate claimed for each; any other additional direct costs or damages and the documents in support thereof;
- g. Where a Claim seeks additional time, time and compensation for Delay, adjustment of Contract Time, or the reduction or elimination of liquidated damages, previously submitted baseline schedule and revised schedules that comply with the requirements of Section 108.3, "Schedule;"
- h. Invoices identifying the labor, Materials, and Equipment used or proposed to be used;
- i. Project Cost Reports. If the total amount of the Claim exceeds \$100,000.00, Project cost reports for the time periods relevant to the Contract and the performance of the Work;
- j. Bid Documents. If the total amount of the Claim exceeds \$100,000.00, or if required by the Contract, the Contractor shall make the Contractor's documents available for inspection by the Project Manager at the Contractor's Project office. This includes information and calculations used to prepare and determine its Bid for the Contract prior to submission of the Bid. The required Bid preparation documents, as maintained by the Contractor, to be produced shall include: clear itemization of the costs for each Pay Item broken down into components sufficient to allow a detailed cost estimate; the costs allocated to each component broken down into the Contractor's usual estimate categories such as direct labor, Equipment, Materials, and Subcontractor cost; indirect costs, including the indirect cost allocations made to each Bid Item; quantity takeoffs; the construction and progress schedule and any conceptual schedules upon which the Bid was based; rates of production and progress; marked up plans, sheets and Working Drawings; calculations, copies and quotes from Subcontractors and Suppliers; memoranda, narratives, and all other information used by the Contractor to arrive at all of the prices contained in the Bid. The Project Manager may waive this requirement;
- k. Total amount of the Claim in terms of time and compensation; and,
- l. Certification of Claim. The Contractor shall submit a Certification of Claim form with the Claim.

#### **105.20.2 District Engineer Level**

##### **Step III. District Level Review and Decision**

The District Engineer or designee has thirty (30) Days from the date the Claim is received by the Project Manager, or additional time if agreed upon by both parties in writing, to review and render a decision. If the District Engineer or designee does not make a written decision within the thirty (30) Days, or the agreed upon additional time, the Claim is deemed denied by the District Engineer. The parties may engage in informal mediation to resolve the Claim at the District Engineer level prior to the expiration of the time in which the District Engineer or designee may render a decision.

Once a Claim is submitted to the Project Manager, nothing in this section shall be construed as permitting the Contractor to revive, modify, supplement, enlarge, or amend the Claim or the

basis of entitlement other than providing additional documents and information in support of the Claim. All further proceedings shall be limited solely to the basis of entitlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written Claim submitted.

### **105.20.3 Cabinet Secretary Level**

#### **Step IV. Service of Request for Reconsideration of Claim to the Cabinet Secretary**

The Contractor shall, within ten (10) Working Days of the District Engineer's decision, serve a written request to reconsider the Claim. When the Contractor fails to request reconsideration to the Cabinet Secretary within the ten (10) Working Day timeframe then the District Engineer's decision is deemed Accepted by the Contractor. This Acceptance shall constitute a complete and final resolution of the Claim and the Department will, within thirty (30) Days of the District Engineer's decision, execute a unilateral Change Order implementing the District Engineer's decision.

A request for reconsideration of the Claim shall be rejected, and rejection shall constitute a waiver or abandonment of the Claim and a failure to exhaust its administrative remedy by the Contractor for the Contractor's failure to comply with the following conditions:

1. Service of Process at the Secretary Level. Service shall not be considered effective unless the request includes all supporting documentation provided at the District Level and, when applicable, a copy of the District Engineer's written denial of the Claim. Service of all notices and required documentation and information at the Secretary Level shall be made upon the Cabinet Secretary with a copy contemporaneously transmitted to both the District Engineer and the Department's Office of General Counsel. Service upon the Cabinet Secretary shall be made during the Department's regular Business Hours by delivery in person, or by certified mail, postage prepaid, return receipt requested, or by delivery by a nationally recognized overnight or same-day courier service that obtains receipts. The copy contemporaneously transmitted to the Office of General Counsel may be served by the means for serving the Cabinet Secretary or, with prior written agreement of the Office of General Counsel, by facsimile copy or by email transmission. Service of notice or documents made after the Department's regular Business Hours shall not be effective until the next Working Day. Service upon the District Engineer may be made by the means for serving the Cabinet Secretary or by facsimile copy or by email transmission and need not include the documentation previously submitted at the District level.
2. Certification of Claim. The Contractor shall submit a Certification of Claim with the request for reconsideration on the Department's approved form.

Additional Information. The Cabinet Secretary retains the right to request additional information from the Contractor to support the Claim, regardless of the Project Manager's previous waiver.

#### **Step V. Cabinet Secretary's Review, Which May Include Referral to Claims Board for an Informal Hearing and Cabinet Secretary Decision**

1. The Cabinet Secretary will provide a written decision on the Claim or will refer the Claim to the Department's Claims Board within twenty-one (21) Days of service of the request for reconsideration. This deadline may be extended in writing by the Cabinet Secretary.
2. Claims Board. If the Claim is referred to a Claims Board, an informal dispute resolution board, by the Cabinet Secretary, the Secretary shall appoint up to three (3) independent panelists with relevant experience in highway and transportation design,

construction management, engineering, surveying, construction, Contract administration, construction oversight, Work, or law. The Claims Board shall not include any current employees of the Department or the Contractor, but may include individuals contracted to provide services to the Department. The Claims Board shall apply the Contract to the Claim and shall conduct an informal hearing in order to facilitate the expeditious and informal resolution of the Claim. Attorneys representing the parties are permitted to attend the informal hearing; however, attorneys shall not participate in the informal hearing unless the Claims Board specifically addresses an issue to them or unless agreed to by both parties. Notification shall be provided by both parties a minimum of five (5) Days prior to the hearing if legal representation will be attending the hearing. The Claims Board shall issue a final, written recommendation to the Cabinet Secretary to resolve the Claim.

3. Cabinet Secretary Decision. If the Claim is referred to the Department's Claims Board, the Cabinet Secretary will provide a written decision within twenty-one (21) Days of the Secretary's receipt of a final, written recommendation on the Claim from the Claims Board. If the Cabinet Secretary does not provide a written decision within twenty-one (21) Days, unless extended by the Secretary in writing prior to expiration of time, the Claims Board's recommendations shall be deemed to have been adopted by the Cabinet Secretary and shall operate as the Secretary's decision.
4. Payment. The Contractor is only entitled to payment of its Claim pursuant to the Cabinet Secretary's decision if the Contractor fully Accepts the decision and executes an accompanying Change Order. If the Contractor fails to execute a Change Order within twenty-one (21) Days of the Cabinet Secretary's decision, the Department may process a unilateral Change Order implementing the Cabinet Secretary's decision. The Contractor's proceeding with litigation in State District Court or arbitration shall operate as a waiver by the Contractor to recover or receive payment pursuant to the Cabinet Secretary's decision.

#### **105.20.4.1 Arbitration**

##### **Step VI. Service of Request for Arbitration or Service of Summons and Complaint in State District Court**

1. The Contractor and Department may agree to arbitrate the Claim instead of proceeding to litigation in State District Court. Arbitration may only be had at the mutual agreement of the Contractor and the Department. Arbitration shall be conducted in accordance with the New Mexico Uniform Arbitration Act, NMSA 1978, §§ 44-7A-1 to -32 (2001), and this section.
2. Service of the request to arbitrate the Claim by the Contractor shall only be made in the request for reconsideration. The Cabinet Secretary will issue a decision denying or agreeing to the request for arbitration in writing within ten (10) Days of the receipt of the request to arbitrate. If the Cabinet Secretary does not respond to the request to arbitrate, then the request is deemed denied.
3. By the parties agreeing to arbitration, the Contractor waives the right to redress through litigation filed in State District Court. The Contractor proceeding with arbitration shall operate as a waiver by the Contractor of recovery under any written decision issued by the Cabinet Secretary.
4. If the Contractor and Department agree to arbitrate the Claim the arbitration panel shall consist of three (3) members.
5. Within fifteen (15) Days of the agreement to arbitrate the Claim, the Contractor shall submit the name of a panelist. The Contractor's panelist shall:
  - a. Not be an employee of the Contractor;

- b. Have fifteen (15) years of experience in Highway construction management, methods, techniques, or law; or have an active professional license with the State of New Mexico as an Engineer, Surveyor or Attorney with ten (10) years of experience in Highway construction management, methods, techniques, or law;
  - c. Be either a resident of the State of New Mexico or identify New Mexico as the panelist's principal place of business; and,
  - d. Agree to serve on the panel.
- 6. Within fifteen (15) Days of receiving notice of the Contractor's panelist, the Cabinet Secretary shall submit the name of a panelist. The Cabinet Secretary's panelist shall:
  - a. Not be an employee of the Department, but may include individuals contracted to provide services to the Department;
  - b. Have fifteen (15) years of experience in Highway construction management, methods, techniques, or law; or have an active professional license with the State of New Mexico as an Engineer, Surveyor or Attorney with ten (10) years of experience in Highway construction management, methods, techniques, or law;
  - c. Be either a resident of the State of New Mexico or identify New Mexico as the panelist's principal place of business; and,
  - d. Agree to serve on the panel.
- 7. Within thirty (30) Days after the Cabinet Secretary panel appointment, the two (2) panelists will choose a third panelist. The third panelist shall:
  - a. Be a professional arbitrator who is a member or diplomat of a nationally recognized professional arbitration organization, such as the National Academy of Arbitrators or the American Arbitration Association; or is a retired federal or New Mexico district or appellate judge; or be a former employee of FHWA;
  - b. Not be an employee or a contractor of either the Department or the Contractor; and,
  - c. Agree to serve on the panel.
- 8. If the two (2) panelists are unable to agree, a district judge from the First Judicial District shall choose the third panelist from a list of four (4) prospective panelists who meet the requirements of the preceding paragraph. The list of four (4) prospective panelists shall be comprised of two (2) prospective panelists provided by the Department and the Contractor each. Application to the court for this appointment shall be made by either or both parties within fifteen (15) Days of the impasse; the parties may agree in writing to extend this deadline.
- 9. The panel shall hold the arbitration hearing in Santa Fe County, unless otherwise approved by the Department, no later than ninety (90) Days after the panel is selected. If the panel fails to meet this deadline or if the parties agree to extend the deadline, the panel retains jurisdiction to hear and resolve the issues in dispute.
- 10. Each party will pay the expenses and fees of its chosen panelist and attorney. Both parties will share equally the expenses and fees of the third panelist. If both parties agree, they will share court reporter costs. If not, the party requesting the transcription will pay the full cost.
- 11. The proceedings and the decision of the panel will be in accordance with the New Mexico Uniform Arbitration Act, NMSA 1978, §§ 44-7A-1 to -32 (2001). The decision is final and binding and may be vacated, confirmed, or appealed only in accordance with the New Mexico Uniform Arbitration Act.

#### **105.20.4.2 Litigation**

If the Contractor does not accept the Cabinet Secretary's decision and there is no agreement to arbitrate, the Contractor shall have forty-five (45) Days from the issuance of the Secretary's decision to proceed with litigation in State District Court by filing a summons and complaint. The Contractor shall properly serve the summons and complaint within thirty (30) Days of the filing of the complaint in State District Court.

The Contractor shall also exhaust the mandatory mediation procedures of the New Mexico Public Works Mediation Act, NMSA 1978, §§ 13-4C-1 to -11 (1992), before seeking judicial relief in State District Court. The Contractor shall provide no less than seven (7) Days of notice for the convening of a mediation session. Service of notice of a mediation session shall be made upon both the Cabinet Secretary and the Office of General Counsel and shall otherwise comply with the New Mexico Public Works Mediation Act.

Failure by the Contractor to timely notice and convene a mediation session, and to timely file and serve a summons and complaint shall operate as a waiver and abandonment of the Claim by the Contractor, shall act as acceptance of the Cabinet Secretary's decision by the Contractor, and shall bar the Contractor from proceeding to litigate the Claim. Upon expiration of the time in which to mediate and file a summons and complaint and to properly serve the summons and complaint, the Department may process a unilateral Change Order implementing the Cabinet Secretary's decision based on the Contractor's abandonment and waiver of the Claim, and acceptance of the Secretary's decision.



## **SECTION 106: CONTROL OF MATERIALS**

### **106.1 CONTRACTOR-FURNISHED AGGREGATE AND BORROW SOURCES**

Exploration and development of Material sources by the Contractor including related GRT and Tribal Taxes shall be Incidental.

The Contractor shall notify the Project Manager in writing of the Materials source prior to delivery of aggregate or borrow Materials to the Project. The Contractor shall provide Acceptable Materials and shall provide the following documentation to the Project Manager:

1. Location of source;
2. Copies of lease agreements, purchase orders, or Pit Agreements the Contractor has made with the pit owner or Supplier;
3. Evidence of environmental Acceptability, which includes the completed Environmental and Cultural Resource requirements of Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals." Such evidence shall, where appropriate, include the completed and Department Accepted recommendations for Environmental and Cultural Resource management. Plans for restoration, including contouring and re-vegetation if necessary; and,
4. Testing results from a Department-approved Laboratory.

Upon request in writing from the Contractor, the Project Manager may approve Materials at the source prior to delivery. The Project Manager may reject sources, or specific areas within sources, due to failure to provide Acceptable Materials or due to environmental, social, or cultural concerns. If the Project Manager determines that the sources of previously Acceptable Materials do not produce Acceptable Materials, the Contractor shall provide Acceptable Materials from other sources, or make changes to the existing source to provide Acceptable Materials. No additional compensation or time shall be provided to the Contractor for unacceptable Materials or for developing alternate source locations.

The Project Manager will notify the Contractor in writing within ten (10) Days if its Material source is Acceptable.

### **106.2 SUPPLIER PLANT INSPECTION**

The Department may inspect Materials at the Supplier's plant. In this event, the Contractor shall:

1. Cooperate and ensure the cooperation of its Materials Supplier;
2. Guarantee unrestricted entry (at reasonable times) to areas where the relevant Material is being manufactured or produced;
3. Arrange for the necessary facilities to be adequately inspected for the production or fabrication of the Material; and,
4. Ensure adequate safety measures are implemented for the inspection.

The Department may retest Materials, before or during use in the Work, and reject Materials that, when retested, do not meet the requirements of the Contract, even if the Materials were tested and Accepted at the plant.

### **106.3 SAMPLES, TESTS, AND CITED SPECIFICATIONS**

The Department will perform tests in accordance with standards, methods, or Specifications, of the Project's Contract. Unless otherwise specified in the Contract, the

Department will take samples and perform tests at its own expense. Unless otherwise specified in the Contract, the Department will provide test results to the Contractor.

#### **106.4 CERTIFICATES OF COMPLIANCE**

The Contractor shall submit Certificates of Compliance forms to the Project Manager before installing or incorporating Material in the Work, and shall ensure each Certificate of Compliance contains all information in the Department current approved Certificate of Compliance form. Additionally, documentation required to verify the information on the Certificate of Compliance form shall be submitted with the completed Certificate of Compliance form.

Materials inspected and stamped during the manufacturing process by a representative of the Department will require the Certificate of Compliance form.

The Contractor may provide Material purchased in bulk or left over from previous Projects by submitting Certificates of Compliance forms for those Materials.

Unless otherwise stated in the Contract, Materials not permanently incorporated into the Work will not require a Certificate of Compliance form.

#### **106.5 BUY AMERICA REQUIREMENTS, BUILD AMERICA, BUY AMERICA REQUIREMENTS, AND FOREIGN MATERIALS REQUIREMENTS**

The Contractor shall provide Materials in accordance with the Buy America Preferences for Infrastructure Projects, Buy America Requirements and Build America, Buy America (BABA) Requirements as referenced in 2 CFR § 184, 23 CFR § 635.410, and P.L 117-58, Sec. 70901 to 70917 respectively, on federal-aid Projects.

The Contractor shall bear the burden of proof and the cost to demonstrate that all products and Materials meet the requirements.

Unless otherwise specified in the Contract, the Contractor shall deliver Materials manufactured outside the United States to approved locations within the state, where they shall remain until sampling and testing are complete. The Contractor shall arrange for testing that the Department is not able to perform, at no additional cost to the Department, and shall test foreign Materials within the State in the presence of the Department.

The Contractor shall provide a Certificate of Compliance for each lot of foreign Material in accordance with Section 106.4, "Certificates of Compliance;" and, if required, provide with the Certificate of Compliance, certified mill test reports for each lot, and clearly identify to which lot they apply.

For structural Material, the Department will only Accept Material from foreign and domestic manufacturers that have established adequate in-plant Quality Control to the satisfaction of the Project Manager. The Department will not Accept structural Materials that do not have Certificates of Compliance and mill test reports.

The Project Manager may inspect the plant or require the Contractor to submit detailed written proof of adequate Quality Control.

#### **106.6 STORAGE OF MATERIALS AND EQUIPMENT**

Storage of Materials and Equipment shall not be stored within Department ROW unless indicated in the Contract. When the Contract allows for the storage of the Materials and

Equipment, the Contractor shall store Materials and Equipment to preserve quality and fitness, to protect against vandalism or theft, and to facilitate inspection. The Contractor shall be responsible for the replacement or repair of Materials affected by inadequate protection. In no event shall the Contractor store Materials and/or Equipment in the clear zone, unless positive protection is used. Positive protection must be approved in writing by the District Traffic Engineer.

#### **106.7 HANDLING AND TRANSPORTING MATERIALS**

The Contractor shall handle Materials in a manner that preserves the Acceptability for the Work. The Contractor shall ensure the transportation of Materials is in accordance with State and federal regulations, and prevent leakage of, scattering of, or damage to Materials. Materials damaged or lost in transportation shall be deemed unacceptable and are not subject to payment by the Department.

#### **106.8 DEPARTMENT-PROVIDED MATERIALS**

Material provided by the Department will be made available to the Contractor as specified in the Contract. The Contractor will be held responsible for all Department supplied Material when it takes physical possession of the Materials and until such time that the Materials are incorporated into the Work and Accepted.

#### **106.9 MATERIALS DESIGNATED BY TRADE NAME**

The Contract may require Materials or Equipment by trade or manufacturers' names. The Department will not Accept the substitution of Materials or Equipment when the Contract requires Materials or Equipment of specific trade or manufacturers' names without prior approval from the Project Manager.

#### **106.10 MATERIAL AND EQUIPMENT GUARANTEES AND WARRANTIES**

The Contractor shall obtain and assign to the Department manufacturer and producer guarantees or warranties for Materials and Equipment. The Contractor shall warrant, for six (6) months after Material or Equipment is installed and operational, that mechanical and electrical Equipment without a manufacturer or producer guarantee are free from defects or imperfections in workmanship and Materials. The Contractor shall repair malfunctions or defects that develop during the six-month period.

The Contractor shall supply manuals for Equipment incorporated in the Work providing the following information:

1. Operational procedures;
2. Complete nomenclature;
3. Wiring diagrams;
4. Schematics showing test voltage and procedural methods;
5. Functional description of circuits;
6. Parts lists;
7. Cross-references to standard part numbers;
8. Names and addresses of sources for testing procedures where appropriate;
9. Flow diagrams; and,
10. Other relevant data.

**106.11 SAFETY DATA SHEETS**

The Contractor shall submit to the Project Manager the most current SDS for all Materials that require SDS upon delivery of the Materials to the Project. The SDS shall conform to current federal requirements in 29 CFR § 1910.1200 (g).

**106.12 RESERVED**

## **SECTION 107: LEGAL RELATIONS, ENVIRONMENTAL REQUIREMENTS, AND RESPONSIBILITY TO THE PUBLIC**

### **107.1 LAWS TO BE OBSERVED**

Before the start of Work, the Contractor shall be fully informed and make the necessary contacts with municipal and State agencies concerning obligations related to all applicable federal and State laws, all local laws, ordinances and regulations, and all orders and decrees of bodies or tribunals having jurisdiction or authority. The Contractor, Subcontractors, and Suppliers shall at all times observe and comply with all such laws, ordinances, regulations, orders, and decrees; and protect and indemnify the State and its officers, employees and agents against all Claims or liability arising from or based on the violation of such laws, ordinances, regulations, orders, or decrees, by the Contractor, its officers, employees or agents, Subcontractors or Suppliers.

### **107.2 PERMITS, LICENSES, AND TAXES**

The Contractor shall procure all permits and licenses; pay charges, fees, royalties, and appropriate taxes; and give notices necessary and incidental to the lawful performance of the Contract.

Prior to beginning Work the Contractor shall furnish to the Department a written list of all permits required for the proper completion of the Contract. The list shall clearly identify the type of permit or permits that must be obtained before Work can be started. Copies of fully executed permits shall be furnished to the Department upon request.

### **107.3 COMPLIANCE WITH PAYMENT OF TAXES**

The Contractor shall pay all lawful taxes imposed by the State of New Mexico or other political entities.

The successful Bidder, after receiving the Notice of Preliminary Award of Contract, shall provide to the Department both the Bidder's Taxation and Revenue Department tax identification number and the Bidder's Motor Transportation Division account number. If either of these numbers is unavailable, the Contractor shall submit a letter of explanation. A Notice to Proceed will not be issued until the Contractor submits both numbers or a satisfactory letter of explanation.

### **107.4 GROSS RECEIPTS TAX AND TRIBAL GOVERNMENT TAXES**

#### **107.4.1 New Mexico Gross Receipts Tax**

The Department will pay the Contractor for applicable New Mexico GRT and local option tax (including tax increases or decreases effective after the Contract date), and the Contractor shall pay applicable taxes to New Mexico Taxation and Revenue Department. The Contractor shall show the GRT and local option tax as a separate amount added to each request for payment.

The Contractor shall promptly reimburse or repay to the Department any tax, including GRT, that is refunded to the Contractor, including any refund received by the Contractor after final payment, to the extent such tax was paid by the Department to the Contractor. The Contractor shall keep and maintain all documents, applications for tax refund, and forms filed with, submitted to, received from, or required by the New Mexico Taxation and Revenue Department which relate to the payment or refunding of any tax paid pursuant to this section for five (5) years following final payment. All of the above material shall be made available to the

Department or FHWA for review, audit, inspection, and copying and shall be produced, upon request, at the Department General Office, the District in which the Work was performed, or an FHWA office, as directed.

#### **107.4.2 Tribal Government Taxes**

All Bids submitted shall exclude any tribal business tax, TERO tax, and other tax imposed by a tribal government. The Department will pay the tax or will exercise its prerogative to challenge the tribal government's authority to impose the tax. If the Department exercises its prerogative to challenge the tribal government's authority to impose the tax, the Department will reimburse the Contractor for such tax only if a court of competent jurisdiction rules the tribe has authority to impose the tax. The Department will reimburse the Contractor only if the final decision of the litigation, or other final disposition of the litigation, results in a determination that the tribe has jurisdiction to impose the tax. The Department will be subrogated to the rights of the Contractor to claim a refund of, or to contest, any such tax imposed on the Work to the extent any alleged obligation of the Contractor or the Department to pay such tax arises under this section or through the Contractor's performance of this Contract.

The Department will reimburse the Contractor for payment of any tribal tax directly related to the performance of the Work within the Project imposed by a tribe upon tribal verification that the tax was paid by the Contractor.

#### **107.5 PATENTED DEVICES, MATERIALS, AND PROCESSES**

The Contractor's Bid Item Unit Price shall include the cost of all royalties and costs from patents, trademarks and copyrights needed to complete the Work.

If the Contractor employs any design, device, Material, or process covered by letters of patent, copyright or trademark, the Contractor shall secure approval for its use from the patentee or owner. The Contractor and the Surety shall indemnify and save harmless the Department from all Claims (including costs, expenses, and damages the Department may be obligated to pay) for infringement by reason of its use. The Contractor and Surety shall also indemnify and save harmless any affected third party and any political subdivision from all Claims for infringement by reason of its use.

#### **107.6 RESTORATION OF SURFACES OPENED BY PERMIT**

The Department reserves the right to allow utility services with authorized permits by the Department to enter the Project and perform the permitted Work.

When directed by the Department the Contractor shall make all necessary repairs. If directed by the Department, the repairs will be subject to the same requirements as the original Work performed. The Department will pay for such repairs in accordance with Section 109.5, "Payment for Extra Work."

The Department will address time extension requests due to Work by utility services in accordance with Section 108.6 "Determination and Extension of Contract Time."

#### **107.7 FEDERAL AID PROVISIONS**

When the FHWA or other federal agency is obligated to reimburse the Department for all or any portion of the cost of a Project, the Contractor shall observe and be subject to federal law applicable to such reimbursement. In such situations, federal requirements supersede conflicting provisions of State and local laws, rules, or regulations. The Work shall be subject to inspection and oversight by the appropriate federal agency. Such inspection or oversight

shall not make the U.S. Government a party to this Contract, nor shall the U.S. Government interfere with the rights of the Contract parties.

#### **107.8 SANITARY, HEALTH, AND SAFETY PROVISIONS**

The Contractor shall provide and maintain sanitary accommodations for use by Contractor and Department employees, in accordance with State and local boards of health, or other legal entity with jurisdiction.

The Contractor shall admit to the Project credentialed Inspectors from OSHA or other agencies responsible for health and safety administration.

##### **107.8.1 State and Federal Land Management Agencies**

While working within or adjacent to State or federal lands and forests, the Contractor shall comply with all regulations of the State or federal authority having jurisdiction governing the protection of these areas, and observe all sanitary laws and regulations. The Contractor shall keep the areas in an orderly condition, dispose of all refuse, and obtain permits for the construction and maintenance of all construction camps, stores, warehouses, residences, latrines, cesspools, septic tanks, and other Structures in accordance with applicable federal or State regulations.

#### **107.9 PUBLIC CONVENIENCE AND SAFETY**

The Contractor shall provide for the convenience and safety of the general public, for reasonable access by local residents and businesses, and for the protection of persons and property, in accordance with Section 104.5, "Maintenance of Traffic."

#### **107.10 RAILROADS**

If the Project affects railroad lines, the Contractor shall observe the requirements of the following Sections and the insurance requirements in accordance with Section 107.25, "Insurance Requirements."

For the purpose of this section, the term "agreement" means the Contract between the Contractor and railroad that defines the rights and responsibilities of both the Contractor and railroad for the Project.

##### **107.10.1 Reserved**

##### **107.10.2 Notice to the Railroad**

Unless otherwise stated in the Contract, the Contractor shall not begin Work in railroad owned Right of Way before entering into an agreement with the railroad owner or providing confirmation from the railroad owner that no agreement is needed.

##### **107.10.3 Cooperation with Owner of Railroad Right of Way**

The Department is not liable for any additional costs or expenses of the Project resulting from the railroad's reallocation of its labor forces assigned to complete railroad Work in the event of an emergency when the owner of the railroad ROW believes such reallocation is necessary to provide for the immediate restoration of the railroad operations or to protect persons or property on or near any other property owned by the railroad. The Contractor may be entitled to a time extension during such reallocation. The Contractor shall provide the Department an updated progress schedule and narrative requesting additional Contract Time associated with

the relocation. Contract Time may be warranted upon adequate justification as determined by the State Construction Engineer.

**107.10.4 Reserved**

**107.10.5 Reserved**

**107.10.6 Reserved**

**107.10.7 Reserved**

**107.11 ENVIRONMENTAL AND CULTURAL RESOURCES APPROVAL**

The Department will obtain the Environmental and Cultural Resource approvals for the Project before construction. The Department will describe in the Contract any Environmental and Cultural Resource requirements developed to protect resources.

**107.12 ENVIRONMENTAL AND CULTURAL RESOURCE DISCOVERIES**

The Contractor shall terminate operations and provide written notification upon discovery of Environmental or Cultural Resources not identified in the Contract. During the terminated operations, the Department will coordinate with appropriate regulatory authorities, and the Contractor shall continue Work in other areas as determined by the Department. The Project Manager will notify the Contractor as to whether the discoveries cause an increase or decrease in the cost or time required to perform the Work. The Contractor shall not proceed with Work in the area of terminated operations until the Project Manager provides written notification to the Contractor to recommence.

**107.13 CONTRACTOR'S RESPONSIBILITY FOR DAMAGE TO ENVIRONMENTAL AND CULTURAL RESOURCES**

The Contractor shall restore or mitigate all damage to Environmental or Cultural Resources caused by the Contractor's failure to abide by requirements included in the Contract as well as those areas covered under Section 107.14, "Contractor's Responsibility for Environmental and Cultural Resource Protection" at no additional cost to the Department. The Department, in coordination with regulatory authorities, will determine the extent of restoration or mitigation. The Contractor shall pay any fine imposed on the Department by a regulatory agency for a regulatory violation caused by the Contractor. The Project Manager may suspend the Work in areas where Environmental or Cultural Resource violations occur.

**107.14 CONTRACTOR'S RESPONSIBILITY FOR ENVIRONMENTAL AND CULTURAL RESOURCE PROTECTION**

**107.14.1 Environmental and Cultural Resource Studies and Approvals**

The Contractor shall obtain new certifications for any Contractor located activity outside the Project Limits or for expansions or additions to existing previously certified areas. If the Contractor purchases Material from a Material source established for another Project by another Contractor working under Contract to the Department, and if the Material source must be expanded beyond the area where Environmental and Cultural Resource approvals have previously been obtained pursuant to Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals," then the requirements for environmental Acceptability shall apply to the additional area and requirements of Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals" must be completed by the Contractor.



Before beginning soil-disturbing activities (in accordance with Section 106.1, "Contractor-Furnished Aggregate and Borrow Sources"), the Contractor shall notify the Project Manager in writing of the proposed studies to be performed. After the Project Manager's concurrence with the Contractor's studies the Contractor shall employ an Environmental Specialist and a Cultural Resource Professional to conduct the approved studies. The Contractor shall ensure that the studies meet the standards of the Department, the State historic preservation officer, and any State, tribal, or federal land-managing agency or entity with jurisdiction. The Contractor shall ensure that the resource studies are in accordance with the National Environmental Policy Act of 1969 (42 USC §4321 et seq.), the National Historic Preservation Act (16 USC §470 et seq.), and the New Mexico Cultural Properties Act, NMSA 1978, §§ 18-6-1 to -17 (1953, as amended 2015). The studies may extend, but are not limited to, the following locations:

1. Camp sites;
2. Plant sites;
3. Crusher sites;
4. Stockpile sites;
5. Equipment yards;
6. Borrow Pits;
7. Surfacing Pits; and,
8. Water sources.

The Contractor shall obtain the Environmental and Cultural Resource approvals regardless of land ownership. For the environmental approval, the Contractor shall use the Department-furnished checklist Categorical Exclusion form (or equivalent form furnished by the Department), which shall be signed by the Contractor and the Environmental Specialist.

For Cultural Resource reports, the Contractor shall use the standard site investigation forms approved by the New Mexico Historic Preservation Division and the New Mexico Cultural Properties Review Committee.

The Contractor may use previously completed Environmental and Cultural Resource studies, provided all other requirements of this section are met.

The Contractor shall submit the documentation prepared for the Environmental and Cultural Resource approvals to the Project Manager. Contractor located activities on State land or privately owned land may take forty-five (45) Days or more for approval after the Contractor delivers the resource studies to the Project Manager. Contractor located activities on federal land have no defined period for approval. The Department will not approve requests for additional Contract Time or compensation related to Contractor Located Activities.

The Contractor shall comply with all conditions and commitments for protection of resources contained in resource agency requirements and in the Environmental and Cultural Resource approvals. The environmental approval is the FHWA-approved checklist categorical exclusion, or its equivalent. The Cultural Resource approval is the concurrence letter signed by the State historic preservation officer, or its equivalent.

The Contractor shall repair at the Contractor's expense all damage to Environmental or Cultural Resources caused by the Contractor's failure to meet the requirements for environmental acceptability or abide by Department directives issued to protect resources identified during the Environmental and Cultural Resource evaluation. The nature and extent of such repairs shall be determined after consultations between the Contractor, Department

representatives, and the regulatory authorities with management jurisdiction over the subject resources.

#### **107.14.1.1 Commercial Material Sources**

Environmental Acceptability requirements do not apply to Commercial Material Sources. Upon request of the Project Manager, the Contractor shall submit copies of its Commercial Sources Air Quality Permit, Groundwater Permits, and Business License.

#### **107.14.2 Parking and Cleaning of Equipment**

For Projects that have received Environmental and Cultural Resource approvals through programmatic categorical exclusions (e.g., pavement preservation and rehabilitation, guardrail replacements, Bridge deck replacements, signalization upgrades, etc.), Environmental and Cultural Resource studies will not have been completed outside the existing paved areas by the Department. These Projects will be noted as such in the Contract. For these Projects, the Contractor shall take special care when parking and cleaning Equipment, as outlined in the following requirement.

The intent of the following requirement is to ensure the protection of sensitive Environmental and Cultural Resources that may be present within the Right of Way and to encourage the Contractor to avoid damaging these resources when parking and cleaning Equipment. The Contractor shall ensure that parking and cleaning of Equipment within the Right of Way does not damage Environmental and Cultural Resources, in one (1) or a combination of the following manners:

1. Park and clean Equipment in previously disturbed areas only;
2. Identify all parking and cleaning locations in previously undisturbed areas, prior to construction, and complete the Environmental and Cultural Resource approvals as described in Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals;" or,
3. Park and clean Equipment in previously undisturbed areas without completing the Environmental and Cultural Resource approvals as described in Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals," and assume all risk and liability for any damage to Environmental or Cultural Resources resulting from these actions.

#### **107.14.3 Clean Water Act**

The Contractor shall comply with the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (1953, as amended 2019) and applicable permits and regulations in accordance with the federal Clean Water Act (33 USC §1251 et seq.).

The Department will apply for and obtain permits and certifications required for construction involving "waters of the United States" as defined by the U.S. Army Corps of Engineers. The Contractor shall comply with the terms of the permit obtained and shall be fully liable for consequences resulting from its failure to comply. The Department will provide a copy of the permits and certifications in the Contract.

#### **107.14.4 Minimization of Soil Disturbance**

The Contractor shall minimize damage to or removal of vegetation and trees, except as approved in Section 104.6, "Rights in and Use of Materials Found on the Work." The Contractor shall not clear, grub, disturb, or excavate land beyond what is authorized by the Contract. The

Contractor shall remediate or replace vegetation due to an unauthorized clearing or damage, at no additional cost to the Department.

#### **107.14.5 Air Quality Requirements and Dust Abatement**

The Contractor shall perform dust abatement on the Project and in areas affected by Project activities. The Contractor shall ensure any operations which produce particulate matter comply with State and federal air quality regulations, as administered by the Air Quality Bureau of the NMED, applicable local air quality regulations, and the federal Clean Air Act (42 USC §7401 et seq.).

#### **107.14.6 Noise Abatement**

The Contractor shall not operate Equipment that emits noise above seventy (70) dbA, measured at a distance of fifty (50) ft, in urban or populated rural areas during the hours specified in the Contract, and shall comply with County or municipal ordinances if they are more stringent than the requirements in the Contract.

#### **107.14.7 Disposal of Materials**

Unless otherwise specified in the Contract, the Contractor shall be solely responsible for disposal of Materials. In the disposal of Materials, the Contractor shall comply with all federal, State, and local regulations. The Contractor shall not dispose of Materials within the Project Limits without written approval from the Project Manager.

#### **107.14.8 Disposal of Other Materials and Debris**

The Contractor shall move items designated for removal without salvage, unsuitable construction Materials, and debris from clearing and grubbing to an environmentally suitable disposal site secured and coordinated with the appropriate regulatory agencies. The Contractor shall not place any items in wetland areas or areas that may impact endangered species or Cultural Resources. The Contractor shall obtain an Environmental and Cultural Resource approval in accordance with Section 107.14.1, "Environmental and Cultural Resource Studies and Approvals."

#### **107.14.9 Prime Coat, Tack Coat, and Soil Sterilants**

The Contractor shall not contaminate soils outside the Roadway Prism when applying prime coat, tack coat and soil sterilants. The Contractor shall not contaminate arroyos, irrigation supplies (acequias and ditches), wetlands, water impoundments, and live streams.

#### **107.14.10 Noxious Weed Prevention**

To avoid the spread of noxious weeds, all prime and Subcontractor construction Equipment (including but not limited to trucks, excavators, bulldozers, loaders, scrapers, backhoes, trailers, tractors, hydro-seeders, drill-seeders, straw-blasters, compost-spreaders, bobcats, and disks) shall be pressure-washed to remove all visible mud, soil, and debris prior to entering the Project Limits.

#### **107.14.11 Migratory Bird Treaty Act Compliance**

The Contractor shall at all times comply with the Migratory Bird Treaty Act, 16 U.S.C. 703 which prohibits the possession, capture, or killing of any migratory bird, egg, chicks or occupied nest. If occupied nests (i.e. nests containing eggs or juvenile birds) are present during construction, the parental birds and their nests must be avoided until juvenile birds have fledged

and flown away from the nests. Occupied nests cannot be disturbed or relocated without authorization from the Environmental Bureau with concurrence from the U.S. Fish and Wildlife Service.

#### **107.15 HAZARDOUS MATERIALS**

The Department will describe in the Contract, all known Hazardous Materials within the Project Limits.

##### **107.15.1 Hazardous Material Discoveries**

During construction, should Material be encountered which is or the Contractor believes to be hazardous or contaminated, the Contractor shall immediately terminate operations in the immediate area, notify the Project Manager in writing per Section 104.2.2, "Differing Site Conditions," and the appropriate regulatory authority, and continue Work in other areas. The Project Manager, Hazardous Materials Investigation Bureau Manager, and environmental regulatory authorities shall investigate to determine the nature and extent of the Hazardous Material or contamination within the Right of Way. If the Contractor is not qualified, as determined by experience and/or licensure, to undertake a clean-up action, the Contractor shall retain the services of a qualified firm. Any adjustments shall be made in accordance with Section 109.5, "Payment for Extra Work."

Should the Contractor fail to notify the Project Manager of Hazardous Material discoveries and/or fail to respond in accordance with all applicable environmental regulations or any part of these Specifications; the Contractor shall pay, at no cost to the Department, any fine or penalty imposed for regulatory violations.

#### **107.16 PREVENTION OF FOREST AND GRASS FIRES**

The Contractor shall prevent forest and grass fires. The Contractor shall immediately notify appropriate officials of the location and extent of any fire. The Contractor shall comply with fire regulations applicable to the area of Work, and furnish and maintain firefighting Equipment and tools required in the Contract. The Contractor shall suspend fire-hazardous operations when necessary at the direction of the Project Manager.

If performing Work within or adjacent to State or National Forests, the Contractor shall comply with all regulations of the USDA Forest Service, State Forestry Division, New Mexico Department of Energy, Minerals and Natural Resources, or other authority having jurisdiction, governing the protection of forests and the performance of Work within forests. The Contractor shall keep the areas in an orderly condition, dispose of all refuse, and obtain permits for the construction of field offices and other Structures in accordance with the requirements of the Forest Supervisor.

The Contractor shall take all reasonable precautions to prevent and suppress forest fires and shall require employees and Subcontractors to take all reasonable measures within their power to prevent and suppress forest fires. The Contractor shall make every possible effort to notify a Forest official at the earliest possible moment of the location and extent of a fire.

#### **107.17 USE OF EXPLOSIVES**

The Contractor shall exercise extreme care when use of explosives is necessary for the prosecution of the Work. The Contractor shall be responsible for all damage resulting from the use of explosives. The Contractor shall not endanger life or property, including new Work. The Contractor shall use, handle, load, transport, and store explosives and blasting agents in accordance with applicable laws and ordinances, as well as the OSHA Safety and Health

Regulations for Construction (29 CFR Part 1926) and 30 CFR Part 15.32, whichever is more restrictive. The Contractor shall clearly mark explosives and store them securely. If no local laws or ordinances apply, the Contractor shall store explosives not closer than 600 ft from Roads, buildings, camping areas, or places of human occupancy. Unless otherwise required by an agreement between the Contractor and public utility or owner of railroad ROW, the Contractor shall provide five (5) Days of notice to any public utility and owner of railroad ROW having Structures or facilities near the Project, of the intention to use explosives, so that they may take steps to protect their property before detonation.

#### **107.18 PROTECTION AND RESTORATION OF PUBLIC AND PRIVATE PROPERTY**

The Contractor shall preserve public and private property including land, governmental survey monuments, and property markers from disturbance or damage until the Project Manager has witnessed or otherwise referenced their location, and directed their removal.

The Contractor shall restore public or private property damaged and pay fines directly or indirectly caused by the Contractor through any act, omission, neglect, or misconduct in the execution of the Work, or by defective Work or Materials, or by non-prosecution of the Work. The Contractor shall return such property to a condition equal to that existing before such damage or injury was done, by repairing, rebuilding, or otherwise restoring as directed by the Project Manager. The Contractor shall maintain responsibility for damage until the Work is completed and Accepted. The Contractor shall provide the Department with the information to update the control sheet records once a reference mark has been reestablished by the Contractor.

##### **107.18.1 Public and Private Reference Marks**

Unless otherwise specified in the Plans, the Contractor shall not disturb or damage any public or private reference marks. If the Contractor directly or indirectly by any act, omission, neglect, or misconduct in the execution of the Work disturbs or damages public or private reference marks the Contractor shall be solely responsible for any restoration of the reference marks in accordance with Section 801, "Construction Staking by the Contractor." If the restoration of the public or private reference mark is done improperly then the Contractor shall be solely responsible for a fine of \$2,000.00 per improper reference mark. Delays, costs or impacts associated with the improper restoration of a reference mark shall be the sole responsibility of the Contractor.

#### **107.19 RESPONSIBILITY FOR THIRD PARTY CLAIMS AND DUTY TO DEFEND**

The Contractor shall indemnify and hold harmless the Department and its officers, employees and agents from and against any and all Claims and suits, liability, damages, losses or expenses, including attorney fees and costs, to the extent that they arise out of or are in any way connected with any act or omission of the Contractor, or its officers, employees or agents. The Contractor agrees, at its own expense, and upon written request by the Department, to defend any suit, action or demand brought against the Department on any Claim or demand covered herein.

The Contractor shall ensure that construction vehicles (Contractor, Subcontractor, and privately owned) working on the Project have clean, unobstructed license plates, and shall mark vehicles legibly with the appropriate company name.

The Contractor shall assign an individual by the date of the Pre-Construction Conference, readily available during normal Working hours, to respond to Claims from the public for losses alleged to have occurred within the Project, whether arising from Contractor or Subcontractor action or inaction. The Contractor shall provide claimants with a written outline of the

Contractor's Claims procedure, along with a written copy of the Contractor's name, address, and telephone number together with the name and title of the individual assigned to handle Claims from the public and provide a copy of the same to the Project Manager. The Contractor shall maintain a status report of Claims filed, including the name, address, and telephone number of the claimant, the nature of the Claim, pertinent findings regarding the Claim, and a statement regarding the resolution of the Claim. The Contractor shall provide the status report to the Project Manager upon request.

#### **107.20 CONTRACTOR'S RESPONSIBILITY TO PROTECT THE WORK**

Until Final Acceptance of the Project by the Project Manager, the Contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof, by the action of the elements or from other causes, whether arising from the execution or from the non-execution of the Work. The Contractor shall rebuild, repair, restore, and make good all injuries or damages to portions of the Work occasioned by the above causes before Final Acceptance and shall bear the expense thereof except as provided in Section 104.5, "Maintenance of Traffic" and Section 105.18.1, "Partial Acceptance."

Should the Contractor be Delayed in the prosecution or completion of the Work by Contractors on contiguous Projects, Acts of God such as fire, flood, earthquake, tornado, or other cataclysmic phenomena of nature, epidemic, quarantine restriction, strike, freight embargo, acts of public enemy, acts of governmental authorities or railroads other than the Department, or documented regional unavailability of construction Material, for which the Contractor is in no way responsible, then the Contractor may be entitled to an extension of Contract Time per Section 108.6, "Determination and Extension of Contract Time," as well as traffic control management and invoice costs for rented traffic control devices only, if used on the Project at the time of the Delay, on a prorated daily basis for the Contract Time extension. The Contractor is not entitled to additional compensation or damages for such Delay. For physical damage to the Work resulting from the above unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, the Contractor may be paid pursuant to Section 109, "Measurement and Payment." The Contractor shall not be entitled to non-allowable damages per Section 109.11, "Compensation for Claims."

In case of suspension of Work per Section 105.8.1, "Project Manager Authority," the Contractor shall be responsible, subject to the provisions of Section 104.5, "Maintenance of Traffic," for the Project and shall take such precautions as may be necessary to prevent damage to the Project.

#### **107.21 CONTRACTOR'S RESPONSIBILITY FOR UTILITY PROPERTY AND SERVICES**

The Contractor shall not begin Work in areas close to railroad, telecommunication, or utility company Right of Way or facilities, or other property where damage from the Work might result in expense, loss, or inconvenience to the owner, until arrangements are made with the Project Manager and the owner of the property for the protection of such property or facilities.

The Contractor shall promptly notify the Project Manager and affected utility or railroad owners of any interruption to services resulting from exposure, lack of support, or breakage. The Contractor shall provide continuous repair Work to restore water service if interrupted. The Contractor shall not perform Work near fire hydrants until provision for service has been approved by the local fire authority.

#### **107.22 FURNISHING RIGHT OF WAY**

The Department will secure necessary Right of Way before construction, except as noted in the Contract.

### **107.23 PERSONAL LIABILITY OF PUBLIC OFFICIALS**

Department employees shall bear no personal liability in carrying out the provisions of the Contract or in exercising powers or authority granted to them by the Contract, it being understood that in such matters they act solely as agents and representatives of the Department.

### **107.24 NO THIRD-PARTY LIABILITY**

The Department and the Contractor specifically agree that the provisions of this Contract do not make anyone, including any Subcontractor or Materials Supplier, a third-party beneficiary or authorize anyone not a party to this Contract to maintain an action for damages under this Contract.

### **107.25 INSURANCE REQUIREMENTS**

The Contractor shall procure and maintain at no cost to the Department insurance as detailed below, using an insurance company authorized to do business in New Mexico. Insurance shall cover operations under the Contract, whether performed by the Contractor, the Contractor's agents or employees, or Subcontractors. The Contractor shall keep insurance in full force and effect for the entire period of the Work, up to and including Final Acceptance, and the removal of Equipment and employees, agents and Subcontractors from the Project. All insurance required in this Section shall be procured from insurance or indemnity companies with an A.M. Best Company financial strength rating level of A- or better, Class VII or better, unless otherwise approved in writing by the Department. In no event shall the Department approve the use of an insurance or indemnity company with an A.M. Best Company financial strength rating level of B or worse.

#### **107.25.1 Liability Insurance**

1. The Contractor shall obtain General Liability (Bodily Injury Liability and Property Damage Liability) insurance coverage applicable in full to the subject Project in the following minimum amounts:
  - a. Personal and Bodily Injury Liability: \$1,000,000.00 each person; \$2,000,000.00 each occurrence (annual aggregate); and,
  - b. Property Damage Liability: \$2,000,000.00 each occurrence; (annual aggregate);
2. The insurance coverage shall be documented on a Comprehensive General Liability form or Commercial General Liability form, which must include the following:
  - a. Coverage for liability arising out of the operation of independent Contractors;
  - b. Completed Operations Coverage; and,
  - c. Attachment of the Broad Form Comprehensive General Liability Endorsement;
3. If the Work includes the use of explosives, the Contractor's insurance must include coverage for injury to or destruction of property arising out of blasting or explosion;
4. If the Contract includes Work next to an existing building or structure, the Contractor's insurance shall include coverage for injury to or destruction of property arising from the collapse of or structural injury to buildings or Structures due to the following:
  - a. Operations related to excavation, including borrowing, filling, or backfilling;
  - b. Tunneling and cofferdam or caisson Work; and,
  - c. Moving, shoring, underpinning, razing, or demolition of buildings or Structures, or removal or rebuilding of structural supports thereof; and,

5. Coverage must include injury to or destruction of property arising out of damage to wires, conduits, pipes, mains, sewers or other similar property or any apparatus in connection therewith below the surface of the ground, if such injury or destruction is caused by or occurs during the use of mechanical Equipment for the purpose of excavating, digging, or drilling.

#### **107.25.2 Automobile Liability Insurance**

The Contractor shall provide or ensure that all vehicles used in performance of the Contract have liability insurance. The Contractor is not responsible for liability insurance for the Department or its agents. The Contractor shall provide limits of liability for automobile liability insurance in the following amounts:

1. Personal and Bodily Injury Liability: \$1,000,000.00 each person; \$2,000,000.00 each occurrence; (annual aggregate); and,
2. Property Damage Liability: \$2,000,000.00 each occurrence; (annual aggregate).

#### **107.25.3 Worker's Compensation Insurance**

The Contractor shall carry worker's compensation insurance and otherwise fully comply with the New Mexico Worker's Compensation Act, NMSA 1978, §§ 52-1-1 to -70(1929, as amended 2017) and the New Mexico Occupational Disease Disablement Law, NMSA 1978, §§ 52-3-1 to -60 (1941, as amended 2019).

#### **107.25.4 Department as Additional Insured**

The Contractor shall name the Department and any third party so designated in the Contract as an additional named insured on the comprehensive general liability form or commercial general liability form furnished by the Contractor in accordance with Section 107.25.1, "Liability Insurance." The certificate of insurance shall state that the coverage provided under the policy is primary over any other valid and collectible insurance. The additional insured endorsement shall conform to the most current version of the Insurance Services Office's CG 2010 or equivalent, Additional Insured Endorsement Form. The Contractor shall provide to the Department a copy of the Contractor's standard commercial general liability policy showing the Additional Insured Endorsement before the Department issues a Notice to Proceed.

#### **107.25.5 Certificate of Liability Insurance and Endorsements**

The Contractor shall provide a Certificate of Liability Insurance (COLI) conforming to these Specifications, which will be made a part of the Contract. The COLI shall identify the Department as an additional insured, including Project Number, and be submitted to the Project Office electronically. The COLI shall indicate compliance with these Specifications and shall certify that the coverage shall not be changed, canceled, or allowed to lapse without giving the Department thirty (30) Days written notice. The Contractor shall provide a COLI to the Department on renewal of a policy or policies as necessary during the term of the Contract. The Department will not issue a Notice to Proceed until the Contractor meets these requirements.

#### **107.25.6 Umbrella Coverage**

The insurance limits cited in this section are minimum limits. The Department does not intend that these Specifications define what constitutes adequate insurance coverage for the individual Contractor. The Department will recognize excess coverage (Umbrella) as meeting the insurance requirements of Section 107.25.1, "Liability Insurance," if the limits of the Umbrella coverage meet the individual requirements of this section.



#### **107.25.7 Optimal Insurance**

If required by the Contract, Contractor shall procure and maintain form and types of bailee theft insurance such as, but not limited to, builder's risk insurance, Contractor's Equipment insurance, and rigger's liability property insurance. If so required, the Contractor shall provide bailee theft insurance in an amount necessary to protect the Department against Claims, losses, and expenses arising from the damage, disappearance, or destruction of property of others in the care, custody, or control of the Contractor, including property of others being worked upon by the Contractor, its agents, employees or Subcontractors.

#### **107.25.8 Railroad Insurance**

If the Work affects railroad property, in addition to the above requirements, unless otherwise specified in the Contract the Contractor shall obtain at its own cost a railroad protective liability policy in the name of the owner of the railroad Right of Way or railroad facilities involved. In addition, on those rails used by the National Railroad Passenger Corporation (NRPC), the Contractor shall obtain a railroad protective liability policy in the name of the NRPC.

Railroad liability insurance shall be in compliance with Railroad-Highway Insurance Protection (23 CFR Part 646 Subpart A). These limits of liability apply to the coverage as set forth in AASHTO's Railroad Protective Liability Endorsement form, subject to the terms, conditions, and exclusions found in the form. The policy must afford coverage as provided in the standard Railroad Protective Liability Endorsement.

#### **107.26 NO WAIVER OF LEGAL RIGHTS**

Upon completion of the Work, the Department will pay the final payment voucher. Payment of the final payment voucher shall not preclude the Department from correcting any measurement, estimate, or certificate made before or after completion of the Contract, nor from recovering from the Contractor or Surety or both, overpayments sustained because the Contractor failed to fulfill the obligations under the Contract. A waiver on the part of the Department of any breach of any part of the Contract shall not be held to be a waiver of any other subsequent breach.

The lack of discovery or rejection of a defect shall not preclude, nor obligate the Department to Accept the defect.

The Contractor, without prejudice to the terms of the Contract, shall be liable to the Department for latent defects, fraud, or such gross mistakes as may amount to fraud, and for warranty and guaranty.

#### **107.27 CONTRACTOR'S RESPONSIBILITY TO THE TRAVELING PUBLIC**

The Contractor shall minimize hazards to the traveling public in the Construction Zone from the commencement of the Work until Final Acceptance. Minimizing hazards shall include:

1. Keep Equipment, Materials, and workers out of the travel lanes;
2. Remove hazardous construction debris deposited within the Project Limits;
3. Inspect and repair the travel lanes (Necessary repairs of damage not caused by the Contractor will be paid for in accordance with Section 109.5, "Payment for Extra Work."); and,
4. Remove obstacles deposited by the public as they transit the Project.

The Contractor shall immediately correct hazards reported by Project inspections, Department employees, or the public. The Contractor shall maintain and publicly post a twenty-four (24)-hour contact number to initiate action quickly.

#### **107.28 CONTRACTOR RECORDS**

The Contractor, Subcontractors and all Suppliers shall keep and maintain all documents in a useable format, including communications, books, papers, records, files, accounts, tax records, cost records, reports, schedules, Bid documents with backup data, including electronic data, and all other material relating to the Contract, Project, Contract compliance, or any Claim for five (5) years following Physical Completion of the Work. Unless otherwise specified in the Contract all of the above material shall be made available to the Department for review, audit, inspection and copying and shall be produced, upon request by the Assistant District Engineer – Construction, at the Department General Office, the District in which the Work was performed, or an FHWA office, as directed. The Contractor shall insert the above requirement in each subcontract and shall also include in all subcontracts a clause requiring Subcontractors to include the above requirement in any lower-tier subcontract. The Contractor's failure to maintain and timely provide all requested documents to the Department waives any Claim the basis of which could have, either in whole or in part, been documented or rebutted by such documents.

All records provided to the Department will be maintained in accordance with the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (1993, as amended 2023). Confidentiality will be protected pursuant to IPRA and the Uniform Trade Secrets Act, NMSA §§ 57-3A-1 to -7 (1989). A Contractor may make an assertion of business confidentiality by visibly marking a record as "Confidential" and providing a written justification for the business confidentiality that is supported by the required protection found under the Inspection of Public Records Act and the Uniform Trade Secrets Act. A Contractor who makes an assertion of business confidentiality will be required to defend their assertion based on the Inspection of Public Records Act and the Uniform Trade Secrets Act. An assertion of business confidentiality is to provide protection from disclosure by the Department in response to a request made pursuant to the Inspection of Public Records Act. Such documents may be disclosed to the Department, including any Inspector, Project Superintendent, Project Manager, Claim consultant, investigator, or testifying or consulting expert, as necessary to perform their duties or as otherwise required by law.

#### **107.29 ASSIGNING OF CONTRACT**

The Contractor may not assign the Contract or assign or delegate any contractual obligation or duty without the prior written consent of the Department and the Surety. Contractor may not make any assignment, in connection with the Contract, including assignment of any payment due Contractor or any Claim, for the benefit of any creditor.

#### **107.30 SEVERABILITY AND CONTRACT INTERPRETATION**

If any provision of this Contract is held to be invalid or unenforceable, the remaining provisions, or the application of such provision to either party, shall remain in full force and effect and, if possible, the rights and obligations of the parties are to be construed and enforced as if the Contract did not contain that term.

If any provision of the Contract is found to be superseded by any applicable State or federal law or regulation or court order, in whole or in part, then both parties shall be relieved of all obligations under that provision only to the extent necessary to comply with the superseding law or ruling, provided however, that the remaining provisions of the Contract, or portions thereof, shall be enforced to the fullest extent permitted by law.

The Contractor agrees that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Contract.

**107.31 CHOICE OF LAW**

This Contract is governed by and construed in accordance with the laws of the State of New Mexico.

## **SECTION 108: PROSECUTION AND PROGRESS**

### **108.1 SUBCONTRACTING**

Any individual, partnership, firm, corporation, or joint venture performing Work on the Project that is not an employee of the Contractor is a Subcontractor unless otherwise stated in the Contract.

A Supplier or Fabricator is not a Subcontractor unless Work is being performed within the Project Limits.

The Contractor shall perform with its own organization at least forty percent (40.0%) of the Work based on the Total Bid Amount. The phrase, "its own organization" includes only workers employed and paid directly, inclusive of employees who are employed by a lease agreement Acceptable to the Department and Equipment owned or rented or without operators and does not include employees or Equipment of the Subcontractor, assignee or agent of the Subcontractor. The Contractor is solely responsible and liable for the performance of all Work or any act by its Subcontractors, Truckers, and Suppliers on the Project. Liability of the Contractor and the Contractor's Surety under the Contract and the Contract Bonds shall not be waived or diminished by subcontracting or any other assignment of interest.

The Contractor shall submit to the Project Manager a request to Subcontract on the current Department approved form. The form must be concurred to by the Department before the subcontracted Work begins. Unless otherwise approved by the Project Manager, the request to Subcontract shall be submitted no later than two (2) Working Days before the Subcontract Work is scheduled to begin. The Contractor shall not circumvent this requirement by placing a Subcontractor's employees on its payroll. If the Contractor does not perform at least forty percent (40.0%) of the Work with its own organization, requests for Subcontractor approval will be rejected. The Department will treat a person or group generally operating as an independent Contractor, as independent Contractors for the purposes of this section. An independent Contractor is a person who is paid for Work by the Contractor who is not the Contractor's employee and is not performing Work within the Project Limits such as the Contractor's attorney or accountant.

The Contractor is responsible for ensuring that its Subcontractors are prequalified by the Department, are duly licensed to perform the Work on the Project, are registered with all State agencies as required to do business in New Mexico, are registered with all State agencies as required to perform Work on Public Works Projects, and are in compliance with all applicable State and federal laws and regulations including the New Mexico Public Works Minimum Wage Act. The Contractor shall comply with the New Mexico Subcontractor Fair Practices Act to the extent it is applicable to the Project. The Contractor shall update its list of Subcontractors and Suppliers submitted at the Pre-Construction Conference as the Work progresses.

A Trucker, as defined in Section 101.4, is not a Subcontractor unless the Contractor is using the Trucker to meet the DBE goal associated with the Project. Transportation of Materials within the Project Limits is Work performed by the Contractor or a Subcontractor. Transportation of Materials on or off the Project site does not require a Subcontract.

The Contractor shall not construe the Department's concurrence as an endorsement of the Subcontract, the Subcontractor, or the Subcontractor's ability to complete the Work in a satisfactory manner. Subcontracting creates no Contract between the Department and the Subcontractor. The Subcontractor gains no rights, and the Department Accepts no responsibilities by reason of the Subcontractor's Contract with the Contractor.

### **108.1.1 Prompt Payment**

The Contractor shall promptly pay its Subcontractors and Suppliers for satisfactory performance of their Contracts no later than thirty (30) Days after receipt of Progress Payment for the Subcontractor's Work or Supplier's Materials by the Department.

For purpose of this section, a Subcontractor's and Supplier's portion of the Work is satisfactorily completed when the Department processes a Progress Payment per Section 109.8, "Progress Payment." In no event shall the Contractor and its Subcontractors fail to promptly pay their Subcontractors and Suppliers the amounts due for undisputed Accepted Work within thirty (30) Days of the Contractor receiving a Progress Payment from the Department. The payment by the Department to the Contractor is not a condition precedent for payment by the Contractor to any Subcontractor or Supplier. A zero dollar (\$0.00) Progress Payment by the Department does not relieve the Contractor from paying the Subcontractor or Supplier for Accepted Work.

The Contractor's failure to make timely or prompt Subcontractor or Supplier payment may result in the Department rejecting the Contractor's future Bids in accordance with Section 102.5, "Rejection of Bids." The Contractor's repeated failure to make timely Subcontractor payment may also lead to suspension or debarment in accordance with Section 102.3, "Suspension and Debarment."

## **108.2 NOTICE TO PROCEED AND PRE-CONSTRUCTION CONFERENCE**

### **108.2.1 Notice to Proceed**

The Department may issue the Notice to Proceed within thirty (30) Days after the Department's Contract execution, unless otherwise agreed to by the parties. The Notice to Proceed will identify the timeframe the Contractor shall begin Work and when Contract Time shall begin. The Contractor shall not commence Work without a Notice to Proceed.

### **108.2.2 Pre-Construction Conference**

After the issuance of the Notice to Proceed, the Project Manager will provide written notice to the Contractor of the date, time and location of the Pre-Construction Conference. The Pre-Construction Conference will occur during the timeframe in the Notice to Proceed. If the Contract has ramp up time, the Pre-Construction Conference shall occur at a minimum of thirty (30) days before Work commences.

The Contractor shall ensure the Project Superintendent or the individual who executed the Contract attends the Pre-Construction Conference. The Contractor shall not commence Work without a Pre-Construction Conference and the items 1-16, below, are Accepted by the Department. Commencing Work without a Pre-Construction Conference may result in a Non-Conformance. Contract Time shall commence as indicated in the Notice to Proceed and no additional Contract Time will be granted.

The Contractor shall provide the following at a minimum of ten (10) Days before the Pre-Construction Conference. The Pre-Construction Conference will not be held until the required items are provided to the Department:

1. Letters of assignment (official capacity) for Project;
  - a. Project Superintendent;
  - b. Company and Project Safety Officer;
  - c. Traffic Control Supervisor (include current copy of wallet card);

2. A list with samples of two (2) authorized signatures and assignments for Supplemental Agreements (Change Orders), and Progress Payments;
3. A list with samples of authorized signatures for payrolls and other related items;
4. Baseline Schedule;
5. Additions, revisions, and/or deletions to the Traffic Control Plan;
  - a. Proposed changes to the Project;
  - b. Potential problems with the construction of the Project;
6. Weighmasters / Deputy Weighmaster certifications (must be maintained throughout the duration of the Project);
7. Progress Payment cutoff date;
8. Company EEO policy statement;
9. Recruitments letter(s);
10. Superintendent's indoctrination letter;
11. If applicable, the on-the-job training letter;
  - a. The trainee classification letter must include the number of trainees to be trained, the training program to be used, the classification of each trainee and the approximate start date;
12. The completed Civil Rights / EEO Pre-Construction Report. Complete and sign the portions that are applicable Department Project personnel;
13. List of permits required per Section 107.2, "Permits, Licenses, and Taxes;"
14. Pre-Construction safety questionnaire; and,
15. Other items and any other documents required by the Contract or as directed by the Project Manager's notice of Pre-Construction Conference.

### **108.3 SCHEDULE**

#### **108.3.1 Original Baseline Schedule**

The Project shall utilize a CPM format for Project schedule unless otherwise specified in the Contract.

The Project Manager will notify the Contractor in writing within ten (10) Days of the submittal of an original baseline schedule if the schedule is "Accepted," "Accepted as noted," or is "rejected." For baseline schedules that are "rejected," the Project Manager shall communicate, in writing, to the Contractor all portions of the schedule that are not in compliance with the Contract requirements. The Contractor shall, within seven (7) Days of receipt of the reasons for rejection of the schedule, provide a new original baseline schedule and all additional information necessary for the Project Manager to "Accept" the original baseline schedule. The Project Manager will notify the Contractor in writing within seven (7) Days of the submittal of the corrected original baseline schedule if the schedule is "Accepted," "Accepted as noted," or is "rejected." The Contractor's failure to provide a timely and Acceptable new original baseline schedule in response to a rejected schedule waives any Claim associated with a rejected original baseline schedule.

Unless otherwise specified in the Contract, the Contractor is wholly and solely responsible for construction means, methods or techniques, therefore the Project Manager's review of the original baseline schedule will be for compliance with the Specifications and Contract requirements. Acceptance by the Project Manager shall not relieve the Contractor of any of its responsibilities for the accuracy or feasibility of the schedule. Any original baseline schedule

which exceeds the as let Contract Time may be "Accepted as noted" and does not revise the Contract Documents, including Contract Time, unless accompanied by a related Change Order. The Department's Acceptance of an original baseline schedule that exceeds as let Contract Time shall not operate as a waiver of the Department's right to assess liquidated damages. An original baseline schedule that reflects a completion date before the expiration of Contract Time does not revise the as let Contract Time. The Contractor shall not commence Work until the Project Manager Accepts an original baseline schedule.

The Department will use the baseline schedule to measure Project performance and for evaluation of changes to the Contract. Failure by the Contractor to include any element of Work required for performance of the Contract shall not excuse the Contractor from completing all Work within the required time.

#### **108.3.1.1 Original CPM Baseline Schedule**

Unless otherwise specified in the Contract, the Contractor shall provide an original CPM Baseline Schedule in the most current version of the scheduling software identified in the Contract, both in hard copy as well as digital file format, which:

1. Has the ability to display the schedule as a Gantt chart;
2. Identifies the Project's Critical Path;
3. Includes all activities required to complete the Work, including but not limited to, engineering, surveying, permitting, submittals, approvals, procurement, fabrication, deliveries, crushing, utility Work and third party Work. The activities shall provide the dates, as well as the station or location of each Work activity;
4. Includes milestones, interim Completion Dates, Substantial Completion Date, Physical Completion Date, and other key dates specified in the Contract;
5. Identifies the scheduled early and late start and finish dates for each activity;
6. Limits activity relationships to finish to start, start to finish, and finish to finish relationships; and,
7. Narrative as described in Section 108.3.3.4 (4).

The CPM Baseline Schedule shall consist of network diagrams and associated bar graphs and shall include a tabulation of each activity shown on the detailed network diagrams. Provide, at a minimum, the following information on the CPM Baseline Schedule:

1. The duration of each activity;
2. Total Float and Free Float for each activity;
3. Workdays each week;
4. Contractor designated Holidays;
5. Anticipated weather events, based on historical data from the last seven (7) years; and,
6. Cost loading that shall include the projected Project completion, measured in dollars and time, on a monthly basis or at each Progress Payment cutoff date.

#### **108.3.1.2 Original Bar Graph Baseline Schedule Format**

If required by the Contract, the Contractor shall submit the original baseline schedule in bar graph form. The original baseline schedule shall list Contract Work activities in sufficient detail to show a reasonable and workable plan to complete the Project within the Contract Time. The Contractor shall show the following on the original bar graph baseline schedule:

1. Each Work activity as a bar;
2. Each activity's planned start and Completion Dates;
3. Anticipated weather events based, based on historical data from the last seven (7) years;
4. Contractor designated Holidays;
5. Each activity's estimated cost and percent of Total Bid Amount;
6. The overall Project cost;
7. The planned Project Substantial and Physical Completion Dates;
8. The monthly projected percent complete in time and dollars;
9. A plot of the monthly projected percent complete (in dollars) on the bar chart; and,
10. Any approved Project suspensions and time extensions.

#### **108.3.2 Monthly and Revised Schedules**

The Contractor shall submit an updated schedule monthly on or before the Progress Payment cutoff date.

For this section "schedule" refers to CPM or Bar Graph as required by the Contract. The Department considers an updated monthly schedule as an update to the Accepted baseline schedule when no changes in activities have occurred except for the progression of planned Work. The Department considers a revised schedule as a schedule that modifies the Accepted baseline schedule. If Accepted the revised schedule becomes the current baseline schedule.

Each activity in a monthly or revised schedule shall contain the same information required for the original baseline schedule. Any updated or revised schedule that exceeds the as let Contract Time may be "Accepted as noted" and does not revise the Contract documents, including Contract Time, unless accompanied by a related Change Order. The Department's Acceptance of an updated or revised schedule does not waive the Department's right to assess liquidated damages.

The Contractor shall submit an updated or revised schedule in accordance with this section. If the Contractor fails to submit an Acceptable schedule, the Department may take action in accordance with Section 109.8.2, "Non-Conformance." The Contractor's repeated failure to provide Acceptable monthly or revised schedules may lead to suspension or debarment in accordance with Section 102.3, "Suspension and Debarment." Failure to timely provide a monthly or revised schedule waives any Claim, the basis of which would have been documented by an Acceptable monthly or revised schedule.

Float generated on Critical Path activities due to the acceleration of the Contractor's performance, at the written direction of the Project Manager, shall be for the exclusive use of the Department; and, Float generated on Critical Path activities due to modification, reduction or elimination of items shall be for the exclusive use of the Department. The Float generated by a VECP may be split equally for the mutual use of the Department and the Contractor.

The State Construction Engineer may grant time extensions only to the extent that the activities on the Critical Path of the CPM baseline schedule in effect at the time of the Delay are impacted. The State Construction Engineer may grant time based on modifications to the baseline Bar Graph if warranted.

The Contractor shall prepare and submit one (1) electronic copy of the baseline schedule, updated monthly schedule, and revised schedules using a Project scheduling software as



directed by the Department that includes the features as listed in Section 108.3.1.1, "Original CPM Baseline Schedule."

### **108.3.3 Contractor's Independent Duty to Provide Schedule Revisions**

If it becomes apparent, or should have become apparent to the Contractor that the Contractor cannot complete the Work within the Contract Time, or if the Critical Path changes, the Contractor shall provide a revised schedule and recovery plan to the Project Manager on or before the next monthly update.

#### **108.3.3.1 Schedule Revisions for Excusable Delay or Concurrent Critical Delay**

If the Work falls behind schedule, the Contractor shall take such steps as may be necessary to mitigate damages and improve its progress. For an excusable compensable Delay, excusable non-compensable Delay, or concurrent critical Delay, as those terms are identified in Section 109.11.2, "Delay," the Contractor shall take all reasonable steps to minimize the impact of the Delay once a Delay is identified. Failure to do so may result in the rejection of all or part of the Delay Claim.

If the Delay cannot be mitigated, the Contractor shall promptly submit either a written request for an extension of the Contract Time pursuant to Section 105.19, "Notice of Potential Claim," and Section 105.20, "Administrative Remedy," or request approval of a late completion schedule and shall be liable for liquidated damages.

#### **108.3.3.2 Schedule Revisions for Inexcusable Delay**

For an inexcusable Delay or a non-excusable Delay, as those terms are identified in Section 109.11.2, "Delay," the Contractor shall consider, at a minimum, the following potential schedule mitigation techniques: increase the number of shifts, begin overtime operations, Work extra Days which may include weekends or Holidays. The Contractor shall submit, as provided in this section, a revised schedule with a proposed recovery plan, to demonstrate the manner in which the agreed rate of progress shall be regained, all at no cost to the Department.

The revised schedule shall show Contract Time, Project Completion Dates and all additional information necessary for the Project Manager to "Accept" the revised schedule. The Contractor's failure to provide a timely and Acceptable revised schedule waives any Claim the basis of which would have been documented by an Acceptable revised schedule. The Project Manager will provide the Contractor with a decision in writing within five (5) Days of receiving the revised schedule. If Accepted, the revised schedule shall become the current Accepted baseline schedule.

#### **108.3.3.3 Schedule Revisions at Request of Department**

If it becomes apparent to the Department that the Contractor cannot meet the schedule, the Project Manager may request a schedule revision and recovery plan from the Contractor. The Contractor shall provide a revised schedule on or before the next monthly update. The Project Manager will provide the Contractor with a decision in writing within five (5) Days of receiving the revised schedule. If Accepted, the revised schedule shall become the current Accepted baseline schedule. The Contractor's failure to provide a timely and Acceptable response waives any Claim the basis of which would have been documented by an Acceptable revised schedule.

#### **108.3.3.4 Schedule Update and Revision Information**

The Contractor's updated monthly and revised schedules shall conform to the requirements of Section 108.3.1, "Original Baseline Schedule" and shall show:

1. Actual start and finish dates of each activity;
2. Remaining duration of activities started but not yet completed;
3. Delays and changes resulting from the addition, deletion or revisions to activities due to the issuance of a Change Order, change to an activity duration, changes to relationship between activities or changes to the planned sequence of Work or the method and manner of its performance; and,
4. Narrative report describing:
  - a. Processes during the month;
  - b. Shifts in the critical activities from the previous update;
  - c. Sources of Delay;
  - d. Weather Days;
  - e. Traffic switches;
  - f. Allocations of crews;
  - g. Work completed the previous month;
  - h. Potential problem areas;
  - i. Work planned for the next update period;
  - j. Changes made to the schedule; and,
  - k. Changes in sequencing of the Project, if applicable.

The Contractor shall sign the narrative and provide certification statement stating that the progress shown on the schedule update accurately represents Work completed through the date indicated.

#### **108.4 UNSATISFACTORY PROGRESS OF WORK**

The progress of the Work is deemed unsatisfactory when:

1. The dollars earned by the Contractor on the Project are fifteen percent (15%) less than the estimated dollars earned, as shown on the current Accepted baseline progress schedule;
2. When the start of an activity on the Critical Path, as shown on the current Accepted progress schedule, has exceeded its late start date by seven (7) Days;
3. When an activity on the Critical Path, as shown on the current Accepted progress schedule, has exceeded its original duration by ten (10) or more Days; or,
4. When the Project Manager determines that the progress of Work is unsatisfactory.

The Project Manager will issue a notice of unsatisfactory performance to the Contractor. The notice will be sent by electronic mail and identify the unsatisfactory performance. The Contractor shall acknowledge in writing receipt of the electronic mail.

The Department's approval of a late completion schedule will not waive the Department's right to assess liquidated damages. Failure by the Contractor to address the unsatisfactory progress on or before the next monthly schedule update, will result in the Project Manager issuing a Non-Conformance.

## **108.5 CHARACTER OF WORKERS, METHODS AND EQUIPMENT**

### **108.5.1 Character of Workers**

The Contractor shall provide the resources necessary to complete the Work as specified. The Contractor shall ensure its workers have the experience and skills to perform assigned Work.

The Contractor shall remove its workers from the Project who perform the Work in an unskilled manner, are ineligible to perform the Work, or who are demonstrating intemperate or disorderly behavior. The Contractor shall allow these workers to return to the Project only with the Project Manager's written permission.

If the Contractor or its workers fail to comply with these requirements, the Project Manager may suspend the Work at no cost to the Department.

### **108.5.2 Methods and Equipment**

The Contractor shall use methods and Equipment capable of performing the Work specified in the Contract. The Contractor shall ensure that the Equipment does not damage the Roadway, adjacent property or other Highways, Streets, or Roads.

The Contractor shall request permission of the Project Manager in writing to use methods or Equipment other than those specified in the Contract. The Contractor shall describe the proposed methods and Equipment to be used and the reasons for the change. The Contractor shall perform Work in accordance with the original Basis of Payment and Contract Time. The Contractor shall discontinue use of alternate methods or Equipment when Work does not meet Contract requirements. The Contractor shall remove and replace unacceptable Work or repair deficient Work at no cost to the Department.

## **108.6 DETERMINATION AND EXTENSION OF CONTRACT TIME**

The Department will provide the Contract Time in the Advertisement, in Working Days, Days, or Mandatory Completion Date.

For Working Day Projects, the Contractor shall review the weekly statement showing the Contract Time, the number of Working Days used, the accumulated Working Days charged, and the number of Working Days remaining to complete the Work. Any discrepancies identified by the Contractor shall be brought to the attention of the Project Manager within seven (7) Days after receipt of the weekly statement. If the Project Manager finds that the Contractor's objection is valid, or if there is an error, then the Project Manager will correct the weekly statement. If the Project Manager determines that the objection is not valid the Project Manager will notify the Contractor in writing. If the Contractor continues to object to the weekly statement then the Contractor may file a Notice of Potential Claim. If the Contractor fails to timely object, the weekly statement is deemed Accepted by the Contractor.

If completion of the Contract requires Extra Work that impacts the Critical Path, the Contractor shall provide the Department an updated progress schedule and narrative requesting additional Contract Time associated with the Extra Work. Contract Time may be warranted upon adequate justification as determined by the State Construction Engineer.

Any request for additional Contract Time shall be made in writing to State Construction Engineer via the Project Manager for review and approval. If the State Construction Engineer rejects a time extension request, the Contractor may proceed pursuant to Section 105.19, "Notice of Potential Claim."

## **108.7 SUSPENSIONS**

### **108.7.1 Full Suspension**

Any request for a full suspension shall be made in writing to the State Construction Engineer via the Project Manager for review and approval. The State Construction Engineer has the authority to wholly suspend the Work for reasons beyond the control of the Contractor or not connected to the construction of the Project when the Project Manager deems such a suspension to be in the best interests of the public and the Department.

### **108.7.2 Partial Suspension**

The Contractor shall submit to the Project Manager in writing, the work to be performed during the Partial Suspension, detailing the line items as shown in the CPM. It shall outline the Equipment and labor, as well as an estimated time necessary to complete the Work.

If the Contractor performs non-Critical Path Work during periods of Partial Suspension, the Department will use the following equation to calculate the Contract Time in Working Days for Work performed:

$$N = (D \times E) / O$$

Where,

- N number of days worked on non-Critical Path items during the Partial Suspension
- D number of Calendar or Working Days of original Contract Time
- E amount earned on items not covered by the Partial Suspension order during the of Partial Suspension (money earned on items worked on during Partial Suspension)
- O Total Original Contract Amount, excluding amount earned for staking, mobilization, crushing, and stockpiling of Materials

The number of Calendar Days or Working Days granted as a result of this provision shall never exceed the total elapsed time during the Partial Suspension.

Partial Suspension shall be lifted if the Contractor works on Critical Path activities and the Project Manager shall re-commence the Day count. Upon lifting Partial Suspension of the Contractor's activities, the Project Manager will provide the Contractor with a statement showing the number of Calendar Days or Working Days charged for the Partial Suspension period and will identify the Calendar Days or Working Days remaining in the Contract.

All other provisions and reporting requirements as specified in Section 108.6, "Determination and Extension of Contract Time" shall remain in effect.

The Contractor is not entitled to a Partial Suspension, at its own request, when any of the conditions below apply:

1. Projects with a bar graph schedule that have not also submitted a CPM Schedule;
2. Projects with a Mandatory Completion Date;
3. Projects that are Calendar Day;
4. When the Contractor has not provided proper justification and the Project Manager has not approved the request;

5. The Work obstructs the Traveled Way; or,
6. For issues for which the Contractor is responsible.

Partial Suspension shall be lifted if the Contractor works on Critical Path activities and Contract Time shall commence.

#### 108.8 LIQUIDATED DAMAGES

The Department will assess liquidated damages for failure of the Contractor to complete the Work within the Contract Time. The liquidated damages represents an amount sufficient to cover estimated average daily Departmental costs if the Contractor does not complete the Project within the Contract Time and does not operate as a penalty to the Contractor.

For Calendar Day Projects, the Contractor will not be assessed liquidated damages for Holidays or Weather Days, unless Work is performed.

For Working Day Projects, the Contractor will not be assessed liquidated damages on weekends, Holidays or Weather Days, unless Work is performed.

In instances involving the assessment or recovery of liquidated damages, the amount assessed will be in addition to every other remedy enforceable at law, in equity, by statute, or under the Contract.

The Department does not waive its rights to assess liquidated damages under the Contract by allowing the Contractor to finish the Work after the expiration of Contract Time.

The Contractor agrees that the following schedule of liquidated damages, unless otherwise specified in the Contract, represents an amount sufficient to cover estimated average daily Departmental costs if the Contractor does not complete the Project within the Contract Time and does not operate as a penalty to the Contractor:

**Table 108.8:1  
Schedule of Liquidated Damages**

| <b>Total Original Contract Amount (\$)</b> | <b>Charge (\$) per Day</b> |
|--|----------------------------|
| ≤100,000                                   | 500                        |
| >100,000–500,00                            | 1,000                      |
| >500,000–1,000,000                         | 1,500                      |
| >1,000,000–2,000,000                       | 2,000                      |
| >2,000,000–4,000,000                       | 2,500                      |
| >4,000,000–7,000,000                       | 3,000                      |
| >7,000,000–10,000,000                      | 4,000                      |
| >10,000,000                                | 5,000                      |

The Department will deduct liquidated damages from the next Progress Payment due to the Contractor after Contract Time expires and will continue to assess liquidated damages each Progress Payment until the determination of Substantial Completion. If the Department directs Extra Work after Substantial Completion, the Department will rescind the determination of Substantial Completion and then assess Contract Time in accordance with Section 104.2, "Extra Work." If the amount of liquidated damages exceeds the monies due to the Contractor for that Progress Payment then the Department will seek reimbursement for any liquidated damages exceeding the dollar amount withheld from the Contractor.

If the Contractor has been granted Substantial Completion, but has not satisfied the

requirements of Section 109.10, "Project Closure" the Department reserves the right to continue to assess liquidated damages until Physical Completion. Upon the completion of steps I through VII of Project Closure the ADE-Construction shall provide a written determination of Physical Completion to the Contractor which stops further assessment of liquidated damages.

#### **108.9 DEFAULT OF CONTRACT**

The Department may declare the Contractor in default of the Contract if the Contractor:

1. Fails to perform the Work with sufficient resources (supervision, workers, Equipment, or Materials) to assure the completion of the Work;
2. Performs the Work unsuitably, or neglects or refuses to remove Materials or to correct rejected Work;
3. Fails to begin the Work within the time specified in the Notice to Proceed;
4. Discontinues the Work;
5. Fails to resume discontinued Work after the Department issues a request to resume Work;
6. Becomes insolvent or is declared bankrupt, or files for reorganization under the bankruptcy code, or commits any act of bankruptcy or insolvency, either voluntarily or involuntarily;
7. Allows a final judgment, in a suit filed in connection with this Contract, to stand unsatisfied for thirty (30) Days;
8. Makes an assignment, in connection with the Contract, for the benefit of its creditors;
9. Fails to carry on the Work in an Acceptable manner in accordance with the Contract;
10. Fails to comply with Contract requirements or willfully violates any term or condition of the Contract;
11. Fails to perform the Work or maintain the Project in compliance with Federal and New Mexico Occupational Health and Safety laws and regulations;
12. Fails to observe or comply with Federal and New Mexico laws and regulations, local laws and ordinances,
13. Is debarred or suspended in accordance with the Section 102.3, "Suspension and Debarment," or is suspended or debarred by any federal agency;
14. Communicates that the Contractor may not perform under the Contract; or,
15. Fails to promptly pay a Subcontractor or Supplier for undisputed Accepted Work in accordance with Section 108.1 "Subcontracting."

The complete default process is sequential and consists of the following steps:

1. Notice of apparent default;
2. Declaration of default and demand for Surety to complete the Work; and,
3. Department completion of the Work.

##### **108.9.1 Notice of Apparent Default**

The Project Manager will provide written notice to the Contractor and the Contractor's Surety specifying the condition(s) in Section 108.9, "Default of Contract" that the Contractor violated and the corrective measures to be taken by the Contractor. If the Contractor or Surety does not proceed with the corrective measures within ten (10) Days of the written notice, the Department has full power and authority, without violating the Contract, to declare the Contractor in default.

#### **108.9.2 Declaration of Default and Demand for Surety to Complete the Work**

The written declaration of default is separate from the notice of apparent default and will be addressed to both the Contractor and the Surety. The declaration of default is issued after time for the Contract to take corrective measures expires in Section 108.9.1, "Notice of Apparent Default." The declaration of default removes the corrective measures from the Contractor, and will demand compliance by the Surety of the terms, conditions, and obligations contained in the Performance Bond.

If the Department determines that the Contractor is in default, the Surety shall complete the Work at its own expense pursuant to the Contract and receive the balance of any funds owed to the Contractor.

#### **108.9.3 Department Completion of the Work**

If the Surety fails to complete the Work, the Department will complete the Work. The Department will deduct costs and charges that the Department incurs as a result of the default and the cost of completing the Work from Contract funds due to or which may become due to the defaulting Contractor or Surety. If the total costs for completing the Work exceeds the amount that would have been payable under the Contract, the defaulting Contractor and the Surety shall be jointly and severally liable for the excess costs.

If a default of the Contractor is later determined to be without cause, the default of the Contractor will revert to a Section 108.10, "Termination of Contract; No Fault of Contractor," and the Contractor is not entitled to recover damages other than those allowed by that Section.

#### **108.10 TERMINATION OF CONTRACT; NO FAULT OF CONTRACTOR**

The Department may terminate, by written notice and order, all or part of the Contract, after determining the following:

1. That the Contractor is prevented from proceeding with or completing the Work as originally contracted for reasons beyond the control of the Contractor; or,
2. That termination would be in the public interest.

Reasons for termination may include, but are not limited to, the following:

1. Executive orders of the President of the United States;
2. Executive orders of the Governor of the State of New Mexico;
3. An emergency that creates a serious shortage of Materials, as deemed by the Secretary;
4. Orders from duly constituted authorities relating to energy conservation;
5. Restraining orders or injunctions obtained by third party citizen actions resulting from national or local environmental protection laws or where the issuance of the order or injunction is primarily caused by acts or omissions of persons or agencies other than the Contractor; or,
6. To correct any material errors or omissions or to correct any discrepancy or contradictions within the Contract discovered after execution of the Contract by both parties, the failure of which to correct is likely to lead to Contractor Delay, a Claim for additional time, or a Claim for compensation which may exceed the costs recoverable under this section.

#### **108.10.1 Submittals and Procedures**

When the Department issues a notice and order for a Contract termination effective on a certain date the Department will pay:

1. For the actual number of units or items of Work completed at the Bid Item Unit Price;
2. For items of Work started but not completed as negotiated and mutually agreed. Negotiated amount shall not exceed the Bid Item Unit Price; and,
3. For invoices to restock or for invoices for Material on hand for Work not yet started. Invoices shall be provided by the Contractor documenting both costs and the Department will make a determination on how to proceed, including delivery of the Material if needed. For the purposes of this section, Materials on hand are Materials that are ordered and have been manufactured before the date notice and order of termination is issued.

After the Contractor receives the termination notice and order from the Department, and no agreement or only a partial agreement is reached about the termination costs, then Contractor shall submit any Claim for damages or costs within thirty (30) Days of the date of the notice and order of termination or shall waive such Claim. The Contractor shall submit the Claim in accordance with Sections 105.19, "Notice of Potential Claim" and 105.20, "Administrative Remedy." The Claim shall be limited to the following cost items:

1. Actual and direct Bidding and Project investigative costs which are separate and excluded from home office overhead costs;
2. Actual and direct mobilization costs, mobilization paid by the Department exceeding actual and direct mobilization costs may be subject to reimbursement by the Contractor;
3. If Work is stopped in advance of the termination date, idle Equipment time using standby-time rental rates at fifty percent (50%) of the Blue Book Equipment rental rate, without the cost of operating personnel;
4. If Work is stopped in advance of the termination date, idle labor costs;
5. Unpaid Supplier costs;
6. Accounting charges involved in Claim preparation;
7. Written and executed agreements for private land usage; and,
8. An additional ten percent (10%) of the total of the above items 2, 3, 4, and 5 to cover home office overhead and salaried labor expenses.

The Contractor shall provide those records required by Section 105.20.1, "Project Manager Level," to the Department to determine the validity and amount of each Claim item. The Contractor shall not be entitled to recover anticipated loss of profits or any category of damages excluded pursuant to Section 109.11, "Compensation for Claims."

Full or partial Contract termination does not relieve the Contractor of its contractual responsibilities for the completed Work, nor will it relieve the Surety of its obligation for Claims arising out of the completed Work.



## **SECTION 109: MEASUREMENT AND PAYMENT**

### **109.1 MEASUREMENT OF QUANTITY**

The Department will measure Pay Items in accordance with the Pay Unit listed in the Contract.

#### **109.1.1 Pay Unit Terminology**

Unless otherwise noted in the Contract, the following terminology controls:

1. The distance between stations is 100 feet, measured longitudinally;
2. Longitudinal measurements are along and parallel to surfaces, not horizontal. For Pay Items measured by the square yard, the Department will make no deduction for fixtures in the Work with areas less than one (1) square yard;
  - a. Transverse measurements for areas of Base Course and pavements are the neat line dimensions shown on the Plans based on the average width of the installed Material along the centerline of the Roadway;
  - b. Structures are measured according to the neat lines shown on the Plans or as provided by the Department;
  - c. For Pay Items measured by the foot, measurements are parallel to the base or foundation;
3. The volume of excavation is calculated by using the average end area method at 25 foot intervals or other Project Manager approved methods;
4. A ton equals 2,000 lb;
5. A "sack" equals 94 lb of cement;
6. Timber and lumber (permanently incorporated in the Project) is measured by the foot, and measured on nominal widths and thickness and the length of each piece. The Department will Accept lumber and timber conforming to the American Lumber Standards for rough and dressed sizes, as specified in the Contract;
7. Standard manufactured items, identified by unit weight or section dimensions, are measured using nominal weights or dimensions. The Department will Accept manufacturing tolerances established by the industries involved, unless otherwise stated in the Contract;
8. Asphalt Materials are measured by the ton or as designated in the Contract. The weight is based on net certified scale weights or weights calculated from certified volumes. The certified weights or volumes are subject to inspection and adjustment at the point of delivery;
9. Materials that are measured by weight shall be measured and proportioned by weight using certified and accurate scales that are within tolerances established by State law;
  - a. The Contractor shall provide scales or use commercial scales;
  - b. Scales shall be certified and sealed at least once every 12 months or each time the scales are relocated, or as directed by the Project Manager;
  - c. Weighmasters (including Deputy Weighmasters), provided by the Contractor and certified by the NMDA, shall operate the scales. The certified weighmasters shall perform their duties in accordance with the regulations of the New Mexico Department of Agriculture statutes and regulations concerning the same. The cost of the certified weighmasters, weighmasters' scales, scale tickets, scale house, and verification of the scale's accuracy is Incidental to the weighed Material;

- d. Empty vehicles used to haul Material paid by weight shall be weighed at least twice daily, at a minimum once prior to initial Material delivery and once prior to final Material delivery, unless a metered scale is used. The Contractor shall ensure vehicles bear legible identification marks. When required, the Contractor shall complete the legal load worksheet provided by the Project Manager showing identification marks, number of axles, the distance between extreme axles and daily tare weights, and update as necessary. The Contractor shall update this information before delivery of the Material and when the Contractor changes vehicles, combination vehicles, or axle length relationships;
- e. The Department may convert weight to volume, or volume to weight, for payment purposes. The Project Manager will determine the factor(s) for conversion using an Acceptable method;
- f. The operator of each weighed vehicle shall obtain a scale ticket (certificate of correct weight) from the weighmaster and deliver the ticket to the Project Manager or designee at the point of delivery. The tare weights shall include the driver. The following information shall be included on the scale ticket:
  - i. Project number;
  - ii. Date;
  - iii. Ticket number;
  - iv. Truck / Trailer unit number;
  - v. Gross weight;
  - vi. Tare weight;
  - vii. Net weight;
  - viii. Material type;
  - ix. Certified weighmaster's name; and,
  - x. Signature of weighmaster.

#### **109.2 APPROVED EQUIPMENT RENTAL RATES**

For machinery or Equipment owned or leased directly by the Contractor or its Subcontractor at any tier, the Contractor will be paid Equipment rental rates as designated in the Contract. The Department will not compensate the Contractor or its Subcontractors at any tier for owned or leased small tools. Small tools are defined as any tool which would be valued less than \$2,000.00 if purchased new.

The Blue Book rates shall be used for the actual time the Equipment is in operation calculated by using the Federal Highway Administration rate. The Department will add a maximum of 10% to the FHWA Equipment rental rates. The Department will apply Equipment rental rates pursuant to the Blue Book and in accordance with the following criteria:

- 1. The manufacturer's identification plates on the Equipment will be used to identify the Equipment and its capacities. If the Equipment does not have these plates, the Contractor shall provide written statements certifying the Equipment identification and capacity as shown on the Contractor's Equipment inventory. The Contractor shall submit the type, capacity, and horsepower of each piece of Equipment, to correlate with the Blue Book schedule. The Blue Book reflects the maximum rates for Equipment of modern design and in good-working condition;
- 2. The Blue Book lists common pieces of Equipment. If the Blue Book does not list a piece of Equipment the use of the Blue Book rental rate for a comparable piece of Equipment shall be used as approved by the Project Manager. If no comparable

piece of Equipment is identified in the Blue Book the Project Manager may negotiate a rental rate with the Contractor at a fair market rental rate;

3. If a piece of Equipment, not available on the Project, requires hauling onto the Project, the Contractor shall provide the actual transportation cost (in and out) via invoice. The Department will pay the transportation cost for each piece of Equipment once;
4. The Contractor shall only be paid the operating rate for those hours the Equipment is actually in use;
5. A standby rate for Equipment required to be at the Work site but not active may be paid by the Department if agreed to in writing in advance by the Project Manager. The Department will pay for standby Equipment using the Blue Book Non-Active Use Rates – Standby Rate. Standby refers to a state of readiness where the Equipment is prepared to be used at a moment's notice and is critical to the completion of the operation at hand;
6. The FHWA rate must be adjusted for age of the Equipment and geographic region; and,
7. Overtime, as described in Blue Book does not apply. The Department will pay for Equipment used on Extra Work at the regular hourly rate in accordance with the rate provided in the Blue Book.

### **109.3 SCOPE OF PAYMENT**

The Contractor shall receive and Accept compensation in accordance with the Bid for performing the Work in an Acceptable manner. The compensation associated with the Bid shall include the risks, losses, damages and expenses that, when considering the nature of the Work and having exercised Pre-Bid Due Diligence, should have been reasonably expected by the Contractor in prosecuting the Work.

The Contractor shall receive and Accept compensation provided for in the Contract as full payment for furnishing all Materials and for performing all Work under the Contract in a complete and Acceptable manner subject to the provisions of Section 107.26, "No Waiver of Legal Rights." The Contractor's Bid Item Unit Price is presumed to be based on its exercise of Pre-Bid Due Diligence and considers all risk, loss, damage, or expense of whatever character arising out of the nature of the Work.

The Department will pay for the approved actual quantities of Material incorporated into the Work unless otherwise provided in the Contract.

The Department will only pay for Pay Items listed in the Contract in accordance with the "Basis of Payment" provisions. Items not included in the "Basis of Payment" provisions shall be considered Incidental, unless otherwise indicated in the Contract. The Department will not pay separately for Work Incidental to the completion of a Pay Item, or pay for the Incidental Work under another Pay Item; except as provided in Section 104.6, "Rights in and Use of Materials Found on the Work."

Payment for any Pay Item shall be full compensation for all Work necessary to complete the Pay Item.

When a Contract Item Specification references another Specification(s) to complete the Work, Pay Items referenced in that Specification, the Pay Items referenced will not be measured or paid for separately. *For example, if the Specification for Contract item "A" refers to Specification "B" the Pay Items in Specification "B" will not be paid for, unless specifically stated in the Contract. The Payment for Contract item "A" will be full compensation for Work as described in the Specification for Contract item "A."*

The Contractor shall not receive payment for corrective Work. Corrective Work is Work required by the Department to make previously unacceptable Work Acceptable.

The Department may Accept portions of the Work at an adjusted price in accordance with the relevant Pay Adjustment provisions in the Contract. The adjusted price only applies to the specific Accepted portion of Work.

#### **109.4 COMPENSATION FOR OVERRUN / UNDERRUN QUANTITIES**

When the Project Manager determines the Work is Acceptable, the Department will pay the Contractor in accordance with Basis of Payment section or Change Order. If the Accepted quantities of Work vary from the quantities in the Contract, the Contractor shall Accept, as payment in full, payment based on the Bid Item or Change Order negotiated Unit Price for the Accepted quantity.

#### **109.5 PAYMENT FOR EXTRA WORK**

The Department will pay the Contractor for Extra Work, differing site conditions or Department ordered Work based on the following order of priority for payment:

1. Bid Item Unit Prices;
2. Negotiated unit prices;
3. Negotiated Lump sum; or,
4. Force Account.

For Items of Work performed by the Contractor, the negotiated unit price or negotiated Lump sum price shall include all costs associated with the Work. If Subcontractors perform Work as Extra Work under items 2, 3 or 4, the Department may only compensate the Contractor in accordance with the table below.

| <b>Table 109.5:1</b>                           |   |
|--|---|
| <b>Payment for Extra Work - Subcontractors</b> |   |
| <b>Total Cost of Extra Work</b>                | <b>Compensation</b>                               |
| \$0.00 - \$10,000.00                           | 10%   |
| Greater than \$10,000.00                       | \$1,000.00 + 5% of the amount over<br>\$10,000.00 |

#### **109.6 FORCE ACCOUNT**

When the order of priority for payment is exhausted and Extra Work must be paid by Force Account, the Department will pay the Contractor in accordance with the following Sections.

##### **109.6.1 Labor**

The Department will pay the wage rate for Force Account Work actually paid by the Contractor during the pay period ending before the Force Account Work commences. Such payment shall include Work by supervisors in direct charge of the Force Account Work. If there is no wage rate for a labor classification needed to perform the type of Work required, the Department and Contractor will negotiate and document a new wage rate before beginning the Force Account Work.

Labor shall also include, and the Department will reimburse for, the following actual reasonable costs paid to (or on behalf of) workers:

1. Subsistence and travel allowances that do not exceed the New Mexico Per Diem and Mileage Act or other Department approved per diem rates;
2. Health and welfare benefits;
3. Retirement fund benefits;
4. Vacation benefits; and,
5. Other benefits required by collective bargaining agreements or other employment Contract, applicable to the class of labor.

The Department will pay an amount equal to 35 percent of the sum of the direct labor costs and fringe benefits. This payment is in compensation for field office overhead, home office overhead, and profit.

#### **109.6.2 Bond, Insurance, and Tax**

The Department will pay the Contractor either:

##### **Option 1**

The actual cost of the following, plus six percent (6%):

1. Property damage, liability, and worker's compensation insurance premiums;
2. Unemployment insurance premiums or contributions;
3. Applicable payroll taxes (not including gross receipts taxes); and,
4. Social Security taxes.

To recover actual costs, the Contractor shall provide actual invoice costs of the rate(s) it has paid for bonds, insurance, and taxes.

##### **Option 2**

In lieu of supplying the above evidence and recovering actual costs:

1. The Contractor shall receive payment at a rate representing 30% of the labor costs for labor burden; and
2. The Contractor shall also receive payment for the additional costs to Contract Bonds supported by invoice(s).

#### **109.6.3 Materials**

The Department will pay the Contractor the actual cost of Materials Accepted by the Project Manager and incorporated into the Force Account Work, including transportation charges paid by the Contractor (exclusive of Equipment rentals), plus 15% of the Material cost.

#### **109.6.4 Equipment**

For Equipment (other than small tools as defined by the Blue Book), including fuel and lubricants and transportation costs, the Department will pay rental rates as determined in accordance with Section 109.2, "Approved Equipment Rental Rates," unless otherwise agreed in writing.

#### **109.6.5 Miscellaneous**

The Department will not pay for other costs not specifically addressed in Section 109.6, "Force Account."

#### 109.6.6 Documentation

The Project Manager will use the Department approved forms to track Force Account costs. The Contractor shall compare and reconcile records with the Project Manager daily, or as otherwise directed by the Project Manager, to determine the amount of Force Account Work completed by the Contractor.

#### 109.6.7 Statements

The Department will not pay for Force Account Work until the Department verifies that the Force Account Labor, Material, and Equipment forms are supported by the documents below. The Contractor shall furnish the Project Manager with itemized statements of the cost of the Force Account Work detailed as follows:

1. Name, classification, date, daily hours, total hours, rate, and extension for each laborer, foreman and Superintendent;
2. Verification of pay for Superintendent and foreman;
3. Attachments verifying Equipment brand, year of manufacture, operating Specifications, dates of use, daily hours, total hours, current Blue Book rental rate, and rate of applicable attachment for each piece of Equipment;
4. Quantities of Materials and prices; and,
5. Transportation of Materials.

Statements shall be supported by receipted invoices for all Materials used and for transportation charges. For in-stock Materials or Materials furnished by the Contractor, the Contractor shall provide an affidavit certifying that such Materials were taken from the Contractor's stock, that the quantity claimed was actually used, and that the price and transportation claimed represent the actual cost to the Contractor. This requirement does not waive the Contractor's responsibility to provide Certificates of Compliance per Section 106.4, "Certificates of Compliance."

The total payment made as provided above shall constitute full compensation for Force Account Work authorized in writing by the Department.

#### 109.6.8 Subcontractors

If Subcontractors perform Work under Force Account, the Department may only compensate the Contractor in accordance with the table below.

| Table 109.6.8:1<br>Payment for Work under Force Account - Subcontractors |   |
|--|---|
| Total Cost of Extra Work   | Compensation                                      |
| \$0.00 - \$10,000.00   | 10%   |
| Greater than \$10,000.00   | \$1,000.00 + 5% of the amount over<br>\$10,000.00 |

#### 109.7 ELIMINATED ITEMS

Should Pay Items contained in the Contract become unnecessary for the reasonable completion of the Work, the Project Manager may direct the Contractor, in writing, to eliminate Pay Items from the Contract. This written notification will not invalidate the Contract. The Department will reimburse the Contractor for actual Work completed before the written notification at Bid Item Unit Price.

The total cost of return freight, handling, and restocking for Materials associated with that eliminated Work will then be increased by 15%. If Materials cannot be returned, the Department will pay for said Materials at Contractor's actual cost and take ownership.

The Contractor is not entitled to compensation of any anticipated profit associated with the eliminated item.

#### **109.8 PROGRESS PAYMENTS**

The Department will make Progress Payments once each month. The Project Manager will prepare and post Progress Payments based on estimates of the value of the Work performed and Materials complete-in-place, and in accordance with Section 109.9, "Stockpile" and minus price reductions within five (5) Days of the estimate cutoff date.

The Department will include monies associated with an Accepted and fully executed Change Order when the Work is Accepted with the next Progress Payment. The Project Manager shall process a Progress Payment on a monthly basis regardless of the dollar amount, including zero dollar (\$0.00), owed the Contractor.

The Contractor shall not construe any Progress Payment to be an Acceptance of any defective Work or improper Material.

The Acceptance of Work for the purposes of Progress Payments does not constitute Final Acceptance of the Work.

The Department has the authority to withhold Progress Payments in part or in their entirety as part of a suspension.

##### **109.8.1 Retainage**

The Department will make Progress Payments to the Contractor in accordance with Section 109.8, "Progress Payments." The Department will pay 100% of the value of Work performed and Materials complete in place in accordance with Section 109.9, "Stockpile," until the sum of the Progress Payments made equals 95% of the Total Original Contract Amount as amended by Change Order. The Department will continue to make additional Progress Payments in the sum of zero dollars (\$0.00) after the Total Original Contract Amount as amended by Change Order equals 95% and until the Contractor completes the Work in an Acceptable manner. The five percent (5%) retained when the Progress Payments equals 95% of the Total Original Contract Amount as amended by Change Order is the amount considered necessary to protect the interests of the public and the Department; those interests include ensuring that the Work is Acceptable, on schedule, in compliance with the Contract, and that the Work reaches Substantial Completion and Final Acceptance. Subject to other deductions the amount retained shall be provided to the Contractor in accordance with Section 109.10, "Project Closure."

##### **109.8.2 Non-Conformance**

If the Contractor fails to comply with all material terms and conditions of the Contract the Department may withhold an additional 25% as a Non-Conformance from each Progress Payment and subsequent Progress Payments in addition to Retainage until the Contractor fully complies with the Contract. Release of Non-Conformance withholdings shall be processed at the next scheduled Progress Payment after the resolution of the Non-Conformance.

Nothing in this section prevents the Department from withholding application and certification for payment because of the following: unsatisfactory job progress, defective construction not remedied, disputed Work, third party Claims filed or reasonable evidence that a Claim will be filed, failure of the Contractor to make timely or prompt payments for labor, Equipment, and Materials, damage to the Department, reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract, or for Retainage.

The Contractor is not entitled to late payment charges, including late payment charges pursuant to NMSA 1978, § 13-1-158, associated with any payment retained under this section.

#### **109.8.2.1 Automatic Non-Conformance**

These items do not follow the Potential Non-Conformance process below. The failure to comply will automatically result in the issuance of a Non-Conformance and withholding of an additional 25% as a Non-Conformance from each Progress Payment. The following items shall be provided in the timeframes in their respective section:

1. The Accepted Certificate of Compliance per Section 106.4, "Certificates of Compliance" for Materials that are required to be Buy America and Build America, Buy America compliant per Section 106.5, "Buy America Requirements, Build America, Buy America Requirements, and Foreign Materials Requirements," prior to the Work being installed or incorporated;
2. Schedule submittals within the timeframes in Subsection 108.3, "Schedule" remaining uncorrected after a twenty-four (24) hour period;
3. Prime Contractor's certified payrolls complete submittal within the timeframe in the "Federal Requirements" Notice to Contractors; and,
4. The Contractor's prompt payment to its Subcontractor for undisputed Accepted Work.

#### **109.8.2.2 Potential Non-Conformance**

For all other terms of the Contract, that the Contractor fails to comply with the Department will issue a Notice of Potential Non-Conformance. The Notice of Potential Non-Conformance will be issued on the current Department form and the Contractor shall have five (5) Days after the Progress Payment cutoff date to resolve the issues listed on the form.

If the Contractor resolves all issues on the Notice of Potential Non-Conformance within five (5) Days after the Progress Payment cutoff date then no action to withhold the 25% Non-Conformance amount is taken by the Department. If the Contractor does not resolve each issue on the Notice of Potential Non-Conformance within five (5) Days after the Progress Payment cutoff date then the Department will withhold an additional 25% as a Non-Conformance from each Progress Payment and subsequent Progress Payments in addition to Retainage until the Contractor fully complies with the Contract.

For safety related items the Department will include a timeframe to resolve the issue in the Notice of Potential Non-Conformance that may be other than five (5) Days after the Progress Payment cutoff date. If the Contractor fails to resolve the safety issue in the Notice of Potential Non-Conformance within the specified timeframe, then the Department will withhold an additional 25% as a Non-Conformance from each Progress Payment and subsequent Progress Payments in addition to Retainage until the Contractor fully complies with the Contract.

### **109.9 STOCKPILE**

Only items identified in the Notice to Contractors titled "Stockpile" are eligible for Stockpile payment.



#### **109.9.1 Stockpile Payment**

After measurement, partial (stockpile) payments to the Contractor may be made for Items on hand not to exceed 50% of the Bid Item Price under the following conditions:

1. The Items will be incorporated in the Work;
2. The Items are delivered to the Project or to a storage place approved by the Project Manager;
3. The delivered Items meet the requirements of the Contract, including Certificates of Compliance per Section 106.4, "Certificates of Compliance," and,
4. The Contractor submits paid invoices, certified by the Supplier or Fabricator, to the Project Manager.

#### **109.10 PROJECT CLOSURE**

- |            |   |
|------------|---|
| Step I.    | Contractor Notice of Projected Substantial Completion Date      |
| Step II.   | Completion Conference   |
| Step III.  | Termination of Contract Time                                    |
| Step IV.   | Project Inspection and Development of Punch List                |
| Step V.    | Notice of Punch List Completion and Request of Final Inspection |
| Step VI.   | Final Inspection  |
| Step VII.  | Contractor Submittal of Final Documentation                     |
| Step VIII. | Physical Completion and Release of Retainage and Final Payment  |

##### **109.10.1 Contractor Notice of Projected Substantial Completion Date**

The Contractor shall provide written notification to the ADE-Construction of the projected Substantial Completion date. This notice shall be provided a minimum of 14 Days prior to the projected date unless otherwise approved by the Project Manager.

##### **109.10.2 Completion Conference**

Prior to the projected Substantial Completion date, the ADE-Construction and the Project Manager shall conduct a completion conference with the Contractor to review the Project and determine conformance with the Contract. The Department and Contractor will address all outstanding Work needed for Substantial Completion. The Department and Contractor will agree on the schedule for completion of all Work necessary for Project Closure pursuant to Section 109.10, "Project Closure."

The Contractor shall continue to submit updated CPM Schedules or bar graphs, as specified in the Contract, until such time that all physical Work items including Punch List items have been completed.

##### **109.10.3 Termination of Contract Time and Determination of Substantial Completion**

After steps I and II of Project closure are complete and the Contractor has determined it is ready to request Substantial Completion, the Contractor shall provide to the ADE-Construction a written request to determine Substantial Completion. Within two (2) Working Days of receipt of the request for Substantial Completion the ADE-Construction will issue a determination of Substantial Completion. Contract Time or, if applicable, Liquidated Damages assessments will cease upon Substantial Completion.

#### **109.10.3.1 Rescinding Substantial Completion**

The Department will rescind Substantial Completion by written notice when any of the conditions for Substantial Completion in the definition of Substantial Completion are no longer met. Substantial Completion will also be rescinded by the Department when Department ordered Work per Section 104.2.3, "Department Ordered Work" is required.

#### **109.10.4 Project Inspection and Development of Punch List**

The Project Manager shall inspect the Project to verify that all Work is complete or develop Punch List items upon the determination of Substantial Completion. The Project Manager shall provide the Contractor written notice that all Work is complete or shall provide a Punch List. Contract Time shall resume if the Contractor fails to provide Acceptable Work associated with the Punch List within the agreed upon schedule that shall not exceed sixty (60) Days and resumed Contract Time shall continue until all Punch List Work is Accepted.

#### **109.10.5 Notice of Punch List Completion and Request of Final Inspection**

The Contractor shall provide written notification to the Project Manager that the Punch List is complete and request final inspection.

#### **109.10.6 Final Inspection**

The final inspection by the Project Manager and the ADE - Construction will be scheduled and conducted within seven (7) Days of the Contractor's written request for final inspection. If the inspection results in unacceptable or unsatisfactory Work, the Project Manager will provide a written list of findings to the Contractor within seven (7) Days of the final inspection. Upon the Contractor's correction of the Work, written notification shall be provided to the Project Manager, the Project Manager shall make an additional inspection and notify the Contractor within seven (7) Days of the findings.

Once the Project Manager and the ADE - Construction are satisfied that the Work is complete and Acceptable, that inspection shall constitute the final inspection. The Project Manager shall provide written notification of the final inspection Acceptance to the Contractor within seven (7) Days.

The Department will Accept the Project as soon as practicable after completion and inspection of the Work. Acceptance is final and conclusive, except for the following situations:

1. Latent defects;
2. Fraud;
3. Gross mistakes that amount to fraud; or,
4. The Department's warranty or guaranty rights.

#### **109.10.7 Contractor Submittal of Final Documentation**

The Department will withhold final payment and no late payment interest shall be due for the withheld payments until the Contractor furnishes all documents required by the Contract.

The Contractor shall submit the following documents required by the Contract including the Certificate of Payment of Claims, Summary to Contractor, Pit Release Letter, additional named insured Insurance Bonding Release, Affidavit of Wages Paid, and Surety Release. For the Pit

Release Acceptance by the Project Manager of a letter of intent from the landowner for future use may exempt haul Roads or other areas from their vegetation requirements.

The Contractor shall furnish a completed Certificate of Payment of Claims form from persons or firms, including the Contractor, who have filed Claims for additional compensation, for labor performed, or for Material, supplies, or services furnished to the Contractor or its Subcontractors.

#### **109.10.8 Physical Completion, Release of Retainage, Final Payment and Final Acceptance**

Upon the completion of steps I through VII of Project Closure the ADE-Construction shall provide a written determination of Physical Completion to the Contractor. The Department will not release retained amounts until Physical Completion and when the Contractor fully complies with all Contract requirements.

Until Physical Completion of the Project, the Contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof, by the action of the elements or from other causes, whether arising from the execution or from the non-execution of the Work.

The Department will prepare an estimate summary to the Contractor which is used for the proposed final payment voucher. The proposed final payment voucher shall correct all prior Progress Payments and release Retainage. The Department will withhold from the proposed final payment voucher liquidated damages and overpayments. The Contractor shall sign, approve and return the Department's final payment voucher. Upon receipt of a signed and approved final payment voucher the Department will Accept the Work and pay the balance due on the final payment voucher. The Department paying the balance due on the final payment voucher constitutes Final Acceptance.

If the Contractor disputes the final payment voucher, then the Contractor shall submit the Notice of Potential Claim form within seven (7) Days of receipt of the final payment voucher. The Contractor shall not change or modify the final payment voucher. If a clerical error on the final voucher is discovered the Contractor shall notify the Project Manager in writing before the seven (7) Day expiration. If the Project Manager agrees that there is clerical error, the Project Manager will correct the error and reissue the final payment voucher. If the Project Manager does not agree the Project Manager shall notify the Contractor in writing and the Contractor shall have seven (7) Days of receipt to sign the final payment voucher or submit a Notice of Potential Claim. If the Contractor submits a Notice of Potential Claim form or the timeframe to submit the Notice of Potential Claim form expires, the Department will Accept the undisputed Work, pay the undisputed balance unilaterally due on the final payment voucher. A Claim is forever barred if the Claim is not timely and properly submitted pursuant to Section 105.19, "Notice of Potential Claim" within seven (7) Days of receipt of the Department's proposed final payment voucher. The Department paying the balance due on the final payment voucher constitutes Final Acceptance.

Upon Final Acceptance the Department will complete its administrative process to close the Project. Project Closure occurs when the State Construction Engineer or designee signs the compass form.

#### **109.10.9 Department Requests for Reimbursement or Refund**

The Contractor shall reimburse or refund the Department for any overpayment in response to a request for refund of overpayment within 30 Days of the Department's request. Failure by the Contractor to comply may subject the Contractor to default and to rejection of the

Contractor's Bids in accordance with Section 102.5, "Rejection of Bids," until such time that Contractor complies with this section.

#### **109.11 COMPENSATION FOR CLAIMS**

The Contractor is not entitled to late payment charges, including late payment charges pursuant to NMSA 1978, § 13-1-158, associated with any Claim or disputed construction services and Materials. The Department will pay the Contractor late payment charges as authorized by NMSA 1978, § 13-1-158 for construction services and Materials not the subject of a disputed Claim or subject to Retainage or withheld Progress Payments and that have been certified by the Department to have been received and Accepted. The Department will pay the Contractor late payment charges on undisputed, qualified, Delayed Progress Payments for certified, approved and Accepted Work in accordance with Section 109.8, "Progress Payments" that are not the subject of a disputed Claim.

The Contractor is barred from seeking a Claim, a remedy, compensation, time, cause of action, or any damages except as provided by Section 105.19, "Notice of Potential Claim," and Section 105.20, "Administrative Remedy," and this section.

The Contractor shall not be entitled to any consequential, indirect, punitive, exemplary, special, or incidental damages. When the Department determines entitlement the Contractor shall only receive additional compensation and time as specifically provided by the following Sections of these Specifications: Section 104.2.1, "Significant Change in the Character of the Work;" Section 104.2.2, "Differing Site Conditions;" Section 104.2, "Extra Work;" Section 107.10.3, "Cooperation with Owner of Railroad Right of Way;" Section 107.20, "Contractor's Responsibility to Protect the Work;" Section 108.6, "Determination and Extension of Contract Time;" Section 108.10, "Termination of Contract; No Fault of Contractor;" Section 109, "Measurement and Payment;" and this section.

Except as otherwise agreed to by the Contractor and the Department in a written Change Order, all Claims and causes of action arising out of the performance and administration of the Contract shall be governed by this section including: Claims for Delay, Claims for additional compensation and time, Contract adjustment, Claims seeking extension of Contract Time, Claims seeking Delay damages, pass-through Subcontractor Claims, causes of action for breach of Contract, promissory estoppel, equitable estoppel, waiver, detrimental reliance, bad faith breach of Contract, breach of the covenant of good faith and fair dealing, or any other cause of action arising out of the performance of the Work or the Contract. The compensation, time and damages provided for in this section are exclusive, complete, and apply regardless of whether such Claims are to be resolved pursuant to the procedures set forth in Section 105.20, "Administrative Remedy," or any other legal or administrative procedure, whether or not authorized herein, including arbitration, mediation, or appeal.

##### **109.11.1 Non-Critical Disruption**

Non-critical disruption is a disruption or interference with Contractor's performance, regardless of cause, that does not negatively impact the Critical Path of the Project and therefore does not meet the definition of a Delay and for which the Contractor will not be entitled to receive Delay compensation per Section 109.11.2.1, "Additional Time for Delay."

##### **109.11.2 Delay**

"Delay," in this section, does not include time extensions granted by the Department by Change Order in accordance with Section 108.6, "Determination and Extension of Contract Time" that do not result in any additional compensation.

The Contractor's entitlement to compensation and time for a Delay is defined, limited to, and provided as follows:

1. **Excusable Delay:** A Delay which is beyond the Contractor's control that negatively impacts the Critical Path of the Project and is not caused, by the Contractor's fault or negligence and for which compensation and/or a time extension may be granted, based upon the following:
  - a. **Excusable Compensable Delay:** An excusable Delay that negatively impacts the Critical Path of the Project resulting from the neglect or default of the Department or from a differing site condition per the section for differing site conditions. For such Delays, the Department may grant additional time and compensation. Examples of an excusable compensable Delay may include but are not limited to Delays attributable to design errors or a differing site condition not readily discovered through Pre-Bid Due Diligence, failure by the Department to acquire Right of Way, and Department-initiated design changes;
  - b. **Excusable Non-compensable Delay:** An unforeseen and unanticipated excusable Delay not caused by the fault of either the Contractor or the Department that negatively impacts the Critical Path of the Project. For such Delays, the Contractor may receive an extension of time but not additional compensation. Examples of a non-compensable Delay may include but are not limited to those events described in Subsection 107.20, "Contractor's Responsibility to Protect the Work."
2. **Inexcusable Delay or Non-excusable Delay:** A Delay for which the Contractor is not entitled to compensation and/or time that was caused by: factors within the Contractor's control; the fault or responsibility of the Contractor; factors that could or should have reasonably been foreseen by the Contractor; Delays caused by an event that the Contractor could have foreseen and prevented but failed to do so; or failure to reasonably mitigate additional Delay after an excusable Delay has been identified. Examples of inexcusable or non-excusable Delays may include but are not limited to those attributable to reasonably expected seasonal inclement weather events based on historical data, reasonable time periods necessary for reviews of Shop Drawings by the Department, inefficient operation by the Contractor or Subcontractor, inefficient or ineffective construction management by the Contractor or Subcontractor, failure to assign sufficient resources to the Project by the Contractor or its Subcontractor, failure by the Contractor to properly perform Pre-Bid Due Diligence, or failure by the Contractor, Subcontractor or Supplier to procure Materials in a timely manner.
3. **Concurrent Critical Delay:** Concurrent Delay only occurs when the Project has two (2) separate Critical Paths that have two (2) separate Delays which start and end on the same date, Delaying the Project for the same amount of time. For Delays that start on the same date but are resolved at different dates the Contractor is not entitled to any time or additional compensation for the duration when a non-excusable or inexcusable Delay occurs on either of the Critical Paths. When an excusable compensable Delay and excusable non-compensable Delay are concurrent as defined above the Contractor shall only be entitled to Contract Time and not any additional compensation.

#### **109.11.2.1 Additional Time for Delay**

The Department may only add Contract Time for an excusable compensable Delay or an excusable non-compensable Delay using the Accepted updated monthly or revised schedules current and in effect at the time the Delay occurred.

#### **109.11.2.2 Compensation for Delay**

The Department may only compensate the Contractor for an excusable compensable Delay as provided in this section and in the following order of priority and no other methods of calculating compensation will be Accepted. In order to receive compensation for an excusable compensable Delay the Contractor shall document and provide costs resulting from the excusable compensable Delay using actual cost records, shall measure and provide expenses using generally Accepted accounting principles, and shall comply with Section 108.3.2, "Schedule Format," and if an agreement about the extension of Contract Time cannot be reached then the Contractor shall comply with Section 108.6, "Determination and Extension of Contract Time."

- I. The Department reserves the right to use innovative bidding approaches, as specified in the Contract, including requiring Bidders to Bid a daily overhead rate (cost / Working Day) as a Bid Item Unit Price. For example, the Contract may require that the Contractor escrow its Bid documents, and the escrow Bid Documents may be considered in resolving Claims.
- II. The compensation which the Contractor may recover for a Delay Claim is limited to:
  1. Non-salaried labor expenses;
  2. Material costs;
  3. Equipment costs pursuant to Section 109.2, "Approved Equipment Rental Rates;"
  4. Costs of extended job site overhead, including additional bonds;
  5. An additional ten percent (10%) of the total of items 1, 2, 3, and 4 to cover home office overhead, salaried labor expenses, and profit.
- III. If the source of the loss of productivity can be attributed to an excusable compensable Delay and cannot be isolated and priced separately, the method by which the Department will calculate the extent of an excusable compensable Delay caused by a production rate inefficiency shall be made in the following order of priority:
  1. Measured Mile analysis by which the Department will compare actual efficiency (production rates) in an impacted area to actual efficiency in a comparable non-impacted area; or,
  2. Comparison of actual productivity to production rates in the Contractor's Baseline Schedule and timely submitted Acceptable updated monthly or revised schedules or in the escrow Bid Documents.

#### **109.11.2.3 Non-Recoverable Damages**

In no event shall the Contractor submit or be entitled to payment based on any of the following including but not limited to Eichleay formula, the Total Cost Method, original Contract period formula, fixed overhead formula, burden fluctuation method, and comparative absorption rates.

Regardless of the basis or cause of the Claim, the Contractor shall not recover and is not entitled to recover the following categories of damage:

1. Any compensation except as provided by Section 109.11.2.2, "Compensation for Delay;"
2. Loss of anticipated profit, incentives, or bonuses;
3. Labor inefficiencies at the fault of the Contractor;

4. Home office overhead regardless of whether it is characterized as absorbed, unabsorbed, or extended exceeding that provided in Section 109.11.2.2, "Compensation for Delays;"
5. Any damages, costs or expenses that are indirect, special, incidental or consequential, including, but not limited to, lost or impaired bonding capacity, loss of Bidding and contracting opportunities, loss of credit standing, cost of financing, interest paid, lost Material discounts, economic loss, loss of reputation, loss of other Work, loss of use, loss of business opportunity, loss of product or output, income, loss of profit or revenue, cost of capital, financing, and for loss of management or employee productivity or of the services of such persons, and business devastation, bankruptcy, or insolvency. The Department waives any entitlement to consequential damages from the Contractor but not general damages including but not limited to liquidated damages as provided in the Contract;
6. Acceleration costs and expenses. The Contractor shall only be entitled to acceleration costs and expenses if the Department has expressly and specifically directed the Contractor in writing to accelerate the Work at the Department's expense, the Contractor completes the Work within the time directed by the Department, the Contractor actually incurs acceleration costs and expenses, and the Contractor provides verifiable documentation to support the acceleration costs and expenses;
7. Late payment charges, including late payment charges pursuant to NMSA 1978, § 13-1-158, associated with any Claim, or disputed construction services or Materials. The Contractor is also not entitled to late payment charges on any judgment or award made to the Contractor. This provision does not affect the Department's payment of late payment charges on undisputed, qualified, Delayed Progress Payments for certified, approved and Accepted Work in accordance with Section 109.11, "Compensation for Claims" that are not the subject of a disputed Claim;
8. Prejudgment or post-judgment interest related to or arising from any disputed Claim or on any Award made to the Contractor; or,
9. Attorneys' fees and costs, Claim preparation expenses, and litigation or other costs related to or arising from any disputed Claim, or prosecution thereof.