



## SECTION 105

### CONTROL OF WORK

**105.1 Authority and Duties of Commission in Contract Administration.** The Commission is subject to comply with and to have the power and authority provided in, among others, the following laws in execution of the Commission's authority over all state transportation programs and facilities:

- (a) 226.130 RSMo providing for Commission to have supervision of highways and bridges constructed, improved and maintained, in whole or part, by the aid of state monies and of highways constructed in whole or in part by the aid of monies appropriated by the United States government, so far as such supervision is consistent with the acts of Congress relating thereto, to let all contracts for the construction or improvement of state highways;
- (b) 226.150 RSMo to comply with acts of Congress and with any of the rules or conditions made by the federal agencies to secure funds allocated to this state;
- (c) 227.030 RSMo to have power to make all final decisions affecting the work provided for therein;
- (d) 227.100 RSMo, to furnish and prescribe contracts for construction of the work provided for in that Chapter;
- (e) 227.107 RSMo to prescribe the form of contracts and make all final decisions concerning the performance of work under a design-build highway project contract including claims for additional time and compensation;
- (f) 23 USC §112 to have supervision over construction of certain projects funded in whole or part by monies appropriated by the United States Government;
- (g) 23 USC §302 to have adequate powers to discharge to the satisfaction of the Secretary of Transportation of the United States Government the duties required by Title 23 of the United States Code and;
- (h) 23 CFR §1.3 providing that the Commission shall be authorized by the laws of the State of Missouri to make all final decisions for the state in all matters relating to contracts and agreements and to take such other actions on behalf of the state as may be necessary to comply with the federal laws and regulations in Part 23 of the CFR.

**105.1.1 Authority of the Engineer.** The engineer will decide all questions that may arise as to the quality, quantity and acceptability of material furnished and the work performed, and as to the rate of progress of the work; all questions that may arise as to the interpretation of the plans and specifications; all questions as to the acceptable fulfillment of the contract on the part of the contractor; all questions of classification; the proper compensation for the performance or breach of the contract; and all claims or controversies of any character whatsoever in connection with or growing out of the construction, whether claimed under the contract, under force account, under quantum merit or otherwise. The engineer's estimates and decisions shall be final, binding, and conclusive upon all parties to the contract.

**105.1.2 Suspension of Work.** The engineer may suspend the work wholly or in part in accordance with these provisions. The suspension may be given verbally, but will be followed in writing immediately.

**105.1.2.1** The engineer may suspend the work wholly or in part for the contractor's failure to:

- (a) Correct conditions unsafe for the project personnel or general public.
- (b) Carry out provisions of the contract.
- (c) Carry out orders of the engineer.

**105.1.2.2** Suspensions in accordance with [Sec 105.1.2.1](#) will be nonexcusable and noncompensable.

**105.1.2.3** Work may also be wholly or partially suspended for:

- (a) Periods necessary due to unsuitable weather.
- (b) Conditions considered unsuitable for the prosecution of the work.
- (c) Any condition or reason determined to be in the public interest.

**105.1.2.4** Suspensions in accordance with [Sec 105.1.2.3](#) may be excusable and may be compensable as determined by the engineer in accordance with [Sec 108](#).

**105.2 Plans and Working Drawings.** The plans will be supplemented by such working drawings as are necessary to adequately control the work. Working drawings for structures shall be furnished by the contractor and shall consist of such detailed plans as may be required to adequately control the work and which are not included in the plans furnished by the Commission. Required working drawings must be accepted by the engineer, and such acceptance shall not relieve the contractor of any responsibility under the contract for the successful completion of the work.

**105.3 Conformity with Contract Documents.** All work performed and all material furnished shall be in accordance with the lines, grades, cross sections, dimensions and material requirements, including tolerances, shown in the contract documents.

**105.3.1** If the engineer finds the material or the finished product in which the material was used is not in accordance with the contract documents, but that reasonably acceptable work has been produced, a determination will be made if the work will be accepted and remain in place. In this event, the engineer will document the basis of acceptance by contract modifications that may provide for an appropriate adjustment in the contract price for such work or material as deemed necessary to conform to the determination based on engineering judgment.

**105.3.2** If the engineer finds the finished product to be unacceptable as a result of the contractor's method of operation or the use of unacceptable material, the work shall be removed and replaced or otherwise corrected by the contractor at the contractor's expense.

**105.4 Coordination of Contract Documents.** The contract documents are essential parts of the contract, and a requirement occurring in one shall be as binding as though occurring in all. Contract documents are intended to be complementary and to describe and provide for a complete work. In case of discrepancy among contract documents, the governing ranking will be:

- (a) Job Special Provisions
- (b) Project Specific Drawings
- (c) General Provisions
- (d) Supplemental Specifications
- (e) Standard Specifications
- (f) Standard Drawings
- (g) Bid Items or Quantities

In case of discrepancies, calculated dimensions will govern over scaled dimensions.

**105.4.1** All contractors, including subcontractors, shall not take advantage of any apparent error or omission in the contract documents. If an error or omission is discovered, the engineer shall be notified promptly so corrections and interpretations necessary to fulfill the intent of the contract can be made. A failure to give notice shall render the effects of any error or omission noncompensable and any delay nonexcusable.

**105.5 Cooperation by Contractor.** The contractor shall maintain one set of contract documents at the work site at all times.

**105.5.1** The contractor shall give the work the constant attention necessary to facilitate the progress thereof and shall cooperate with the engineer and other contractors in every possible way.

**105.5.2** The contractor shall have at the work site at all times, as the contractor's agent, a competent individual capable of reading and thoroughly understanding the plans and specifications and thoroughly experienced in the type of work being performed, whom shall receive instructions from the engineer. That individual shall have full authority to execute orders or directions of the engineer without delay and to promptly supply material, equipment, tools, labor and incidentals as may be required.

**105.6 Cooperation Between Contractors.** The Commission reserves the right at any time to contract for and perform other or additional work on or near the project limits covered by the contract.

**105.6.1** If separate contracts are awarded within the limits of any one project, each contractor shall conduct work so as not to interfere with or hinder the progress or completion of the work being performed by other contractors. Full cooperation of the contractors involved, in careful and complete coordination of their respective activities in the area, will be required.

**105.6.2** Each contractor and surety involved shall assume all liability, financial or otherwise, in connection with the contract and shall indemnify and save harmless the State, the Commission, and the Commission's agents, employees and assigns from any and all damages or claims that may arise because of inconvenience, delay or loss experienced, caused or contributed to by the contractor because of the presence and operations of other contractors working within the limits of the same project.

**105.6.3** The contractor shall schedule and conduct work and shall place and dispose of material being used so as not to interfere with or cause unnecessary inconvenience or delay to

the operations of other contractors within the limits of the same project. The contractor shall join work with other contractors as required by the contracts or in a manner acceptable to the engineer and shall perform the work in proper sequence with the work of the other contractors. When necessary for proper prosecution of work, each contractor shall permit the other contractors access through overlapping construction areas and shall permit the use of any access or haul roads.

**105.7 Cooperation With Utilities.** All utility facilities and appurtenances within the project limits shall be installed or relocated by the utility owner, unless specified otherwise. Utility installation and relocation shall be made in accordance with 7 CSR 10-3, Utility and Private Line Location and Relocation.

**105.7.1** The contractor shall cooperate with utility owners and the engineer in the installation and relocation of utility facilities to minimize effects on the contractor's work, interruption to utility service and duplication of work by the utility owners. Facilities or appurtenances that are to remain in place during construction shall be accounted for and protected by the contractor's work procedures.

**105.7.2** The contractor shall notify Missouri One Call (800-344-7483) with its intent to excavate, as described in Chapter 319 RSMo. Locations of all utility facilities and appurtenances within the project limits will be provided by utility owners and may not be exact, particularly with regard to underground.

**105.7.3** The contractor shall proceed in a safe and prudent manner to prevent damage to all public and private utilities. Repairs to damaged utilities caused by negligent or wrongful acts or omissions on the part of the contractor shall be corrected at the contractor's expense. Damaged facilities shall be restored to a condition similar or equal to that existing before the damage occurred.

**105.7.4** In the event of any damage, dislocation or disturbance of any underground facility in connection with any excavation, the contractor shall immediately notify Missouri One Call and cooperate with the utility owners until their facilities have been restored. Work shall not begin around any fire hydrants until provisions for continued service have been made and approved by the local fire authority.

**105.7.5** The contractor shall be solely responsible and liable for incidental and consequential damage to any utility facilities or interruption of the service caused by it or its subcontractor's operation. The contractor shall hold and save harmless the Commission from damages to any utility facility's interruption of service by it or its subcontractor's operation

**105.7.6** When the failure of the owners of utility facilities to cooperate and coordinate their work with that of the contractor results in actual delay to the contractor in the overall completion of the contractor's work, such delay will be considered in the count of working days or date specified for completion as contractor's sole compensation from the Commission, provided the contractor notified the engineer in writing of the delay at the time the delay occurred.

**105.7.7** Should there be located within the right of way any public or private utility facilities that are to remain in place and that will interfere with the contractor's proposed methods of operation, the contractor, in cooperation with the engineer, shall make all necessary arrangements with the owner for any temporary or permanent removal or relocation of such facilities desired for the contractor's convenience. Any cost involved shall be at the contractor's expense.

**105.7.8** If utility facilities or appurtenances are found that are not noted in the contract documents and could not be discovered in accordance with [Sec 102.5](#), the engineer will determine whether relocation of the utility is necessary to accommodate construction. If relocation is necessary, the engineer will make necessary arrangements with the utility owner and the contractor. Compensability and excusability will be determined under [Secs 104](#) and [108](#).

**105.8 Construction Stakes, Lines and Grades.** Surveying, project layout and setting of construction stakes will be performed by the contractor in accordance with [Sec 627](#).

**105.9 Authority and Duties of Resident Engineer.** As the immediate representative of the Commission, the resident engineer has direct charge of the engineering details of each construction project and is delegated commensurate authority for the administration of the project. The resident engineer may reject defective material and suspend and reject any work that is being improperly performed. The resident engineer will have no authority to modify the contract except in accordance with the contract documents or when expressly authorized by the Commission.

**105.10 Inspection of Work.** All material and each part or detail of the work will be subject to inspection by the engineer. The engineer shall be allowed unlimited access to all parts of the work and shall be furnished with such information and assistance by the contractor as is required to make a complete and detailed inspection.

**105.10.1** If requested by the engineer, the contractor, at any time before acceptance of the work, shall remove or uncover such portions of the finished work as may be directed. After examination, the contractor shall restore said portions of the work to the standards required by the contract documents. If the work thus exposed or examined proves acceptable, the uncovering, the removing, recovering or making good the parts removed will be paid for in accordance with [Sec 109](#). If the work so exposed or examined proves unacceptable, the uncovering, removing, recovering or making good the parts removed shall be at the contractor's expense.

**105.10.2** Any work done or material used without inspection by an authorized Commission representative may be ordered removed and replaced at the contractor's expense.

**105.10.3** If any unit of government or political subdivision pays all or a portion of the cost of the work covered by the contract, the unit's respective representatives shall have the right to inspect the work.

**105.10.4** When any work is being done on, over or under railroad right of way or adjustments are being made to any public or privately-owned utility facility, the respective representatives shall have the right to inspect the work.

**105.10.5** Inspections authorized in [Secs 105.10.3](#) and [105.10.4](#) will not make any of these agencies a party to the contract or affect the rights of the parties to the contract.

**105.10.6** Adequate provisions for lighting, meeting the prior approval from the engineer, shall be provided by the contractor to permit satisfactory construction and inspection of all work done and material produced.

**105.10.7 Final Inspection.** Upon presumptive completion of the entire project, the engineer will make an inspection. If all construction contemplated by the contract has been completed to the engineer's satisfaction, that inspection will constitute the final inspection. The engineer will make the acceptance for maintenance upon completion of the final inspection. The engineer will notify the contractor in writing of acceptance for maintenance as of the date of

the final inspection, with the exception of items covered by item specific performance bonds. Final acceptance will take place within a maximum of 30 days of receipt of final documentation from the contractor.

**105.10.7.1** Following the final inspection, the contractor, subcontractors and suppliers will be relieved of any new or additional liability to third parties for personal injury, death or property damages which may be alleged to result from the design or construction of the work, unless additional work on the right of way will be required by the engineer.

**105.10.7.2** Nothing in [Sec 105.10.7](#) shall be deemed to excuse the contractor of liability or responsibility for any personal injury, death or property damages which may have occurred prior to the final inspection of the work.

#### **105.11 Unauthorized and Defective Work.**

**105.11.1** All changes in the work or departures from the plans, except those due to reclassification of excavation material, will be considered unauthorized and at the contractor's expense unless, before proceeding with the work, the contractor has a copy of an order record signed by the engineer, or a change order signed by all parties whose signatures are provided for, except the federal engineer. These forms will contain complete detailed instructions regarding the proposed changes. Any departure from the instructions contained in such a written order will be considered unauthorized.

**105.11.2** The engineer may order unauthorized work removed and replaced at the contractor's expense.

**105.11.3** All construction and materials that have been rejected or declared unsatisfactory shall be remedied or removed and replaced in an acceptable manner by the contractor at the contractor's expense. Upon failure of the contractor to remedy or remove and properly dispose of rejected material or work, or to replace them immediately after receiving written notice from the engineer, the engineer may employ labor to rectify the work, and the cost of rectification will be deducted from any payment due or which may become due the contractor.

#### **105.12 Load Restrictions.**

**105.12.1** The contractor's movement of equipment and vehicles over bridges and pavements within the limits of the project will be subject to the load limit regulations for highways as prescribed by state statutes in effect when the movement occurs, and the contractor shall acquire special permits from the Commission prior to the movement of any such equipment or vehicles with a gross weight in excess of the load limits permitted by statute. All costs of obtaining special permits shall be at the contractor's expense, unless the special permit will be required by a restriction first imposed after the contractor has submitted the bid on the project. Outside of project limits, width, length, height and weight limitations as prescribed by state statutes shall be adhered to by the contractor during the movement of equipment and vehicles over any part of the state highway system, to include project exceptions, and the contractor shall not move or operate any such equipment or vehicles that exceed any statutory limitation without special permits from the Commission. All costs of obtaining special permits shall be at the contractor's expense. Material receipts issued by the engineer will not indicate compliance with any weight restriction regulations. All permits required for movement over highways other than those that are state owned or maintained shall be obtained by the contractor from the respective authority at the contractor's expense.

**105.12.1.1** Special permits will not be required for the movement of construction equipment over any part of a bridge or pavement that is constructed or rehabilitated in the contract.

**105.12.1.2** All movement will be subject to the same conditions and regulations established by the Commission for movements under special permits with the following additional requirements:

- (a) Bridge decks shall be protected by planking of uniform thickness for the full tread width of track.
- (b) All concrete in the bridge shall have achieved design strength.
- (c) No more than one unit at a time may be moved over the structure.
- (d) Equipment shall be centered on centerline of structure during movement.
- (e) Adequate provisions shall be made to prevent marring of the pavement surface or the loss of surface texture.
- (f) Portland cement concrete pavement shall have achieved the strength required for opening to all traffic.
- (g) Adequate provisions shall be made to assure uniform load distribution at the edges of the pavement.
- (h) All movements shall be made under the supervision of the resident engineer.

**105.12.1.3** Movement of equipment over bridges or pavement not constructed under the contract, but located within the limits of the contract, will be subject to all requirements of this section, and a special permit will be required.

**105.12.2** Track or crawler-type equipment having a gross weight of 40,000 pounds or less, evenly distributed over the treads, may be moved over bridges not posted for lesser loads or over rigid-type pavements without special permits. Such equipment having a gross weight in excess of 40,000 pounds shall have a special permit before moving. Crawler-type equipment having a gross weight in excess of 75,000 pounds will not be permitted on bridges or rigid type pavements unless authorized by the engineer.

**105.12.3** Track or crawler-type equipment that is subject to unequal distribution of weight, such as cranes and paving mixers and which have a gross weight in excess of 18,000 pounds but less than 40,000 pounds, may be operated upon bridges not posted for lesser loads and rigid type pavements, provided special precautions satisfactory to the engineer are taken to distribute the weight evenly over the treads. Such equipment in excess of 40,000 pounds will require a special permit from the Commission.

**105.12.4** The contractor shall not move or operate any type of equipment of such weight or so loaded that the equipment will cause damage to highway facilities either being constructed or in existence. Equipment and vehicles with steel lugs will not be permitted to operate directly on bridges or pavements at any time.

**105.12.5** When it is required that material from roadway or borrow excavation be hauled across existing pavement, the contractor may move the material across the pavement with equipment that results in overweight loading, provided the following requirements are met at the contractor's expense:

- (a) The contractor and the engineer shall select the location or locations where the crossing over the existing pavement is to be made. The width of the crossing shall

be clearly marked on the pavement by painted lines and the contractor's equipment will be required to operate within the limits of the marked crossing.

(b) The contractor shall obtain written permission, including the description of the location of the crossing, from the engineer prior to movements of overweight loads across the existing pavement.

(c) The existing pavement shall be kept open at all times for highway traffic except for short periods of time when individual pieces of equipment are crossing the pavement. The pavement shall be kept reasonably free from earth or other material during hauling operations and shall be cleaned off and kept clean during periods when no hauling across the pavement is in progress.

(d) The pavement and shoulders within the crossing area shall be maintained by the contractor in a condition satisfactory to the engineer.

(e) The contractor shall provide signs and flaggers to direct traffic when hauling across the pavement.

(f) If any hauling across the pavement is done at night, the contractor shall provide adequate lighting to illuminate the crossing.

(g) If the existing pavement at the crossing is to be used in place after the contract is completed, the contractor shall, upon completion of the hauling operations, remove the existing shoulders, pavement and base between the limits of the crossing and replace the pavement with the same type, width and thickness of shoulders, pavement and base existing prior to the beginning of hauling operations.

(h) The contractor shall construct and maintain all necessary bypasses or temporary connections required for the proper handling of traffic during removal and replacement of the pavement in the crossing area.

**105.12.6** The contractor shall not store or stockpile any materials on a bridge without approval from the engineer.

**105.12.7** Nothing contained herein or in any special permit will relieve the contractor of liability for any damage caused to highway facilities from the movement or operation of equipment and vehicles over the highway system.

**105.13 Maintenance of the Work.** The contractor shall maintain the work during construction until the work is accepted. This maintenance shall be prosecuted such that the roadway or structures are kept in satisfactory condition at all times.

**105.13.1** In the case of a contract for placing a course upon a course or subgrade previously constructed, the contractor shall maintain the previous course or subgrade during all construction operations.

**105.13.2** No direct payment will be made for maintenance of the work before the work is accepted.

**105.14 Failure to Maintain Roadway or Structure.** If the contractor's performance at any time fails to comply with the provisions of [Sec 105.13](#), the engineer will notify the contractor of such non-compliance. If notice is provided verbally, notice will be promptly confirmed in writing. If the contractor fails to remedy unsatisfactory maintenance within 24 hours after receipt of such notice, the engineer may immediately proceed to maintain the project, and the

entire cost of this maintenance will be deducted from monies due or to become due the contractor.

### **105.15 Acceptance.**

**105.15.1 Partial Acceptance.** The contractor may request that the engineer inspect the following completed sections of work for acceptance at any time during the prosecution of the project:

- (a) Any section 0.5 mile or more in length.
- (b) Any section 0.5 mile or more in length in one direction of a divided highway.
- (c) A complete bridge.
- (d) An intersection traffic signal system. Partial acceptance may be made for signal equipment prior to the 30 day testing period though any required performance tests and/or guarantees shall remain applicable.
- (e) Devices intended to be used for traffic safety and control. Acceptance of traffic safety devices is limited to guardrail, impact attenuation barriers, traffic signal items, signs, delineators, lighting, concrete barrier walls, concrete bridge parapet, bridge railing, guard cable, crash cushions and fence, which are permanently installed in their final position in accordance with the contract documents.

**105.15.1.1** If the contract contains seasonal items, such as sodding, painting or such items as might delay the final completion of the project, a partial acceptance of the completed portion may be made prior to completion of the entire project. If the engineer finds upon inspection that the completed work is in acceptable condition, the contractor will be notified in writing and after such notice has been given, the contractor will be relieved of the duty of maintaining and protecting that work to the extent provided in the notice.

**105.15.1.2** Nothing in the contract shall be construed to relieve the contractor of full responsibility for making good any non-latent defect in work or material found on any section of work prior to final acceptance of the entire project, to alter in any manner the method of payment prescribed in the contract or to constitute a waiver of any claim the Commission might have against the contractor on the entire project.

**105.15.2 Final Acceptance.** Upon receipt by the engineer of all project documentation required by the contract and verification by the engineer that all material incorporated into the work has been properly inspected, the engineer will make the final acceptance upon completion of the final inspection and acceptance for maintenance in accordance with [Sec 105.10.7](#).

**105.15.2.1** When required by the contract, project documentation shall consist of the following: Contractor's Affidavit Regarding Settlement of Claims (Form C-242), Final Change Order, DBE Participation List and Final Verification, Affidavit – Compliance with the Prevailing Wage Law.

**105.15.2.2** Final acceptance will not excuse the contractor's liability or responsibility to the Commission for any latent defects in the work or material incorporated into the work, or for claims relating to any work or material incorporated into the work.

### **105.16 Controversies and Claims for Adjustment.**

**105.16.1** The contractor shall follow the requirements of [Sec 104.4](#) for written notification of differing site conditions or significant changes in the character of work and [Sec 108.15](#) for suspensions of work directed by the engineer. If, after receiving a written reply from the engineer the contractor considers additional compensation is due, the contractor shall file a written notice of claim for additional compensation within 60 days after completing the work in question. The procedure for filing a claim shall be as described in [Secs 105.16.6](#) through [105.16.8.2](#).

**105.16.2** If the contractor considers additional compensation may be due for work or material not clearly covered in the contract or not ordered in writing by the engineer as change in the work, the contractor shall notify the engineer in writing of the intention to make a claim before beginning the work in question. If notification is not given and the engineer is not afforded proper facilities by the contractor to provide necessary inspection and for keeping strict account of actual costs, the contractor agrees to waive any claims for additional compensation. Notice by the contractor and the fact that the engineer has kept account of the costs shall not be construed as substantiating the validity of the claim. The contractor shall file a written notice of claim for additional compensation within 60 days after completing the work in question. The procedure for filing the claim shall be as described in [Secs 105.16.6](#) through [105.16.8.2](#).

**105.16.3** Claims for additional time or compensation under [Sec 104](#) shall be filed within 60 days after completing the work in question. Claims for additional time or compensation in accordance with [Sec 108](#) shall be filed within 60 days after receipt of the engineer's determination. The procedures for filing and the disposition of the claim or controversy shall be in accordance with [Secs 105.16.3](#) through [105.16.9](#).

**105.16.4** If the contractor has any claim against the Commission arising out of the provisions of the contract or the performance or non-performance thereunder, and is not within the scope of [Sec 105.16.1](#) through [105.16.3](#), the claim shall be filed within the earlier of:

- (a) 90 days after the date of final inspection under [Sec 105.10.7](#).
- (b) 60 days after the date of declaration of default or termination of the contract under [Sec 108](#).
- (c) As provided in [Sec 108](#) upon a termination of the contract for convenience of the Commission.

**105.16.5** If the Commission has a claim against the contractor that in any way arises out of the provisions of the contract or the performance or non-performance thereunder, the claim will be filed within 90 days after the date of final inspection under [Sec 105.10.7](#), except for claims of a differing site condition or defects in work or material under [Sec 105.15.2.2](#).

**105.16.6** If the claim is against the Commission, the written claim shall be personally delivered or sent by certified mail to the Office of the Secretary of the Commission in Jefferson City, Missouri. If the claim is against the contractor, the written claim will be personally delivered or sent by certified mail to the contractor at the address shown under the signature on the contract. If the claim is against an assignee, the written claim will be personally delivered or sent by certified mail to the assignee at the address shown on the accepted notice of assignment.

**105.16.6.1** This provision shall not extend the claim filing time limits of the contractor or the Commission in the case of a differing site condition or a suspension of the work under [Sec 108](#).

**105.16.6.2** This provision will not limit the Commission's claim filing time for defects in work or material not discovered within 90 days after the date of final inspection under [Sec 105.10.7](#) or other claim rights not discovered within 60 days of filing of any claim by the contractor, or as to any work covered by a separate or continuing performance bond specified to survive project final acceptance.

**105.16.7** Claim submittals on the contractor's part shall be in sufficient detail, as specified in this section, to enable the engineer to determine the basis for additional time or compensation. The following minimum information shall accompany each claim submitted:

- (a) A detailed factual statement of the claim, providing all necessary dates, locations and items of work affected by the claim.
- (b) The date actions resulting in the claim occurred or conditions resulting in the claim became evident.
- (c) A copy of the notice of claim filed by the contractor for the specific claim.
- (d) The name, title and activity of each MoDOT employee knowledgeable about facts that gave rise to such claim.
- (e) The name, title and activity of each contractor or subcontractor employee knowledgeable about facts that gave rise to such claim.
- (f) The specific provisions of the contract supporting the claim, and a statement why the provisions support the claim.
- (g) The identification of any pertinent documents, and the substance and date of any material oral communication relating to the claim.
- (h) A statement whether the additional compensation or extension of time is based on the provisions of the contract, including breach of contract, or other basis in law outside the contract, with detailed support of the basis a claim may be made outside the terms of the contract.
- (i) If an extension of time is also sought, the specific days for which the extension is sought and the basis for such a claim as determined by an analysis of the construction schedule.
- (j) The amount of additional compensation sought with an itemized accounting of that amount.

**105.16.8 Required Certification of Claims.** The claim submittal shall include the contractor's written certification, under oath, attesting to the following:

- (a) The claim is made in good faith.
- (b) Supporting data is accurate and complete to the contractor's best knowledge and belief.
- (c) The amount requested includes all costs related to the specific claim and that no additional related claims will be submitted.



**105.16.8.1** The person signing the claim and affidavit under oath shall be the owner if the contractor is a sole proprietorship, shall be a general partner if the contractor is a partnership, shall be an authorized agent if the contractor is a limited liability company or joint venture, or shall be an authorized officer or member of the board if the contractor is a corporation.

**105.16.8.2** No claim shall be deemed filed under the contract by a contractor until:

- (a) Every item of information provided for in [Sec 105.16.7](#) has been provided or the contractor makes an affirmative, unequivocal statement as part of its claim that no record, document or information provided for by a specific provision of that section exists, and
- (b) The sworn certification precisely as set forth in [Sec 105.16.8](#) has been made and delivered to the Secretary of Commission.

**105.16.9 Duty to Supply Records and Information Regarding a Claim or Controversy.**

The Commission is subject to a legal duty to pay no additional sum to a contractor after a contract has been entered into and performed in whole or part, or any claim under any agreement or contract made without express authority of law. The Commission is under the further legal duty to pay only those claims that are supported, which have a basis in the terms of the contract and applicable state law as fairly construed and which are in accordance with prevailing principles of public contract law. The Commission is obligated by law to set forth both the contractual basis and the cost data, supported by audit, of actual costs incurred by the contractor to substantiate any amount paid.

**105.16.9.1 Record Retention.** From and after the date the contractor determines a cause has occurred for a possible contract adjustment, and notwithstanding any policy the contractor may have regarding record retention, the contractor shall retain all files, records and data, in whatever form, that relate to the contractor's bid and performance of the contract relevant to the possible contract adjustment.

**105.16.9.2 Duty to Supply Information.** During the review of the claim, the contractor and the contractor's subcontractors and suppliers shall cooperate with MoDOT and shall provide, if requested, access to the documents that contain the below information, to the extent requested by MoDOT and MoDOT's attorneys or consultants. Request for some, but not all, of the following information will not preclude MoDOT's right to request the same or additional information at another time:

- (a) Job site superintendent and foreman diaries, daily time sheets and daily reports of all types.
- (b) Any union agreements applicable to the work, including any amendments.
- (c) Insurance, welfare and benefits records.
- (d) Earnings records of salaried and hourly personnel charged as costs of the work.
- (e) Payroll tax and withholding returns.
- (f) Material invoices, purchase orders, and all material and supply acquisition contracts.
- (g) Material cost distribution worksheets.

- (h) Records for all equipment whose use was included either in the bid or which was charged to the project. This should include internal equipment rates used for both purposes, as well as equipment leased from third parties and from affiliates and related parties. All lease or rental agreements shall be provided.
- (i) Vendor rental agreements and contracts with subcontractors and suppliers.
- (j) Payment records and invoices for subcontracted work.
- (k) Canceled checks (payroll and vendors).
- (l) Job cost reports, both periodic and final, and both the summary and supporting reports, for all costs charged to the contract and for any changes to the work, including any reports that compare estimated with actual costs.
- (m) General ledger, general journal (if used) and all subsidiary ledgers and journals, including all supporting documentation pertinent to entries made in these ledgers and journals, whether paper or computer-maintained.
- (n) Financial statements with all footnotes and attachments for all years in which the contractor performed work on the project.
- (o) Depreciation records on all company equipment, and all documents used to develop the actual cost of owning and operating equipment used in the work.
- (p) All documents that reflect the contractor's actual profit and overhead during the time the work was being performed, and for each of the two years prior to the beginning of the project.
- (q ) All bid records related to the preparation of the contractor's bid, including the final calculations on which the bid was determined.
- (r) Worksheets, working papers and all other records used in or the product of preparation of the claim. This includes those showing the cost components claimed and how the amounts claimed were computed. Without limitation, this is intended to include personnel and equipment production analysis, schedule analysis, all data inputs used or developed for computer analysis or generation of the claim.
- (s) Projected and actual personnel and equipment loading plans.
- (t) Any internal budget for the project.

**105.16.9.3 Confidentiality of Records.** The contractor and, if applicable, the contractor's subcontractors and suppliers, shall deliver to MoDOT and MoDOT's attorneys or consultants, all information and documents requested, notwithstanding any claim of confidentiality or proprietary interest in the records. MoDOT and MoDOT's attorneys and consultants will affirmatively act to protect the records and information from disclosure beyond those persons having a need to know the information for the purpose of making a decision regarding the claim, or for law enforcement purposes. The contractor shall identify and segregate any documents or information that the contractor considers particularly sensitive.

**105.16.10** On any claim for additional compensation for work on the project, whether claimed under the contract, for a differing site condition, as a change in the work, for breach of the contract, for a positive representation by which the contract was induced or otherwise, the following items shall never be allowable or claimed directly or indirectly:

- (a) Attorney fees, consultant or claims preparation costs, or costs related to litigation.
- (b) Any item that would not be eligible for federal-aid participation under the provisions of 23 CFR 635.124, regardless of whether the project is one approved by the FHWA.
- (c) Any item that would be an expressly unallowable cost under the provisions of 48 CFR Part 31, Subparts 31.1 and 31.2, or as it may be amended, superseded or replaced during the life of the contract.

**105.16.11** Any claim, controversy or item of any claim or controversy not included in the writings required to be filed in [Sec 105.16](#), or any claim included but not clearly defined and specifically set out, itemized and supported, or any notice or claim not filed within the time and in the manner provided in [Sec 105.16](#), shall be forever waived, and shall neither constitute the basis of nor be included in any legal action, counterclaim, defense, set-off, arbitration or other alternative dispute resolution procedure mutually agreed upon between the parties.

**105.16.11.1** The omission of any claim or of the detail required to be in a claim in accordance with [Sec 105.16.7](#) will not be subject to cure by making the claim or supplying the details in any later court or alternative dispute resolution proceeding.

**105.16.11.2** MoDOT has established a written procedure for handling contractor claims and controversies that provides the process for resolution of all claims and the engineer's final decision. The completion of that process and the engineer's final decision will be a condition precedent to any legal action, counterclaim, defense, set-off or arbitration concerning the matters claimed. Any claim or controversy, or any portion thereof that has not been presented for handling in accordance with MoDOT's contractor claims and controversies procedure will not be subject to resolution in an alternate dispute resolution process.

**105.16.12** MoDOT's review of a claim pursuant to [Sec 105.16](#) will be in addition to the right or duty of MoDOT or the Commission to conduct audits or other reviews of a claim or contractor's books of account or operations otherwise provided by federal or state laws or the rules of civil procedure.

**105.17 Venue.** Any action concerning any matter, thing or dispute arising out of or relating to the terms, performance, non-performance or otherwise of the agreement, shall be filed in the Circuit Court of Cole County, Missouri. The parties agree that the contract is entered into at Jefferson City, Missouri, and substantial elements of the contract's performance will take place or be delivered at Jefferson City, Missouri, by reason of which the contractor consents to venue of any action by or against the contractor in Cole County, Missouri. The contractor shall cause this provision to be incorporated in all of the contractor's agreements with, and to be binding upon, all subcontractors in the performance of this agreement.

#### **105.18 Arbitration.**

**105.18.1. Purpose.** By adoption of 226.096 RSMo (L. 2003, HB 668), certain controversies or claims to which the Missouri Department of Transportation is a party that arises out of or relates to a contract awarded pursuant to subdivision (9) of subsection 1 of 226.130 (RSMo) subject to certain limits and preconditions are subject to, "be settled (sic) by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, except as provided, in 226.096". Under the provisions of Chap. 435 RSMo arbitration is the subject of agreement between the parties to a contract. This section provides for incorporation of the, American Arbitration Association's, Construction Industry Arbitration Rules and Mediation Procedures (AAA Rules), amended and effective on the date arbitration

is demanded and for their modification and revisions as permitted by the AAA Rules and Chap. 435 RSMo.

**105.18.2. Incorporation.** The AAA Rules are incorporated as part of the contract except as amended or excluded. The AAA Rules are further expressly amended or excluded as provided herein and as provided directly or indirectly by 226.096 RSMo (L. 2003, HB 668) and Chap. 435 RSMo.

**105.18.3 Regular Track Procedures.** The AAA Construction Industry Arbitration Rules, Regular Track Procedures, October 1, 2009 are amended as follows:

**105.18.3.1 R-1. Agreement of Parties and Designation of Applicable AAA Rules.** Not revised.

**105.18.3.2 R-2. AAA and Delegation of Duties.** Not revised.

**105.18.3.3 R-3. National Panel of Construction Neutrals.** Shall be replaced with the following:

In cooperation with the National Construction Dispute Resolution Committee the AAA shall establish and maintain a National Roster of Construction Arbitrators ("National Roster") and shall appoint arbitrators as provided first by the provisions of Missouri law, including 7 CSR 10-26, and then as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

**105.18.3.4 R-4. Filing Requirements Under an Arbitration Agreement in a Contract.** Not revised.

**105.18.3.5 R-5. Filing Requirements under a Submission Agreement.** Not revised.

**105.18.3.6 R-6. Changes of Claim or Counterclaim.** Shall be replaced with the following:

The contract between the parties provides for a Notice of Controversy or a Claim for adjustment to the contract prior to any demand for arbitration. Arbitration demands, issues, nature or amount of relief sought, shall not differ or be additional to that in the Notice of Controversy or Claim for contract adjustment provided for in the contract. There may not be a revision of the issues, nature of relief sought or increase in relief during or by way of any presentation of evidence during the arbitration. No award may be upon different issues or basis of relief or provide relief different in nature or greater in amount than contained in the Notice of Controversy or Claim given under the contract and stated in the demand for arbitration. No new or different controversy, claim or counterclaim may be submitted to the arbitrator except with the consent of both parties and the arbitrator and any consent must be clearly expressed, written and signed by the parties. There will be no amendments by implication.

**105.18.3.7 R-7. Consolidation or Joinder.** Shall be replaced with the following:

If Commission expressly agrees in writing with regard to multiple disputes arising under a particular contract, multiple demands may be consolidated so long as the relief sought in total does not exceed \$409,123 in the principal relief sought, as adjusted on an annual basis effective January first of each year in accordance with the Implicit Price Deflator for Personal Consumption Expenditures as calculated pursuant to subsection 5 of section 537.610, RSMo. See <http://insurance.mo.gov/industry/sovimmunity.php>. Demands to which Commission is not a party in direct privity of contract will never be joined. The issue of consolidation of

claims and joinder of parties will not be arbitrable. Nothing in this section shall prohibit more than one demand for arbitration pursuant to the same contract, provided that each demand for arbitration arises from a separate claim based upon facts supporting a separate right of relief, filed with the Department and accepted by the department under the Missouri Department of Transportation's "Contractor Claims and Controversies Procedures". Neither shall a prime contractor be prohibited from filing a demand for arbitration arising from work, which was subcontracted provided that; (a) the claim was initially accepted by the department under "Contractor Claims and Controversies Procedures." and (b) would provide a right to contract adjustment separate from any claimed or which could be claimed by the prime contractor for its sole benefit. However, subcontractors shall have no right to file a demand for arbitration with the Commission.

**105.18.3.8 R-8 Interpretation and Application of Rules.**

**105.18.3.9 R-9. Jurisdiction.** Not revised.

**105.18.3.10 R-10. Mediation.** Not revised.

**105.18.3.11 R-11. Administrative Conference.** Not revised.

**105.18.3.12 R-12. Fixing of Locale.** Not revised.

**105.18.3.13 R-13. Date, Time and Place of Hearing.** Not revised.

**105.18.3.14 R-14. Arbitrator Appointment from National Construction Panel.** Delete paragraphs (a), (b), (c), (d) and (e) and replace with the following:

Arbitrators will be selected and appointed in accordance with 7 CSR 10-26.

**105.18.3.15 R-15. Direct Appointment by a Party.** Not revised.

**105.18.3.16 R-16. Appointment by a Chairperson by Party-Appointed Arbitrators or Parties.** Not revised.

**105.18.3.17 R-17. Nationality of Arbitrator in International Arbitration.** Not revised.

**105.18.3.18 R-18. Number of Arbitrators.** Not revised.

**105.18.3.19 R-19. Disclosure.** Not revised.

**105.18.3.20 R-20. Disqualification of Arbitrator.** Not revised.

**105.18.3.21 R-21. Communication with Arbitrator and the AAA.** Not revised.

**105.18.3.22 R-22. Vacancies.** Not revised.

**105.18.3.23 R-23. Preliminary Management Hearing.** Not revised.

**105.18.3.24 R-24. Exchange of Information.** Not revised.

**105.18.3.25 R-25. Attendance at Hearings.** Not revised.

**105.18.3.26 R-26. Representation.** Not revised.

**105.18.3.27 R-27. Oaths.** Not revised.

**105.18.3.28 R-28. Stenographic Record.** Not revised.

**105.18.3.29 R-29. Interpreters.** Not revised.

**105.18.3.30 R-30. Postponements of Hearings.** Not revised.

**105.18.3.31 R-31. Arbitration in the Absence of a Party or Representative.** Not revised.

**105.18.3.32 R-32. Conduct of Proceedings.** Not revised.

**105.18.3.33 R-33. Evidence.** Not revised.

**105.18.3.34 R-34. Evidence by Affidavit and Posthearing Filing of Documents or Other Evidence.** Not revised.

**105.18.3.35 R-35. Inspection or Investigation.** Not revised.

**105.18.3.36 R-36. Interim Measures.** Not revised.

**105.18.3.37 R-37. Closing of Hearing.** Not revised.

**105.18.3.38 R-38. Reopening of Hearing.** Not revised.

**105.18.3.39 R-39. Waiver of Rules.** Not revised.

**105.18.3.40 R-40. Extensions of Time.** Not revised.

**105.18.3.41 R-41. Serving of Notice.** Paragraphs (a) and (b) shall be replaced with the following:

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith, or for the entry of judgment on any award made under these rules, may be served on a party by mail addressed to the party or its representative at the last known address with return receipt or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery with return receipt or electronic facsimile transmission (fax) to give the notices required by these rules. Facsimile transmission must require an acknowledgment that an entire legible transmission was received. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (email), or other methods of communication.

(c) Not revised

**105.18.3.42 R-42. Majority Decision.** Not revised.

**105.18.3.43 R-43. Time of Award.** Not revised.

**105.18.3.44 R-44. Form of Award.** Paragraph (b) shall be replaced with the following:

(a) Not revised.

(b) The arbitrator shall provide a concise, written breakdown of the basis of the award and a written explanation and justification for the awarded amount.

(c) Not revised.

**105.18.3.45 R-45. Scope of Award.** Not revised.

**105.18.3.46 R-46. Award upon Settlement.** Not revised.

**105.18.3.47 R-47. Delivery of Award to Parties.** Not revised.

**105.18.3.48 R-48. Modification of Award.** Not revised.

**105.18.3.49 R-49. Release of Documents.** Not revised.

**105.18.3.50 R-50. Withdrawal of Claims or Counterclaims.**

**105.18.3.51 R-51. Applications to Court and Exclusion of Liability.** Paragraph (c) shall be replaced with the following:

(a) Not revised.

(b) Not revised.

(c) Parties to these rules shall be deemed to have consented that judgment upon the arbitration award shall be entered as provided by 226.096, RSMo (L. 2003, HB 668).

(d) Not revised.

(e) Not revised.

**105.18.3.52 R-52. Administrative Fees.** Not revised.

**105.18.3.53 R-53. Expenses.** Not revised.

**105.18.3.54 R-54. Neutral Arbitrator's Compensation.** Not revised.

**105.18.3.55 R-55. Deposits.** Not revised.

**105.18.3.56 R-56. Remedies for Nonpayment.** Not revised.

**105.18.4 Fast Track Procedures.** The AAA Construction Industry Arbitration Rules, Fast Track Procedures, October 1, 2009 are amended as follows:

**105.18.4.1 F-1. Fast Track Applicability.** Not revised.

**105.18.4.2 F-2. Answers and Counterclaims.** Not revised.

**105.18.4.3 F-3. Limitation on Extensions.** Not revised.

**105.18.4.4 F-4. Changes of Claim or Counterclaim** - Shall be replaced with the following: The contract between the parties provides for a Notice of Controversy or a Claim for adjustment to the contract prior to any demand for arbitration. Arbitration demands, issues,

nature or amount of relief sought, shall not differ or be additional to that in the Notice of Controversy or Claim for contract adjustment provided for in the contract. There may not be a revision of the issues, nature of relief sought or increase in relief during or by way of any presentation of evidence during the arbitration. No award may be upon different issues or basis of relief or provide relief different in nature or greater in amount than contained in the Notice of Controversy or Claim given under the contract and stated in the demand for arbitration. No new or different controversy, claim or counterclaim may be submitted to the arbitrator except with the consent of both parties and the arbitrator and any consent must be clearly expressed, written and signed by the parties. There will be no amendments by implication.

**105.18.4.5 F-5. Appointment and Qualification of Arbitrator.** Shall be replaced with the following:

The provisions of 7 CSR 10-26 and the procedures for regular track arbitrator selection, apply to fast track procedure arbitrations.

**105.18.4.6 F-6. Serving of Notice for Hearing–** Shall be replaced with the following:

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith, or for the entry of judgment on any award made under these rules, may be served on a party by mail addressed to the party or its representative at the last known address with return receipt or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery with return receipt or electronic facsimile transmission (fax) to give the notices required by these rules. Facsimile transmission must require an acknowledgment that an entire legible transmission was received. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (email), or other methods of communication.

**105.18.4.7 F-7. Preliminary Telephone Management Hearing.** Not revised.

**105.18.4.8 F-8. Exchange of Information.** Not revised.

**105.18.4.9 F-9. Discovery.** Not revised.

**105.18.4.10 F-10. Date, Time, and Place of Hearing.** Not revised.

**105.18.4.11 F-11. The Hearing.** Not revised.

**105.18.4.12 F-12. Time Standards.** Not revised.

**105.18.4.13 F-13. Time of Award.** Not revised.

**105.18.4.14 F-14. Neutral Arbitrator's Compensation.** Not revised.

**105.18.5 Form of Award** – Shall be added as follows:

The arbitrator shall provide a concise, written breakdown of the basis of the award and a written explanation and justification for the awarded amount.

**105.19 Electronic Signatures.** The contractor may utilize a verifiable electronic signature to sign contract documents. The electronic signature shall be verified by a recognized independent third party or the Construction and Materials Divisions.