
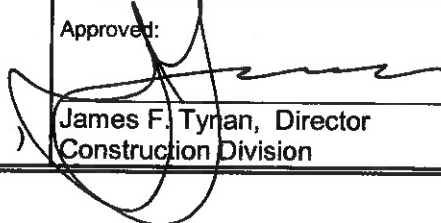


To: <p style="text-align: center;">SUPERSEDED BY <u>EB 06-057</u> EFFECTIVE <u>5/3/07</u></p>		<p style="text-align: center;"><i>New York State Department of Transportation</i> ENGINEERING INSTRUCTION</p>	<p style="text-align: center;">EI 05-029</p>
Title: REVISIONS TO STANDARD SPECIFICATIONS SECTION 100 – PHASE 5B - RETAINAGE			
Distribution: <input checked="" type="checkbox"/> Manufacturers (18) <input checked="" type="checkbox"/> Local Govt. (31) <input checked="" type="checkbox"/> Agencies (32)		Approved:  _____ James F. Tyrnan, Director Construction Division	<u>8-12-05</u> Date
<input checked="" type="checkbox"/> Surveyors (33) <input checked="" type="checkbox"/> Consultants (34) <input checked="" type="checkbox"/> Contractors (39) <input type="checkbox"/> _____ ()			

ADMINISTRATIVE INFORMATION:

- This Engineering Instruction (EI) is effective beginning with projects submitted for the letting of 09/08/05.
- This EI does not supersede any other issuances.
- The revisions issued with this EI will be incorporated into a future update of the Standard Specifications.

PURPOSE:

This EI issues revisions to Section 100 of the Standard Specifications of January 2, 2002.

TECHNICAL INFORMATION:

- Legislation modifying Section 38 of the Highway Law was signed into law on 7/26/05.
- The legislation allows the Department to stop withholding retainage in future contracts.
- The elimination of retainage brings the Department into compliance with the Federal requirements contained in 49 CFR 26.29.
- References to holding retainage have been eliminated from §103-06, §109-05, §109-06, §109-07 and §109-10.
- Language prohibiting Contractors from holding retainage from Subcontractors has been added to §103-06 and §109-07.

IMPLEMENTATION:

- Main Office Design Quality Assurance Bureau will insert the standard specification shelf note beginning with projects submitted for the letting of 09/08/05.

TRANSMITTED MATERIALS:

This EI transmits standard specification shelf note *Revisions To Standard Specifications Section 100 – Phase 5b - Retainage*.

BACKGROUND:

49 CFR 26 was issued in July 2003, requiring one of three options regarding retainage, all of which conflicted with Section 38 of the Highway Law. The Department submitted a temporary waiver request to USDOT through the FHWA, and has been operating under that waiver request until such time as legislation was enacted.

CONTACT: Direct questions regarding this issuance to Brian DeWald of the Construction Division via e-mail at BDeWald@dot.state.ny.us or at (518) 457-6472.

REVISIONS TO STANDARD SPECIFICATIONS SECTION 100 – PHASE 5B - RETAINAGE

Make the following changes to the Standard Specifications of January 2, 2002, as modified by EI 05-011:

Page 56 of 147, §103-06 Sample Form of Contract Agreement

Delete Article 7. *Contract Payments* and **Replace** it with the following:

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

Page 56 of 147, §103-06 Sample Form of Contract Agreement

Delete the 1st paragraph of Article 9. *Final Acceptance Of Work* and **Replace** it with the following:

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

Page 137 of 147, §109-05 *Extra Work And Time Related Compensation*

Delete §109-05D.3.e. and **Replace** it with the following:

“e. Consequential damages, including but not limited to interest on monies in dispute, including interest which is paid on such monies, loss of bonding capacity, bidding opportunities, or interest on investment, or any resultant insolvency;”

Page 137 of 147, §109-06 *Contract Payments*

Delete the first paragraph of §109-06 in its entirety and **Replace** it with the following:

“109-06 CONTRACT PAYMENTS. Payments will be made to the Contractor for work satisfactorily performed monthly in accordance with Article 7 *Contract Payments* of the contract agreement. No contract payment will be rendered unless the value of the work done equals 5% of the Contract Amount or \$1000, whichever is the lesser. At the Contractor’s request, semimonthly contract payments may be rendered provided the value of the work performed in a two-week interval is in excess of \$50,000 or if, in the opinion of the Department, it is to the best interests of the State to do so.”

REVISIONS TO STANDARD SPECIFICATIONS SECTION 100 – PHASE 5B - RETAINAGE

Page 138 of 147, §109-07 *Prompt Payments By The Contractor*
Delete §109-07 in its entirety and **Replace** it with the following:

“109-07 PROMPT PAYMENTS BY THE CONTRACTOR. Section 139-f(2) of the State Finance Law requires the Contractor to pay each Subcontractor and materialman for the value of work performed pursuant to contract no later than fifteen (15) calendar days from the receipt of each payment the Contractor receives from the State. Payment by the Contractor to Subcontractors or materialmen shall represent the value of work performed and/or materials furnished and reflect the percentage of work completed or materials furnished by the Subcontractor or materialmen and be based upon the actual value of the subcontract or purchase order. The Contractor shall not hold any retainage, but may deduct an amount necessary to satisfy any claims, liens or judgments against a Subcontractor or materialman which have not been fully discharged.

The Contractor shall maintain an accounting system acceptable to the Department to track payments made by the State to the Contractor and payments made by the Contractor to each Subcontractor, Manufacturer, Fabricator or Material Supplier by item and by date, for the purpose of enabling the Department to audit the payment provisions of this subsection. The system shall be able to provide data necessary for the completion of Contractor Report of Contract Payments. Reports shall include a certification that Subcontractors, Manufacturers, Fabricators and Material Suppliers have been paid with any exceptions noted and explained.”

Page 140 of 147, §109-10 *Uncompleted Work Agreements*

Delete the first paragraph of §109-10 in its entirety and **Replace** it with the following:

“109-10 UNCOMPLETED WORK AGREEMENTS. Whenever a contract shall, in the judgment of the Department, be substantially completed, and keeping the contract open and maintaining the contract bonding, would be an injustice to the Contractor, the Department may enter into an Uncompleted Work Agreement with the Contractor. Prior to entering into an Uncompleted Work Agreement, the essential items in the contract shall have been completed by the Contractor in accordance with the terms of the contract and the provisions of §109-09C. *Final Agreement*, and certified by the Regional Director. The essential items in the contract shall include, but will not be limited to the completion of or the safe working order of all pavement, shoulders, guide rail, drainage, signs, and signals, so that the highway is safe for use by the traveling public without the use of any temporary or emergency devices.”