ARTICLE VIII – PROSECUTION AND PROGRESS

8.1 Notice to Proceed (NTP). A notice to proceed will be issued to the Contractor. It shall establish the date the Contractor is expected to start work and from which contract time will commence.

The Engineer will consult with the Contractor in an effort to set a mutually agreeable notice to proceed date. When the notice to proceed date is set by mutual agreement, Contractor shall have no claim for delay impact costs resulting from the issuance of the notice to proceed for such date.

In the absence of an agreed notice to proceed date, the Engineer will issue a notice to proceed to the Contractor for a date convenient to the State. In the event that the Engineer establishes a starting date that is more than 90 days after the effective date of the contract, the Contractor may not terminate the contract for a default by the State but may submit a claim in accordance with Section 7.16 Disputes and Claims for increased labor and material costs which are directly attributable to the delay beyond the first 90 days. The Engineer may suspend the contract before issuing the notice to proceed, in which case the Contractor's remedies are exclusively those set forth in Section 8.10 Suspension of Work.

The Contractor shall begin work no later than 10 working days from the date in the notice to proceed and shall diligently prosecute the same to completion within the contract time. In the event that the Contractor fails to start the work, the Engineer may terminate the contract in accordance with Section 8.11 Termination of Contract for Cause. The Contractor shall notify the Engineer at least three working days before beginning work.

The Contractor shall notify the Engineer at least 24 hours before restarting work after a suspension of work pursuant to Section 8.10 Suspension of Work.

The Contractor shall not begin work before the date in the notice to proceed. Any work done prior to the notice to proceed date will be considered unauthorized work. If the Engineer does not direct that the unauthorized work be removed, it shall be paid for after the notice to proceed date and only if it is acceptable.

When construction is started, the Contractor shall work expeditiously and pursue the work diligently until it is complete. If a portion of the work is to be done in stages, the Contractor shall leave the area safe and usable for the user agency at the end of each stage.

8.2 Prosecution of Work. Unless otherwise permitted by the Engineer in writing, the Contractor shall not commence with physical construction unless sufficient materials and equipment are available for either continuous construction or completion of a specified portion of the work.

8.3 Preconstruction Data Submittal. The awardee shall submit to the Engineer, for information and review, the preconstruction data within 30 days after the execution of the contract. Until the items listed below are received and found acceptable by the Engineer, the Contractor shall not commence work unless otherwise authorized to do so in writing and subject to such conditions set by the Engineer. No progress payment will be made to the Contractor until the Engineer acknowledges, in writing, receipt of the following preconstruction data submittals acceptable to the Engineer:

(1) List of the Superintendent and other Supervisory Personnel.

(2) Name of person(s) authorized to sign for the Contractor.

(3) Work Schedule.

(4) Initial Progress Schedule (See Section 8.6 Progress Schedules).

(5) Water Pollution and Siltation Control Submittals.

(6) Solid Waste Disposal form.

(7) Tax Rates.

(8) Insurance Rates.

(9) Certificate of Insurance, satisfactory to the Engineer, indicating that the Contractor has in place all insurance coverage required by the contract documents.

(10) Schedule of Values.

(11) List of suppliers.

(12) Shop drawings and material data sheets.

(13) Other submittals as directed by the Engineer.

8.4 Character and Proficiency of Workers. The Contractor shall at all times provide adequate supervision and sufficient labor and equipment for prosecuting the work to full completion in the manner and within the time required by the contract. The superintendent and all other representatives of the Contractor shall act in a civil and honest manner in all dealings with the Engineer, all other State officials and representatives, and the public in connection with the work.

All workers shall possess the proper license, certification, job classification, skill, training, and experience necessary to properly perform the work assigned to them.

The Engineer may direct the removal of any worker(s) who does not carry out the assigned work in a proper and skillful manner or who is disrespectful, intemperate, violent, or disorderly. The worker shall be removed forthwith by the Contractor and will not work again without the written permission of the Engineer.

8.5 Contract Time.

(a) Calculation of Contract Time. When the contract time is on a working day basis, the total contract time allowed for the performance of the work will be the number of working days shown in the contract plus any additional working days authorized in writing as provided hereinafter. The count of elapsed working days to be charged against contract time, will begin from the date of notice to proceed and will continue consecutively to the date of substantial completion. When multiple shifts are used to perform the work, the State will not consider the hours worked over the normal eight working hours per day or night as an additional working day.

Whenever the Engineer provides the Contractor with a written statement of elapsed working days, the Contractor may file a written protest with the Engineer setting forth, in detail, the basis of the protest, not later then seven days after receiving the statement. Failure of the Contractor to file such a protest shall be deemed an acceptance by the Contractor of the correctness of the statement.

When the contract is on a calendar day basis, the total contract time allowed for the performance of the work will be the number of days shown in the contract plus any additional days authorized in writing as provided

hereinafter. The count of elapsed days to be charged against contract time will begin from the date of notice to proceed and will continue consecutively to the date of substantial completion. The Engineer will exclude days elapsing between the orders of the Engineer to suspend work and resume work for suspensions not the fault of the Contractor.

(b) Modifications of Contract Time. Whenever the Contractor believes that an extension of contract time is justified, the Contractor shall serve written notice on the Engineer not more than five working days after the occurrence of the event that causes a delay or justifies a contract time extension. The Engineer may grant an extension of contract time for any discrete part of the work affected by the delay(s) while, at the same time, keeping the existing completion date in place or modifying it separately for the remainder of the work not affected by the delay. Contract time may be adjusted for the following reasons or events but only if and to the extent the critical path has been affected:

(1) Changes in the Work, Additional Work, and Delays Caused by the State. If the Contractor believes that an extension of time is justified on account of any act or omission by the State, and is not adequately provided for in a field order or change order, it must request the additional time as provided above. At the request of the Engineer, the Contractor must show how the critical path will be affected and must also support the time extension request with schedules as well as statements from its subcontractors, suppliers, or manufacturers, as necessary. Claims for compensation for any altered or additional work will be determined pursuant to Section 4.2 Changes.

Additional time to perform the extra work, to the extent such work affects the critical path, will be added to the time allowed in the contract for the completion of the project, or the Engineer may

limit the extension to only the portion of the project work affected by the delay, without regard to the date the change directive was issued, even if the contract completion date has passed. A change requiring additional time issued after contract time has expired will not constitute an excusal or waiver of pre-existing Contractor delay.

(2) Delay for Permits. For delays in the routine application and processing time required to obtain necessary permits, including permits to be obtained from State agencies, on the condition that the delay is not caused by the Contractor and, provided that, as soon as the delay occurs, the Contractor notifies the Engineer in writing that the permits are not available. Time extensions will be the exclusive relief granted and no additional compensation will be paid the Contractor on account of such delays.

(3) Delays Beyond Contractor's Control. For delays caused by acts of God, a public enemy, fire, inclement weather days or adverse conditions resulting therefrom, earthquakes, floods, epidemics, quarantine restrictions, labor disputes impacting the Contractor or the State, freight embargoes, and other reasons beyond the Contractor's control, the Contractor may be granted an extension of time provided that:

(A) In the written notice of delay to the Engineer, the Contractor describes possible effects on the completion date of the contract. The description of delays shall:

(i) State specifically the reason or reasons for the delay and fully explain in a detailed chronology how the delay affects the critical path.

(ii) Include copies of pertinent documentation to support the time extension request.

(iii) Cite the anticipated period of delay and the time extension requested.

(iv) State either that the above circumstances have been cleared and normal working conditions restored as of a certain day or that the above circumstances will continue to prevent completion of the project.

(B) The Contractor shall notify the Engineer in writing when the delay ends. Time extensions will be the exclusive relief granted and no additional compensation will be paid the Contractor for such delays.

(4) Delays in Delivery of Materials or Equipment. For delays in delivery of materials or equipment, which occur as a result of unforeseeable causes beyond the control and without fault of the Contractor, its subcontractor(s), or supplier(s), time extensions shall be the exclusive relief granted and no additional compensation will be paid the Contractor on account of such delay. The delay shall not exceed the difference between the originally scheduled delivery date and the actual delivery date. The Contractor may be granted an extension of time provided that it complies with the following procedures:

(A) The Contractor's written notice to the Engineer must describe the delays and state the effect such delays may have on the critical path.

(B) The Contractor, if requested, must submit to the Engineer, within five days after a firm delivery date for the material and equipment is established, a written statement regarding the delay. The Contractor must justify the delay as follows:

(i) State specifically all reasons for the delay. Explain in a detailed chronology the effect of the delay on the critical path.

(ii) Submit copies of purchase order(s), factory invoice(s), bill(s) of lading, shipping manifest(s), delivery tag(s), and any other documents to support the time extension request.

(iii) Cite the start and end date of the delay and the time extension requested.

(5) Delays for Suspension of Work. When the performance of the work is totally suspended for one or more days (calendar or working days, as appropriate) by order of the Engineer in accordance with Subsections 8.10(a)(1), 8.10(a)(2), 8.10(a)(3) or 8.10(a)(5), the number of days from the effective date of the Engineer's order to suspend operations to the effective date of the Engineer's order to resume operations shall not be counted as contract time, and the contract completion date will be adjusted. During periods of partial suspensions of the work, the Contractor will be granted a time extension only if the partial suspension affects the critical path. If the Contractor believes that an extension of time is justified for a partial suspension of work, it must request the extension in writing at least five working days before the partial suspension will affect the critical path operation(s) in progress. The

Contractor must show how the critical path was affected based on the status of the work and must also support its claim, if requested, with statements from its subcontractors. A suspension of work will not constitute a waiver of pre-existing Contractor delay.

(6) Contractor Caused Delays. No time extension will be granted under the following circumstances:

(A) Delays within the Contractor's control in performing the work caused by the Contractor, subcontractor, supplier, or any combination thereof.

(B) Delays within the Contractor's control in arrival of materials and equipment caused by the Contractor, subcontractor, supplier, or any combination thereof, in ordering, fabricating, and delivery.

(C) Delays requested for changes which do not affect the critical path.

(D) Delays caused by the failure of the Contractor to make submittals in a timely manner for review and acceptance by the Engineer, such as, but not limited to, shop drawings, descriptive sheets, material samples, and color samples except as covered in Subsection 8.5(b)(3) and 8.5(b)(4).

(E) Delays caused by the failure to submit sufficient information and data in a timely manner in the proper form in order to obtain necessary permits related to the work.

(F) Failure to follow the procedure within the time allowed by contract to request a time extension.

(G) Failure of the Contractor to provide evidence sufficient to support the time extension request.

(7) Reduction in Time. If the State deletes or modifies any portion of the work, an appropriate reduction of contract time may be made in accordance with Section 4.2 Changes.

8.6 Progress Schedules.

(a) Forms of Schedule. All schedules shall be submitted using the specific computer program designated in the bid documents or as directed by the Engineer.

Schedule submittals shall be as follows:

(1) For Contracts $2,000,000 or Less or For Contract Time 100 Working Days or 140 Calendar Days or less. For contracts of $2,000,000 or less or for contract time of 100 working days or 140 calendar days or less, the progress schedule will be a Time Scaled Logic Diagram (TSLD). The Contractor shall submit a TSLD submittal package and it shall meet the following requirements and have these essential and distinctive elements:

(A) The major features of work shown in the chronological order in which the Contractor proposes to work that feature of work and its location on the project. The schedule shall account for normal inclement weather, unusual soil, or other conditions that may influence the progress of the work, schedules, and coordination required by any utility, off or on

site fabrications, and other pertinent factors that relate to progress.

(B) All features listed or not listed in the contract documents that the Contractor considers a controlling factor for the timely completion of the contract work.

(C) The time span and sequence of the activities or events for each feature, and its interrelationship and interdependencies in time and logic to other features in order to complete the project.

(D) The total anticipated time necessary to complete work required by the contract.

(E) Identification of the critical path i.e. a chronological listing of critical intermediate dates or time periods for features or milestones or phases that can affect timely completion of the project.

(F) Major activities related to the location on the project.

(G) Non-construction activities, such as submittal and acceptance periods for shop drawings and material, procurement, testing, fabrication, mobilization, and demobilization or order dates of long lead material.

(H) Set schedule logic for out of sequence activities to retain logic. In addition, open ends shall be non-critical.

(I) Show target bars for all activities.

(J) Vertical and horizontal sight lines both major and minor shall be used as well as a separator line between groups. The Engineer will determine frequency and style.

(K) The file name, print date, revision number, data, and project title and number shall be included in the title block.

(L) Have columns with the appropriate data in them for activity ID, description, original duration, remaining duration, early start, early finish, total float, percent complete, and resources. The resource column shall list who is responsible for the work to be done in the activity. These columns shall be to the left of the bar chart.

(2) For Contracts More Than $2,000,000 or For Contract Time of More Than 100 Working Days or 140 Calendar Days. For contracts which have a contract amount more than $2,000,000 or contract time of more than 100 working days or 140 calendar days, the Contractor shall submit a Timed-Scaled Logic Diagram (TSLD) and it shall meet the following requirements and have these essential and distinctive elements:

(A) The information and requirements listed in (1) above.

(B) Additional reports and graphics available from the software as requested by the Engineer.

(C) Sufficient detail to allow at least weekly monitoring of the Contractor and subcontractor's operations.

(D) The time scaled schematic shall be on a calendar or working days basis. What will be used shall be determined

by how the contract keeps track of time. It will be the same. Plot the critical calendar dates anticipated.

(E) Breakdown of activity, such as forming, placing reinforcing steel, concrete pouring and curing, and stripping in concrete construction. Indicate location of work to be done in such detail that it would be easily determined where work would be occurring within approximately 200 feet.

(F) Latest start and finish dates for critical path activities.

(G) Identify responsible subcontractor, supplier, and others for their respective activity.

(H) No individual activity shall have duration of more than 20 calendar days unless requested and approved by the Engineer.

(I) All activities shall have work breakdown structure codes and activity codes. The activity codes shall have coding that incorporates information for phase, location, who is responsible for doing work, type of operation, and activity description.

(J) Incorporate all physical access and availability restraints.

(b) Inspection and Testing. All schedules shall provide reasonable time and opportunity for the Engineer to inspect and test each work activity.

(c) Engineer's Acceptance of Progress Schedule. The submittal of and the Engineer's receipt of any progress schedule shall not be deemed an agreement to modify any terms or conditions of the contract. Any modifications to the contract terms and conditions that appear in or may be inferred from an acceptable schedule will not be valid or enforceable unless and until the Engineer exercises discretion to issue an appropriate change order. Nor shall any submittal or receipt imply the Engineer's approval of the schedule's breakdown, its individual elements, or any critical path that may be shown; nor shall it obligate the State to make its personnel available outside normal working hours or the working hours established by the Contract in order to accommodate such schedule. The Contractor has the risk of all elements (whether or not shown) of the schedule and its execution. No claim for additional compensation, time, or both, shall be made by the Contractor or recognized by the Engineer for delays during any period for which an acceptable progress schedule or an updated progress schedule, as required by Subsection 8.6(e) Contractor's Continuing Schedule Submittal Requirements, had not been submitted. Any acceptance or approval of the schedule shall be for general format only and shall not be deemed an agreement by the State that the construction means, methods, and resources shown on the schedule will result in work that conforms to the contract requirements or that the sequences or durations indicated are feasible.

(d) Initial Progress Schedule. The Contractor shall submit an initial progress schedule. The initial progress schedule shall consist of the following:

(1) Four sets of the TSLD schedule.

(2) All the software files and data to re-create the TSLD in a computerized software format as specified by the Engineer.

(3) A listing of equipment that is anticipated to be used on the project, including the type, size, make, year of manufacture, and all information necessary to identify the equipment in the Rental Rate Blue Book for Construction Equipment.

(4) An anticipated manpower requirement graph plotting contract time and total manpower requirement. This may be superimposed over the payment graph.

(5) A Method Statement that is a detailed narrative describing the work to be done and the method by which the work shall be accomplished for each major activity.

(A) A major activity is an activity that meets any of the following criteria:

(i) Has a duration longer than five days;

(ii) Is a milestone activity;

(iii) Is a contract item that exceeds $10,000 on the Proposal Schedule;

(iv) Is a critical path activity; or

(v) Is an activity designated as such by the Engineer.

(B) Each Method Statement shall include the following items needed to fulfill the schedule:

(i) Quantity, type, make, and model of equipment;

(ii) The manpower to do the work, specifying worker classification; and

(iii) The production rate per eight hour day, or the working hours established by the contract documents needed to meet the time indicated on the schedule. If the production rate is not for eight hours, the number of working hours shall be indicated.

(6) Two sets of color time-scaled project evaluation and review technique charts ("PERT") using the activity box template of Logic – Early Start or such other template designated by the Engineer.

If the contract documents establish a sequence or order for the work, the initial progress schedule shall conform to such sequence or order.

(e) Contractor's Continuing Schedule Submittal Requirements. After the acceptance of the initial TSLD and when construction starts, the Contractor shall submit four plotted progress schedules, two PERT charts, and reports on all construction activities every two weeks (bi-weekly). This scheduled bi-weekly submittal shall also include an updated version of the project schedule in a computerized software format as specified by the Engineer. The submittal shall have all the information needed to re-create that time period's TSLD plot and reports. The bi-weekly submittal shall include, but is not limited to, an update of activities based on actual durations, all new activities, and any changes in duration or start or finish dates of any activity.

The Contractor shall submit with every update, in report form acceptable to the Engineer, a list of changes to the progress schedule since the previous schedule submittal. The Engineer may change the frequency of the submittal requirements but may not require a submittal of the schedule to be more than once a week. The Engineer may decrease the frequency of the submittal of the bi-weekly schedule.

The Contractor shall submit updates of the anticipated work completion graph, equipment listing, manpower requirement graph, or method statement when requested by the Engineer. The Contractor shall submit such updates within 4 calendar days from the date of the request by the Engineer.

The Engineer may withhold progress payments until the Contractor is in compliance with all schedule update requirements.

(f) Float. All float appearing on a schedule is a shared commodity. Float does not belong to or exist for the exclusive use or benefit of either the State or the Contractor. The State or the Contractor has the opportunity to use available float until it is depleted. Float has no monetary value.

(g) Scheduled Meetings. The Contractor shall meet with the Engineer to review the progress schedule on a periodic basis as determined by the Engineer. The Contractor shall have someone attending the meeting that can answer all questions on the TSLD and other schedule related submittals.

(h) Accelerated Schedule; Early Completion. If the Contractor submits an accelerated schedule (shorter than the contract time), the Engineer's review and acceptance of an accelerated schedule does not constitute an agreement or obligation by the State to modify the contract

time or completion date. The Contractor is solely responsible for and shall accept all risks and any delays, other than those that can be directly and solely attributable to the State, that may occur during the work until the contract completion date. The contract time or completion date is established for the benefit of the State and cannot be changed without an appropriate change order or final acceptance by the State. The State may accept the work before the completion date set by the contract but is not obligated to do so.

If the TSLD indicates an early completion of the project, the Contractor shall, upon submittal of the schedule, cooperate with the Engineer in explaining how it will be achieved. In addition, the Contractor shall submit the above explanation in writing which shall include the State's part, if any, in achieving the early completion date. Early completion of the project shall not rely on changes to the Contract Documents unless approved by the Engineer.

(i) Contractor Responsibilities. The Contractor shall promptly respond to any inquiries from the Engineer regarding any schedule submission. The Contractor shall adjust the schedule to address directives from the Engineer and shall resubmit the TSLD package to the Engineer until the Engineer finds it acceptable.

The Contractor shall perform the work in accordance with the submitted TSLD. The Engineer may require the Contractor to provide additional work forces and equipment to bring the progress of the work into conformance with the TSLD at no increase in contract price or contract time whenever the Engineer determines that the progress of the work does not insure completion within the specified contract time.

8.7 Weekly Meeting. In addition to the bi-weekly schedule meetings, the Contractor shall be available to meet once a week with the Engineer, at the time

and place as determined by the Engineer, to discuss the work and its progress including, but not limited to, the progress of the project, potential problems, coordination of work, submittals, erosion control reports, etc. The Contractor's personnel attending shall have the authority to make decisions and answer questions.

The Contractor shall bring to weekly meetings a detailed work schedule showing the next three weeks' work. The number of copies of the detailed work schedule to be submitted will be determined by the Engineer. The three-week schedule is in addition to the TSLD and shall in no way be considered as a substitute for the TSLD or vice versa. The three-week schedule shall show:

(a) All construction events, traffic control, and BMP related activities in such detail that the Engineer will be able to determine at what location and type of work will be done for any day for the next three weeks. This is for the State to use to plan its manpower requirements for that time period.

(b) The duration of all events and delays.

(c) The critical path clearly marked in red or marked in a manner that makes it clearly distinguishable from other paths and is acceptable to the Engineer.

(d) Critical submittals and requests for information (RFI's).

(e) The project title, project number, date created, period the schedule covers, Contractor's name, and creator of the schedule on each page.

Two days prior to each weekly meeting, the Contractor shall submit a list of outstanding submittals, RFIs, and issues that require discussion.

8.8 Liquidated Damages for Failure to Complete the Work or Portions of the Work on Time. The actual amount of damages resulting from the Contractor's failure to complete the contract in a timely manner is difficult to accurately determine. Therefore, the amount of such damages shall be liquidated damages as set forth herein and in the Special Provisions, Invitation for Bid, or Request for Proposal. The State may, at its discretion, deduct the amount from monies due or that may become due under the contract.

When the Contractor fails to reach substantial completion of the work for which liquidated damages are specified, within the time or times fixed in the contract or any extension thereof, in addition to all other remedies for breach that may be available to the State, the Contractor shall pay liquidated damages to the State, in the amount specified in the contract documents.

If a contract time extension is granted for part but not all of the project, the Engineer may make a reasonable apportionment of the liquidated damages amount among the different completion dates.

(a) Liquidated Damages Upon Termination. If the State terminates on account of Contractor's default, liquidated damages may be charged against the defaulting Contractor and its surety until substantial completion of work.

(b) Liquidated Damages for Failure to Complete the Punchlist. The Contractor shall complete the work on any punchlist created after substantial completion within the contract time or any extension thereof.

When the Contractor fails to complete the work on such punchlist within the contract time or any extension thereof, the Contractor shall pay liquidated damages to the State of 20 percent of the amount of liquidated damages established for failure to substantially complete the work within

the contract time. Liquidated damages shall not be assessed for the period between:

(1) Substantial completion of the work and the time the punchlist is delivered to the Contractor,

(2) The date of the completion of punchlist as determined by the Engineer and the date of the successful final inspection, and

(3) The date of the inspection that results in final acceptance and the receipt by the Contractor of the written notice of the final acceptance.

(c) Actual Damages Recoverable If Liquidated Damages Deemed Unenforceable. In the event a court of competent jurisdiction holds that any liquidated damages assessed pursuant to this contract are unenforceable, the State will be entitled to recover its actual damages for Contractor's failure to complete the work or any designated portion of the work within the time set by the contract.

8.9 Fines and Other Penalties. In addition to any compensatory remedies available to the State arising out of the Contractor's failure to complete the work by the contract completion date including, but not limited to, liquidated damages, the Contractor shall reimburse the State for any fines, penalties, citations, or fees levied by a third party against the State arising from the late completion of the work.

8.10 Suspension of Work.

(a) Suspension of Work. The Engineer may, by written order, suspend the performance of the work, either in whole or in part, for such periods as the Engineer may deem necessary. Unless instructed

otherwise by the Engineer, the Contractor shall be responsible for the maintenance and protection of the work during the period of suspension. Suspension may be ordered for any cause, including, but not limited to:

(1) Unanticipated weather or soil conditions considered unsuitable for prosecution of the work.

(2) Whenever a redesign that may affect the work is deemed necessary by the Engineer.

(3) Unacceptable noise or dust arising from the construction, even if it does not violate any law, regulation, or permit.

(4) Failure on the part of the Contractor to:

(A) Correct conditions unsafe for the general public or for the workers.

(B) Carry out orders given by the Engineer.

(C) Perform the work in strict compliance with the provisions of the contract.

(D) Provide adequate supervision on the jobsite.

(5) The convenience of the State.

(b) Partial and Total Suspension. Suspension of work on some but not all items of work shall be considered a “partial suspension”. Suspension of work on all items shall be considered “total suspension”. The period of suspension shall be computed from the date set out in the

written order for work to cease until the date of the order for work to resume.

(c) Reimbursement to Contractor. In the event that the Contractor is ordered by the Engineer, in writing as provided herein, to suspend work under the contract for the reasons specified in Subsections 8.10(a)(1), 8.10(a)(2), 8.10(a)(3) or 8.10(a)(5) of the "Suspension of Work" paragraph, the Contractor may be reimbursed for actual direct costs incurred on work at the jobsite, as authorized in writing by the Engineer, including costs expended for the maintenance and protection of the work. An allowance of 5 percent for indirect categories of delay costs will be paid on any reimbursed direct costs, including extended branch and home-office overhead and delay impact costs. No allowance will be made for anticipated profits. Payment for equipment which is ordered to standby during such suspension of work shall be made as described in Subsection 9.6(h) Idle and Standby Equipment.

(d) Cost Adjustment. If the performance of all or part of the work is suspended for reasons beyond the control of the Contractor, an adjustment shall be made for any increase in cost of performance of this contract (excluding profit) necessarily caused by such suspension, and the contract modified in writing accordingly.

However, no adjustment to the contract price shall be made for any suspension, delay, or interruption:

(1) For weather related conditions;

(2) To the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor; or

(3) For which an adjustment is provided for or excluded under any other provision of this Contract.

(e) Claims for Adjustment. Any adjustment in contract price made shall be determined in accordance with Sections 4.2 Changes and 4.6 Methods of Price Adjustment.

Any claims for such compensation shall be filed in writing with the Engineer within 30 days after the date of the order to resume work or the claim will not be considered. The claim shall conform to the requirements of Subsection 7.16(d) Making of a Claim. The Engineer will take the claim under consideration, may make such investigations as are deemed necessary, and will be the sole judge as to the equitability of the claim. The Engineer's decision will be final.

(f) No Adjustment. No provision of this clause shall entitle the Contractor to any adjustments for delays due to failure of its surety, the cancellation or expiration of any insurance coverage required by the contract documents, for suspensions made at the request of the Contractor, for any delay required under the contract, or for suspensions, either partial or whole, made by the Engineer under Subsection 8.10(a)(4) of the "Suspension of Work" paragraph.

8.11 Termination of Contract for Cause.

(a) Default. If the Contractor refuses or fails to perform the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in this contract, or any extension thereof, or commits any other material breach of this contract, and further fails within seven days after receipt of written notice from the Engineer to commence and continue correction of the refusal or failure with diligence and promptness, the Engineer may, by written notice to the Contractor,

declare the Contractor in breach and terminate the Contractor's right to proceed with the work or the part of the work as to which there has been delay or other breach of contract. In such event, the State may take over the work, perform the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, the materials, appliances, and plants as may be on the site of the work and necessary therefore. Whether or not the Contractor's right to proceed with the work is terminated, the Contractor and the Contractor's sureties shall be liable for any damage to the State resulting from the Contractor's refusal or failure to complete the work within the specified time.

(b) Additional Rights and Remedies. The rights and remedies of the State provided in this contract are in addition to any other rights and remedies provided by law.

(c) Costs and Charges. All costs and charges incurred by the State, together with the cost of completing the work under contract, will be deducted from any monies due or which would or might have become due to the Contractor had it been allowed to complete the work under the contract. If such expense exceeds the sum which would have been payable under the contract, then the Contractor and the surety shall be liable and shall pay the State the amount of the excess.

In case of termination, the Engineer will limit any payment to the Contractor to the part of the contract satisfactorily completed at the time of termination. Payment will not be made until the work has satisfactorily been completed and all required documents, including the tax clearance required by Section 9.11 Final Payment, are submitted by the Contractor. Termination shall not relieve the Contractor or Surety from liability for liquidated damages.

(d) Erroneous Termination for Cause. If, after notice of termination of the Contractor's right to proceed under this section, it is determined for any reason that good cause did not exist to allow the State to terminate as provided herein, the rights and obligations of the parties shall be the same as and the relief afforded the Contractor shall be limited to the provisions contained in Section 8.12 Termination for Convenience.

8.12 Termination For Convenience.

(a) Terminations. The Director may, when the interests of the State so require, terminate this contract in whole or in part, for the convenience of the State. The Director will give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.

(b) Contractor's Obligations. The Contractor shall incur no further obligations in connection with the terminated work, and on the date set in the notice of termination, the Contractor shall stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work subject to the State's approval. The Engineer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the State. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as necessary to do so.

(c) Right to Construction and Goods. The Engineer may require the Contractor to transfer title and to deliver to the State in the manner and to the extent directed by the Engineer, the following:

(1) Any completed work.

(2) Any partially completed construction, goods, materials, parts, tools, dies, jigs, fixtures, drawings, information, and contract rights (hereinafter called "construction material") that the Contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

(3) The Contractor shall protect and preserve all property in the possession of the Contractor in which the State has an interest. If the Engineer does not elect to retain any such property, the Contractor shall use its best efforts to sell such property and construction materials for the State's account in accordance with the standards of Chapter 490:2-706, H.R.S.

(d) Compensation.

(1) The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data, submitted to the extent required by Subchapter 15, Chapter 3-122, H.A.R. If the Contractor fails to file a termination claim within one year from the effective date of termination, the Engineer may pay the Contractor, if at all, an amount set in accordance with Subsection 8.12(d)(3).

(2) The Engineer and the Contractor may agree to a settlement provided the Contractor has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the State; the proceeds of any sales of construction, supplies, and construction materials

under Subsection 8.12(c)(3); and the proportionate contract price of the work not terminated.

(3) Absent complete agreement, the Engineer will pay the Contractor the following amounts less any payments previously made under the contract:

(A) The cost of all contract work performed prior to the effective date of the notice of termination plus a 5 percent markup on the actual direct costs, including amounts paid to subcontractor, less amounts paid or to be paid for completed portions of such work. However, if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no markup shall be allowed or included, and the amount of compensation shall be reduced to reflect the anticipated rate of loss. No anticipated profit or consequential damage will be due or paid.

(B) Subcontractors shall be paid a markup of 10 percent on their direct job costs incurred to the date of termination. No anticipated profit or consequential damage will be due or paid to any subcontractor. These costs must not include payments made to the Contractor for subcontract work during the contract period.

(C) The total sum to be paid the Contractor shall not exceed the total contract price reduced by the amount of any sales of construction supplies and construction materials.

(4) Cost claimed, agreed to, or established by the State shall be in accordance with Chapter 3-123, H.A.R.

8.13 Pre-Final and Final Inspections.

The procedures described herein shall apply for the entire project if there is a single completion date or to each part of the project for which there is a separate completion date. When there are two or more separate completion dates, "project" as used herein shall refer to each part of the work for which there is a separate completion date. Inspection and acceptance procedures shall be applied as described herein for each part of the project for which there is a separate completion date.

(a) Inspection Requirements. Before the Engineer undertakes a final inspection of any work, a pre-final inspection must first be conducted. The Contractor shall notify the Engineer that the work has reached substantial completion and is ready for pre-final inspection.

(b) Pre-Final Inspection. Before notifying the Engineer that the work has reached substantial completion, the Contractor shall inspect the project and test all installed items with all of its subcontractors as appropriate. The Contractor shall also submit the following documents as applicable to the work:

(1) All written guarantees required by the contract.

(2) Complete weekly certified payroll records for the Contractor and Subcontractors.

(3) Certificate of Plumbing and Electrical Inspection.

(4) Certificate of Building Occupancy.

(5) Certificate of Soil and Wood Treatments.

(6) Certificate of Water System Chlorination.

(7) Certificate of Elevator Inspection and Boiler and Pressure Pipe Inspection.

(8) Maintenance Service Contract and two copies of a list of all equipment installed.

(9) Any other final items and submittals required by the contract documents.

(c) Procedure. When in compliance with the above requirements, the Contractor shall notify the Engineer in writing that the project has reached substantial completion and is ready for pre-final inspection.

The Engineer will then make a preliminary determination as to whether or not the project is substantially complete and ready for pre-final inspection. The Engineer may, in writing, postpone until after the pre-final inspection the Contractor's submittal of any of the items listed in Subsection 8.13(b) Pre-Final Inspection, herein, if in the Engineer's discretion it is in the interest of the State to do so.

If, in the opinion of the Engineer, the project is not substantially complete, the Engineer will provide the Contractor a punchlist of specific deficiencies in writing which must be corrected or finished before the work will be ready for a pre-final inspection. The Engineer may add to or otherwise modify this punchlist from time to time. The Contractor shall take immediate action to correct the deficiencies and must repeat all steps described above, including written notification that the work is ready for pre-final inspection.

After the Engineer is satisfied that the project appears substantially complete, a final inspection shall be scheduled within ten working days after receipt of the Contractor's latest letter of notification that the project is ready for final inspection.

If, as a result of the pre-final inspection, the Engineer determines the work is not substantially complete, the Engineer will inform the Contractor in writing as to specific deficiencies which must be corrected before the work will be ready for another pre-final inspection. If the Engineer finds the work is substantially complete but finds deficiencies that must be corrected before the work is ready for final inspection, the Engineer will prepare, in writing, and deliver to the Contractor a punchlist describing such deficiencies.

At any time before final acceptance, the Engineer may revoke the determination of substantial completion if the Engineer finds that it was not warranted and will notify the Contractor in writing the reasons therefore together with a description of the deficiencies negating the declaration.

When the date of substantial completion has been determined by the State, liquidated damages for the failure to complete the punchlist, if due to the State, will be assessed pursuant to Subsection 8.8(b) Liquidated Damages for Failure to Complete the Punchlist.

(d) Punchlist; Clean Up and Final Inspection. Upon receiving a punchlist after substantial completion, the Contractor shall promptly devote all required time, labor, equipment, materials, and incidentals to correct and remedy all punchlist deficiencies. The Engineer may add to or otherwise modify this punchlist until final acceptance of the project.

Before final inspection of the work, the Contractor shall clean all ground, occupied by the Contractor in connection with the work, of all

rubbish, excess materials, temporary structures, and equipment; shall remove all graffiti and defacement of the work; and shall restore all property and facilities that may have been damaged or affected during the course of the work to the original condition, unless otherwise directed by the Engineer. The worksite shall be left in a neat and presentable condition to the satisfaction of the Engineer.

Final inspection will occur within ten working days after the Contractor notifies the Engineer in writing that all punchlist deficiencies remaining after the pre-final inspection have been completed and the Engineer concurs. If the Engineer determines that deficiencies still remain at the final inspection, the work will not be accepted, and the Engineer will notify the Contractor, in writing, of the deficiencies which shall be corrected and the steps above repeated.

If the Contractor fails to correct the deficiencies and complete the work by the established or agreed date, the State may correct the deficiencies by whatever method it deems appropriate and deduct the cost from any payments due the Contractor.

8.14 Final Acceptance.

The procedures described herein shall apply for the entire project if there is a single completion date or to each part of the project for which there is a separate completion date. When there are two or more separate completion dates, “project” as used herein shall refer to each part of the work for which there is a separate completion date. Inspection and acceptance procedures shall be applied as described herein for each part of the project for which there is a separate completion date.

When the Engineer finds that the project has been satisfactorily completed in compliance with the contract, the Engineer will notify the Contractor in writing

of the project's completion and acceptance. The final acceptance date shall determine end of contract time, liquidated damages for failure to complete the punchlist, and commencement of all guaranty periods subject to Section 8.16 Contractor's Responsibility for Work; Risk of Loss or Damage.

8.15 Use of Structure or Improvement. The State has the right to use the structure, equipment, improvement, or any part thereof, at any time after it is considered by the Engineer as available, whether or not substantial completion has been reached. In the event that the structure, equipment, or any part thereof is used by the State before final acceptance, the Contractor is not relieved of its responsibility to protect and preserve all the work until final acceptance.

8.16 Contractor's Responsibility for Work; Risk of Loss or Damage. Until the written notice of final acceptance has been received, the Contractor shall take every precaution against loss or damage to any part of the work from any cause whatsoever, whether arising from the performance or from the non-performance of the work. The Contractor shall rebuild, repair, restore, and make good all loss or damage to any portion of the work resulting from any cause before its receipt of the written notice of final acceptance and shall bear the risk and expense thereof.

The risk of loss or damage to the work from any hazard or occurrence that may or may not be covered by a builder's risk policy is that of the Contractor and Surety, unless such risk of loss is placed elsewhere by express language in the contract documents.

8.17 Guarantee of Work.

(1) Regardless of, and in addition to, any manufacturers' warranties, all work and equipment shall be guaranteed by the Contractor against defects in materials, equipment, or workmanship for one year from the

date of final acceptance or as otherwise specified in the contract documents.

(2) When the Engineer determines that repairs or replacements of any guaranteed work and equipment is necessary due to materials, equipment, or workmanship which are inferior, defective, or not in accordance with the terms of the contract, the Contractor shall, at no increase in contract price or contract time, and within five working days of receipt of written notice from the State, commence to do all of the following:

(A) Correct all noted defects and make replacements, as directed by the Engineer, in the equipment and work.

(B) Repair or replace to new or pre-existing condition any damages resulting from such defective materials and equipment or installation thereof.

(3) The State will be entitled to the benefit of all manufacturers' and installers' warranties that extend beyond the terms of the Contractor's guaranty regardless of whether or not such extended warranty is required by the contract documents. The Contractor shall prepare and submit all documents required by the providers of such warranties to make them effective and submit copies of such documents to the Engineer. If an available extended warranty cannot be transferred or assigned to the State as the ultimate user, the Contractor shall notify the Engineer who may direct that the warranted items be acquired in the name of the State as purchaser.

(4) If a defect is discovered during a guarantee period, all repairs and corrections to the defective items when corrected shall be guaranteed for a new duration equal to the original full guarantee period. The running of

the guarantee period shall be suspended for all other work affected by any defect. The guarantee period for all other work affected by any such defect shall restart for its remaining duration upon confirmation by the Engineer that the deficiencies have been repaired or remedied.

(5) Nothing in this section is intended to limit or affect the State's rights and remedies arising from the discovery of latent defects in the work after the expiration of any guarantee period.

8.18 No Waiver of Contract Obligations. None of the provisions of this contract shall be considered waived by the State unless such waiver is given in writing by the State. No such waiver shall be a waiver of any past or future default, breach or modification of any of the terms, provisions, conditions, or covenants of the contract unless expressly stipulated in such waiver.

The following will not operate or be considered as a waiver of any portion of the contract, or any power herein reserved, or any right to damages provided herein or by law:

(1) Any payment for, or acceptance of, the whole or any part of the work.

(2) Any extension of time.

(3) Any possession taken by the Engineer.

A waiver of any notice requirement or of any noncompliance with the contract will not be held to be a waiver of any other notice requirement or any other noncompliance with the contract.

8.19 Final Settlement of Contract.

(a) Closing Requirements. The contract will be considered settled after the project acceptance date or, after the last acceptance date if there is more than one acceptance date for different portions of the project, and when the following items have been satisfactorily submitted, where applicable:

(1) Two accepted final as-built drawings as specified in Subsection 5.8(a) Drawings and Special Provisions.

(2) All written guarantees required by the contract.

(3) Complete and certified weekly payrolls for the Contractor and its subcontractors.

(4) Certificate of plumbing and electrical inspection.

(5) Certificate of building occupancy.

(6) Certificate for soil treatment and wood treatment.

(7) Certificate of water system chlorination.

(8) Certificate of elevator inspection and boiler and pressure pipe installation.

(9) Certificates of Compliance for employment of State of Hawaii residents by Contractor and applicable subcontractors per Section 7.2 Employment of State of Hawaii Residents.

(10) Tax clearance.

(11) All other documents required by the Contract or by law.

(b) Failure to Meet Closing Requirements. The Contractor shall meet the applicable closing requirements within 60 days from the date of Project Acceptance or the agreed to Punchlist complete date. Should the Contractor fail to comply with these requirements, the Engineer may terminate the contract for cause.

END OF ARTICLE VIII