

1 **ARTICLE IX - MEASUREMENT AND PAYMENT**

2

3 **9.1 Schedule of Values.** After the award of contract, the Contractor shall  
4 submit a schedule of prices (Schedule of Values) for each of the various items of  
5 work paid for by a lump sum price. For projects involving more than a single  
6 building, structure, or facility, the breakdown cost shall reflect a separate  
7 schedule of prices for the various items of work for each building, structure, and  
8 facility. The sum of the prices submitted for the various items must equal the  
9 lump sum bid in the bidder's proposal. This schedule of values will be subject to  
10 acceptance by the Engineer who may require the bidder to submit another or  
11 several other schedules if, in the Engineer's opinion, the prices are unbalanced  
12 or not sufficiently detailed. The Engineer is not bound by any cost proposal  
13 schedule in the bid documents in determining if the schedule of values is  
14 sufficiently detailed or balanced; the accepted schedule of values shall  
15 supersede any bid proposal schedule. This schedule of values **(1)** shall be used  
16 for the purpose of determining the value of monthly payments due the Contractor  
17 for work installed complete in place and **(2)** may be used as the basis for  
18 determining cost and credit of added or deleted items of work, respectively.

19

20 As a condition of payment, the Contractor shall estimate, at the close of  
21 each month, the percentage of work completed under each of the various  
22 construction items during such month and submit the estimate to the Engineer for  
23 review and approval. The Contractor shall be paid the percentage of the price,  
24 as approved by the Engineer, established for each item less any permissible  
25 retention.

26

27 **9.2 Payment is not Acceptance.** No payment made to the Contractor prior  
28 to final acceptance is an acceptance by the State of the work or the portion of the  
29 work related to the payment; nor does a progress payment affect the State's  
30 rights to inspect, test, or reject the work. A progress payment does not relieve  
31 the Contractor of the risk of loss or damage to the work for which payment is  
32 made. The Contractor still maintains the responsibility and duty with respect to

33 the work for which payment is made, to protect against loss or damage, to insure  
34 the work, to insure and indemnify the State against claims, to maintain the  
35 required surety bonds, and to protect the work and the public.

36

### 37 **9.3 Measurement of Quantities.**

38

39 **(a) Measurements; Disputes.** The work will be measured in  
40 accordance with United States standard measure or as otherwise stated in  
41 this contract. Final measurement shall be verified or determined by the  
42 Engineer. If the Contractor has a dispute about the measurement of the  
43 work, the Contractor must demonstrate the existence of an error by actual  
44 physical measurement before the work has progressed in a manner that  
45 would make a proper verification of the contested measurements  
46 impractical. If the Contractor's claim cannot be physically verified, the  
47 Engineer's measurements will be deemed as correct.

48

49 **(b) Methodology.** Longitudinal measurements for area  
50 computations of the various surfaces will be made in the horizontal  
51 projection of the actual surface. Transverse measurements for area  
52 computations will be the neat dimensions shown in the contract  
53 documents or the horizontal projection of the actual surface or as ordered  
54 in writing by the Engineer. No deductions in measurement for unit price  
55 payment purposes will be made for fixtures or structures in place having a  
56 combined area of nine square feet or less.

57

58 Work will be measured to the pay limits shown in the contract documents.

59

60 Measurement of items that are measured by the linear foot will be  
61 made parallel to the base or foundation.

62

63 Every vehicle hauling material specified for measurement and  
64 payment by "loose measurement" or "measurement by vehicle" shall be

65 made available to the Engineer for verification of its load volume or  
66 capacity. A vehicle's full load shall be its water level capacity. The  
67 Engineer may direct that any load in a vehicle be leveled for purposes of  
68 measurement or payment.

69

70 The Contractor shall notify the Engineer 24 hours before hauling  
71 material payment for which is based upon weight. Unless otherwise  
72 directed by the Engineer, the truck used to haul material paid by weight  
73 shall be weighed with no load on a properly certified scale before each  
74 load is added.

75

76 The following items will not be paid for and such quantities will be  
77 deducted from the final total measured quantities:

78

79 **(1)** Quantities of material wasted or disposed of in a manner not  
80 called for under the contract;

81

82 **(2)** Rejected material, including material rejected after it has  
83 been placed by reason of the failure to conform to the provisions of  
84 the contract;

85

86 **(3)** Material not unloaded from the transporting vehicle;

87

88 **(4)** Material placed outside of the lines indicated on the plans or  
89 given by the Engineer; or

90

91 **(5)** Material remaining on hand after completion of the work.

92

93 No compensation will be allowed for hauling any above-described  
94 material to or from the site.

95

96           **(c) Standards and Definitions.**           When identifying standard  
97           manufactured items by gage, unit weight, or section dimensions, such  
98           identification will be nominal weights or dimensions. Standard  
99           manufactured items shall be such items as fence, wire, plates, rolled  
100           shapes, and pipe conduit. Unless specific allowable tolerances are set by  
101           the contract documents, tolerances generally accepted or established by  
102           the industries involved in the manufacture of the product are acceptable.

103

104                       A station, when used as a definition or term of measurement, is 100  
105           linear feet.

106

107                       The term "gage" refers to the U. S. steel wire gage or U.S standard  
108           gage for uncoated hot and cold rolled sheets.

109

110                       The term "ton" will mean the short ton of 2,000 pounds avoirdupois  
111           weight. The Contractor shall weigh materials measured or proportioned  
112           by weight on properly certified scales.

113

114           **9.4 Full Compensation; Changes.**           The contract price is full compensation  
115           for the work.

116

117                       Change order work as described in Section 4.5 Contract Change Orders,  
118           shall be paid for in the manner established by the related change order.

119

120                       The total price adjustment as specified in the field order or the change  
121           order shall be considered full compensation for all materials, labor, insurance,  
122           bonds, fees, taxes, equipment use or rental, profit and all overhead, and any  
123           delay impact costs.

124

125           **9.5 Allowances for Overhead and Profit.**           In determining the cost or credit  
126           to the State resulting from a change, the allowances for all overhead, including  
127           extended overhead resulting from adjustments to contract time (including home

128 office, branch office, and field overhead and related delay impact costs) and  
129 profit combined, shall not exceed the percentages set forth below:

130

131           **(1)**     20 percent of the direct cost for any work performed by the  
132           Contractor's own labor force.

133

134           **(2)**     20 percent of the direct cost for any work performed by each  
135           subcontractor's own labor force.

136

137           **(3)**     For the Contractor or any subcontractor for work performed  
138           by their respective subcontractor or tier subcontractor, 10 percent  
139           of the amount due to the performing subcontractor or tier  
140           subcontractor.

141

142           **(a) Allowance Percentages.**     The allowance percentages will be  
143           applied to all credits and to the net increase of direct costs where work is  
144           added and deleted by the changes.

145

146           **(b) Allowed Markup.**     Not more than three markup allowance line  
147           item additions not exceeding the maximum percentage noted in  
148           Subsections 9.5(1), 9.5(2), and 9.5(3) are allowed for profit and overhead,  
149           regardless of the number of tier subcontractors.

150

151 **9.6 Force Account Provisions and Compensation.**     The contract  
152 documents may provide that certain work be compensated by force account  
153 method, or the Contractor may be directed to provide changes compensable  
154 under the price adjustment provision Subsection 4.6(a)(5). When performing  
155 force account work, the Contractor and its subcontractor(s) shall comply with the  
156 provisions of this section. Compensation by force account will not alter any  
157 rights, duties, and obligations under the contract. The Contractor shall follow  
158 these procedures:

159

160           **(a) The Contractor's Duties; Engineer's Authority.**           The  
161 Contractor has the duty to perform the work payable under this provision  
162 efficiently and economically. When the Engineer determines the  
163 Contractor is working inefficiently or uneconomically, the Engineer may  
164 direct the Contractor to stop, modify its means and methods, or the  
165 Engineer may specifically direct means and methods of doing the force  
166 account work. The Engineer will not pay for work that is unacceptable or  
167 for the cost of correcting work that fails to conform to contract  
168 requirements.

169  
170           **(b) Records.**    The Contractor shall maintain accurate daily records of  
171 all allowable costs. The records, as well as all work and costs, are subject  
172 to review, audit, and approval by the Engineer.

173  
174           The Contractor shall use the State's Force Account Form and  
175 obtain the Inspector's signature thereon each day the Contractor performs  
176 force account work. As the condition of payment of the force account  
177 work, the Contractor shall submit an original and two copies of the force  
178 account records, together with invoices, receipts, and other backup data to  
179 the Engineer.

180  
181           **(c) Allowable Costs.**    Allowable costs include labor, equipment and  
182 machinery, trucks, insurance, taxes and bonds, overhead, profit, and  
183 reimbursable expenses all as described herein. Other costs or items not  
184 covered under this section are subject to the Engineer's written approval.

185  
186           **(d) Labor.**    Allowable costs include Contractor and subcontractor(s)  
187 costs for hourly worker wages, and fringe benefits required by  
188 employment contracts, plus overhead and profit markup. The Contractor  
189 shall provide the information on the force account form regarding each  
190 worker and supervisor.

191

192 Overtime compensation, per diem costs, and other reimbursable  
193 costs are not allowed unless approved in writing by the Engineer prior to  
194 incurring the expense. Overhead and profit markup will not be allowed for  
195 such costs. Costs and time for employees to travel to and from the project  
196 site are not allowed unless approved in writing by the Engineer prior to  
197 performing the work.

198

199 **(e) Materials.** Contractor and subcontractor(s) are allowed the  
200 actual cost of materials (excluding financing costs) delivered and  
201 incorporated into the work plus overhead and markup. The Contractor  
202 shall provide descriptions and quantities of materials, prices, and  
203 extensions and costs to transport materials if not included in the prices of  
204 the materials. The Contractor shall provide legible receipts and invoices  
205 for all materials used and transportation charges. The Contractor shall  
206 promptly inform the Engineer of any early payment discounts that are  
207 available, as well as scheduled or anticipated price increases.

208

209 If materials used are not specifically purchased for the force  
210 account work but are taken from the Contractor's stock, then in lieu of the  
211 invoices, the Contractor shall certify that the materials were taken from  
212 stock and that the amount claimed represents the actual cost to the  
213 Contractor.

214

215 **(f) Equipment and Machinery.** For equipment and machinery  
216 necessary and actually used (other than small tools defined under  
217 Subsection 9.6(i) Small Tools) that are owned or leased or rented, the  
218 Contractor is allowed costs for use of equipment or machinery at a per  
219 hour rate.

220

221 Hourly rates shall include costs for fuel, oil, lubricants, supplies,  
222 necessary attachments, repairs, maintenance, tire wear, depreciation,  
223 storage, and other incidentals. The allowable hourly rates shall be the

224 Contractor's actual customary charges, e.g., shop rates, yard rates, or  
225 rental cost as verified by Contractor's records or invoices, provided that  
226 the maximum rate shall not exceed the current rates published in the Blue  
227 Book, effective at the time of equipment use. Blue Book hourly rates are  
228 calculated based upon the following formula:

229

230 Hourly Rates = [(Blue Book Monthly Rate ÷ 176) X (Regional  
231 Adjustment Factor) X (Rate Adjustment Table Factor)] + Hourly  
232 Operating Cost

233

234 Equipment and machinery costs are not subject to any additional  
235 overhead and profit markup.

236

237 Equipment and machinery shall be in good condition and suitable  
238 for the purpose for which the equipment and machinery are to be used.

239

240 For equipment and machinery that is not listed in the Blue Book,  
241 the Contractor shall obtain the Engineer's written approval of the monthly  
242 and hourly rates prior to using the equipment or machinery. If there is no  
243 agreement on the rates, the Engineer will set the rate. Engineer may,  
244 prior to the use of rental equipment, approve in writing rates that are  
245 higher than the published rates, if justified by special circumstance.

246

247 **(g) Equipment Charges.** The rental period for equipment and  
248 machinery brought to the work site, specifically for the force account work,  
249 begins when the equipment or machinery reaches the work site, continues  
250 each day the equipment or machinery is at the site, and terminates at the  
251 end of the day when the equipment or machinery is no longer needed for  
252 the force account work or when the equipment or machinery leaves the  
253 project site, whichever comes first.

254



255 Rental times for all other equipment and machinery used for force  
256 account are paid for the time actually used. Prior to the performance of  
257 work, the Engineer must approve any hours of operation in excess of 8  
258 hours in any one day. No additional premium beyond the normal rates  
259 used will be paid for equipment or machinery over 8 hours per day or 40  
260 hours per week.

261

262 The total of all force account rental charges minus the operating  
263 cost accrued over the duration of the contract for a specific item of  
264 equipment or machinery (same make, model, or kind of equipment or  
265 machinery doing the same kind of force account work) shall not exceed  
266 the replacement cost of that equipment. The Contractor shall provide the  
267 cost of replacement to the Engineer prior to using the equipment or  
268 machinery. If the Engineer does not agree with the replacement cost  
269 provided by the Contractor or if the Contractor does not provide the  
270 replacement cost, the Engineer shall set the replacement cost. The  
271 Contractor may contest the replacement cost set by the Engineer in  
272 accordance with Section 7.16 Disputes and Claims. The Engineer will pay  
273 only the hourly operating cost should the replacement cost be reached.  
274 This provision shall not apply to the accrued rental charges for barricades  
275 and other traffic control devices.

276

277 Rental times are not allowed or credited for any time during which  
278 equipment or machinery is inoperative due to its breakdown.

279

280 **(h) Idle and Standby Equipment.** In the event the equipment or  
281 machinery must standby due to work being delayed or halted by reasons  
282 beyond the Contractor's control, the rental rate shall be: Standby/Idle  
283 Hourly Rental Rates = [(Blue Book Monthly Rate ÷ 176) X (Regional  
284 Adjustment Factor) X (Rate Adjustment Table Factor)] X 0.50 or the  
285 Contractor's shop rates or yard rates, whichever is lower. The Engineer  
286 may order the demobilization of standby/idle equipment or may direct that

287 equipment that was located at the jobsite at the start of the force account  
288 work cease to be used for force account work.

289

290 Payment will be made only when:

291

292 **(1)** The Contractor has notified the Engineer in writing at the  
293 beginning of the standby/idle period that compensation is expected  
294 for the individual piece of equipment or machinery.

295

296 **(2)** The Contractor submits to the Engineer on each Monday a  
297 list of the equipment or machinery that was idle the past week.  
298 This list shall have all information necessary to determine the  
299 hourly rental rate and the date and time it became idle and the  
300 reason for the equipment or machinery being idle. The list shall  
301 also have the date and time when any maintenance was performed  
302 on the equipment or machinery during the period the equipment  
303 was idle.

304

305 With the written approval of the Engineer, the Contractor may store  
306 the idle equipment or machinery on the project site for its own  
307 convenience at no increase in contract price or contract time.

308

309 **(i) Small Tools.** Contractor and subcontractor(s) are not allowed  
310 costs for depreciation or use of small tools, even if the small tools are  
311 consumed by use. Small tools are individual pieces of equipment, tools,  
312 or other items having a purchase price for that new item or equivalent  
313 replacement value of \$500.

314

315 **(j) Trucks and Utility Items.** The Contractor's cost for utility  
316 vehicles and other items such as pickup trucks, vans, flatbed trucks,  
317 storage trailers, containers, etc. that are already in use or planned for use  
318 on the entire project will not be allowed except for the time that, in the

319 opinion of the Engineer, they: (1) are directly and necessarily used for the  
320 performance of the force account work; and (2) the use of such items has  
321 not been included within the Contractor's total project overhead costs.

322

323 Allowable rental rates for trucks not owned or leased by the  
324 Contractor shall not exceed the listed rates in the Blue Book or those  
325 established under the Hawaii State Public Utilities Commission, whichever  
326 is less.

327

328 The Contractor shall provide points of origin, destinations, mileage,  
329 and hourly rates for each travel segment.

330

331 Payment for use of trucks shall be in accordance with the  
332 provisions of Subsection 9.6(f) Equipment and Machinery.

333

334 **(k) Transportation, Mobilization, and Demobilization.** The  
335 Contractor shall obtain the Engineer's approval of the location from which  
336 the equipment or machinery will be moved or transported.

337

338 Where the equipment or machinery must be transported to the work  
339 site, the Contractor will be paid the reasonable costs to mobilize and  
340 demobilize, load and unload, and transport the equipment or machinery to  
341 and from its original location to the work site or, upon completion of the  
342 work, to another location, whichever cost is less.

343

344 The cost to transport the equipment or machinery shall not exceed  
345 the rates established by the Hawaii State Public Utilities Commission. If  
346 the rates are nonexistent, then the rates will be determined by the  
347 Engineer based upon the prevailing rates charged by established haulers  
348 within the locale.

349

350                   If the Contractor uses the equipment or machinery for other than  
351 force account work, the costs to mobilize and transport may be disallowed  
352 or prorated depending on the non-force account work.

353

354                   **(l) Subcontractors.**           Subcontractor's costs are allowed plus a  
355 markup limited under Section 9.5 Allowances for Overhead and Profit and  
356 applicable State excise tax. Costs for insurance and taxes shall comply  
357 with the provisions of Subsections 9.6(m) Insurance and Taxes.

358

359                   **(m) Insurance and Taxes.**       Contractor and subcontractor(s) are  
360 allowed actual additional costs attributable exclusively to the force account  
361 work for insurance premiums for property damage, liability and workers  
362 compensation insurance, State unemployment contributions, Federal  
363 unemployment taxes, Social Security and Medicare taxes, plus an  
364 allowable markup of 6 percent.

365

366                   **(n) Other Costs.**           Any other costs or items not covered under this  
367 Section 9.6 Force Account Provisions and Compensation are subject to  
368 the Engineer's written approval and conditions.

369

370                   **(o) Reimbursable Expenses.**   All costs are subject to Section 3-123,  
371 H.A.R., Cost Principles. Reimbursable expenses are subject to the  
372 Engineer's written approval and conditions. Overhead and profit markups  
373 are not permitted on reimbursable expenses.

374

375                   Costs incurred by the Contractor for air transportation and  
376 associated ground transportation and per diem or subsistence allowance  
377 costs (lodging and meals) are allowed as reimbursable expenses when  
378 the project conditions require special skilled workers not readily available  
379 on the island of the project site. Air transportation shall not exceed the  
380 actual cost of coach class airfare. Whenever possible, Contractor shall  
381 take advantage of advance purchase discount air fares. Ground

382 transportation shall not exceed the actual cost of renting a compact-sized  
383 vehicle. Rental vehicles shall be shared among Contractor's employees  
384 to the greatest extent possible. Insurance coverage is not a reimbursable  
385 expense.

386

387 Per diem or subsistence costs (lodging and meals) shall not exceed  
388 the applicable daily authorized rates for inter-island or out-of-state travel  
389 for State government employees. No per diem is allowed for leaving and  
390 returning the same day. The Contractor shall obtain prior written approval  
391 from the Engineer for other conditions.

392

393 **(p) State Excise Tax and Bond.** The Contractor will be reimbursed  
394 for State excise taxes paid or payable on the allowable force account  
395 work. The State shall pay increased premiums only on the bonds the  
396 Contract requires the Contractor to maintain for the work. No additional  
397 premium costs shall be paid for bonds not required by the Contract or for  
398 bonds acquired or maintained by any subcontractor.

399

400 The actual bond premium, not to exceed 1 percent is allowed on  
401 items covered by Subsections 9.6(d) Labor, 9.6(e) Materials, 9.6(f)  
402 Equipment and Machinery, 9.6(j) Trucks and Utility Items, 9.6(l)  
403 Subcontractors, 9.6(m) Insurance and Taxes, 9.6(n) Other Costs, and  
404 9.6(o) Reimbursable Expenses when applicable. When the original  
405 contract price includes a bond premium for an allowance item to be paid  
406 by force account, no additional bond premium for such allowance items  
407 will be paid until the allowance amount is exhausted.

408

409 **9.7 Assignment of Payments.** The Contractor may not assign its right to  
410 receive monies due under the contract without the written consent of the State  
411 and the surety.

412

413 **9.8 Progress Payments.**

414

415       **(a) Monthly Payment.**       The Contractor shall be paid progress  
416 payments monthly upon approval of a monthly payment estimate by the  
417 Engineer. The monthly payment estimate shall be based upon the value  
418 of the items of work that appear to be satisfactorily completed, including  
419 the value of materials incorporated in the work. Materials not yet  
420 incorporated in the work will be paid in accordance with Subsection 9.8(b)  
421 Payment for Material On Hand. Monthly payments will be approximate  
422 only and shall be subject to correction before or in the final payment.  
423 Monthly shall mean the period between the first day of the month to the  
424 last day of the month. The Engineer and the Contractor may agree on a  
425 different monthly period.

426

427               The Engineer may withhold all or any part of a monthly payment  
428 due to the Contractor, without interest accruing on account of:

429

430               **(1)**     The failure of the Contractor to meet a requirement of law or  
431 the contract that is a condition precedent of payment.

432

433               **(2)**     The exercise of any right granted the Engineer to withhold  
434 money due the Contractor established by law or the contract.

435

436               No monthly payment will be made if the total value of the work done  
437 since the last estimate is less than \$2,000.

438

439       **(b) Payment for Material On Hand.**     The Contractor will be paid the  
440 manufacturer's, supplier's, distributor's, or fabricator's invoice cost of  
441 materials not yet incorporated into the work on the following conditions:

442

443               **(1)**     If acceptance of submittals of such materials are required by  
444 the contract documents, the submittal processes have been

445 completed and the materials for which payment is requested  
446 conform to the accepted submittal.

447

448 **(2)** The materials shall be stored and handled in accordance  
449 with Section 5.14 Storage and Handling of Materials and  
450 Equipment.

451

452 **(3)** Payments shall be made only if:

453

454 **(A)** All materials are acceptable to the Engineer.

455

456 **(B)** Contractor provides legible documentary evidence  
457 that all materials for which payment is requested have been  
458 paid in full.

459

460 **(C)** The materials are insured for their full replacement  
461 value to the benefit of the State against theft, fire, damages  
462 incurred in transportation to the site, and other hazards.

463

464 **(D)** In case of materials stored off the project site, the  
465 materials are clearly marked and identified for the project  
466 and are not commingled with other materials not to be  
467 incorporated into the project.

468

469 The payment authorized in this subsection will not exceed the  
470 contract price of that item. Payment for the material under this subsection  
471 is not final acceptance of the material nor shall any such payment shift the  
472 risk of loss or damage from the Contractor to the State.

473

474 Payment for the material does not relieve the Contractor of its  
475 obligations to furnish material acceptable to the Engineer and to properly

476 incorporate the material into the project in accordance with the contract  
477 documents.

478  
479 The State will not make material payment on living or perishable  
480 plant material or any material that may deteriorate or is not insurable.

481

482 **9.9 Prompt Payment.**

483

484 **(a) Contractor's Duty.**

485

486 **(1)** When any subcontractor has met all the terms and  
487 conditions of the subcontract, and there are no bona fide disputes,  
488 the Contractor, upon receiving payment from the State for the work,  
489 shall make full payment to the subcontractor of all monies due  
490 within 10 days from the receipt of an invoice from the  
491 subcontractor. Upon final payment to the Contractor, full payment  
492 to the subcontractor shall include all retainage amounts due. This  
493 payment obligation applies to payments made to and payable to all  
494 tiers of subcontractors.

495

496 **(2) Bona Fide Disputes.** The existence of a bona fide  
497 dispute with a subcontractor or material supplier shall not release  
498 the Contractor of its prompt payment obligations as to all sums due  
499 that are not directly affected by such disputes.

500

501 The following are examples of 'bona fide disputes':

502

503 **(A)** When work done by a subcontractor is paid for and  
504 later found to be non-conforming or unacceptable and the  
505 amount previously paid by the State is deducted from the  
506 Contractor's subsequent payment request.

507



508                   **(B)** When the Contractor and subcontractor disagree as  
509 to whether the subcontractor has failed to promptly correct  
510 any deficiencies or non-conforming work.

511  
512                   **(C)** When the Contractor and subcontractor disagree as  
513 to whether the subcontractor has failed to fulfill any material  
514 term, condition, or requirement of its subcontract.

515  
516           **(b) Filing Of Non-Payment Complaint And Verification Of Its**  
517 **Validity.** Subcontractors and material suppliers may file, in writing, a  
518 complaint with the Engineer regarding non-payment by the Contractor.  
519 Such a complaint must state:

520  
521                   **(1)** The amount past due for work performed and already paid  
522 for by the State;

523  
524                   **(2)** The date the work was completed;

525  
526                   **(3)** The date payment was due from the Contractor;

527  
528                   **(4)** That all the terms, conditions, or requirements of its  
529 subcontract have been met; and

530  
531                   **(5)** That no bona fide dispute over its performance exists.

532  
533                   The Engineer will investigate, hear and receive evidence, and  
534 determine the validity of the complaint, and the Engineer's decision on the  
535 matter shall be final. It is not the Engineer's responsibility to determine  
536 how a bona fide dispute should be resolved.

537  
538           **(c) Follow-Up Action.** If the Engineer determines that the  
539 Contractor failed to make prompt payment required under the subcontract

540 or these contract documents to a subcontractor or material supplier with  
541 whom the Contractor has no bona fide dispute within the time period  
542 specified above, the Engineer shall inform the Contractor of the findings  
543 and direct the Contractor to make payment accordingly.  
544

545 If the Contractor does not act promptly, the Engineer may do any or  
546 all of the following including:

547  
548 **(1)** Withholding from future progress payment amounts to cover  
549 any sums paid to the Contractor for work performed by a  
550 subcontractor if the State finds that the subcontractor's complaint  
551 regarding non-payment by the Contractor has merit.

552  
553 **(2)** Refer the matter to the Contractor Licensing Board for  
554 appropriate action.

555  
556 **(3)** Initiate a petition for debarment.

557  
558 **(d) Penalty.** The Contractor will be subject to a penalty of one and  
559 one-half percent per month upon outstanding amounts due that were not  
560 timely paid by the Contractor under the following conditions.

561  
562 Where a subcontractor has provided evidence to the Contractor of  
563 satisfactorily completing all work under their subcontract and has provided  
564 a properly documented final payment request, and:

565  
566 **(1)** Has provided to the contractor an acceptable  
567 performance and payment bond for the project executed by a surety  
568 company authorized to do business in the State; or

569  
570 **(2)** The following has occurred:

571

572 (A) A period of ninety days after the day on which  
573 the last of the labor was done or performed and the  
574 last of the material was furnished or supplied has  
575 elapsed without written notice of a claim given to  
576 contractor and the surety, as provided for in section  
577 103D-324; and

578  
579 (B) The subcontractor has provided to the  
580 Contractor an acceptable release of retainage bond,  
581 executed by a surety company authorized to do  
582 business in the State, in an amount of not more than  
583 two times the amount being retained or withheld by  
584 the Contractor; any other bond acceptable to the  
585 Contractor; or any other form of mutually acceptable  
586 collateral,

587  
588 then, all sums retained or withheld from a subcontractor and otherwise  
589 due to the subcontractor for satisfactory performance under the  
590 subcontract shall be paid by the Engineer to the Contractor and  
591 subsequently, upon receipt from the Engineer by the Contractor, to the  
592 subcontractor within ten days after receipt of payment from the Engineer.

593  
594 The penalty may be withheld from future payment due to the  
595 Contractor if the Contractor was the responsible party. If a Contractor has  
596 a violation three or more times within two years of the first violation, the  
597 Contractor shall be referred by the Engineer to the Contractors License  
598 Board for action under Section 444-17(14), HRS.

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600 (e) **Documented Subcontractor Final Payment Request.** A  
601 properly documented final payment request from a subcontractor shall  
602 include:

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- (1) Substantiation of the amounts requested;
- (2) A certification by the subcontractor, to the best of the subcontractor's knowledge and belief, that:
  - (A) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the subcontract;
  - (B) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the subcontract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
  - (C) The payment request does not include any amounts that the subcontractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.
- (3) The submission of documentation confirming that all other terms and conditions required under the subcontract agreement have been fully satisfied.

The Engineer shall return any defective final payment request, along with a statement identifying the defect, to the Contractor within seven days after receipt.

**(f) Additional Subcontract Terms and Conditions.**

635 This section shall not be construed to impair the right of a  
636 contractor or a subcontractor, at any tier, to negotiate and to include in  
637 their respective subcontracts provisions that provide for additional terms  
638 and conditions that are requested to be met before the subcontractor shall  
639 be entitled to receive final payment, provided that any such payments  
640 withheld shall be withheld by the Engineer.

641

642 **9.10 Retainage; Withholding of Payment for Unsatisfactory Progress.**

643

644 **(a) Retainage.** If the Engineer finds that satisfactory progress is  
645 being made, an amount equivalent to 5 percent of the first 50 percent of  
646 the whole will be deducted from the total of the amounts ascertained as  
647 payable and will be retained by the Department until after completion of  
648 the entire contract in an acceptable manner. After 50 percent of the work  
649 has been completed, the Department shall make any of the remaining  
650 progress payments in full provided progress is satisfactory.

651

652 **(b) Withholding of Payment for Unsatisfactory Progress.** If the  
653 Contractor is progressing or performing the work unsatisfactorily, the  
654 Engineer, upon written notice to the Contractor, may withhold sums not  
655 exceeding 5 percent of the total contract price from subsequent progress  
656 payments.

657

658 The Engineer may deduct, from any amounts due to the Contractor,  
659 sums assessed as liquidated damages as well as any other charges  
660 against the Contractor allowed by law or the contract documents.

661

662 If the Contractor refuses or fails to comply with the laws and  
663 regulations dealing with equal employment opportunity, affirmative action,  
664 non-discrimination, labor compliance, implementing and maintaining the  
665 BMP and NPDES standards, and disadvantaged business enterprise  
666 requirements, the Engineer, at its sole discretion and upon written notice

667 to the Contractor, may withhold any or all of the monthly progress  
668 payments that are due or to become due.

669

670 With the approval of the State, the Contractor may withdraw, from  
671 time to time, the whole or any portion of the sum withheld after endorsing  
672 over to the State and depositing with the State any general obligation  
673 bond of the State or its political subdivisions suitable to the State. But in  
674 no case will the bond have a face value less than the value of the amount  
675 to be withdrawn. The State may sell the bond and use monies directly  
676 withheld from progress payments or the final payment.

677

678 **9.11 Final Payment.** The Engineer will prepare the final estimate when the  
679 State accepts the project in accordance with Section 8.14 Final Acceptance.  
680 Prior progress estimates and payments shall be subject to correction in the final  
681 estimate and payment.

682

683 Upon final settlement, the State will pay the entire sum due, less all  
684 previous payments and less any sums that may have been or may be deducted  
685 in accordance with the provisions of the contract, upon receipt of the following  
686 documents in a format acceptable to the Engineer:

687

688 **(1)** Consent of the surety to payment of the final estimate and  
689 certificate of release from the surety.

690

691 **(2)** Evidence by affidavit that the Contractor fully paid the debts  
692 resulting from the contract.

693

694 **(3)** A current "Certificate of Vendor Compliance" issued by the Hawaii  
695 Compliance Express (HCE). The Certificate of Vendor Compliance is used  
696 to certify the Contractor's compliance with (a) Section 103D-328, HRS (for  
697 all contracts \$25,000 or more) which requires a current tax clearance  
698 certificate issued by the Hawaii State Department of Taxation and the

699 Internal Revenue Service; (b) Chapters 383, 386, 392, and 393, HRS; and  
700 (c) Subsection 103D-310(c), HRS. The State reserves the right to verify  
701 that compliance is current prior to the issuance of final payment.  
702 Contractors are advised that non-compliance status will result in the  
703 rejection of the submission and the final payment being withheld until  
704 compliance is attained.

705

706 Sums necessary to meet the claims of any governmental agencies may be  
707 withheld from the sums due the Contractor until said claims have been fully and  
708 completely discharged or otherwise satisfied.

709

710 **9.12 Records, Accounts, And Documents.** The Contractor shall retain and  
711 preserve its bid documents and estimates, contract records, accounts, data, and  
712 documents of the Contractor and its subcontractors, including all records  
713 regarding the employment of State of Hawaii residents , for not less than three  
714 years from the date of final payment. If any lawsuit or claim relating to the work  
715 is pending before the expiration of the three year period, the Contractor shall  
716 retain the documents until it is resolved. The Contractor shall provide written  
717 notice to the Engineer not less than 30 days of its intent to dispose of the  
718 contract records. The Engineer may direct, in writing, the Contractor to retain  
719 such records for an additional period of time at no cost to the State. The  
720 documents shall be available for inspection and auditing by the State and other  
721 government agencies at the offices of the Contractor and its subcontractors upon  
722 24 hours notice to the Contractor. The Contractor shall cooperate during such  
723 inspection and auditing of the documents at no cost to the State.

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**END OF ARTICLE IX.**