

1 **ARTICLE VIII – PROSECUTION AND PROGRESS**

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3 **8.1 Notice to Proceed (NTP).** A notice to proceed will be issued to the
4 Contractor. It shall establish the date the Contractor is expected to start work
5 and from which contract time will commence.
6

7 The Engineer will consult with the Contractor in an effort to set a mutually
8 agreeable notice to proceed date. When the notice to proceed date is set by
9 mutual agreement, Contractor shall have no claim for delay impact costs
10 resulting from the issuance of the notice to proceed for such date.
11

12 In the absence of an agreed notice to proceed date, the Engineer will
13 issue a notice to proceed to the Contractor for a date convenient to the State. In
14 the event that the Engineer establishes a starting date that is more than 90 days
15 after the effective date of the contract, the Contractor may not terminate the
16 contract for a default by the State but may submit a claim in accordance with
17 Section 7.16 Disputes and Claims for increased labor and material costs which
18 are directly attributable to the delay beyond the first 90 days. The Engineer may
19 suspend the contract before issuing the notice to proceed, in which case the
20 Contractor's remedies are exclusively those set forth in Section 8.10 Suspension
21 of Work.
22

23 The Contractor shall begin work no later than 10 working days from the
24 date in the notice to proceed and shall diligently prosecute the same to
25 completion within the contract time. In the event that the Contractor fails to start
26 the work, the Engineer may terminate the contract in accordance with Section
27 8.11 Termination of Contract for Cause. The Contractor shall notify the Engineer
28 at least three working days before beginning work.
29

30 The Contractor shall notify the Engineer at least 24 hours before restarting
31 work after a suspension of work pursuant to Section 8.10 Suspension of Work.
32

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

38

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

43

44 **8.2 Prosecution of Work.** Unless otherwise permitted by the Engineer in
45 writing, the Contractor shall not commence with physical construction unless
46 sufficient materials and equipment are available for either continuous
47 construction or completion of a specified portion of the work.

48

49 **8.3 Preconstruction Data Submittal.** The awardee shall submit to the
50 Engineer, for information and review, the preconstruction data within 30 days
51 after the execution of the contract. Until the items listed below are received and
52 found acceptable by the Engineer, the Contractor shall not commence work
53 unless otherwise authorized to do so in writing and subject to such conditions set
54 by the Engineer. No progress payment will be made to the Contractor until the
55 Engineer acknowledges, in writing, receipt of the following preconstruction data
56 submittals acceptable to the Engineer:

57

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

59

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

61

62 (3) Work Schedule.

63

- 64 **(4)** Initial Progress Schedule (See Section 8.6 Progress
65 Schedules).
- 66
- 67 **(5)** Water Pollution and Siltation Control Submittals.
- 68
- 69 **(6)** Solid Waste Disposal form.
- 70
- 71 **(7)** Tax Rates.
- 72
- 73 **(8)** Insurance Rates.
- 74
- 75 **(9)** Certificate of Insurance, satisfactory to the Engineer,
76 indicating that the Contractor has in place all insurance coverage
77 required by the contract documents.
- 78
- 79 **(10)** Schedule of Values.
- 80
- 81 **(11)** List of suppliers.
- 82
- 83 **(12)** Shop drawings and material data sheets.
- 84
- 85 **(13)** Other submittals as directed by the Engineer.
- 86

87 **8.4 Character and Proficiency of Workers.** The Contractor shall at all
88 times provide adequate supervision and sufficient labor and equipment for
89 prosecuting the work to full completion in the manner and within the time required
90 by the contract. The superintendent and all other representatives of the
91 Contractor shall act in a civil and honest manner in all dealings with the Engineer,
92 all other State officials and representatives, and the public in connection with the
93 work.

94

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

98
99 The Engineer may direct the removal of any worker(s) who does not carry
100 out the assigned work in a proper and skillful manner or who is disrespectful,
101 intemperate, violent, or disorderly. The worker shall be removed forthwith by the
102 Contractor and will not work again without the written permission of the Engineer.

103 104 **8.5 Contract Time.**

105
106 **(a) Calculation of Contract Time.** When the contract time is on a
107 working day basis, the total contract time allowed for the performance of
108 the work will be the number of working days shown in the contract plus
109 any additional working days authorized in writing as provided hereinafter.
110 The count of elapsed working days to be charged against contract time,
111 will begin from the date of notice to proceed and will continue
112 consecutively to the date of substantial completion. When multiple shifts
113 are used to perform the work, the State will not consider the hours worked
114 over the normal eight working hours per day or night as an additional
115 working day.

116
117 Whenever the Engineer provides the Contractor with a written
118 statement of elapsed working days, the Contractor may file a written
119 protest with the Engineer setting forth, in detail, the basis of the protest,
120 not later than seven days after receiving the statement. Failure of the
121 Contractor to file such a protest shall be deemed an acceptance by the
122 Contractor of the correctness of the statement.

123
124 When the contract is on a calendar day basis, the total contract time
125 allowed for the performance of the work will be the number of days shown
126 in the contract plus any additional days authorized in writing as provided

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

132

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

143

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

155

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

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

164
165 **(2) Delay for Permits.** For delays in the routine application
166 and processing time required to obtain necessary permits, including
167 permits to be obtained from State agencies, on the condition that
168 the delay is not caused by the Contractor and, provided that, as
169 soon as the delay occurs, the Contractor notifies the Engineer in
170 writing that the permits are not available. Time extensions will be
171 the exclusive relief granted and no additional compensation will be
172 paid the Contractor on account of such delays.

173
174 **(3) Delays Beyond Contractor's Control.** For delays
175 caused by acts of God, a public enemy, fire, inclement weather
176 days or adverse conditions resulting therefrom, earthquakes,
177 floods, epidemics, quarantine restrictions, labor disputes impacting
178 the Contractor or the State, freight embargoes, and other reasons
179 beyond the Contractor's control, the Contractor may be granted an
180 extension of time provided that:

181
182 **(A)** In the written notice of delay to the Engineer, the
183 Contractor describes possible effects on the completion date
184 of the contract. The description of delays shall:

185
186 **(i)** State specifically the reason or reasons for the
187 delay and fully explain in a detailed chronology how
188 the delay affects the critical path.

189

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

192
193 (iii) Cite the anticipated period of delay and the time
194 extension requested.

195
196 (iv) State either that the above circumstances have
197 been cleared and normal working conditions restored
198 as of a certain day or that the above circumstances
199 will continue to prevent completion of the project.

200
201 (B) The Contractor shall notify the Engineer in writing
202 when the delay ends. Time extensions will be the exclusive
203 relief granted and no additional compensation will be paid
204 the Contractor for such delays.

205
206 (4) **Delays in Delivery of Materials or Equipment.** For
207 delays in delivery of materials or equipment, which occur as a result
208 of unforeseeable causes beyond the control and without fault of the
209 Contractor, its subcontractor(s), or supplier(s), time extensions shall
210 be the exclusive relief granted and no additional compensation will
211 be paid the Contractor on account of such delay. The delay shall
212 not exceed the difference between the originally scheduled delivery
213 date and the actual delivery date. The Contractor may be granted
214 an extension of time provided that it complies with the following
215 procedures:

216
217 (A) The Contractor's written notice to the Engineer must
218 describe the delays and state the effect such delays may
219 have on the critical path.

220

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

226
227 **(i)** State specifically all reasons for the delay.
228 Explain in a detailed chronology the effect of the delay
229 on the critical path.

230
231 **(ii)** Submit copies of purchase order(s), factory
232 invoice(s), bill(s) of lading, shipping manifest(s),
233 delivery tag(s), and any other documents to support
234 the time extension request.

235
236 **(iii)** Cite the start and end date of the delay and the
237 time extension requested.

238
239 **(5) Delays for Suspension of Work.** When the performance
240 of the work is totally suspended for one or more days (calendar or
241 working days, as appropriate) by order of the Engineer in
242 accordance with Subsections 8.10(a)(1), 8.10(a)(2), 8.10(a)(3) or
243 8.10(a)(5), the number of days from the effective date of the
244 Engineer's order to suspend operations to the effective date of the
245 Engineer's order to resume operations shall not be counted as
246 contract time, and the contract completion date will be adjusted.
247 During periods of partial suspensions of the work, the Contractor
248 will be granted a time extension only if the partial suspension
249 affects the critical path. If the Contractor believes that an extension
250 of time is justified for a partial suspension of work, it must request
251 the extension in writing at least five working days before the partial
252 suspension will affect the critical path operation(s) in progress. The

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

257

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

260

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

264

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

269

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

272

273 **(D)** Delays caused by the failure of the Contractor to
274 make submittals in a timely manner for review and
275 acceptance by the Engineer, such as, but not limited to,
276 shop drawings, descriptive sheets, material samples, and
277 color samples except as covered in Subsection 8.5(b)(3) and
278 8.5(b)(4).

279

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

283

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

286
287 (G) Failure of the Contractor to provide evidence sufficient
288 to support the time extension request.

289
290 (7) **Reduction in Time.** If the State deletes or modifies any
291 portion of the work, an appropriate reduction of contract time may
292 be made in accordance with Section 4.2 Changes.

293

294 **8.6 Progress Schedules.**

295

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

299

300 Schedule submittals shall be as follows:

301

302 (1) **For Contracts \$2,000,000 or Less or For Contract Time**
303 **100 Working Days or 140 Calendar Days or less.** For
304 contracts of \$2,000,000 or less or for contract time of 100 working
305 days or 140 calendar days or less, the progress schedule will be a
306 Time Scaled Logic Diagram (TSLD). The Contractor shall submit a
307 TSLD submittal package and it shall meet the following
308 requirements and have these essential and distinctive elements:

309

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

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

318

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

322

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

327

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

330

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

335

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

337

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

342

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

345

346 **(I)** Show target bars for all activities.

347

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

351

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

354

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

361

362 **(2) For Contracts More Than \$2,000,000 or For Contract**
363 **Time of More Than 100 Working Days or 140 Calendar Days.**

364 For contracts which have a contract amount more than \$2,000,000
365 or contract time of more than 100 working days or 140 calendar
366 days, the Contractor shall submit a Timed-Scaled Logic Diagram
367 (TSLD) and it shall meet the following requirements and have these
368 essential and distinctive elements:

369

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

371

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

374

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

377

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

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

382

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

388

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

390

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

393

394 **(H)** No individual activity shall have duration of more than
395 20 calendar days unless requested and approved by the
396 Engineer.

397

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

403

404 **(J)** Incorporate all physical access and availability
405 restraints.

406

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

410

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

434
435 **(d) Initial Progress Schedule.** The Contractor shall submit an initial
436 progress schedule. The initial progress schedule shall consist of the
437 following:

- 438
- 439 **(1)** Four sets of the TSLD schedule.
 - 440
 - 441 **(2)** All the software files and data to re-create the TSLD in a
442 computerized software format as specified by the Engineer.

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(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:

- 475 (i) Quantity, type, make, and model of equipment;
476
477 (ii) The manpower to do the work, specifying
478 worker classification; and
479
480 (iii) The production rate per eight hour day, or the
481 working hours established by the contract documents
482 needed to meet the time indicated on the schedule. If
483 the production rate is not for eight hours, the number
484 of working hours shall be indicated.

- 485
486 (6) Two sets of color time-scaled project evaluation and review
487 technique charts (“PERT”) using the activity box template of Logic –
488 Early Start or such other template designated by the Engineer.

489
490 If the contract documents establish a sequence or order for the
491 work, the initial progress schedule shall conform to such sequence or
492 order.

493
494 **(e) Contractor’s Continuing Schedule Submittal Requirements.**
495 After the acceptance of the initial TSLD and when construction starts, the
496 Contractor shall submit four plotted progress schedules, two PERT charts,
497 and reports on all construction activities every two weeks (bi-weekly).
498 This scheduled bi-weekly submittal shall also include an updated version
499 of the project schedule in a computerized software format as specified by
500 the Engineer. The submittal shall have all the information needed to re-
501 create that time period’s TSLD plot and reports. The bi-weekly submittal
502 shall include, but is not limited to, an update of activities based on actual
503 durations, all new activities, and any changes in duration or start or finish
504 dates of any activity.

505

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

512
513 The Contractor shall submit updates of the anticipated work
514 completion graph, equipment listing, manpower requirement graph, or
515 method statement when requested by the Engineer. The Contractor shall
516 submit such updates within 4 calendar days from the date of the request
517 by the Engineer.

518
519 The Engineer may withhold progress payments until the Contractor
520 is in compliance with all schedule update requirements.

521
522 **(f) Float.** All float appearing on a schedule is a shared commodity.
523 Float does not belong to or exist for the exclusive use or benefit of either
524 the State or the Contractor. The State or the Contractor has the
525 opportunity to use available float until it is depleted. Float has no
526 monetary value.

527
528 **(g) Scheduled Meetings.** The Contractor shall meet with the
529 Engineer to review the progress schedule on a periodic basis as
530 determined by the Engineer. The Contractor shall have someone
531 attending the meeting that can answer all questions on the TSLD and
532 other schedule related submittals.

533
534 **(h) Accelerated Schedule; Early Completion.** If the Contractor
535 submits an accelerated schedule (shorter than the contract time), the
536 Engineer's review and acceptance of an accelerated schedule does not
537 constitute an agreement or obligation by the State to modify the contract

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

546

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

554

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

560

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

567

568 **8.7 Weekly Meeting.** In addition to the bi-weekly schedule meetings, the
569 Contractor shall be available to meet once a week with the Engineer, at the time

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

575

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

581

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

586

587 **(b)** The duration of all events and delays.

588

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

592

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

594

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

597

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

600

601 **8.8 Liquidated Damages for Failure to Complete the Work or Portions of**
602 **the Work on Time.** The actual amount of damages resulting from the
603 Contractor's failure to complete the contract in a timely manner is difficult to
604 accurately determine. Therefore, the amount of such damages shall be
605 liquidated damages as set forth herein and in the Special Provisions, Invitation
606 for Bid, or Request for Proposal. The State may, at its discretion, deduct the
607 amount from monies due or that may become due under the contract.

608

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

614

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

618

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

623

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

627

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

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

634

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

637

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

640

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

644

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

651

652 **8.9 Fines and Other Penalties.** In addition to any compensatory remedies
653 available to the State arising out of the Contractor's failure to complete the
654 work by the contract completion date including, but not limited to,
655 liquidated damages, the Contractor shall reimburse the State for any fines,
656 penalties, citations, or fees levied by a third party against the State arising
657 from the late completion of the work.

658

659 **8.10 Suspension of Work.**

660

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

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

667

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

670

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

673

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

676

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

678

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

681

682 (B) Carry out orders given by the Engineer.

683

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

686

687 (D) Provide adequate supervision on the jobsite.

688

689 (5) The convenience of the State.

690

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

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

697

698 **(c) Reimbursement to Contractor.** In the event that the Contractor
699 is ordered by the Engineer, in writing as provided herein, to suspend work
700 under the contract for the reasons specified in Subsections 8.10(a)(1),
701 8.10(a)(2), 8.10(a)(3) or 8.10(a)(5) of the "Suspension of Work" paragraph,
702 the Contractor may be reimbursed for actual direct costs incurred on work
703 at the jobsite, as authorized in writing by the Engineer, including costs
704 expended for the maintenance and protection of the work. An allowance
705 of 5 percent for indirect categories of delay costs will be paid on any
706 reimbursed direct costs, including extended branch and home-office
707 overhead and delay impact costs. No allowance will be made for
708 anticipated profits. Payment for equipment which is ordered to standby
709 during such suspension of work shall be made as described in Subsection
710 9.6(h) Idle and Standby Equipment.

711

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

717

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

720

721 **(1)** For weather related conditions;

722

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

726

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

729

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

733

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

741

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

749

750 **8.11 Termination of Contract for Cause.**

751

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

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

769

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

773

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

781

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

789

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

796

797 **8.12 Termination For Convenience.**

798

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

804

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

817

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

821

822 (1) Any completed work.

823

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

829

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

836

837 (d) **Compensation.**

838

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

846

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

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

855

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

859

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

870

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

877

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

881

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

884

885 **8.13 Pre-Final and Final Inspections.**

886

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

894

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

899

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

905

906 **(1)** All written guarantees required by the contract.

907

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

910

911 **(3)** Certificate of Plumbing and Electrical Inspection.

912

913 **(4)** Certificate of Building Occupancy.

914

915 **(5)** Certificate of Soil and Wood Treatments.

916

- 917 **(6)** Certificate of Water System Chlorination.
918
919 **(7)** Certificate of Elevator Inspection and Boiler and Pressure
920 Pipe Inspection.
921
922 **(8)** Maintenance Service Contract and two copies of a list of all
923 equipment installed.
924
925 **(9)** Any other final items and submittals required by the contract
926 documents.

927
928 **(c) Procedure.** When in compliance with the above requirements,
929 the Contractor shall notify the Engineer in writing that the project has
930 reached substantial completion and is ready for pre-final inspection.

931
932 The Engineer will then make a preliminary determination as to
933 whether or not the project is substantially complete and ready for pre-final
934 inspection. The Engineer may, in writing, postpone until after the pre-final
935 inspection the Contractor's submittal of any of the items listed in
936 Subsection 8.13(b) Pre-Final Inspection, herein, if in the Engineer's
937 discretion it is in the interest of the State to do so.

938
939 If, in the opinion of the Engineer, the project is not substantially
940 complete, the Engineer will provide the Contractor a punchlist of specific
941 deficiencies in writing which must be corrected or finished before the work
942 will be ready for a pre-final inspection. The Engineer may add to or
943 otherwise modify this punchlist from time to time. The Contractor shall
944 take immediate action to correct the deficiencies and must repeat all steps
945 described above, including written notification that the work is ready for
946 pre-final inspection.

947

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

952

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

961

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

966

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

971

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

977

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

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

986
987 Final inspection will occur within ten working days after the
988 Contractor notifies the Engineer in writing that all punchlist deficiencies
989 remaining after the pre-final inspection have been completed and the
990 Engineer concurs. If the Engineer determines that deficiencies still remain
991 at the final inspection, the work will not be accepted, and the Engineer will
992 notify the Contractor, in writing, of the deficiencies which shall be
993 corrected and the steps above repeated.

994
995 If the Contractor fails to correct the deficiencies and complete the
996 work by the established or agreed date, the State may correct the
997 deficiencies by whatever method it deems appropriate and deduct the cost
998 from any payments due the Contractor.

999

1000 **8.14 Final Acceptance.**

1001

1002 The procedures described herein shall apply for the entire project if there
1003 is a single completion date or to each part of the project for which there is a
1004 separate completion date. When there are two or more separate completion
1005 dates, "project" as used herein shall refer to each part of the work for which there
1006 is a separate completion date. Inspection and acceptance procedures shall be
1007 applied as described herein for each part of the project for which there is a
1008 separate completion date.

1009

1010 When the Engineer finds that the project has been satisfactorily completed
1011 in compliance with the contract, the Engineer will notify the Contractor in writing

1012 of the project's completion and acceptance. The final acceptance date shall
1013 determine end of contract time, liquidated damages for failure to complete the
1014 punchlist, and commencement of all guaranty periods subject to Section 8.16
1015 Contractor's Responsibility for Work; Risk of Loss or Damage.

1016

1017 **8.15 Use of Structure or Improvement.** The State has the right to use the
1018 structure, equipment, improvement, or any part thereof, at any time after it is
1019 considered by the Engineer as available, whether or not substantial completion
1020 has been reached. In the event that the structure, equipment, or any part thereof
1021 is used by the State before final acceptance, the Contractor is not relieved of its
1022 responsibility to protect and preserve all the work until final acceptance.

1023

1024 **8.16 Contractor's Responsibility for Work; Risk of Loss or Damage.**
1025 Until the written notice of final acceptance has been received, the Contractor
1026 shall take every precaution against loss or damage to any part of the work from
1027 any cause whatsoever, whether arising from the performance or from the non-
1028 performance of the work. The Contractor shall rebuild, repair, restore, and make
1029 good all loss or damage to any portion of the work resulting from any cause
1030 before its receipt of the written notice of final acceptance and shall bear the risk
1031 and expense thereof.

1032

1033 The risk of loss or damage to the work from any hazard or occurrence that
1034 may or may not be covered by a builder's risk policy is that of the Contractor and
1035 Surety, unless such risk of loss is placed elsewhere by express language in the
1036 contract documents.

1037

1038 **8.17 Guarantee of Work.**

1039

1040 (1) Regardless of, and in addition to, any manufacturers' warranties, all
1041 work and equipment shall be guaranteed by the Contractor against
1042 defects in materials, equipment, or workmanship for one year from the

1043 date of final acceptance or as otherwise specified in the contract
1044 documents.

1045

1046 **(2)** When the Engineer determines that repairs or replacements of any
1047 guaranteed work and equipment is necessary due to materials,
1048 equipment, or workmanship which are inferior, defective, or not in
1049 accordance with the terms of the contract, the Contractor shall, at no
1050 increase in contract price or contract time, and within five working days of
1051 receipt of written notice from the State, commence to do all of the
1052 following:

1053

1054 **(A)** Correct all noted defects and make replacements, as
1055 directed by the Engineer, in the equipment and work.

1056

1057 **(B)** Repair or replace to new or pre-existing condition any
1058 damages resulting from such defective materials and equipment or
1059 installation thereof.

1060

1061 **(3)** The State will be entitled to the benefit of all manufacturers' and
1062 installers' warranties that extend beyond the terms of the Contractor's
1063 guaranty regardless of whether or not such extended warranty is required
1064 by the contract documents. The Contractor shall prepare and submit all
1065 documents required by the providers of such warranties to make them
1066 effective and submit copies of such documents to the Engineer. If an
1067 available extended warranty cannot be transferred or assigned to the
1068 State as the ultimate user, the Contractor shall notify the Engineer who
1069 may direct that the warranted items be acquired in the name of the State
1070 as purchaser.

1071

1072 **(4)** If a defect is discovered during a guarantee period, all repairs and
1073 corrections to the defective items when corrected shall be guaranteed for
1074 a new duration equal to the original full guarantee period. The running of

1075 the guarantee period shall be suspended for all other work affected by any
1076 defect. The guarantee period for all other work affected by any such
1077 defect shall restart for its remaining duration upon confirmation by the
1078 Engineer that the deficiencies have been repaired or remedied.

1079

1080 (5) Nothing in this section is intended to limit or affect the State's rights
1081 and remedies arising from the discovery of latent defects in the work after
1082 the expiration of any guarantee period.

1083

1084 **8.18 No Waiver of Contract Obligations.** None of the provisions of this
1085 contract shall be considered waived by the State unless such waiver is given in
1086 writing by the State. No such waiver shall be a waiver of any past or future
1087 default, breach or modification of any of the terms, provisions, conditions, or
1088 covenants of the contract unless expressly stipulated in such waiver.

1089

1090 The following will not operate or be considered as a waiver of any portion
1091 of the contract, or any power herein reserved, or any right to damages provided
1092 herein or by law:

1093

1094 (1) Any payment for, or acceptance of, the whole or any part of the
1095 work.

1096

1097 (2) Any extension of time.

1098

1099 (3) Any possession taken by the Engineer.

1100

1101 A waiver of any notice requirement or of any noncompliance with the
1102 contract will not be held to be a waiver of any other notice requirement or any
1103 other noncompliance with the contract.

1104

1105 **8.19 Final Settlement of Contract.**

1106

1107 **(a) Closing Requirements.** The contract will be considered settled
1108 after the project acceptance date or, after the last acceptance date if there
1109 is more than one acceptance date for different portions of the project, and
1110 when the following items have been satisfactorily submitted, where
1111 applicable:

1112
1113 **(1)** Two accepted final as-built drawings as specified in
1114 Subsection 5.8(a) Drawings and Special Provisions.

1115
1116 **(2)** All written guarantees required by the contract.

1117
1118 **(3)** Complete and certified weekly payrolls for the Contractor
1119 and its subcontractors.

1120
1121 **(4)** Certificate of plumbing and electrical inspection.

1122
1123 **(5)** Certificate of building occupancy.

1124
1125 **(6)** Certificate for soil treatment and wood treatment.

1126
1127 **(7)** Certificate of water system chlorination.

1128
1129 **(8)** Certificate of elevator inspection and boiler and pressure
1130 pipe installation.

1131
1132 **(9)** Certificates of Compliance for employment of State of Hawaii
1133 residents by Contractor and applicable subcontractors per Section
1134 7.2 Employment of State of Hawaii Residents.

1135
1136 **(10)** Tax clearance.

1137
1138 **(11)** All other documents required by the Contract or by law.

1139

1140

(b) Failure to Meet Closing Requirements. The Contractor shall

1141

meet the applicable closing requirements within 60 days from the date of

1142

Project Acceptance or the agreed to Punchlist complete date. Should the

1143

Contractor fail to comply with these requirements, the Engineer may

1144

terminate the contract for cause.

1145

1146

END OF ARTICLE VIII

ARTICLE IX - MEASUREMENT AND PAYMENT

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

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

9.2 Payment is not Acceptance. No payment made to the Contractor prior to final acceptance is an acceptance by the State of the work or the portion of the work related to the payment; nor does a progress payment affect the State's rights to inspect, test, or reject the work. A progress payment does not relieve the Contractor of the risk of loss or damage to the work for which payment is 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.

599
600 (e) **Documented Subcontractor Final Payment Request.** A
601 properly documented final payment request from a subcontractor shall
602 include:

603

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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.

724

725

END OF ARTICLE IX.