SECTION 109 - MEASUREMENT AND PAYMENT

Make the following amendments to said Section:

(I) Amend **109.01 Measurement of Quantities** as follows:

Amend the twelfth paragraph by adding the following:

"In lieu of DOA certification, a manufacturer's truck calibration information with an accompanying dip stick calibrated for the truck is acceptable."

Amend the last sentence of the second to the last paragraph to read as follows:

"If the Engineer orders the Contractor to hold the equipment on the job, payment time for the equipment will be 'idle time' and/or 'stand-by time' as defined in Subsections 109.04(F)(9) - Rental Rates For Idle and Stand-By Time."

(II) Amend **109.02 Scope of Payment** as follows:

(1) Furnishing materials, labor, equipment, tools and incidentals necessary for the completed work;

(2) Doing work contemplated and embraced in the contract;

(3) Loss or damage arising out of the nature of the work, from the action of the elements;

(4) Risks of descriptions connected with the prosecution of the work;

(5) Expenses incurred by the Contractor for the suspension or discontinuance of the work;

(6) Cost arising from claims of infringement of a patent, trademark or copyright;

(7) The completion of the work according to the contract; and

(8) All expenses incurred to restore areas affected by the Contractor's work back to original condition if not specified otherwise.

(III) Amend **109.03 Compensation for Altered Quantities** by adding the following:

"Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than 15% above or below the estimated quantity stated in this contract, an adjustment in the contract price shall be made upon demand of either party. The adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115% or below 85% of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Engineer shall, upon receipt of a timely written request or an extension of time, prior to the date of final settlement of the contract, ascertain the facts and make such adjustment for extending the completion date as in the judgement of the Engineer the findings justify.

Price adjustment will be based on the increased or decreased actual cost per unit of said item or items to the Contractor, or at the option of the Engineer, such adjustment will be made on the basis of force account according to Subsection 109.04 - Extra and Force Account Work."

(IV) Amend **109.04 Extra and Force Account Work** to read as follows:

"**109.04 Payment for Additional and Force Account Work.** The Engineer will pay for work done according to Subsections 104.02 - Alterations of Plans or Type of Work and 104.03 - Extra Work at the unit prices or lump sum (L.S.) prices. Also, the Engineer may require the Contractor to do such work on a force account (F.A.) basis. The following provisions shall govern in determining the compensation to be paid to the Contractor for all work done on the F.A. method and the calculation of new unit prices or L.S. prices.

(A) Allowances for Overhead and Profit.

(1) In determining the cost or credit to the Department resulting from a change, the allowances for all overhead, including extended overhead resulting from adjustments to contract time (including home office, branch office and field overhead, and related delay impact costs) and profit combined, shall not exceed the percentages set forth below:

(a) For the Contractor, for any work performed by its own labor forces, 15% of the direct cost;

(b) For each subcontractor involved, for any work performed by its own forces, 15% of the direct cost;

(c) For the Contractor or any subcontractor, for work performed by their subcontractors, 7% of the amount due the performing subcontractor.

(2) Not more than three markup allowance line item additions each of which not exceeding the maximum percentage shown above will be allowed for profit and overhead, regardless of the number of tier subcontractors.

(3) The allowance percentages will be applied to all credits and to the net increase of direct costs where work is added and deleted by the changes.

(4) Allowances for overhead and profit set forth above shall not be used in the Calculation of Contractor or Subcontractor owned equipment costs.

(B) Labor. For all hourly workers, the Contractor will receive the rate of wage including fringe benefits when such amounts are required by collective bargaining agreement or other employment contract generally applicable to the classes of labor employed to that type of work.

All markups for overhead and profit shall be added subject to limitations established in Subsection 109.04(A) - Allowances for Overhead and Profit.

No allowance for overtime compensation will be given without the written approval of the Engineer prior to performance of such work.

The Engineer will allow for overtime compensation only if authorized by the Engineer in writing before performance of that work. For authorized overtime, the Engineer will pay 1.5 times the hourly wage rate plus the actual hours of overtime for fringe benefits, and/or as required by collective bargaining agreement.

(C) Insurance and Taxes. The Contractor will receive the projected average and/or actual rate for the required insurance and taxes including property damage, liability, workers' compensation insurance premiums, average tax rate, State unemployment contributions, Federal unemployment taxes, social security and Medicare taxes. The Engineer will add a markup of 6%.

(D) Materials. For materials accepted by the Engineer and used, the Contractor and subcontractor(s) will receive the actual cost of such materials delivered and incorporated into work. The Engineer will include transportation charges and taxes paid by the Contractor if such cost is not reflected in the prices of the materials. The Engineer will add a markup allowed under Subsection 109.04(A) - Allowances for Overhead and Profit.

For stock materials, used and/or incorporated the work, the Contractor shall receive the actual cost as certified by the Contractor to the cost paid by the Contractor. Provide to the satisfaction of the Engineer all data used to calculate the actual cost. The Engineer will include transportation charges and taxes paid by the Contractor if they were not included in the cost of the material. The Engineer will add a markup allowed under Subsection 109.04(A) - Allowances for Overhead and Profit.

(E) Subcontractors. Subcontractor costs shall be the actual costs of the Subcontractor calculated as defined in Subsection 109.04(B) - Labor, Subsection 109.04(C) - Insurance and Taxes, Subsection 109.04(D) - Materials, Subsection 109.04(F) - Equipment, plus a markup allowed under Subsection 109.04(A) - Allowances for Overhead and Profit.

(F) Equipment.

(1) For any machinery or special equipment (other than small tools as herein) owned by the Contractor or subcontractor(s) or a related entity, the use of which has been authorized by the Engineer, the Contractor will be paid at the per-hour rental rates based on the monthly rate divided by 176, established for said machinery or equipment in the then-current edition of the Rental Rate Blue Book for Construction Equipment including the estimated operating cost per hour and regional correction provided therein. The rental rate shall be calculated using the following formula:

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

If no rate is listed for a particular kind, type or size of machinery or equipment, then the monthly rental rates and hourly operating costs shall be as agreed upon in writing by the Contractor and the Engineer prior to the use of said machinery or equipment. The hourly rental rate shall be determined as if the agreed upon monthly rate had been obtained from the Blue Book. If there is no agreement, the Engineer will set a rate. The Contractor may contest the rate pursuant to Section 105.18 - Claims for Adjustment and Disputes.

(2) Rental rates which are higher than those specified in the aforesaid Rental Rate Blue Book publication may be allowed where such higher rates can be justified by job conditions such as work in water and work on lava. Request for such higher rates shall be submitted in writing to the Engineer for approval prior to the use of the machinery or equipment in question. The Contractor is responsible for justifying rental rates that are higher than those specified in the Rental Rate Blue Book. If the Contractor has not justified the request for higher rental rates before the equipment is needed or used, all rental rates for that equipment shall be paid for at the rental rate unadjusted for that job conditions of the work until the higher rental rate is approved by the Engineer. No adjustment will be made to the rental rate of work already done or paid for, if the requested new rental rates are approved by the Engineer after the event has passed.

(3) The rental rate for trucks not owned by the Contractor or subcontractor(s) or a related entity shall be those as established under the Hawaii State Public Utilities Commission, which will be paid for as a material item pursuant to Subsection 109.04(D) - Materials.

Rental rates for Contractor or subcontractor(s) or a related entity -owned trucks not listed in the Rental Rate Blue Book shall be agreed upon in writing by the Contractor and Engineer prior to the use of said trucks. If there is no agreement, the Engineer will set the rate. The Contractor may contest the rate pursuant to Section 105.18 - Claims for Adjustment and Disputes.

(4) All rental rates for machinery and equipment shall include the cost of fuel, oil lubricants, supplies, small tools, necessary attachments, repairs, maintenance, tire wear, depreciation, storage, and all other incidentals.

For equipment used with more than one attachment, the Engineer will pay only the attachment(s) being used. When the attachment(s) is part of the rental rate listed in the Blue Book, the Engineer will deduct the rental rate of the attachments(s) and replace them with the rental rate of the attachment(s) being used.

(5) All machinery and equipment shall be in good working condition and suitable for the purpose for which the machinery and equipment is to be used.

(6) All or any individual pieces of equipment or tools having a replacement value of $2,000 or less, whether or not consumed by use, shall be considered to be small tools and included in the allowed markup for overhead and profit and no separate payment will be made therefor.

(7) The total of all force account rental charges accrued over the duration of the contract for a specific item of equipment will not exceed the replacement cost of that equipment. The Engineer will pay only the hourly operating cost.

The Contractor shall provide the cost of replacement to the Engineer prior to using the equipment. When the Engineer does not agree with or the Contractor does not provide the replacement cost, the Engineer shall set the replacement cost. The Contractor may contest the replacement cost pursuant to Section 105.18 - Claims for Adjustment and Disputes.

(8) Should the item of equipment be rented from an unrelated entity, the rental cost will be treated as a material cost under Subsection 109.04(D) - Materials.

(9) Rental rates for idle and Stand-by Time.

(a) The Contract defines idle time as the time period in which the machinery and/or equipment designated for a specific work is not in use for the work due to reasons beyond the control of the Contractor. The maximum amount of chargeable hours shall be 8 hours per working day.

(b) The Contract defines stand-by time as the time period in which the machinery and equipment are standing by for the specific work day due to reasons beyond the control of the Contractor. The maximum chargeable hours per work day shall not exceed 8 hours (stand-by time plus the time it operated) per working day unless the Engineer authorizes the overtime.

(c) The Engineer will pay, when the requirements of this Section are met, for equipment that is idle and\or on stand-by, 50% of the hourly rental rate excluding the estimated operational cost per hour per working day.

(d) Storage of equipment on the project site for the convenience of the Contractor shall not be paid for. Only when the Contractor complies with the following reporting requirements will the Engineer consider any compensation to the Contractor:

1. Notifies the Engineer in writing that compensation is expected for the individual piece of equipment located on the project site at the beginning of the idle period and

2. Submits to the Engineer every week on Monday a list of the equipment that is expected to be idle and a list of the equipment that was idle the past week. On this list shall have all information necessary to determine the hourly rental rate and the date and time it became idle. The list shall also have when any maintenance was performed on the equipment during the period the equipment was idle.

(e) Only when the Contractor complies with the reporting requirements will the Engineer consider any compensation to the Contractor.

(10) The Engineer will pay for authorized overtime for each hour over the normal 8 hours shift work day, legal holidays, Saturdays, and Sundays if approved by the Engineer prior to the performance of the work. The Engineer will not pay for additional premium beyond the normal rates used for the equipment.

(11) Transportation and/or Mobilization. The location from which the equipment is to be moved or transported shall be approved by the Engineer.

The cost of transporting the equipment shall not exceed the rates established by the Hawaii State Public Utilities Commission. If such rates are nonexistent, then the Engineer will determine the rates based upon the prevailing rated charged by established haulers within the locale.

(a) Equipment on the Project Site.

(1) The rental time shall be the time the equipment is in operation on the F.A. work. Also, the rental includes the time required to move the equipment to the location of the F.A. work and to return the equipment to the original location or another location requiring the equipment to the original location. When using the equipment at the site of the F.A. work on other than F.A. work, the Engineer will not pay for moving time.

(2) When moving the equipment other than on its own power, the Engineer will allow loading and transporting cost instead of moving time. When using the equipment at the site of the F.A. work on other than F.A. work, the Engineer will pay for loading and transportation cost only to the site of the F.A. work.

(b) Equipment Not on the Project Site.

(1) The Engineer will confirm the location from which the equipment is to be moved or transported.

(2) When transporting the equipment to the site for exclusive use of F.A. work, the Engineer will pay the cost of mobilizing and transporting the equipment from its original location to the site of the F.A. work. This includes loading and unloading. Also, the Engineer will pay the cost of demobilizing and transporting the equipment back to its original location or another location, whichever cost less.

(3) For self-propelled equipment, the Engineer will pay the cost of moving the equipment by its own power from its original location to the site of the F.A. work. Also, the Engineer will pay the cost of moving the equipment back to its original location or another location, whichever cost less.

(4) When the Contractor desires the return of the equipment to another location, the Engineer will pay the cost of transportation according to the above provisions, provided such payment does not exceed the cost of moving the equipment to the project site.

(5) When using the equipment on the project site in ways other than on F.A. work, the Engineer will pay the cost of transporting the equipment to the jobsite. Returning the equipment shall be at no cost to the State.

(12) Rental.

(a) The Engineer will begin the rental period at the time the equipment is unloaded at the site of work or at the time specified, whichever is later. After that, the Engineer will pay for the equipment for the time actually used unless the equipment is considered idle or on standby by the Engineer according to Subsection 109.04(F)(9).

(b) In the event the equipment must standby due to work being delayed or halted by reason of design, traffic, or other related problems uncontrollable by the Contractor, excluding Saturdays, Sundays and Legal Holidays, unless the equipment is used to perform work on such days, the Engineer will pay for the rental according to Subsection 109.04(F)(9).

(c) When the equipment goes 'idle' from the event of the previous work day, the Engineer will make the rental rate and rental period under 'idle time' excluding Saturday, Sundays, and legal holidays until the Engineer orders the Contractor to discontinue or demobilize the machinery or equipment. The Engineer will pay for the rental rate according to Subsection 109.04(F)(9).

(d) Any hours of operation in excess of 8 hours in any one day must be approved by the Engineer prior to the performance of such work.

(e) The Engineer will not allow or credit the rental time for any day on which machinery or equipment is inoperative due to its breakdown or cannot work. On such days, the Engineer will pay only for the actual hours, If any, that the machinery or equipment was in operation.

(f) In the event the force account work is completed in less than 8 hours, equipment rental shall nevertheless be paid for a minimum 8 hours only if:

> **(1)** the equipment had been mobilized from a location not on the project site for the specific work the equipment had performed that day and
>
> **(2)** the equipment had a total rental period charged since its mobilization to the project site of less than 8 hours and the equipment will be removed by the end of the next business day.

(g) For the purpose of determining the rental period the continuous and consecutive days shall be the normal 8-hour shift work day, Monday through Friday excluding legal State of Hawaii holidays. Any work day to be paid less than 8 hours will not be considered as continuous, except for equipment removed from rental for fuel and lubrication.

(h) The Engineer will not pay additional premium beyond the normal rates used for equipment used over 8 hours per day or 40 hours per week or Saturdays or Sundays or Holidays.

(13) Pickup trucks, flatbed trucks, vans, storage trailers, and containers, unless specifically requested by the State for the F.A. work, shall be considered incidental to the F.A. work and the costs therefor are included in the markup allowed under Section 109.04 (A) - Allowances for Overhead and Profit.

(G) State Excise (Gross Income) Tax and Bond. A sum equal to the current percentage rate for the State excise (Gross Income) tax on the total sum determined in Subsections B, C, D, E, and F, of Subsection 109.04, - Payment for Additional and Force Account Work and any required bond premium shall be added as compensation to the Contractor. The payment for the bond premium not to exceed 1% on the total sum determined in Subsections B, C, D, E, and F of Subsection 109.04 - Payment for Additional and Force Account Work, when applicable.

The compensation as determined in Subsections B, C, D, E, F, and G of Subsection 109.04 - Payment for Additional and Force Account Work shall be deemed to be payment in full for work paid on a F.A. basis or any calculation of new unit prices or L.S. prices.

(H) Records. The Contractor and the Engineer shall compare records of the labor, materials and equipment rentals paid by the F.A. basis at the end of each day. These daily records, if signed by both parties, shall be used as a reference to come to the agreed amount to be paid for work done under the F.A. method. The Contractor shall not be entitled to payment for F.A. records not signed by the Engineer.

(I) Statements. No payment will be made for work on a F.A. basis until the Contractor has submitted to the Engineer triplicate, itemized statements of the cost of such F.A. work detailed as follows:

(1) Laborers - Name, Identification Number (If available), classification, date, daily hours, total hours, rate, and extension for each laborer and foreman and also the amount of fringe benefits payable if any.

(2) Equipment - Designation, year of manufacture, attachments, dates, daily hours, total hours, rate, and extension for each unit of machinery and equipment.

(3) Materials -

a. Quantities of materials, prices and extensions

b. Costs of transporting materials, if such cost is not reflected in the prices of the materials

c. Statements shall be accompanied and supported by legible receipted invoices for all materials used and transportation charges if such cost is not reflected in the prices of the materials. A detail description of all the material shall accompany the statement so that the Engineer may determine if proper material is on the invoice. However, if materials used on the F.A. work are not specifically purchased for such work but are taken from the Contractor's stock, then in lieu of the invoices the Contractor shall submit an affidavit certifying that such materials were taken from stock and that the amount claimed represents the actual cost to the Contractor according to Subsection 109.04(D) - Materials.

(4) Insurance - Cost of property damage, liability and workers' compensation insurance premiums, unemployment insurance contributions, and social security tax according to Subsection 109.04(C) - Insurance and Taxes.

(V) Amend **109.09 Progress Payments** to read as follows:

"**109.09 Progress Payments.** The Engineer will prepare a monthly estimate of the progress of the project based on the items of work done and materials incorporated in the work at the unit prices or lump sum prices set forth in the contract. Progress estimates and payments will be approximate only and shall be subject to correction before or in the final estimate and payment. Monthly shall mean the period between the sixteenth day of the month to the fifteenth day of the succeeding month. The Engineer and the Contractor may agree on a different monthly period.

The Engineer will not make progress payment if the total value of the work done since the last estimate is less than $1,000. If the progress payment includes work from Sections 617 - Planting Soil, 618 - Grassed Surfaces, 619 - Planting and Transplanting and 641 - Hydro-Mulch Seeding, the Engineer will not make progress payment if the total value of the work done since the last estimate is less than $500.

For Federal-Aid Project, the 'Monthly Report of DBE Participation" must be submitted with the progress payment. (A sample of the "Monthly Report of DBE Participation' is in the forms section of the contract.)

(A) Retainage. If the Engineer finds that the Contractor is progressing satisfactorily in completing the project work and:

(1) less than 50% of the whole contract cost is complete, the Engineer shall retain 5% of the value of the work done until the Engineer makes final payment;

(2) more than 50% of the whole contract cost is complete, the Engineer may make the remaining progress payments in full.

(3) After satisfactory completion of work other than landscaping items, the Engineer may adjust the amount of retainage to 15% of the landscaping items or 2½% of the total contract amount whichever is less. Do not use this subsection if the contract is only landscaping.

(B) Additional Withholding. If the Contractor is progressing unsatisfactorily in completing the project work, the Engineer, upon written notice to the Contractor, may withhold an additional 5% of subsequent progress payments.

If the Contractor refuses or fails to comply with the equal employment opportunity, affirmative action, non-discrimination, labor compliance, training, and disadvantaged business enterprise requirements, the Engineer at its sole discretion and upon written notice to the Contractor may withhold the entire or portion of the monthly progress payments."

(VI) Add the following Section:

"109.13 Prompt Payment. According to 103-10.5, HRS,

(1) any money, other than retainage, paid to a Contractor shall be dispersed to the Subcontractors within 10 consecutive calendar days after receipt of the money according to the terms of the subcontract, provided that the Subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes, and

(2) upon final payment to the Contractor, full payment to the Subcontractor, including retainage, shall be made within 10 consecutive calendar days after receipt of the money, provided there are no bona fide disputes over the Subcontractor's performance under the subcontract.

(3) for Federal-Aid projects, the Contractor shall pay each subcontractor's retainage no later than 10 calendar days after the subcontractor's work has been satisfactorily completed. (This is regardless of the State's acceptance of the subcontractor's work.) The Contractor must receive written approval from the Department for any delay in the return of retainage.

A subcontract is any written agreement between the Contractor and its Subcontractors which contains the conditions under which the Subcontractor is to perform a portion of the work for the Contractor.

(A) Examples of Bona Fide Disputes.

(1) When a Subcontractor delays the project to the extent that liquidated damages may be imposed on the Contractor and the Subcontractor with written justification for such delay;

(2) When work done by a Subcontractor is paid for and later found to be non-conforming or unacceptable and the amount previously paid by the State is deducted from subsequent payment request;

(3) When the Subcontractor fails to promptly correct any and all deficiencies and/or non-conforming work cited by the State; or

(4) When the Subcontractor fails to fulfill any term, condition or requirement of its subcontract.

(B) Filing Of Complaint And Verification Of Its Validity. Complaints by Subcontractors of late or non-payment must be submitted in writing to the Director stating:

(1) the amount past due for work performed and already paid for by the State,

(2) that all the terms, conditions or requirements of its subcontract have been met, and

(3) that no bona fide dispute over its performance exists.

The Director or its representative will hear and receive evidence to determine the validity of the complaint and the Director's decision on the matter shall be final.

(C) Follow-Up Action. If the Director or authorized representative determines that the Contractor failed to make payment required under the subcontract to a Subcontractor with whom the Contractor has no 'bona fide dispute' within the 10 consecutive calendar days after receipt of the money, the Director shall inform the Contractor of its findings and request the Contractor make payment accordingly.

If the Contractor does not act promptly, the Director or authorized representative shall take appropriate action as allowed under this contract and/or refer the matter to the Contractor Licensing Board for appropriate action according to 444-17(15), HRS, regarding the Revocation, Suspension and Renewal of (Contractor) Licenses."

END OF SECTION