

SECTION 104 - SCOPE OF WORK

Make the following amendments to said Section:

(I) Amend 104.01 Contract to read as follows:

"104.01 Intent of Contract, Duty of Contractor. The intent of the contract is to provide for the construction, complete in every detail, of the work described at the accepted bid price and within the time established by the contract. The Contractor has the duty to furnish all labor, materials, equipment, tools, transportation, incidentals and supplies and to determine the means, methods and schedules required to complete the work in accordance with the contract documents."

(II) Amend 104.02 Alterations of Plans or Type of Work to read as follows:

"104.02 Changes. The Engineer may at any time, during the progress of the work, by written order and without notice to the sureties, make changes in the work as may be found to be necessary or desirable. Such changes shall not invalidate the contract nor release the surety and the Contractor will perform the work as changed, as though it had been a part of the original contract.

(A) **Minor Changes.** The Engineer may direct minor changes in the work with no changes in contract price or time of performance. If the Contractor believes a minor change directive justifies an increase in contract price or time it must follow the oral and written notice requirements set forth in Subsection 104.02(B) – Orders and Directives.

(B) **Orders and Directives.** Only a duly issued change order or field order may alter the contract terms and work requirements. Any order, direction, instruction, interpretation or determination from the Engineer that is not a field order or change order, may be considered as a compensable change only if the Contractor gives the Engineer an oral notice of its intent to treat such order, direction, instruction, interpretation or determination as a change directive. Such notice must be given before the Contractor acts in conformity with the order, direction, instruction, interpretation or determination but not later than noon of the following working day. The oral notice shall be followed by a written notice of a potential claim that must be delivered to the Engineer within five days after communication of the order, direction, instruction, interpretation, or determination to the Contractor. The written notice of a potential claim shall state the date, circumstances, and source of the order, direction, instruction, interpretation, or determination that the Contractor regards as a compensable change, and provide a detail justification for additional payment for time. Such written notice may not be waived and shall be a condition precedent to the filing of any claim by

the Contractor. Unless the Contractor acts in accordance with this procedure, any such order or directive shall not be treated as a change for which the Contractor may make a claim for an increase in the contract time, compensation, or contract price related to such work.

No more than ten working days after receipt of the written notice of potential claim from the Contractor, a written response shall be issued for the subject work if the State agrees that it constitutes a change. The Contractor shall deem it a rejection of its potential claim if a written response is not issued in the time established. If the Contractor objects to the Engineer's position, it shall file a written claim with the Engineer within 30 days after delivery to the Engineer of the Contractor's written notice of a potential claim. Failure by the Contractor to submit a written notice of a potential claim in the time specified waives all rights for an increase in contract time or compensation related to such work. The protest shall be determined as provided in Subsection 105.18 – Claim for Adjustments and Disputes. In all cases, the Contractor shall proceed with the work as specified in the order, direction, instruction, interpretation, or determination immediately upon providing the Engineer with the oral notice described above, unless otherwise directed in writing by the Engineer.

(C) Penal Sum of the Surety Performance and Payment Bonds. The penal sum of the Surety Performance and Payment Bonds will be adjusted by the amount of each and every Contract Change Order”

(III) Move and Amend 104.02(C) Differing Site Conditions. (See 104.12 – Differing Site Conditions)

(IV) Amend 104.03 Extra Work to read as follows:

“104.03 Field Orders. Upon receipt of the field order the Contractor shall proceed with the work as changed by the field order without delay. If the Contractor does not agree with any of the terms or conditions or the adjustment or nonadjustment to the contract time and/or contract price set forth therein, the Contractor shall file a written notice of potential claim with the Engineer not later than three days after receipt of the field order. No more than ten working days after receipt of the written notice of a potential claim from the Contractor, a written response shall be issued for the subject work if the State agrees that it constitutes a change. The Contractor shall deem it a rejection of its potential claim if a written response is not issued in the time established. If the Contractor objects to the Engineer's position, it shall file a written claim with the Engineer within 30 days after delivery to the Engineer of the Contractor's written notice of a potential claim. Failure to file the written notice of a potential claim or to protest any portion(s) of the field order by the time specified shall constitute agreement on the part of the Contractor with all the terms, conditions, amounts and adjustment or non-adjustment to contract price and/or contract time set forth

in the field order or the non-protested portion of the field order. Timely written notice shall be a non-waivable condition precedent to the assertion of a claim."

(V) Delete **104.04 Maintenance of Traffic** in its entirety.
(See Section 645 – Work Zone Traffic Control)

(VI) Amend **104.05 Construction and Maintenance of Detour** by deleting the second paragraph in its entirety.

(VII) Amend **104.06 Rights in and Use of Materials Found on the Work** by deleting it in its entirety. (See 106.02 – Natural Material Source)

(VIII) Add the following:

"104.09 Method of Price Adjustment. Any adjustment in the contract price pursuant to a change or claim in this contract shall be made in one or more of the following ways:

(1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(2) By unit prices or other price adjustments specified in the contract or subsequently agreed upon;

(3) The Engineer may base the adjustment for a lump sum item on a calculated proportionate unit price. The Engineer will calculate the proportionate unit price by dividing the original contract lump sum price by the actual or original estimated quantity established by the Contract Documents;

(4) In such other manner as the parties may mutually agree;

(5) At the sole option of the Department, by the costs attributable to the event or situation covered by the change, plus appropriate profit or fee, all as specified in Subsection 109.04(A) Allowances for Overhead and Profit and the force account provision of 109.04 Payment for Additional Work;

(6) By a determination by the Department of the reasonable and necessary costs attributable to the event or situation covered by the change, plus appropriate profit or fee, all as computed by the generally accepted accounting principles and applicable sections of Chapter 3-123 and 3-126 of the HAR and Subsection 109.04(A) Allowances for Overhead and Profit herein."

(IX) Amend Subsection 105.19 Value Engineering to read as follows:

"104.10 Value Engineering Incentive Proposal. On any contract in an amount greater than \$100,000, the Contractor shall be entitled to an equitable adjustment to share in cost savings resulting from the value engineering proposal, subject to the following conditions:

(1) A value engineering proposal must result in savings to the State by providing less costly items than those specified in the contract without impairing any of their essential functions and characteristics such as service life, reliability, substitutability, economy of operations, ease of maintenance, and necessary standardized features;

(2) A value engineering proposal shall not be deemed accepted until a change order has been issued establishing the proposed as part of the work;

(3) A value engineering proposal must be submitted in conformity with, and is subject to the terms and conditions of HAR §3-132."

(X) Add the following:

"104.11 Variations in Estimated Quantities. Where the quantity of a unit price item in this contract is estimated on the proposal schedule and where the actual quantity of such pay item varies more than 15 percent 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 percent or below 85 percent of the estimated quantity. The adjustment shall be subject to Subsection 104.09 – Method of Price Adjustment and Subsection 109.05 - Allowances for Overhead and Profit."

104.12 Differing Site Conditions. The Contractor shall promptly and before such conditions are disturbed, notify the Engineer of:

(1) Subsurface or latent physical conditions at the site differing materially from those indicated in this Contract; or

(2) Unknown physical conditions at the site of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract.

(A) **Adjustments of Price or Time for Performance.** After receipt of the notice, the Engineer shall promptly investigate the site and if it is found that the conditions do materially so differ and cause an increase in the Contractor's cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed as a result of the

conditions, an equitable adjustment shall be made and the Contract modified by contract change order. Any adjustment in contract price or time made pursuant to this clause shall be determined in accordance with the price and/or time adjustment subsections of this Contract.

(B) Timeliness of Claim. No claim of the contractor under this subsection shall be allowed unless: The contractor shall give a verbal notice within 12 hours of discovery of the differing site condition and written notification to the Engineer no later than 5 days after the discovery of the differing site condition. The Engineer in writing may extend the time prescribed in this subsection for giving verbal and written notice. The notices to the Engineer are non-waivable conditions precedent to any claim under this Section.

(C) No Claim After Final Payment. No request by the Contractor for an equitable adjustment to the contract shall be allowed if asserted after final payment under this Contract.

(D) Knowledge. Nothing contained in this subsection shall be grounds for an adjustment in compensation if the Contractor had actual knowledge of the existence of such conditions prior to the submission of the bids.

104.13 Contract Change Orders. The Engineer will issue sequentially numbered contract change orders at times it deems appropriate during the contract period. A contract change order may contain the adjustment in contract price and/or time for a number of field orders. In all cases, the Contractor shall proceed with the work as changed by the contract change order. No payment for any changes will be made until the contract change order is issued.

104.14 Duty of Contractor to Provide Change Proposals. A field order may request the Contractor to supply the Engineer with a detail proposal for an adjustment to the contract time or contract price for the work described therein. Any such request for a proposal shall not affect the duty of the Contractor to proceed as ordered with the work described in the field order.

The Engineer at times may issue a Request for Change Proposal to the Contractor requesting price and/or time adjustment proposals for contemplated changes in the work. The Request for Change Proposal is not a directive for the Contractor to perform the work described therein.

The Contractor shall submit a detailed written proposal in a time span allowed by the Engineer or if a time span is not stated by the Engineer it shall be within 15 days after receipt of a request for Request for Change Proposal or field order containing a request for proposal. The format shall set forth all charges the Contractor proposes for the change and a detailed justification for the

proposed adjustment of the contract time, all properly itemized and supported by sufficient substantiating data to permit evaluation. The Engineer will determine whether the proposal is acceptable.

No payment shall be allowed to the Contractor for pricing or negotiating or research or designs for proposed or actual changes. No time extensions will be granted for delay caused by late Contractor pricing of changes or proposed changes or time spent in negotiation.

The Engineer may accept the entire proposal, or any discrete cost item contained within the proposal, or the proposed adjustment to contract time by a notice in writing to the Contractor delivered to the contractor within thirty days after receipt of the proposal. The written acceptance by the Engineer of all or part of the Contractor's proposal shall create a binding agreement between the parties for that aspect of the change.

If the Engineer refuses to accept the Contractor's entire proposal, the Engineer may issue a field order for the work; or if a field order has already been issued, the Engineer may issue a supplemental field order establishing new contract prices, the remaining adjustments to contract price and /or contract time for the ordered changes. If the Contractor disagrees with any term, condition or adjustment contained in such field order or supplemental field order, it shall follow the protest procedures set forth in and be subject to the other terms of Subsection 104.03 - Field Orders.

104.15 Overweight Vehicle Control. All weight tags for aggregates and hot mix asphalt concrete transported to the worksite shall be submitted daily to the Engineer. The maximum legal total gross weight (W) as calculated by the formulas in HRS 291-35 Gross weight, axle, and wheel loads, for the transporting vehicle shall be clearly indicated on the weight tag. The Engineer may inspect any material transporting vehicle for compliance with HRS 291-34 to 291-36 at no additional cost to the State. The Engineer may refuse entry to or demand the removal from the worksite of any vehicle that exceeds the maximum legal total gross weight and shall inform the appropriate enforcement authority of the violation."

END OF SECTION 104