

Amend Section 108 - Prosecution and Progress to read as follows:

"SECTION 108 - PROSECUTION AND PROGRESS

108.01 Subcontracting. The Contractor shall not subcontract, sell, transfer, assign, or otherwise dispose the contract or any portion thereof, or his/her right, title, or interest in the contract without the written consent of the Director. The Contractor shall not discriminate on the grounds of race, color, religion, sex, national origin, age, or disability in the selection or retention of subcontractors, including procurement of materials and leases.

Subject to the provisions of Section 103D-302, HRS, the Contractor may subcontract a portion of the work but he/she remains primarily responsible for the work so subcontracted. The Contractor shall not be permitted to subcontract work to any subcontractors who has been suspended by the State. If requested by the Engineer, the Contractor shall provide a copy of any subcontract.

The Contractor shall perform with his/her own organization, work amounting to not less than 30 percent of the total contract cost. Where an entire item is subcontracted, the value of work subcontracted, the value of work subcontracted will be based on the contract item bid price. When a portion of an item is subcontracted, the value of work subcontracted will be estimated by the Director and be based on the cost of such portion of the contract item.

When any portion of the work which has been subcontracted is not prosecuted in a manner satisfactory to the Director, the Contractor, upon receipt of a written notice thereof, shall immediately remove the subcontractor from the project, and the subcontractor shall not again be employed on the project.

No subcontract shall in any case release the Contractor of his/her liability under the contract and bonds.

Under Section 103D-302, HRS, the Contractor is required to list the names of persons or firms to be engaged by the Contractor as a subcontractor or joint contractor in the performance of the contract. When a change in a listed subcontractor is requested by the Contractor, submission of a formal release from the listed subcontractor is required by the State before a substitution will be considered for approval regardless of whether the substitute is another subcontractor or the Contractor himself/herself.

108.02 Notice to Proceed (NTP). When the Director accepts the contract, the Department will give a NTP to the Contractor. The Department will show the date that the Contractor expects to begin the work and charge contract time. The date specified in the NTP will be no later than 45 days from the date of award unless there is no execution of contract.

The Contractor shall begin work within 10 working days from the specified date. Pursue the work diligently to completion within the contract time allowed. Do not work before the specified date without a written acceptance.

When the Contractor begins work before receiving the NTP, the Department will consider the Contractor doing work at its own volition and risk.

When the Department gives written consent to work before the specified date, the Contractor may begin work, subject to:

- (1) assuming the risk that the Department may disapprove the contract,
- (2) taking precautions required for public safety,
- (3) observing the provisions in the contract before beginning operations,
- (4) working as is necessary to leave the project site in a neat condition at no cost to the State, and
- (5) restoring the site to its former condition at no cost to the State if the work done affects existing roads or highways.

The Engineer will pay for all acceptable work done before the NTP date when the Department executes the contract.

The Engineer will not allow additional compensation nor an extension of time for delay, hindrance or interference caused by doing the project work before the NTP date except when the same situation would have occurred if the Contractor had begun work after the NTP date.

108.03 Progress Schedules. The Contractor shall submit four sets of its detailed progress schedule along with all the files needed to re-create that time period's progress schedule's plot and reports on a 3-1/2 inch HD floppy disk to the Engineer for review before the date of NTP or 30 calendar days after award of the contract whichever is earlier. The schedule shall account for normal inclement weather, unusual soil or other conditions that may influence the progress of the work, schedules and coordination required by any utility, off or on site fabrications, and all other pertinent factors that relate to progress. The Engineer will review and comment on the submitted progress schedule. The Contractor shall adjust the schedule to address comments made by the Engineer. Submit progress schedules and along with the files on a 3-1/2 inch HD floppy disk to the Engineer for review until the Engineer finds it acceptable. The Engineer will not authorize progress payments until the Engineer

acknowledges, in writing, a receipt of a schedule that meets all the requirements of this Subsection.

Upon request, provide two color timescaled Project Evaluation and Review Technique (PERT) charts using the activity box template of Logic – Early Start or any template requested by the Engineer.

All progress schedules submittal shall be a color Time-Scaled Logic Diagram (TSLD). The critical path shall be marked in red. For both the TSPD and PERT chart no blue or black line diagrams will be acceptable. The Engineer will designate the color to be used and the size of the plot and quality of paper for both the TSPD and PERT chart. The critical path is defined as the chain(s) of activities that take the longest time to accomplish completion of the project.

Submittal of and the Engineer's receipt of the progress schedule will not imply the Department's approval of the schedule breakdown, its individual elements, and any critical path that may be shown. Acceptance of the schedule will not be deemed an agreement by the Department that the constructions means, methods and resources shown on the schedule will result in work that conforms to the contract requirements. The Contractor has the risk of all elements (whether or not shown) of the schedule and its execution.

In the event the Contractor submits and the Department receives a schedule, e.g., shorter than the contract time, such will not constitute an agreement to modify the contract time or completion date, nor will the receipt and acceptance of such a schedule incur any obligation by the Department. The Contractor shall be solely responsible for and shall accept all risks and any delays, other than those that can be directly and solely attributed to the Department, that may materialize during the construction work until the contract completion date is reached. The contract time or completion date is established for the benefit of the Department and cannot be changed without an appropriate change order issued by the Department. The Department will not be responsible if the Contractor does not meet its accelerated schedule. Unless the Contractor can prove that the Department is solely responsible for its failure to meet its schedule. The Department will be responsible for or obligated to accept the work before the completion date established by the contract.

After construction starts submit four plotted progress schedules and reports on all construction activities every two weeks (bi-weekly). The bi-weekly submittal shall include an update on new activities and any changes in duration or start or finish dates of any activity. Setting for software shall be such that changes in the activity's start or finish dates shall result in a change in all activities that precedes. Also, submit with every update, in report form, any changes to the progress schedule since the previous schedule submittal. This scheduled bi-weekly submittal shall also include an updated version of the

project schedule on a 3-1/2 inch HD floppy disk. The disk shall have all the information needed to re-create that time period's TSLD plot and reports. Non-compliance will be grounds for delaying the processing of the progress payment. In addition, during the period when there is no acceptable progress schedule the Contractor shall make no claim for additional compensation for delays and waives the right to claim for additional compensation and/or time for that period of time. Progress schedules when submitted after the fact, more than four working days after the required submittal date, will not be considered timely. Therefore, it shall not acceptable as evidence for delays. The Engineer may change the frequency of the submittal requirements but may not require a submittal of the schedule to be more than once a week. The Engineer may decrease the frequency of the submittal of the bi-weekly schedule.

When requested by the Engineer, submit a schedule with supplementary revisions. Submit such changes within four calendar days from the date of request by the Engineer. Non-compliance will be grounds for delaying the processing of the progress payment until the submittal is received.

The Contractor shall meet on a bi-weekly basis with the Engineer to review the progress schedule. The Contractor shall have someone attending the meeting that can answer all questions on the TSLD submitted.

Any float in the project schedule is owned by the project, and as such neither the owner nor the Contractor owns it.

The software used for scheduling shall be the latest version of SureTrak Project Manager by Primavera Systems, Inc. No alternative software will be considered. The Contractor shall provide one independently licensed copy of the most current version of SureTrak Project Manager by Primavera Systems, Inc. to the State for its exclusive use which will become the property of the State at the end of the project. The Contractor shall also pay for training of State personnel, and the maintenance, technical support and supply upgrade software for this copy of SureTrak Project Manager until final acceptance of the project or until the final estimate is accepted by the Contractor whichever is later. The providing and maintaining of the SureTrak Project Manager software shall be considered incidental to various items of the contract and no separate payment shall be made.

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

- (1) the major features of work, such as but not limited to grubbing, roadway excavation, structure excavation, structure

construction, BMP installation, shown in the chronological order in which the Contractor proposes to work that feature or work and its location on the project;

(2) all features listed or not listed in the Special Provisions that the Contractor considers a controlling factor for the timely completion of the contract work;

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

(4) the total anticipated time necessary to complete work required by the contract;

(5) a chronological listing of critical intermediate dates or time periods for features or milestone or phases that can affect timely completion of the project;

(6) major activities related to the location on the project;

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

(8) set schedule logic for out of sequence activities to retain logic. Also, open ends shall be non-critical;

(9) show target bars for all activities:

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

(11) the file name, print date, data and project title and number shall be included in the title block; and

(12) have columns with the appropriate data in them for activity ID, Description, Original Duration, Remaining Duration, Early Start, Early Finish, Total Float, Percent Complete, Resources. The Resource column shall list who is responsible for the work to be done in the activity. These columns shall be to the left of the bar chart.

(B) For Contracts Which Have A Contract Amount More Than One Million Dollars (\$1,000,000) Or Having A Contract Time Of More Than

100 Working Days Or 140 Calendar Days. For contracts which have a contract amount more than one million dollars (\$1,000,000) or contract time of more than 100 working days or 140 calendar days, the Contractor shall submit a Timed-Scaled Logic Diagram (TSLD) submittal package and it shall meet the following requirements and have these essential and distinctive elements:

- (1) have the information and requirements listed in A above;
- (2) provide reports and graphics available from the software as requested by the Engineer;
- (3) sufficient detail to allow at least weekly monitoring of the Contractor and subcontractor's operations;
- (4) the time scaled schematic shall be on a calendar or working days basis. What will be used shall be determined by how the Contract keeps track of time. It will be the same. Plot the critical calendar dates anticipated. Provide sufficient space for plotting actual calendar dates;
- (5) breakdown of activity, such as forming, placing reinforcing steel, concrete pouring and curing, and stripping in concrete construction. Indicate location of work to be done in such detail that it would be easily determined where work would be occurring within approximately 200 feet;
- (6) latest start and/or finish dates for critical phasing;
- (7) identify responsible subcontractor, supplier, and others for their respective activity;
- (8) no individual activity shall have duration of more than 20 calendar days unless requested and approved by the Engineer;
- (9) all activities shall have work breakdown structure codes and activity codes. The activity codes shall have coding that incorporates information for phase, location, who is responsible for doing work and type of operation and activity description and
- (10) incorporate all physical access and availability restraints.

If the TSLD indicates an early completion of the project the Contractor shall upon submittal of the schedule cooperate with the State in explaining how he will achieve it. In addition, the Contractor shall submit the above explanation in writing which shall include the State's part, if any, in achieving the early

completion date. Early completion of the project shall not rely on changes to the Contract Documents unless approved by the Engineer.

Submit an anticipated work completion or payment graph plotting contract time and gross payment anticipated with the initial TSLD submittal and when the Engineer requests an updated graph.

Submit a listing of equipment that is anticipated to be used on the project. Include type, size, make, year of manufacture and all information necessary to identify the equipment in the Rental Rate Blue Book for Construction Equipment with the initial TSLD submittal.

Submit an anticipated manpower requirement graph plotting contract time and total manpower required. This may be superimposed over the payment graph. Submit with the initial TSLD submittal and when the Engineer requests an updated graph.

Provide a Method Statement for each major activity group or description of work. A major activity is defined as an activity that has a duration longer than 5 days, or a milestone activity or a contract item that exceeds \$10,000 for the total amount for that item on the Contract cost proposal or a critical path activity or an activity designated as such by the Engineer. Each Method Statement shall be a detailed narrative describing the work to be done and the method by which the work shall be accomplished. Included as part of each Method Statement shall be the planned quantity and type, make and model of equipment, the manpower to do the work, which shall also include worker classification and the production rate per eight hour day needed to meet the time frame indicated on the schedule. If the production rate varies by more than plus or minus ten percent or if planned equipment or manpower should change for any reason then another Method Statement shall be provided and additional information supplied to substantiate and differentiate it from other like activities.

The Contractor shall not construe receipt of TSLD to assign responsibility of performance or contingencies to the State. Also, receipt of the TSLD does not relieve the Contractor of responsibility to adjust forces, equipment and work schedules in order to meet the contract completion date.

When making TSLD adjustment submittals the Contractor shall show how they intend to make those adjustments and remain on the anticipated schedule and within the contract time.

The Contractor shall begin work according to the submitted TSLD after receiving the NTP. Prosecute the work in the order of the schedule expeditiously. The Engineer may require the Contractor to provide additional work forces and equipment to bring the operation into accordance with the submitted TSLD if failure to proceed as provided in the schedule or prosecution of the work in the current manner does not insure completion within the specified

Contract time. This action by the State shall be not considered as a directive for constructive acceleration and therefore will be at no additional cost to the State.

When the Contractor fails to insure completion within the specified time, the Engineer will consider employing an outside work force and equipment. The Engineer will charge the Contractor all cost to do the work including but not limited to, profit, employee benefits and fringes, bonds, taxes, insurance, overhead and depreciation for plant and equipment.

In addition to the bi-weekly schedule meetings the Contractor shall meet once a week with the State to have a general discussion on but not limited to, the progress of the project, potential problems, coordination of work, submittals etc. The personnel attending shall have the ability to make decisions and answer questions.

The Contractor shall bring to weekly meeting a detailed work schedule showing the next three weeks work. The three-week schedule shall show:

- 1) All construction events, traffic control and BMP related activities and be of such detail that the Engineer will be able to determine at what location and type of work will be done for any day for the next three weeks. This is for the State to use to plan its manpower requirements for that time period;
- 2) The duration of all events and delays;
- 3) The critical path on the three-week schedule shall be clearly marked in red or marked in a manner that makes it clearly distinguishable from other paths and is acceptable to the Engineer;
- 4) The detail of the three-week schedule shall be significantly greater than the one presented in the TSLD. The Engineer will be the sole judge if the amount of detail presented is sufficient;
- 5) Critical submittals and RFI's that are expected to be needed in the next three weeks shall be listed also;
- 6) The three-week schedule is in addition to the TSLD and shall in no way be considered as a substitute for the TSLD.

The Contractor shall submit two days ahead of the weekly meeting a list of outstanding submittals or RFIs that will be needed in the near future with a rating of urgency. The status of which will be discussed at the weekly meeting.

In addition to the three-week schedule the Contractor shall submit and be ready to discuss all of their required erosion control inspection reports for the past week.

Full compensation for any additional costs occasioned by compliance with the provisions in this section shall be considered as included in the prices paid for the various contract items of work and no additional compensation will be allowed therefor.

The Contractor shall have on the work site as its designated agent, a competent superintendent. The superintendent shall be able to read and understand the project plans and specifications and shall be experienced in the type of project being undertaken and the work being performed. The superintendent shall receive instructions from the Engineer or its authorized representative. Authorize the superintendent to:

- (a) execute the orders and directions of the Engineer or its authorized representative without delay and
 - (b) promptly supply such materials, equipment, tools, labor and incidentals as may be required to complete the project within the prescribed contract time.
- Furnish a superintendent irrespective of the amount of project work sublet.

108.04 Limitation of Operations. Conduct work with the least interference of traffic. Use care to the location of detours and the provisions for handling traffic. Do not create more work to the prejudice or detriment of work already started. The Engineer may require the Contractor to finish a section before starting work on additional sections if the opening of that section is essential to public convenience.

108.05 Character Of Workers, Methods, And Equipment. Workers shall have sufficient skill and experience to do the assigned work properly. Workers engaged in special or skilled work shall have sufficient experience to do that work properly and satisfactorily. Also, they shall have sufficient experience in the operation of the equipment to do that work properly and satisfactorily.

The Contractor shall remove the workers who do not carry out the assigned work in a proper and skillful manner from the project at the written request of the Engineer. Also, remove the workers who are excessive or disorderly from the project at the written request of the Engineer. Such worker shall not work for two years on Federal-Aid, State, or County projects from the date of departure without the written acceptance of the Department.

If the Contractor fails to remove such worker or fails to furnish suitable and sufficient personnel for the proper prosecution of the work, the Engineer may suspend the work in writing until such orders are complied with.

The Department will consider Contractors using such workers within a period of two years from the date of departure non-responsible.

The Department may declare the Contractor using such workers in material default of the project contract.

Proposed equipment on the work shall be of sufficient size and in such mechanical condition to meet requirements of the work and to produce a satisfactory quality of work. Equipment used on the project shall not injure the roadway, adjacent property, or other highway facilities.

The Contractor may use methods or equipment that will complete the non-prescribed work according to the contract.

If the contract specifies certain methods and equipment for that work, the Contractor shall use such methods and equipment unless the Engineer accepts the Contractor's choice of methods and equipment.

The Contractor shall submit a written request that includes a full description of the methods and equipment that the Contractor is proposing. Also, submit a written request that includes an explanation of the reasons for changing such methods and equipment. If the Engineer grants the request, the request will be on the condition that the Contractor shall be fully responsible for completing the work according to the contract. If the Engineer concludes that the work does not meet contract requirements after trial use of the requested methods or equipment, stop using the requested method or equipment. Complete the remaining work with the specified methods and equipment. Remove and replace the deficient work with work of specified quality or take such other corrective action. The authorized requested methods or equipment will not change the basis of payment for the contract items involved nor the project contract time.

108.06 Temporary Suspension of Work. The Engineer will have the authority to suspend the project in whole or in part for such period as the Engineer may deem necessary. Causes for temporary suspension of work include:

- (1) unsuitable weather;
- (2) other conditions out of the control of the Contractor which may prevent proper prosecution of the work or;
- (3) failure to prosecute or do the work according to the contract;

- (4) non-compliance with non-discrimination, Affirmative Action, EEO and wage and hour contract provisions.

The Contractor shall immediately comply with the Engineer's written order to suspend the affected work. Resume the suspended work only upon written NTP from the Engineer.

When the Engineer orders such suspension of project work, the Engineer will assume the cost of eliminating the hazards and inconveniences caused by such suspension according to Subsection 104.03 - Extra Work. The Engineer may do the work at no cost to the Contractor at the Engineer's option. The Engineer will apply this provision only to the portion of the work suspended.

When the Engineer causes suspension of work and the Engineer chooses not to do the work of eliminating the hazards and inconveniences, the Engineer will pay the Contractor to do the work to such amount as the Engineer may in writing find to be fair, reasonable and auditable. The amount compensated will be the actual cost considered unavoidable by the Engineer. Take immediate steps, after consultation with the Engineer, to minimize costs.

When a contract phase or a controlling item of work is suspended more than two weeks, the Engineer may pay compensation for the following:

- (1) direct project overhead costs excluding overhead equipment plus a markup of 10% for profit and indirect general and administrative expenses;
- (2) overhead equipment at the Blue Book Rental Rate for actual operating hours;
- (3) rental at rate determined by cost divided by expected useful life for major construction materials used temporarily in the construction work when their actual period of use is extended by the suspension;
- (4) idle equipment at 40% of the applicable Blue Book Rental Rate without operation costs or equal to the direct cost;
- (5) Demobilization and mobilization of workers and equipment as extra work according to Subsection 109.04 - Extra and Force Account (F.A.) Work.

The Contractor shall submit a claim for additional compensation in writing within 20 calendar days of the start of the suspension. Submit the amount of claim and the detailed supporting documents to justify the claim in writing within 60 calendar days after the completion of the suspension period.

Notwithstanding the suspension which may still be in progress, the Engineer may make progress payments for costs incurred under provisions of this section upon submission of cost documentation which the Engineer deems acceptable.

If the Contractor causes the suspension of the work, do the work necessary to eliminate and repair hazards and inconveniences caused by such suspension at no cost to the State. If the Contractor fails to do the work as specified herein, the Department may do such work and the Contractor shall pay the cost and the Engineer will deduct from payments due.

Before the Department assumes the cost of maintenance, the Contractor shall eliminate hazards and inconveniences and repair damages to the work that the Contractor could have done before the suspension. If the Contractor fails to do this work, the Department will do the work and the Contractor shall pay the cost of that work and the Engineer will deduct from payments due or become due.

The Engineer will not charge the Contractor a working day, if:

- (1) the Department orders such suspension of project work and
- (2) the Contractor is unable to proceed with 60% of its normal labor and equipment force engaged in the current controlling operation for at least five hours on working days.

If a non-controlling item of work does become the current controlling operation, make the time of completion of the work on the current controlling operation.

If the Contractor causes the suspension of the work, the Engineer will consider the days during which the suspension order is in effect to be working days. The Engineer will charge those days as part of completion time.

The Engineer will decide who is responsible for suspensions.

If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Engineer in the administration of this contract, or by the failure of the Engineer to act within the time specified in this contract (or if no time is specified, within reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract necessarily caused by such reasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent:

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

(2) for which an adjustment is provided for or excluded under any other provision of this contract.

No claim under this clause shall be allowed:

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Engineer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(2) Unless the claim is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

Any adjustment in contract price made pursuant to this clause shall be determined according to the price adjustment clause of this contract.

108.07 Determination and Extension of Contract Time. When the contract time is on a working day basis, the Engineer will furnish the Contractor a weekly statement. The Engineer will show the number of days charged to the contract for the preceding week. Also, the Engineer will show the number of days specified for completion of the contract. The Engineer will allow the Contractor one week in which to file a written protest setting forth in what respect said weekly statement is incorrect. If the Contractor does not file a written protest within such time period, the Engineer will assume that the Contractor accepts the statement as correct.

When the contract time is on a calendar day basis, the Engineer will include the number of calendar days stated in the contract. This includes the NTP, Sundays, holidays and non-work days. The Engineer will exclude calendar days elapsing between the orders of the Engineer to suspend work and to resume work for suspensions not the fault of the Contractor.

When the contract completion time is a fixed calendar date, the contract completion time shall be the date when completing work.

The Engineer will determine the completion time allowed as awarded from the original proposal quantities. If the Engineer orders more quantities than those set forth in the proposal, the Engineer will increase the contract time allowed for performance. The Engineer will decide the increase in contract time.

When the Contractor desires an extension of time for delays, the Contractor shall notify the Engineer in writing 7 days before the start of that delay. The Contractor shall then submit to the Engineer within 30 days of that delay a written request for an extension of time. The extension of time shall set forth reasons in support of the request. Claiming insufficient time is not a valid reason for extension of time. If the delayed work was because of conditions beyond its control and without the fault of the Contractor, the Engineer may extend the time for completion. The extended time for completion shall then be in full force and effect the same as though the extended time was the original time for completion.

When the Engineer gives final acceptance or relief of maintenance according to Subsection 105.17 - Acceptance, the daily time charge will cease.

108.08 Liquidated Damages and Failure to Complete on Time. The Contractor shall comply with the contract terms regarding opening lanes to traffic during the hours specified in Subsection 104.04(B) - Traffic Maintenance Plans. The Engineer will assess liquidated damages of \$500 for every one-to fifteen-minute increment for each lane not open to the public if the Contractor fails to comply with the requirement. The maximum amount assessed per day shall be \$5,000. The Engineer will decide the time and liquidated damages assessed.

The Engineer may consider delays caused by a problem beyond the Contractor's control in opening lane(s) closure on time for not charging liquidated damages. Equipment breakdown is not a cause to waive liquidated damages.

Before closing lane(s), the Contractor shall submit a contingency plan for acceptance by the Engineer which will indicate what steps and efforts the Contractor shall take to open lane(s) to the public on time. The Engineer will not allow lane closures until the Engineer accepts the contingency plan. The Engineer will not make separate payment for work to implement a contingency plan.

The Contractor shall complete the work within the number of working days specified in the contract. The contract will begin officially from the date designated in the NTP. If the contract specifies a calendar date as the date of completion, the Contractor shall complete the work by that date.

Delay in the completion of the work within the required time will inconvenience the public, obstruct traffic and interfere with business.

The Contractor shall pay the amount shown in Table 108-I - Schedule of Liquidated Damages for each working day delayed in the completion of the contract. The Contractor shall not pay by way of a penalty. The Department may deduct the amount from monies due or that may become due under the contract if the Contractor does not pay the liquidated damages. Table 108-I do

not include actual cost of engineering, superintendence, inspection, and traveling expenses.

TABLE 108-I - SCHEDULE OF LIQUIDATED DAMAGES		
Total Amount Including Extras Set Up On Contract		Liquidated Damage Amount
For More Than	To And Including	Per Working Day
\$ 0	\$ 25,000	\$ 125
\$ 25,000	\$ 50,000	\$ 200
\$ 50,000	\$ 100,000	\$ 260
\$ 100,000	\$ 500,000	\$ 440
\$ 500,000	\$ 1,000,000	\$ 700
\$ 1,000,000	\$ 2,000,000	\$1,000
\$ 2,000,000	\$ 5,000,000	\$1,300
\$ 5,000,000	\$10,000,000	\$2,300
\$10,000,000	---	\$2,800

The findings of the Director shall be accepted by the parties hereto as final, but any allowance of time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract, nor be construed to prevent action under Subsection 108.09 - Default and Termination of Contract in case the Contractor fails in the judgement of the Director to make reasonable and satisfactory progress after such allowance of time has been granted. Liquidated damages shall be assessed in the amount set forth in the Schedule of Liquidated Damages or as specified in the proposal.

(a) **Liquidated Damages Upon Termination.** If the Department so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages for such reasonable time as may be required for final completion of work.

(b) **Liquidated Damages In The Absence Of Termination.** If the Department does not terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

108.09 Default and Termination of Contract.

(A) If the Contractor:

(1) Fails to begin the work under the contract within the time specified in the Notice to Proceed, or

(2) Fails to perform the work with sufficient workers and equipment or with sufficient materials to assure the prompt completion of said work, or

(3) Performs the work unsuitably or neglects or refuses to remove materials or to perform anew such work as may be rejected as unacceptable and unsuitable, or

(4) Discontinues the prosecution of the work, or

(5) Fails to resume work which has been discontinued within a reasonable time after notice to do so, or

(6) Becomes insolvent or is declared bankrupt, or commits any act of bankruptcy or insolvency, or

(7) Allows any final judgement to stand against the Contractor unsatisfied for a period of 10 days, or

(8) Makes an assignment for the benefit of creditors, or

(9) For any other cause whatsoever, fails to carry on the work in an acceptable manner,

the Engineer will give notice in writing to the Contractor and its surety of such delay, neglect, or default.

The Department may take the prosecution of the work out of the hands of the Contractor or surety without violating the contract if the Contractor or surety receives written notification from the Engineer of such delay, neglect or default and the Contractor or surety fails to proceed according to the notice to remedy the delay, neglect or default, within a period of 10 days after receipt of said notice. The Department may appropriate or use any or all materials and equipment on the ground as may be suitable and acceptable and may enter into an agreement for the completion of said contract according to the terms and provisions thereof, or use such other methods required for the completion of the project according to the contract.

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

The Department may bar Contractors from bidding and working on construction projects of the Department for two consecutive years from the date of termination. This includes its owners, officers, and

managerial and supervisory staff terminated under provisions of this section.

(B) Erroneous Termination For Default. If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing termination for convenience of the State, be the same as if the notice of termination had been issued pursuant to such clause.

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

(D) Termination For Convenience.

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

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

(3) Right to Construction and Goods. The Department may

require the Contractor to transfer title and deliver to the State in the manner and to the extent ordered by the Department:

- (a) Any completed constructions; and
- (b) The partially completed construction, goods, materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "construction material") as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The Contractor shall protect and preserve property in the possession of the Contractor in which the State has an interest. If the Director does not exercise this right, the Contractor shall use best efforts to sell such construction, goods, and construction materials according to the standards of Section 490:2-706, HRS. This in no way implies that the State has breached the contract by exercise of the termination for convenience clause.

(4) Compensation.

- (a) The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data, submitted to the extent required by Subchapter 15, Chapter 3-122, HAR, bearing on such claim. If the Contractor fails to file a termination claim within one year from the effective date of termination, the Department may pay the Contractor, if at all, an amount set according to Subparagraph 108.09(D)(4)(c)2.
- (b) The Department and the Contractor may agree to a settlement provided the Contractor has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the State, the proceeds of any sales of construction, supplies, and construction materials under paragraph 108.09(D)(3) of this clause, and the contract price of the work not terminated.
- (c) Absent complete agreement under subparagraph 108.09(D)(4)(b) of this paragraph, the Department shall pay the Contractor the following amounts, provided payments under subparagraph 108.09(D)(4)(b) shall not duplicate payments under this paragraph the total (without duplication of any items) of:

1. The cost of all contract work performed before the effective date of the notice of termination work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of such work; provided, however, that if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

2. Costs of settling and paying claims arising from the termination of subcontracts or orders pursuant to paragraph 108.09(D)(2) of this clause. These costs must not include costs paid according to subparagraph 108.09(D)(4)(c)1 of this paragraph;

3. The reasonable settlement costs of the Contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract; and

4. The total sum to be paid the Contractor under this paragraph shall not exceed the total contract price plus the reasonable settlement costs of the Contractor reduced by the amount of any sales of construction supplies, and construction materials under paragraph 108.09(D)(3) of this clause, and the contract price of work not terminated.

(d) Cost claimed, agreed to, or established under subparagraphs 108.09(D)(4)(b) and 108.09(D)(4)(c) of this paragraph shall be according to Chapter 3-123, HAR.

108.10 Emergency and Legally Justifiable Cause for Termination of Contract. The Engineer may end the contract when a national emergency or other reasons beyond the control of the Engineer makes the termination necessary. The Department will give the Contractor a written notice of

termination. The Engineer will pay the Contractor for work done and accepted at the contract unit prices or lump sum prices upon termination. The Engineer will reimburse the Contractor for required expenditures in preparing for and moving to and from the project site. Also, the Engineer will reimburse the Contractor for required expenditures not compensated for. The Contractor shall not submit claims for interest or loss of anticipated profits.

The Engineer will purchase the materials from the Contractor at actual cost per receipted bills. The Contractor shall get these material to the worksite at locations designated by the Engineer. The Engineer will inspect and test these materials for acceptance. The Contractor shall not have incorporated these materials in the work yet. Store and maintain these material properly.

END OF SECTION