

SECTION 105 - CONTROL OF WORK

Make the following amendments to said Section:

(I) Amend **105.01 Authority of the Engineer** to read as follows:

"105.01 Authority.

(A) **Authority of the Engineer.** The Engineer is the representative of the Director and has all the authority of the Director except the ability to enter into a contract to procure goods and/or services for the State. The Engineer will make decisions on all questions that may arise regarding the contract, such as, but not limited to:

- (1) Interpretation of the contract documents;
- (2) Acceptability of the materials furnished and work performed;
- (3) Manner of performance and rate of progress of the work;
- (4) Acceptable fulfillment of the contract on the part of the Contractor;
- (5) Compensation under the contract.

The Engineer's decisions on questions, claims, and disputes will be final and conclusive subject to Subsection 105.18 – Disputes and Claims.

The Engineer may delegate specific authority to act for the Engineer to a specific person or persons. Such delegation of authority shall be established in writing and shall become effective upon delivery to the Contractor.

(B) **Authority of the Resident Engineer.** As the representative of the Engineer, the Resident Engineer has all the authority of the Engineer in matters involving the work.

(C) **Authority of the Inspectors.** Inspectors, as a representative of the Resident Engineer or other agencies, will inspect the work done and materials furnished. Such inspection may extend to the preparation, fabrication or manufacture of the materials to be used. The Inspector does not have authority vested in the Resident Engineer unless specifically delegated in writing. The Inspector may not alter or waive the provisions of the contract, issue instructions contrary to the contract, or act as agent or representative of the Contractor.

Failure of an Inspector at any time to reject non-conforming work shall not be considered a waiver of the State's right to require work in strict conformity with the contract documents as a condition of final acceptance.

(D) Authority of the Consultant. The State may engage Consultants to perform duties in connection with the work. Unless otherwise specified in writing to the Contractor, such retained Consultants shall have no greater authority than an Inspector."

(II) Amend 105.02 Contract Plans and Working and Shop Drawings to read as follows:

"105.02 Shop Drawings.

(A) Shop Drawing Requirements. The Contractor shall prepare, thoroughly check, approve, all shop drawing, and submit to the Engineer for review. Whenever possible, electronic files in MS Word, MS Excel and Microstation format shall be submitted with the hard copies. The Contractor shall indicate its approval by stamping and signing each submittal of shop drawing. Any shop drawing submitted without being reviewed, stamped and signed will be returned as an incomplete submittal, and any delay caused thereby shall be the Contractor's responsibility.

All drawing, which require engineering stamp, shall be stamped by professional engineers licensed in the State of Hawaii. Shop drawings shall indicate in detail all parts of an item of work, including erection and setting instructions and engagements with work of other trades or other separate contractors. Shop drawings for structural steel, millwork, pre-cast concrete and falsework, formwork or centering with heights of 40 feet or more or open spans of 20 feet or more shall consist of calculations, fabrication details, erection drawings and other shop drawings, as necessary, to show the details, dimensions, sizes of members, anchor bolt plans, insert locations and other information necessary for the complete fabrication and erection of the structure to be constructed. Shop drawings also include stress sheets, drawings, bending diagrams for reinforcing steel, and plans for erection, falsework, framework, cofferdam, and other items or such other similar data required for the successful completion of the work.

All shop drawings as required by the contract, or as determined by the Engineer to be necessary to illustrate details of the work shall be submitted to the Engineer with such promptness as to cause no delay in the work or in that of any other Contractor. Delay caused by the failure of the Contractor to submit shop drawings on a timely basis to allow for

review, possible resubmittal and acceptance will not be considered as a justifiable reason for a contract time extension. Contractor, at its own risk, may proceed with the work affected by the shop drawings after they are submitted but before receiving acceptance. The State shall not be liable for any costs or time required for the correction of work done without the benefit of accepted shop drawings.

The Contractor shall not make changes to the accepted shop drawings without submitting a written request to the Engineer and reviewing a written acceptance of the change by the Engineer.

By approving and submitting shop drawings, the Contractor thereby represents that it has determined and verified all field measurements and field construction criteria, or will do so, and that it has checked and coordinated each shop drawing with the requirements of the work and the contract documents. When shop drawings are prepared and processed before field measurements and field construction criteria can be or have been determined or verified, the Contractor shall make all necessary adjustments in the work or resubmit further shop drawings, all at no change in contract price or time.

The shop drawing submitted must be accompanied by a transmittal giving a list of the titles and number of the drawings. Each series shall be numbered consecutively for ready reference and the submittal shall be marked with enough information to identify itself, including date, project name and number, name of the submitting Contractor or subcontractor, revision number, and revision box which gives date of the revision and what the revisions changed.

The size of the sheets that shop drawings are prepared on shall be as appropriate to suit the drawing being presented so that the information is clearly and legibly depicted. The Engineer will determine what size is appropriate.

When required by the contract, the Contractor shall submit to the Engineer descriptive sheets such as brochures, catalogs and illustrations, which will completely describe the material, product, equipment, furniture or appliances to be used in the project as shown in the drawings and specifications and indicate such conformity by marking, or stamping and signing each sheet.

(B) Submittal for Deviations and Variances. The Contractor shall include with the submittal, written notification clearly identifying and summarizing all deviations or variances from the contract drawings, specifications and other contract documents. The variances shall also be clearly indicated on the shop drawing, descriptive sheet, and material

sample or color sample. Failure to so notify of and identify such variance shall be grounds for rejection of the related work or materials, notwithstanding that the Engineer accepted the submittal. If the variances are not acceptable to the Engineer, the Contractor will be required to furnish the item as specified or indicated on the contract documents at no additional cost or time."

(III) Delete 105.03 Conformity with the Contract in its entirety and replace it with the following:

"105.03 Review and Acceptance Process. The Engineer will complete the review of the submittal within 30 days from the date of receipt unless a different review time is established by the contract documents. The Engineer will advise the Contractor, in writing, as to the acceptability of the submittal. Should the Engineer partially or totally reject the submittal, the Contractor shall modify the submittal as required by the Engineer and resubmit the item within 15 days. At this time, the review and acceptance cycle described above shall begin again. The review and acceptance cycle shall begin again as described above each time the submittal is returned to the Contractor for modification. If the volume of the shop drawings submitted at any time for review is unusually large, the Contractor shall inform the Engineer of its preferred order for reviews, and the Engineer will use reasonable efforts to accommodate the Contractor's priority.

The acceptance by the Engineer of the Contractor's submittal relates only to their sufficiency and compliance with the intention of the contract. Acceptance by the Engineer of the Contractor's submittal does not relieve the Contractor of any responsibility for accuracy of dimensions, details, and proper fit, and for agreement and conformity of submittal with the contract drawings and specifications. Nor will the Engineer's acceptance relieve the Contractor of responsibility for variance from the contract documents unless the Contractor, at the time of submittal, has provided notice and identification of such variances required by this section. Acceptance of a variance shall not justify a contract price or time adjustment unless the contractor requests such adjustment at the time of submittal and the adjustment is explicitly agreed to in writing by the Engineer. Any such request shall include price details and proposed scheduling modifications. Acceptance of a variance is subject to all contract terms, stipulations and covenants, and is without prejudice to any and all rights under the surety bond.

If the Engineer returns a submittal to the Contractor that has been rejected, the Contractor, so as not to delay the work, shall promptly make a resubmittal conforming to the requirements of the contract documents and indicating in writing on the transmittal and the subject submittal what portions of the resubmittal has been altered in order to meet the acceptance of the Engineer. Any other differences between the resubmittal and the prior submittal shall also be specifically described in the transmittal.

No mark or notation made by the Engineer on or accompanying the return of any submittal to the Contractor shall be considered a request or order for a change in work. If the Contractor believes any such mark or notation constitutes a request for a change in the work for which it is entitled to an adjustment in contract price and/or time, the Contractor must follow the same procedures established in Subsection 104.02 – Changes or lose its right to claim for an adjustment.

(IV) Amend 105.04 Furnishing and Coordination of the Contract to read as follows:

"105.04 Priority of the Contract Documents; Drawings.

(A) Priority if the Contract Documents. The contract documents are complimentary. Any requirement occurring in one document is as binding as though occurring in all. The Contractor shall carefully study and compare the contract documents with each other, with field conditions and with the information furnished by the State and shall at once report to the Engineer errors, conflicts, ambiguities, inconsistencies, or omissions discovered. Should an item not be sufficiently detailed or explained in the contract documents, the Contractor shall report to the Engineer immediately and request the Engineer's clarification and interpretation. The Engineer will issue a clarification or interpretation that is consistent with the intent of and reasonably inferred from the contract documents.

In the event of conflict or discrepancy that has not been brought to the attention of and resolved by the Engineer, the following priorities govern:

If a conflict or discrepancy within a document occurs, the stricter requirement governs over less strict requirement. The stricter requirement will be the requirement that provides the greater product life, durability, strength and function. The Engineer will be the sole judge as to which requirement is the stricter requirement.

Special provisions govern over project plans, standard plans, and standard specifications.

Project plans govern over standard plans.

Standard specifications governs over standard plans.

(B) Priority Within Drawings.

- (1) Numerical dimensions govern over scaled dimensions and
- (2) Larger scale drawings govern over smaller scale drawings.

Any requirement occurring in one or more of the sheets is as binding as though occurring in all applicable sheets.

(V) Delete **105.05 Cooperation with Utility Companies** in its entirety. (See 107.21 – Utilities and Services).

(VI) Amend **105.06 Cooperation Between Contractors** to read as follows:

"105.06 Coordination Between the Contractors. Other work by other Contractors may be in progress within or near the project limits. Each Contractor shall conduct work so as not to hinder the progress of the work by other Contractors within or near the project limit. Contractors shall cooperate with each other, including but not limited to:

- (1) Coordinating their work schedules and traffic control plans;
- (2) Placing and disposing the materials used;
- (3) Operating and storage of equipment.

Each Contractor shall be responsible for any damage done by it to work performed by another Contractor.

(VII) Amend **105.07 Construction Stakes, Lines and Grade** to read as follows:

"105.07 Construction Stakes, Lines and Grades. The Engineer will establish control points at the beginning and end of the project, points of intersection, and furnish benchmarks information known to the Engineer. The Contractor shall be responsible for the laying out of all other necessary stakeouts from the given information.

The Contractor shall preserve control points and stakes or marks that the Engineer may have set. If the Contractor destroys or disturbs the control points, stakes, or marks, the State will charge the Contractor the cost of replacing the stakes or marks.

Prior to final acceptance by the Engineer, the Contractor shall verify all street survey monuments (horizontal and vertical alignment).

The Contractor shall submit two copies of data used in setting and referencing stakes and other layout markings used by the Contractor.

The Contractor shall survey and stake out the work including verification and establishment of all lines, grades, dimensions, and elevations by qualified personnel under the direct supervision of a surveyor licensed in the State of Hawaii with experience in construction surveying of the work.

The Engineer may check the Contractor's survey work as the work progresses. The Engineer will inform the Contractor of the results of these checks. Such checks shall not relieve the Contractor of its responsibility for the accuracy of the layout work. The Contractor shall immediately correct or replace deficient or inaccurate layout and construction work at no cost to the State and no adjustment in contract time. The State will deduct expenses incurred by the Engineer due to the deficiencies or inaccuracies from payment due to the Contractor.

The Contractor shall furnish necessary personnel, engineering equipment and supplies, transportation, and material necessary to complete the survey work. The State will consider the requirements imposed by this subsection incidental to the various contract items."

(VIII) Delete 105.08 Authority and Duties of Project Engineer in its entirety. (See 105.01 – Authority).

(IX) Delete 105.09 Duties of the Inspector in its entirety. (See 105.01 – Authority).

(X) Amend 105.10 Inspection of Work to read as follows:

105.10 Inspection of the Work and Materials. Materials and each part or details of the work shall be subject to inspection by the Engineer. The Contractor shall furnish the Engineer information, assistance, and provide appropriate safeguards and equipment to allow a complete inspection to be made.

The Engineer may inspect the production, fabrication, and manufacture of materials and items that are to be incorporated into the work. The Contractor shall ensure that the producer, fabricator, and manufacturer provide access to the Engineer, without adjustment in contract time or price, at the source of such materials and items or at any other place such materials or items may be located before they are incorporated into the work. When government or utility companies are to pay a portion of the cost of the work covered by this contract, they shall have the right to inspect the work. Such inspection shall not make that government or utility company a party to this contract.

For any inspection, the Contractor shall expose or uncover such portions of the work as requested by the Engineer. After inspection, the Contractor

shall restore that portion of the work to the standard required by the contract. When the Engineer orders an inspection that is not considered a normal daily, pre-final or final inspection, that requires uncovering, damage to or destruction of or work in place:

- (1) If the exposed and inspected work conforms to the contract requirements, the State will reimburse the reasonable costs of exposing, inspecting and or restoring the work, as extra work and extend contract time as appropriate.
- (2) If the exposed and inspected work is non-conforming or otherwise non-acceptable, the costs and time relating to the exposing, inspecting and restoring of the work is not reimbursable.
- (3) No reimbursement will be allowed for the costs and time of exposing, inspecting and restoring work that the Engineer had not been given reasonable opportunity to inspect before it was covered.

When the contract documents or a written directive from the Engineer requires that certain work not proceed until the Engineer is given notice and the opportunity to inspect, the Engineer may order the work done or materials used without the Engineer having been given notice and opportunity to inspect, to be removed and replaced at no cost to the State and no adjustment in contract time.

The inspection of or the failure to inspect the work shall not relieve the Contractor of obligations to fulfill the contract as prescribed, to make good defective work, and to replace unsuitable or rejected materials regardless of whether payment for such work has been made."

(XI) Amend 105.12 Removal of Unacceptable and Unauthorized Work to read as follows:

"105.12 Removal of Defective and Unauthorized Work. All work that does not conform to the requirements of the contract shall be remedied or removed and replaced by the Contractor at no cost to the State and no adjustment in contract time.

Any work done beyond the work limits shown on the drawings and specifications or established by the Engineer or any additional work done without written authority will be considered as unauthorized work. Unauthorized work will not be paid for. Work so done may be ordered removed at no cost to the State and no adjustment in contract time.

The Engineer may require that the Contractor submit a schedule acceptable to the Engineer for the performance of corrective or remedial work at the convenience of the State and shall obtain the Engineer's approval of its

schedule. Should the Contractor fail to submit an acceptable schedule or fail to comply with the accepted schedule for performance of corrective or remedial work, or otherwise fail to comply with any order of the Engineer regarding remedial, corrective, removal and replacement work, the Engineer shall have the authority, in addition to all other remedies, provided by contract or law, to cause defective work to be remedied or removed and replaced, and unauthorized work removed, by someone other than the Contractor, to charge the Contractor the cost of such work, and/or to deduct the costs from any monies due or to become due the Contractor."

(XII) Delete **105.13 Load Restrictions** in its entirety. See 104.14 – Overweight Vehicle Control and 401.05(B)(5) – Material Transfer Vehicle (MTV).

(XIII) Amend **105.17 Acceptance** to read as follows:

"105.17 Final Acceptance. When the Engineer finds that the project has been satisfactorily completed in compliance with the contract, the Engineer will notify the Contractor in writing of the project's completion and acceptance and will notify the Contractor in writing of its acceptance effective as of the date of the final inspection. The final acceptance date shall determine end of contract time, liquidated damages for failure to complete the punchlist and commencement of all guaranty periods subject to Subsection 108.15 – Contractor's Responsibility for Work; Risk of loss or Damage."

(XIV) Amend **105.18 Claims for Adjustment and Disputes** to read as follows:

"105.18 Disputes and Claims.

(A) **Written Notice A Condition Precedent to Claim.** As a condition precedent to any claim for damages, or any matter dealing with contract price or contract time, the Contractor must give notice of a potential claim in writing as required by the contract documents including but not limited to the following Subsections of these general provisions:

- (1) 104.02 – Changes
- (2) 104.03 – Field Orders
- (3) 104.12 – Differing Site Conditions
- (4) 104.13 – Contract Change Orders
- (5) 105.02(B) – Review and Acceptance Process
- (6) 106.03 – Sample Submittals
- (7) 108.07 – Contract Time

(B) **Contractor's Duty to Maintain Accurate and Contemporaneous Records.** Upon delivering written notice of a potential claim as

described in Subsection 105.18(A) – Written Notice A Condition Precedent to Claim, the Contractor has the duty to support and substantiate all claims by maintaining accurate, contemporaneous records of the subject work and the time and costs thereof. The Engineer may direct the manner and the format in which such records must be prepared, maintained, and verified. The Contractor shall comply with such directives at no additional cost to the State. Any directive from the Engineer regarding the manner and format for the keeping of records associated with the potential claim shall not in any way be deemed an agreement by the State regarding the validity of any element of the claim.

(C) Contractor to Proceed with Work. The Contractor shall at all times continue with performance of the contract in full compliance with the directions of the Engineer. Continued performance by the Contractor shall not prejudice any claim for damages or any matter dealing with contract price or contract time provided that the notice of a potential claim is given in writing by the Contractor in the manner and within the time set forth in the contract documents.

(D) Making of a Claim. All Contractors' claims for damages or any matter dealing with contract price or contract time shall be submitted in writing to the Engineer. The written submission (THE CLAIM) shall be clearly identified and labeled as a claim. The Contractor shall sequentially number its claims in the chronological order submitted to the Engineer. No claim shall be valid if it is delivered to the Engineer after the date of final acceptance or later than 180 days after Contractor's delivery of its notice of potential claim, whichever comes first.

The Claim shall, at a minimum, contain the following:

- (1) A detailed description of the facts and circumstances that justify every element of claim. The detailed description shall include, but is not limited to, providing all necessary dates, locations, and items of work affected by the claim.
- (2) The specific provisions of the contract or laws which support the claim and a statement of the reasons why such provisions support the claim.
- (3) A copy of the related written notice of potential claim required by Subsection 107.15(A) – Written Notice A Condition Precedent to Claim.
- (4) Any other documents that support the claim.

(5) If an adjustment of time for the performance of the contract is sought:

- (a) The specific days and dates for which it is sought.
- (b) The specific reasons the Contractor believes a time adjustment should be granted.
- (c) The specific provisions of the contract under which additional time is sought.
- (d) The Contractor's detailed analysis of its previously submitted time scaled logic diagram (TSLD) schedule and impact on the critical path.

(6) If additional monetary compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:

- (a) **Labor.** Listing of individuals, description and location of work performed, classification, hours worked, wage rate, fringe benefits, employee number if available, etc.
- (b) **Materials.** Invoices, purchase orders, evidence of payment, descriptions and quantities, etc.
- (c) **Equipment.** Detailed description (make, model, year, attachments, serial number, etc.), hours of use and dates of use. Equipment rates shall be subject to the terms and limitations as set forth in Subsection 109.02 – Payment for Additional and Force Account Work.
- (d) **Contractor's Margin for Profit and Overhead.**
- (e) Other categories as specified by the Contractor or the State.

(7) The claim shall be certified on behalf of the Contractor by an authorized representative, as follows:

Under penalty of law for submission of false claims, false statements, and misrepresentation, the undersigned,

(Name)

(Title)

(Company)

hereby certifies that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the State of Hawaii is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.

Signature

Date

(E) Engineer's Review and Decision. The Engineer shall review the claim, and may request and the Contractor shall provide additional information, documentation, and other evidence from the Contractor. The Engineer may conduct interviews with Contractor's employees and other persons having knowledge related to the claim.

The Engineer shall render a written decision on the claim after the claim is complete and fully documented, as follows:

- (i) Within 60 days for claims less than \$50,000
- (ii) Within 90 days on claims exceeding \$50,000.

If the Engineer does not issue a written decision within the time period described herein, then the Contractor may proceed as if the claim has been denied in its entirety. If the claim submittal is found to be incomplete, the Contractor shall be notified to provide the additional information that is required. When this occurs, the Engineer's review time will be adjusted as deemed appropriate and the Contractor will be notified.

The decision will be sent to the Contractor by Certified Mail, Return Receipt Requested.

(F) Appeal of the Engineer's Decision.

- (1) Any Contractor aggrieved by an adverse decision by the Engineer on a claim may appeal the decision to the Director, as head of the purchasing agency as specified in the Hawaii Administrative Rules for Procurement Disputes.

(2) Appeals of the Engineer's decision must be filed in writing not later than 30 days after delivery of the Engineer's decision on the claim to the Contractor, or if no written decision is delivered, within 30 days after the deadline for the Engineer's decision. A copy of the notice of appeal of the Engineer's decision shall be delivered to the Engineer

(3) The record on appeal by the Contractor to the Director shall be limited to the Claim as submitted by the Contractor described in Subsection 107.15(D) – Making of a Claim, the Engineer's response to the claim, the project file, and any other material or evidence the Director, in the Director's discretion, believes may be useful in deciding the merits of the appeal.

(4) In its notice of appeal of the Engineer's decision, the Contractor shall provide specific citations to the Engineer's decision and explanations as to why the Contractor believes the Engineer's decision was incorrect.

(5) All controversies and claims which are appealed to the Director shall be decided by the Director within 90 days after the filing of the appeal by the Contractor; provided that:

(a) If the Director does not issue a written decision within 90 calendar days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the Contractor may proceed as if an adverse decision had been received.

(b) The Director immediately furnishes a copy of the decision to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

(c) Any such decision shall be final and conclusive, unless fraudulent, or unless the Contractor brings an action seeking judicial review of the decision in a Hawaii circuit court within the six months from the date of receipt of the decision.

(G) **Contractor's Duty to Continue Work.** During the Claim review and appeal process including any litigation in relation to the Claim, the Contractor shall proceed diligently with performance of this contract, except where:

(1) The State has suspended the work, or has terminated the contract for default of the Contractor or for the convenience of the State;

(2) There has been an alleged material breach of contract by the State excusing further performance by the Contractor; provided that in such event the Contractor shall proceed diligently with the performance of the contract where the Director has made a written determination that continuation of work under the contract is essential to the public health and safety."

(XV) Delete **105.19 Value Engineering** in its entirety. (See 104.10 – Value Engineering Incentive Proposal).

(XVI) Amend **105.20(A) General** by revising the first sentence to read as follows:

"(A) **General.** The Contractor and the Department will establish a Disputes Review Board (Board) when the proposal amount is more than fifty million dollars (\$50,000,000) or the completion time is more than 360 working days."

(XVII) Add the following:

"105.21 Coordination Between the Contractor and the State.

(A) **Furnishing Drawings and Special Provisions.** The State will furnish the Contractor 10 sets of the project plans and special provisions. The project plans furnished will be the same size as that issued for bidding purposes. The Contractor shall have and maintain at least one set of plans and specifications on the work site, at all times.

(B) **Superintendent.** The Contractor shall have a competent superintendent on the work site while work is being performed under the contract. The superintendent shall be able to read and understand the contract documents, shall be experienced in the type of project being undertaken and the work being performed, and shall be fluent in the English language. If a superintendent is not present at the work site, the Engineer shall have the right to suspend the work as described under Subsection 108.10 – Suspension of Work.

The Contractor shall provide the Engineer a written statement giving the name of the superintendents assigned to the project. The Contractor shall be responsible for notifying the Engineer in writing of any change in the superintendents in a timely manner.

105.22 Submittals. The contract contains the description of various items that the Contractor must submit to the Engineer for review and acceptance. The Contractor shall review all submittals for correctness, conformance with the requirements of the contract documents and completeness before submitting them to the Engineer. The submittal shall indicate the contract items and specifications subsections for which the submittal is provided. The submittal shall be legible and clearly indicate what portion of the submittal is being submitted for review if more than the required submissions at the earliest possible date. The Contractor shall provide six copies of the required submissions at the earliest possible date.

Failure to furnish acceptable submittal(s) may result in the suspension of payments due the Contractor.

The Contractor shall not add onto the submittals any conditions or disclaimers that conflict with the contract requirements."

END OF SECTION