

1 Amend **Section 108 – PROSECUTION AND PROGRESS** to read as follows:

2  
3 **“108 – PROSECUTION AND PROGRESS**

4  
5 **108.01 Notice to Proceed (NTP).** A Notice To Proceed will be issued to the  
6 Contractor not more 30 days after the contract certification date. The Engineer  
7 may suspend the contract before issuing the Notice To Proceed, in which case  
8 the Contractor’s remedies are exclusively those set forth in Subsection 108.10 –  
9 Suspension of Work.

10  
11 The Contractor shall be allowed up to 60 calendar days after the Notice to  
12 Proceed to begin physical work. The Start Work Date will be established when  
13 this period ends or on the actual day that physical work begins, whichever is first.  
14 Charging of Contract Time will begin on the Start Work Date. The Contractor  
15 shall notify the Engineer, in writing, at least five working days before beginning  
16 physical work.

17  
18 In the event that the Contractor fails to start physical work within the time  
19 specified, the Engineer may terminate the contract in accordance with  
20 Subsection 108.11 – Termination of Contract for Cause.

21  
22 During the period between the Notice to Proceed and the Start Work Date  
23 the Contractor should adjust work forces, equipment, schedules, and procure  
24 materials and required permits, prior to beginning physical work.

25 Any physical work done prior to the Start Work Date will be considered  
26 unauthorized work. If the Engineer does not direct that the unauthorized work be  
27 removed, it shall be paid for after the Start Work Date and only if it is acceptable.

28  
29 In the event that the Engineer establishes, in writing, a Start Work Date  
30 that is beyond 60 calendar days from the Notice to Proceed date, the Contractor  
31 may submit a claim in accordance with, Subsection 107.15 – Disputes and  
32 Claims for increased labor and material costs which are directly attributable to  
33 the delay beyond the first 60 calendar days after the NTP date.

34  
35 The Contractor shall notify the Engineer at least 24 hours before restarting  
36 physical work after a suspension of work pursuant to Subsection 108.10 –  
37 Suspension of Work.

38  
39 Once physical work has begun, the Contractor shall work expeditiously  
40 and pursue the work diligently to completion with the contract time. If a portion of  
41 the work is to be done in stages, the Contractor shall leave the area safe and  
42 usable for the user agency and the public at the end of each stage.

43  
44 **108.02 Prosecution of Work.** Unless otherwise permitted by the Engineer,  
45 in writing, the Contractor shall not commence with physical construction unless  
46 sufficient materials and equipment are available for either continuous  
47 construction or completion of a specified portion of the work.

49 **108.03 Preconstruction Submittals.** The awardee shall submit to the  
50 Engineer for information and review the pre-construction submittals within 30  
51 calendar days from notice to proceed. Until the items listed below are received  
52 and found acceptable by the Engineer, the Contractor shall not start physical  
53 work unless otherwise authorized to do so in writing and subject to such  
54 conditions set by the Engineer. Charging of Contract Time will not be delayed,  
55 and additional contract time will not be granted due to Contractor delay in  
56 submitting acceptable preconstruction submittals. No progress payment will be  
57 made to the Contractor until the Engineer acknowledges, in writing, receipt of  
58 the following preconstruction submittals acceptable to the Engineer:

- 59  
60 (1) List of the Superintendent and other Supervisory Personnel, and  
61 their contact information.
- 62  
63 (2) Name of person(s) authorized to sign for the Contractor.
- 64  
65 (3) Work Schedule including hours of operation.
- 66  
67 (4) Initial Progress Schedule (See Subsection 108.06 – Progress  
68 Schedule).
- 69  
70 (5) Water Pollution and Siltation Control Submittals, including Site-  
71 Specific Best Management Practice Plan.
- 72  
73 (6) Solid Waste Disposal form.
- 74  
75 (7) Tax Rates.
- 76  
77 (8) Insurance Rates.
- 78  
79 (9) Certificate of Insurance, satisfactory to the Engineer, indicating  
80 that the Contractor has in place all insurance coverage required by the  
81 contract documents.
- 82  
83 (10) Schedule of agreed prices.
- 84  
85 (11) List of suppliers.
- 86  
87 (12) Traffic Control Plan, if applicable.

88  
89 **108.04 Character and Proficiency of Workers.** The Contractor shall at all  
90 times provide adequate supervision and sufficient labor and equipment for  
91 prosecuting the work to full completion in the manner and within the time required  
92 by the contract. The superintendent and all other representatives of the  
93 Contractor shall act in a civil and honest manner in all dealings with the Engineer,  
94 all other State officials and representatives, and the public, in connection with  
95 the work.

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

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

#### 106 107 **108.05 Contract Time.**

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

118  
119 When the contract is on a calendar day basis, the total contract time  
120 allowed for the performance of the work will be the number of days shown  
121 in the contract plus any additional days authorized in writing as provided  
122 hereinafter. The count of elapsed days to be charged against contract  
123 time will begin from the Start Work Date and will continue consecutively to  
124 the date of Substantial Completion. The Engineer will exclude days  
125 elapsing between the orders of the Engineer to suspend work and resume  
126 work for suspensions not the fault of the Contractor.

127  
128 **(B) Modifications of Contract Time.** Whenever the Contractor  
129 believes that an extension of contract time is justified, the Contractor shall  
130 serve written notice on the Engineer not more than five working days after  
131 the occurrence of the event that causes a delay or justifies a contract time  
132 extension. Contract time may be adjusted for the following reasons or  
133 events, but only if and to the extent the critical path has been affected:

134  
135 **(1) Changes in the Work, Additional Work, and Delays**  
136 **Caused by the State.** If the Contractor believes that an  
137 extension of time is justified on account of any act or omission by  
138 the State, and is not adequately provided for in a field order or  
139 change order, it must request the additional time as provided  
140 above. At the request of the Engineer, the Contractor must show  
141 how the critical path will be affected and must also support the time  
142 extension request with schedules, as well as statements from its  
143 subcontractors, suppliers, or manufacturers, as necessary.

Claims for compensation for any altered or additional work will be determined pursuant to Subsection 104.02 – Changes.

Additional time to perform the extra work will be added to the time allowed in the contract without regard to the date the change directive was issued, even if the contract completion date has passed. A change requiring time issued after contract time has expired will not constitute an excusal or waiver of pre-existing Contractor delay.

**(2) Delay for Permits.** For delays in the routine application and processing time required to obtain necessary permits, including permits to be obtained from State agencies, the Engineer may grant an extension provided that the permit takes longer than 30 days to acquire and the delay is not caused by the Contractor, and provided that as soon as the delay occurs, the Contractor notifies the Engineer in writing that the permits are not available. Permits required by the contract that take less than 30 days to acquire from the time which the appropriate documents are granted shall be acquired between Notice to Proceed and Start Work Date or accounted for in the contractor's progress schedule. Time extensions will be the exclusive relief granted on account of such delays.

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

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

1. State specifically the reason or reasons for the delay and fully explain in a detailed chronology how the delay affects the critical path.
2. Include copies of pertinent documentation to support the time extension request.
3. Cite the anticipated period of delay and the time extension requested.

191 4. State either that the above circumstances have  
192 been cleared and normal working conditions restored  
193 as of a certain day or that the above circumstances  
194 will continue to prevent completion of the project.  
195

196 (b) The Contractor shall notify the Engineer in writing  
197 when the delay ends. Time extensions will be the  
198 exclusive relief granted and no additional compensation will  
199 be paid the Contractor for such delays.  
200

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

212 (a) The Contractor's written notice to the Engineer must  
213 describe the delays and state the effect such delays may  
214 have on the critical path.  
215

216 (b) The Contractor, if requested, must submit to the  
217 Engineer within five days after a firm delivery date for the  
218 material and equipment is established, a written statement  
219 regarding the delay. The Contractor must justify the delay  
220 as follows:  
221

222 1. State specifically all reasons for the delay.  
223 Explain in a detailed chronology the effect of the delay  
224 on the critical path.  
225

226 2. Submit copies of purchase order(s), factory  
227 invoice(s), bill(s) of lading, shipping manifest(s),  
228 delivery tag(s), and any other documents to support  
229 the time extension request.  
230

231 3. Cite the start and end date of the delay and the  
232 time extension requested.  
233

234 (5) **Delays for Suspension of Work.** When the performance  
235 of the work is totally suspended for one or more days (calendar or  
236 working days, as appropriate) by order of the Engineer in  
237 accordance with Subsections 108.10(A)(1), 108.10(A)(2), or

238 108.10(A)(5) the number of days from the effective date of the  
239 Engineer's order to suspend operations to the effective date of the  
240 Engineer's order to resume operations shall not be counted as  
241 contract time and the contract completion date will be adjusted.  
242 During periods of partial suspensions of the work, the Contractor  
243 will be granted a time extension only if the partial suspension  
244 affects the critical path. If the Contractor believes that an  
245 extension of time is justified for a partial suspension of work, it  
246 must request the extension in writing at least five working days  
247 before the partial suspension will affect the critical operation(s) in  
248 progress. The Contractor must show how the critical path was  
249 increased based on the status of the work and must also support its  
250 claim if requested, with statements from its subcontractors. A  
251 suspension of work will not constitute a waiver of pre-existing  
252 Contractor delay.

253  
254 **(6) Contractor Caused Delays.** No time extension will be  
255 granted under the following circumstances:

256  
257 **(a)** Delays within the Contractor's control in performing  
258 the work caused by the Contractor, subcontractor, supplier,  
259 or any combination thereof.

260  
261 **(b)** Delays within the Contractor's control in arrival of  
262 materials and equipment caused by the Contractor,  
263 subcontractor, supplier, or any combination thereof, in  
264 ordering, fabricating, and delivery.

265  
266 **(c)** Delays requested for changes which do not affect the  
267 critical path.

268  
269 **(d)** Delays caused by the failure of the Contractor to  
270 make submittals in a timely manner for review and  
271 acceptance by the Engineer, such as but not limited to shop  
272 drawings, descriptive sheets, material samples, and color  
273 samples except as covered in Subsection 108.05(B)(3) and  
274 108.05(B)(4).

275  
276 **(e)** Delays caused by the failure to submit sufficient  
277 information and data in a timely manner in the proper form in  
278 order to obtain necessary permits related to the work.

279  
280 **(f)** Failure to follow the procedure within the time allowed  
281 by contract to request a time extension.

282  
283 **(g)** Failure of the Contractor to provide evidence sufficient  
284 to support the time extension request.

(7) **Reduction in Time.** If the State deletes or modifies any portion of the work, an appropriate reduction of contract time may be made in accordance with Subsection 104.02 - Changes.

**108.06 Progress Schedules.**

(A) **Forms of Schedule.** All schedules shall be submitted using the specific computer program designated in the bid documents. If no such scheduling software program is designated, then all schedules shall be submitted using the latest version of Microsoft Project by Microsoft or approved equivalent software program.

Schedule submittals shall be as follows:

(1) **For Contracts \$2,000,000 or less or For Contract Time 100 Working Days or 140 Calendar Days or Less.** For contracts of \$2,000,000 or less 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 meeting the following requirements and having these essential and distinctive elements:

(a) The major features of work, such as but not limited to BMP installation, grubbing, roadway excavation, structure excavation, structure construction, shown in the chronological order in which the Contractor proposes to work that feature or work and its location on the project. 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 other pertinent factors that relate to progress;

(b) All features listed or not listed in the contract documents that the Contractor considers a controlling factor for the timely completion of the contract work.

(c) 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.

(d) The total anticipated time necessary to complete work required by the contract.

(e) A chronological listing of critical intermediate dates or time periods for features or milestones or phases that can affect timely completion of the project.

(f) Major activities related to the location on the project.

(g) 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.

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

(i) Show target bars for all activities.

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

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

(l) 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.

**(2) For Contracts Which Have A Contract Amount More Than \$2,000,000 Or Having A Contract Time Of More Than 100 Working Days Or 140 Calendar Days.** For contracts which have a contract amount more than \$2,000,000 or contract time of more than 100 working days or 140 calendar days, the Contractor shall submit a Timed-Scaled Logic Diagram (TSLD) meeting the following requirements and having these essential and distinctive elements:

(a) The information and requirements listed in Subsection 108.06(A)(1) – For Contracts \$2,000 or Less or For Contract Time 100 Working Days or 140 Calendar Days or Less.

(b) Additional reports and graphics available from the software as requested by the Engineer.

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

381 (d) The time scaled schematic shall be on a calendar or  
382 working days basis. What will be used shall be determined  
383 by how the contract keeps track of time. It will be the  
384 same. Plot the critical calendar dates anticipated.

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

391  
392 (f) Latest start and finish dates for critical path activities.

393  
394 (g) Identify responsible subcontractor, supplier, and  
395 others for their respective activity.

396  
397 (h) No individual activity shall have duration of more than  
398 20 calendar days unless requested and approved by the  
399 Engineer.

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

406  
407 j) Incorporate all physical access and availability  
408 restraints.

409  
410 **(B) Inspection and Testing.** All schedules shall provide reasonable  
411 time and opportunity for the Engineer to inspect and test each work  
412 activity.

413  
414 **(C) Engineer's Acceptance of Progress Schedule.** The submittal  
415 of, and the Engineer's receipt of any progress schedule, shall not be  
416 deemed an agreement to modify any terms or conditions of the contract.  
417 Any modifications to the contract terms and conditions that appear in or  
418 may be inferred from an acceptable schedule will not be valid or  
419 enforceable unless and until the Engineer exercises discretion to issue an  
420 appropriate change order. Nor shall any submittal or receipt imply the  
421 Engineer's approval of the schedule's breakdown, its individual elements,  
422 any critical path that may be shown, nor shall it obligate the State to make  
423 its personnel available outside normal working hours or the working hours  
424 established by the Contract in order to accommodate such schedule.  
425 The Contractor has the risk of all elements (whether or not shown) of the  
426 schedule and its execution. No claim for additional compensation, time,  
427 or both, shall be made by the Contractor or recognized by the Engineer

for delays during any period for which an acceptable progress schedule or an updated progress schedule as required by Subsection 108.06(E) – Contractor's Continuing Schedule Submittal Requirements had not been submitted. Any acceptance or approval of the schedule shall be for general format only and shall not be deemed an agreement by the State that the construction means, methods, and resources shown on the schedule will result in work that conforms to the contract requirements or that the sequences or durations indicated are feasible.

**(D) Initial Progress Schedule.** The Contractor shall submit an initial progress schedule. The initial progress schedule shall consist of the following:

- (1) Four sets of the TSLD schedule.
- (2) All the software files and data to re-create the TSLD in a computerized software format as specified by the Engineer.
- (3) A listing of equipment that is anticipated to be used on the project. Including the type, size, make, year of manufacture, and all information necessary to identify the equipment in the Rental Rate Blue Book for Construction Equipment.
- (4) An anticipated manpower requirement graph plotting contract time and total manpower requirement. This may be superimposed over the payment graph.
- (5) A Method Statement that is a detailed narrative describing the work to be done and the method by which the work shall be accomplished for each major activity. A major activity is an activity that:
  - (a) Has a duration longer than five days.
  - (b) Is a milestone activity.
  - (c) Is a contract item that exceeds \$10,000 on the contract cost proposal.
  - (d) Is a critical path activity.
  - (e) Is an activity designated as such by the Engineer.

Each Method Statement shall include the following items needed to fulfill the schedule:

- (a) Quantity, type, make, and model of equipment.

476 (b) The manpower to do the work, specifying worker  
477 classification.

478  
479 (c) The production rate per eight hour day, or the working  
480 hours established by the contract documents needed to  
481 meet the time indicated on the schedule. If the production  
482 rate is not for eight hours, the number of working hours shall  
483 be indicated.

484  
485 (6) Two sets of color time-scaled project evaluation and review  
486 technique charts ("PERT") using the activity box template of Logic –  
487 Early Start or such other template designated by the Engineer.

488  
489 If the contract documents establish a sequence or order for the  
490 work, the initial progress schedule shall conform to such sequence or  
491 order.

492  
493 **(E) Contractor's Continuing Schedule Submittal Requirements.**

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

504  
505 The Contractor shall submit with every update, in report form  
506 acceptable to the Engineer, a list of changes to the progress schedule  
507 since the previous schedule submittal. The Engineer may change the  
508 frequency of the submittal requirements but may not require a submittal of  
509 the schedule to be more than once a week. The Engineer may  
510 decrease the frequency of the submittal of the bi-weekly schedule.

511  
512 The Contractor shall submit updates of the anticipated work  
513 completion graph, equipment listing, manpower requirement graph or  
514 method statement when requested by the Engineer. The Contractor  
515 shall submit such updates within 4 calendar days from the date of the  
516 request by the Engineer.

517  
518 The Engineer may withhold progress payment until the Contractor  
519 is in compliance with all schedule update requirements

520  
521 **(F) Float.** All float appearing on a schedule is a shared commodity.  
522 Float does not belong to or exist for the exclusive use or benefit of either

the State or the Contractor. The State or the Contractor has the opportunity to use available float until it is depleted. Float has no monetary value.

**(G) Scheduled Meetings.** 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 and other schedule related submittals.

**(H) Accelerated Schedule; Early Completion.** If the Contractor submits an accelerated schedule (shorter than the contract time), the Engineer's review and acceptance of an accelerated schedule does not constitute an agreement or obligation by the State to modify the contract time or completion date. The Contractor is solely responsible for and shall accept all risks and any delays, other than those that can be directly and solely attributable to the State, that may occur during the work, until the contract completion date. The contract time or completion date is established for the benefit of the State and cannot be changed without an appropriate change order or Substantial Completion granted by the State. The State may accept the work before the completion date is established, but is not obligated to do so.

If the TSLD indicates an early completion of the project, the Contractor shall, upon submittal of the schedule, cooperate with the Engineer in explaining how it will be achieved. 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.

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

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

**108.07 Weekly Meeting.** In addition to the bi-weekly schedule meetings, the Contractor shall be available to meet once a week with the Engineer at the time and place as determined by the Engineer to discuss the work and its progress including but not limited to, the progress of the project, potential

problems, coordination of work, submittals, erosion control reports, etc. The Contractor's personnel attending shall have the authority to make decisions and answer questions.

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

(a) All construction events, traffic control and BMP related activities in 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.

(b) The duration of all events and delays.

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

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

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

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

**108.08 Liquidated Damages for Failure to Complete the Work or Portions of the Work on Time.** The actual amount of damages resulting from the Contractor's failure to complete the contract in a timely manner is difficult to accurately determine. Therefore the amount of such damages shall be liquidated damages as set forth herein and in the special provisions. The State may, at its discretion, deduct the amount from monies due or that may become due under the contract.

When the Contractor fails to reach substantial completion of the work for which liquidated damages are specified, within the time or times fixed in the contract or any extension thereof, in addition to all other remedies for breach that may be available to the State, the Contractor shall pay liquidated damages to the State, in the amount of \$3,000 per working day.

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

618  
619 **(B) Liquidated Damages for Failure to Complete the Punchlist.**  
620 The Contractor shall complete the work on any punchlist created after the  
621 pre-final inspection, within the contract time or any extension thereof.  
622

623 When the Contractor fails to complete the work on such punchlist  
624 within the contract time or any extension thereof, the Contractor shall pay  
625 liquidated damages to the State of 20 percent of the amount of liquidated  
626 damages established for failure to substantially complete the work within  
627 contract time. Liquidated damages shall not be assessed for the period  
628 between:  
629

630 (1) Notice from the Contractor that the project is substantially  
631 complete and the time the punchlist is delivered to the Contractor.  
632

633 (2) The date of the completion of punchlist as determined by the  
634 Engineer and the date of the successful final inspection, and  
635

636 (3) The date of the Final Inspection that results in Substantial  
637 Completion and the receipt by the Contractor of the written notice of  
638 Substantial Completion.  
639

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

647 **108.09 Rental Fees for Unauthorized Lane Closure or Occupancy.** In  
648 addition to all other remedies available to the State for Contractor's breach of the  
649 terms of the contract, the Engineer will assess the rental fees in the amount of  
650 \$2,500 for every one-to fifteen-minute increment for each roadway lane closed to  
651 public use or occupied beyond the time periods authorized in the contract or by  
652 the Engineer. The State may, at its discretion, deduct the amount from monies  
653 due or that may become due under the contract. The rental fee may be waived in  
654 whole or part if the Engineer determines that the unauthorized period of lane  
655 closure or occupancy was due to factors beyond the control of the Contractor.  
656 Equipment breakdown is not a cause to waive liquidated damages.  
657

658 **108.10 Suspension of Work.**  
659

660 **(A) Suspension of Work.** The Engineer may, by written order,  
661 suspend the performance of the work, either in whole or in part, for such  
662 periods as the Engineer may deem necessary, for any cause, including  
663 but not limited to:  
664

665 (1) Weather or soil conditions considered unsuitable for  
666 prosecution of the work.

667  
668 (2) Whenever a redesign that may affect the work is deemed  
669 necessary by the Engineer.

670  
671 (3) Unacceptable noise or dust arising from the construction  
672 even if it does not violate any law or regulation.

673  
674 (4) Failure on the part of the Contractor to:

675  
676 (a) Correct conditions unsafe for the general public or for  
677 the workers.

678  
679 (b) Carry out orders given by the Engineer.

680  
681 (c) Perform the work in strict compliance with the  
682 provisions of the contract.

683  
684 (d) Provide adequate supervision on the jobsite.

685  
686 (5) The convenience of the State.

687  
688 **(B) Partial and Total Suspension.** Suspension of work on some but  
689 not all items of work shall be considered a "partial suspension".  
690 Suspension of work on all items shall be considered "total suspension".  
691 The period of suspension shall be computed from the date set out in the  
692 written order for work to cease until the date of the order for work to  
693 resume.

694  
695 **(C) Reimbursement to Contractor.** In the event that the Contractor  
696 is ordered by the Engineer in writing as provided herein to suspend all  
697 work under the contract for the reasons specified in Subsections  
698 108.10(A)(2), 108.10(A)(3), or 108.10(A)(5) of the "Suspension of Work"  
699 paragraph, the Contractor may be reimbursed for actual direct costs  
700 incurred on work at the jobsite, as authorized in writing by the Engineer,  
701 including costs expended for the protection of the work. An allowance of 5  
702 percent for indirect categories of delay costs will be paid on any  
703 reimbursed direct costs, including extended branch and home-office  
704 overhead and delay impact costs. No allowance will be made for  
705 anticipated profits. Payment for equipment which is ordered to standby  
706 during such suspension of work shall be made as described in Subsection  
707 109.06(H) - Idle and Standby Equipment.

708  
709 **(D) Cost Adjustment.** If the performance of all or part of the work is  
710 suspended for reasons beyond the control of the Contractor except an  
711 adjustment shall be made for any increase in cost of performance of this

contract (excluding profit) necessarily caused by such suspension, and the contract modified in writing accordingly.

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

(1) For weather related conditions.

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

(3) Or, for which an adjustment is provided for or excluded under any other provision of this Contract.

**(E) Claims for Adjustment.** Any adjustment in contract price made shall be determined in accordance with Subsections 104.02 – Changes and 104.06 – Methods of Price Adjustment.

Any claims for such compensation shall be filed in writing with the Engineer within 30 days after the date of the order to resume work or the claim will not be considered. The claim shall conform to the requirements of Subsection 107.15(D) – Making of a Claim. The Engineer will take the claim under consideration, may make such investigations as are deemed necessary and will be the sole judge as to the equitability of the claim. The Engineer's decision will be final.

**(F) No Adjustment.** No provision of this clause shall entitle the Contractor to any adjustments for delays due to failure of its surety, the cancellation or expiration of any insurance coverage required by the contract documents, for suspensions made at the request of the Contractor, for any delay required under the contract, for suspensions, either partial or whole, made by the Engineer under Subsection 108.10(A)(4) of the "Suspension of work" paragraph.

#### **108.11 Termination of Contract for Cause.**

**(A) Default.** If the Contractor refuses or fails to perform the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in this contract, or any extension thereof, or commits any other material breach of this contract, and further fails within seven days after receipt of written notice from the Engineer to commence and continue correction of the refusal or failure with diligence and promptness, the Engineer may, by written notice to the Contractor, declare the Contractor in breach and terminate the Contractor's right to proceed with the work or the part of the work as to which there has been delay or other breach of contract. In such event, the State may take

over the work, perform the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, the materials, appliances, and plants as may be on the site of the work and necessary therefore. Whether or not the Contractor's right to proceed with the work is terminated, the Contractor and the Contractor's sureties shall be liable for any damage to the State resulting from the Contractor's refusal or failure to complete the work within the specified time.

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

**(C) Costs and Charges.** All costs and charges incurred by the State, 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 it 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 the State the amount of the excess.

In case of termination, the Engineer will limit any payment to the Contractor to the part of the contract satisfactorily completed at the time of termination. Payment will not be made until the work has satisfactorily been completed and all required documents, including the tax clearance required by Subsection 109.11 – Final Payment are submitted by the Contractor. Termination shall not relieve the Contractor or Surety from liability for liquidated damages.

**(D) Erroneous Termination for Cause.** If, after notice of termination of the Contractor's right to proceed under this section, it is determined for any reason that good cause did not exist to allow the State to terminate as provided herein, the rights and obligations of the parties shall be the same as, and the relief afforded the Contractor shall be limited to, the provisions contained in Subsection 108.12 – Termination for Convenience.

#### **108.12 Termination For Convenience.**

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

**(B) 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 subject to the State's approval. The Engineer 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.

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

**(1)** Any completed work.

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

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

**(D) Compensation.**

**(1)** 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 HAR Subchapter 15, Chapter 3-122. If the Contractor fails to file a termination claim within one year from the effective date of termination, the Engineer may pay the Contractor, if at all, an amount set in accordance with Subsection 108.12(D)(3).

**(2)** The Engineer 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 Subsection 108.12(C)(3), and the proportionate contract price of the work not terminated.

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

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

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

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

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

#### 884 108.13 Pre-Final and Final Inspections. 885

886 (A) **Inspection Requirements.** Before the Engineer undertakes a  
887 final inspection of any work, a pre-final inspection must first be conducted.  
888 The Contractor shall notify the Engineer that the work has reached  
889 substantial completion and is ready for pre-final inspection.  
890

891 (B) **Pre-Final Inspection.** Before notifying the Engineer that the  
892 work has reached substantial completion, the Contractor shall inspect the  
893 project and test all installed items with all of its subcontractors as  
894 appropriate. The Contractor shall also submit the following documents  
895 as applicable to the work:  
896

897 (1) All written guarantees required by the contract.  
898

899 (2) Two accepted final field-posted drawings as specified in  
900 Section 648 – Field-Posted Drawings;  
901

- 902 (3) Complete weekly certified payroll records for the Contractor  
903 and Subcontractors.  
904  
905 (4) Certificate of Plumbing and Electrical Inspection.  
906  
907 (5) Certificate of building occupancy as required.  
908  
909 (6) Certificate of Soil and Wood Treatments.  
910  
911 (7) Certificate of Water System Chlorination.  
912  
913 (8) Certificate of Elevator Inspection, Boiler and Pressure Pipe  
914 Inspection.  
915  
916 (9) Maintenance Service Contract and two copies of a list of all  
917 equipment installed.  
918  
919 (10) Current Tax clearance. The contractor will be required to  
920 submit an additional tax clearance certificate when the final  
921 payment is made.  
922  
923 (11) And any other final items and submittals required by the  
924 contract documents.  
925

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

930 The Engineer will then make a preliminary determination as to  
931 whether or not the project is substantially complete and ready for pre-final  
932 inspection. The Engineer may, in writing, postpone until after the pre-  
933 final inspection the Contractor's submittal of any of the items listed in  
934 Subsection 108.13(B) – Pre-Final Inspection, herein, if in the Engineer's  
935 discretion it is in the interest of the State to do so.  
936

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

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

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

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

When the date of substantial completion has been determined by the State, liquidated damages for the failure to complete the punchlist, if due to the State will be assessed in pursuant to Subsection 108.08(B) - Liquidated Damages for Failure to Complete the Punchlist.

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

Before final inspection of the work, the Contractor shall clean all ground occupied by the Contractor in connection with the work of all rubbish, excess materials, temporary structures and equipment, shall remove all graffiti and defacement of the work and all parts of the work and the worksite must be left in a neat and presentable condition to the satisfaction of the Engineer.

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

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

998 **108.14 Substantial Completion and Final Acceptance.**

999  
1000 **(A) Substantial Completion.** When the Engineer finds that the  
1001 Contractor has satisfactorily completed all work for the project in  
1002 compliance with the contract, with the exception of the planting period and  
1003 the plant establishment period, the Engineer will notify the Contractor, in  
1004 writing, of the project's substantial completion, effective as of the date of  
1005 the final inspection. The substantial completion date shall determine end  
1006 of contract time and relieve contractor of any additional accumulation of  
1007 liquidated damages for failure to complete the punchlist.

1008  
1009 **(B) Final Acceptance.** When the Engineer finds that the Contractor  
1010 has satisfactorily completed all contract work in compliance with the  
1011 contract including all plant establishment requirements, and all the  
1012 materials have been accepted by the State, the Engineer will issue a Final  
1013 Acceptance Letter. The Final Acceptance date shall determine the  
1014 commencement of all guaranty periods subject to Subsection 108.16 –  
1015 Contractor's Responsibility for Work; Risk of Loss or Damage.

1016  
1017 **108.15 Use of Structure or Improvement.** The State has the right to use  
1018 the structure, equipment, improvement, or any part thereof, at any time after it  
1019 is considered by the Engineer as available. In the event that the structure,  
1020 equipment or any part thereof is used by the State before final acceptance, the  
1021 Contractor is not relieved of its responsibility to protect and preserve all the work  
1022 until final acceptance.

1023  
1024 **108.16 Contractor's Responsibility for Work; Risk of Loss or Damage.**  
1025 Until the written notice of final acceptance has been received, the Contractor  
1026 shall take every precaution against loss or damage to any part of the work by the  
1027 action of the elements or from any other cause whatsoever, whether arising from  
1028 the performance or from the non-performance of the work. The Contractor  
1029 shall rebuild, repair, restore and make good all loss or damage to any portion of  
1030 the work resulting from any cause before its receipt of the written notice of final  
1031 acceptance and shall bear the risk and expense thereof.

1032  
1033 The risk of loss or damage to the work from any hazard or occurrence that  
1034 may or may not be covered by a builder's risk policy is that of the Contractor and  
1035 Surety, unless such risk of loss is placed elsewhere by express language in the  
1036 contract documents.

1037  
1038 **108.17 Guarantee of Work.**

1039  
1040 **(1)** Regardless of, and in addition to, any manufacturers' warranties,  
1041 all work and equipment shall be guaranteed by the Contractor against  
1042 defects in materials, equipment or workmanship for one year from the  
1043 date of final acceptance or as otherwise specified in the contract  
1044 documents.

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

(a) Correct all noted defects and make replacements, as directed by the Engineer, in the equipment and work.

(b) Repair or replace to new or pre-existing condition any damages resulting from such defective materials, equipment or installation thereof.

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

(4) If a defect is discovered during a guarantee period, all repairs and corrections to the defective items when corrected shall be guaranteed for a new duration equal to the original full guarantee period. The running of the guarantee period shall be suspended for all other work affected by any defect. The guarantee period for all other work affected by any such defect shall restart for its remaining duration upon confirmation by the Engineer that the deficiencies have been repaired or remedied.

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

**108.18 No Waiver of Legal Rights.** The following will not operate or be considered as a waiver of any portion of the contract, or any power herein reserved, or any right to damages provided herein or by law:

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

(2) Any extension of time.

(3) Any possession taken by the Engineer.

1094 A waiver of any notice requirement or of any noncompliance with the  
1095 contract will not be held to be a waiver of any other notice requirement or any  
1096 other noncompliance with the contract.  
1097

1098 **108.19 Final Settlement of Contract.**  
1099

1100 **(A) Closing Requirements.** The contract will be considered settled  
1101 after the project acceptance date and when the following items have been  
1102 satisfactorily submitted, where applicable:  
1103

- 1104 (1) All written guarantees required by the contract.
- 1105
- 1106 (2) Complete and certified weekly payrolls for the Contractor  
1107 and its subcontractor's.
- 1108
- 1109 (3) Certificate of plumbing and electrical inspection.
- 1110
- 1111 (4) Certificate of building occupancy.
- 1112
- 1113 (5) Certificate for soil treatment and wood treatment.
- 1114
- 1115 (6) Certificate of water system chlorination.
- 1116
- 1117 (7) Certificate of elevator inspection, boiler and pressure pipe  
1118 installation.
- 1119
- 1120 (8) Tax clearance.
- 1121
- 1122 (9) All other documents required by the Contract or by law.
- 1123

1124 **(B) Failure to Meet Closing Requirements.** The Contractor shall  
1125 meet the applicable closing requirements within 60 days from the date of  
1126 Project Acceptance or the agreed to Punchlist complete date. Should  
1127 the Contractor fail to comply with these requirements, the Engineer may  
1128 terminate the contract for cause."  
1129

1130  
1131  
1132 **END OF SECTION 108**  
1133