

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

2  
3 **“SECTION 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 calendar days after the contract certification date. The  
7 Engineer may suspend the contract before issuing the Notice To Proceed, in  
8 which case the Contractor’s remedies are exclusively those set forth in Subsection  
9 108.10 – Suspension of Work.

10  
11 The Contractor shall be allowed up to 14 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 shall  
15 notify the Engineer, in writing, at least five working days before beginning physical  
16 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 Subsection  
20 108.11 – 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  
26 Any physical work done prior to the Start Work Date will be considered  
27 unauthorized work. If the Engineer does not direct that the unauthorized work be  
28 removed, it shall be paid for after the Start Work Date and only if it is acceptable.

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

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

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

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

**108.03 Preconstruction Submittals.** The awardee shall submit to the Engineer for information and review the pre-construction submittals within 21 calendar days from award. Until the items listed below are received and found acceptable by the Engineer, the Contractor shall not start physical work unless otherwise authorized to do so in writing and subject to such conditions set by the Engineer. Charging of Contract Time will not be delayed, and additional contract time will not be granted due to Contractor delay in submitting acceptable preconstruction submittals. No progress payment will be made to the Contractor until the Engineer acknowledges, in writing, receipt of the following preconstruction submittals acceptable to the Engineer:

- (1) List of the Superintendent and other Supervisory Personnel, and their contact information.
- (2) Name of person(s) authorized to sign for the Contractor.
- (3) Work Schedule including hours of operation.
- (4) Initial Progress Schedule (See Subsection 108.06 – Progress Schedule).
- (5) Water Pollution and Siltation Control Submittals, including Site-Specific Best Management Practice Plan.
- (6) Solid Waste Disposal form.
- (7) Tax Rates.
- (8) Insurance Rates.
- (9) Certificate of Insurance, satisfactory to the Engineer, indicating that the Contractor has in place all insurance coverage required by the contract documents.
- (10) Schedule of agreed prices.
- (11) List of suppliers.
- (12) Traffic Control Plan, if applicable.

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

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

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

**108.05 Contract Time.**

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

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

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

135 **(1) Changes in the Work, Additional Work, and Delays**  
136 **Caused by the State.** If the Contractor believes that an extension of  
137 time is justified on account of any act or omission by the State, and is  
138 not adequately provided for in a field order or change order, it must  
139 request the additional time as provided above. At the request of the  
140 Engineer, the Contractor must show how the critical path will be  
141 affected and must also support the time extension request with  
142 schedules, as well as statements from its subcontractors, suppliers,  
143 or manufacturers, as necessary. Claims for compensation for any  
144 altered or additional work will be determined pursuant to Subsection  
145 104.02 – Changes.

146  
147 Additional time to perform the extra work will be added to the  
148 time allowed in the contract without regard to the date the change  
149 directive was issued, even if the contract completion date has  
150 passed. A change requiring time issued after contract time has  
151 expired will not constitute an excusal or waiver of pre-existing  
152 Contractor delay.

153  
154 **(2) Delay for Permits.** For delays in the routine application and  
155 processing time required to obtain necessary permits, including  
156 permits to be obtained from State agencies, the Engineer may grant  
157 an extension provided that the permit takes longer than 30 days to  
158 acquire and the delay is not caused by the Contractor, and provided  
159 that as soon as the delay occurs, the Contractor notifies the  
160 Engineer in writing that the permits are not available. Permits  
161 required by the contract that take less than 30 days to acquire from  
162 the time which the appropriate documents are granted shall be  
163 acquired between Notice to Proceed and Start Work Date or  
164 accounted for in the contractor's progress schedule. Time  
165 extensions will be the exclusive relief granted on account of such  
166 delays.

167  
168 **(3) Delays Beyond Contractor's Control.** For delays caused by  
169 acts of God, a public enemy, fire, inclement weather days or  
170 adverse conditions resulting therefrom, earthquakes, floods,  
171 epidemics, quarantine restrictions, labor disputes impacting the  
172 Contractor or the State, freight embargoes and other reasons  
173 beyond the Contractor's control, the Contractor may be granted an  
174 extension of time provided that:

175  
176 **(a)** In the written notice of delay to the Engineer, the  
177 Contractor describes possible effects on the completion date  
178 of the contract. The description of delays shall:  
179

180 1. State specifically the reason or reasons for the  
181 delay and fully explain in a detailed chronology how the  
182 delay affects the critical path.

183  
184 2. Include copies of pertinent documentation to  
185 support the time extension request.

186  
187 3. Cite the anticipated period of delay and the time  
188 extension requested.

189  
190 4. State either that the above circumstances have  
191 been cleared and normal working conditions restored  
192 as of a certain day or that the above circumstances will  
193 continue to prevent completion of the project.

194  
195 (b) The Contractor shall notify the Engineer in writing when  
196 the delay ends. Time extensions will be the exclusive relief  
197 granted and no additional compensation will be paid the  
198 Contractor for such delays.

199  
200 **(4) Delays in Delivery of Materials or Equipment.** For delays  
201 in delivery of materials or equipment, which occur as a result of  
202 unforeseeable causes beyond the control and without fault of the  
203 Contractor, its subcontractor(s) or supplier(s), time extensions shall  
204 be the exclusive relief granted and no additional compensation will  
205 be paid the Contractor on account of such delay. The delay shall not  
206 exceed the difference between the originally scheduled delivery date  
207 and the actual delivery date. The Contractor may be granted an  
208 extension of time provided that it complies with the following  
209 procedures:

210  
211 (a) The Contractor's written notice to the Engineer must  
212 describe the delays and state the effect such delays may have  
213 on the critical path.

214  
215 (b) The Contractor, if requested, must submit to the  
216 Engineer within five days after a firm delivery date for the  
217 material and equipment is established, a written statement  
218 regarding the delay. The Contractor must justify the delay as  
219 follows:

220  
221 1. State specifically all reasons for the delay.  
222 Explain in a detailed chronology the effect of the delay  
223 on the critical path.  
224

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

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

**(5) Delays for Suspension of Work.** When the performance of the work is totally suspended for one or more days (calendar or working days, as appropriate) by order of the Engineer in accordance with Subsections 108.10(A)(1), 108.10(A)(2), or 108.10(A)(5) the number of days from the effective date of the Engineer's order to suspend operations to the effective date of the Engineer's order to resume operations shall not be counted as contract time and the contract completion date will be adjusted. During periods of partial suspensions of the work, the Contractor will be granted a time extension only if the partial suspension affects the critical path. If the Contractor believes that an extension of time is justified for a partial suspension of work, it must request the extension in writing at least five working days before the partial suspension will affect the critical operation(s) in progress. The Contractor must show how the critical path was increased based on the status of the work and must also support its claim if requested, with statements from its subcontractors. A suspension of work will not constitute a waiver of pre-existing Contractor delay.

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

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

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

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

**(d)** Delays caused by the failure of the Contractor to make submittals in a timely manner for review and acceptance by the Engineer, such as but not limited to shop drawings,

descriptive sheets, material samples, and color samples except as covered in Subsection 108.05(B)(3) – Delays Beyond Contractor's Control and 108.05(B)(4) – Delays in Delivery of Materials or Equipment.

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

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

(g) Failure of the Contractor to provide evidence sufficient 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

315 site fabrications, and other pertinent factors that relate to  
316 progress;

317  
318 **(b)** All features listed or not listed in the contract  
319 documents that the Contractor considers a controlling factor  
320 for the timely completion of the contract work.

321  
322 **(c)** The time span and sequence of the activities or events  
323 for each feature, and its interrelationship and  
324 interdependencies in time and logic to other features in order  
325 to complete the project.

326  
327 **(d)** The total anticipated time necessary to complete work  
328 required by the contract.

329  
330 **(e)** A chronological listing of critical intermediate dates or  
331 time periods for features or milestones or phases that can  
332 affect timely completion of the project.

333  
334 **(f)** Major activities related to the location on the project.

335  
336 **(g)** Non-construction activities, such as submittal and  
337 acceptance periods for shop drawings and material,  
338 procurement, testing, fabrication, mobilization, and  
339 demobilization or order dates of long lead material.

340  
341 **(h)** Set schedule logic for out of sequence activities to  
342 retain logic. In addition, open ends shall be non-critical.

343  
344 **(i)** Show target bars for all activities.

345  
346 **(j)** Vertical and horizontal sight lines both major and minor  
347 shall be used as well as a separator line between groups.  
348 The Engineer will determine frequency and style.

349  
350 **(k)** The file name, print date, revision number, data and  
351 project title and number shall be included in the title block.

352  
353 **(l)** Have columns with the appropriate data in them for  
354 activity ID, description, original duration, remaining duration,  
355 early start, early finish, total float, percent complete,  
356 resources. The resource column shall list who is responsible  
357 for the work to be done in the activity. These columns shall  
358 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 \$2,000,000 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.

**(d)** 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.

**(e)** 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.

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

**(g)** Identify responsible subcontractor, supplier, and others for their respective activity.

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

**(i)** 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.

(j) Incorporate all physical access and availability restraints.

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

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

448 (4) An anticipated manpower requirement graph plotting contract  
449 time and total manpower requirement. This may be superimposed  
450 over the payment graph.

451  
452 (5) A Method Statement that is a detailed narrative describing the  
453 work to be done and the method by which the work shall be  
454 accomplished for each major activity. A major activity is an activity  
455 that has one or more of the following:

456  
457 (a) Has a duration longer than five days.

458  
459 (b) Is a milestone activity.

460  
461 (c) Is a contract item that exceeds \$10,000 on the contract  
462 cost proposal.

463  
464 (d) Is a critical path activity.

465  
466 (e) Is an activity designated as such by the Engineer.

467  
468 Each Method Statement shall include the following items  
469 needed to fulfill the schedule:

470  
471 (a) Quantity, type, make, and model of equipment.

472  
473 (b) The manpower to do the work, specifying worker  
474 classification.

475  
476 (c) The production rate per eight hour day, or the working  
477 hours established by the contract documents needed to meet  
478 the time indicated on the schedule. If the production rate is  
479 not for eight hours, the number of working hours shall be  
480 indicated.

481  
482 (6) Two sets of color time-scaled project evaluation and review  
483 technique charts ("PERT") using the activity box template of Logic –  
484 Early Start or such other template designated by the Engineer.

485  
486 If the contract documents establish a sequence or order for the work,  
487 the initial progress schedule shall conform to such sequence or order.

488  
489 **(E) Contractor's Continuing Schedule Submittal Requirements.**  
490 After the acceptance of the initial TSLD and when construction starts, the  
491 Contractor shall submit four plotted progress schedules, two PERT charts,  
492 and reports on all construction activities every two weeks (bi-weekly). This

scheduled bi-weekly submittal shall also include an updated version of the project schedule in a computerized software format as specified by the Engineer. The submittal shall have all the information needed to re-create that time period's TSLD plot and reports. The bi-weekly submittal shall include, but not limited to, an update of activities based on actual durations, all new activities and any changes in duration or start or finish dates of any activity.

The Contractor shall submit with every update, in report form acceptable to the Engineer, a list of changes to the progress schedule since the previous schedule submittal. 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.

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

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

**(F) Float.** All float appearing on a schedule is a shared commodity. 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.

**(J) Early Contract Completion Incentive Provision.** This contract provides an incentive payment of \$10,000.00 per day towards the work completed in the opening of the roadway to two-way two lane traffic by 90 calendar days after the Notice to Proceed date. The maximum incentive amount payable is \$300,000 (30 calendar days). To qualify for the incentive, all work, excluding the plant establishment period, must be completed, operational and accepted by the Engineer.

**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. Directly submit an informational copy of the three-week schedule to the Material Testing Research Branch (MTRB) on the same day as the weekly meeting is held or was to be held. An informational copy is for informational use only and requires no response or further action from the

582 MTRB. Number of copies of the detailed work schedule to be submitted will be  
583 determined by the Engineer. The three-week schedule is in addition to the TSLD  
584 and shall in no way be considered as a substitute for the TSLD or vice versa. The  
585 three-week schedule shall show:

586  
587 (a) All construction events, traffic control and BMP related activities in  
588 such detail that the Engineer will be able to determine at what location and  
589 type of work will be done for any day for the next three weeks. This is for  
590 the State to use to plan its manpower requirements for that time period.

591  
592 (b) The duration of all events and delays.

593  
594 (c) The critical path clearly marked in red or marked in a manner that  
595 makes it clearly distinguishable from other paths and is acceptable to the  
596 Engineer.

597  
598 (d) Critical submittals and requests for information (RFI's).

599  
600 (e) The project title, project number, date created, period the schedule  
601 covers, Contractor's name and creator of the schedule on each page.

602  
603 Two days prior to each weekly meeting, the Contractor shall submit  
604 a list of outstanding submittals, RFIs and issues that require discussion.

605  
606 **108.08 Liquidated Damages for Failure to Complete the Work or Portions**  
607 **of the Work on Time.** The actual amount of damages resulting from the  
608 Contractor's failure to complete the contract in a timely manner is difficult to  
609 accurately determine. Therefore, the amount of such damages shall be liquidated  
610 damages as set forth herein and in the special provisions. The State may, at its  
611 discretion, deduct the amount from monies due or that may become due under the  
612 contract.

613  
614 When the Contractor fails to reach substantial completion of the work for  
615 which liquidated damages are specified, within the time or times fixed in the  
616 contract or any extension thereof, in addition to all other remedies for breach that  
617 may be available to the State, the Contractor shall pay liquidated damages to the  
618 State, in the amount of \$ 8,000.00 per working day.

619  
620 (A) **Liquidated Damages Upon Termination.** If the State terminates  
621 on account of Contractor's default, liquidated damages may be charged  
622 against the defaulting Contractor and its surety until final completion of  
623 work.

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

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

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

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

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

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

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

**108.10 Suspension of Work.**

**(A) Suspension of Work.** The Engineer may, by written order, suspend the performance of the work, either in whole or in part, for such periods as

the Engineer may deem necessary, for any cause, including but not limited to:

- (1) Weather or soil conditions considered unsuitable for prosecution of the work.
- (2) Whenever a redesign that may affect the work is deemed necessary by the Engineer.
- (3) Unacceptable noise or dust arising from the construction even if it does not violate any law or regulation.
- (4) Failure on the part of the Contractor to:
  - (a) Correct conditions unsafe for the general public or for the workers.
  - (b) Carry out orders given by the Engineer.
  - (c) Perform the work in strict compliance with the provisions of the contract.
  - (d) Provide adequate supervision on the jobsite.
- (5) The convenience of the State.

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

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



**(D) Cost Adjustment.** If the performance of all or part of the work is suspended for reasons beyond the control of the Contractor except an 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.

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

(a) The cost of all contract work performed prior to the effective date of the notice of termination work plus a 5 percent markup on the actual direct costs, including amounts paid to subcontractor, 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 markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss. No anticipated profit or consequential damage will be due or paid.

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

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

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

#### **108.13 Pre-Final and Final Inspections.**

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

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

- (1) All written guarantees required by the contract.
- (2) Two accepted final field-posted drawings as specified in Section 648 – Field-Posted Drawings;
- (3) Complete weekly certified payroll records for the Contractor and Subcontractors.
- (4) Certificate of Plumbing and Electrical Inspection.
- (5) Certificate of building occupancy as required.
- (6) Certificate of Soil and Wood Treatments.
- (7) Certificate of Water System Chlorination.
- (8) Certificate of Elevator Inspection, Boiler and Pressure Pipe Inspection.
- (9) Maintenance Service Contract and two copies of a list of all equipment installed.
- (10) Current Tax clearance. The contractor will be required to submit an additional tax clearance certificate when the final payment is made.
- (11) And any other final items and submittals required by the contract documents.

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

The Engineer will then make a preliminary determination as to whether or not the project is substantially complete and ready for a pre-final inspection. The Engineer may, in writing, postpone the pre-final inspection until all the items listed in Subsection 108.13(B) – Pre-Final Inspection, are submitted and accepted or in the sole opinion of the Engineer the work is not substantially complete or a combination of both. The Engineer may

939 give a wavier to the Contract Document requirements for the pre-final,  
940 which will be written, only if the waiver can justify that it is in the best  
941 interest of the State to do so.

942  
943 If in the sole opinion of the Engineer, the project's work status is not  
944 substantially complete, the Engineer may deny the pre-inspection from  
945 being held until it is a qualifying condition. The Engineer may at its sole  
946 discretion provide the Contractor a punchlist of specific deficiencies in  
947 writing which shall be corrected or finished before the work will be ready for  
948 a pre-final inspection. The Engineer needs to do so only if in its sole  
949 opinion the project's status of the work is near or at an acceptable condition  
950 for a pre-final inspection. The Contractor shall use due diligence to make  
951 the project's work status acceptable for a pre-final inspection before  
952 requesting one. The Engineer may add to or otherwise modify this  
953 punchlist from time to time. The Contractor shall take immediate action to  
954 correct the deficiencies and must repeat all steps described above including  
955 written notification.

956  
957 If the Engineer finds the work status is substantially complete after a  
958 pre-final inspection but finds deficiencies that are required to be corrected  
959 before the work is ready for a final inspection, the Engineer will prepare in  
960 writing and deliver to the Contractor a punchlist describing such  
961 deficiencies.”

962  
963 After the Engineer is satisfied that the project appears substantially  
964 complete a final inspection shall be scheduled within ten working days after  
965 receipt of the Contractor's latest letter of notification that the project is ready  
966 for final inspection.

967  
968 At any time before final acceptance, the Engineer may revoke the  
969 determination of substantial completion if the Engineer finds that it was not  
970 warranted and will notify the Contractor in writing the reasons therefore  
971 together with a description of the deficiencies negating the declaration.

972  
973 When the date of substantial completion has been determined by the  
974 State, liquidated damages for the failure to complete the punchlist, if due to  
975 the State will be assessed in pursuant to Subsection 108.08(B) - Liquidated  
976 Damages for Failure to Complete the Punchlist.

977  
978 **(D) Punchlist; Clean Up and Final Inspection.** Upon receiving a  
979 punchlist after pre-final inspection, the Contractor shall promptly devote all  
980 required time, labor, equipment, materials and incidentals to correct and  
981 remedy all punchlist deficiencies. The Engineer may add to or otherwise  
982 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.

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

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

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

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

1029  
1030 **108.16 Contractor's Responsibility for Work; Risk of Loss or Damage.**

1031 Until the written notice of final acceptance has been received, the Contractor shall  
1032 take every precaution against loss or damage to any part of the work by the action  
1033 of the elements or from any other cause whatsoever, whether arising from the  
1034 performance or from the non-performance of the work. The Contractor shall  
1035 rebuild, repair, restore and make good all loss or damage to any portion of the  
1036 work resulting from any cause before its receipt of the written notice of final  
1037 acceptance and shall bear the risk and expense thereof.

1038  
1039 The risk of loss or damage to the work from any hazard or occurrence that  
1040 may or may not be covered by a builder's risk policy is that of the Contractor and  
1041 Surety, unless such risk of loss is placed elsewhere by express language in the  
1042 contract documents.

1043  
1044 **108.17 Guarantee of Work.**

1045  
1046 **(1)** Regardless of, and in addition to, any manufacturers' warranties, all  
1047 work and equipment shall be guaranteed by the Contractor against defects  
1048 in materials, equipment or workmanship for one year from the date of final  
1049 acceptance or as otherwise specified in the contract documents.

1050  
1051 **(2)** When the Engineer determines that repairs or replacements of any  
1052 guaranteed work and equipment is necessary due to materials, equipment,  
1053 or workmanship which are inferior, defective, or not in accordance with the  
1054 terms of the contract, the Contractor shall, at no increase in contract price  
1055 or contract time, and within five working days of receipt of written notice  
1056 from the State, commence to all of the following:

1057  
1058 **(a)** Correct all noted defects and make replacements, as directed  
1059 by the Engineer, in the equipment and work.

1060  
1061 **(b)** Repair or replace to new or pre-existing condition any  
1062 damages resulting from such defective materials, equipment or  
1063 installation thereof.

1064  
1065 **(3)** The State will be entitled to the benefit of all manufacturers and  
1066 installers warranties that extend beyond the terms of the Contractor's  
1067 guaranty regardless of whether or not such extended warranty is required  
1068 by the contract documents. The Contractor shall prepare and submit all  
1069 documents required by the providers of such warranties to make them  
1070 effective, and submit copies of such documents to the Engineer. If an  
1071 available extended warranty cannot be transferred or assigned to the State  
1072 as the ultimate user, the Contractor shall notify the Engineer who may direct  
1073 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.

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

**108.19 Final Settlement of Contract.**

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

(1) All written guarantees required by the contract.

(2) Complete and certified weekly payrolls for the Contractor and its subcontractor's.

(3) Certificate of plumbing and electrical inspection.

(4) Certificate of building occupancy.

(5) Certificate for soil treatment and wood treatment.

(6) Certificate of water system chlorination.

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(7) Certificate of elevator inspection, boiler and pressure pipe installation.

(8) Tax clearance.

(9) All other documents required by the Contract or by law.

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

**END OF SECTION 108**