

1 Amend **Section 106 – Control Of Material** to read as follows:  
2

3 **"SECTION 106 - CONTROL OF MATERIAL**  
4

5 **"106.01 Source of Supply and Quality Requirements.** The Contractor shall  
6 furnish, pay for, and install all materials required to complete the work, except  
7 materials that are designated in the contract documents to be furnished by the  
8 State. Materials shall be in new condition as of the time of final acceptance  
9 subject to normal wear.  
10

11 All materials proposed to be used may be inspected and tested at any  
12 time and place including but not limited to the source of supply and locations of  
13 manufacture and fabrication. When requested by the Engineer, the Contractor  
14 shall notify the Engineer of the Contractor's proposed sources of materials prior  
15 to delivery. At the request of the Engineer, the Contractor shall provide  
16 reasonable and adequate testing facilities and equipment for the Engineer at the  
17 inspection site, at no cost to the State.  
18

19 **106.02 Material Sources.** The written permission and subject to conditions  
20 set by the Engineer, the Contractor may, at no increase in contract price or  
21 contract time, use stone, gravel, sand, or other materials found within the  
22 project limits. Such permission will not be considered a change and may be  
23 revoked at any time for any reason by the Engineer at no increase in contract  
24 price or contract time.  
25

26 The contract documents or Engineer may make available to the  
27 Contractor the option to use material from sources made available by the State.  
28 Designation of a source for material is not a representation by the Engineer of  
29 the quantity or quality of material obtainable or the method, equipment or work  
30 required to obtain material from the source. The Contractor is not obligated to  
31 use material from such sources. The Contractor bears all costs of using such  
32 material and assumes the risk that such material does not conform to contract  
33 requirements.  
34

35 **106.03 Material Sample; Sample Submittals; Notice of Change.**  
36

37 **(A) Material Sample.** Submission of material samples and equipment  
38 data required by the contract documents or by the Engineer are  
39 exclusively for the benefit of the State's quality control monitoring of the  
40 project. Any statement or representation by the Engineer that any  
41 submitted sample or equipment data is "ACCEPTED", "APPROVED", or  
42 other words to similar effect, shall not be deemed conclusive that the  
43 material and equipment data for which a sample was submitted will  
44 conform to the contract requirements when incorporated into the work.  
45 The "ACCEPTANCE" or "APPROVAL" of any sample by the Engineer  
46 does not change or modify any contract requirements.  
47

48 The Engineer may conduct tests of or take samples of any  
49 materials at any time. The Contractor shall collect and forward samples  
50 and provide other assistance when requested by the Engineer. In all  
51 cases, the Contractor shall furnish the required samples at no cost to the  
52 State. The Contractor shall not be entitled to payment for work that  
53 incorporates materials required to be tested or inspected until the  
54 Engineer completes the tests or inspections. Where samples are required  
55 from the completed work, the Contractor shall cut and furnish samples  
56 from the completed work at the sites and quantities designated by the  
57 Engineer. The work where sample so removed shall be restored with new  
58 material conforming to the contract requirements or accepted by the  
59 Engineer at no increase in contract price or contract time.  
60

61 Tests of the material samples will be made in accordance with the  
62 latest standards of HDOT Hawaii Test Methods, AASHTO, ASTM, or  
63 other recognized material organizations as amended prior to the date of  
64 advertisement unless otherwise provided. References to HDOT Hawaii  
65 Test Method means "Hawaii Test Methods", published by the State of  
66 Hawaii, Department of Transportation, Highways Division, Materials  
67 Testing and Research Branch. The Engineer shall decide the tests to  
68 be conducted and standards to be applied, whether a submitted material  
69 sample passes the tests and meets the standards, and whether a  
70 submitted material sample shall be retested.  
71

72 Each sample submitted shall have a label indicating project title  
73 and number, date sampled, the material represented, its place of origin,  
74 the names of the producers and suppliers, the Contractor, and the  
75 portion of the work for which the material is intended. Samples shall be  
76 marked to indicate where the materials represented are required by the  
77 contract documents.  
78

79 A letter in duplicate shall accompany each delivery of samples and  
80 shall contain a list of the samples and the same information required on  
81 the labels accompanying each sample.  
82

83 For Sampling/Testing Guide for Acceptance and Verification, go  
84 to: <http://www.state.hi.us/dot/highways/specs94/provisions/provhme.htm>  
85 (106A)  
86

87 **(B) Sample Submittals.**  
88

89 **(1) Contractor's Duty.** When sample submittals are required  
90 by the contract documents, the Contractor shall review, approve,  
91 indicate its approval and submit to the Engineer samples of the  
92 materials to be used in the work. It is the responsibility of the  
93 Contractor to submit required material and color samples for review  
94 at the earliest possible date after the date of award. Delays caused

95 by the failure of the Contractor to submit material and color  
96 samples will not be considered as justifiable reasons for contract  
97 time extension or additional compensation.  
98

99 **(2) Deviations.** The Contractor shall include with the submittal  
100 of samples written notification of, and shall clearly identify, all  
101 deviations from the contract documents. Failure to so notify the  
102 Engineer of, and identify, such deviations shall be grounds for the  
103 subsequent rejection of the related work or materials,  
104 notwithstanding that the sample upon its submittal was accepted by  
105 the Engineer. Any deviations will be subject to Subsection 102.16  
106 – Substitution of Materials and Equipment Before Bid Opening. If  
107 the deviations are not acceptable to the Engineer, the Contractor  
108 shall be required to furnish the samples as specified or indicated on  
109 the contract documents at no additional cost or time.  
110

111 **(3) Review Process.** The Engineer will inspect or test samples  
112 and communicate the results of the inspection or test within 45  
113 days of receipt unless otherwise agreed between the Contractor  
114 and the Engineer or as stated in the contract documents. If the  
115 volumes of samples submitted at any time for review is unusually  
116 large, the Contractor may inform the Engineer of its preferred  
117 order for review and the Engineer will use reasonable efforts to  
118 accommodate the Contractor's priorities.  
119

120 If the Engineer notifies the Contractor that a sample does  
121 not conform to the contract documents, the Contractor shall  
122 promptly submit a sample conforming to the requirements of the  
123 contract documents, indicating in writing on the transmittal and the  
124 subject sample what portions of the resubmittal have been altered.  
125

126 No mark or notation made by the Engineer on or  
127 accompanying the return of any sample to the Contractor shall be  
128 considered a request or order for a change or extra work. If the  
129 Contractor believes any such mark or notation constitutes a request  
130 for a change or extra work for which it is entitled to an adjustment  
131 in contract price and contract time, or both, the Contractor must  
132 follow the procedures established in Subsection 104.02 – Changes  
133 for oral orders, directions, instructions, interpretations, or  
134 determinations from the Engineer or else lose its right to claim for  
135 an adjustment.  
136

137 **(4) Conformance of Material to Submittal.** After a material  
138 submittal has been accepted by the Engineer, the Contractor shall  
139 provide materials for the work that conform to such submittal.  
140 Materials that do not conform to such submittal are non-conforming  
141 material in accordance with Subsection 106.08 – Non-Conforming

Materials, even if they otherwise meet the contract requirements. If Contractor intends to substitute a material in place of a material for which a submittal has been accepted, the Contractor shall submit the substitute material in accordance with the sampling and testing procedures described herein. The Contractor shall not use the substitute material until the Engineer accepts it.

**((C) Notice of Change.** If during the course of the work the Contractor intends to change the source of supply of any previously submitted material, or the location of any manufacturing or fabrication plant, the Contractor shall provide the Engineer written notice of such intended change not less than ten days before the change is made. The Engineer may require that the Contractor repeat the submittal process in accordance with this Section 106 – Material Restrictions and Requirements for any such material.

**106.04 Plant Inspection.** (Unassigned). (See 105.11 – Inspection of the Work and Materials).

**106.05** (Unassigned). (See Subsection 105.23 – Storage and Handling of Materials and Equipment).

**106.06** (Unassigned). (See 105.23 – Storage and Handling of Materials and Equipment).

**106.07 Non-Conforming Materials.** All materials not conforming to the contract requirements, whether in place or not, shall be promptly removed from the site of the work when directed by the Engineer in writing. If the Contractor fails to comply forthwith with any order of the Engineer made under the provisions of this subsection, the Engineer shall have the authority to remove and replace non-conforming materials and charge the removal and replacement to the Contractor.

**106.08 State-Furnished Material.** The Contractor shall furnish all materials required to complete the work, except those specified to be furnished by the State. The contract documents or the Engineer will establish the time and means of delivery or the turning over of State-furnished materials.

Unless otherwise stated in the contract documents, it shall be conclusively presumed that State-furnished materials conform to the contract documents as of the time of delivery to the Contractor

Upon receipt, the Contractor shall inventory, store, inspect, protect, distribute, and install State-furnished material at its risk and cost."

**106.09 Special Test Methods.** (Unassigned). (See 106.03 (A)- Material Sample).

**106.10 Certificate of Compliance.** In addition to or instead of the submission of material samples for inspection or testing, the Engineer or the contract documents may require the Contractor to submit to the Engineer a Certificate of Compliance from the manufacturer or supplier, or both.

A Certificate of Compliance shall be an English language document containing:

- (1) A description of the material supplied.
- (2) Means of material identification, including but not limited to label, lot number, heat number, batches, or marking including the respective quantities of each supplied for the work.
- (3) Statement that the material complies in all respects with the requirements of the cited specifications within the contract documents.
- (4) When required by the Engineer, test results confirming that the material complies in all respect with the requirements of the contract documents.
- (5) The name, title, and signature of the authorized person acting on behalf of the manufacturer or the supplier of the material, the date of the signature, and the name and address of the manufacturer or supplier of the material.

**106.11 Steel and Iron Construction Material.** (Not Applicable).

**106.12 Recycling of Waste Glass.** (Unassigned) See 717 - Cullet and Cullet-Made Materials).

**106.13 Payment for Deleted Materials.**

**(A) Canceled Orders.** If acceptable material was ordered by the Contractor for any item deleted by an ordered change in the work prior to the date of notification of such deletion by the Engineer, the Contractor shall use its best efforts in a timely manner to cancel the order. The State will pay reasonable cancellation charges required by the supplier. The Contractor will be paid a 7 percent markup on all reasonable cancellation charges for compensation for overhead and profit.

**(B) Returned Materials.** If acceptable deleted material is in the possession of the Contractor or is ultimately received by the Contractor, if such material is returnable to the supplier and the Engineer so directs, the material shall be returned. After the Contractor returns acceptable material to the supplier, the State will pay for the reasonable charges made by the supplier or other source for the return of the material. The

Contractor shall be paid a markup for overhead and profit on charges made by the supplier. The Contractor shall be paid a 7 percent markup on the reasonable charges made by the supplier or other source for returning the material for compensation for overhead and profit. The cost to the Contractor for handling the returned material will be paid as provided in Subsection 104.09 - Method of Price Adjustment.

**(C) Uncancelled Material.** If orders for acceptable material that was deleted cannot be canceled at a reasonable cost or returned, it will be paid for at the actual cost to the Contractor including a markup for overhead and profit of 7 percent. In such cases the material paid for shall become the property of the State and the cost of further storage and handling will be paid as provided in Subsection 104.09 - Method of Price Adjustment.

All charges the Contractor proposes for the acceptable material that was deleted shall be properly itemized and supported by sufficient substantiating legible data to permit evaluation. The Engineer will determine whether the proposal is acceptable.

**106.14 Assignment Of Antitrust Claims For Overcharges For Goods and Materials Purchased.** Vendor and purchaser recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, vendor hereby assigns to purchaser any and all claims for such overcharges as to goods and materials purchased in connection with this order or contract, except as to overcharges which result from antitrust violations commencing after the price is established under this order or contract and which are not passed on to the purchaser under an escalation clause.

Contractor and owner recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the owner. Therefore, Contractor hereby assigns to owner any and all claims for such overcharges as to goods and materials purchased in connection with this order or contract, except as to overcharges which result from antitrust violations commencing after the price is established under this order or contract and any contract change order. In addition, Contractor warrants and represents that each of its first tier suppliers and subcontractors shall assign any and all such claims to owner, subject to the aforementioned exception."

**106.15 Unauthorized Excavation.** Unless otherwise expressly directed or authorized by the contract documents, Contractor shall not excavate beyond the excavation limits for the purpose of obtaining materials. The site disturbed by unauthorized excavation shall be returned to the condition existing before such unauthorized excavation at no cost to the State. Any unauthorized excavation shall be filled, at the direction of the Engineer, with either the material taken out or a substitute material selected by the Engineer.

283 **106.16 Substitution Of Materials and Equipment After Bid Opening.**  
284 (See 102.16 for Substitution Of Materials and Equipment Before Bid Opening).  
285 Substitution of material or equipment will not be allowed after the bid opening  
286 date except under the following circumstances:  
287

288 (1) A specified or pre-qualified item is delayed by an unforeseeable  
289 event beyond the control of the Contractor which would impact the timely  
290 completion of the project.  
291

292 (2) A specified or prequalified item is no longer being manufactured or  
293 is no longer reasonably commercially available.  
294

295 (3) A specified or pre-qualified item is found to be unsuitable for  
296 reasons beyond the control of the Contractor.  
297

298 (4) When a manufacturer or supplier of a prequalified or specified item  
299 makes available at no increase in contract price or contract time a suitable  
300 item, determined by the Engineer to be equal to or better than the item  
301 prequalified or specified.  
302

303 (5) Under such other terms and conditions acceptable to the Engineer.  
304

305 Every substitution request shall be fully explained in writing, by the  
306 Contractor and shall include the justification, the quantities and unit prices  
307 involved, quotations and such other documents as are deemed necessary  
308 to support the request. Any savings in cost will accrue to the State.  
309

310 The burden of proof as to the comparative quality and suitability of  
311 alternate equipment, articles or materials shall be upon the Contractor. The  
312 Contractor shall furnish, at no increase in contract price or contract time, all  
313 information required by the Engineer.  
314

315 The Engineer reserves the right to deny any request the Engineer deems  
316 irregular or not in the best interest of the State and shall be the sole judge of the  
317 comparative quality and suitability of alternates , equipment, articles, or  
318 materials."  
319

320  
321  
322 **END OF SECTION 106**