

September, 2013

**UNIVERSITY OF HAWAII
GENERAL PROVISIONS
FOR
GOODS AND SERVICES**

Attached are the University of Hawaii's General Provisions, dated September, 2013 which will be made a part of all offers for goods and services contracts by reference only, and will not be attached to every solicitation or contract. It will be necessary for you to retain this copy for future use until further notice.

Offerors are cautioned to read and understand all the terms and conditions contained in the General Provisions. These General Provisions are governed by the Hawaii Revised Statutes and the Hawaii Administrative Rules. In the event of any conflict between these General Provisions and the Hawaii Revised Statutes and Hawaii Administrative Rules, the Statutes and Rules in effect at the time of the issuance of the solicitation shall control, and are hereby incorporated by reference.

UNIVERSITY OF HAWAII
GENERAL PROVISIONS
FOR GOODS AND SERVICES
SEPTEMBER, 2013

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SECTION 1 – DEFINITIONS OF TERMS

The words defined in these General Provisions shall have the meanings set forth below whenever they appear in Invitations for Bids or Requests for Proposals unless:

- a. the context in which they are used clearly requires a different meaning; or
- b. a different definition is prescribed for a particular section.

1.1 Amendment of Solicitation

A written document issued by the Procurement Officer after the issuance of an Invitation for Bids or a Request for Proposals, but before bid opening or prior to submission of proposals, to modify or correct the solicitation.

1.2 Bid

The executed document submitted by a bidder in response to an Invitation for Bids or a multi-step bidding procedure.

1.3 Bid or Proposal Form

The prescribed form or format which an Offeror uses to submit its offer.

1.4 Bid Security or Proposal Guarantee

The legally sufficient form of security furnished by an Offeror as a warranty of good faith that the Offeror will enter into a contract with the University and supply the necessary performance and payment bonds should its offer be accepted and which amount will be forfeited in the event of failure or refusal of the Offeror to enter into a contract.

1.5 Bid Opening

The process of opening and reading bids at the time and place specified in the Invitation for Bids and/or the advertisement and in the view of anyone who wishes to attend.

1.6 Bidder or Offeror

Any individual, partnership, or corporation submitting directly or through a duly authorized representative or agent, a bid or proposal in response to an Invitation for Bids, a Request for Proposals, or an unpriced technical offer to an expression of interest.

1.7 Brand Name Specification

A specification limited to one or more items by manufacturers' names or catalog numbers.

1.8 Brand Name or Acceptable Alternate Specification

A specification which uses one or more manufacturer's names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet requirements and which provides for the submission of equivalent products.

1.9 Calendar Day

Any working day as well as Saturdays, Sundays and State-recognized holidays. If no designation of calendar or working day is made, "day" shall mean calendar day.

1.10 Change Order

A written order signed by the Procurement Officer directing the Contractor to make changes which the Changes clause of the contract authorizes the Procurement Officer to order without the consent of the Contractor.

1.11 Contract

The combination of the solicitation, including the instructions to the Offerors, the specifications or scope of work, the Special Provisions, and the General Provisions; the offer and any best and final offers; and any amendments to the solicitation or to the contract; and any terms implied by law.

1.12 Contract Bond

The approved form of security furnished by the Contractor and its surety or sureties or by the Contractor alone, to ensure completion and satisfactory performance of the contract in accordance with the terms of the contract and to guarantee full payment of all claims for labor, materials and supplies furnished, used or incorporated in the work.

1.13 Contract Modification

Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract.

1.14 Contract Time

The time stated in the IFB or RFP and the contract, giving the definite number of consecutive calendar days or work days in which to perform and complete all work covered by the contract. The contract time shall start on the specified date in the "Notice to Proceed."

1.15 Contractor

An individual, partnership, firm, corporation, joint venture or other legal entity undertaking the execution of work under the terms of the contract with the University, and acting directly or through its agents, employees, or Subcontractors.

1.16 Days

Calendar days unless otherwise specified.

1.17 Default

Failure by a party to a contract without legal justification to comply with contractual requirements.

1.18 F.O.B. Point

The F.O.B. (free on board) point (origin or destination) of an order determines the point at which title to goods passes from the vendor to the University.

1.19 Goods

All property, including but not limited to equipment, equipment leases, materials, supplies, printing, insurance and processes, including computer systems and software, excluding land or a permanent interest in land, leases of real property, and office rentals.

1.20 HRS

Hawaii Revised Statutes.

1.21 Invitation for Bids (IFB)

A written solicitation, including all documents, whether attached or incorporated by reference, to prospective bidders requesting bids on University requirements.

1.22 Lease-Purchase Agreement

A rental contract in which the University's periodic payments or parts thereof are applied both to fulfill the rental obligation and as installments for eventual University-ownership of the commodity upon completion of the agreement.

1.23 Life-Cycle Costing

A procurement technique which considers operating, maintenance, acquisition price, and other costs of ownership in the award of contracts to ensure that the item acquired will result in the lowest total ownership cost.

1.24 Liquidated Damages

A specified sum of money in the contract to be paid by the Contractor to the University in the event the Contractor fails to perform as agreed.

1.25 May

Means permissive.

1.26 Offer

Bid, proposal, or quotation.

1.27 Offeror

Defined in 1.6.

1.28 OPRPM

University of Hawaii Office of Procurement and Real Property Management.

1.29 Order of Precedence

In the event of an inconsistency among provisions of the solicitation, the inconsistency shall be resolved by giving precedence in the following order:

- a. Bid or Proposal Form;
- b. Technical Specifications or Scope of Work;
- c. Special Provisions; and
- d. General Provisions.

1.30 Payment Bond

The legally sufficient form of security which guarantees payment and protection for those furnishing labor and materials to the Contractor or its Subcontractors for the work bonded.

1.31 Performance Bond

The legally sufficient form of security which indemnifies the University against loss resulting from the failure of the Contractor to perform a contract in accordance with the specifications.

- 1.32 Posting
A public announcement inviting bids or requesting proposals for goods and services to be furnished or performed.
- 1.33 Priority-Listed Offerors
The three or more responsive and responsible Offerors who have submitted the highest ranked proposals.
- 1.34 Procurement Officer
The Director, Office of Procurement and Real Property Management (OPRPM), or any person who has been officially delegated authority to enter into and administer contracts and make written determinations with respect to the contract.
- 1.35 Procurement Protest
A complaint brought by an aggrieved bidder, offeror, or Contractor in connection with the solicitation or award of a procurement contract.
- 1.36 Proposal
The executed document submitted by an Offeror in response to a Request for Proposals or a multi-step proposal procedure.
- 1.37 Purchase Order
A purchasing document used to formalize a transaction with a vendor containing statements as to the quantity, description, and price of the goods, or services ordered; agreed terms as to payment, discounts, date of performance, transportation terms, and all other information pertinent to the purchase and its execution by the vendor. Written acceptance of a purchase order or shipment of all or any portion of the goods or services covered by a purchase order by a vendor constitutes a contract.
- 1.38 Purchasing Agency
The University of Hawaii.
- 1.39 Request for Proposals (RFP)
A written solicitation, including all documents, whether attached or incorporated by reference, to prospective Offerors requesting proposals on University requirements.
- 1.40 Requirements Contract
A contract in which the vendor agrees to supply all the University requirements that arise for an item or items within a specified period.
- 1.41 Responsible Bidder or Offeror
A bidder or Offeror who meets minimum or special standards as may be prescribed; has adequate financial resources, or the ability to obtain such resources as required for contract performance; is able to comply with required delivery or performance schedule, taking into consideration all existing business commitments; has a satisfactory record of performance; has a satisfactory record of integrity and business ethics; has the necessary organization, experience, licensing, accounting and operational controls, and technical skills or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, and quality assurance measures applicable to materials to be produced or services to be performed by the prospective Contractor and Subcontractors); has the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and is otherwise qualified and eligible to receive an award under applicable laws. When the situation warrants, special standards of responsibility applicable to a particular procurement may be developed to insure the existence of unusual expertise or other factors necessary for adequate contract performance.

1.42 Responsive Bidder or Offeror

A bidder or Offeror whose bid or offer conforms in all material respects to the Invitation for Bids or Request for Proposals.

1.43 Shall

Means mandatory.

1.44 Solicitation

An Invitation for Bids, a Request for Proposals, or any other document issued by the University for the purpose of soliciting bids or proposals to perform a University contract.

1.45 Special Provisions

The terms and conditions pertaining to the specific solicitation in which they are contained; including but not limited to terms and conditions describing the preparation of offers, evaluation of offers, determination of award, plus those applicable to performance by the Contractor.

Should any Special Provisions conflict with the General Provisions, the Special Provisions shall govern.

1.46 Specifications

Any description of the physical, functional, or performance characteristics, or of the nature of goods and services. The term includes descriptions of any requirement for inspecting, testing, or preparing goods or services for delivery.

1.47 State

State of Hawaii.

1.48 Subcontractor

An individual, partnership, firm, corporation, joint venture or other legal entity which enters into an agreement with the Contractor to perform a portion of the work for the Contractor.

1.49 Supplemental Agreement

A written contract modification that is signed by both the Contractor and the Procurement Officer.

1.50 Surety

The individual, firm, partnership or corporation other than the Contractor, which executes a bond with and for the Contractor to ensure the Contractor's acceptable performance of the contract.

1.51 Technical Representative of the Procurement Officer (TRPO)

The person identified and designated by the Procurement Officer to address technical matters within the Specifications.

1.52 University

University of Hawaii.

1.53 Working Day

Monday through Friday during the hours of 7:45 a.m. to 4:30 p.m., excluding State-recognized holidays.

SECTION 2 – OFFER REQUIREMENTS AND CONDITIONS

2.1 Competency of Offeror

Prospective Offeror must be capable of performing the work for which offers are being called. Either before or after the deadline for an offer, the purchasing agency may require Offeror to submit answers to questions regarding facilities, equipment, experience, personnel, financial status or any other factors relating to its ability to furnish satisfactorily the goods or services being solicited by the University. Any such inquiries shall be made and replied to in writing; replies shall be submitted over the signatures of the person who signs the offer. Any Offeror who refuses to answer such inquiries will be considered nonresponsive. All answers to such questions will be handled by the purchasing agency on a confidential basis and will be returned after they have served their purpose.

The purchasing agency also reserves the right to visit an Offeror's place of business to inspect its facilities and equipment and to observe its methods of operation in order to facilitate evaluation of performance capabilities.

2.2 Solicitation Forms

Prospective Offerors will be furnished with solicitation forms which may include but not be limited to a statement of work, the location, description and the contract time of the contemplated work, the various quantities being requested, estimated and/or firm, and items of work to be performed or materials to be furnished, along with a schedule of items for which unit prices and/or lump sum prices are asked, depending on the type of solicitation, e.g., Invitation for Bids or Request for Proposals.

The General Provisions, Technical Specifications, Special Provisions and other documents referenced in or attached to the solicitation shall be considered a part of the offer whether attached to the offer or not at the time of its submission. Such documents shall not be altered in any way when the bid or proposal is submitted and any alterations so made by the Offeror may be cause for rejection of the offer.

2.3 Examination of General Provisions, Specifications, Site of Work, Etc.

The Offeror shall carefully examine the site of the contemplated work, the Solicitation, General Provisions, Technical Specifications, Special Provisions, amendments, etc., before submitting offers. The submission of an offer shall be considered as a warranty that the Offeror has made such examination and is satisfied with the conditions to be encountered in performing the work and with the requirements of the solicitation, General Provisions, Technical Specifications, supplemental specifications, Special Provisions, contract and bonds when required.

No extra compensation will be given by reason of the Contractor's misunderstanding or lack of knowledge of the requirements of the work to be accomplished or the conditions to be encountered in performing the work.

2.4 Amendments and Interpretations

Questions, discrepancies, omissions or doubts as to the meaning of General Provisions, specifications or Special Provisions should be communicated in writing to the Procurement Officer and must be received by the purchasing agency no later than FIVE (5) calendar days prior to the date fixed for opening. Any interpretation, clarification of ambiguities, correction of mistakes or omissions, and any supplemental instructions will be in the form of written amendments to the solicitation, which will be mailed, faxed, or made available for pick up by all prospective Offerors, prior to the date fixed for the opening of offers. It shall be presumed that any amendments or interpretations so issued have been received by an Offeror and such amendments or interpretations shall become a part of the contract documents.

2.5 Preparation of Offer

Proposals submitted in response to a Request for Proposals (RFP) shall be in the format prescribed by the RFP.

Bids submitted in response to an Invitation for Bids (IFB) must be prepared in ink or typed on the form furnished by the purchasing agency or on an exact copy thereof in full accordance with the instructions given. For each item, the Offeror shall specify either the unit and total price in figures in the columns provided for that purpose or the price both in words and numerals in the spaces provided, and, if required, the total sum of all items being offered. Bid prices shall be in U.S. dollars.

Where the IFB involves the furnishing and delivery of goods, the price shall include the cost of delivery to the specified destination, at which point acceptance of said goods will be made by authorized personnel. Should special requirements involving additional costs to the Contractor be necessary, the requirements will be stated in the Special Provisions and offers for the costs therefore shall be governed by the Special Provisions.

Only one bid in response to an IFB or one proposal in response to an RFP for the same work from an individual, firm, partnership, corporation or joint venture under the same or different name will be accepted. If more than one bid is offered for the same work, only the lowest priced bid may be considered; all others will be automatically rejected.

Competing subsidiary or jointly-owned companies may submit bids or proposals and these may be accepted for evaluation and award if such companies submit with their proposals a certificate of non-collusion, sworn to before a notary, which acknowledges that the offer is without collusion.

All prices shall include applicable federal, state and local taxes. Any illegible or otherwise unrecognizable price offer shall cause automatic rejection of the offer.

Offers submitted in response to an IFB or RFP shall be signed in ink (must be an original signature) in the space provided on the bid or proposal page by (1) the owner of a sole proprietorship showing his/her name and post office address; (2) one or more members of a partnership showing name(s) and post office address(es); (3) one or more members or officers of each firm representing a joint venture showing the name and post office address of each member of the individual firm, partnership, or corporation comprising the joint venture with other pertinent information required of firms, partnerships or corporations, as the case may be; (4) one or more officers of a corporation (an offer submitted by a corporation must show the name of the state under the laws of which the corporation was chartered and the names, titles, and business addresses of the president, vice-president, and secretary, as well as evidence showing the authority of the bidder to enter on behalf of said corporation into a contract with the University); or (5) an agent of the Offeror duly authorized to submit offers on, the Offerors behalf (a power of attorney must be on file with the University of Hawaii prior to the opening of offers, or it shall be submitted with the offer, otherwise, the offer may be rejected as irregular and unauthorized).

2.6 Offer Guaranty

Unless required by the Special Provisions, a bid or proposal security deposit, performance and payment bonds, or any other guaranty is not required on any offer for goods or services.

When required by the Special Provisions, an acceptable bid or proposal security deposit shall be in an amount equal to at least FIVE PERCENT (5%) of the amount offered and shall be limited to: a bond in a form satisfactory to the University underwritten by a company licensed to issue bonds in this State; legal tender; or a certificate of deposit, share certificate, cashier's check, treasurer's check, teller's check, or official check drawn by, or a certified check accepted by, a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration. Certificate of deposit, share certificate, cashier's check, treasurer's check, teller's check, official check, or certified check may be utilized only to a maximum of \$100,000, provided, however, if the required security or bond amount totals over \$100,000, more than one instrument not exceeding \$100,000 each and issued by different financial institutions, may be submitted.

If an offer does not comply with the security requirements, the offer shall be rejected as nonresponsive, unless the failure to comply is determined by the Procurement Officer to be nonsubstantial.

2.7 Certification of Independent Price Determination

By submission of a bid in response to an IFB, each bidder certifies, and in the case of a joint bid, each party thereto certifies as to its own organization, that in connection with the procurement:

- a. The prices in the bid have been arrived at independently, without any consultation, communication, or agreement, with any other bidder or competitor for the purpose of restricting competition, relating to (i) such prices, (ii) the intention to submit a bid, or (iii) the methods or factors used to calculate the prices bid.
- b. Unless otherwise required by law, the prices submitted in the bid have not been knowingly disclosed by the bidder to any other bidder or competitor and will not knowingly be disclosed by the bidder to any other bidder or competitor prior to bid opening.

2.8 Certification of Offeror Concerning Wages, Hours, and Working Conditions of Employees of Contractors Performing Services

All Offerors for service contracts shall comply with Section 103-55, HRS, which provides for the wages, hours, and working conditions of employees of Contractors performing services for any governmental agency. By submitting an offer, the Offeror certifies that its offer complies with the requirements of Section 103-55, HRS.

2.9 Taxes

The offer shall include all applicable federal, state, and county taxes. In the State of Hawaii, applicable taxes include, but are not limited to:

- a. The general excise tax (Chapter 237, HRS) is levied on gross receipts or gross income derived from all business activities in the State, e.g., sale or leasing of tangible personal property; contracting; the rendering of services, including professional services; commissions; and the rental of real property. The general excise tax is not a sales tax. It is imposed on persons (individuals, corporations, partnerships, or other entities) receiving the income for the privilege of doing business in Hawaii.

Out-of-state vendors as well as vendors located in Hawaii are subject to the general excise tax on activities in the State or sources within Hawaii. An out-of-state vendor is subject to the general excise tax if the vendor has sufficient presence in the State; presence in the State is established if the vendor has an office, inventory, property, employees, or other representation located in the State or if services in conjunction with sales of property, such as training, installation, or repairs, are provided in the State. Other factors which are considered in determining if the sale of goods or services of out-of-state vendors is taxable are where delivery and acceptance of goods takes place and where title or risk of loss passes from the seller to the buyer.

If final acceptance of goods occurs in Hawaii or services are performed in Hawaii under the Invitation for Bids or Request for Proposals, the transaction shall be taxable in accordance with Chapter 237, HRS, and the Offeror receiving an award for these goods or services will be required to pay the State of Hawaii General Excise Tax.

- b. The use tax (Chapter 238, HRS) is a tax on the landed value of tangible personal property imported into Hawaii for use in the State. If tangible personal property is imported into Hawaii for resale at the retail level or for lease or rental to another person or business, the vendor will be subject to the use tax at the rate of 1/2 of 1% of the landed value of the property, i.e., the invoiced or manufactured cost of the property, plus freight and insurance.

For a general overview of Hawaii State taxes, Publication-1, Information on Hawaii State Taxes Administered by the Department of Taxation, is available at: <http://www6.hawaii.gov/tax/pubs/12pub1.pdf> Questions pertaining to taxes should be directed to the State of Hawaii Department of Taxation, Taxpayer Services Branch, 830 Punchbowl Street, Honolulu, Hawaii 96813-5045, telephone: toll free (800) 222-3229 or (808) 587-4242.

Out-of-state vendors are encouraged to contact the Department of Taxation, telephone 1-800-222-3229 regarding their specific circumstances.

2.10 Modification or Withdrawal of Offers Prior to Deadline for Submittal

Offers may be modified or withdrawn prior to the deadline for submittal of offers by the following documents:

Withdrawal of offers: a written notice received in the office designated in the solicitation; or a written notice faxed to the office designated in the solicitation.

Modification of offers: a written notice received in the office designated in the solicitation stating that a modification to the offer is submitted and is accompanied by the actual modification(s) securely sealed in a separate envelope or container.

2.11 Submittal, Receipt, Opening, and Recording of Bids

Each bid shall be placed in an envelope which shall be sealed and identified with the name and address of the bidder, the IFB number and title, and the time and date of the bid opening and then mailed or delivered to the address indicated in the Notice to Bidders.

Upon its receipt, each bid and modification(s) shall be time-stamped but not opened, and stored in a secure place by the Procurement Officer until the time and date set for bid opening. Copies of bids transmitted via facsimile machine or electronically shall not be acceptable, except as provided for in the Special Provisions.

Bids and modification(s) shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the IFB. The name of each bidder, the bid price(s), and such other information as is deemed appropriate by the Procurement Officer or the officer's designated representative, shall be read aloud or otherwise made available. If practicable, such information shall also be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The name(s) and address(es) of the required witnesses shall also be recorded at the opening.

The opened bids shall be available for public inspection at the time of bid opening except to the extent that the bidder designates trade secrets or other proprietary data to be confidential. Bidders shall ensure that material so designated as confidential shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices and makes and model or catalog numbers of items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.

The Procurement Officer, or the officer's designated representative, shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Procurement Officer or the officer's designated representative shall inform the bidders present at the bid opening that the material designated for nondisclosure shall be subject to written determination by the Office of the Vice President for Legal Affairs and University General Counsel for confidentiality. If that office determines in writing that the material so designated as confidential is subject to disclosure, the bidder submitting the material under review and other bidders who were present at the bid opening shall be so notified in writing, and the material shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

When a purchasing agency denies a person access to a University procurement record, the person may appeal the denial to the Office of Information Practice in accordance with Section 92F-42(12), HRS.

Bids shall be unconditionally accepted without alteration or correction, except as allowed in Section 2.16.

2.12 Submittal, Receipt, and Registration of Proposals

Each proposal shall be placed in an envelope which shall be sealed and identified with the name and address of the Offeror, the RFP number and title, and the time and date established for receipt of proposals, and then mailed or delivered to the address indicated in the Notice to Offerors.

Proposals and modifications shall be time-stamped upon receipt and held in a secure place by the Procurement Officer until the established due date. Proposals shall not be opened publicly, but shall be opened in the presence of two or more procurement officials. Proposals and modifications shall be shown only to University personnel having a legitimate interest in them.

After the date established for receipt of proposals, a register of proposals shall be prepared which shall include for all proposals: the name of each Offeror; the number of modifications received, if any; and a description sufficient to identify the goods or services offered.

An Offeror shall request in writing nondisclosure of designated trade secrets or other proprietary data to be confidential. Offerors shall ensure that such data so designated as confidential shall be readily separable from the proposals in order to facilitate eventual public inspection of the nonconfidential portion of the proposal.

If a request is received to inspect the portions of an Offeror's proposal designated as confidential, the inspection shall be subject to written determination by the Office of the Vice President for Legal Affairs and University General Counsel for confidentiality. If that office determines in writing that the material designated as confidential is subject to disclosure, the material shall be open to public inspection.

The contract file, including the register of proposals and proposals of all Offerors, shall be available for public inspection after the contract is signed by all parties.

2.13 Discussions with Offerors

Discussions may be conducted with Offerors who submit proposals determined to be reasonably susceptible of being selected for award, but proposals may be accepted without such discussions.

2.14 Cancellation of Invitation for Bids or Request for Proposals

The Invitation for Bids or Request for Proposals may be canceled and any and all bids or proposals may be rejected in whole or in part when it is deemed in the best interest of the University, without any liability to any Offeror.

2.15 Late Offers, Late Withdrawals, and Late Modifications

Any notice of withdrawal, notice of modification of an offer with the actual modification, or any offer received at the place designated for receipt and opening of an offer after the time and date set for receipt and opening of offers is late. A late offer, late modification, or late withdrawal shall not be considered late if received before the deadline for submittal and would have been timely if not for the action or inaction of personnel within the procurement activity. A late offer or late modification that will not be considered for award shall be returned to the bidder unopened as soon as practicable and accompanied by a letter from the procurement activity stating the reason for its return. A late withdrawal request shall be responded to with a statement of the reason for nonacceptance of the withdrawal.

2.16 Mistakes in Bids

- a. An obvious mistake in a bid may be corrected or withdrawn, or waived to the extent that it is not contrary to the best interest of the University or to the fair treatment of other bidders.
- b. A bidder may correct a mistake in a bid discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Section 2.10.
- c. A mistake in a bid discovered after the time and date set for bid opening but prior to award may be corrected or waived by the Procurement Officer under the following conditions:
 - 1) The mistake is attributable to an arithmetical error. In the case of error in extension of bid price, unit price shall govern;
 - 2) The mistake is a minor informality which does not affect price, quantity, quality, delivery, or contractual conditions, and the bidder submits documentation that demonstrates a mistake was made. Examples of such mistakes include typographical errors, transposition errors, and the failure of a bidder to sign the bid or provide an original signature, but only if the unsigned bid or copy is accompanied by other material indicating the bidder's intent to be bound;

- 3) A mistake not allowable under paragraphs 1 and 2 above, but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the University and is fair to the other bidders.
- d. A bidder may be permitted to withdraw a bid if the mistake is attributable to an obvious error that does affect price, quantity, quality, delivery, or contractual conditions, and the bidder submits documentation that demonstrates a mistake was made and the Procurement Officer prepares a written approval or denial in response to this request.
- e. A bidder may correct a mistake in bid discovered after award of the contract if the Procurement Officer makes a written determination that it would be unreasonable not to allow the mistake to be corrected.

2.17 Mistakes in Proposals

Once discussions are commenced or after best and final offers are requested, any priority-listed Offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

If discussions are not held, or if the best and final offers upon which award will be made have been received, mistakes shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident on the face of the proposal.

If discussions are not held, or if the best and final offers upon which award will be made have been received, an Offeror alleging a mistake which makes a proposal nonresponsive may be permitted to withdraw the proposal if the mistake is clearly evident on the face of the proposal, but the intended correct offer is not, and the Offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.

If discussions are not held, or if best and final offers upon which award will be made have been received, the Procurement Officer may waive technical irregularities of form rather than substance and insignificant mistakes which do not affect price, quality, quantity or contractual conditions or allow an Offeror to correct them if either is in the best interest of the University.

Mistakes shall not be corrected after award of contract.

2.18 Offer Inspection

Offers to competitive sealed bids may be inspected only as provided for in Section 2.11, above, and after award of contract. For the competitive sealed proposals, except for confidential portions, the proposals shall be made available for public inspection upon posting of award.

2.19 Disqualification of Offerors

An Offeror shall be disqualified and its offer automatically rejected for any one or more of the following reasons: proof of collusion, in which case, all offers involved in the collusive action will be rejected and any participant to such collusion will be barred from future solicitations until reinstated; Offeror's lack of responsibility and cooperation as shown by past work or services; Offeror's being in arrears on existing contracts with the University or having defaulted on previous contracts; Offeror's lack of proper equipment and/or sufficient experience to perform the work contemplated; Offeror does not possess proper license to cover the type of work contemplated, if required; Offeror's delivery of the offer after the deadline specified in the public notice calling for offers, or as amended, except as allowed in Section 2.15; Offeror's failure to pay, or satisfactorily settle, all bills overdue for labor and material on former University contracts at the time of issuance of solicitation; Offeror's failure to follow directions and instructions in the solicitation; or Offeror's placing conditions, limitations, or restrictions on its offer.

2.20 Standards of Conduct

Section 84-15, HRS, provides that a state agency may not enter into any contract to procure or dispose of goods or services, or for construction, with a legislator, an employee, or with a business in which a legislator or an employee has a controlling interest, involving services or property of a value in excess of \$10,000 unless:

- a) The contract is awarded by competitive sealed bidding;
- b) The contract is awarded by competitive sealed proposal; or
- c) The agency posts a notice of its intent to award the contract and files a copy of the notice with the state ethics commission at least TEN (10) days before the contract is awarded.

In addition, a state agency may not enter into a contract with any person or business which is represented or assisted personally in the matter by a person who has been an employee of the agency within the preceding TWO (2) years and who participated while in state office or employment in the matter with which the contract is directly concerned.

All Offerors should be certain that their offers are not in violation of this law. By submitting an offer, the Offeror certifies that its offer does not pose a conflict with Section 84-15, HRS. Contracts awarded shall be void if there is a violation of Section 84-15, HRS.

2.21 Irregular Offers

Offers will be considered irregular and shall be rejected for the following reasons including but not limited to the following: if the offer is unsigned by the Offeror; if the required offer guaranty received separately from the offer is not identifiable as guaranty for a specific offer, or is received after the date and time set for the opening; if the required offer guaranty is not in accordance with Section 2.6 of these General Provisions; if the Offeror or surety fails to sign the surety bond submitted as offer guaranty; if Offeror fails to use the surety bond form furnished by the University or identical wording contained in the said form when submitting a surety bond as offer guaranty; if the offer shows any noncompliance with applicable law or contains any alterations of form, uninitialed erasures or corrections, unauthorized additions or deletions, conditioned, incomplete, or irregular or is in anyway making the offer incomplete, indefinite, or ambiguous as to its meaning; or unbalanced offers in which the price for any item is obviously out of proportion to the prices for other items.

The University reserves the right to reject any and/or all offers and to waive any defects or authorize any substitutions, when in its opinion, such rejection, waiver or substitution shall be in the best interest of the University.

2.22 Costs for Bid or Proposal Preparation

Any costs incurred by Offerors in preparing or submitting a bid or proposal are the Offeror's sole responsibility and the University shall not be liable for such costs.

2.23 Procurement Protest

- a. Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Procurement Officer.
- b. Protests shall be submitted in writing to the Procurement Officer within FIVE (5) working days after the aggrieved party knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted within FIVE (5) working days after the posting of award of the contract under Chapters 103D-302 or 103D-303, Hawaii Revised Statutes, if no request for debriefing has been made, as applicable; provided further that no protest based upon the content of the solicitation shall be considered if submitted after the date set for the receipt of offers. Protests which are not timely filed shall not be considered.

- c. To expedite handling of protests, the protesting party should submit the written protest in an envelope labeled "Procurement Protest" and either served personally or sent by registered or certified mail, return receipt requested, to the Procurement Officer. The written protest shall include at a minimum the following:
 - 1) The name and address of the protestor;
 - 2) Appropriate identification of the procurement, and, if a purchase order or contract has been awarded, its number;
 - 3) A statement of reasons for the protest; and
 - 4) Supporting exhibits, evidence, or documents to substantiate any claims unless not available within the time provided for filing, in which case the expected availability date shall be indicated.
- d. If the protest is not resolved by mutual agreement, the Procurement Officer shall render a decision on a protest in writing to uphold or deny the protest, as expeditiously as possible after receiving all relevant information as requested. The decision shall:
 - 1) State the reasons for the action taken; and
 - 2) Inform the protestor of the protestor's right to an administrative proceeding as provided in this section, if applicable.
- e. A copy of the decision under subsection (d) shall be mailed or otherwise furnished promptly to the protestor and any other party intervening.
- f. A decision under subsection (d) shall be final and conclusive, unless any person adversely affected by the decision commences an administrative proceeding under Chapter 103D-709, Hawaii Revised Statutes.

2.24 Offers to be Held Valid

The prices quoted therein shall be held valid for a period of at least SIXTY (60) consecutive calendar days from the date of bid opening or the deadline for receipt of proposals.

SECTION 3 - EVALUATION, AWARD, AND EXECUTION OF CONTRACT

3.1 Preferences

- a. Preference for Hawaii Products (Applicable to RFP's and IFB's)
 - 1) All persons submitting bids or proposals who wish to claim a Hawaii Products Preference under Section 103D-1002, HRS and Subchapter 1, Section 3-124, HAR, shall designate in their offer the individual product which is to be supplied as a Hawaii product and its price.
 - 2) The responsibility for obtaining qualification shall rest upon the person desiring the preference by submitting application to the Administrator of the State Procurement Office or the University. Any person desiring a preference pursuant to this section shall have the product(s) qualified and registered on the Hawaii products list in accordance with Section 3-124-3, HAR. The Hawaii products list is available on the SPO website at <http://hawaii.gov/spo>.
 - 3) For evaluation purposes, no preference shall be considered when only registered Hawaii products are offered. Where offers include both registered Hawaii products and non-Hawaii products, for the purpose of determining the lowest evaluated offer, the offer for the Hawaii product shall be decreased by its applicable TEN PERCENT (10%) or FIFTEEN PERCENT (15%) classification preference. The contract amount shall be the amount of the price offered, exclusive of the preference.

- 4) In the event of any change that materially alters the offeror's ability to supply Hawaii products, the offeror shall immediately notify the University in writing and the parties shall enter into discussions for the purposes of revising the contract or terminating the contract for convenience.

b. Printing Preference (Applicable to IFB's only)

Section 103D-1003, HRS, and Subchapter 2, Chapter 3-124, HAR, provide as follows:

All bids submitted for a printing, binding, or stationery contract in which all work will be performed in-state, including all preparatory work, presswork, bindery work, and any other production-related work, to include storage and shipping costs, shall receive a FIFTEEN PERCENT (15%) preference for purposes of bid evaluation. This shall not apply whenever the application will disqualify any government agency from receiving federal funds or aid.

Where bids are for work performed in-state and out-of-state, then for the purpose of selecting the lowest bid, the amount bid or proposed for work performed out-of-state shall be increased by FIFTEEN PERCENT (15%). The lowest total bid, taking the preference into consideration, shall be awarded the contract unless the solicitation provides for additional award criteria. The contract amount awarded, however, shall be the amount of the original price offered, exclusive of the preference.

c. Software Development Business Preference (Applicable to RFP's and IFB's)

Section 103D-1006, HRS, and Subchapter 5, Chapter 3-124, HAR, provide as follows:

This preference shall apply to all bids or offers issued by a purchasing agency when so stated in the solicitation. Bids issued by a governmental agency pursuant to Section 103D-301, HRS, shall contain a notice stating that a price preference will be given to Hawaii software development businesses. This price preference will be TEN PERCENT (10%) of the offer price, and will be used for evaluation.

Offerors requesting a preference shall submit a completed certification form, as required by Section 3-124-33, HAR, with each offer. Previous certifications shall not apply unless allowed by the offer.

Any Offeror who fails to indicate that it is a Hawaii software development business will be presumed to be a non-Hawaii software development business and the offer will be increased by TEN PERCENT (10%) for purposes of evaluation.

Where an Offer contains both Hawaii software development businesses and non-Hawaii software development businesses, then for the purpose of determining the lowest evaluated bid, the original offer for the non-Hawaii software development businesses shall be increased by TEN PERCENT (10%).

The responsible Offeror submitting the lowest evaluated offer(s), taking into consideration all applicable preferences shall be awarded the contract, provided the product being offered meets the minimum specifications.

The contract amount of any contract awarded shall be the original price offered, exclusive of any preferences.

d. Recycled Products Preference (Applicable to IFB's only)

Section 103D-1005, HRS, and Subchapter 4, Chapter 3-124, HAR, provide as follows:

Solicitations issued by a governmental agency pursuant to Section 103D-302, HRS, and Section 3-124-22, HAR, shall contain a notice stating that a price preference will be given to recycled products. This price preference will be at least FIVE PERCENT (5%) of the offer price, and will be used for bid evaluation, as specified in Section 3-124-25, HAR.

When a purchase specified recycled products only, or when recycled products only are offered, the price preference shall not apply.

Offerors requesting a preference shall complete a certification of recycled content form which shall be included with the solicitation if applicable as follows:

- 1) Offerors shall indicate on the certification form, the recycled content of the products offered. Recycled content shall be expressed as a percentage of total product weight.
- 2) Offerors shall submit with the certification form sufficient information to support the stated recycled content of the products offered, including but not limited to manufacturer's specifications, or manufacturer's certification. The University reserves the right to request additional information deemed necessary in order to qualify a product, and has sole discretion in determining acceptance of a product.
- 3) Any Offeror whose product is not accepted for application of preference may appeal by filing a written request for re-examination of facts to: Office of Procurement and Real Property Management, University of Hawaii, 1400 Lower Campus Road, Room 15, Honolulu, Hawaii 96822.

Previous certifications shall not apply unless allowed by the solicitation.

Offerors failing to submit the certification at the time established for receipt of offers will not be considered for the price preference.

When both recycled products and non-recycled products are offered for the purpose of determining the lowest price, the original offer price for the non-recycled product item shall be increased by FIVE PERCENT (5%).

Should the price comparison, after taking into consideration all applicable preferences, result in an identical evaluated price, award shall be made to the responsible and responsive bidder as follows: 1) To the bidder bidding the product with the higher post-consumer recovered material content; or 2) To the bidder bidding the product with the higher recovered material content if the products have identical post-consumer recovered material content.

The contract amount of any contract awarded shall be the original offer price offered, exclusive of any preferences.

e. Tax Preference (Applicable to IFB's only)

Section 103D-1008, HRS, Subchapter 7, Section 3-124, HAR, provides a tax preference for taxpaying bidders. For purposes of this section, tax exempt bidders and tax paying bidders are defined as follows:

- 1) "Tax exempt bidder" mean a bidder that is not subject to the applicable Hawaii general excise and applicable Hawaii use tax, under Chapters 237 and 238, HRS, resulting from the performance of the work required by the solicitation; or a bidder that has tax exempt status under federal or state laws or both.

- 2) "Taxpaying bidder" means a bidder that is subject to the applicable Hawaii general excise tax and applicable Hawaii use tax, under Chapters 237 and 238, HRS, for the performance of the work required by the solicitation.

Any taxpaying bidder shall qualify for the tax preference by submitting tax clearance certificates(s) issued by the State of Hawaii Department of Taxation and the Internal Revenue Service to the University with their bids.

The price submitted by the tax exempt bidder shall be increased by the applicable retail rate of the Hawaii general excise tax and applicable use tax to determine the evaluated price for award purposes. The contract amount shall be the original price bid, exclusive of any preferences use in evaluating the bid.

f. Qualified Community Rehabilitation Programs Preference (Applicable to RFP's and IFB's)

Section 103D-1009, HRS, Subchapter 8, Section 3-124, HAR, provides a preference for qualified community rehabilitation programs.

All solicitations for goods and services made pursuant to Sections 103D-302 and 103D-303, HRS, issued by a purchasing agency shall contain a notice stating that a price preference will be given to qualified community rehabilitation programs.

When a governmental body contracts for goods and services, a FIVE PERCENT (5%) preference shall be given to goods and services to be provided by nonprofit corporations or public agencies operating qualified community rehabilitation programs in conformance with criteria established by the department of labor and industrial relations pursuant to Chapter 91; provided that contracts awarded under this section shall be exempt from the wages provision of Section 103-55. Organizations listed in the partners employment program qualify for a preference. All other prospective Offerors desiring a preference shall submit with their offer the "Certificate of Eligibility to be Certified as a Qualified Community Rehabilitation Program" issued by the State Procurement Office.

In evaluating offers for goods or services, the University shall decrease the price offered by a qualified rehabilitation program by FIVE PERCENT (5%) for the purpose of determining the lowest evaluated Offeror. The contract amount of any contract awarded shall be the original price offered, exclusive of any preferences.

g. Application of Multiple Preference

Should more than preference allowed by statute apply, the evaluated price shall be based on application of applicable preferences in the following order:

- 1) Hawaii Products list, pursuant to Section 103D 1002, HRS;
- 2) Tax adjustment for tax exempt Offerors, pursuant to Section 103D-1008, HRS;
- 3) Preferred use of Hawaii software development business, pursuant to Section 103D-1006;
- 4) Recycled products, pursuant to Section 103D-1005, HRS;
- 5) Printing, binding, and stationery work within the State, pursuant to Section 103D-1003, HRS; and
- 6) Preference for persons with disabilities pursuant to Section 103D-1009, HRS.

The preferences shall be applied to the original prices. The sum of the preferences, where applicable, shall be applied to the original price, except that preferences 1) and 4) shall be subtracted from the Hawaii products or recycled products price.

The responsible Offeror submitting the lowest evaluated offer(s), taking into consideration all applicable preferences shall be awarded the contract provided that the product offered meets the minimum Technical Specifications. Lastly, the contract amount shall be the amount of the price offered, exclusive of any preference.

3.2 Low Tie Bids

Low tie bids are bids from responsive, responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the invitation for bids.

At the discretion of the Procurement Officer, award shall be made in any permissible manner that will resolve tie bids, including but not limited to:

- a. Award the contract to a business providing goods produced or manufactured in this State or to a business that otherwise maintains a place of business in this State;
- b. Award the contract to the bidder offering a low tie bid who received the previous award and continue to award succeeding contracts to the same bidder so long as all low bids are identical.

If no permissible method will be effective in resolving tie bids, award may be made by drawing lots.

3.3 Availability of Funds

An award shall be contingent upon the availability of funds, and any solicitation shall be subject to cancellation by the University at any time if funds are unavailable.

3.4 Certification Requirements for Contracts

Prior to award, the successful Offeror shall submit the following certifications:

a. Tax Clearance for Contracts

In accordance with Sections 103-53 and 103D-328, HRS, and Section 3-122-112, HAR, the Contractor shall obtain tax clearances from the State of Hawaii Department of Taxation (DOTAX) and the Internal Revenue Service (IRS) certifying that all tax returns due have been filed, and all taxes, interest, and penalties levied or accrued under the provisions of Title 14 that are administered by the DOTAX and under the Internal Revenue Code against the Offeror, have been paid. This shall apply to all contracts, whether with Hawaii Offerors, out-of-state Offerors, or nonprofit organizations.

This shall not apply to Offerors if the DOTAX certifies that the Offeror is in good standing under a plan in which delinquent taxes are being paid to the DOTAX (and the IRS, if applicable) in installments.

b. Certificate of Compliance, Hawaii State Department of Labor

The Contractor shall obtain a Certificate of Compliance issued by the Hawaii State Department of Labor and Industrial Relations (DLIR), in accordance with Section 103D-310, HRS, and Section 3-122-112, HAR.

c. Certificate of Good Standing, State of Hawaii Department of Commerce and Consumer Affairs

The Contractor shall obtain a Certificate of Good Standing from the State of Hawaii Department of Commerce and Consumer Affairs (DCCA), in accordance with Section 103D-310, HRS, and Section 3-122-112, HAR.

- d. To meet the above requirements, the State of Hawaii has developed an electronic proof of compliance process, Hawaii Compliance Express, that allows a vendor to obtain the aforementioned certifications by registering on-line at:

<http://vendors.ehawaii.gov/hce/splash/welcome.html>.

Vendors shall electronically register with the Hawaii Compliance Express to obtain a Certificate of Vendor Compliance which is acceptable as proof of compliance for both contracting purposes and final payment.

The above certifications should be applied for by Offerors in a timely manner. The University will inform the successful Offeror in writing as to the exact date and time that the above certifications are due to the University. If the successful Offeror does not submit the certifications by the date and time specified in the University's written notification, the successful Offeror's proposal shall be rejected. Thereafter, the University reserves the right to consider other offers received for award.

3.5 Execution of Contract

The University shall forward a formal contract to the successful Offeror for execution. The contract shall be signed by the successful vendor and returned, together with a satisfactory contract bond if required, and other supporting documents, within TEN (10) days after receipt by the Offeror or within such further time as the Procurement Officer may allow.

No such contract shall be considered binding upon the University until the contract has been fully and properly executed by all the parties thereto and the University of Hawaii has endorsed thereon a certificate that there is an appropriation or balance of an appropriation over and above all outstanding contracts, sufficient to cover the amount required by the contract; with the exception of a multi-term contract, whereby, the University of Hawaii shall only be required to certify that there is an appropriation or balance of an appropriation over and above all outstanding contracts, that is sufficient to cover the amount required to be paid under the contract during the fiscal year or remaining portion of the fiscal year of each term of the multi-year contract. This requirement shall not apply to any contract in which the total amount payable to the Contractor cannot be accurately estimated at the time the contract is to be awarded.

In any contract involving not only University funds but supplemental funds from the federal government, this section shall be applicable only to that portion of the contract price as is payable out of University funds. As to the portion of the contract price as is expressed in the contract to be payable out of federal funds, the contract shall be construed to be an agreement to pay the portion to the Contractor, only out of federal funds to be received from the federal government. This paragraph shall be liberally construed so as not to hinder or impede the University in contracting for any project involving financial aid from the federal government.

If the successful Offeror is other than a sole proprietorship, it shall submit satisfactory evidence, e.g., certificate or corporate resolution, power of attorney or other such evidence of authority of the signers' authority to execute on the contract date the contract on behalf of the successful bidder. If such document has been submitted to the purchasing agency on a previous occasion, the successful Offeror may submit a copy of this document, provided there has been no amendment, modification or rescission of the document previously submitted, and provided further, that no such copy shall be acceptable unless the date of the document previously submitted is dated within ONE (1) year of the contract date. If there has been a modification, amendment or rescission of the evidence of authority previously submitted, then the superseding document shall be attached to the contract.

If the successful offeror to whom the contract was awarded fails to enter into the contract and furnish satisfactory security, if applicable, the University may thereupon, at its discretion, award the contract to the next lowest or remaining responsible Offeror or may publish another call for offers; provided in the case of only one remaining responsible Offeror, the Procurement Officer may negotiate with such Offeror to reduce the scope of work, if available funds are exceeded, and to award the contract at a price which reflects the reduction in the scope of work.

The Procurement Officer further reserves the right to cancel the contract award at any time prior to execution of said contract by all parties, without any liability to the awardee and to any other Offeror.

The contract shall not be binding on the University until such time as it is fully executed by the Procurement Officer.

3.6 Contract Bond

The requirement for contract performance and payment bonds, if any, shall be stated in the Special Provisions of the solicitation.

When required by the Special Provisions, a performance bond and a payment bond shall be delivered by the Contractor to the University at the same time the executed contract is delivered. Each amount of the performance and payment bonds shall not exceed FIFTY PERCENT (50%) of the amount of the contract price; provided, for contracts where contract price cannot be determined at the time of award, the amounts of the bonds shall be as stated in the solicitation.

The acceptable performance and payment bonds are the same as the acceptable bid or proposal security deposit specified in Section 2.6. If a surety bond is submitted for either the performance or payment bond, in addition to the form prescribed, a power of attorney for the surety's attorney-in-fact executing the bond shall be provided.

3.7 Failure to Execute Contract

If the Offeror to whom a contract is awarded shall fail or neglect to enter into the contract and to furnish satisfactory security as required by Section 3.6 within TEN (10) days after such award or within such further time as the Procurement Officer may allow, the purchasing agency may pay the amount of Offeror's proposal guaranty, as required under Section 2.6, into the University's account as a realization of the University. The Procurement Officer may thereupon award the contract to the next lowest responsible Offeror or may call for new offers, whichever method the officer may deem is in the best interest of the University.

3.8 Return of Offer Guaranties

All offer guaranties submitted as required in the solicitation shall be retained until the successful Offeror enters into contract and furnishes satisfactory security or if the contract is not awarded or entered into, until the Procurement Officer's determination is made to publish another call for offers. At such time, all offer guaranties, except surety bonds, will be returned.

3.9 Submission of Insurance Certification

The Contractor agrees to deliver to the University, when contract documents are executed, a certificate of insurance evidencing any and all insurance required by the Special Provisions. Said certificate shall contain an endorsement that such insurance may not be canceled except upon THIRTY (30) days' notice to the University. It shall also contain a statement to the effect that the University of Hawaii is named additional insured under the policy(s), if required by the Special Provisions.

Failure of the Contractor to provide and keep in force insurance policy(s) as required shall be regarded as material default under this contract, entitling the University to exercise any or all of the remedies provided in this contract for a default of the Contractor.

3.10 Notice to Proceed

A written notice from the Procurement Officer shall be issued advising the Contractor of the date on which work under the contract will proceed.

SECTION 4 – PERFORMANCE OF CONTRACT

4.1 Contract Administration

It is expressly understood and agreed that the Contractor is an independent Contractor, with the authority to control and direct the performance and details of the work and services herein contemplated; however, the University retains the general right of inspection by a designated representative in order to judge, whether in the University's opinion, such work is being performed by the Contractor in accordance with the terms of this agreement.

4.2 Compliance with Contract Terms, Etc.

The work shall be completed in conformity with the specifications and each and every requirement of the General Provisions and other provisions forming a part of the contract. In the event the Contractor fails to so perform, the Procurement Officer, in addition to any other recourse, reserves the right to suspend the Contractor from bidding on any or all University contracts.

4.3 Change Orders and Modifications

The Contractor will not undertake to perform the portion of the work affected by any changes to the contract until a change order or written modification has been approved and issued by the Procurement Officer.

4.4 Acceptance of Goods and Services

The goods and services furnished by the Contractor shall be exactly as specified, free from all defects in design, workmanship, and materials and shall be inspected by the University upon receipt of goods or completion of services. If any goods and/or services supplied are found to be defective or not as specified, the Contractor shall correct the defects without charge. If the Contractor is unable or refuses to correct such defects, the University may terminate the contract in whole or in part. Contractor shall bear all risks as to rejected goods and/or services, and in addition to any costs for which the Contractor may become liable to the University for all payments made to the Contractor. Notwithstanding final acceptance and payment, the Contractor shall be liable for latent defects, fraud or misrepresentation.

4.5 Delivery Extensions

In the case of contracts for the purchase of goods, the delivery date or the maximum number of days for delivery will be specified by the University in its solicitation requirements, and all goods must be delivered within the time specified. However, the Contractor will not be held responsible for delay due to fire, flood, riot, labor disturbances, war, shortage of transportation, act of God or other reason beyond its control, provided that the Contractor notifies the University of such delay and the reason therefore as soon as practicable after its occurrence and requests extension prior to the specified date of delivery. Requests for extension of time shall be accompanied by documents such as the Contractor's purchase order, manufacturer's acknowledgment, shipping manifest, and any other documents substantiating that the causes for delay were beyond the control of the Contractor. The University shall be the sole judge of whether such delay is truly beyond the control of the Contractor and whether extension will be granted. The University reserves the right to terminate the contract or to assess liquidated damages, if provided for in the contract, for delays not covered by specific authorized extension.

SECTION 5 – LEGAL RELATIONS AND RESPONSIBILITY

5.1 Laws to be Observed

The Contractor shall at all times observe and comply with all federal, state and local laws or ordinances, rules and regulations which in any manner affect those engaged or employed in the performance of the work, the manufacture and sale of materials and equipment required under the contract, and the conduct of the work. The Contractor shall also comply with all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the work. Any reference to such laws, ordinances, rules and regulations shall include any amendments thereto.

The Contractor shall indemnify, defend and hold harmless the University and all its officers, agents and employees against any claim or liability arising from or based on the violation of any such laws, ordinances, rules and regulations, orders and decrees, whether such violation is committed by the Contractor or its Subcontractor or an employee of either or both. If any discrepancy or inconsistency is discovered in the contract for the work in relation to any such laws, ordinances, rules and regulations, orders or decrees, the Contractor shall forthwith report the same to the Procurement Officer in writing.

5.2 Patented Article

The Contractor will be required to, and shall hold the University and its duly authorized representatives harmless against all demands, claims, actions, suits or liabilities arising from the use of any patented article, patented process or patented appliance used in connection with the contract. Any royalties due or becoming due for the use of any patented article or process shall be paid by the Contractor and shall be deemed to be included within the proposal amount and contract price.

5.3 Subcontracting and Assigning

The Contractor shall not subcontract, convey, transfer or assign any of the work to be performed under its contract with the University, nor shall the Contractor assign the contract to any other person or firm without written permission from the Procurement Officer, and no subcontract or assignment made without such permission will be recognized. No subcontract shall, under any circumstances, relieve the Contractor of its obligation and liability under its contract with the University, and all persons engaged in performing the work covered by the contract shall be considered employees of the Contractor.

5.4 Assignment of Antitrust Claims

The Contractor, as vendor, and the University, as purchaser, recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the Contractor hereby assigns to the University 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 escalating clause.

5.5 Responsibility for Damage Claims; Indemnification

The Contractor shall indemnify, defend, and hold harmless the University and its officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees and costs, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of the Contractor or the Contractor's employees, officers, subcontractors, or agents under this contract.

The provisions of this provision shall remain in full force and effect notwithstanding the expiration or early termination of this contract. The purchase of liability insurance shall not relieve the Contractor of the obligations described herein.

In case the University shall, without any fault on its part, be made a party to any litigation commenced by or against the Contractor in connection with this contract, the Contractor shall pay all costs and expenses incurred by or imposed on the University, including attorneys' fees.

5.6 Personal Liability of Public Officials

In carrying out any of the provisions of the contract or in exercising any power or authority granted to them by the contract, there shall be no liability upon the Procurement Officer or the officer's authorized representatives, either personally or as officials of the University, it being understood that in such matters, they act solely as agents and representatives of the University.

5.7 Utilization of Small Business and Small Disadvantaged Business Concerns

- a. It is the policy of the University that small business and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by the University. The Contractor agrees to use its best efforts to carry out this policy in the award of subcontracts to the fullest extent consistent with the efficient performance of this contract.

As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" hereafter referred to as disadvantaged business, shall mean a small business concern:

- 1) which is at least FIFTY-ONE PERCENT (51%) owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least FIFTY-ONE PERCENT (51%) of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
- 2) whose management and daily business operations are controlled by one or more of such individuals.

The Contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans (i.e., American Indians, Eskimos, Aleuts, and Native Hawaiians), Asian-Pacific Americans (i.e., U.S. citizens whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands, the Northern Mariana Islands, Laos, Cambodia, or Taiwan), Asian-Indian Americans (i.e., U.S. citizens whose origins are in India, Pakistan, or Bangladesh), Asian-Indian Americans, and any other minorities, or any other individuals found to be disadvantaged by the Administration pursuant to Section 8(a) of the Small Business Act.

- b. The University, acting in good faith, may rely on written representations by the Contractors and Subcontractors regarding their status as either a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals.

5.8 Utilization of Women-Owned Businesses

- a. It is the policy of the University that women-owned small businesses shall have the maximum practicable opportunity to participate in the performance of contracts awarded by the University.
- b. The Contractor agrees to use its best efforts to carry out this policy in the award of subcontracts to the fullest extent consistent with the efficient performance of this contract. As used in this contract, "women-owned small businesses" means small business concerns that are at least FIFTY-ONE PERCENT (51%) owned by women who are U.S. citizens and who also control (i.e., exercise the power to make policy decisions) and operate (i.e., being actively involved in the day-to-day management of business) the business.

As used in this contract, the term "small business concern" shall mean a concern including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on University contracts, and qualified as a small business under the criteria and size standards in 13 CFR 121.

- c. The University, acting in good faith, may rely on written representations by the Contractors and Subcontractors regarding their status as women-owned businesses.

5.9 Equal Opportunity And Affirmative Action Certification

The Contractor agrees that the equal opportunity clause which prohibit discrimination on the basis of race, color, religion, sex or national origin and the affirmative action requirements of Executive Order 11246, as amended, and implementing regulations at 41 CFR 60, are incorporated by reference in each non-exempt contract, subcontract, or purchase order which is presently existing or which may be entered into hereafter, between the Contractor and the University of Hawaii. The Contractor agrees to perform the applicable obligations of the equal employment opportunity and affirmative action clauses, as amended, covering minorities and women (41 CFR 60-1.4), persons with disabilities (41 CFR 60-741.5), and Veterans (41 CFR 60-300.5). Contractors and construction contractors with 50 or more employees, and contracts of \$50,000 or more, agree to comply with requirements for EEO-1 reports [41 CFR 60-1.7(a)], affirmative action programs [41 CFR 60-1.40(a)], affirmative action program for persons with disabilities (41 CFR-74140), and affirmative action program for Veterans (41 CFR 60-300.40) for contracts of \$100,000 or more. In addition, the Contractor agrees to comply with 29 CFR Part 471, Appendix A to subpart A. The Contractor agrees to indemnify and hold harmless from any claims or demands with regard to the Contractor's compliance with these provisions.

5.10 Affirmative Action for Individuals with Disabilities

The Contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued under the Rehabilitation Act of 1973 (29 U.S.C. 793), as amended, if such rules, regulations, and relevant orders apply to this procurement. The Contractor agrees to indemnify and hold the University harmless from any claims or demands with regard to the Contractor's compliance.

5.11 Affirmative Action for Disabled Veterans, Recently Separated Veterans, Other Protected Veterans, and Armed Forces Services Medal Veterans

The Contractor agrees to comply with the rules, regulations or relevant orders of the Secretary of Labor issued under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA), if such rules, regulations, or relevant orders apply to this procurement. The Contractor agrees to indemnify and hold the University harmless from any claims or demands with regard to the Contractor's compliance.

5.12 Disputes

- a. All controversies between the University and the Contractor which arise under, or are by virtue of this contract and which are not resolved by mutual agreement, shall be decided by the University in writing within NINETY(90) calendar days after a written request by the Contractor for a final decision concerning the controversy; provided that if the University does not issue a written decision within NINETY (90) calendar days after a written request for a final decision, or within such longer period as may be agreed upon by the parties, then the Contractor may proceed as if an adverse decision had been received.
- b. The University shall immediately furnish a copy of the decision to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.
- c. Any decision shall be final and conclusive, unless fraudulent, or unless the Contractor brings an action seeking judicial review of the decision in a circuit court of the State of Hawaii within the six months from the date of receipt of the decision.
- d. The Contractor shall comply with any decision of the University and proceed diligently with performance of the contract pending final resolution by a circuit court of the State of Hawaii of any controversy arising under, or by virtue of, the contract, except where there has been a material breach of contract by the University; provided that in any event the Contractor shall proceed diligently with the performance of the contract where the University's Chief Procurement Officer has made a written determination that continuation of work under the contract is essential to the public health and safety.

5.13 Governing Law

The contract and any of its terms or provisions, as well as the rights and duties of the parties to the contract, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of the contract shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.

5.14 Severability

In the event that any provision of the contract is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of the contract.

5.15 Waiver

The failure of the University to insist upon the strict compliance with any term, provision or condition of the contract shall not constitute or be deemed to constitute a waiver or relinquishment of the University's right to enforce the same in accordance with the contract.

5.16 Service of Process

The Contractor may designate a representative within the State of Hawaii duly authorized to accept service of process on its behalf. In the event that the Contractor fails to so designate such a representative, or such representative is unavailable, the Contractor consents that service of any notice or process issued against it may be served upon it by filing same with the Director of Commerce and Consumer Affairs, State of Hawaii, or in the director's absence with the Deputy Director. The University shall forward by certified mail to the Contractor a copy of any such notice or process served on the Director of Commerce and Consumer Affairs. A copy of such notice must also be sent to the Contractor.

5.17 Audit of Records

- a. The University, at reasonable times and places, may audit the books and records of any person who has submitted cost or pricing data similar to those described in Section 103D-312, HRS, to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless another period is otherwise authorized in writing.
- b. The University shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. The books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract, unless another period is otherwise authorized in writing.

5.18 Campaign Contributions by State and County Contractors Prohibited

If awarded a contract in response to this solicitation, offeror agrees to comply with Section 11-355, HRS, which states that campaign contributions are prohibited from State and County government contractors during the term of the contract if the contractor is paid with funds appropriated by the legislative body between the execution of the contract through the completion of the contract. . Further information is available from the Campaign Spending Commission's Executive Director or its General Counsel at (808) 586-0285.

SECTION 6 – MODIFICATION AND TERMINATION OF CONTRACTS FOR GOODS AND SERVICES

6.1 Remedies

Any dispute arising under or out of this contract is subject to Chapter 3-126, HAR.

6.2 Change Orders to Goods and Services Contracts

- a. Generally. By written order, at any time, and without notice to any surety, the Procurement Officer may, unilaterally, order of the Contractor:
 - 1) Changes in the work within the scope of the contract; and
 - 2) Changes in the time of performance of the contract that do not alter the scope of the contract work.
- b. Adjustments of price or performance time. If any such change order increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, adjustment shall be made and the contract modified in writing accordingly.

- 1) Any adjustment in contract price made pursuant to this section shall be determined, where applicable, in accordance with the price adjustment clause of the contract. Failure of the parties to agree to an adjustment shall be resolved in accordance with the price adjustment clause of the contract.
- 2) Failure of the parties to agree to an adjustment in time shall not excuse the Contractor from proceeding with the contract as changed, provided that the Procurement Officer, within FOURTEEN (14) days after the changed work commences makes the provisional adjustments in time as the University deems reasonable.

The right of the Contractor to dispute the contract price or time required for performance or both shall not be waived by its performing the work, provided however, that it follows the notice requirements for disputes and claims established by the contract.

- c. Time period for claim. Except as may be provided otherwise by Section 103D-501(b), HRS, the Contractor must file a written claim disputing the contract price or time provided in a change order within TEN (10) days after receipt of a written change order, unless such period is extended by the University in writing. The requirement for filing a timely written claim cannot be waived and shall be a condition precedent to the assertion of a claim.
- d. Claim barred after final payment. No claim by the Contractor for an adjustment hereunder shall be allowed if the claim is not received by the University prior to final payment under this contract.
- e. Other claims not barred. In the absence of such a change order, nothing in this clause shall be deemed to restrict the Contractor's right to pursue a claim under the contract or for breach of contract.

6.3 Modifications to Goods and Services Contracts

- a. Contract modification. By a written order, at any time, and without notice to any surety, the University, subject to mutual agreement of the parties to the contract and all appropriate adjustments, may make modifications within the general scope of this contract to include any one or more of the following:
 - 1) Drawings, designs, or specifications, for the goods to be furnished;
 - 2) Method of shipment or packing;
 - 3) Place of delivery;
 - 4) Description of services to be performed;
 - 5) Time of performance, (i.e., hours of the day, days of the week, etc.);
 - 6) Place of performance of the services; or
 - 7) Other provisions of the contract accomplished by mutual action of the parties to the contract.
- b. Adjustments of price or time for performance. If any modification increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this contract or as negotiated.
- c. Claim barred after final payment. No claim by the Contractor for an adjustment hereunder shall be allowed if the claim is not received by the University prior to final payment under this contract.
- d. Other claims not barred. In the absence of such a contract modification, nothing in this clause shall be deemed to restrict the Contractor's right to pursue a claim under the contract or for a breach of contract.

6.4 Authorization for a Stop Work Order

- a. Section 6.5 applies to any fixed-price contract for goods and services under which work stoppage may be required for reasons such as advancements in the state of the art, production modifications, engineering changes, or realignment of programs.
- b. Stop work orders shall not exceed SIXTY (60) consecutive days and shall include, as appropriate:
 - 1) A clear description of the work to be suspended;
 - 2) Instructions as to the issuance of further orders by the Contractor for material or services;
 - 3) Guidance as to action to be taken on subcontracts; and
 - 4) Other instructions and suggestions to the Contractor for minimizing costs.
- c. Promptly after issuance, stop work orders should be discussed with the Contractor and should be modified, if necessary, in light of such discussions.
- d. As soon as feasible after a stop work order is issued:
 - 1) The contract will be terminated; or
 - 2) The stop work order will be canceled or extended in writing beyond the period specified in the order.
- e. In any event, whether the contract is terminated or the stop work order is extended, action must be taken before the specified stop work period expires. If an extension of the stop work order is necessary, it must be evidenced by a supplemental agreement. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order.

6.5 Stop Work Orders

- a. Order to stop work. The Procurement Officer, may, by written order to the Contractor, at any time, and without notice to any surety, require the Contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding SIXTY (60) days after the order is delivered to the Contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this paragraph. Upon receipt of such an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Procurement Officer shall either:
 - 1) Cancel the stop work order; or
 - 2) Terminate the work covered by such order as provided in the "termination for default clause" or the "termination for convenience clause" of this contract.
- b. Cancellation or expiration of the order. If a stop work order issued under this section is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the Contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if:
 - 1) The stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and
 - 2) The Contractor asserts a claim for such an adjustment within THIRTY (30) days after the end of the period of work stoppage; provided that, if the Procurement Officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.

- c. Termination of stopped work. If a stop work order is not canceled and the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowable by adjustment or otherwise.
- d. Adjustment of price. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract.

6.6 Variations in Quantities for Definite Quantity Contracts

Upon the agreement of the parties, the quantity of goods or services or both specified in this contract may be increased by a maximum of TEN (10) percent provided: the unit prices will remain the same except for any price adjustments otherwise applicable; and the Procurement Officer determines that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.

6.7 Price Adjustment

- a. Price adjustment Methods. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:
 - 1) By agreement on a fixed price adjustment before commencement of the pertinent performance;
 - 2) By unit prices specified in the contract or subsequently agreed upon before commencement of the pertinent performance;
 - 3) By the costs attributable to the event or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon, before commencement of the pertinent performance;
 - 4) In such other manner as the parties may mutually agree upon, before commencement of the pertinent performance; or
 - 5) In the absence of agreement between the parties, the provisions of Section 103D-501(b)(5), HRS shall apply.
- b. Submission of cost or pricing data. The Contractor shall be required to submit cost or pricing data if any price adjustment in contract price is subject to the provisions of 103D-312, HRS. The submission of any cost or pricing data shall be made for any price adjustment subject to the provisions of Subchapter 15, Chapter 3-122, HAR. A fully executed change order or other document permitting billing for the adjustment in price under any method listed in paragraphs a(1) to a(4) shall be issued within TEN (10) days after agreement on the method of adjustment.

6.8 Novation or Change of Name

- a. No assignment. No University contract is transferable, or otherwise assignable, without the written consent of the Procurement Officer provided, that a Contractor may assign monies receivable under a contract after due notice to the University.
- b. Recognition of a successor in interest; assignment. When in the best interest of the University, a successor in interest may be recognized in a assignment agreement in which the transferor and the transferee and the University shall agree that:
 - 1) The transferee assumes all of the transferor's obligations;
 - 2) The transferor remains liable for all obligations under the contract but waives all rights under the contract as against the University; and
 - 3) The transferor shall continue to furnish, and the transferee shall also furnish, all required bonds.

- c. Change of name. When a Contractor requests to change the name in which it holds a contract with the University, the Procurement Officer responsible for the contract shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting Contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

6.9 Claims Based on the University's Actions or Omissions

- a. If any action or omission on the part of the University, requiring performance changes within the scope of the contract constitutes the basis for a claim by the Contractor for additional compensation, damages, or an extension of time for completion, the Contractor shall continue with performance of the contract in compliance with the directions or orders of the University, but by so doing, the Contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided;
 - 1) The Contractor shall have given written notice to the Procurement Officer or designee of such officer:
 - a) Prior to the commencement of the work involved, if at that time the Contractor knows of the occurrence of such action or omission;
 - b) Within THIRTY (30) days after the Contractor knows of the occurrence of such action or omission, if the Contractor did not have such knowledge prior to the commencement of the work; or
 - c) Within such further time as may be allowed by the Procurement Officer in writing.
 - 2) This notice shall state that the Contractor regards the act or omission as a reason which may entitle the Contractor to additional compensation, damages, or an extension of time. The Procurement Officer or designee of the officer, upon receipt of such notice may rescind such action, remedy such omission, or take other steps as may be deemed advisable in the discretion of the Procurement Officer or designee of the officer;
 - 3) The notice required by subparagraph 1) describes as clearly as practicable at the time, the reasons why the Contractor believes that additional compensation, damages, or an extension of time may be remedies to which the Contractor is entitled; and
 - 4) The Contractor maintains and, upon request, makes available to the Procurement Officer within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with such changes.
- b. Nothing herein contained, however, shall excuse the Contractor from compliance with any rules of law precluding any University officers and any Contractors from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the contract.
- c. Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of the contract.

6.10 Termination for Default

- a. Default. If the Contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer may notify the Contractor in writing of the delay or non-performance, and if not cured in TEN (10) days or any longer time specified in writing by the Procurement Officer, the officer may terminate the Contractor's right to proceed with the contract or a part of the contract as to which there has been delay or other breach of contract. In the event of termination in whole or in part, the Procurement Officer may procure similar goods or services in a

manner and upon terms deemed appropriate by the Procurement Officer. The Contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

- b. Contractor's duties. Notwithstanding termination of the contract and subject to any directions from the Procurement Officer, the Contractor shall take timely and necessary action to protect and preserve property in the possession of the Contractor in which the University has an interest.
- c. Compensation. Payment for completed goods delivered and accepted by the University shall be at the contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Procurement Officer; if the parties fail to agree, the Procurement Officer shall set an amount subject to the Contractor's rights under Chapter 3-126, Hawaii Administrative Rules. The University may withhold from amounts due the Contractor such sums as the Procurement Officer deems to be necessary to protect the University against loss because of outstanding liens or claims of former lien holders and to reimburse the University for the excess costs incurred in procuring similar goods and services.
- d. Excuse for nonperformance or delayed performance. Except with respect to defaults of Subcontractors, the Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms, if the Contractor has notified the Procurement Officer within FIFTEEN (15) days after the cause of the delay and the failure arises out of causes, including but not limited to the following: acts of God; acts of the public enemy; acts of the University and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a Subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the Contractor shall not be deemed to be in default, unless the goods or services to be furnished by the Subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the contract requirements.

Upon request of the Contractor, the Procurement Officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the Contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the University under the clause entitled in fixed priced contracts, "Termination for Convenience" and in cost-reimbursement contracts, "Termination". As used in this paragraph, the term "subcontractor" means subcontractor at any tier.

- e. Additional rights and remedies. The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

6.11 Liquidated Damages

- a. The following is for goods or services contracts when it is difficult to determine with reasonable accuracy the amount of damage to the University due to delays caused by late Contractor performance or nonperformance.
- b. Liquidated damages. When the Contractor is given notice of delay or nonperformance as specified, in the termination for default clause of this contract and fails to cure in the time specified, the Contractor shall pay to the University the dollar amount specified in the liquidated damages provision of the Special Provisions, if any, per calendar day from date set for cure until either the University reasonably obtains similar goods or services if the Contractor is terminated for default, or until the Contractor provides the goods or services if the Contractor is not terminated for default. To the extent that the Contractor's delay or nonperformance is excused under paragraph 6.9.d, liquidated damages shall not be due the University. The Contractor remains liable for damages caused other than by delay.

6.12 Termination for Convenience

- a. Termination for convenience. The Procurement Officer may, when the interests of the University so require, terminate this contract in whole or in part, for the convenience of the University. The Procurement Officer shall 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 dates set in the notice of termination the Contractor will 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 University's approval. The Procurement Officer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the University. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.
- c. Right to goods. The Procurement Officer may require the Contractor to transfer title and deliver to the University in the manner and to the extent directed by the Procurement Officer:
 - 1) Any completed goods; and
 - 2) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights, hereinafter called "manufacturing material," as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The Contractor shall, upon direction of the Procurement Officer, protect and preserve property in the possession of the Contractor in which the University has an interest. If the Procurement Officer does not exercise this right, the Contractor shall use the Contractor's best efforts to sell such goods and manufacturing materials. Use of this section in no way implies that the University has breached the contract by exercise of the termination for convenience clause.

- d. Compensation:
 - 1) The Contractor shall submit a termination claim specifying the amounts due based on the termination for convenience together with cost or pricing data to the extent required by Subchapter 15, Chapter 3-122, HAR, bearing on such claim. If the Contractor fails to file a termination claim within ONE (1) year from the effective date of termination, the Procurement Officer may pay the Contractor, if at all, an amount set in accordance with subparagraph 3) below.
 - 2) The Procurement Officer and the Contractor may agree to settlement provided the Contractor has filed a termination claim supported by cost or pricing data to the extent required by Subchapter 15, Chapter 3-122, HAR, and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the University, the proceeds of any sales of goods and manufacturing materials under subparagraph 3) c), below, and the contract price of the work not terminated.
 - 3) Absent complete agreement under subparagraph 2), the Procurement Officer shall pay the Contractor the following amounts, provided payments agreed to under subparagraph 2) shall not duplicate payments under this subparagraph for the following:
 - a) Contract prices for goods or services accepted under the contract.
 - b) Costs incurred in preparing to perform and performing the terminated portion of the work plus a FIVE PERCENT (5%) markup on actual direct costs on the portion of the work, the markup shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided 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.

- c) Subject to the prior approval of the Procurement Office, the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to paragraph b) . Subcontractors shall be entitled to a markup of no more than TEN PERCENT (10%) on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with subparagraph 3) b).
 - d) The total sum to be paid the Contractor under this subparagraph shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of goods and manufacturing materials under paragraph 2), and the contract price of work not terminated.
- 4) Cost claimed, agreed to, or established under subparagraphs 2) and 3) shall be in accordance with Chapter 3-123, HAR.

SECTION 7 – PAYMENT

7.1 Method of Payment

The method of payment shall be as set forth in the contract. Invoices shall be payable upon certification by authorized University personnel that the Contractor has satisfactorily performed the work required herein.

7.2 Tax Clearance and Certification of Compliance For Final Payment

Final payment shall be subject to Sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the Contractor have been paid. Further, in accordance with Section 3-122-112, HAR, Contractor shall provide a certificate affirming that the Contractor has remained in compliance with all applicable laws as required by this section.

7.3 Prompt Payment by Contractor to Subcontractors

- a. Generally. Any money paid to a Contractor shall be dispersed to Subcontractors within TEN (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the Subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes on which the University has withheld;
- b. Final Payment. Upon final payment to the Contractor, full payment to the Subcontractor, including retainage, shall be made within TEN (10) days after receipt of the money; provided that there are no bona fide disputes under the subcontract.
- c. Penalty. The University or the Contractor, as applicable, will be subject to a penalty of one and one-half percent (1-1/2 %) per month upon outstanding amounts due that were not timely paid by the responsible party under the following conditions. Where a subcontractor has provided evidence to the Contractor of satisfactorily completing all work under their subcontract and has provided a properly documented final payment request as described in paragraph d, and:
 - 1) Has provided to the Contractor an acceptable performance and payment bond for the project executed by a surety company authorized to do business in the State, as provided in Section 103-32.1, HRS; or
 - 2) The following has occurred:
 - a) A period of NINETY (90) days after the day on which the last of the labor was done or performed and the last of the material was furnished or supplied has elapsed without written notice of a claim given to Contractor and surety, as provided for in Section 103D-324, HRS; and

- b) The subcontractor has provided to the Contractor, an acceptable release of retainage bond, executed by a surety company authorized to do business in the State, in an amount of not more than two times the amount being retained or withheld by the Contractor; or any other bond acceptable to the Contractor; or any other form of mutually acceptable collateral, then, all sums retained or withheld from a subcontractor and otherwise due to the subcontractor for satisfactory performance under the subcontract shall be paid by the University to the Contractor and subsequently, upon receipt from the University, by the Contractor to the subcontractor within the applicable time periods specified in paragraph b and Section 103-10, HRS. The penalty may be withheld from future payment due to the Contractor, if the Contractor was the responsible party. If a Contractor has violated paragraph b three or more times within two years of the first violation, the Contractor shall be referred by the University to the Contractors License Board for action under Section 444-17(14), HRS.
- d. A properly documented final payment request from a subcontractor, as required by paragraph c, shall include:
 - 1) Substantiation of the amounts requested;
 - 2) A certification by the subcontractor, to the best of the subcontractor's knowledge and belief, that:
 - a) The amounts requested are only for performance in accordance with the specifications, terms, and conditions for the subcontract;
 - b) The subcontractor had made payments due to its subcontractors and suppliers from previous payments received under the subcontract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
 - c) The payment request does not include any amounts that the subcontractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract; and
 - 3) The submission of documentation confirming that all other terms and conditions required under the subcontract agreement have been fully satisfied.

The University shall return any final payment request that is defective to the Contractor within SEVEN (7) days after receipt, with a statement identifying the defect.

- e. This section shall not be construed to impair the right of a Contractor or subcontractor at any tier to negotiate and to include in their respective subcontracts provisions that provide for additional terms and conditions that are requested to be met before the subcontractor shall be entitled to receive final payment under paragraph c; provided that any such payments withheld shall be withheld by the University.

7.4 Interest

Interest on amounts ultimately determined to be due to a Contractor or the University shall be payable at the statutory rate applicable to judgments against the University under Chapter 662, HRS, from the date the claim arose through the date of decision or judgment, whichever is later, or as otherwise provided under Hawaii law.