

Prepared by Office of Procurement and Real Property Management.
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A8.275

A8.200 Procurement

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A8.275 Contract Formation and Administration

1. General

Contract formation and administration consists of the preparation of the contractual document and the management of all facets of contracts and purchase orders to assure that the Contractor's total performance is in accordance with its contractual commitments and that the obligations of the University are fulfilled. It includes the monitoring and supervision of contract actions from award of the contract to completion of the work required. It also includes, but is not limited to, the following:

- a. Insuring timely delivery;
- b. Inspection and acceptance of goods and services;
- c. Reconciling of invoices with orders;
- d. Making payment (progress payments for services or construction);
- e. Obtaining Certificates of Compliance, including State and Federal tax clearance before entering into and/or making final payment on contracts for goods, services and construction, when required;
- f. Clarifying contract plans and drawings;
- g. Issuing amendments or contract modifications, if necessary;
- h. Resolving disputes;
- i. Processing claims;

- j. Issuing stop work orders;
- k. Interpreting contract provisions;
- l. Assessing liquidated damages;
- m. Terminating contracts; and
- n. Closing the contract file.

Contract administration requires awareness of the current status of contractual actions throughout the performance period of the contract. The Fiscal Administrator shall remain current on contract progress to insure that necessary remedial action is taken in a timely manner.

Contract formation begins at the time specifications are developed because the clarity and completeness of specifications have significant bearing on the extent of administration required. Inclusion of the proper terms in the contract is perhaps equally important since performance by and relations with the Contractor are largely influenced by them. Therefore, programs are encouraged to begin the procurement process as early as possible by discussing their plans with the Fiscal Administrator and the OPRPM. Early planning of contract requirements will do much to prevent inappropriate awards and inadequate contract provisions.

2. Role of Office of Procurement and Real Property Management

When required, only the OPRPM will take remedial action in accordance with the terms of the contract and information supplied by the program. Actions that may be taken by the OPRPM include:

- a. Issuance of cure letters, contract modifications, stop work orders or suspensions, and show cause letters;
- b. Contract interpretations;
- c. Imposition of liquidated damages;
- d. Termination for default;

- e. Recommendation for legal action;
- f. Suspension and/or debarment of bidders; and
- g. Novation/assignment agreements.

3. Technical Representative of the Procurement Officer (TRPO)

A TRPO may be designated for University of Hawaii procurements for the following purposes:

- a. To address matters within the technical specifications of the procurement solicitation;
- b. To perform a technical evaluation of all quotations, bids, and proposals and to make a recommendation for award;
- c. To evaluate the Contractor's total performance throughout the contract period, and to notify the Director, OPRPM, when such performance is less than satisfactory; and
- d. To certify that goods have been delivered or services have been performed satisfactorily by the Contractor.

It should be noted that a TRPO does not have contracting authority, and therefore care should be exercised by a TRPO in dealing with Contractors in order to avoid a misunderstanding or contractual dispute.

4. Contract

- a. Encumbrance of Contracts Beyond the Fiscal Administrator's Purchasing Authority

The requisition and purchase order shall be used:

- 1) to record contract encumbrance transactions; and
- 2) to initiate contract payment processing. Contract renewals also require use of these forms.

The purchase order amend shall be used:

- 1) to liquidate a remaining balance on a completed contract; and
- 2) to record changes in encumbrance data, e.g. account code/object code/ amount; or
- 3) to record applicable changes to contract period and payment terms.

Refer to Kualif Financial System User Guides, which are available at the following website:

<http://www.hawaii.edu/kualifinancial/>

b. Contract Numbering

The OPRPM is responsible for assigning identifying numbers to all contracts beyond the Fiscal Administrator's purchasing authority and other instruments related thereto.

The procurement instrument identification number should be retained unchanged for the life of the particular instrument and shall consist of numeric or alpha-numeric characters, as applicable, with major elements separated by dashes.

An illustration of the numbering system is as follows:

1) Contracts

Number Configuration: C000123

Position 1: = Identification of Alpha prefix (C) for contracts

Position 2-3: = Identification of FY (00 for FY 2000)

Position 4-7: = Four position Serial Number (0123)

2) Modification of Contracts

Number Configuration: Modification No. 1, 2, 3,
etc.

c. Distribution

The basic contract and modifications shall be distributed only by the OPRPM as specified below:

- 1) Original copy to the OPRPM
- 2) One copy to each of the following:
 - a) Contractor/Lessor;
 - b) Fiscal Administrator; and
 - c) requiring organization.

(Refer to Attachment 275.1a) Requests for copies of contractual documents, in addition to the above, shall be referred to the OPRPM.

d. Modifications

Contract modifications include administrative changes, supplemental agreements, notices of exercising an option, renewals and notices of termination. Contract modifications beyond the Fiscal Administrator's purchasing authority shall only be issued by the OPRPM. No additional work shall be authorized or additional equipment ordered without the issuance of a contract modification by the OPRPM.

e. Timely Submittal of Contractual Documents

It is University policy not to accept goods or services without a fully executed contract being in place. In furtherance of this policy, requests for payment for goods and services acquired prior to the existence of a valid contract will not be processed.

A fully executed, written contract serves to set forth clearly the duties, responsibilities and expectations of both the contractor and the University with respect to the services to be performed. The failure to have such a contract in place prior to the commencement of services can lead to misunderstanding and confusion between the University and the contractor and may serve to weaken the University's ability to seek legal recourse against the contractor in the event of a dispute regarding the services.

Programs should coordinate with departmental Fiscal Administrators sufficiently in advance of the date when goods or services will be needed in order to ensure the proper completion and execution of necessary contractual documents. Requests to extend or otherwise modify existing contracts for goods or services should similarly be submitted in advance so that fully-executed contract amendments can be in place prior to the commencement of the extension period or other modified requirement taking effect.

In order to assure non-interrupted service to University programs, Deans, Directors and Fiscal Administrators shall submit their requests (memorandum) to the OPRPM for renewal of contracts beyond the Fiscal Administrator's purchasing authority, together with a requisition/purchase order for funding the renewal period, at least thirty (30) days prior to the contract expiration date or, in the case of new services contracts, at least thirty (30) days prior to the beginning of the contract period, unless otherwise notified.

f. Tax Clearance

1) Prerequisite tax clearances

- a) In accordance with Section 103-53, HRS, prior to entering into any contract for goods, services or construction, a tax clearance from the State of Hawaii Department of Taxation (DOTAX) and the Internal Revenue Service (IRS) must be submitted by the contractor.

- 2) Final payment tax clearances
 - a) In accordance with Section 103-53, HRS, the University shall withhold final payment of a contract for goods, services or construction until the receipt of tax clearances from the DOTAX and the IRS.
 - b) Notwithstanding sections 40-57 and 40-58, HRS, if a contractor fails to provide the requisite tax clearances within six months of the completion date of the contract, the University shall first notify the DOTAX which in turn will notify the IRS, of amounts payable to the contractor on completed contracts. The DOTAX and the IRS shall, within thirty days, request the University to offset the amount of taxes due against any payment due to the contractor until the tax debt is paid in full to the DOTAX or the IRS or both. No final bill or invoice from the contractor shall be required as a condition to the offset. Any remaining contract balance shall revert to the appropriation under which it was encumbered.
 - c) The Disbursing Office will not process final payment for any affected contract unless a tax clearance is submitted.
- 3) Vendors shall provide documentation of tax clearances from DOTAX and the IRS via the Hawaii Compliance Express addresses in Section A8.275 (4)(p)(5).
- 4) Notwithstanding the provisions under sections 40-57 and 40-58, HRS, if a contractor fails to timely file all tax returns and pay all taxes, interest, and penalties due to the State or IRS during the term of a contract, the University shall immediately assign any progress payment due to the contractor, if any (provided such payment

is not subject to any restriction or encumbrance), to the State payable to the DOTAX or to the IRS to the credit of the contractor, whichever the case may be; provided that the DOTAX may first offset its tax debt against the sum owed to the contractor. The University shall assign as many progress payments as necessary to cover the amount of the tax delinquency.

- 5) The above requirements shall not apply to a contractor if the DOTAX certifies that the contractor is in good standing under a plan in which delinquent taxes, interest, and penalties are being paid to the DOTAX (and the IRS, if applicable) in installments.
- 6) Tax clearances under this section shall not be required for:
 - a) Any procurement otherwise covered by Section 103D-310, HRS, as set forth in Section A8.275 (4)(p) herein;
 - b) Any procurement exempt from Chapter 103D, HRS, less than \$25,000;
 - c) Emergency purchases for the procurement of goods, services, or construction under Section A8.260, disaster relief under chapter 127, HRS, or a civil defense emergency under chapter 128, HRS;
 - d) Grants and subsidies disbursed by the University pursuant to chapter 42F, HRS, or in accordance with standards provided by law as required by article VII, section 4, of the State Constitution;
 - e) Contracts or agreements between government agencies;
 - f) Contracts or agreements to disburse funds:
 - (1) To make payments to or on behalf of public officers and employees for

salaries, fringe benefits, professional fees, and reimbursements;

- (2) To satisfy obligations required to be paid by law, including fees, judgments, settlements, and other payments for resolving claims;
 - (3) To make refunds or return funds held by the State or county as trustee, custodian, or bailee;
 - (4) For entitlement programs, including public assistance, unemployment, and workers' compensation programs, established by state or federal law;
 - (5) For deposit, investment, or safekeeping, including sums to pay expenses related to their deposit, investment, or safekeeping;
 - (6) For loans under government-administered loan programs;
 - (7) To make periodic, recurring payments for utility services; and
- g) Rent for the use or occupation of the premises and facilities at Aloha Stadium, the convention center, or any other state or county large spectator events facility;

g. Completion of Contract/Purchase Order Exceeding Departmental Purchasing Authority

The contract completion date specified in the notice to proceed/purchase order shall be strictly adhered to and shall not be allowed to lapse. Follow-up contact with the vendor shall be maintained to assure timely completion of a contract/purchase order. If timely completion of a contract/purchase order cannot be made due to excusable delays, a request for extension of the contract/purchase order completion date shall be submitted to the OPRPM. This request shall include

information and documentation as to the cause of the contractor's delay in performance.

There should be no discrepancy between the completion date specified in the notice to proceed or purchase order and the actual completion date, since extension(s) of the contract/purchase order completion date should have been requested and accomplished by issuance of a modification to the contract or purchase order change.

If no excusable delay exists, the Fiscal Administrator shall provide the OPRPM with information and documentation so that a determination can be made as to whether liquidated damages should be assessed whenever the contractor fails to complete the contract in accordance with the contract/purchase order completion date.

h. Contract Payment Processing

Fiscal Administrators are not authorized to process payment documents:

- 1) When the contract or purchase order is not completed (except where progress payments are specified in the contract) or is completed after the contract completion date;
- 2) For purposes of making an advance payment or deposit of any kind, unless approved in writing by the Chancellor or his/her designee or Vice President for contracts or purchase orders within departmental purchasing authority or the Vice President for Budget and Finance and Chief Financial Officer for contracts or purchase orders exceeding departmental purchasing authority, with the exception of advance payments for insurance, airfare, conference fees, subscription services, software license fees and software maintenance, organizational membership, accreditation and related fees, cellular telephone fees, security alarm fees, rental and related fees for the lease/use of outside space or facilities, postage meter fees, equipment lease and maintenance fees, cable services fees,

internet connectivity fees, and costs associated with the publication of articles in scholarly journals. In addition, advance payments or deposits for these exceptions are only allowed when expressly provided for and/or required in the contract or purchase order;

OPRPM Form 154, Request for Advance Payment and/or Deposit (Attachment 275.4) may be used for the purpose of securing approval from the Chancellor, Vice President and/or Vice President for Budget and Finance and Chief Financial Officer for an advance payment or deposit. Chancellors may delegate the authority to approve advance payments to their respective Vice Chancellors for Administration. However, no further delegation of such authority is permitted. Any request for an advance payment or deposit for a contract or purchase order exceeding departmental purchasing authority shall include the written concurrence of the Chancellor or his/her designee or Vice President for purposes of its submission to the Vice President for Budget and Finance and Chief Financial Officer for approval.

- 3) When the University has not received an invoice or other supporting payment document from the contractor. Under no circumstances should Fiscal Administrators create pro forma invoices on behalf of a contractor to process or expedite payments; or
- 4) When a contractor requests the University to pay a third party except as provided for in A8.275(4)(o)(Assignment of Payment).

i. Closing

The following actions must be taken by the Fiscal Administrator to close a contract/purchase order file when performance is completed and accepted:

- 1) Submittal of Completion Report OPRPM Form 127b (**Attachment 275.1b**) to the OPRPM; and

- 2) Submittal of appropriate supporting documents (e.g., tax clearance, etc.) to the Disbursing Office.

j. Termination for Default

Default termination is the University's exercise of its right to terminate a contract when the Contractor fails to meet all commitments in accordance with the contract specifications and does not remedy any such default within a certain period of time. Any such failure of the Contractor that cannot be resolved by the department shall promptly be reported to the OPRPM by telephone followed by a memorandum detailing the Contractor's delinquencies. The OPRPM will then issue a letter giving the Contractor a reasonable opportunity, usually 30 days after receipt of written notice, to explain the contractor's failure to perform and corrective measures to be taken before any action is taken to effect default termination.

The decision to terminate a contract for default will be made by the Director, OPRPM, only after consideration of, but not limited to, the following:

- 1) The nature and seriousness of the default;
- 2) The availability of other sources to satisfy the requirement;
- 3) The urgency of the procurement; and
- 4) Whether the other available sources would be able to produce the item before the existing contractor can make delivery.

In some instances, default may be justified but not advisable. The contract must then be carefully administered to preserve the right to terminate for default should this action become necessary at a later date.

k. Disputes and Claims

- 1) Disputes usually arise as a result of mistakes, ambiguities, misunderstandings, unauthorized commitments, fraud, nonperformance or

delinquencies. Ambiguous specifications can often result in disputes as to what is required in the contract.

- 2) Disputes may be avoided by:
 - a) A clear written understanding of what the contracting parties are required to do;
 - b) Periodic follow-up on progress of the contract requirements and remedy of noted deficiencies;
 - c) Educating personnel of the acquiring program in proper dealings with the Contractor;
 - d) Dealing with reputable firms;
 - e) Directing the Contractor to the OPRPM for the interpretation of contract terms; and
 - f) Timely notification to the OPRPM of any potential problems with the Contractor.
- 3) All contract disputes shall be immediately referred to the OPRPM. Referred disputes shall be resolved as follows:
 - a) An informal resolution will be sought through discussions with the Contractor. If not satisfied, the Contractor may file a claim in writing to the Director, OPRPM, for a written decision;
 - b) The Director, OPRPM, shall render a written decision in accordance with Chapter 103D, HRS, and Chapter 3-126, HAR, at <http://www.hawaii.gov/spo/statutes-and-rules/har-for-hrs-103d/har-3-126>; and
 - c) The decision by the Director, OPRPM, shall be final and conclusive unless the Contractor brings an action seeking judicial review of the decision in a circuit court of the State of Hawaii within six (6) months from the date of receipt of the decision.

- 4) If after an award of a contract it is determined that the award is in violation of law, the University may ratify, terminate, or modify the contract as provided in Section 103D-707, HRS.

l. Labor-Management Disputes

When progress is impeded by a labor-management dispute, the Contractor should notify the University. It is incumbent upon the Contractor to keep the University informed of events while the dispute is in effect. Since the University desires to maintain equitable relations with both Labor and Management, it does not take sides in a dispute nor attempt any acts toward mediation. To prevent interruption of work, voluntary agreements may be obtained from both sides. However, prudence must be observed in any such approach.

Delays caused by labor disputes may be excusable under the contract. However, if the Contractor is responsible for delays that are reasonably avoidable, the Contractor will not be excused from performing the contract. It is the responsibility of the Contractor to document this claim for non-responsibility in any labor-management dispute affecting contract progress.

m. Vendor Evaluation

An effective State and University purchasing program is dependent on dealing with reliable and competent suppliers having stability, high ethical standards and a sense of competitiveness. A vendor's poor performance, while evident to the acquiring program, may be unknown to the OPRPM unless it is advised of the deficiencies. Acquiring programs are encouraged to report a poor performance by a Contractor or to commend a Contractor for superior performance. OPRPM Form 98, Vendor Evaluation (**Attachment 275.2**) may be used for this purpose.

n. Suspension and Debarment

Any action to debar or suspend a person from consideration for award of University contracts shall be processed in accordance with Chapter 103D, HRS, and

Chapter 3-126, HAR at
<http://www.hawaii.gov/spo/statutes-and-rules/har-for-hrs-103d/har-3-126>.

o. Assignment of Payment

As a general rule, no payment should ever be made to any party other than the contractor to whom the contract or purchase order is issued.

On occasion, a vendor/contractor to whom the University has awarded a purchase order or a contract requests that payment(s) under the specific purchase order or contract be assigned to a third party. Pursuant to section 40-58, HRS, the vendor/contractor may not assign payment(s) for a specific purchase order or contract to a third party unless the assignment is first approved by the Vice President for Budget and Finance/Chief Financial Officer. The University's form for assignment, Assignment of Money by Party to Whom University is Directly Indebted (OPRPM Form 90), (**Attachment 275.3**).

The OPRPM Form 90 including the instructions and explanation for filling the form should be provided to the vendor/contractor wishing to assign payment(s) under a purchase order or contract. Upon completion of the form by the vendor/contractor with the appropriate signature and notarization, the Fiscal Administrator shall submit three (3) copies of the form to the OPRPM for review and transmittal to the Vice President for Budget and Finance/Chief Financial Officer for execution. Following approval by the Vice President for Budget and Finance/Chief Financial Officer, the OPRPM will distribute the three copies to 1) OPRPM, 2) Payee, and 3) Vendor/Contractor. In addition, the OPRPM will provide a copy of the approved OPRPM Form 90 to the Fiscal Administrator and the Disbursing Office. Since the responsibility for fulfilling the purchase order or contract remains with the vendor/contractor, the vendor/contractor name will not be changed.

p. Certificates of Compliance for purposes of Section 103D-310, HRS

- 1) In accordance with Section 103D-310, HRS, upon award of a contract, the offeror shall:
 - a) Comply with all laws governing entities doing business in Hawaii, including chapters 237, 383, 386, 392, and 393, HRS; and
 - b) Be incorporated under Hawaii law or registered to do business in Hawaii with the Department of Commerce and Consumer Affairs.
- 2) For compliance purposes, the offeror shall provide certifications as provided by section 3-122-112, HAR, which is available at <http://www.hawaii.gov/spo/statutes-and-rules/har-for-hrs-103d/har-3-122>. The required certifications are issued by the Hawaii Department of Taxation, the Internal Revenue Service, the Hawaii Department of Labor and Industrial Relations, and the Hawaii Department of Commerce and Consumer Affairs.
- 3) A Certificate of Vendor Compliance is required upon award of a contract for any procurement processed under Section A8.235 (competitive sealed bidding), Section A8.240 (competitive sealed proposals), Section A8.245 (professional services), Section A8.255 (sole source), and for procurements of \$2,500 or more awarded pursuant to Section A8.250 (small purchases). A certificate of vendor compliance is not required for the emergency procurement of goods, services, or construction under Section A8.260. However, even if a certificate of vendor compliance is not required for a procurement for purposes of Section 103D-310, HRS (e.g. procurements exempt from the requirements of Chapter 103D, HRS), a tax clearance may still be required for such procurements under Section 103-53, HRS (see section A8.275(f)(4)).
- 4) A certificate of vendor compliance is also required for final payment for all contracts

issued under the foregoing procurement sections which are in an amount of \$25,000 or more.

- 5) 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>. Instead of manually applying for the certificates at the separate State agencies, a vendor may electronically register with the Hawaii Compliance Express to obtain a Certificate of Vendor Compliance which is acceptable as proof of compliance with Section 3-122-112, HAR, for both contracting purposes and final payment.

q. Audit of Records

- 1) 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.
- 2) 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.