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A8.200 Procurement

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A8.230     Contracting for Services

1.     General

Programs requiring specialized skills, knowledge, resources and/or experience which cannot be provided by existing staff may obtain such services on a contractual basis from providers outside the University. Under no circumstances should a services contract be used to circumvent University employment procedures or to perform a job that could be accomplished by available personnel within the University.

Moreover, while acquisition of services by contract may be perceived as a cost-effective means for satisfying departmental service requirements, the misclassification of a service provider can potentially subject the University to costly penalties due to non-compliance with federal tax laws or assessments resulting from workers' compensation, unemployment insurance, malpractice or other employment-related claims. Therefore, programs are cautioned that careful consideration should be given to the various ramifications of obtaining services on a contractual basis.

2.     Applicability

This section shall apply to all University officials, programs, and organizations.

3.     Definitions

a.     Consultant Contract means a contract engaging the services of a consultant where the predominant service to be rendered is advice or counsel in either verbal or written form. Included under this definition shall be contracts engaging individuals or firms to perform

studies or evaluations of University programs, systems or procedures. As provided by Board policy, consultant services would include, but not be limited to, the services of architects, engineers, designers, financial advisers, audit providers, and planners.

- b. Contract means any agreement for the procurement of goods, services or construction.
- c. Contractor means any individual, partnership, firm, corporation, joint venture, or other legal entity undertaking the execution of the work under the terms of the contract with the University, and acting directly or through its agents or employees.
- d. Employee means an individual who performs services that are subject to the will and control of an employer - both what must be done and how it must be done. The employer can allow the employee considerable discretion and freedom of action, as long as the employer has the legal right to control both the method and the result of the services. It is not necessary that the employer actually direct or control the manner in which services are performed; it is sufficient if the employer has the right to do so.
- e. Grant means the furnishing of assistance whether financial or otherwise, to any person to support a program authorized by law. The term does not include an award whose primary purpose is to procure an end product, whether in the form of goods, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.
- f. Honorarium means a payment which is primarily intended to confer distinction on or to demonstrate respect, esteem or admiration for the recipient.
- g. Independent Contractor means any service provider having a contract with the University who is subject to the control and direction of the University for which services are performed only as to the result of the work and not as to the means. In determining whether a service provider should be an independent contractor or an employee, "control" is the

determining factor according to the Internal Revenue Service (IRS) (Refer to "employee" above). In addition, a service provider may be considered an independent contractor if he or she:

- 1) has a significant investment in assets and/or training;
- 2) incurs significant unreimbursed expenses;
- 3) agrees to perform the services for a particular amount of time or to complete a specific result;
- 4) is liable for damages for early termination without cause;
- 5) is paid primarily on a commissioned basis; and
- 6) purchases products for resale.

Additional benchmarks are if the service provider has a principal place of business, and does not primarily provide the service on University premises, or pays a fair market rent for use of the University's premises; or the service provider is not required to perform services exclusively for the University, and in the year in question and the preceding or subsequent year has performed other work for other clients, has advertised or otherwise solicited jobs, including listing with registries, agencies or brokers.

Among the most frequently used categories of independent contractors are:

- i. Consultant: an individual or firm possessing expertise in a particular field for which it is engaged to give expert or professional advice or counsel in return for an established fee.
- ii. Speaker: an individual having specialized knowledge of a particular subject who is engaged to convey this knowledge by discourse to an audience in return for an established fee. Note: The Internal Revenue Service (IRS) has ruled

that, in most cases, adjunct faculty are employees.

- iii. Technical Service: an individual or firm rendering technical service for a fee. Note: In general, individuals (as opposed to corporations) rendering technical services are employees.
  - h. Professional Services means those services within the scope of the practice of architecture, landscape architecture, professional engineering, land surveying, real property appraisal, law, medicine, accounting, dentistry, public finance bond underwriting, public finance bond investment banking or any other practice defined as professional by the laws of this State.
  - i. Services means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.
  - j. Sole Proprietorship means a form of business in which one person owns all the assets. No one else has any interest in the business as owner. The interest or ownership of the business is not held in common or jointly with others, but is of such nature that the sole proprietor must alone sustain the entire loss if the business is ruined.
4. Procedure for the Acquisition of Services

Acquisition of services for all University programs shall be subject to the following procedures:

- a. Prior to initiating the acquisition of services via procurement procedures, programs should first determine whether their requirements may be met by available in-house resources or through other employment options authorized by University policy.

If the program's recruitment efforts prove unsuccessful or if employment procedures are deemed to be impracticable, the program may then consider acquisition of its service requirements by contract.

- b. If the University program decides to acquire services by contract, the services shall be acquired by one of the standard source selection methods, unless such services may be acquired as an exempt procurement (see Section A8.220). Programs should consult the relevant section of the Administrative Procedures Manual to determine the appropriate source selection method for a specific requirement.
- c. Subsequent to completion of the appropriate source selection process, the following procedure shall apply:

If the awardee is an individual (with or without a dba), he or she shall be hired through the University's employment procedures except for individuals in the following categories who are considered independent contractors with no employer/employee relationship with the University:

- 1) Entertainers or performers, e.g., dancers, singers, disc jockeys and other performance service providers, e.g. directors, stage hands, sound/lighting technicians, costumers, etc. for any length of time;
- 2) Speakers for special engagements, e.g., commencement speaker, University sponsored speaker making a presentation in his/her area of expertise for any length of time;
- 3) Officials for athletic events;
- 4) Artist's models;
- 5) Special-duty police officers;
- 6) Sign language interpreters;
- 7) Legal support and related services, e.g. hearings officers, court reporters, expert witnesses, etc.;
- 8) Non-credit instructional services;
- 9) Emergency services which are exempt from civil service, e.g., computer repair, locksmithing, on a one time basis where no long term service contract exists or is implied;
- 10) Repair and maintenance services which are exempt from civil service utilizing 58XX object code;

- 11) Freelance copy editors;
- 12) Freelance proofreaders;
- 13) Freelance publication designers;
- 14) Freelance sales representatives;
- 15) Physicians for School of Medicine residency program in Okinawa;
- 16) Physicians for workers' compensation cases;
- 17) Individuals receiving royalty payments utilizing 7105 object code;
- 18) Freelance typesetters;
- 19) Sole proprietors doing business under a company name whose services are exempt from civil service;
- 20) Foreign language interpreters;
- 21) Freelance writers;
- 22) Consultant services to provide expert advice or counsel in return for an established fee; and
- 23) Upholsterers for vehicles.

Any other exception to this procedure must be approved by the Office of Human Resources (OHR) and will be granted only if it is clearly established that the individual is an independent contractor in accordance with Internal Revenue Service guidelines. Programs shall take into consideration the 20 common law factors provided by the IRS (Independent Contractors, **Attachment 230.1**), which indicate whether sufficient control is present to establish an employer-employee relationship, for determination of the correct relationship. Programs are advised that if the proper relationship cannot be ascertained after analyzing these factors, the employer-employee relationship should be established.

Programs wishing to secure an exception shall provide the OHR with written justification including the Independent Contractor Questionnaire, UH Form 78 (**Attachment 230.2**).

If the OHR determines that the individual may be considered an independent contractor, it shall notify the program in writing of its determination. The program may then proceed with the acquisition by contract as specified in Exhibit A. However, if the information provided on the Independent Contractor

Questionnaire, UH Form 78 (**Attachment 230.2**) is inadequate for the OHR to make a determination, OHR will either request additional information or notify the program in writing that the individual should be hired as an employee.

Any determination made by the OHR will apply to other individuals of the same class if the facts are not materially different from those of the individual whose status was ruled upon. The OHR shall decide whether a previous determination is applicable to other individuals.

- d. In addition to the independent contractor review discussed above, if services which could be considered civil service are to be provided by an individual, the University program shall request approval from the OHR for exemption from the Civil Service Law in accordance with section 76-16, HRS. If the OHR determines that the services are exempt from the Civil Service Law, the appropriate certification will be affixed to the procurement document by OHR:

CERTIFICATION OF EXEMPTION FROM CIVIL SERVICE

Pursuant to the delegation of the authority by the Director of Human Resources Development, I certify that the services provided under this Agreement, and the person(s) providing the services under this Agreement are exempt from the civil service, pursuant to Hawaii Revised Statutes §76-16.

- e. Sole proprietors shall be subject to the same requirements in paragraphs c and d above as those required for service providers who are individuals. Corporations and partnerships may be awarded a procurement contract without regard to paragraphs c and d above.

5. Limitations

- a. Prior approval of the Board of Regents is required for:

- 1) all consultant contracts which exceed \$100,000, including expenses;
- 2) all consultant contracts, regardless of cost, which: a) involve the study or review of University programs and/or operations for the purpose of recommending courses of action which are anticipated to require changes in Board policies and/or have significant impact on policy, programs or operations; or b) have a systemwide impact. This requirement of Board approval may not be circumvented by parceling the amount of the contract or by engaging the services of consultants through entities or organizations other than the University of Hawaii.

No State General Funds may be utilized to engage consultants for the purpose of seeking external funds for the enhancement of University programs and facilities.

- b. Prior grantor approval is generally required for the acquisition of consultant services under extramural contracts and grants. (Refer to Section A8.290)
- c. Prior authorization of the Office of the Vice President for Legal Affairs and University General Counsel is required in order to expend public funds for the employment or retention by contract or otherwise of any attorney.

## 6. Honoraria

An "honorarium" is a payment which is primarily intended to confer distinction on or to demonstrate respect, esteem or admiration for the recipient. It is paid to non-employees **at the discretion of the University** and is not a fee charged or negotiated by the person being paid. If the recipient is being paid to render services, e.g., to give a lecture or deliver an address, the payment, regardless of the amount, will be considered a payment for services and shall be subject to the procedures mentioned above. Written justification for honoraria exceeding a nominal



amount, e.g., \$500, shall be maintained in the fiscal officer's file.

7. Responsibility

a. Programs requiring services are responsible for:

- 1) Obtaining all required approvals in advance of contract preparation, and insuring that the specifications and/or contract terms are clear, complete and justifiable. Technical assistance may be requested from the Office of Procurement and Real Property Management (OPRPM).
- 2) For services to be acquired in dollar amounts within departmental purchasing authority, a purchase order should be issued for services of less than \$15,000. A University of Hawaii Services Contract, OPRPM Form 63, **Attachment 230.5**, together with a purchase order for encumbrance and payment purposes, shall be used for services of \$15,000 to the limits of departmental purchasing authority. Fiscal officers are authorized to execute the University of Hawaii Services Contract, OPRPM Form 63, **Attachment 230.5**, within their purchasing authority and together with the fully executed contract, fiscal officers shall issue a purchase order for purposes of encumbrance of funds and payment.
- 3) Providing a timely written request for services exceeding departmental purchasing authority to OPRPM for procurement action which shall include appropriate supporting documentation (Contracting for Services, OPRPM Form 74, **Attachment 230.3**). If services are to be acquired on a sole source basis, a Request for Sole Source, Form 65, **Attachment 255.1**, a quotation from the sole source vendor, Determination of Cost or Price Reasonableness, Form 95, **Attachment 285.1**, grant award documents (if applicable), Contract Encumbrance and Payment Form, FMIS-41, **Attachment 275.1a and 275.1b**, and a draft of the proposed contract, University of Hawaii Agreement for

Services, OPRPM Form 107G, **Attachment 230.4**, made ready for execution by the parties, shall be submitted to OPRPM with the request for procurement action. If services are to be acquired on an exempt basis, a quotation from the exempt vendor, Determination of Cost or Price Reasonableness, Form 95, **Attachment 285.1**, grant award documents (if applicable), Contract Encumbrance and Payment Form, FMIS-41, **Attachment 275.1a and 275.1b**, and a draft of the proposed contract, University of Hawaii Agreement for Services, OPRPM Form 107G, **Attachment 230.4**, made ready for execution by the parties, shall be submitted to OPRPM with the request for procurement action.

- 4) Insuring that all contracted services are performed satisfactorily and on time, in accordance with the contract terms.
- 5) Complying with Administrative Procedure A9.480 Casual Appointments.
- 6) Notifying the contractor of the requirement of a tax clearance in accordance with Section 103-53, Hawaii Revised Statutes, prior to entering into the contract and before final payment can be made (Refer to Section A8.275.4.f).

b. OPRPM responsibilities include:

- 1) Reviewing all documentation submitted by the program for services exceeding departmental purchasing authority including: a) completeness of all required contractual and supporting documentation, b) determination of adequate justification for sole source award of the contract, if applicable, c) determination that adequate cost or price reasonableness has been established, d) determination that appropriate ethics clearances have been satisfied and/or obtained from the Ethics Commission, e) determination of appropriate contract form to be utilized, f) transmittal of the contract for execution by the contractor, g) confirming the

tax status of the contractor, including contractor's tax identification number, h) assignment of a University contract number and i) final distribution.

- 2) Notifying the contractor of the requirement of a tax clearance in accordance with Section 103-53, Hawaii Revised Statutes, prior to entering into the contract and before final payment can be made.