

September, 2013

**UNIVERSITY OF HAWAII
GENERAL PROVISIONS
FOR
CONSTRUCTION
REQUEST FOR QUOTATIONS (RFQ)
(SMALL PURCHASES)**

Attached are the University of Hawaii's General Provisions for Construction Request for Quotations (Small Purchases), dated September, 2013 which will be made a part of all offers for construction RFQ's.

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 CONSTRUCTION

REQUEST FOR QUOTATIONS (RFQ)
(SMALL PURCHASES)

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 Request for Quotations 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 Addendum or Amendment

A document issued by the Procurement Officer after the issuance of a Request for Quotations, but before the offer submittal deadline, to modify or correct the solicitation, including but not limited to, changes in quantity, specifications, plans, delivery schedule, dates, etc., or to correct a defective or ambiguous solicitation.

1.2 Brand Name Specification

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

1.3 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.

1.4 Brand Name or Approved 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 to be approved by the University prior to the deadline for submission of offers.

1.5 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.

1.6 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. The written order shall establish the full payment and final settlement of all claims for direct, indirect and consequential costs, including costs of delays, and establishes any adjustments to contract time related to work covered and affected by one or more field orders, or for change work done or agreed to be done without issuance of a separate field order.

1.7 Commercepoint

The administrator of the University of Hawaii's online quotation system.

1.8 Contract

The written agreement between the Contractor and the University by which the Contractor is bound to furnish all labor, materials, tools and equipment to perform the specified work within the contract time stipulated, and by which the University is obligated to compensate the Contractor therefor at the prices set forth therein. The contract shall include the solicitation, including the instructions to offerors, the specifications or scope of work, the Special Provisions, and the General Provision; the offer; and any addendums or amendments to the solicitation or to the contract; and any terms implied by law.

- 1.9 Contract Documents
- Consists of the Notice to Proceed, the Contract/Award page, the Contract Performance and Payment Bonds, the Quotation Form (includes the Plans, Technical Specifications, Special Provisions and General Provisions), all written Addendums or Amendments, and Change Orders.
- 1.10 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.
- 1.11 Contract Performance and Payment Bonds
- The approved forms of security furnished by the Contractor and its surety or sureties or by the Contractor alone, to guarantee the completion of the work in accordance with the terms of the contract, and to guarantee full payment of all claims for labor, materials and supplies used or incorporated in the work.
- 1.12 Contract Time
- The time stated in the Request for Quotation and the contract, giving the definite number of consecutive calendar days or successive 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."
- 1.13 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.
- 1.14 Days
- Calendar days unless otherwise specified.
- 1.15 Default
- Failure by a party to a contract without legal justification to comply with contractual requirements.
- 1.16 Dispute
- A claim of the Contractor for the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or related to the contract.
- 1.17 Field Order
- A written order issued by the Procurement Officer or its authorized representative to the Contractor requiring the contract work to be performed in accordance with a change or changes in the work. A field order may (1) establish a price adjustment and/or time adjustment in an amount the University believes is reasonable for the change; or (2) may declare that the University does not intend to adjust contract time or price for the work; or (3) may request the Contractor to submit a proposal for an adjustment to the contract time and/or price by a certain date.
- 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 Force Account

Term used when Work is ordered to be done without prior agreements as to lump sum or unit price cost thereof and is to be billed for at cost of labor, materials and equipment, insurance(s), taxes, etc., plus an agreed percentage for overhead and profit.

1.20 Goods

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

1.21 Hazardous Materials

Any and all radioactive materials, asbestos, polychlorinated biphenyls, petroleum, crude oil, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, toxic substances or materials cited in Hazardous Material Laws.

1.22 Holidays

The days of each year which are set apart and established as State holidays pursuant to Chapter 8, Hawaii Revised Statutes.

1.23 HRS

Hawaii Revised Statutes.

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

Quotation.

1.27 Offeror

Any individual, partnership, or corporation submitting directly or through a duly authorized representative or agent, a quotation in response to a Request for Quotations, or an offer to supply the goods specified and/or to perform the service as indicated.

1.28 OPRPM

University of Hawaii Office of Procurement and Real Property Management.

1.29 Option

A unilateral right provided for in the contract by which the University may elect to purchase additional quantities of the supplies or services called for by the contract, or to extend the term of the contract, or to terminate the contract, etc.

1.30 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. Quotation Form and Quotation Information;
- b. Plans and Technical Specifications;
- c. Special Provisions; and
- d. General Provisions.

1.31 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.

1.32 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.

1.33 Plans

Plans, as used herein, means the contract drawings approved by the University which show the location, character, dimensions and details of the work to be done and which shall be a part of the contract.

1.34 Posting

A public announcement inviting quotations for goods and services to be furnished or performed.

1.35 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.

1.36 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.

1.37 Purchasing Agency

The University of Hawaii.

1.38 Quotation

The offer with pricing submitted by an offeror in response to a Request for Quotation.

1.39 Request for Quotations (RFQ)

An online or written solicitation issued by OPRPM, or its designees, including all documents, whether attached or incorporated by reference, to prospective offerors requesting offers 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 Offeror

An 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 Offeror

An offeror whose offer conforms in all material respects to the Request for Quotation as determined by the University.

1.43 Shall

Means mandatory.

1.44 Solicitation

A Request for Quotation, or any other document issued by the University for the purpose of soliciting quotations 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 a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service, or construction item for delivery. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably.

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 SuperQuote
The University's online quotation system administered by Commercepoint.
- 1.50 Supplemental Agreement
A written contract modification that is signed by both the Contractor and the Procurement Officer.
- 1.51 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.
- 1.52 Technical Representative of the Procurement Officer (TRPO)
The person identified and designated by the Procurement Officer to address technical matters within the Specifications.
- 1.53 University
University of Hawaii.
- 1.54 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 offer submittal deadline, 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 shall be furnished with solicitation forms via the University's online quotation system, SuperQuote, at <http://www.commercepoint.com> or other solicitation forms. The solicitation 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.

The General Provisions, Technical Specifications, Special Provisions, plans 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 offer is submitted and any alterations so made by the Offeror may be cause for rejection of the offer.

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

The Offeror shall carefully examine the Request for Quotation, plans, site of the contemplated work, the Solicitation, General Provisions, Technical Specifications, Special Provisions, addendums, amendments, etc., before submitting offers. The submission of an offer shall be considered as a warranty and certification that the Offeror has made such examination and is satisfied with the conditions to be encountered, as to the character, quality and quantities of the work to be performed, and labor, material and equipment to be furnished 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 additional 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 Addendums, Amendments and Interpretations

Questions, discrepancies, omissions or doubts as to the meaning of General Provisions, plans, specifications or Special Provisions should be communicated in writing to the Procurement Officer and must be received by the purchasing agency within the offer submittal deadline set forth in the RFQ. Any interpretation, clarification of ambiguities, correction of mistakes or omissions, and any supplemental instructions will be in the form of addendums or amendments to the solicitation, which will be posted online, or provided to prospective offerors prior to the offer submittal deadline. It shall be presumed that any addendums or amendments or interpretations so issued have been received by an Offeror and such addendums or amendments or interpretations shall become a part of the contract documents.

2.5 Preparation of Offer

Only one offer 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 offer is submitted for the same work, only the lowest priced offer may be considered; all others will be automatically rejected.

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

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

If the offer is made by an individual, his/her name and address must be shown. If made by a corporation, the offer must provide the address of the corporation. If made by a joint venture, the name and address of each member of the individual firm, partnership, or corporation comprising the joint venture must be shown, as the case may be.

When offers are submitted by an agent, other than the officer or officers of a corporation authorized to sign the offer on its behalf, or a member of a co-partnership, the University may request a power of attorney showing that the agent is authorized to submit an offer on behalf of the Offeror.

2.6 Certification of Independent Price Determination

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

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

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

All Offerors for construction service contracts shall comply with Chapter 104, HRS, which provides for the prevailing wage requirements applicable to all contracts for construction of public works in excess of \$2,000 including alterations, repair, painting and decorating.) By submitting an offer, the Offeror certifies that its offer complies with the requirements of Section 104, HRS.

2.8 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 Request for Quotation, 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.

2.9 Modification or Withdrawal of Offers

Any offer may be modified or withdrawn at any time prior to, but not after, the offer submittal deadline set forth in the RFQ. The withdrawal of an offer prior to the offer submittal deadline shall not prejudice the right of an Offeror to submit a new offer prior to the offer submittal deadline.

2.10 Submittal and Receipt of Offers

All offers shall be submitted through the University's online quotation system, SuperQuote, via <http://www.commercepoint.com>. All information required by the offer shall be provided in accordance with the instructions therein. Offers received after the offer submittal deadline specified in the RFQ will not be considered. Offers shall be unconditionally accepted without alteration or correction, except as allowed in Section 2.9. For other RFQ's not solicited on SuperQuote, offers shall be submitted in accordance with the instructions set forth therein.

2.11 Cancellation of Request for Quotations

The Request for Quotations may be canceled and any and all offers 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.

2.12 Mistakes in Offers

- a. An Offeror may correct a mistake in an offer discovered before the offer submittal deadline by withdrawing or correcting the offer as provided in Section 2.9.
- b. An Offeror may be permitted to withdraw an offer if the mistake is attributable to an obvious error that does affect price, quantity, quality, delivery, or contractual conditions, and the Offeror submits documentation that demonstrates a mistake was made.
- d. An Offeror may not correct a mistake in an offer discovered after award of the contract except where the Procurement Officer makes a written determination that it would be unreasonable not to allow the mistake to be corrected.

2.13 Offer Inspection

Offers for Requests for Quotations shall be made available for public inspection after award.

2.14 Disqualification of Offerors

An Offeror shall be disqualified and its offer automatically rejected for any one or more of the following reasons:

- a. 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;
- b. Offeror's lack of responsibility and cooperation as shown by past work or services;
- b. Offeror's being in arrears on existing contracts with the University or having defaulted on previous contracts;
- c. Offeror's lack of proper equipment and/or sufficient experience to perform the work contemplated;
- d. Offeror does not possess proper license to cover the type of work contemplated, if required;
- e. Offeror's delivery of the offer after the offer submittal deadline specified in the RFQ, or as amended,
- f. 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;
- g. Offeror's failure to follow directions and instructions in the solicitation;
- h. Offeror's placing conditions, limitations, or restrictions on its offer; or
- i. Offeror is debarred or suspended in accordance with applicable Hawaii law.

2.15 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.

2.16 Irregular Offers

Offers will be considered irregular and shall be rejected if the offer shows any noncompliance with applicable law, or contains 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.

2.17 Costs for Offer Preparation

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

2.18 Procurement Protest

- a. Any actual or prospective Offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may submit a 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 regarding an award or proposed award shall in any event be submitted within FIVE (5) working days after notification of award. In no event shall a protest based upon the content of the solicitation 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 protesting party;
 - 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. The Procurement Officer shall render a decision on a protest as expeditiously as possible after receiving all relevant information as requested. A copy of the decision shall be mailed or otherwise furnished promptly to the protesting party. The decision shall be final and conclusive.

2.19 Offers to be Held Valid

The prices quoted therein shall be held valid for a period of at least NINETY (90) consecutive calendar days from the offer submittal deadline set forth in the RFQ.

SECTION 3 – EVALUATION, AWARD, AND EXECUTION OF CONTRACT

3.1 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.

3.2 Low Tie Offers

Low tie offers are offers from responsive, responsible Offerors that are identical in price and which meet all the requirements and criteria set forth in the Request for Quotations.

At the discretion of the Procurement Officer, award shall be made in any permissible manner that will resolve tie offers, 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 Offeror that is offering a low tie offer who received the previous award and continue to award succeeding contracts to the same Offeror so long as all low offers are identical.

If no permissible method will be effective in resolving tie offers, award may be made by drawing of cards. The Offeror drawing the highest card shall be awarded the contract.

3.3 Evaluation of Offers

After the offers are received, the figures shall be extended and/or totaled in accordance with the prices of the acceptable offers and the totals will be compared. In comparison of offers where extension or other errors are detected, words written in the offer shall govern over figures and unit prices shall govern over totals when needed to clarify to determine offer prices, i.e., if the product of the Unit Price quoted multiplied by the number of units does not equal the total amount indicated by an Offeror of any item, it will be assumed that the error was made in computing the total amount and for the purpose of computing the lowest Offeror, the Unit Price alone will be considered as representing the Offeror's intention and the total amount quoted on such item shall be considered to be the amount arrived at by multiplying the Unit Price by the number of units.

3.4 Rejection of Offers

Offers may be rejected if they show any alterations of form, additions not called for, un-initialed erasures or corrections. Conditional and incomplete offers may also be rejected. 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 substitutions shall be in the best interest of the University.

3.5 Purchase Order

The University reserves the right to issue a purchase order for any award.

3.6 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 Offeror. 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.

3.7 Requirement of Performance and Payment Bonds

Performance and Payments Bonds shall be required for construction contracts of \$50,000 or more. At the time of the execution of the contract, the successful Offeror shall file good and sufficient performance and payment bonds on the forms furnished by the University, each in an amount equal to ONE HUNDRED PERCENT (100%) of the amount of the contract price unless otherwise stated in the Request for Quotations (RFQ). Acceptable performance and payment bonds shall be limited to the following:

- a. Surety bond underwritten by a company licensed to issue bonds in this State (see attached Standard Form); or
- b. Legal Tender; or
- c. Certificate of Deposit; share certificate; or cashier's, treasurer's, teller's or official check drawn by, or a certified check accepted by, and payable on demand to the University by a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration.
 - 1) These instruments may be utilized only to a maximum of \$100,000.
 - 2) 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 shall be accepted.

3.8 Vendor Certification Requirements

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

a. Tax Clearance for Contracts

In accordance with HRS 103-53 and HRS 103D-328, 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 and Industrial Relations

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, Hawaii Administrative Rules

- 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 offer shall be rejected. Thereafter, the University reserves the right to consider other offers received for award.

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 Submission of Joint Contractor and/or Subcontractor List

The successful Offeror, prior to award, shall be required to submit to the University a listing of joint contractors and/or subcontractors which identifies each person or firm to be engaged by the successful Offeror to perform the work required under the contract.

3.11 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 3.7, and insurance certificate required by Section 3.8, within TEN (10) days after such award or within such further time as the Procurement Officer may allow, 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.

3.12 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 contract.

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 submitting offers on any or all University contracts.

4.3 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.

4.4 Excusable Delay

The Contractor shall not be liable for delays arising out of the causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, Acts of God, public enemy, government in its sovereign or contractual capacity, fires, floods, strikes, freight embargoes and unusually severe weather; but, in every case, the failure to deliver or perform must be beyond the control and without the fault or negligence of the Contractor; if the failure to deliver or perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and the subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for failure to perform within the time agreed, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery or performance schedule. If such delay should occur, the Contractor shall notify the University, in writing, setting forth the reasons for the delay at the earliest possible date. The Procurement Officer shall ascertain the facts and extent of such failure, and if he/she determines that any failure to perform was occasioned by any one or more of the said causes, a Supplemental Agreement shall be issued if extension of completion time is allowed.

4.5 Intent of Plans and Specifications

It is intended that the plans and specifications shall include all work necessary for the proper completion of the work. The Contractor shall comply with the obvious intent and meaning of these specifications which shall be construed to include all labor and materials, measures and modes of work necessary to complete the work herein specified in a workmanlike manner and to the satisfaction of the University. In case of any discrepancy in the plans and specifications, the matter shall be immediately submitted to the University without whose decision said discrepancy shall not be adjusted by the Contractor.

4.6 Permits and Licenses

The Contractor shall obtain and pay for all necessary permits, licenses, and give all notices required for the execution of the work.

4.7 Contractor's Licenses

In accordance with Section 444-9, HRS, no person shall act, or assume to act, or advertise, as a general engineering contractor, general building contractor or specialty contractor without a license previously obtained under and in compliance with the provisions of Chapter 444, HRS, and the rules and regulation of the Contractor's License Board.

4.8 Materials and Equipment

- a. Unless otherwise specifically provided for in the specifications, all materials, equipment and articles incorporated in the work covered by this contract are to be new and of the best grade of its respective kind for the purpose. The University does not guarantee that the specified or pre-qualified product listed in the drawings and technical specifications are available at the time of solicitation or during the contract period.

- b. All materials and equipment not conforming to the requirements of these contract documents, whether in place or not, shall be rejected and removed immediately from the site of work unless otherwise permitted by the University in writing. No rejected material or equipment which has subsequently been made to conform shall be used unless and until written acceptance has been given by the University. If the Contractor fails to comply forthwith with any order of the University made under the provisions of this clause, the University shall have the authority to remove and replace non-conforming materials and equipment and charge the cost of removal and replacement to the Contractor.

4.9 Working Directives

- a. After award of contract and prior to the start of work, the Contractor shall submit a schedule of work and proposed sequence of work to the University for approval. No deviation from the approved schedule will be permitted without written approval.
- b. All work shall be scheduled with the University in accordance with the TECHNICAL SPECIFICATIONS. All work shall be expedited to shorten the shutdown time as much as possible. The work shall be coordinated and planned in a manner which will permit operation of University facilities without interruption.
- c. The Contractor shall perform all work with extreme care to avoid damage to existing construction and installations. The existing building will be in use during the construction period. The Contractor shall make all necessary provisions to keep interferences to a minimum as to the scheduling of work and storage of materials. Scheduling and performance of work shall be done in such a manner as to cause the least possible inconvenience to personnel using the building and least possible interferences with the activities in and around the building.
- d. In the event the Contractor submits and the University receives an accelerated schedule (shorter than the contract time), such will not constitute an agreement to modify the contract time or completion date, nor will the receipt, acceptance or approval of such a schedule incur any obligation by the University. The University will not be responsible if the Contractor does not meet its accelerated schedule.

4.10 Removal of Defective, Non-Conforming and Unauthorized Work

- a. All work which has been rejected as not conforming to the requirements of the Contract shall be remedied or removed and replaced by the Contractor in an acceptable manner and no compensation will be allowed for such removal or replacement. Any work done beyond the work limits shown on the Plans and Technical Specifications or established by the University or any additional work done without written authority will be considered as unauthorized and will not be paid for. Work so done may be ordered removed at the Contractor's expense.
- b. Scheduling Corrective Work - The Contractor shall perform its corrective or remedial work at the convenience of the University and shall obtain the University's approval of its schedule.
- c. Failure to Correct Work - If the Contractor fails to promptly commence to correct any defects of any nature within TEN (10) calendar days of any written order of the University made under this clause, and thereafter to expeditiously complete the correction of said defects, the University shall have the authority, without further notice to the Contractor or surety and without termination of contract, to cause defective work to be remedied or removed and replaced, and unauthorized work to be removed, at the Contractor's expense, and to deduct the costs from the monies due or to become due the Contractor under the contract.

4.11 Workmanship and Character of Workers

All work to be executed shall be of the highest quality and performed by skilled workmen in the best workmanlike manner. Any worker employed on the project by the Contractor or by any subcontractor who the University deems incompetent, careless, insubordinate, or otherwise objectionable shall at the written request of the University, be removed forthwith by the Contractor or subcontractor employing such worker and shall not be employed again in any portion of the work without the written consent of the University. Should the Contractor or subcontractor continue to employ, or again employ such person or persons on the project, the University may withhold all payments which are or may become due, or the University may suspend the work until its orders are followed, or both.

4.12 Insufficient Workers

A sufficient number of workers shall be present to ensure the work is accomplished at an acceptable rate. In addition, the proper ratio of apprentice to journey worker shall be maintained to ensure the work is properly supervised and performed. In the event that the University finds insufficient workers are present to accomplish the work at an acceptable rate of progress or if a adequate number of journey workers are not present and no corrective action is taken by the Contractor after being informed in writing, the University may terminate the contract as provided for under the Default clause of the contract.

4.13 Cooperation Between Contractor and the University

During the contract period, the existing buildings and grounds will be occupied by the University. Therefore, while the new work is under construction, the Contractor shall confine its operations, materials, and equipment within the immediate vicinity of the new work and shall prearrange or schedule with the University for all disruptive noise-producing construction activities so as not to unreasonably obstruct or interfere with any phase of activities of the University.

4.14 Supervision of Work

The Contractor shall provide a competent superintendent, satisfactory to the University, on the work at all times during progress of the work with authority to act for the Contractor. The Contractor shall also provide an adequate staff to coordinate and expedite its work properly and shall at all times maintain competent supervision of its work and that of its subcontractors to ensure compliance with contract requirements.

4.15 Protection of Persons and Property

Contractor shall provide adequate, clearly marked and/or lighted barricades or warning signs at all open trenches, excavation and contract work areas for the protection of the work and safety of the public and students.

4.16 Protection of Buildings and Property

The Contractor shall take all necessary precautions during the progress of the work to protect the buildings as well as adjoining property, roadways, walkways, trees, lawns, landscape, and buildings from damage and injury and shall promptly repair any such damage to the satisfaction of the University, at no cost to the University.

4.17 Interruption of Air Conditioning (A/C) and Electrical Service

The Contractor shall schedule interruption of A/C and electrical services in such a manner so as to minimize such interruption to University operations. Air Conditioning interruptions shall be permitted only on Saturdays, Sundays, and holidays. Electrical interruptions shall be permitted only on Saturdays and holidays. The Contractor shall notify the University, in writing, at least FIFTEEN (15) days in advance of any proposed interruption and shall obtain the approval of the University prior to the interruption. Scheduled interruptions of electrical service shall not exceed TWELVE (12) hours.

4.18 Water and Electricity

The Contractor will be allowed to use water and electricity for construction purposes without charge.

4.19 Sanitary Facilities

If existing sanitary facilities of the University are close to the contract work area, the Contractor is permitted to use same and shall maintain a sanitary condition at all times. If none is close by, Contractor shall install sanitary facilities at the job site and maintain same in a clean and sanitary condition for the use of the employees on the job site for the duration of the contract. The sanitary facilities shall conform to the requirements of the State Department of Health.

4.20 Equipment Access

The University shall keep the area around the equipment reasonably clear so that the Contractor will have access to the equipment and so as not to limit or impair the ability of the Contractor to perform the services.

4.21 Monitoring of Work

An inspector, designated by the University, will make daily observation of the work at the site. The Contractor shall direct all inquiries, technical or administrative, to said inspector during construction.

4.22 Removal of Debris and Cleanup

The Contractor shall, as directed during the progress of the work, remove and properly dispose of resultant dirt and debris and keep the premises reasonably clear. Before the work shall be considered completed, all equipment and unused materials provided for the work shall be removed and the building and premises will be in a neat and broom-clean condition.

4.23 Inspection

All materials, equipment and workmanship shall be subject to inspection at any and all times during the period of installation. The University has the right to reject defective or non-conforming material, equipment and workmanship. Rejected material and equipment shall be promptly removed from the job site and satisfactorily replaced. Rejected workmanship shall be satisfactorily corrected.

4.24 Acceptance

Upon completion of the job, the Contractor shall notify the University in writing, to arrange for final inspection and acceptance. Final payment will not be made until acceptance of work by the University.

4.25 Guarantee of Work

- a. Except as otherwise specified in the Technical Specifications, all work shall be guaranteed by the Contractor against defects resulting from the use of defective or inferior materials, equipment or workmanship for ONE (1) year from the date of final project acceptance.
- b. If, within any guarantee period, repairs, replacements or modifications are required as a result of the use of any materials, equipment or workmanship which is inferior, defective or not in accordance with the terms of this contract, the Contractor shall within FIVE (5) consecutive working days and without expense to the University:
 - 1) Take corrective action to cure all defects identified by the University; and
 - 2) Repair all damage to University property occasioned by the defective condition. If any such property cannot be satisfactorily repaired or restored, the Contractor shall replace it.

- c. Whenever a manufacturer's guarantee on any product used in the performance of this contract exceeds ONE (1) year, such guarantee shall become a part of this contract. The Contractor shall complete the warranty form in the name of the University and submit such form to the manufacturer within the time required to validate the warranty. The Contractor shall submit to the University a photocopy of the completed warranty form as evidence that such warranty form was filed with the manufacturer.
- d. If there is any conflict between the terms of this section and the terms contained in the Technical Specifications, the terms of the Technical Specifications shall be controlling.

4.26 Material Safety Data Sheets (MSDS)

The Contractor shall submit to the Technical Representative SIX (6) copies of the Material Safety Data Sheet (MSDS) for each chemical product prior to it being provided or used under this contract. No chemical products shall be provided or used without prior approval by the University. MSDS's shall be submitted within TWO (2) weeks of the date of Notice to Proceed. Failure to submit MSDS's may result in suspension of work for which no additional compensation and/or extension of time will be granted or in cancellation of the contract.

4.27 Differing Site Conditions – Price Adjustments

- a. Notification. The Contractor shall promptly, and before such conditions are disturbed, notify the University of:
 - 1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or
 - 2) Unknown physical conditions at this site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.
- b. Adjustments of price or time for performance. After receipt of such notice, the University shall promptly investigate the site, and if it is found that such conditions do materially so differ and cause an increase in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, 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 in accordance with the price adjustment clause of this contract.
- c. Timeliness of claim. No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in this clause; provided, however, that the time prescribed therefore may be extended by the University in writing.
- d. No claim after final payment. No claim by the Contractor for an adjustment thereunder shall be allowed if asserted after final payment under this contract.
- e. Knowledge. Nothing contained in this clause shall be grounds for an adjustment in compensation if the Contractor had actual knowledge of the existence of such conditions prior to the submission of offers.

4.28 Differing Site Conditions – Contractor's Responsibility

The Contractor accepts the conditions at the construction site as they eventually may be found to exist and warrants and represents that the contract can and will be performed under such conditions, and that all materials, equipment, labor, and other facilities required because of any unforeseen conditions (physical or otherwise) shall be wholly at the Contractor's own cost and expense, anything in this contract to the contrary notwithstanding.

4.29 Performance Evaluation Report

a. Overall Evaluation of Contractor

A Contractor's overall evaluation includes the performance of its subcontractors and shall be based on the following performance elements using either "outstanding" or "satisfactory" or "unsatisfactory" as an evaluation finding:

1) Performance Elements

- a. Compliance with the submittals requirement(s) (i.e., schedules, shop drawings, daily reports, payroll affidavits, closing documents, etc.) and the associated deadline(s) specified in the RFQ.
- b. Effectiveness of management (i.e., during the course of construction, the Contractor provided on the job site a foreman familiar with the project's requirements; Contractor exhibited control of his subcontractors.)
- c. Adherence to the approved work schedule by Contractor and its subcontractors.
- d. Cooperation and timely response in resolving any project issue(s) raised by the University (i.e., questions, problems, change orders, etc.) within the time specified by the University for such matter(s).
- e. Quality of work (i.e., adherence to performance specifications and quality control standards specified for the project; extent of punch-list reasonable for size/type of project).
- f. Understanding of project requirements to minimize the submission of RFIs and/or change order requests.
- g. Timely Performance (i.e., Contractor achieved project completion by the contract completion date; Contractor completed all punch-list items by the deadline specified by the University).
 - 1) Compliance with Labor Standards
 - 2) Compliance with Safety Standards

2) Overall Evaluation

- a. If a performance rating of "unsatisfactory" is given to a Contractor for any THREE (3) elements noted above, the Contractor shall be assigned an overall evaluation rating of "unsatisfactory."
- b. An overall "unsatisfactory" rating shall also apply to any other company which the Contractor's Officers or Directors or Responsible Managing Employee(s) or Managing Partner(s) or Partner(s) are listed by the DCCA as holding similar titles/positions.

b. Revision(s) to Performance Evaluation Report During Warranty Period(s)

Following the date of project acceptance, if a Contractor fails to satisfactorily respond to and complete any warranty work requested by the University during the period such warranty(ies) is/are in effect, the University reserves the right to downgrade the Contractor's overall rating. Such action shall be without prejudice to any other remedy or right of action available to the University.

SECTION 5 – LEGAL RELATIONS AND RESPONSIBILITY

5.1 Compliance With Laws, Ordinances, and Regulations

The Contractor shall at all times observe and comply with all federal, state and local laws or ordinances, rules and regulations of any kind pertaining, but not limited to permits, licensing, safety, work and labor, employees, wages, and payrolls, withholding and other taxes, and materials, 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, including all attorneys' fees and costs, 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 Indemnification; Responsibility for Damage Claims

- a. Contractor shall indemnify, defend and hold harmless the University and the State of Hawaii, and their officers, employees, agents, or any person acting on their behalf from and against: (1) any claim or demand for loss, liability or damage, including, but not limited to, claims for property damage, personal injury or death, by whomsoever brought, arising from any accident or incident connected with the performance of this contract by the Contractor, any subcontractor, or their employees and agents, except liability arising out of the sole negligence of University or its officers and employees; (2) all claims, suits and damages by whomsoever brought or made by reason of the nonobservance or nonperformance of any of the terms, covenants and conditions herein or the rules, regulations, ordinances and laws of the federal, state, municipal or county governments. Furthermore, Contractor shall reimburse University and the State of Hawaii, and their officers, employees, agents, or any person acting on their behalf for all attorney's fees, costs, and expenses incurred in connection with the defense of any such claims. The purchase of liability insurance shall not relieve the Contractor of the obligations described herein. The provisions of this section shall remain in full force and effect notwithstanding the expiration or early termination of this contract.
- b. The Contractor agrees that it will not attempt to hold the University and its officers, representatives, or employees, liable or responsible for any losses or damages to third parties from the action of the elements, the nature of work to be done under this contract, or from any unforeseen obstructions, acts of God, vandalism, fires or encumbrances which may be encountered in the performance of the work under this contract.
- c. Contractor shall pay all claims for materials, equipment, supplies, tools, labor and other claims against the Contractor or any subcontractor in connection with this contract, and the surety bond will not be released by final acceptance and payment by the University unless all such claims are paid or released. The University may, but is not obligated to, withhold or retain as much of the monies due or to become due the Contractor under this contract considered necessary by the University to cover such claims until satisfactory proof of payment or the establishment of a payment plan is presented.

5.3 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.

5.4 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.

5.5 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 submitting offers 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.

5.6 Equal Opportunity And Affirmative Action Certification

The Contractor agrees that the equal opportunity clause which prohibits 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-741.40), 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.

5.7 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.

5.8 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.

5.9 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 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 this contract pending final resolution by a circuit court of the State of Hawaii of any controversy arising under, or by virtue of, this 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.

5.10 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.

5.11 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.

5.12 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.

5.13 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.

5.14 No Third-Party Beneficiary Status

Nothing contained in the Contract Documents or otherwise shall create any contractual relationship between the University and any subcontractor or sub-subcontractor.

5.15 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.

5.16 Statutes

- a. The Contractor's attention is directed to the following statutes in Hawaii Revised Statutes:

Chapter 104 Wages and Hours of Employees on Public Works

Chapter 237 General Excise Tax Law

Chapter 376 Industrial Safety

Chapter 377 Hawaii Employment Relations Act

Chapter 383 Hawaii Employment Security Law

Chapter 386 Worker's Compensation Law

Chapter 387 Wage and Hour Law

Chapter 388 Payment of Wages

Chapter 392 Temporary Disability Insurance

Chapter 393 Prepaid Health Care

Chapter 396 Occupational Safety and Health

Chapter 425 Partnerships

Chapter 444 Contractors

- b. By signing the contract, the Contractor certifies that the statutes have been read and are understood. If applicable, the Contractor shall comply with the provisions and acknowledges any rights the University has under these laws.

5.17 Prevailing Wage Requirements Applicable to All Contractors for Construction of Public Works in Excess of \$2,000 (Including Alterations, Repair, Painting and Decorating)

- a. In accordance with the provisions of Chapter 104, Hawaii Revised Statutes, the following shall be complied with by the Contractor, subcontractor and others who are connected with this job.
- b. All laborers and mechanics engaged in the performance of this contract on the job site shall be paid prevailing wages not less than those determined by the Director of Labor and Industrial Relations to be the prevailing wages for corresponding classes of laborers and mechanics on any project of similar character in the State, as published in the wage rate bulletins. It is the responsibility of the Contractor to keep current of all changes to the prevailing wage rates. The wage rate bulletin contains the prevailing wages for corresponding classes of laborers and mechanics on any projects of similar character in the State, or as determined by the Director of Labor and Industrial Relations for purposes of Chapter 104, Hawaii Revised Statutes. All rates are subject to change.
- c. The prevailing wages shall be periodically increased during the performance of the contract in an amount equal to the increase in the prevailing wages for those kinds of work as periodically determined by the Director of Labor and Industrial Relations. Notwithstanding the provisions of the original contract, if the director determines that the prevailing wage has increased, the rate of pay of laborers and mechanics on a public work project shall be raised accordingly.

- d. Payroll records for all laborers and mechanics working at the site of the work shall be maintained by the General Contractor and its subcontractors, if any, during the course of the work and preserved for a period of THREE (3) years thereafter. Such records shall contain the name and address of each employee, the employee's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. Such records shall be made available for inspection by the University or any authorized representative thereof who may also interview employees during working hours on the job.
- e. A certified copy of all payrolls shall be submitted weekly to the University. The General Contractor shall be responsible for the submission of certified copies of the payrolls of all subcontractors. The certification shall affirm that the payrolls are correct and complete, that the wage rates contained therein are not less than the applicable rates contained in the wage determination decision of the Director of Labor and Industrial Relations, and that the classification set forth for each laborer or mechanic conforms with the work performed by the laborer or mechanic.
- f. The rates of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the job site, and a copy of the rates of wages required to be posted shall be given to each laborer and mechanic employed under the contract by the Contractor at the time each laborer and mechanic is employed, except that where there is a collective bargaining agreement, the Contractor does not have to provide employees with the wage rate schedules.
- g. No laborer or mechanic employed on the job site shall be permitted or required to work on any Saturday, Sunday and legal holiday of the State, or in excess of EIGHT (8) hours on any other day unless the laborer or mechanic receives compensation for all hours worked on any Saturday, Sunday and legal holiday of the State, or in excess of EIGHT (8) hours on any other day at a rate not less than one and one half times the basic hourly rate of pay. For the purposes of determining overtime compensation under this sub-section, the basic hourly rate of any laborer or mechanic shall not be less than the basic hourly rate determined by the Director of Labor and Industrial Relations to be the prevailing basic hourly rate for corresponding classes of laborers and mechanics on projects of similar character in the State.
- h. The Contractor or subcontractor shall pay all mechanics and laborers employed on the job site, unconditionally and not less often than once a week, and without deduction or rebate on any account, except as allowed by law, the full amounts of their wages including overtime, accrued to not more than FIVE (5) working days prior to the time of payment, at wage rates not less than those deemed to be prevailing, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and laborers and mechanics.
- i. The University may withhold from the Contractor so much of the accrued payment as may be necessary to pay the laborers and mechanics the difference between the prevailing wages required by the contract and the wages received by such laborers and mechanics.
- j. If the University finds that any laborer or mechanic employed on the job site by the Contractor or any subcontractor has been or is being paid wages at a rate less than the prevailing rate required by this contract or the specifications, or has not received full overtime compensation, the University may, by written notice to the Contractor, terminate the Contractor's right, or the right of any subcontractor, to proceed with the work or with the part of the work in which the required wages or overtime compensation have not been paid and may complete such work or part by contract or otherwise, and the Contractor and its sureties shall be liable to the University for any excess costs occasioned thereby.
- k. For further information on this Act, the Contractor shall refer to Chapter 104, Hawaii Revised Statutes.

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.

5.19 Requirement for General Contractor Licensing Classifications

General contractors that hold an A or B license are prohibited from undertaking any work solely as part of a larger project which would require the general contractor to act as a specialty contractor in any area that the general contractor has no specialty contractor's license. The general contractor must have the appropriate specialty contractor's license either obtained on its own, or obtained automatically under the rules and regulations of the Contractors License Board, Department of Commerce and Consumer Affairs.

SECTION 6 – MODIFICATION AND TERMINATION OF CONTRACTS FOR CONSTRUCTION

6.1 Remedies

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

6.2 Modification of Contract

The contract may be modified by the mutual agreement of the parties, in writing executed by the Contractor and the University, and may include, but is not limited to, such changes as term extensions to the contract and changes in scope of work.

6.3 Changes Orders in Construction Contracts

- a. Change order. The University, at any time, and without notice to any surety, in a signed writing designated or indicated to be a change order, may make changes in the work within the scope of the contract as may be found to be necessary or desirable. Such changes shall not invalidate the contract or release the sureties, and the Contractor will perform the work as changed, as though it had been part of the original contract. Minor changes in the work may be directed by the University at no change in contract price or time of performance.
- b. Adjustments of price or time for performance. If any 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, an adjustment may be made and the contract modified in writing accordingly.
 - 1) Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract. Failure of the parties to agree to an adjustment in contract price shall be resolved in accordance with the price adjustment clause of this contract.
 - 2) Failure of the parties to agree to an adjustment in time shall not excuse a Contractor from proceeding with the contract as changed, provided that the University, within fourteen days after the changed work commences, makes such 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 written notice requirements for disputes and claims established by the contract.

- c. Time period for claim. Within THIRTY (30) days after receipt of a written change order under Section 6.3, paragraph a, unless such period is extended by the University in writing, the Contractor shall file a notice of intent to assert a claim for an adjustment. The requirement for filing a timely written notice 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 written notice is not given 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 restrict the Contractor's right to pursue a claim arising under the contract or for breach of contract.

6.4 Suspension of Work for Construction Contracts

- a. Suspension of work. The University may, by written order, suspend the performance of the work, either in whole or in part for periods as the University may deem necessary for any cause, including but not limited to:
 - 1) Weather or soil conditions considered unsuitable for prosecution of the work;
 - 2) Failure on the part of the Contractor to:
 - a. Correct conditions unsafe for the general public or for the workers;
 - b. Carry out orders given by the University;
 - c. Perform the work in strict compliance with the provisions of the contract; or
 - d. Provide adequate supervision on the jobsite.
 - 3) Whenever a redesign that may affect the work is deemed necessary by the University;
 - 4) Unacceptable noise or dust arising from the construction even if it does not violate any law or regulation; or
 - 5) The convenience of the University.
- b. Partial and total suspension. Suspension of work on some but not all items of work shall be considered a "partial suspension." Suspension of work on all items shall be considered "total suspension." The period of suspension shall be computed from the date set out in the written order for work to cease until the date of the order for work to resume.
- c. Reimbursement to Contractor. In the event that the Contractor is ordered by the University in writing as provided herein to suspend all work under the contract in accordance with Section 6.4, paragraph a, subparagraphs 3, 4, or 5, the Contractor may be reimbursed for actual money expended towards the project during the period of suspension. No allowance will be made for anticipated profits.
- d. Cost adjustment. If the performance of all or part of the work is suspended for reasons beyond the control of the Contractor, an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such suspension, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension:
 - 1) To the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor; or

- 2) For which an adjustment is provided for or excluded under any other provision of this contract.
- e. Claims for adjustment. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the provisions on changes and claims for adjustment. Claims for compensation shall be filed in writing with the University within THIRTY (30) days after the date of the order to resume work or the claims will not be considered. Together with the claim, the Contractor shall submit substantiating documents covering the entire amount shown on the claim. The University shall take the claim under consideration, may make such investigations as are deemed necessary, and shall be the sole judge as to the equitability of the claim. The University's decision shall be final.
- f. No adjustment. No provision of this clause shall entitle the Contractor to any adjustments for delays due to failure of surety, for suspensions made at the request of the Contractor, for any delay required under the contract, for suspensions, either partial or whole, made by the University under the provisions in Section 6.4, paragraph a, subparagraph 2.

6.5 Authorization for a Stop Work Order

- a. Section 6.5 applies to any fixed-price contract 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. 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.
- d. In any event, some such 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.

6.6 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.

6.7 Variations in Estimated Quantities for Construction Contracts

- a. Variations requiring adjustments. Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than FIFTEEN PERCENT (15%) above or below the estimated quantity stated in this contract, an adjustment in the contract price shall be made upon demand of either party. The adjustment shall be based upon any increase or decrease in costs due solely to the variation above ONE HUNDRED FIFTEEN (115) percent or below EIGHTY FIVE (85) percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the University shall, upon receipt of a timely written request for an extension of time, prior to final payment of the contract, ascertain the facts and make such adjustment for extending the completion date as in the judgment of the University the findings justify.
- b. Adjustment of price. Any adjustment in contract price shall be determined in accordance with the price adjustment provisions of this contract.

6.8 Price Adjustment for Construction Contracts

- a. Price adjustment methods. Any adjustment in the 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 events 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 any other manner as the parties may mutually agree upon before commencement of the pertinent performance; or

- 5) In the absence of an 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 adjustment in contract price is subject to the provisions of section 103D-312, HRS. The submission of any cost or pricing data shall be made 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 paragraph a, subparagraph 1 through paragraph 1, subparagraph 4 shall be issued within ten days after agreement on the method of adjustment.
- c. Determining Adjustments to Price. In determining the adjustment in price to the University resulting from a change, the allowances for all overhead, extended overhead resulting from adjustments to contract time (including home office and branch office overhead) and profit combined shall not exceed the percentages set forth below:
 - 1) For the Contractor, for any work performed by its own forces, TWENTY PERCENT (20%) of the total cost.
 - 2) For each subcontractor involved, for any work performed by its own force, TWENTY PERCENT (20%) of the cost;
 - 3) For the Contractor or any subcontractor, for the work performed by their subcontractors, TEN PERCENT (10%) of the amount due the performing subcontractor.

Not more than three line item percentages for fee and overhead, not to exceed the maximum percentages shown above, will be allowed regardless of the number of tier subcontractors.

- d. The University in determining an adjustment in price using any of the methods listed in paragraph a subparagraph 1 through paragraph a, subparagraph 4, above may not mandate that the Contractor submit its proposal for a price adjustment at a specified percentage that it unilaterally considers to be acceptable.
- e. Paragraphs c and d shall not be construed to impair the right of a Contractor and the University from mutually agreeing to a price adjustment under any method listed in paragraphs a, subparagraph 1 through paragraph a, subparagraph 4 above.

6.9 Value Engineering Incentive

- a. This provision is applicable only if this contract exceeds \$100,000. Whenever VECP is mentioned in the following paragraphs, it shall mean "Value Engineering Change Proposal" (VECP). The application of value engineering incentives to contracts shall not be construed to have an effect on the solicitation or the selection of the Contractor.
- b. The Contractor may develop and submit VECP change proposals for drawings, designs, specifications, or other requirements of this contract. If any proposal is accepted and approved, in whole or in part by the University, the contract shall be modified and shall include an equitable adjustment of the contract price in accordance with this provision. This clause does not, however, apply to any VECP unless it is identified as such by the Contractor at the time of its submission to the University.
- c. All VECP shall:
 - 1) Result in an estimated net savings to the University in the project cost of at least FOUR THOUSAND DOLLARS (\$4,000) by providing less costly items than or using different construction methods from those specified in the contract without impairing any of their essential functions and characteristics such as service life, reliability, substitutability, economy of operation, ease of maintenance, and necessary standardized features of the completed work;

- 2) Require, in order to be applied to this contract, a modification to this contract; and
 - 3) Not adversely impact on the performance schedule or the contract completion date.
- d. VECP Required Information - At a minimum, the following information will be submitted by the Contractor with each proposal:
- 1) A description of the difference between the existing contract requirement and the VECP, and the comparative advantages and disadvantages of each including durability, service life, reliability, substitutability, economy of operation, ease of maintenance, desired appearance, design, safety standards, impacts due to construction, and other essential or desirable functions and characteristics as appropriate;
 - 2) An itemization of the requirements of the contract which must be changed if the VECP is adopted and a recommendation as to how to make each such change;
 - 3) An itemized estimate of the reduction in performance costs that will result from adoption of the VECP or parts thereof taking into account the costs of implementation by the Contractor, including any amounts attributable to subcontracts, and the basis for the estimate;
 - 4) A prediction of any effects and impacts the VECP would have on other costs to the University as the costs of University furnished property, related items, and maintenance and operation over the anticipated life of the material, equipment, or facilities as appropriate; the construction schedule, sequence and time; and bid item totals used for evaluation and payment purposes;
 - 5) A statement of the time by which a modification adopting the VECP must be issued so as to obtain the maximum cost reduction during the remainder of this contract, noting any effect on the contract time; and
 - 6) If previously submitted, the dates of any previous submissions of the VECP, the numbers of any University contracts under which submitted and the previous actions by the University, if known.
- e. When, in the judgment of the University, a value engineering change proposal alters the design prepared by a registered professional architect or engineer, the Contractor shall ensure the changes to be prepared are by or under the supervision of a registered professional architect or engineer, and stamped and so certified.
- f. The VECP will be processed expeditiously and in the same manner as prescribed for any other proposal which would likewise necessitate issuance of a contract modification.
- Unless and until a modification applies a VECP to this contract, the Contractor shall remain obligated to perform in accordance with the terms of the existing contract and the University shall not be liable for any delays incurred by the Contractor resulting from the time required for the University's determination of the acceptability of the VECP.
- g. The determination of the University as to the acceptance of any VECP under this contract shall be final.
- h. Acceptance of VECP - The University may accept in whole or in part any VECP submitted pursuant to this clause by issuing a modification to the contract. Prior to issuance of the modification, the Contractor shall submit complete final contract documents similar to those of the original contract showing the accepted changes and the new design and features as well as the following:
- 1) Design calculations;
 - 2) The design criteria used; and

- 3) A detailed breakdown of costs and expenses to construct or implement such revisions.

The modification will identify the final VECP on which it is based.

- i. VECP Price Adjustments - When a VECP submitted pursuant to this clause is accepted under this contract, an equitable adjustment in the contract price and in any other affected provisions of this contract shall be made in accordance with this clause and "change order" clause of this contract. The equitable adjustment shall first be established by determining the effect on the Contractor's cost of implementing the change (including any amount attributable to subcontracts), and to the University's charges to the Contractor for architectural, engineering, or other consultant services and the staff time required to examine and review the proposal. The contract price shall then be reduced by FIFTY PERCENT (50%) of net estimated decrease in the cost of performance.
- j. The Contractor may restrict the University's right to use any sheet of a VECP or of the supporting data, submitted pursuant to this clause, if it is stated on such sheet as follows:
 - 1) "This data or information or both shall not be disclosed outside the University, or be duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate this value engineering change proposal submitted under said clause.
 - 2) "This restriction does not limit the University's right to use this data or information or both if obtained from another source, or is otherwise available, without limitations. If such a proposal is accepted by the University by issuance of a modification under the 'change order' clause of said contract after the use of this data in such an evaluation, the University shall have the right to duplicate, use and disclose any data pertinent to the proposal as accepted, in any manner and for any purpose whatsoever, and permit others to do so."
- k. In the event of acceptance of a VECP, the University shall have all rights to use, duplicate or disclose in whole or in part in any manner and for any purpose whatsoever, and to have or permit others to do so, any data or information or both reasonably necessary to fully utilize such proposal.
- l. Notwithstanding the provisions of this section, the Contractor shall not be precluded from making substitution requests in accordance with applicable rules and policies of the University. The University shall be the sole judge of whether a proposal is a VECP or a substitution request.
- m. The Contractor shall submit with each VECP all required information and provide all additional information as may be required by the University to evaluate and implement the VECP. The cost for preparing the VECP shall be the Contractor's responsibility, and will be part of the Contractor's responsibility, and will be part of the Contractor's cost for implementing the change, and compensation shall be made only when the proposal is accepted by the University and modification issued.
- n. If the services of the University's architect, engineer or consultant is necessary to review and evaluate a VECP, the cost thereof shall be paid for by the Contractor.
- o. Each VECP shall be evaluated as applicable to this contract, and past acceptance on another University project for a similar item shall not be automatic grounds for approval.
- p. The method by which the Contractor will share a portion of the cost savings from an accepted VECP shall be for this contract only, and no consideration shall be made for future acquisition, royalty type payment or collateral savings.
- q. The University may accept a VECP in whole or in part. The University shall issue a contract modification to the contract to identify and describe the accepted VECP.

6.10 Substitution of Subcontractors

- a. Substitution of subcontractors will be allowed only after contract award and only if the subcontractor:
 - 1) Fails, refuses or is unable to enter into a subcontract; or
 - 2) Becomes insolvent; or
 - 3) Has its contractor's license suspended or revoked; or
 - 4) Has defaulted or has otherwise breached the subcontract in connection with the subcontracted work; or
 - 5) Is unable to comply with the other requirements of law applicable to contractors, subcontractors and public works projects.
- b. Requests to substitute a subcontractor shall be submitted to the Procurement Officer for approval and the General Contractor shall include:
 - 1) A copy of the subcontractor's written release request to the General Contractor (if applicable);
 - 2) A written release from the affected subcontractor acknowledging that it unconditionally is indemnifying the General Contractor and the University of Hawaii from any liens and/or claims which may be brought as a result of the requested change;
 - 3) A written acknowledgement agreeing to hold the University harmless and to indemnify the University for all claims, liabilities, or damages whatsoever, including attorney's fees arising out of or related to the approval or disapproval of the substitution request;
 - 4) A written acknowledgement that the requested change shall be at no additional cost to the University; and
 - 5) A written acknowledgement that it will not use its request to change subcontractor(s) as a basis for requesting a time extension to the performance period specified in the contract.

6.11 Novation or Change of Name

- a. No assignment. No University contract is transferable, or otherwise assignable, without the written consent of the University 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 an assignment agreement in which the transferor, 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.

6.12 Claims Based on Oral Directives for Construction Contracts

- a. Any oral order, direction, instruction, interpretation or determination from the University which, in the opinion of the Contractor, causes any change, can be considered as a change only if the Contractor gives the University written notice of its intent to treat such oral order, direction, instruction, interpretation or determination as a change directive. The written notice must be delivered to the University before the Contractor acts in conformity with the oral order, direction, instruction, interpretation or determination, but not more than FIVE (5) days after delivery of the oral order to the Contractor. The written notice shall state the date, circumstances, whether a time extension will be requested, and source of the order that the Contractor regards as a change. The written notice may not be waived and shall be a condition precedent to the filing of a claim by the Contractor. Unless the Contractor acts in accordance with this procedure, any oral order shall not be treated as a change and the Contractor waives any claim for an increase in the contract time or contract price related to the work.
- b. Not more than FIVE (5) days after receipt of the written notice from the Contractor the University shall issue a change order for the subject work if the University agrees that it constitutes a change. If no change order is issued in the time established, it shall be deemed a rejection of Contractor's claim for a change. If the Contractor objects to the University's refusal to issue a change order, it shall file a written complaint with the University within THIRTY (30) days after delivery to the University of the Contractor's written notice of its intention to treat the oral order as a change. In all cases the Contractor shall proceed with the work. The complaint shall be determined as provided in the Section 5.9.

6.13 Default, Delay, and Time Extension for Construction Contracts

- a. Default. If the Contractor refuses or fails to perform the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in this contract, or any extension thereof, fails to complete said work within such time, or commits any other substantial breach of this contract, and further fails within SEVEN (7) days after receipt of written notice from the University to commence and continue correction of such refusal or failure with diligence and promptness, the University may, by written notice to the Contractor, declare the Contractor in breach and terminate the Contractor's right to proceed with the work or such part of the work as to which there has been delay or other breach of contract.

In the event the University may take over the work and perform the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, the materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, the Contractor and the Contractor's sureties shall be liable for any damage to the University resulting from the Contractor's refusal or failure to complete the work within the specified time period.

- b. Liquidated damages upon termination. If fixed and agreed liquidated damages are provided in the contract, and if the University so terminates the Contractor's right to proceed, the resulting damage will consist of the liquidated damages for the time as may be required for final completion of the work.
- c. Liquidated damages in absence of termination. If fixed and agreed liquidated damages are provided in the contract, and if the University does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.
- d. Time extension. The Contractor's right to proceed shall not be so terminated nor shall the Contractor be charged with resulting damage if:
 - 1) The delay in the completion of the work arises from causes such as: acts of God; acts of the public enemy; acts of the University and any other governmental entity in either a sovereign or contractual capacity; acts of another Contractor in the performance of a contract with the University; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes;

freight embargoes; unusually severe weather; delays of subcontractors due to causes similar to those set forth above; or shortage of materials; provided, however, that no extension of time will be granted for a delay caused by a shortage of materials, unless the Contractor furnishes to the University proof that the Contractor has diligently made every effort to obtain such materials from all known sources, and further proof that the inability to obtain such materials when originally planned did in fact cause a delay in final completion of the entire work which could not be compensated for by revising the sequence of the Contractor's operations; and

- 2) The Contractor, within TEN (10) days from the beginning of the delay (unless the University grants a further period of time before the date of final payment under the contract), notifies the University in writing of the causes of delay. The University shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in the judgment of the University, the findings of fact justify such an extension.
- e. Additional rights and remedies. The rights and remedies of the University provided in this contract are in addition to any other rights and remedies provided by law.

6.14 Cancellation of Contract

In the event the Contractor fails to meet its commitments under this contract, the University, in addition to any other remedy at its disposal, shall have the right to cancel this contract and may use the Contractor's performance bond to complete the contract requirements.

6.15 Termination for Default

- a. Termination for 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, such officer may terminate the Contractor's right to proceed with the contract or such 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. 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, including any failure by the Contractor to make progress in the prosecution of the work hereunder which endangers such performance, 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 such as: 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; unusually severe weather or for delay due to reasons beyond the Contractor's control. 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.

- 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.

6.16 Force Account Work

- a. Force Account Method - When, for the convenience of the University, payment is to be made by the Force Account method, all work performed or labor and materials and equipment furnished shall be paid for as described below. Payment by the Force Account method will not alter any rights, duties and obligations under the contract.
- b. Labor - For all hourly workers, the Contractor will receive the rate of wage including fringe benefits when such amounts are required by collective bargaining agreement or other employment contract generally applicable to the classes of labor employed on the work, which shall be agreed upon in writing before beginning work for each and every hour that said labor is actually engaged in said work
 - 1) All markups for overhead and profit shall be added subject to limitations established in Section 6.8, paragraph c.
 - 2) No allowance for overtime compensation will be given without the written approval of the University prior to performance of such work
- c. Insurance and Taxes - The Contractor and subcontractor(s) will also receive the actual additional costs paid for property damage, liability, workers compensation insurance premiums, State unemployment contributions, Federal unemployment taxes, social security and Medicare taxes to which a markup of up to SIX PERCENT (6%) may be added.
- d. Materials - For materials accepted by the Engineer and used, the Contractor and subcontractor(s) shall receive the actual cost of such materials delivered and incorporated into work, plus a markup allowed under Section 6.8, paragraph c.
- e. Subcontractors - Subcontractor costs shall be the actual costs of the subcontractor plus a markup allowed under Section 6.8, paragraph c.
- f. Equipment
 - 1) For machinery or special equipment (other than small tools as herein defined in Section 6.16, paragraph f, subparagraph 8) owned or leased by the Contractor or a related entity, the use of which has been authorized by the University:
 - a. The Contractor will be paid at the per hour rental rates based on the monthly rate established for said machinery or equipment in the then-current edition of the Rental Rate Blue Book for Construction Equipment including the estimated operating cost per hour and regional correction provided therein.
 - b. If no rate is listed for a particular kind, type or size of machinery or equipment, then the monthly, hourly rates shall be as agreed upon in writing by the Contractor and the

University prior to the use of said machinery or equipment. If there is no agreement, the University will set a rate. The Contractor may contest the rate pursuant to Section 5.9

- c. Rental rates which are higher than those specified in the aforesaid Rental Rate Blue Book publication may be allowed where such higher rates can be justified by job conditions such as work in water and work on lava, etc. Request for such higher rates shall be submitted in writing to the University for approval prior to the use of the machinery or equipment in question.
- 2) For machinery or special equipment (other than small tools as herein defined in Section 6.16, paragraph f, subparagraph 8), rented by the Contractor or a related entity specifically for the Force Account work, the use of which has been authorized by the University. The Contractor will be paid the actual rental cost for the machinery or equipment, including mobilization and demobilization costs. A receipt from the equipment supplier shall be submitted to the University.
- 3) For machinery or special equipment (other than small tools as herein defined in Section 6.16, paragraph f, subparagraph 8) rented by the Contractor or a related entity for use in the project, but which will also be used for the Force Account work, the use of which has been authorized by the University. The Contractor will be paid the actual rental cost for the machinery or equipment. No additional mobilization and demobilization costs will be paid. A receipt from the equipment supplier shall be submitted to the University.
- 4) The rental rate for trucks not owned by the Contractor shall be those as established under the Hawaii State Public Utilities Commission, which will be paid for as an equipment item pursuant to Section 6.16, paragraph f. Rental rates for Contractor-owned trucks not listed in the Rental Rate Blue Book shall be agreed upon in writing by the Contractor and University prior to the use of said trucks. If there is no agreement, the University shall set the rate. The Contractor may contest the rate pursuant to Section 5.9.
- 5) The rental period shall begin at the time equipment reaches the site of work, shall include each day that the machinery or equipment is at the site of the work and shall terminate at the end of the day on which the equipment is no longer needed. In the event the equipment must standby due to work being delayed or halted by reason of design, traffic, or other related problems uncontrollable by the Contractor, excluding Saturdays, Sundays and Legal Holidays, unless the equipment is used to perform work on such days, the rental shall be TWO (2) hours per day until the equipment is no longer needed.
 - a. The rental time to be paid will be for the time actually used. Any hours or operation in excess of EIGHT (8) hours in any one day must be approved by the University prior to the performance of such work.
 - b. Rental time will not be allowed or credited for any day on which machinery or equipment is inoperative due to its breakdown. On such days, the Contractor will be paid only for the actual hours, if any, that the machinery or equipment was in operation.
 - c. In the event the Force Account work is completed in less than EIGHT (8) hours, equipment rental shall nevertheless be paid for a minimum EIGHT (8) hours.
 - d. For the purpose of determining the rental period the continuous and consecutive days shall be the normal EIGHT (8)-hour shift work day, Monday through Friday excluding legal holidays. Any work day to be paid less than EIGHT (8) hours shall not be considered as continuous, except for equipment removed from rental for fuel and lubrication.
 - e. No additional premium beyond the normal rates used will be paid for equipment over EIGHT (8) hours per day or FORTY (40) hours per week.

- 6) All rental rates for machinery and equipment shall include the cost of fuel, oil, lubricants, supplies, small tools, necessary attachments, repairs, maintenance, tire wear, depreciation, storage, and all other incidentals.
- 7) All machinery and equipment shall be in good working condition and suitable for the purpose for which the machinery and equipment is to be used.
- 8) Individual pieces of equipment or tools having a replacement value of ONE THOUSAND DOLLARS (\$1,000) or less, whether or not consumed by use, shall be considered to be small tools and included in the allowed markup for overhead and profit and no separate payment will be made therefor.
- 9) The total of all Force Account rental charges accrued over the duration of the contract for a specific item of equipment shall not exceed the replacement cost of that equipment.
 - a. The Contractor shall provide the cost of replacement to the University prior to using the equipment. If the University does not agree with the replacement cost, the University shall set the replacement cost. The Contractor may contest the replacement cost pursuant to Section 5.9.
- 10) Should the item of equipment be rented from an unrelated entity, the rental cost will be treated as an equipment cost under Section 6.16, paragraph f.
- 11) Transportation and/or Mobilization: The following provisions shall govern in determining the compensation to be paid to the Contractor for use of equipment or machinery on the Force Account method:
 - a. The location from which the equipment is to be moved or transported shall be approved by the University.
 - b. Where the equipment must be transported to the site of the force account work, the University will pay the reasonable cost of mobilizing and transporting the equipment, including its loading and unloading, from its original location to the site of force account work. Upon completion of the work, the University will pay the reasonable cost of mobilizing and transporting the equipment back to its original location or to another location, whichever cost is less.
 - c. The cost of transporting the equipment shall not exceed the rates established by the Hawaii State Public Utilities Commission. If such rates are nonexistent, then the rates will be determined by the University based upon the prevailing rates charged by established haulers within the locale.
 - d. Where the equipment is self-propelled, the University will pay the cost of moving the equipment by its own power from its original location to the site of the force account work. Upon completion of the work the University will pay the reasonable cost of moving of the Equipment back to its original or another location, whichever cost is less.
 - e. At the discretion of the University, when the Contractor desires to use such equipment for other than Force Account work, the costs of mobilization and transportation shall be prorated between the Force Account and non-Force Account work.
 - f. Pickup trucks, vans, storage trailers, unless specifically rented for the Force Account work, shall be considered incidental to the Force Account work and the costs therefore are included in the markup allowed under Section 6.8, paragraph c.

- g. State Excise (Gross Income) Tax and Bond - A sum equal to the current percentage rate for the State excise (Gross Income) tax on the total sum determined in Section 6.16, paragraphs b, c, d and e above, and the bond premium shall be added as compensation to the Contractor. The actual bond premium not to exceed ONE PERCENT (1%) shall be added to items covered by Section 6.16, paragraphs b, c, d and e when applicable.
- 1) The compensation as determined in Section 6.16, paragraphs, b, c, d, e and f above shall be deemed to be payment in full for work paid on a force account basis.
- h. Records - The Contractor and the University shall compare records of the labor, materials and equipment rentals paid by the Force Account basis at the end of each day. These daily records, if signed by both parties, shall thereafter be the basis for the quantities to be paid for by the Force Account method. The Contractor shall not be entitled to payment for Force Account records not signed by the University.
- i. Statements - No payment will be made for work on a Force Account basis until the Contractor has submitted to the University, duplicate itemized statements of the cost of such Force Account work detailed as follows:
- 1) Laborers - Name, classification, date, daily hours, total hours, rate, and extension for each laborer and foreman and also the amount of fringe benefits payable if any.
 - 2) Equipment - Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.
 - 3) Materials:
 - a. Quantities of materials, prices and extensions
 - b. Costs of transporting materials, if such cost is not reflected in the prices of the materials.
 - c. Statements shall be accompanied and supported by receipted invoices for all materials used and transportation charges. However, if materials used on the Force Account work are not specifically purchased for such work but are taken from the Contractor's stock, then in lieu of the invoices the Contractors shall submit an affidavit certifying that such materials were taken from stock and that the amount claimed represents the actual cost to the Contractor.
 - 4) Insurance - Cost of property damage, liability and worker's compensation insurance premiums, unemployment insurance contributions, and social security tax.

6.17 Termination for Convenience for Construction Contracts

- a. Termination. The University may, when the interests of the University so require, terminate this contract in whole or in part, for the convenience of the University. The University 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 date 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 University 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 necessary to do so.

- c. Right to construction and goods. The University may require the Contractor to transfer title and deliver to the University in the manner and to the extent directed by the University:
- 1) Any completed construction; and
 - 2) The partially completed construction, goods, materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "construction material") as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The Contractor shall protect and preserve property in the possession of the Contractor in which the University has an interest. If the University does not exercise this right, the Contractor shall use the Contractor's best efforts to sell such construction, goods, and construction materials in accordance with the standards of Section 490:2-706, HRS. This 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 because of the termination for convenience together with cost or pricing data, submitted 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 University may pay the Contractor, if at all, an amount set in accordance with Section 6.17, paragraph d, subparagraph 3c.
- 2) The University and the Contractor may agree to a settlement provided the Contractor has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the University, the proceeds of any sales of construction, goods, and construction materials under Section 6.17, paragraph d, subparagraph 3c, and the contract price of the work not terminated.
- 3) Absent complete agreement under Section 6.17, paragraph d, subparagraph 2, the University shall pay the Contractor the following amounts, provided payments under Section 6.17, paragraph d, subparagraph 2 shall not duplicate payments under this paragraph, for the total (without duplication of any items) of:
 - a. The cost of all contract work performed prior to the effective date of the notice of termination work plus a FIVE PERCENT (5%) markup on actual direct costs on such portion of the work (the markup shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of the work; provided, however, that if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of the loss;
 - b. Subject to the prior approval of the University, the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant the "Contractor's Obligations" provisions of this contract. 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 cost paid in accordance with Section 6.17, paragraph d, subparagraph 3a; and
 - c. The total sum to be paid the Contractor under this paragraph shall not exceed the total contract price reduced by the amount of any sales of construction, goods, and construction materials under Section 6.17, paragraph c, and the contract price of work not terminated.

- 4) Cost claimed, agreed to, or established under Section 6.17, paragraph e, subparagraph 2 and Section 6.17, paragraph d, subparagraph 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 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.

7.4 Progress Payments to Contractor

- a. The Contractor will be allowed progress payments on a monthly basis upon preparing the Contractor's Request for Progress Payment form and submitting it to the University. The monthly payment shall be based on the items of work satisfactorily completed and the value thereof at unit prices and/or lump sum prices set forth in the contract as determined by the University and shall be subject to compliance with Section 5.17.
- b. If requested by the University, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments.
- c. In the event the Contractor or any Subcontractor fails to submit certified copies of payrolls in accordance with Section 5.17, the University may retain the amount due for items of work for which payroll affidavits have not been submitted on a timely basis notwithstanding satisfactory completion of the work until such records have been duly submitted. The Contractor shall not be due any interest payment for any amount thus withheld.
- d. Partial Payment for Materials - The Contractor shall also be allowed partial payments to the extent of NINETY PERCENT (90%) of the manufacturer's, supplier's, distributor's or fabricator's invoice cost of accepted materials to be incorporated in the work on the following conditions:
 - 1) The materials are delivered and properly stored at the site of Work; or
 - 2) For special items of materials accepted by the University, the materials are delivered to the Contractor or subcontractor(s) and properly stored in an acceptable location within a reasonable distance to the site of Work.

- e. Partial payments shall be made only if the University finds that:
 - 1) The Contractor has furnished bills of sale for the materials or otherwise demonstrates clear title to such materials and that it will be utilized on the work covered by this contract.
 - 2) The materials are insured for their full replacement value to the benefit of the University against theft, fire, damages incurred in transportation to the site, and other hazards.
 - 3) The materials are not subject to deterioration.
 - 4) In case of materials off the project site, the materials are not commingled with other materials not to be incorporated into the project.
- f. All material and work covered by progress payments made shall thereupon become the sole property of the University, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the University to require the fulfillment of all of the terms of the contract.

7.5 Prompt Payment by Contractors to Subcontractors

- a. Generally. Any money paid to a Contractor shall be disbursed 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 payment.
- 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 over the subcontractor's performance 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. In the case of a construction contract, a payment request made by a Contractor to the procurement officer that includes a request for sums that were withheld or retained from a subcontractor and are due to a subcontractor may not be approved under paragraph c unless the payment request includes:
- 1) Substantiation of the amounts requested; and
 - 2) A certification by the Contractor, to the best of the Contractor's knowledge and belief, that:
 - a) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
 - b) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the contract 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 Contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

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.

- f. 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.

7.6 Final Payment

Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed invoice and after the Contractor shall have furnished the University with a Tax Clearance Certificate, Certification of Compliance for Final Payment, all specified closing documents and a release of all claims against the University arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release.

7.7 Retainage

The University shall retain a portion of the amount due under the contract to the Contractor, to ensure the proper performance of the contract.

- a. The sum withheld by the University from the Contractor shall not exceed FIVE PERCENT (5%) of the total amount due the Contractor and that after FIFTY PERCENT (50%) of the contract is completed and progress is satisfactory, no additional sum shall be withheld; provided further that if progress is not satisfactory, the University may continue to withhold as retainage, sums not exceeding FIVE PERCENT (5%) of the amount due the Contractor.
- b. The retainage shall not include sums deducted as liquidated damages from monies due or that may become due the Contractor under the contract.
- c. Any retainage provided for in this section or requested to be withheld by the Contractor shall be held by the University.
- d. A dispute between a Contractor and subcontractor of any tier shall not constitute a dispute to which the University is a party and there is no right of action against the University. The University may not be interpleaded in any judicial or administrative proceeding involving such a dispute.
- e. The retention amount withheld by the Contractor from its subcontractor shall be not more than the same percentage of retainage as that of the Contractor (also applies to subcontractors who subcontract work to other subcontractors) where a subcontractor has provided evidence to the Contractor of:
 - 1) A valid performance and a payment bond for the project that is acceptable to the Contractor and executed by a surety company authorized to do business in this State.
 - 2) Any other bond acceptable to the Contractor; or
 - 3) Any other form of collateral acceptable to the Contractor.
- f. A written notice of any withholding shall be issued to a subcontractor, with a copy to the University, specifying the following:
 - 1) The amount to be withheld;
 - 2) The specific causes for the withholding under the terms of the subcontract; and
 - 3) The remedial actions to be taken by the subcontractor to receive payment of the amounts withheld.